JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/2009

APPLICATION NOS. 144/09 & 181/09

BETWEEN	RELIANT ENTERPRISE COMMUNICATIONS LIMITED	1st APPLICANT
AND	TWOMEY GROUP LIMITED	2nd APPLICANT
AND	INFOCHANNEL LIMITED	RESPONDENT

Miss Sherry-Ann McGregor and Miss Anna Harry instructed by Nunes, Scholefield, Deleon & Company for the applicants

Anthony Williams instructed by Usim, Williams and Company for the respondent

13 & 21 October & 4 & 16 November & 2 December 2009

IN CHAMBERS

PHILLIPS, JA

[1] The applicants by way of notice of application for court orders dated and filed 23 July, 2009, which was re-listed and subsequently amended on 16 October 2009, sought an order that the execution of the judgment of Pusey, J contained in the order dated 18 June 2009 be stayed pending the hearing of the appeal in Supreme Court Civil Appeal No. 99/2009.

Pusey, J made the following orders on 18 June 2009:

"(i) Judgment for Infochannel Limited in Claim No. HCV 2828 of 2004 in the sum of US$647,691.69.

(ii) Interest awarded at the rate of 3% per annum from the date of filing of the Claim Form to 18 June, 2009

(iii) Judgment for Infochannel on the claim in Claim No. HCV 05621 of 2005.

(iv) Stay of execution granted until 30 July, 2009."

[2] The grounds of the application before me were that if the applicants were required to pay the judgment sum of US$647,691.69 to the respondent prior to the hearing of the appeal, the applicants would be in jeopardy of financial ruin and their ability to prosecute the appeal would be severely prejudiced. Further, if required to pay the judgment sum, and they subsequently succeeded on appeal, the appeal would be rendered nugatory as it was unlikely that the respondent would be in a position to repay the judgment sum to the applicants. Finally, the applicants believed that they had a real prospect of success on appeal.

[3] The respondent also filed a notice of application for court orders on 30 September 2009, which sought an order that the applicants invest the judgment debt plus interest and legal costs accrued up to the date of the

judgment in an interest-bearing investment account at a reputable financial institution, in the joint names of the attorneys representing the parties within seven days of the order, until the hearing of the appeal or until further order.

There were several grounds advanced in respect of this application which in effect stated that:

(1) the respondent believed that the applicants had no real prospect of succeeding on appeal;

(2) the respondent believed that the applicants were taking steps to dispose of their assets and that if the judgment debt plus interest and costs were not paid and the applicants were not successful on appeal then, the judgment debt would be rendered nugatory as the applicants would not be in a position to pay the same;

(3) the respondent believed that the 1st applicant was also taking steps to leave the jurisdiction, as it had given its landlord notice to quit the leased premises as tenant, and its whereabouts would be uncertain;

(4) the 1st applicant had commenced closing down its operation by giving termination notices to its staff to cease employment on/or before 30 September 2009;

in this claim at all about the joint venture agreement entered into between the parties.

[8] Reliant, however, filed a defence which was later amended and which in para. 3 thereof raised the issue of the written agreement "entered into between three (3) corporate entities, The Twomey Group Ltd. Infochannel Ltd. and World Telenet Ltd". Reliant claimed that the purpose of the agreement "was the intended formation of the joint venture company to be known as Reliant Enterprise Communications Ltd, which entity was intended to carry on business in the telecommunications sector in Jamaica as a joint venture entity on the terms and conditions agreed". Reliant claimed that the joint venture company was duly incorporated on 25 August 2003 with an authorized share capital of 1000 shares to be allotted to the Twomey Group and Infochannel based on the level of their investment (World Telenet Ltd had in the interim been acquired by Infochannel).

[9] Reliant further contended that pursuant to the agreement, Infochannel spent sums to defray operating expenses in respect of Reliant in fulfillment of the arrangements under the joint venture. It was the understanding that ultimately there would be a periodic accounting and reconciliation, and audit, in discharge of Infochannel's investments under the agreement. It was also contended that any payments made by

Reliant on behalf of Infochannel would also be accounted for in the reconciliation exercise.

[10] Reliant's main contention, however, is set out in para. 6 of the amended defence, which avers that, "Under the said agreement the claimant was required to invest US$2,750,000.00 in the defendant from which investment it was agreed between the Twomey Group Ltd and the Claimant that the Claimant would on meeting the agreed level of investment receive 51% of the authorized share capital of the defendant". Reliant averred that only US$647,691.69 had been invested, which level of investment entitled Infochannel to 120 shares in Reliant, or 11.99% of the authorized share capital. The Twomey Group Ltd. pursuant to the agreement, it was pleaded, was obliged to provide a proposed business plan. Further, over a period, the Twomey Group Ltd also advanced monies to Reliant on behalf of Infochannel, and this too was expected to be a part of the accounting exercise and audit. Accordingly, the Twomey Group Ltd was allotted 200 shares or 20% of the shareholding with 680 shares from the authorized share capital remaining unissued.

[11] Infochannel demanded what it considered to be its correct entitlement, with Reliant insisting that Infochannel was only entitled to its proportionate share according to its investment.

[12] Reliant further contended that the amount of shareholding allotted, to wit 11.99% had been confirmed by an audit of KPMG Peat Marwick, which they indicated that they would have relied on at trial.

[13] The issues were clearly joined and Reliant pleaded in para 12 of the amended defence, counter claim and set off, that Infochannel had failed to honour its investment obligations under the agreement and was claiming a 51% share entitlement, having not paid the amount agreed to equate to that level of investment. Infochannel, it was pleaded, had not been prepared to accept the percentage shareholding which it had been allotted therefore, it had filed suit claiming that the sums advanced were monies had and received, without giving any credit for the sums advanced by the Twomey Group Ltd on its behalf. As a consequence of not receiving the funds which should have been invested, Reliant claimed a loss of US$26,746,800.00 and damages for breach of the agreement of 20 January 2003 which agreement, it pleaded, was partly written, partly oral relating to the investment in the project. It also claimed interest and costs.

[14] Infochannel responded. Its defence to the amended counter claim and amended set off stated that the agreement contained no provision that it was required or obligated to invest US$2,750,000.00 in Reliant or any monies at all. Infochannel denied that it agreed to inject

any capital to enable Reliant to raise the balance of the joint venture requirements. Essentially, Infochannel denied all facts alleged by Reliant as to its loss, damage, set off or any legitimate expectation to receive any alleged investments and stated that it was "mere hypotheses founded on false assumptions and assertions known only to the defendant".

[15] Reliant and the Twomey Group Ltd thereafter commenced a new action, Claim No. 2005 HCV 05621 on 29 December 2005 essentially making the same claims as Reliant did in the defence, counterclaim and set off in the earlier suit, save and except there was now an additional claim for US$5,349,560.00 made by the Twomey Group Ltd for loss suffered due to the breach by Infochannel of the agreement.

[16] In its defence and counterclaim Infochannel admitted that there was an agreement, the purpose of which was to pursue a joint venture business agreement in the telecommunications sector.

[17] It was contended that it had been agreed between the parties that World Telenet International would change its name to Reliant Corporate Communications Ltd and would thereafter apply for all the relevant licences as it already had licences to operate in the telecommunications sector.

[18] It was further contended that due to the unavailability of that name, Reliant Enterprises Communications Ltd was formed. Further, the shareholders' agreement was the only agreement between the parties and Infochannel claimed that it contained no provisions for an investment of US$2,750,000.00 from Infochannel in order to obtain 51% of the shareholding. Indeed, Infochannel contended that it already owned 100% of the shareholding presumably through its ownership of World Telenet International Ltd. The monies therefore advanced to Reliant were by way of a loan to defray the operational expenses of Reliant from time to time. Infochannel maintained that Reliant had not at any time advanced any monies which ought to have been made available to Reliant by Infochannel. The monies Infochannel claimed that were owed to it were US$647,691.69. Infochannel maintained that by way of the agreement mentioned previously, it was entitled to not less than 50% of the shareholding, the Twomey Group Ltd would have been entitled to 20% of the shareholding, there would not have been any call on capital and there had never been any discussion of any proportionate allotment of the shares. Further, Infochannel denied any agreement to submit to any audit and rejected any alleged audit by KPMG Peat Marwick, as it stated that the auditors did not have knowledge of the shareholders agreement when conducting their alleged exercise. Infochannel denied owing any sum to Reliant and maintained its claim for US$647,691.69 as

monies "had and received" by Reliant. Reliant filed a defence and set off to counterclaim wherein it set out its position as previously stated herein.

[19] It was necessary to set out the competing contentions of the parties as pleaded in their respective statements of case as I found I was somewhat hampered in the decision making process in respect of the applications before me, as I was without the benefit of the written reasons of Pusey, J and also the documentation which outlined the parties' respective obligations and responsibilities to wit, inter alia, the shareholders' agreement and the business plan.

The Applications

[20] Mr. Twomey in his affidavit in support of the application for a stay of execution averred that the decision of Pusey, J was flawed insofar as he held that:

(1) the joint venture agreement had not been "consolidated";

(2) all the sums invested constituted a loan, which must be repaid;

(3) there were no conditions that Infochannel should invest any particular amount in Reliant;

(4) the parties were not bound by the terms of the shareholders' agreement;

(5) World Telenet still played a part in the joint enterprise.

He stated that in light of the evidence that had been adduced at the trial and also on the documentation submitted, the above ruling must be erroneous, as both sides relied on the agreement, and on the course of dealings between them. Further, there was no loan agreement, and no evidence at all of any terms and conditions thereof. He stated that the appeal filed on 23 July 2009 challenging the above findings of Pusey, J had a real chance of success. He however added that having regard to the state of Infochannel's indebtedness and its adverse financial position, it was his belief that Infochannel would have great difficulty in repaying the judgment sum if Reliant was successful on appeal, and the appeal would therefore be rendered nugatory.

[21] Mr Patrick Terrelonge, Chief Executive Officer of Infochannel, in his affidavit filed 30 September 2009, alleged that Reliant had served notices to its employees generally and was closing down its business. He stated that its chief financial officers had addresses overseas and suggested that the company could easily move its assets elsewhere and on that basis, Infochannel's judgment debt would be at risk.

[22] Mr. Twomey in his 2nd affidavit of 9 October 2009 denied that Reliant was taking any steps to relocate its business, and explained that the company had few assets, the sale of which would bring little funds. The company, he said, was earning small revenue and had not made any

profits in 2008/2009. The company, therefore did not have any means to put any funds in escrow. He stated that the company had converted its physical tenancy at the Technology Centre to a virtual tenancy so that it could retain its business address and telephone facilities as well as meeting rooms and other facilities but maintained that the company was continuing its business and without the stay of execution the appeal would be stifled.

[23] Thereafter, two (2) affidavits were filed by Sherry-Ann McGregor on 21 October and 17 November 2009, the latter relating to a specific correction to para. 4 of the earlier affidavit, which attached financial statements of Reliant for the years ending 31 May 2007 and 31 May 2008, which she stated showed that the company had incurred losses in both years and had made total net deficits in excess of US$1M. These documents had been submitted to Miss McGregor by Mr. Keith Summers, a director of Reliant. With regard to the year 2007, there was an independent auditor's report, and in respect of 2008, there was an independent accountant's report; both will be referred to later in these reasons.

[24] Mr Terrelonge's 2nd affidavit attached three (3) items of correspondence between Reliant and Infochannel dated 7, 21 and 22 October 2004, but as this affidavit was filed and served just before the

application was about to be heard, Infochannel agreed not to refer to the same; the affidavit was withdrawn and I shall make no further reference to it.

[25] Mr Terrelonge stated that the company's costs to date were approximately JA$1M and if not paid or secured in someway it was unlikely that Infochannel would ever recover the same.

[26] Based on the pleadings, the various court orders and the several affidavits referred to above, the parties made their submissions over several days and I have endeavoured to summarize these submissions below.

The Submissions

For the applicants Reliant and the Twomey Group Limited

[27] Miss McGregor submitted that although Pusey J had given judgment for Infochannel on 18 June 2009 he had granted a stay of execution of the judgment until 30 July 2009 and had declined to impose any terms and conditions, as requested by Infochannel, that the judgment debt be paid into an investment account.

[28] Miss McGregor submitted that the amount of the judgment, to wit US$647,691.91, was a figure arrived at, on the basis of sums paid by Infochannel and reduced by sums paid by Reliant. She submitted that

the sums paid by Reliant were paid due to Infochannel having run into financial difficulties.

[29] Miss McGregor submitted that the ruling by Pusey J that the monies were essentially a loan is seriously challenged. She said the first suit was filed due to the fact that Reliant rejected the demand by Infochannel to issue the 51% shareholding without the required amount of funds being paid. The share certificates had been issued to record the 11.99% shareholding but due to the discord, they were later cancelled.

[30] Miss McGregor relied on rule 2.14 of the Court of Appeal Rules, 2002, (CAR) which, she submitted, makes it clear that an appeal does not operate as a stay of execution of the decision of the court below. A stay of execution of the judgment can only be obtained by an order of the court below, or by a single judge of appeal or the Court of Appeal. She further submitted that it is also clear that the judge has discretion to grant or refuse the stay of execution but she pointed out that no particular criteria are set out in the CAR for the consideration of the judge.

[31] Miss McGregor identified the following principles which ought to be utilized in the exercise of the court's discretion on whether to grant or refuse a stay of execution of the judgment:

(a) the court has the power to grant a stay of execution for such period and on such terms as it sees fit (see Halsbury's Laws of England 4th Edition, Volume 17, page 452).

(b) the court ought not to embark on an analysis of the merits of the appeal but should form a view as to whether the appeal is one that is "wholly unmeritorious or wholly unlikely to succeed." (**Sewing Machines Rentals Ltd v Wilson & Anor** [1976] 1 WLR 37)

(c) a stay will be granted if the applicant can show that he is unable to pay the money (**Linotype Hell Finance v Baker** [1993] 1 WLR 321, **Flowers, Foliage & Plants et al v Jamaica Citizens Bank Ltd.** (1997) 34 JLR, 446).

(d) a stay may also be granted if a refusal of it may render the appeal nugatory which may mean the substratum of the appeal may be destroyed and the applicant may be deprived of the results of the appeal if successful (**Polini v Gray,** (1879) 12 Ch. D. 438).

(e) one must consider the risk of injustice to one or other of the parties and in doing so the following questions are relevant:

"(i) If a stay is refused, what is the risk of the appeal being stifled?

(ii) If a stay is granted and the appeal fails, what is the likelihood that the respondent will be unable to enforce the judgment?

(iii) On the other hand, if a stay is refused and the appeal succeeds, and the judgment has been enforced during the conduct of the appeal, what is the likelihood that the appellant will be able to recover any monies paid to the respondent pursuant to the judgment"(**Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ.1915)"

[32] Miss McGregor further submitted that it is a very important balancing exercise, that is, to weigh the advantages and disruptions to one party, as against there being special and good reasons to deprive the successful litigant of the fruits of his judgment. The court should always be focused on whether there is any potential prejudice to any of the parties in respect of the outcome of the appeal.

[33] Miss McGregor therefore relied on the affidavit before the court which showed that Infochannel was in an adverse financial position and would have difficulty in repaying the judgment sum if Reliant and the Twomey Group were successful on appeal. Further, Reliant and Twomey Group were not in a financial position to pay, so any order requesting them to do so would stifle the appeal and ensure financial ruin. In any event, payment of the judgment sum in circumstances where it would be irrecoverable, would destroy the substratum of the appeal, as the critical issue to be determined on appeal is whether the sum is payable by Reliant to Infochannel.

[34] Miss McGregor also set out the basis for her contention that the applicants Reliant and the Twomey Group have a good prospect of success. As I believe I may not do justice to this aspect of her submissions, I have set them out in extenso and am grateful for her clarity of expression.

> "1. The learned Judge had no evidence before him on the basis of which to find that a loan existed between the parties; especially as Infochannel admitted that there was no loan agreement.
>
> 2. Infochannel also admitted that the payments were made to off-set expenses incurred in commencing operations of Reliant.
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> 3. There was clear evidence that the parties' actions, since the signing of the joint venture agreement, were all referable to the said agreement; and to no other arrangement between them. The Judge fell into error by finding that the agreement had not been consummated despite the fact that the parties all acted in accordance with it.
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> 4. There was evidence that meetings of Reliant were held to discuss the workings of the joint venture and to secure additional financing.
>
> 5. As there would have been no Reliant in the absence of the joint venture agreement, how could the learned judge conclude that the agreement was not consummated?
>
> 6. The agreement provided for Infochannel to provide the requisite financing to fund the joint venture in exchange for which it would be a shareholder in Reliant. Against this background, how does the payment of any sums to or on

> behalf of Reliant by Infochannel become a loan repayable to it?
>
> 7. As no reasons for judgment have been provided, it is not clear why the alternative remedy sought by Infochannel for 51% of the shares in Reliant to be allotted to it pursuant to the joint venture agreement, was not the finding of the Court, when the claim is made pursuant to the joint venture agreement. In which case, Reliant is of the view that the Court should also order Infochannel to pay US$2M, which is the balance of the amount which it ought to have invested in Reliant."

For the Respondent - Infochannel

[35] In this matter the parties relied in the main on the same authorities but Mr. Williams, attorney-at-law for Infochannel, submitted that the principles distilled from the cases should be applied differently. Mr Williams submitted that the court has an absolute and unfettered discretion with regard to the grant or refusal of the stay of execution of a judgment, but emphasized that proper weight must be given to the principle that there should be good reason for depriving Infochannel of the fruits of its judgment. In fact, he submitted, there must be special circumstances which must be deposed to in the affidavit at the hearing; for instance, if the basis for obtaining the grant of a stay of execution of the judgment is an inability to pay, the affidavit must set out the income received, value of properties owned and liabilities owned by Reliant. Mr

Williams submitted that in an appropriate case the court can order that sums be paid into court or security be provided for the same.

[36] Infochannel relied heavily on the **Hammond Suddard** case, which I will refer to later, for the principle that the court will exercise its discretion to refuse a stay of execution of a judgment if certain compelling facts exist, for example, that the applicant is a company formed with no identifiable assets in the jurisdiction, thereby rendering it difficult to enforce the judgment. Further, if the company has resources to instruct solicitors, then it may have funds to pay the judgment debt and costs. Alternatively, if there is evidence that the company can get access to funds through other resources by way of wealthy owners, directors, or otherwise, to pay costs, then the respondent ought not to be denied the fruits of its judgment, particularly in circumstances in which if the appeal is unsuccessful, the question must arise, if the judgment is not enforced, will the judgment debt be lost?

[37] In essence, Mr Williams submitted that there was no credible evidence from Reliant that it was unable to pay the judgment debt inclusive of interest and costs. He submitted that the affidavit of Sherry-Ann McGregor attaching the financial statements was defective, in that it was a breach of part 30 of the CPR, as there was no evidence as to the belief in the veracity of the statement, as Miss McGregor was not a

director of Reliant and could not speak to the same. It was further submitted that Reliant had not given any indication that its wealthy owners, directors, shareholders, backers or otherwise could not provide the necessary resources. Although the financial statements were produced to show financial ruin, Mr Williams submitted that to the extent that they showed loss and profits, this was as a result of substantial sums being paid to the main management personnel in the company. Mr Williams relied heavily on three (3) cases not cited by Miss McGregor which I shall also refer to later in this decision, that is, **Keary Developments Ltd v Tarmac Construction Ltd and Another** [1995] 3 All ER 534; **MV York Motors (A firm) v Edwards** [1982]1 All ER 1024 and **SSI Cayman Ltd et al v International Marbella Club SA** SCCA No. 57/86 – delivered 6 February 1987 (unreported).

[38] He also submitted that the Twomey Group Ltd is a foreign based entity whose shareholders are foreign nationals who can therefore dispose of their assets in an instant and frustrate the judgment obtained by Infochannel. He submitted that the learned judge accepted on good evidence, that the amount of US$647,691.69 paid to Reliant by Infochannel was a loan (although it was apparently not disputed between the parties that there was no loan agreement between them in relation to this matter).

[39] Mr. Williams then urged the court to find that there was no real chance of success, as there was no credible evidence of financial ruin. Thus the application for stay should be refused and Reliant should be ordered to pay the judgment debt with costs and interest within seven (7) days of the date of the order of the court.

[40] In response, Miss McGregor submitted that part 30 of the CPR did not state that the affidavit with its attachments would be inadmissible and that the information would not be available to the court. She however admitted that there was an error with regard to the document which had been submitted on behalf of Reliant, viz the financial statement ending on 31 May, 2007 and she would file an affidavit correcting the same. This was done.

[41] Further, Miss McGregor pointed out that rule 2.12 of the CAR states the following:

> "(1) The court may order –
> (a) an appellant; or
> (b) a respondent who files a counter-notice asking the court to vary or set aside an order of a lower court, to give security for the costs of the appeal.
>
> (2) No application for security may be made unless the applicant has made a prior written request for such security.

> (3) In deciding whether to order a party to give security for the costs of the appeal, the court must consider –
>
> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order.
>
> (4) On making an order for security for costs the court must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered."

Miss McGregor indicated that no prior request had been made by Infochannel for security for costs and so any application for security for costs was not properly before the court. Miss McGregor also responded to **Keary Developments Ltd** and **MV York Motors,** the two cases relied on by Infochannel, submitting that the court has a different approach to applications for security for costs as against applications for stay of execution of a judgment, in that the threshold with regard to the former is higher as the applicant must show a potentially high degree of success, whereas in an application for stay of execution of a judgment, the court must consider whether the appeal has a chance of success.

[42] Finally, Miss McGregor submitted that to order the directors and shareholders to pay the judgment debt or to provide resources to do so would be tantamount to lifting and/or piercing the veil of incorporation and that would be going much further than any of the authorities suggest,

in circumstances where Reliant is a limited liability company and the debt is not one owed personally by the directors. Further, Miss McGregor told the court that the fact that the leading management personnel have received substantial salaries is irrelevant to the court's current deliberations, as this is historical information with regard to events which occurred before the judgment was given. Therefore, it was submitted, it would not be open to the court to find, as Infochannel appeared to be submitting, that payment to the management personnel was made in an attempt to defeat creditors, or to remove resources outside the reach of creditors.

Discussion - Application for stay of execution

The Applicable Law

[43] It is abundantly clear, and there seems to be no dispute on this, that pursuant to the CAR I have an absolute and unfettered discretion in the grant or refusal of the stay of execution of a judgment (rules 2.11 (b) and 2.14). The discretion, of course, must be exercised judicially, and in accordance with the criteria set out in the authorities which have spanned many, many years. In this court we have set out certain guidelines – (see the case of **Flowers Foliage & Plants** which endorses the **Lino-Type Hell Finance** case) and I therefore accept that the applicants must show that without the stay of execution:

(1) they will be ruined and that;

(2) the appeal has some prospect of success.

[44] The court in the case of **Flowers, Foliage & Plants** reviewed the principles laid down in the **SSI Cayman** case and relied on them in arriving at the conclusion that the single judge of appeal had not erred in not making an order for a stay of execution subject to the condition that the amount of the judgment debt be paid to the applicant's attorney at-law by the respondent, to be held in escrow and paid out in accordance with any order made by the Court of Appeal on the determination of the appeal. In the **SSI Cayman** case, claims were made by the plaintiff based on sums advanced to the defendants secured by debentures and guarantees in respect of property at Dragon Bay and the sale of the same. The defendants did not deny the existence of the loans or the magnitude of the same, but counter-claimed that they had been fraudulently induced to enter into certain collateral and inter-dependent agreements. The learned judge granted the defendants an injunction restraining the disposition of the property by the plaintiff subject to certain conditions. The parties appealed and the Court of Appeal decided in favour of the plaintiff.

[45] Relying on the said principles in the **SSI Cayman** case, Rattray P (as he then was) in **Flowers, Foliage & Plants**, stated that the rule that an injunction can be granted to restrain the mortgagee on the condition that

the sums claimed by the mortgagee are paid by the mortgagor forthwith is "a general rule" and "courts of equity do not shackle themselves with unbreakable fetters, if the justice of the particular case demands a more flexible approach". He then relied on the principles set out in the **Lino-Type Hell Finance** case. Additionally, he stated that this approach accords with an "acceptable concept of equity and justice, a relevant ingredient for the exercise of judicial discretion". With this view, I entirely agree particularly bearing in mind the comments of Cotton L.J. of over a 100 years ago in **Polini v Gray** "when there is an appeal about to be prosecuted, the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the court to interfere and suspend the right of the party, who, so far as the litigation has gone, has established his rights. "

[46] So in the exercise of the judicial discretion, the single judge must endeavour to ensure that any order made does not render the appeal nugatory; but at the same time he/she must be mindful of the principle stated by Ralph Gibson L.J. in **Winchester Cigarette Machinery Ltd. v Payne & Anor.** (No. 2) (1993) The Times December 15, that:

> "the approach of the court now was a matter of common sense and a balance of advantage. But in holding any such balance of advantage ,full and proper weight had to be given by the court to the starting principle that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment."

It is incumbent therefore on the judge to ascertain whether any good and sufficient reason has been shown by the applicant.

[47] However, I am mindful of the caution given by MeGaw LJ in the **Sewing Machines** case that it would be wrong for the court to give any view on the merit of the claims in fact or in law, at this stage of the proceedings, as the issues are the subject of appeal to the court and will have to be determined at a later date. In the **Sewing Machines** case, though the principle relating to the threshold in this type of application was stated, the issue in that case was whether the claimants who claimed to be lawful assignees of mortgages were as they claimed or whether the whole transaction was a sham. The monies advanced, which were allegedly advanced initially by a registered friendly society (the assignor), were really part of a machinery used in order to give an air of respectability to loans which had in fact been made by money lenders and contrary to the provisions of the Moneylending Act. MeGaw L.J. stated:

> "The court, as I see it and as has, I think, always been its practice, is prepared to take into

> account on an application for a stay of execution on an appeal from the High Court or a county court a view that it may form as to whether the appeal is one that is wholly unmeritorious or wholly unlikely to succeed"

[48] In the **Hammond Suddard** case, the Court of Appeal agreed with the general principles for the grant of a stay of execution and said this:

> "Whether the court should exercise this discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties, if it grants or refuses a stay. In particular if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?
>
> On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover any monies paid from the respondent?"

[49] The issue in that case related to the payment to the respondents (who were solicitors) of unpaid fees and, on the other hand, whether they had been negligent in their representation of the appellant. The appellant was a foreign company with no assets in the jurisdiction and on whom it would have been difficult to enforce a judgment. The court refused an order for stay of execution as the appellant failed to satisfy the court that without a stay of execution the appeal would be stifled as the evidence on its financial situation was contradictory, vague and entirely

insufficient and unacceptable. An order for security for costs was made, as the company had deponed to wealthy principals, yet no information had been put before the court as to their inability to support the litigation. In summary, the order was made for the judgment debt to be paid or the appellant would not be able to proceed with the appeal. The order was made on several bases, viz that the company had failed to submit adequate information on its financial affairs, that the court was satisfied that the company had the resources to fund the litigation and had not shown that it did not have the resources to pay the judgment debt and, most importantly, the company was a foreign entity resident outside of the court's jurisdiction with no assets within the jurisdiction. Interestingly, both parties have relied heavily on the **Hammond Suddard** case.

Analysis of the Submissions

[50] As indicated previously, I found myself substantially hampered by the fact that I did not have the benefit of Pusey J's reasons nor did I have sight of the documentation executed and existing between the parties which would have been before him, in particular, the shareholders' agreement and the business plan, documents which were nonetheless referred to by both parties in their submissions to me.

[51] Notwithstanding the above, I have perused the pleadings and the affidavits with great care and endeavoured to give the detailed

consideration of which the submissions of both counsel are worthy, which submissions were thorough and comprehensive and for which I am indeed grateful.

[52] In this case, the financial statements of the 1st applicant have been provided. They were attached to the affidavit of Sherry-Ann McGregor submitted to her by a director of that company. In my view, the statements were admissible, bearing in mind the provisions of Part 30 of the CPR. As indicated, both statements contained, in relation to the year ended 31 May 2007, an independent auditor's report and in relation to the year ended 31 May 2008, an independent accountant's report from KPMG, well recognized chartered accountants. There was no claim that the documents were not as they purported to be. The documents show the company having a total net deficit/liability in 2007 of US$1,431,768. (audited) and US$1,126,085 in 2008 (unaudited) although the net deficit shown has been decreasing from 2006 to 2008.

[53] I do not think that the respondent can rely on an argument that the substantial sums paid to the leading management personnel of the applicants are the reason that the applicants are not in a position to pay the judgment debt as this debt has arisen subsequently. What seems clear on this evidence is that if a stay is not granted, payment of the judgment sum of US$647,691.91 would bring about financial ruin to the

applicants. I am therefore satisfied that the applicants have met the first limb of the **Lino-Type Hell Finance** case.

[54] With regard to the second limb. I have noted the following:

1. The parties entered into a shareholders' agreement relative to a joint venture;
2. The 1st applicant Reliant was allegedly formed for that purpose;
3. The monies which were the subject of the first suit appear to relate to the operations of the 1st applicant;
4. The sums claimed in the first suit by the respondent Infochannel was an amount of US$856,827.27 for monies had and received by the 1st applicant. There was no mention of a loan;
5. The judgment sum is for US$647,691.91, which allegedly represents a net sum, taking into account monies paid by the 1st applicant on behalf of the respondent relative to the operations of the 1st applicant.
6. There was no evidence of a loan agreement.
7. In the first suit the respondent referred to the joint venture agreement in the defence to defence and counterclaim and set off.

8. In the second suit, the 1st applicant claims sums due for breach of the said shareholder's contract and joint venture agreement;

9. The issue of the respective shareholdings, the proportionate percentages, the relevant documentation and parties to the agreement and/or arrangements are matters of conflict decided in favour of Infochannel and now form the substantive issues on appeal.

[55] I found that I could not, in light of the above, conclude that the applicants' appeal is one that is "wholly unmeritorious or wholly unlikely to succeed". However, I am also guided by the dictum of MeGaw J in the **Sewing Machines** case where he stated:

> "I would grant the applications and direct that there shall be a stay of execution pending the hearing of the appeals and that such stay of execution shall be unconditional, subject only to this, that a stay of execution ordered by this court should, I think, be a stay of execution pending the hearing of the appeals or *further order*, so that, if by chance (and one hopes it does not occur) the plaintiff should have reason to believe that there is any undue delay on the part of the defendants in bringing their appeals before this court, they could make application in respect of the stay of execution and it would be for the court then to consider whether it was an appropriate case for 'further order'. "

[56] At the hearing I was informed that the appeal could be heard in February 2010 once the record of appeal was filed (which was awaiting reasons for judgment and the transcript of the hearing below). It is incumbent on the applicants to make every effort to have the record filed timeously. As a consequence, I therefore indicated that the execution of the judgment would be stayed until the hearing of the appeal or further order.

Application for security for costs and/or payment of the judgment debt into account in the names of the Attorneys

[57] As stated previously (para. 38) the CAR indicate that the court can order that an appellant give security for the costs of an appeal, but that no order may be made unless the respondent has made a prior written request for such security.

[58] As indicated earlier in this decision, no prior written request was made for payment of security of costs. In my view the failure to do so would be determinative of Infochannel's application. The cases of **MV York** and **Motors Kreary Development Ltd.** on which Infochannel placed such reliance would therefore not be relevant. The question of proving whether the directors and/or other third parties have the resources to pay the costs and/or to give security for the same would not arise.

[59] As a consequence I made the orders as set out in para 5.