[2020] JMCA App 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV0005

APPLICATION NO COA2020APP00051

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**TELEVISION JAMAICA LIMITED**	**APPLICANT**
AND	**MICHAEL TROUPE**	**RESPONDENT**
AND	**SYLVAN REID**	**RESPONDENT**

AND

SUPREME COURT CIVIL APPEAL NO COA2019CV00119

APPLICATION NO COA2020APP00052

BETWEEN	**CVM TELEVISION LIMITED**	**APPLICANT**
AND	**MICHAEL TROUPE**	**RESPONDENT**
AND	**SYLVAN REID**	**RESPONDENT**

Mrs M Georgia Gibson Henlin QC and Ms Nicola Richards instructed by Henlin Gibson Henlin for Television Jamaica Limited

Nigel Jones and Ms Liane Chung instructed by Nigel Jones & Co for CVM Television Limited

Leonard Green and Ms Sylvan Edwards instructed by Chen, Green & Co for Messrs Troupe and Reid

20 and 27 April 2020

MORRISON P

[1] In these applications, which were heard together, Television Jamaica Limited ('TVJ') and CVM Television Limited ('CVM') ('the applicants') make common cause in seeking to discharge an order made by Brooks JA ('the judge of appeal') on 27 February 2020. They say that the judge of appeal, who refused their applications to stay execution of a judgment given against them by Lindo J in the Supreme Court on 13 December 2019, erred in principle and that his order should therefore be discharged or varied.

[2] On the other hand, Messrs Troupe and Reid ('the respondents'), who were the successful claimants in the court below, maintain that the judge of appeal exercised his discretion whether or not to grant a stay of execution applying correct principles and that his decision should therefore not be disturbed.

[3] The brief background to the matter, which we gratefully adapt from the judge of appeal's admirable summary[1], is as follows. On 18 July 2012, arising out of a search and seizure operation carried out at their respective homes by members of the Jamaica Constabulary Force's Anti Lottery Scam Task Force and the Jamaica Defence Force, the respondents were arrested. The applicants each made broadcasts relating to the arrests and they also published separate statements on the arrests by two senior police officers[2] and certain news personnel. The charges laid against the applicants arising from the raids of their homes were subsequently dropped or not proceeded with.

[4] Arising out of the broadcasts, the respondents filed an action for defamation of character against the applicants and the two senior police officers. They also claimed against one of the officers for false imprisonment. The Attorney General was also sued in his capacity as the representative of the Government of Jamaica pursuant to the Crown Proceedings Act.

[5] Lindo J gave judgment for defamation against all the defendants, and for malicious prosecution and false imprisonment against the Attorney General. Mr Troupe and Mr Reid were awarded damages for defamation in the sum of $11,000,000.00 and $8,500,000.00 respectively, while Mr Reid was awarded damages for false

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[1] At paras [4]-[6] of the judgment
[2] Including the then Commissioner of Police and a Superintendent of Police

imprisonment and malicious prosecution against the Attorney General in the total sum of $3,500,000.00.

[6] TVJ and CVM have appealed against both the finding of liability against them and the quantum of damages awarded. In its application for a stay of execution of the judgment pending appeal, TVJ stated that (i) it had good grounds of appeal with a prospect of success; (ii) the respondents' attorneys-at-law had already indicated that, in the absence of a stay, they intended to enforce the judgment; (iii) if a stay were not granted, the appeal would be rendered nugatory; and (iv) it would suffer irremediable harm if a stay were not granted, particularly since there was no guarantee that, if the judgment sum was paid, the respondents would be in a position to repay it if the appeal succeeded.[3]

[7] CVM took the same position, praying in aid similar considerations.[4] In addition, it emphasised that the quantum of the judgment was "excessive and beyond the awards in comparable cases and even if the Judgment is upheld on appeal there is a real chance that the award will be substantially reduced"[5].

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[3] See affidavit of urgency of Nicola Richards and in support of notice of application for stay of execution, sworn to on 17 January 2020.
[4] See affidavit of urgency of Liane Chung in support of notice of application for court orders, sworn to on 5 February 2020.
[5] Ibid, at para. 16

[8] The respondents for their part emphasised the prejudice and injustice to them of having had to live with the effects of the defamatory statements made against them for the past eight years. On their behalf, it was said that "they are actively involved in public life and are gainfully employed well-known businessmen in the parish of St. James, and they are men of means and would therefore have no difficulty in repaying the judgement debt, if the appeal were to be successful"[6].

[9] In considering the applications for a stay, the judge of appeal noted[7] that there was no dispute "that applications, such as the present ones, are guided by the principle that the approach to be adopted is that there must be merit in the applicant's appeal and that the result should be the one less likely to result in injustice". The judge of appeal considered that, while the applicants had satisfied the first limb of the test, they had failed to demonstrate that the granting of a stay would cause less injustice than would a refusal. The applications for a stay of execution of Lindo J's judgment were accordingly refused.

[10] The essence of the judge of appeal's reasoning can be found in the following passage from his judgment[8]:

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[6] Affidavit of Sylvan Edwards, sworn to on 10 February 2020, para. 14
[7] At para. [13]
[8] At para. [16]

> "[16] In the present case, [TVJ and CVM] have provided sufficient material to demonstrate that there is some merit in their respective appeals. In considering which approach would result in less injustice, it cannot be said that [they] have shown that they would be irreparably prejudiced by any execution of the judgment. They have not shown that they would not be able to pay the sums involved, without causing severe dislocation, and they have provided no evidential support for the assertion that the risk exists that they would not be able to recover the sums if they were paid to the respondents. In the meantime, the respondents are entitled to the fruits of their judgment."

[11] The judge of appeal also added this[9]:

> "[18] The only hesitation in respect of refusing the application would be the fact that the Attorney General is also liable to the respondents. The Attorney General has not appealed, and must be deemed to have accepted liability. That consideration is, however, not sufficient to warrant a stay. Whereas the Attorney General is also liable to the respondents, the liability for the damages is a joint liability shared with the applicants. If either of the applicants satisfy that liability it will be able to recover from the Attorney General a third of what it has paid (see section 3 of the Law Reform (Joint Tort-Feasors) Act and **Dwayne Smith v William Hylton and Another** [2014] JMCA App 35). There is nothing to suggest that it would be more onerous for them to seek to recover those sums from the Attorney General, than it would be for the respondents to carry out that exercise."

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[9] At para. [18]

[12] There has been no suggestion that the judge of appeal acted on any wrong principle in his indication that the proper approach to the question whether a stay should be granted is to determine, first, whether there is some merit in the applicant's appeal and, second, once that threshold has been crossed, to seek for the result that will be less likely to result in injustice to either party. That approach, as the judge of appeal demonstrated, is now well established in the jurisprudence of this court[10]. Nor has there been any real challenge to the judge of appeal's conclusion that there was "some merit" in the appeals.

[13] These applications therefore involve a direct challenge to the manner in which the judge of appeal exercised his discretion whether or not to grant a stay. In this regard, both applicants accept that this court will generally not interfere with the exercise of a discretion by a judge on an interlocutory application, unless it can be shown that it was based on a misunderstanding of the law or of the evidence, or on an inference that can be shown to be demonstrably wrong[11]. However, both Mrs Gibson-Henlin QC for TVJ and Mr Jones for CVM grasped this nettle in their written and oral submissions, which I hope I do no disservice by summarising in the following way.

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[10] As to which, see the most recent example in **Marilyn Hamilton v Advantage General Insurance Company Limited** [2019] JMCA Civ 48, esp. para. [41]

[11] **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, applying **Hadmor Productions Ltd and others v Hamilton** [1983] AC 191

[14] Concentrating on the risk of prejudice, Mrs Gibson-Henlin submitted that the judge of appeal applied the wrong criterion, in that he applied the traditional test propounded in **Linotype-Hell Finance Ltd v Baker**[12]. She submitted that the **Linotype** test, which spoke to the need for the applicant for a stay to demonstrate that, without a stay, he will be financially ruined, has since been overtaken by what was described by Phillips JA in **Kenneth Boswell v Selnor Developments Company Limited**[13] as the "more liberal approach". The correct approach is now for the court to make the order "that is likely to produce less injustice between the parties". The judge of appeal also misapplied the Law Reform (Tort-Feasors) Act, in that, should TVJ succeed on appeal, it would no longer stand in the position of joint tortfeasor vis-à-vis the Attorney General and no question of contribution as between them would therefore arise. In terms of balancing the risk of a stay to either party, there is less risk to the respondents of not recovering the judgment sum if the appeal fails, than there is to TVJ of recovering it from the applicants if the appeal succeeds. In this latter regard, the respondents have merely asserted their ability to repay, without supplying any evidence that they would in fact be in a position to do so.

[15] In all the circumstances, Mrs Gibson-Henlin submitted, rather than an outright refusal of a stay, some other order would have been more appropriate, even if not a

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[12] [1992] 4 All ER 887
[13] [2017] JMCA App 30

complete stay, a stay conditional on payment of the judgment sum or a part of it into court.

[16] Adopting Mrs Gibson-Henlin's submissions, Mr Jones also emphasised the risk that the judgment sums might be irrecoverable if they were paid over to the respondents while the appeal was still pending. He too characterised the respondents' statement that they would be able to repay as "bald assertions". With reference to the appeal against the quantum of damages, Mr Jones submitted that the awards in this case were excessive and not in keeping with awards in comparable cases. There was therefore a likelihood that they would be reduced on appeal, thus leaving CVM exposed if a stay were not granted. Mr Jones also advanced additional reasons why the appeal against liability stood a good chance of success.

[17] For the respondents, Mr Green submitted that there is no basis for this court to interfere with the judge's entirely proper exercise of his discretion whether or not to grant a stay. The joint liability of the Attorney General is not a relevant factor, since the respondents cannot effect a levy against the Crown. The respondents are entitled to the fruits of their judgments, given the fact that eight years have passed since the filing of the claims and there will be further delays in bringing the appellate process to conclusion. Both respondents are public figures and well-known businessmen and they would therefore be fully capable of repaying the judgment sums in the unlikely event

that the appeals should succeed. In the circumstances, the judge of appeal's order should not be disturbed.

[18] First, I will take Mrs Gibson-Henlin's complaint that the judge of appeal, wrongly, applied the **Linotype** test in coming to his conclusion that no stay should be ordered. I will say at once that I am not so sure that the complaint is entirely fair to the judge of appeal. It is true that the judge of appeal did refer to the fact that the applicants "have not shown that they would not be able to pay the sums involved, without causing severe dislocation"[14], but I do not think that it can fairly be said that this was the entire basis upon which he decided not to grant a stay.

[19] It seems to me that the judge of appeal was obliged to take into account all the relevant factors. In balancing the risk of injustice, the fact that the applicants could not say that they would suffer severe financial prejudice if called upon to pay the judgment sums was clearly one such relevant factor for the judge of appeal to have in mind. However, this was not the end of the judge of appeal's consideration of whether to grant or refuse a stay. He also made specific note of the facts that (i) the applicants provided no evidence in support of their assertion that there was a risk that the judgment sums would be irrecoverable from the respondents if paid before the outcome of the appeal was known; and (ii) in those circumstances, the respondents were

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[14] See the passage quoted from para. [16] of the judge's judgment at para. [10] above

"entitled to the fruits of their judgment". And, at the end of the day, in a clear invocation of the "liberal approach", the judge of appeal concluded[15] that the application for a stay should be refused because of the applicants' failure "to demonstrate that a grant of a stay would cause less injustice than a refusal".

[20] So, I do not think that the judge of appeal can in any real sense be said to have erred in principle in this aspect of his approach to the question whether to grant a stay or not. But I have been more troubled by Mrs Gibson-Henlin's second submission, which is that the judge of appeal misapprehended the potential effect of the Law Reform (Tort-Feasors) Act in the circumstances of this case.

[21] As I understand it, the judge of appeal resolved his only hesitation about refusing to grant a stay by reference to the fact that the applicants, should they be obliged to pay the judgment sums to the respondents, would have recourse to the Attorney General, as a joint tortfeasor, to recover a one-third contribution[16]. In this regard, the judge of appeal clearly had in mind section 3(1)(c) of the Law Reform (Tort-Feasors) Act, which provides that "[w]here damage is suffered by any person as a result of a tort … any tort-feasor liable in respect of such damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in

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[15] At para. [19]
[16] See para. [11] above

respect of the same damage …" Section 3(2) goes on to provide that, in proceedings for contribution under the section, "… the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage …"

[22] Mrs Gibson-Henlin's point is that, should the applicants pay the judgment sums and then succeed on appeal, they and the Attorney General will at that juncture no longer be joint tortfeasors and so they will not then be able to avail themselves of the provisions of section 3. In that circumstance, the applicants' only recourse would be to attempt to recover the judgment sums from the respondents.

[23] In my respectful view, this is clearly a fair point. Accordingly, it seems to me that, had the judge of appeal looked at the matter in this way, he might well have hesitated further before coming to the conclusion that no stay should be granted. In my view, therefore, the judge of appeal having erred on an issue of law, it is open to this court to make a fresh determination on the matter.

[24] In this regard, the only question which really arises at this stage is how best to balance the risk of injustice to either party in all the circumstances of the case. As rule 2.14(a) of the Court of Appeal Rules 2002 makes clear, an appeal does not operate as a stay of execution of the judgment of the court below. *Prima facie*, therefore, the respondents are entitled to the fruits of their judgments. The applicants do not contend

that they are unable to pay the judgment sums, but they have expressed the fear that, if they pay and the appeal ultimately succeeds, the respondents will be unable to pay them back. In response to this assertion, the respondents say that they are public figures, well-known businessmen and men of substance, who will be well able to repay the judgment sums if called upon to do so.

[25] As has been seen[17], the judge of appeal disposed of the issue by saying that the applicants "have provided no evidential support for the assertion that the risk exists that they would not be able to recover the sums if they were paid to the respondents". It seems to me, with respect, that, by leaving the matter in this way, the judge of appeal failed to address the possibility of injustice that might well arise if the entire judgment sums were paid over to the respondents unconditionally. The sums involved are not insubstantial. The respondents, not surprisingly, bemoan the time it has taken for them to achieve this success and complain about the further time that the appeal is likely to consume. It therefore appears to me that, while the risk of injustice applies equally to both the applicants and the respondents, it might be possible to mitigate it to some extent by an order that a stay of execution be granted on condition.

[26] The applicants are joint tortfeasors. Assuming for present purposes that they will each be responsible for a 50% share of the damages due to the respondents, I would

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[17] See para. [10] above

therefore grant a stay of execution of the judgment of Lindo J on condition that, within 28 days of this order, each applicant is to pay 60% of its share of the damages awarded by Lindo J to each respondent into an interest bearing account established for the purpose in the joint names of the respective attorneys-at-law for the parties, at a commercial bank doing business in Jamaica.

[27] In order to achieve this, I would propose that (i) the applicants are to put forward a joint list of three such commercial banks within four days of the orders on these applications; (ii) within a further period of three days, the respondents are to select a commercial bank from that list; (iii) should the respondents fail to make a selection within that period, the Registrar of the Court of Appeal should be empowered to make the selection from the said list; and (iv) upon the disposal of the appeal, the amount deposited, together with any interest accrued thereon, should go, or be returned, to the successful party.

[28] I would also order that the costs of these applications are to be costs in the appeal and that there be liberty to apply to any of the parties.

F WILLIAMS JA

[29] I have read in draft the judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

STRAW JA

[30] I too have read the draft judgment of the learned President and agree with his reasoning and conclusion. There is nothing that I wish to add.

MORRISON P

ORDER

APPLICATION NO COA2020APP00051

1. Application to discharge order of Brooks JA made on 27 February 2020 granted.

2. A stay of execution of the judgment of Lindo J given on 13 December 2019 is hereby ordered, on condition that, within 28 days of this order, the applicant, Television Jamaica Limited, pays the sum of $5,850,000.00 into an interest bearing account in the joint names of the attorneys-at-law for the parties, established for this purpose, at a reputable commercial bank doing business in Jamaica selected by the following means:

(i) within a period of four days from the date of this order, the applicants are to provide the respondents with a joint list of three such commercial banks;

(ii) within a further period of three days after receipt of the said list, the respondents are to select a commercial bank therefrom;

(iii) should the respondents fail to make a selection within that period, the Registrar of the Court of Appeal is hereby empowered to select a commercial bank from the said list.

3. Upon the disposal of the appeal, the amount so deposited, together with any interest accrued thereon, shall go, or be returned, to the successful party.

4. The costs of this application are to be costs in the appeal.

5. Liberty to apply to any of the parties.

APPLICATION NO COA2020APP00052

1. Application to discharge order of Brooks JA made on 27 February 2020 granted.

2. A stay of execution of the judgment of Lindo J given on 13 December 2019 is hereby ordered, on condition that, within 28 days of this order, the applicant, CVM Television Limited, pays the sum of $5,850,000.00 into an interest bearing account in the joint names of the attorneys-at-law for the parties, established for this purpose at a reputable commercial bank doing business in Jamaica selected by the following means:

(i) within a period of four days from the date of this order, the applicants are to provide the respondents with a joint list of three such commercial banks;

(ii) within a further period of three days after receipt of the said list, the respondents are to select a commercial bank therefrom;

(iii) should the respondents fail to make a selection within that period, the Registrar of the Court of Appeal is hereby empowered to select a commercial bank from the said list.

3. Upon the disposal of the appeal, the amount so deposited, together with any interest accrued thereon, shall go, or be returned, to the successful party.

4. The costs of this application are to be costs in the appeal.

5. Liberty to apply to any of the parties.