

**IN THE SUPREME COURT OF BELIZE A.D. 2009
(CIVIL)**

CLAIM NO. 409 of 2009

BETWEEN

GEORGE DUECK

Claimant/Respondent

AND

THOMAS POUND

KINGDOM FIRST MINISTRIES

Defendants/Applicants

Date of hearing: 25th September, 2017; 13th October, (Oral Decision)

Before: The Honourable Madame Justice Griffith

Appearances: Mr. Mark Williams for the Defendants/Applicants and Ms. Lizette Staine, Barrow & Williams, for the Claimant/Respondent.

DECISION

Introduction

1. This is an Application by the Defendants/Judgment Debtors herein for an order for a stay of all further proceedings, including execution of the judgment in favour of the Claimant, which was delivered by written decision on the 31st January, 2014. This written and signed decision was reduced into an order which was perfected (belatedly) on 7th June, 2017. The stay is sought until the determination of 'a proposed appeal' against the judgment (the notice of appeal has in fact been filed), or until any order the Court of Appeal may make discharging the stay, if granted. The Claimant/Judgment Creditor has opposed the application and the application was heard on the 25th September, 2017. The Court gave an oral decision on 13th October, 2017 which it now follows up with its reasons.

Background

2. The 1st Defendant Thomas Pound was adjudged by various declarations to have defrauded the Claimant into transferring to him 120 acres of land in Sarango Bight, Belize which the Claimant had previously bought, for the purposes of residential and touristic development.

The transfers by the Claimant to Mr. Pound were declared null and void, as were subsequent transfers by Mr. Pound to the 2nd Defendant, Kingdom First Ministries International. By reason of the fraud, the veil of incorporation was lifted and the liability of the company, was attributed personally to Mr. Pound. The land had been subdivided and transferred to or mortgaged to third parties. The court declined to set aside those transfers and instead ordered Mr. Pound to pay damages as compensation for (i) each lot conveyed and (ii) for each lot mortgaged. The damages awarded were to be calculated at US\$50,000 per lot for each lot conveyed and in an amount equal to the value of the mortgage in respect of each lot mortgaged.

3. The total amount of damages due in respect of all of the conveyances and mortgages was not calculated by the Court, however, given the number of lots involved, the final award of damages would no doubt be in excess of six figures in US dollars. In addition to the damages, prescribed costs were awarded on that final amount, and pre-trial interest from the date of filing of the claim as well as statutory interest on judgment were to be added to the damages and costs. To date, there has been no attempt at execution by the Claimant, nor any satisfaction of any part of the judgment by the Defendants.

The Application and Submissions

4. The grounds of the Defendants' application for a stay of execution are that the 1st Defendant is impecunious and elderly (71 years); has no income, no assets other than a model house on the 'disputed land'; and would face financial ruin and be forced to declare bankruptcy if the stay is not granted. The tenor of the affidavit in support of the application for the stay, was to the effect that (i) the Defendant's prior investments in the property (the subject of the appeal) had been substantial and have left him with no other property; (ii) the Defendant continues to occupy, maintain and upkeep the property (the subject matter of the judgment), but does so with the assistance of his children who live overseas; (iii) he has been faced with difficult circumstances of travelling between Belize and the United States to assist in caring for his ailing mother; and finally (iv) given that the subject matter of the appeal concerns title to land, the status quo would best be

maintained, as it would be difficult if not impractical to reverse any dealings carried out with respect to the land prior to the determination of the appeal.

5. The Claimant/Respondent's submissions in opposition to the grant of a stay of execution are twofold. Firstly, by way of an objection to form – that the application being one concerning an appeal, has improperly been filed in the Supreme Court instead of the Court of Appeal. Secondly, that even if found to have been properly filed, the application fails to satisfy any of the accepted grounds upon which a Court could be called upon to grant a stay of execution of its judgment. Specifically, the accepted principles being that (i) there is no reasonable probability of recovering any damages or costs paid under the judgment; (ii) that the appellant would be financially ruined by satisfying the judgment; (iii) the existence of exceptional circumstances justifying the grant of a stay; and (iv) that there is a reasonable prospect of success of the appeal. The Respondent submits that not even one of these grounds has been satisfied by the Applicant and that it was his obligation to have provided evidence or otherwise satisfied the Court of those grounds.

The Court's Consideration

The objection to jurisdiction

6. The first objection albeit based on form, is of some force as it speaks to the question of jurisdiction and warrants full consideration. According to learned Counsel for the Respondent, the application has been filed as per the cause in the Supreme Court (it is intitled and in all respects identified as such). The submission is that the jurisdiction of the Supreme Court to entertain an application for a stay of execution of a matter pending appeal is exercisable only pursuant to the provisions of the Court of Appeal Act and the applicable Court of Appeal Rules ('the Rules'). This submission, derives from the cumulative effect of Order II Rules 16 and 17 which provide as follows: -

"16.-(1) – In any cause or matter pending before the Court a single judge of the Court may upon application make orders for –

(a)...

(b)...

...(c) a stay of execution on any judgment appealed from pending the determination of such appeal"....(e)

-(2) Every order made by a single judge of the Court in pursuance of this rule maybe discharged or varied by any judges of that Court having power to hear and determine the appeal

“17.-(1) Applications referred to in rule 16 shall ordinarily be made to a judge of the Court, but, where this may cause undue inconvenience or delay, a judge of the Court below may exercise the powers of a single judge of the Court under that rule.

(2) ...”

7. The effect of these rules, it was submitted, is that the Supreme Court (as the Court below), is in effect exercising its jurisdiction as a single judge of the Court of Appeal, given the context that the jurisdiction arises only where a hearing by a single judge of the Court itself, might cause undue inconvenience or delay. In response to this contention, learned counsel for the Applicant submitted as a matter of long settled authority, that the Supreme Court’s power to stay its own proceedings or execution of judgment is exercisable pursuant to its inherent jurisdiction. By way of authority, counsel for the Applicant cited **The Attorney-General v BCB Holdings Limited & The Belize Bank Limited**¹ in which it was affirmed by Sosa P² that the first instance court was possessed of an inherent jurisdiction to stay execution of its own judgment and that the Court of Appeal Rules, affirmed the existence of that jurisdiction. In response to this submission, counsel for the Respondent acknowledged that inherent jurisdiction, but submitted that such jurisdiction ended upon filing of a notice of appeal, as had been done in the instant case.
8. In the circumstances it was claimed that the Supreme Court’s jurisdiction to entertain the application as part of its own procedure in the concluded claim, was at an end. In support of this contention, Counsel for the Respondent also relied on **Attorney-General v BCB Holdings & BBL**, but with reference to the preliminary objection therein on the very point of jurisdiction. Counsel for the Applicant rested his submission on this issue on the judgment of Sosa P in this same case.

¹ Belize Civil Appeal No. 4 of 2011.

² Ibid per Sosa P. @ paras 33-34.

The answer to the objection to the Supreme Court's jurisdiction to entertain the application for a stay given the filing of the notice of appeal, is in fact clearly and firmly provided in the very judgment of Sosa P in **Attorney-General v BCB Holdings & BBL** above. To usefully illustrate this answer, the case and judgment of Sosa P are extracted in some detail as follows³:-

- (i) The Attorney-General filed a notice of appeal and application for stay of execution of judgment against the first instance decision of Muria J in favour of the claimants therein. At the time the notice of appeal and application for stay were filed, the decision had already been perfected by requisite order. The application for the stay was filed, heard and disposed of as per the Supreme Court claim, as distinct from a cause in the Court of Appeal, albeit that the notice of appeal had been filed. The stay was granted by the then acting Chief Justice, expressed to be until the hearing of the appeal. A few months later in the Court of Appeal, the Respondents to the appeal, applied for a discharge of the stay, in response to which the Appellants filed a notice of preliminary objection to the application to discharge the stay.
- (ii) The preliminary objection to the application to discharge the stay⁴, was that having been made entirely as per the Supreme Court claim, and not as a cause in the Court of Appeal, the Court of Appeal itself lacked jurisdiction to discharge the Supreme Court's order. It was said that the only way for the Court of Appeal to discharge the Supreme Court's stay, would have been by means of an appeal against the stay, which was not what had been done. The submissions in response to this preliminary objection were the same as those made by Counsel for the Applicant in this case. The first, was that the effect of Rules 16 and 17 of the Court of Appeal Rules, was that the Supreme Court's jurisdiction to grant a stay of execution existed only in the capacity as a single judge of the Court of Appeal as empowered by Rule 16(2).

³ Ibid per Sosa P. paras 1 et seq.

⁴ Outlined at paras. 3-4 of the judgment of Sosa P – **Attorney General v BCB Holdings & BBL** *supra*.

Further, the reference in Rule 19(1) as pertains to a stay of execution granted by 'the Court below', was in fact a reference to the Supreme Court judge sitting as a single judge as empowered by Rule 16(2). It was therefore contended that despite the application having been made and disposed of as per the Supreme Court claim, the judge granting the application, had by necessary implication, been acting as a single judge of the Court of Appeal.

- (iii) The submission in response to the preliminary objection continued – that the necessity of so acting, was borne out of the fact that the jurisdiction as single judge, was at that stage, the only jurisdiction which was available to the then acting Chief Justice. This was so, because albeit recognized that the Supreme Court had an inherent jurisdiction to stay its own process, that inherent jurisdiction was subject to a temporal limitation, available only to that point in time when an order made pursuant to its judgment is perfected. At that point, it was contended, the Supreme Court becomes *functus officio*, save for corrections under the slip rule or other actions authorized by statute. The judgment having been perfected by order since December of 2010 and a notice of appeal filed in January, 2011, unless acting as a single judge of the Court of Appeal, the hearing and grant of the application for a stay by the then Chief Justice would have lacked jurisdiction. So concluded the response to the preliminary objection to the application to discharge the stay in ***Attorney-General v BCB Holdings & BBL***.
- (iv) After considering a number of authorities cited in support of that contention⁵, Sosa P rejected the response to the preliminary objection, and concluded that there was no support in any of those authorities for the proposition that the inherent jurisdiction of the Supreme Court to stay execution of its own judgment, was limited to the perfection of the order, or filing of a notice of appeal.

⁵ Ibid. Paras

Moreover, the learned President considered two further authorities⁶ and conclusively concluded⁷ that the inherent jurisdiction of the Supreme Court to stay execution pending appeal was not subject to any temporal limitation which prevented it from so doing once the order to be stayed was perfected. Therefore, the then acting Chief Justice had been entitled to stay the execution of the decision appealed. The preliminary objection was therefore upheld and the application to discharge the Supreme Court's stay of execution, was dismissed.

9. It is considered that this judgment of the Court of Appeal (***Attorney-General v BCB Holdings & BBL***), effectively disposes of the Claimant/Respondent's first objection to the Defendant's application for a stay of execution. The application for the stay of execution has been properly filed as part of the Supreme Court claim and this Court is entitled to entertain the application further to its inherent jurisdiction to stay its own process. It is further found, based upon the decision referred to above, that this inherent jurisdiction is not affected by the fact that a notice of appeal has already been filed. The Court will now consider whether the Applicant has satisfactorily established any grounds for granting the stay.

The grounds of the application

10. The general grounds upon which an application for a stay of execution of judgment are to be considered, were equally acknowledged by counsel for both parties as being that stated in ***Linotype-Hell Finance Ltd. v Baker***.⁸ That is, that where an appellant could show an arguable appeal and that without a stay he would be financially ruined, a stay of execution ought to be granted. Aside from these grounds counsel for the Claimant/Respondent contends that there also must be some exceptional circumstance shown in order for the Court to consider granting a stay or that in the case of a money judgment, the appellant would be unable to recover monies paid out in satisfaction from the respondent.

⁶ ***Cropper v Smith (1883) 24 Ch. D 305; Bibby et anor v Pertap et ors [1996] 1 WLR 931***

⁷ ***Attorney-General v BCB Holdings & BBL*** supra para 20.

⁸ [1992] 4 All ER 887 @888

As stated before, counsel for the Claimant/Respondent contends that the Applicant has failed to demonstrate the existence of even one of the grounds. In particular, the Applicant has not presented any evidence supporting his claim of impecuniosity or that he would be ruined were the judgment to be enforced. The evidence that ought to have been submitted was said to be at least bank and expenditure statements, bills or other expenses and some quantifiable indication of income.

11. Whilst accepting that there had been no financial information provided, counsel for the Applicant submitted that the affidavit in support adequately illustrated the Applicant's circumstances and that relative to those circumstances, it was clear that by the sheer magnitude of the damages awarded, he would be sure to face financial ruin. Additionally, however, counsel for the Respondent states that the Applicant has failed to show any special circumstance necessitating the stay of execution. To the contrary, the Respondent notes that the Applicant has boldly evidenced his disregard for the judgment of the Court by remaining on the property and continuing to expend monies on the property. In response to this observation by Counsel for the Respondent, Counsel for the Applicant submitted, inter alia, the following:- (i) the fact of the exceptionally large quantum of the award of damages as a circumstance worthy of consideration; (ii) that the Applicant had expended considerable amounts of money improving the property in question; and (iii) that given that the subject matter of the appeal is land, irreparable harm could be suffered as a result of the process of enforcement in the event of a successful appeal - whereas in the event of an unsuccessful appeal, the lands would be available to satisfy the judgment.
12. The Respondent also claimed that the Applicant has remained on the land, not in defiance of the order, but because he has a house there, which was not affected by the judgment. Additionally, that his maintenance and upkeep of the property was intended to preserve its value, rather than allow it to deteriorate. Counsel for the Claimant/Respondent also contended that the Applicant rested his application solely on his unsupported claim of financial hardship, as opposed to addressing any other accepted grounds of appeal,

namely - the prospect of success on appeal. Citing **Ramdehol v Ramdehol**⁹ counsel for the Respondent noted that the issue of financial hardship was recognized in conjunction with the prospect of success, therefore it was incumbent upon the Applicant to have addressed the prospect of success in his application. With respect to the prospect of success, counsel for the Applicant contended that his appeal is arguable, as illustrated by his grounds of appeal and that far from considering grounds individually, the approach to be adopted by the Court would be that outlined by the Barrow JA, in **Sagis Investments Ltd. v Radio Krem Ltd.**¹⁰ that the order to be made would be that which best accords with the interests of justice. Counsel for the Applicant submits that the interests of justice would best be served by granting the stay as prayed.

13. As alluded to by then Hafiz-Bertram J, in **Nina Somkhisvili v Nigg, Christinger & Partner et al**¹¹, the Court must firstly be satisfied of an appeal's prospect of success, for in the absence of such, the application would be bound to fail. With respect to this issue, it is noted that the Applicant's grounds of appeal are extensive in number at ten and that they challenge not only the trial judge's findings of facts but also application of law. With respect to the latter, the grounds of appeal express with some particularity several alleged failings of the trial judge as regards the proof of the cause of action (fraudulent misrepresentation). Without any attempt to speak to the merits of the appeal, it is found that the grounds put forth by the Applicant in his notice of appeal are arguable. As such, this ground at the very least is found to be satisfied. With respect to the issue of financial ruin, it is accepted that the judgment will amount to sizeable sum in the region of at least six figures (US\$). However, it is acknowledged, that the Applicant has failed to provide any evidence to substantiate his alleged dire financial position. One cannot of course prove a negative, but at the very least the Applicant could have provided a statement of the value of the property he lives in (which according to him is not affected by the judgment, thus it is an asset).

⁹ [2013] CCJ 9 [AJ].

¹⁰ Belize Civil Appeal No. 13 of 2008.

¹¹ Supreme Court Claim No. 386 of 2011.

14. The Applicant also could have provided a statement of what his actual living expenses are, versus the income he has from whatever source, be it his children, social security, pension or other means. The Applicant clearly has some income from which he must live - he has deponed that he pays land taxes and has been travelling between Belize and the USA to assist in caring for his ailing parent. It is not difficult to accept, that a modest income can fund the expenses and outlays spoken of by the Applicant. However, the Court agrees with Counsel for the Applicant, that in the absence of fixed assets, a modest income would be no answer to the sizeable award of damages that must be paid in this case. The prospect of financial ruin relative to the size of the judgment as against the age and general lack of means on the part of the Applicant, is considered sufficiently, if not happily established within the circumstances of this case. It is specifically noted however, that as was expressed by Counsel for the Respondent, the Court finds the entire tenor of the applicant's affidavit to be dismissive of the judgment but fortunately for the Applicant, his application falls to be decided with reference only to relevant legal principles.
15. With respect to the question of exceptional circumstances, none of the facts or circumstances listed by Counsel for the Applicant is considered exceptional. The large amounts of money the Applicant claims to have invested in developing the property; the fact that the judgment is sizeable; the Applicant's age and retirement status - these are all matters which arise from the circumstances of the claim, which in any event fall to be considered with reference to the other grounds of an application for a stay of execution. There is nothing exceptional which arises as a consequence of the application for a stay itself. In addition to the above issues raised and argued by respective Counsel, the Court also raised the issue of delay. Albeit not raised by Counsel for the Claimant/Respondent, in light of the fact that a significant delay in taking any step in proceedings can be deemed an abuse of the Court's process, the issue of the unexplained delay in filing the notice of appeal was considered material to the exercise of the Court's discretion. The notice of appeal in this case was filed within the required twenty-one days of the perfection of the order arising out of judgment.

However that order was not filed until June, 2017, despite the fact that a written decision was handed down by the trial judge two and a half years earlier on the 31st January, 2014.

16. There was no evidence which accounted for this delay and Counsel for the Applicant, upon the inquiry of the Court, was of course constrained by his inability to attempt to provide any such evidence from the Bar. It is noted, that it was always within the purview, if not expected of the Claimant, to have filed the requisite order embodying the Court's decision and to have proceeded to enforce the judgment as well as to have started the clock for the time limited for appeal. In the absence of any evidence accounting for any reason for Claimant's failure to pursue enforcement of the judgment, much less objection to the application on the grounds of delay, the Court will regard the issue of delay as a neutral factor as between the parties. Additionally raised by the Court as relevant to the exercise of its discretion, was the question of when the appeal would likely be heard. The Applicant expressed the view (with no demur from Counsel for the Respondent that the appeal would most likely be heard in the first session of 2018, given that the October, 2017 session was imminent at the time of the hearing of the application. The required steps of settlement of the appeal record and case management were said to most certainly be able to be completed within time for the appeal to be heard in March, 2018.
17. In all of the circumstances discussed above, the Court finds it not unreasonable to accept that the Applicant would be financially ruined as a result of enforcement of the judgment. Additionally, that the Applicant has demonstrated arguable grounds of appeal and the appeal is likely to be heard within a relatively short period of time, considering the next available session of the Court of Appeal in March, 2018. The factor of concern to the Court - of Applicant's delay in filing the notice of appeal is balanced against the fact that on the face of the proceedings, the Claimant/Respondent has taken no steps to enforce the judgment and made no objection to the Application on any issue of delay. The issue of delay however does influence the Court's view of the Applicant's intention to prosecute the appeal with due dispatch, thus in the circumstances, there will be a time limit imposed on the stay which is granted.

The Application for stay of execution on the judgment is granted for a period of six (6) months from the date of this judgment, and is granted only in respect of the execution of the award of damages. All declaratory orders and the restraints against dealings or dispositions of the properties the subject matter of the judgment remain in force.

Disposition

18. The Application for stay of execution of the judgment of 31st January, 2014 is granted upon the following terms:-

- (i) The stay of execution herein is granted for a period of six months only, to expire on 12th April, 2018 unless varied or discharged by further order of this Court or order of the Court of Appeal;
- (ii) The stay of execution applies only to the payment of damages and not in relation to any of the declaratory orders or orders of injunction restraining any dealings or disposition of the subject properties;
- (iii) There is no order as to costs.

Dated the 17th day of October, 2017.

Shona O. Griffith
Supreme Court Judge.