8 pages

ROYAL COURT
(Samedi Division) 20

5th February, 1993

Before: P.R. Le Cras, Esq., Lieutenant Bailiff, and Jurats Orchard and Le Ruez

---

BETWEEN:	**ARYA HOLDINGS, LIMITED**	**PLAINTIFF**
AND:	**MINORIES FINANCE, LIMITED**	**DEFENDANT**

Application by the Defendant for an Order staying the hearing date for the taxation of costs pending the final determination of the Defendant's Appeal from the Order of the Royal Court of 31st March, 1992, refusing to strike out the Plaintiff's Order of Justice.

Advocate A.J. Dessain for the Defendant.
Advocate R.J. Michel for the Plaintiff.

JUDGMENT

THE LIEUTENANT BAILIFF: The instant application comes before the Court following an Order made for costs on 31st March, 1992. The Order then made followed the dismissal by the Court of a summons brought by the Defendants to strike out an Order of Justice issued by the Plaintiff. No application for a stay of the Order for costs was then made.

On 7th May, 1992, the Defendant served a Notice of Appeal against the Order of the Royal Court and followed this with its case on 8th September, 1992, the Plaintiff replying with its case on 8th December, 1992.

No certain date would appear to have been set down for the hearing of the appeal, though it is thought likely to be in May or June, 1993. Mr. Michel for the Defendant told us, however, that

as late as November, 1992, it was supposed to come on in January of this year.

On 19th October, 1992, Mr. Michel forwarded his bill of costs to the Judicial Greffier. This included costs for English solicitors who claimed an allowance for general care and conduct of 150% on the hourly rates charged, and for English counsel.

In his letter Mr. Michel foresaw difficulty and said as much when he wrote to Mr. Dessain on the same day. There was no immediate response from Mr. Dessain and after a misunderstanding and some delay, Mr. Dessain wrote on 17th December, 1992, saying, *inter alia*:

> *"There is no merit in undertaking the considerable work involved in preparing for the detailed taxation prior to the decision of the Court of Appeal.*
>
> *If the Court of Appeal finds in Minories favour the order for costs will be likely to be reversed. The order for costs is subject to the appeal in any event. Then the work involved would be a waste of time and costs. Furthermore there would be likely to be a hearing on taxation of Minories costs both at first instance and on appeal. If the Court finds in favour of Ayra there will be a need for taxation of costs on the appeal".* I should say here that when Mr. Dessain used the words *"will"* in the last sentence, he has amended that in his submissions today to the word *"may". In any event pending the appeal any order for costs would be stayed and therefore no practical purpose is achieved in having this issue determined prior to the determination of the appeal".* And he then fixed a date before the Greffier for Christmas Eve.

The date for the taxation hearing was fixed for 10th February of this year, but before that date the Defendant's summons before the Greffier to defer it was heard and dismissed.

The Greffier *inter alia* stated at page 5 of his Judgment of 20th January, 1993:

> ***"If I were to adopt the English system set out in Order 62 Rule 8 then there could be very substantial delays before taxation because of delays in the conclusion of the cause or matter and clearly the party who obtained the Order would be seriously prejudiced in such a case. Furthermore, I am not aware of any cases in Jersey in which the English procedure has been followed and I am aware that I have on a number of occasions, during summonses, expressed the view that taxation could proceed immediately unless an Order were made staying the enforcement of the costs until a later stage. Indeed, I have, in the past, made a number of such Orders and have***

expressed the view that, where an application for a stay is made to me, I would generally follow the English principles. However, no such stay was ordered in this case by the Royal Court and I am firmly of the opinion that the law in Jersey does not follow Order 62 Rule 8 and that Orders for costs can proceed to taxation unless there is a stay.

I move on now to the question as to whether or not the Judicial Greffier has a discretion to adjourn a costs hearing. Clearly, the Judicial Greffier has such a discretion. Indeed, any Judicial body has an inherent discretion to adjourn its own proceedings. However, that discretion ought to be exercised in a judicial manner. In my view, it would clearly be wrong to adjourn a taxation hearing for any of the reasons advanced by Advocate Dessain. The Royal Court has made its Order and the Greffier is under a duty to proceed with a taxation hearing as soon as is reasonably possible. To find otherwise would substitute the Greffier's discretion for the need to apply to the Royal Court or to the Court of Appeal for a stay of the taxation order."

This, therefore, brings us to today. Before dealing with the submissions, however, a point of jurisdiction arose. Both advocates wished to have the Court constituted with Jurats in case any question of jurisdiction should ultimately arise on the grounds that this was a stay of an award and not an award itself for costs. I find this argument quite untenable. Before 1948 the power on questions of law and costs, as with facts, lay with the Court as a whole. By Article 13 of the 1948 Royal Court Jersey Law it was provided :

"1) In all causes and matters, civil, criminal and mixed, the Bailiff shall be the sole Judge of law and shall award the costs, if any."

This was a major change. It is clear to me that the power to award costs must include power to stay the award and I rule, and have no hesitation in ruling, that this summons should come before the Bailiff, or his *alter ego* alone and that the Jurats have neither the right nor the power to interfere with his award of costs or any conditions which he may attach to it. However, as this is the first ruling of this nature I propose in this instance to record the view of the Jurats following my decision.

The case was put by Mr. Dessain on this basis: the Court has in each case a discretion so that each case shall be dealt with individually and a fair and sensible conclusion be reached, or as he later put it *"that logic and good sense should prevail"*.

His starting point was Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964, which reads:

> ***"15. (1) Except so far as the court below or the Court may otherwise direct -***
>
> ***(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;***
>
> ***(b) no intermediate act or proceeding shall be invalidated by an appeal.***
>
> ***(2) Where execution has been delayed by an appeal, interest for the period of delay at the rate of four per centum per annum shall be allowed unless the Court otherwise orders."***

In his submission, the Court should so "otherwise direct", in this instance, because: (1) as there was no final award there was no question of depriving a party of the fruits of judgment; (2) no prejudice would be suffered by the plaintiff, who should wait and see; and (3) it is a complicated taxation involving points of principle and detail. He was concerned that even if the points of principle were decided by the Greffier, these might be of little use in a subsequent taxation were he to win on appeal. He referred us to The Attorney General -v- Emerson [1890] 24 Q.B.D. 56. First, to the head-note at page 56 and second to the judgment of Lord Esher, at page 58:

> ***"In all the rules the word "may" has been held to mean "may or may not". It has been held to give a discretion, which is called a judicial discretion, but is still a discretion. If the practice contended for be established, in my opinion it alters the effect of the rule. It takes away the discretion to refuse a stay of execution, by imposing a particular term as a condition of the refusal in all cases. The Courts have no power to alter the effect of the rule; no authority to establish any practice in conflict with the rule; and no power to say that it shall be binding upon the Courts. I decline to take any other view than that the Court has a discretion in each case. It is said that the cases shew that the Courts have frequently made the order asked for here and there is no reported case to the contrary. Whether there be any reported case to the contrary or not, I feel certain that this Court has over and over again refused to say there was any established practice, but has said that it would exercise its discretion in each case. I cannot, therefore, accept the view which the Attorney-General urged upon us. I believe that rule 16 was made in the terms in which it is upon a consideration of the rights of the solicitor, and his position in regard to his lien for costs against his client, and in order to get rid of the rule which***

formerly prevailed that a rule nisi in all cases operated as a stay of execution."

And, I refer also to the judgment of Lindley L.J. at page 59 where he states:

"It is not competent for any Court or judge to lay down a rule which shall limit the exercise of that discretion."

And, of Lopes L.J.:-

"The true interpretation of that rule is clear. It confers a discretion upon the Court or judge asked to make an order such as is asked for in this case. It would be interfering with and limiting that discretion if we held that it was an established practice in every case to make the order. As to this particular case, there are special circumstances which justify us in granting the application."

Mr. Dessain, then referred to R.S.C. (1993 Ed'n) (p.1004) O. 59, r.13, paragraph (1) of which is in virtually identical terms to those of paragraph 15 (1) of the Court of Appeal (Civil) (Jersey) Rules, 1964. We note the passage which he put to us at 59/13/1:-

"When will a stay of execution be granted? - An appeal does not operate as a stay on the order appealed against, except to the extent that the court below, or the Court of Appeal (or a single Lord Justice) otherwise directs (0.59, r.13 (1) (a)). It follows that service of notice of appeal and setting down the appeal does not, by itself, have any effect on the right of the successful party to act on the decision in his favour and to enforce the order of the court below. If an appellant wishes to have a stay of execution, he must make express application for one (see further para 59/13/3 below). Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled," pending an appeal."

The passage on page 1005 was also put to the Court:-

"But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory... or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the court and the court will grant it where the special circumstances of the case so require."

And, we also had a further passage put to us from 59/13/2 at page 1006:-

> ***"As regards costs, it used to be the practice generally to refuse a stay provided that the solicitor for the successful party was willing to give an undertaking to repay the costs in the event of the appealing being allowed (see, e.g. Swyny v. Harland [1894] 1 Q.B. 707). But that is no longer the practice (except possibly in the case of stays pending appeal to the House of Lords: see para 59/13/6 below). In the case of appeals to the Court of Appeal the modern approach is simply to decide, as a matter of discretion, whether to grant a stay on the costs order as well as the other parts of the order, or to grant one subject to an appropriate amount in respect of costs (and/or the judgment debt) being paid into court or otherwise secured, or to refuse a stay."***

Put in general terms, his case was that it would be waste of time to go to taxation were he to win shortly in the Court of Appeal. And, in these circumstances he would not be compensated fully for costs, while the plaintiff, given that interest can be ordered, suffers no harm. He conceded that Mr. Harper's affidavit, which very properly accompanied his application, does not say that unless there is a stay the appeal would be nugatory and quite rightly conceded that he could not, in the circumstances, do so. His point was that if he were successful the taxation would be largely redundant and it will be more satisfactory to do the whole exercise together.

As authority for this point he referred to Seale Street Developments -v- Chapman & Anor. (3rd December, 1992) Jersey Unreported C. of A. at page 9:

> ***"We do not propose in this judgment to set out all those factors which may be taken into account in deciding whether to grant or to refuse a stay. The discretion of the court is ex facie unfettered and it may take into consideration any matter which it properly considers material to the exercise of its jurisdiction. Plainly, the factors referred to by Cotton L.J. in Polini -v- Gray, supra, are of first importance, that there may, in a particular case, be other factors, such as the consequences to the parties respectively of the grant or refusal of a stay, which require also to be weighed in the balance."***

Mr. Michel for the plaintiff relied on the proposition that unless there is good reason an appeal does not prevent an order from running. There are, here, no special circumstances which should delay taxation. He was prepared, albeit unwillingly, to give the usual undertaking to repay, should the plaintiff lose the appeal (as in the Attorney General -v- Emerson and in Swyny -v- Harland). The practice had clearly been in being at that time,

and so far as the Island was concerned, was still in being. It was, he agreed, a matter of discretion in each case. There were no special circumstances here and indeed, as Mr. Dessain agreed, the appeal date was not yet fixed. He had an order for his costs and subject to the usual undertaking which he was, as we have said, prepared to give, his client should be put in funds. It would not be just and equitable to refuse this to him.

It is a matter of discretion in each case. Here I can find no special circumstances which would induce me to grant a stay. Nor do I find it fair and sensible, as Mr. Dessain put it, or logical and in good sense to do so. I agree with Mr. Michel's view and I therefore dismiss the summons and order that the taxation should proceed against Mr. Michel's undertaking.

The learned Jurats have had a chance to consider this judgment, and in case and so far as their views are relevant, they have asked me to say that they agree with it.

Authorities

Arya Holdings Ltd -v- Minories Finance (20th January, 1993) Jersey Unreported.

Court of Appeal (Civil)(Jersey) Rules, 1964: Rules 15, 18.

R.S.C. (1993 Ed'n) 59/13; 62/3/4

Jobas -v- Anglo Coins [1987-88] J.L.R. 359

Tuck -v- Southern Counties Deposit Bank [1889] 42 Ch.D. 471

Swyny -v- Harland [1891-4] All E.R. Rep. 1270

Bloor -v- Liverpool Derricking Co. [1936] 3 All E.R. 399

In re Dégrèvement and Remise de Biens of Barker [1987-88] J.L.R 1.

Sloan -v- Sloan [1987-88] J.L.R. 651

Wilson -v- Church (No. 2) [1879] 12 Ch.D. 454

The Ratata [1897] P.118.

Attorney General -v- Emerson [1890] 24 Q.B.D. 56.

Scheweppes -v- Gibbons [1904] W.N. 209.

Griffiths -v- Benn [1911] 27 T.L.R. 326.

Seale Street Developments -v- Chapman (3rd December, 1992) Jersey Unreported C. of A.

Royal Court (Jersey) Law, 1948: Article 13.