REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 48 of 2011

H.C.A. No. 3400 of 1999

BETWEEN

NATIONAL STADIUM (GRENADA) LIMITED

Appellant/Third Defendant

And

NH INTERNATIONAL (CARIBBEAN) LIMITED

Respondent/Plaintiff

CLICO INVESTMENT BANK LIMITED

Respondent/First Defendant

I.C.S. (GRENADA) LIMITED

Respondent/Second Defendant

Claim No. CV 2006 – 01205

BETWEEN

NATIONAL STADIUM (GRENADA) CORPORATION

Appellant/Second Defendant

And

NH INTERNATIONAL (CARIBBEAN) LIMITED

Respondent/Claimant

CLICO INVESTMENT BANK LIMITED

Respondent/First Defendant

PANEL

P. Weekes, J.A.

APPEARANCES

Mr. Seenath Jairam, S.C. for the Appellant/Second Defendant, instructed by Mr. Quamina
Mr. Alvin Fitzpatrick, S.C. for the Respondent/Claimant, instructed by Ms. Lucky-Samaroo

DATE OF DELIVERY: 09th June 2011

JUDGMENT

Delivered by P. M. Weekes, J.A.

1. This is an application for a stay of execution of the judgment of Rajkumar J. dated 28th January 2011 whereby his Lordship ordered the following:

    1. *A declaration is granted that the sum of EC $7,430,724.70 ("the said EC sum") was held by the First Defendant [CIB] on trust for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project.*

    2. *A declaration is granted that (i) the Deposited Amount and (ii) the Additional Sum and (iii) Interest accumulated thereon, are held on trust (for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the Project).*

    3. *A declaration is granted that the sum of EC $7,430,724.70 ("the said EC sum") was held on trust for NH by the First Defendant [CIB].*

    4. *A declaration is granted that the sum of US$2,682,719.24 ("the Deposit Amount") paid by the First Defendant [CIB] into Account No. 0447657-005 at the Trinidad and Tobago Unit Trust Corporation (UTC) [the Account] pursuant to the order of Mr. Justice Tam dated 23rd July 2004 (made in the High Court Action 3400 of 1999) together with any interest accumulated thereon, is held on trust for NH.*

    5. *A declaration is granted that the sum of US $93,174.54 ("The Additional sum) is held by CIB on trust for NH.*

    6. ***It is ordered that the Deposited Amount and all interest accumulated thereon be paid out to NH and that there be payment out to NH of the monies held in the Account.***

    7. ***It is ordered that CIB do pay to NH the Additional Sum of US$93,174.54 owed by CIB as a result of the 2005 Order together with interest thereon from May 26 2005 at the rate of 12% per annum.***

    8. *It is ordered that interest on the said EC sum from November 30 1999 to April 26 2005 be assessed.*

    9. *It is ordered that CIB do,*

        a. provide, file and serve on all parties within 7 days from today's date complete accounts, records and documentation in its possession in relation

to the frozen EC sum from the date of Justice Tam's initial order dated November 30th 1999 to the date of payment to the UTC account pursuant to order dated 23rd July 2004.

b. Leave is granted to all parties to this action for

(i) the filing ,within 14 days from today, of such material, if considered necessary in relation to evidence of relevant interest rates and

(ii) Replies if any within 7 days thereafter.

10. It is ordered that the costs of these actions be paid by the Defendants to the Claimant/Plaintiff on the basis prescribed by the Civil Proceedings Rules as follows –

(i) In the case of CIB costs are to be paid on the value of the total of the (a) Additional Sum, (b) Interest thereon, and (c) the interest, when assessed, on the said EC sum from November 30 1999 to April 26 2005.

(ii) In the case of NS, costs are to be paid on the basis prescribed for the value of the Deposited Amount (not including the interest which has been accumulating thereon since its deposit into the Unit Trust Account).

2. It is the orders at ***(6), (7)*** and ***(10)*** that are the true subject of this application. The application is supported by two affidavits of Colm Imbert dated and filed the 11th and 31st of March 2011 respectively. Affidavits in opposition were filed by Emile Elias and Richard Joseph on the 18th of March 2011.

GROUNDS FOR STAY OF EXECUTION

3. The Appellant's grounds for the application are as follows:

    1. That the appeal has good prospects of success;

    2. There are exceptional circumstances for granting the stay;

    3. If a stay is not granted, there is no reasonable prospect of recovering the monies and the appeal will be rendered nugatory;

4. The Respondent will suffer no prejudice if a stay is granted since the monies are being kept in an interest bearing account at the Unit Trust Corporation in the joint names of attorneys-at-law for the parties; and

5. If a stay is refused, the risk of injustice to the Appellant would be far greater than the risk of injustice to the Respondent.

LAW

4. **CPR Rule 64.18 (1) (b)** provides that a single judge may make an order for a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal.

5. **The Civil Procedure Rules and Practice Directions 2010 Vol. 1 para. 52.7.1 – 52.7.2** highlights the general principle that a successful litigant is not to be deprived of the fruits of his litigation:

> "[…] Under RSC O.59 (which governed appeals prior to May 2000) the courts had established the principle that a successful litigant should not generally be deprived of the fruits of his litigation pending appeal, unless there was some good reason for this course. This general principle still applies. "The normal rule is for no stay…" per Potter L.J. in *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474 at [13]. In *DEFRA v Downs* [2009] EWCA Civ 257 at [8] – [9] Sullivan L.J. having noted that a stay is the exception rather than the rule, stated that the "solid grounds" which an applicant must put forward are normally "some form of irremediable harm if no stay is granted".

6. **CPR Rule 64.16**, which is analogous to RSC O.59, provides:

> "*Except so far as the court below or the court or a single judge may otherwise direct –*
>
> *(a) an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and*
>
> (b) *no intermediate act or proceeding is invalidated by an appeal.*

7. The test in this jurisdiction for whether a stay of execution should be granted is whether the appeal has good prospects of success and additionally whether there are any special circumstances which would justify exceptionally the grant of a stay**: Emmanuel Romain v W.A.S.A. Civ. App. No. 24 of 1997; Clayton Bruce and Maria Bruce v The National Insurance Board of Trinidad and Tobago Civ. App. No. 63 of 2005.** Additionally, where an appellant can satisfy the court that if a judgment is paid, there would be no reasonable prospect of getting it back in the event of a successful appeal, a stay may be granted: **Atkins v Great Western Railway (1886) 2 TLR 400.**

8. Whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice **Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] All ER (D) 258 (Dec) para 22**. In weighing the issue of injustice the court must consider, among other matters, if a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? 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 what has been paid to the respondent?: **Blackstone's Civil Practice 2005 para. 71.42.**

BACKGROUND

9. To understand the submissions made before this Court, it is necessary to outline the somewhat convoluted facts in this matter. A history of the instant case, extracted from the judgment of Rajkumar J, is as follows.

10. In 1996 the government of Grenada was desirous of constructing a sporting complex. Colm Imbert formed a company, Imbert Construction Services Limited (ICSL), in Trinidad and made a proposal to the government of Grenada for ICSL to implement

and develop this project, including arranging financing. The monies were to be raised from investors arranged by Clico Investment Bank (CIB). Another company, Imbert Construction Services Grenada (ICS Grenada), was later formed in Grenada for the purpose of the construction aspect of the project. National Stadium (NS) was formed in Grenada to be the "Project Company". NS was incorporated on Mr. Imbert's instructions and he was a principal of ICSL, ICS Grenada, and NS. Mr. Elias' company N.H. International (Caribbean) Limited (NH) was awarded a subcontract by ICS Grenada for construction work to be performed, initially of 70 % of the value of the initial project cost.

11. The government of Grenada entered into an agreement with ICSL to award them the contract to build the sporting complex. The agreement was subsequently confirmed in a Memorandum of Understanding between the Government, ICSL and CIB.

12. On 15th May 1997 two critical agreements were executed in relation to this project. The government of Grenada, ICS Grenada, CIB and NS executed a **Development Agreement** under which ICS Grenada agreed to undertake the development of the complex in accordance with a contract to be entered into with NS. Clause 6.5 of the agreement contained an undertaking that CIB, under a Facility Agreement, would pay or cause to be paid *through* the project company (NS) all monies due under the contract documents to the developer (ICS Grenada), consultants, suppliers and other providers of goods and services in relation to the project.

13. NS and CIB entered into the **Facility Agreement** whereby CIB agreed to arrange a bond issue on behalf of NS, the proceeds of which were to be used to construct the sporting complex. CIB was to make advances to or on behalf of NS up to a maximum amount of US$23,000,000. Such advances were to be used solely for the purpose of the sporting complex.

14. Simultaneously with the execution of the Facility Agreement, NS engaged ICS Grenada to build the complex for US$23,000,000. NS was to receive the monies from CIB under the Facility Agreement and pay it over to ICS Grenada and no profit was to be retained by NS.

15. There was a third critical agreement. Prior to the execution of the Development Agreement and the Facility Agreement, Mr. Imbert, the principal behind ICS Grenada and director of NS, met with representatives of NH to negotiate a sub-contract of 70% of the value of work to be done on the sporting complex. An agreement was reached on 6th June 1997 whereby ICS Grenada entered into a **Construction Agreement** with NH for construction work on the sporting complex for the sum of EC$43,502,812 (approximately US$16,000,000).

16. Just over two years later, on 29th October 1999 ICS wrote to NH purporting to give 14 days notice of its intention to terminate the Construction Agreement. NH sought and obtained an interim injunction restraining CIB from paying out of the Facility Agreement, any monies which would reduce the balance below EC$7,430,724.70. This represented monies due and owing to NH under the Construction Agreement.

17. On 5th November 1999 Tam J granted an *ex parte* injunction, which was continued at the *inter partes* hearing, ordering *inter alia*, that CIB be restrained from paying to ICS Grenada or NS any monies under the Facility Agreement that would reduce the balance below EC$7,430,724.70, which represented outstanding monies owed to them under the Construction Agreement.

18. Tam J's order was appealed in **Cv. App. No. 159 and 160 of 1999**. On 14th December 1999, the Court of Appeal held that Tam J's order was correct and ordered that the injunction continue until further order.

19. NH then instituted arbitral proceedings against ICS Grenada pursuant to the Construction Agreement and on 18th March 2002 obtained an award for the net figure of EC$ 8,412,636.83 together with interest in relation to goods and services provided

on the project. ICS Grenada appealed this award in **H.C.A. 1541 of 2002** which was dismissed on 17th February 2004 by Jamadar J as he then was. An order rendering the award enforceable as an order of the High Court was granted on 27th June 2004 subject to an undertaking not to enforce same until final determination of any appeal. An appeal of the arbitration award was made in the Court of Appeal but was dismissed on 31st December 2004.

20. On 23rd July 2004, Tam J ordered that the EC Sum or its $US equivalent be deposited into an interest bearing account at the Unit Trust Corporation ("UTC"). The US$ equivalent amounted to US$ 2,738, 932. 54; however, US$ 2,682, 719.24 was actually deposited ("the deposited sum"). The difference of US$ 93,174.54 ("the additional sum") has not been paid into the UTC account to date.

21. NS's claim to the monies deposited at UTC was based on a default judgment obtained against ICS Grenada in the Supreme Court of Grenada on 9th June 2004. As a result of Tam J's injunction, NS secured alternative funding for the project and loaned ICS Grenada EC$13,499,469.00. NS obtained judgment in the amount of EC$ 13,452,094.00 inclusive of costs with interest accruing thereon at a daily rate of EC$4,422.61 from June 9th 2004 until actual payment.

22. NH's claim, eventually heard by Rajkumar J arose out of two actions which were consolidated and in which it sought the following relief *inter alia*:

    1) A declaration that NS is a trustee for ICS Grenada of the rights and obligations accruing to it under the Facility Agreement between CIB and NS;

    2) A declaration that there is a binding assignment in favor of NH of so much of the monies due and to become due from CIB under the Facility Agreement as would from time to time be due and payable to NH under the Construction Agreement;

    3) As against ICS and NS a declaration that there is a binding assignment in favor of NH of so much of the monies due and to become due from NS to ICS Grenada;

4) A declaration that the sum of EC$7,430,724.70 was held on trust for NH;

5) A declaration that the sum of US$2,682,719.24 (the deposited sum) together with all interest accumulated thereon and the additional sum of US$ 93,174.54 are held on trust for NH;

6) A declaration that the deposited amount and the additional sum are held on trust for the sole purpose of applying the same in payment of suppliers and other providers of goods and services in relation to the project;

7) A declaration that NH as a supplier of goods and services in relation to the project is entitled to enforce the said trust for its benefit; and

8) An order that the deposited amount and the additional sum be paid out to NH.

23. The essential issues before Rajkumar J were:

1. Whether a trust existed in respect of the EC sum for the benefit of NH and whether NH could enforce such a trust; and
2. Whether ICS Grenada assigned its right to receive payment from NS to NH.

His findings with reasons therefor are recorded at paragraphs 31, 32 and 36.

GOOD PROSPECTS OF SUCCESS

24. Mr. Jairam, S.C. submitted that the appeal had good prospects of success based on the grounds contained in the appellant's notice of appeal filed 11th March 2011.

25. He submitted before the Court that the judge ***erred in his finding of fact*** that the purpose of the trust was to finance the construction of the sporting complex. He argued that the purpose of the trust was uncertain and therefore that the beneficiaries were uncertain as well and that the trust was therefore unenforceable by NH. Alternatively, he submitted that the primary purpose of any trust that arose was the construction of the sporting complex which had been fulfilled, therefore NH was not beneficially entitled to the monies.

26. He also submitted that the judge ***erred in law*** on the question of enforcement of the trust. He submitted that a *Quistclose*-type trust could only be enforced by lenders and not by beneficiaries as the judge held.

27. On the issue of the assignment Mr. Jairam submitted that the trial judge ***erred in his finding of fact*** that ICS Grenada agreed to assign to NH its rights to receive payment from NS and/or CIB. He submitted that there was no evidence to support such a finding and further that the Development Agreement contained a prohibition against assignment at clause 10.

28. He argued that if Tam J had not granted an interim injunction freezing the EC sum, these monies would have been paid to NS, thus a successful claim was interrupted because at all times that sum belonged to NS. He submitted that NH wrongfully obtained the injunction and NS suffered loss as a result.

29. In reply, Mr. Fitzpatrick, S.C. submitted that the application for a stay of execution was misguided because NS made no claim to and has no beneficial interest in the monies and submitted that the basis of NS's claim to the funds at UTC was misconceived. He argued that NS's default judgment had no bearing on the monies frozen by Tam J's injunction, and NS had to proceed against ICS Grenada to recover the debt as it could not be satisfied out of sums payable under the **Facility Agreement**. He further submitted that NS would not have suffered any loss had they been repaid by ICS Grenada. NS's counter claim in proceedings below, disclosed no cause of action against NH and further NS instituted no claim against CIB for the monies deposited at UTC.

JUDGE'S REASONING

30. Before Rajkumar J, NH had submitted that the funds payable by CIB to NS under the Facility Agreement were impressed with a trust in favor of suppliers and providers of goods and services to the project, such as NH, therefore NH could enforce the trust as beneficiary.

31. In respect of the trust, Rajkumar J considered the law on the creation and enforcement of trusts by creditors and lenders in relation to third parties. He referred himself to **Barclays Bank Ltd v Quistclose Investments Ltd [1970] A.C. 567** in which The House of Lords held that arrangements for the payment of a person's creditors by a third person gave rise to a relationship of a fiduciary character or trust in favour, as a primary trust, of the creditors, and, secondly, if the primary trust failed, of the third person.

32. In relation to whether a trust existed, Rajkumar J found on the facts that it did, because the monies under the Facility Agreement were intended by CIB and NS to ensure payment to the suppliers of goods and services to the project. He found that the primary purpose of the monies was therefore the payment of suppliers, such as NH. He therefore concluded that the EC sum (later the deposited sum in UTC), being a portion of the monies under the Facility Agreement was subject to a trust for payment to NH as a supplier of goods and services to the project.

33. Having found that the deposited sum was subject to a trust for the benefit of NH as a supplier of goods and services, ***Rajkumar J considered whether NH had enforceable rights***. He was guided by the learning in **Carreras Rothmans Ltd. v Freeman Matthews Treasure Ltd (in liq.) and Another [1985] 1 All E.R. 155** ***and concluded that NH, as a supplier of goods and services to the project, was an intended beneficiary of the funds under the Facility Agreement. NH therefore had enforceable rights*** and could enforce the trust as a beneficiary. Although finding that the deposited sum was the subject of a trust enforceable by NH which was dispositive of the matter, Rajkumar J, went on to consider NH's alternative argument.

34. NH had alleged that before embarking on construction activities for the sporting complex, assurances were sought from Colm Imbert that NH would be paid directly by CIB, and that payment for work done under the Construction Agreement would be assigned to them (NH) by ICS Grenada. Under this arrangement NH would not have

to wait for ICS Grenada to be paid by NS, then receive payment from ICS Grenada. NH alleged that this arrangement was agreed upon in a meeting with a CIB representative and Mr. Imbert. NS denied that ICS Grenada agreed to assign any rights or monies payable under the Facility Agreement. NS claimed that NS, ICS, NH and CIB agreed that subject to a formal contract being entered into, CIB would make payments directly to NH for the purposes of convenience only. Furthermore, NS alleged that assignments were prohibited by a non-assignment clause in the Development Agreement.

35. Rajkumar J considered the law on equitable assignments as found in **Chitty on Contracts 30th Edn. Vol 1** on Means of assignment; Formalities for equitable assignments; Consideration needed for agreement to assign; and Agreement to assign expectancy supported by consideration.

36. He also considered the learning on equitable assignments in the Privy Council judgment in **Palmer v Carey [1926] AC 703** where at p 706-707, Wrenbury J stated:

> *"The law as to equitable assignment, as stated by Lord Truro in Rodick v. Gandell 1 D. M. & G. 763, 777, 778, is this:*
>
> > *'The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers.'*
> >
> > *An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way but if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance*."

37. The judge found, on the evidence, that at a meeting between ICS, CIB and NH, ICS agreed to assign to NH its right to receive payment from NS and by letter dated 4th June 1997, NH wrote to ICS Grenada under the rubric "Assignment of Loan Proceeds" and requesting confirmation of the assignment. By letter dated 5th June 1997, Mr. Imbert replied stating that 'all monies due to NH under the Agreement shall be assigned and paid directly to NH". He found that the consideration for the agreement was NH's EC$ 10,000,000 performance bond in favour of ICS Grenada. Rajkumar J also found that the non-assignment clause related to the Development Agreement only; the Facility Agreement contained no such prohibition. He therefore concluded that ICS Grenada did agree to assign its right to receive payment from NS to NH. The agreement was thus enforceable by NH as assignee.

38. Rajkumar J also examined the basis on which NS claimed to be entitled to the deposited sum which was that NS had obtained a default judgment against ICS in Grenada. NS claimed that NH wrongfully and without justification obtained an injunction that froze monies payable under the Facility Agreement. As a result, NS had to source alternative funding and loaned ICS Grenada approximately EC$13,000,000 to complete the project. NS claimed that they were unlawfully and improperly kept out of monies lawfully belonging to them for their sole benefit. Thusly they suffered loss and damage as a result of NH improperly obtaining an injunction.

39. Rajkumar J found that even if such a loan had been proved, it would amount to no more than a debt owed by ICS Grenada to NS. He also noted that NS had made no claim against CIB in the proceedings for the monies; further NS could not seek to recover a loan owed to them by ICS Grenada from funds under the Facility Agreement. Thus, they could not obtain payment for that loan from the deposited sum. The project documents were clear that the capacity in which NS was to receive the Facility monies: for onward transmission to suppliers of goods and services only. Therefore, the monies were not for NS's benefit.

LAW ON APPELLATE COURT DISTURBING TRIAL JUDGE'S FINDINGS OF FACT

40. An appellate court does not disturb a trial judge's findings of fact lightly: **Visham Lalla v Suruj John Lalla Civ. App. No. 102 of 2003**. Mendonca J.A. stated the principles which guide appellate courts at para. 24:

> "*It is well established that a court of appeal would not lightly interfere with a trial judge's finding on issues of fact. This is because a trial judge, as he is in a position to see and hear the witnesses, is in a position of advantage over a court of appeal. The principles which guide an appellate court that is asked to upset a judge's finding have been often stated and it is not necessary to cite the many authorities in which the principles have been rehearsed. I think reference need only be made to Civil Appeal No. 116 of 1996 Ettienne v Ettienne where the principles were adequately set out by de la Bastide C. J. He stated (at p. 8):*
>
> > *'An appellate court ought not to upset a trial judge's finding of fact, simply because the appellate court would have come to a different conclusion. Due weight must be given to the advantage which the trial judge has as a result of being able to see and hear the witnesses give their evidence and to form an impression from that of their credit-worthiness. For his finding to be upset there must be some demonstrable flaw in the process by which he reached it. It may be for instance that he drew an inference which was not justified or failed to draw an inference which was. Another ground on which the appeal court may interfere is that the trial judge failed to take account of some relevant piece of evidence or to appreciate its proper significance, or conversely that he took into account something which he ought not to have taken into account, or attributed to it a significance which it did not rightly have*.'"

41. Having studied the judgment of Rajkumar J, in particular the points which are impugned in the substantive appeal, and this application I can find no fault with it. In particular the applicant has not shown and I have not found any demonstrable flaw in the process by which he arrived at his findings of fact. Counsel for the appellant has, in my view, introduced nothing additional on the law to what was argued before Rajkumar J, and therefore the exercise for this court was limited to a review of matters before him. I concur with his interpretation of the law. To my mind his findings of fact were reasonable and cannot be disturbed in an appellate process and

his appreciation and application of the relevant law was unexceptionable. The appellant has not discharged the burden on it to satisfy this court of good prospects of success.

RECOVERING MONIES IN THE EVENT OF A SUCCESSFUL APPEAL

42. Mr. Jairam submitted that if the appellants were to be successful on appeal, there was a danger that they would be unable to recover the monies from NH. He submitted that *inter alia* NH is incorporated in the Cayman Islands and routinely exports its earnings to bank accounts/companies in that country. He referred the court to para 11 of **BMW AG & Another v Commissioners for HM Revenue & Customs [2008] EWCA Civ 1028**:

> *"The starting point is that the ordinary principle, long established, is that a successful litigant is entitled to receive the fruits of his success, and the launching of an appeal by his opponent does not operate to stay his entitlement. Nor indeed is the contrary suggested. That starting point is, however, by no means also the finishing point, because it is also equally well-established that the court has an unfettered discretion to order a stay of the order under appeal if the justice of the case demands it. In a case in which the question of the ordering of a stay arises, the role of the court is to make the order that best accords with the interests of justice. Where there is a risk of harm to one party or the other, whichever order is made, the court has to balance the alternatives and made a decision as to the course which is likely to occasion the least injustice. In Leicester Circuits Ltd v Coates Brothers plc [2002] EWCA Civ 474 , Potter LJ said at paragraph 13:*
>
> > *'The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal.'"*

43. The affidavit of Colm Imbert (11th March 2011) purported to address this issue. Mr. Imbert deposed that he had been advised by Richard Joseph, a former financial controller of NH, that NH's earnings were routinely exported from Trinidad and Tobago to the Cayman Islands into various bank accounts/companies owned and/or controlled by Emile Elias, however, Mr. Joseph in his affidavit denied this

conversation ever occurred and further also stated that during his tenure as financial controller he was never aware of any export of NH's earnings to the Cayman Islands.

44. Mr Imbert also deposed that there was no evidence of NH having unencumbered fixed assets and further, that NH was in financial difficulty over certain projects and embroiled in expensive litigation and arbitration proceedings. He claimed to be aware of an arbitration award made against NH in 2009 for TT$ 20,000,000. He conducted a search at the Trinidad and Tobago Companies' Registry and discovered Emile Elias had shareholding/interest in several different companies with similar names. He concluded that Emile Elias had formed these companies to suit his commercial purposes since Elias was predominantly involved in the construction industry and not in any business venture that necessitated the use of so many entities.

45. Mr. Imbert also deposed that Mr. Elias was 75 years old and had informed him that he was concerned that prostate cancer had spread to other areas of his body and that as NH was a personality driven company it was unlikely to survive Mr. Elias. He felt that as there was no succession plan in place and was of the view that Mr. Elias would divest himself of his interest in NH or wind up the company.

46. He claimed that Mr. Elias had told him that he used the device of a trust to conceal his ownership of companies in the Cayman Islands. Mr. Imbert also discovered that foreign judgments could not be enforced against trusts established in the Cayman Islands since there is no reciprocal arrangement with the Cayman Islands under the Foreign Judgments Reciprocal Enforcement Act.

47. Based mainly on Mr. Imbert's affidavit, Mr. Jairam submitted that there was an overwhelming likelihood that the monies at UTC would be dissipated by NH should Rajkumar J's judgment be executed thereby rendering any appeal nugatory.

48. Mr. Elias in his affidavit in opposition deposed that NS had strongly resisted being joined as a party in the action below, and an application to set aside permission to serve NS was granted, but they were subsequently joined on appeal by way of a

consent order. The only basis for NS's claim was the default judgment against ICS Grenada; however no claim was made against them in the proceedings below. He denied that NH was in any financial jeopardy or exported its earnings to the Cayman Islands. He deposed that NH paid tax in Trinidad and Tobago and annexed their audited financial statements for the years ending 2008 – 2010. He stated that the sum owed to NH by CIB formed part of NH's receivable assets, but that sum had not been included in the financial statements because there was to date no determination of the matter. He stated that although NH is registered as an external company, its primary place of business and head office was in Trinidad and Tobago.

49. He responded that the various companies Mr. Imbert highlighted in his affidavit were joint venture companies formed for one-off projects in the 1970's and 1980's. Of the current arbitration proceedings, he stated that three of four partial awards were substantially in NH's favor; no award for payment of monies has been made yet; and according to accounts NH may have been overpaid by only TT$1,000,000. Mr. Elias also stated that he was in good health and denied Mr. Imbert's allegations to the contrary or having any conversation as deposed to by Mr. Imbert.

50. The significant aspects of Mr. Imbert's affidavit in reply were that NH's current ratio was just over 1:1, below the international satisfactory standard of 2:1 and that he had caused a qualified accountant, Mr. Madan Ramnarine, to examine NH's audited financial statements as per NH's annexures. The overall analysis revealed a company that had problems collecting funds from construction projects; had a low cash balance; was highly inefficient; and paid no corporate tax.

51. Mr. Imbert also alleged that NH registered as an external company to avoid paying corporation tax in Trinidad and Tobago and also deposed that NH had no physical presence in the Cayman Islands and was registered at a building in Grand Cayman notorious for registering shell companies.

52. Mr. Fitzpatrick submitted in reply that there was no evidence that NH would be unable to repay the monies in the event of a successful appeal. He referred to NH's financial statements and the substantial receivables contained therein. He concluded by submitting that NH was in a financial position to repay the monies in the event of a successful appeal therefore a stay of execution should be refused.

53. **CPR Rule 31.3** provides *inter alia*:

> *(1)The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his own knowledge.*
>
> *(2) However, an affidavit may contain statements of information and belief – (a) where any of these Rules so allows; and*
>
> *(b)**where it is for use in any procedural or interlocutory application, or in an application for summary judgment; provided that the source of such information and the ground of such belief is stated in the affidavit.***
>
> ***(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.***

54. An application for a stay of execution pending appeal not finally deciding the rights of the parties, is therefore interpreted as interlocutory. Hearsay evidence is permitted by **CPR Rule 31.3(2)(b)** once the source and grounds of the deponent's beliefs are stated. **CPR Rule 30.1(2)** defines hearsay evidence as follows:

> *"'Hearsay Evidence' means a statement made otherwise than by a person while giving oral evidence in proceedings which is tendered as evidence as of the matters stated."*

55. Hearsay evidence in the context of **CPR Rule 31.3(2)(b)** must still conform to the rules of evidence and mere opinions or material that is otherwise inadmissible will not be allowed. In **Savings & Investment Bank Ltd. v Gasco Investments (Netherlands) B.V. and Others [1984] 1 W.L.R. 271**, Gibson J considerer RSC Order 41, r 5(2) which allowed hearsay evidence to be used in interlocutory proceedings. He stated the following at pg. 282 – 283:

> *"To my mind the purpose of rule 5(2) is to enable a deponent to put before the court in interlocutory proceedings, frequently in circumstances of great urgency, facts which he is not able of his own knowledge to prove but which, the deponent is informed and believes, can be proved by means which the deponent identifies by specifying the sources and grounds of his information and belief. What the sub-rule allows the deponent to state that he has obtained from another must, in my judgment, be limited to what is admissible as evidence […] So too, in my judgment, a statement in an affidavit referring to other forms of inadmissible evidence should be treated as irrelevant. That would include statements of opinion not being within any recognised exception to the general principle to which I have referred […]In my judgment the court ought not to allow in affidavits to be used in interlocutory proceedings material which cannot be proved because it is mere opinion or is otherwise inadmissible."*

56. Much of what is contained in Mr. Imbert's affidavit is mere opinion, speculative and unfounded in any established facts. The burden is his to convince the court of the reliability of his assertions and in the face of denials by Mr. Joseph and Mr. Elias that conversations alluded to by Mr. Imbert took place, the Court finds these assertions unreliable. Further, Mr. Imbert's conclusions, deductions and assessment on the state of NH's affairs and how they relate to other businesses in which Mr. Elias is involved are all highly subjective, speculative and dependent on many more factors that Mr. Imbert has raised in his affidavit. There has been a "broad brush" approach in the expectation that the cumulative effect of the suppositions will produce the desired inference.

I am therefore not satisfied that NH will be unable to repay moneys paid out under Rajkumar J's judgment should the appellant be successful on his appeal.

EXCEPTIONAL CIRCUMSTANCES

57. Mr. Jairam submitted that the special circumstance in this case was the fact that the deposited sum was in an interest bearing account at UTC.

58. Mr. Fitzpatrick submitted in reply that this was not a special circumstance that justified a stay of execution. He submitted that "special circumstances" in the context of stay of execution proceedings had to affect the applicant.

59. The Court does not regard the fact that the moneys are at this time held in an interest bearing account, a special circumstance that in any way affects the matter at hand. A special circumstance must be something, further than prospect of success, that goes to the justice of the situation such as to be a factor that the court must consider in its balancing exercise. I find that there are no special circumstances disclosed by this applicant.

RISK OF INJUSTICE/PREJUDICE

60. In the context of this application, this can be considered an "umbrella ground." Given all that has been said, the Court finds no risk of injustice to the appellant in a refusal to order a stay of execution. The only real injustice that could possibly arise on those facts would be if the appellant was in danger of being unable to recover any monies paid out under the judgment of Rajkumar J. Having already decided that I am not satisfied that this is a risk, I find no risk of injustice.

61. Being deprived of the fruits of his litigation without good reason is prejudicial to a respondent. The fact that the monies are secure and that the respondent has been without them during the pendency of these proceedings does not mean that he will suffer no prejudice if that *status quo* remains undisturbed. If the respondent is entitled to the monies and is made to await receipt, that is in and of itself an inconvenience and causes it to suffer prejudice. It cannot lie in the mouth of the unsuccessful litigant

in these circumstances to say that there would be no prejudice to the successful litigant should it have to await the decision of the Full Court to receive its judgment.

In the above premises the application is dismissed.

P.Weekes
Justice of Appeal