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 PROJECT (GRENADA) CORPORATION

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 PROJECT (GRENADA) CORPORATION

Appellant/Second Defendant

AND

NH INTERNATIONAL (CARIBBEAN) LIMITED

Respondent/Claimant

CLICO INVESTMENT BANK LIMITED

Respondent/First Defendant

PANEL: **N. BEREAUX, J.A.**
J. JONES, J.A.
A. DES VIGNES, J.A.

APPEARANCES:

Mr. S. Hughes, QC instructed by Ms. A. Sooklal for the Appellant.

Mr. A. Fitzpatrick, S.C. and Mr. S. Sharma instructed by Mr. A. Byrne for the Respondent/Plaintiff.

Mr. B. Reid instructed by Mr. C. Foderingham for the Respondent/First Defendant.

Respondent/ Second Defendant unrepresented.

DATE DELIVERED: 28th July, 2017.

I have read the Ruling of Jones, J.A. and I agree with it.

N. Bereaux
Justice of Appeal

I too agree.

A. des Vignes
Justice of Appeal

RULING

Delivered by J. Jones, J.A.

1. The applicant, National Stadium (Grenada) Corporation, seeks a stay of the execution of an order made by Rajkumar J. dated 28th January 2011 pending the hearing and determination of its appeal from his judgment. At issue here is the payment out to the respondent, NH International (Caribbean) Ltd., of the sum of USD 2,682,719.24 held in an account at the Unit Trust Corporation ("UTC"). This sum had been placed in the account in the joint names of the instructing attorneys then on record for the applicant, the respondent and CLICO Investment Bank ("CIB") since December 2004 pending the hearing and determination of the high court action or until further order.

Procedural History

2. The notice of appeal was filed on 11th March 2011. On the same date the applicant applied to the judge sitting in the Court of Appeal Chamber Court for a stay of execution of the order of Rajkumar J. ("the order"). This application was dismissed. The judge, Weekes JA, found that, in accordance with the established principles, it was incumbent on the applicant to show that the appeal had a good prospect of success and identify any special circumstances that would "justify exceptionally" the grant of the stay. In addition, she acknowledged, that a stay may be granted where an applicant satisfies 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. According to the judge the essential factor in the exercise of her discretion was the risk of injustice.

3. Weekes JA found that the applicant had not satisfied the burden on it that: (a) it had good prospects of success on the appeal; and (b) the respondent would be unable to repay the monies paid out under the judgment if the applicant was successful on the appeal. She found that there were no exceptional circumstances that warranted a stay and no risk of injustice to the applicant if the stay was refused.

4. Thereafter, in accordance with the accepted procedure, the applicant renewed its application for a stay of the order to the full court but before that court could determine the application the substantive appeal was dismissed. This dismissal was not a dismissal on the merits of the appeal but based on a lacuna in the notice of appeal: that the applicant had not demonstrated any entitlement to the sum nor appealed the judge's finding against it on that issue.

5. The applicant appealed the dismissal of the substantive appeal to the Judicial Committee of the Privy Council ("the Board"). Pending the hearing of the appeal before the Board the respondent gave limited undertakings not to enforce the judgment. These undertakings expired on 25th April 2013. On 16th February 2015 the Board allowed the appeal, gave the applicant leave to amend its notice of appeal and remitted the matter to the Court of Appeal for hearing.

6. The amended notice of appeal was filed on 1st April 2015. It is accepted that at the time of the filing of the amended notice of appeal the transcript of the notes of evidence necessary for the filing of the record of appeal was not as yet available. However the respondent alleges, and the applicant does not deny, that no further steps were taken by the applicant to prosecute the appeal. In particular the applicant made no application for directions pursuant to Part 64.11 of the Civil Proceedings Rules 1998 as amended ("the CPR") until after a letter from the respondent dated 16th January 2016 requesting that it take the necessary steps to do so.

7. Thereafter the applicant applied for and, in May 2016, received directions for the filing of the record of appeal without the notes of evidence and for the filing of written submissions, by first the applicant and then the respondent, 60 days and 90 days after receipt of the notes of evidence. The notes of evidence were obtained by the respondent and forwarded to the applicant on 12th October 2016 with a reminder that its written submissions were due 60 days from the 14th October 2016. When it became evident that the applicant would be unable to file its written submissions within the allotted time the applicant applied for an extension of time to do so on 5th December 2016.

8. By letter dated 9th December 2016 the respondent wrote the applicant giving 30 days notice of its intention to take steps to enforce the order. The justification taken in the letter for the respondent's stance was that the chronology of events demonstrated a failure by the applicant to proceed with its appeal with due diligence and that the six year period, during which the rules allowed for a writ of execution to be issued without the need to obtain permission of the court pursuant to part 47.3 of the CPR, was to expire on 28th January 2017. On 23rd January 2017 the respondent filed its request for the issue of a Writ of Fieri Facias pursuant to part 47 of the CPR.

9. Meanwhile, on 6th January 2017, the applicant made another application to the Court of Appeal Chamber Court for a stay of the execution of the order. On 13th March 2017 that application was refused on the basis that the judge had no jurisdiction to hear it. On 18th May 2017 the applicant made this application to the full court.

The applicable law

10. It is trite law that an appeal does not operate as a stay of the judgment or order appealed. The basic rule is that a successful litigant is entitled to enjoy the fruits of its success. The onus therefore is on the applicant for a stay to satisfy the court that, having regard to all the circumstances of the case and the risk of injustice, a stay ought to be imposed.

11. The risk of injustice was referred to and relied on by this Court in the case of **Andre Baptiste v Investment Managers Ltd**.[1]:

> "Whether the court should exercise its discretion to grant a stay of execution 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: See

[1] CA No 181 of 2012

Clarke LJ in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd.[2001] All ER (D) 258** (Dec). In weighing the risk of injustice in the circumstances of this case, the court must consider, among other matters, if a stay is refused, what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks to the appellant?": per Rajunath-Lee JA[2]

This position is consistent with the requirement in the CPR that the court deals with cases justly whenever it exercises any discretion given to it by the rules[3].

12. In accordance with the established principles referred to above in this jurisdiction the circumstances of the case include a consideration of the prospects of success of the appeal, any special or exceptional circumstances posed by the particular facts of the case and the respondent's ability to repay the judgment sum if necessary: see **Emmanuel Romain v Water and Sewerage Authority[4].**

13. Insofar as Weekes J.A. identified the applicable principles of law we are satisfied she was correct. There been no suggestion before us that she got it wrong on the facts before her. This application coming some six years later of necessity has its own distinctive facts. In particular the prospects of success argument has been bolstered by the amendment to the notice of appeal ordered by the Board and, of course, insofar as the applicant now relies on the financial statements of the respondent for the years 2013-2016, the basis of the

[2] Paragraph 13 of the judgment.
[3] Part 1.1 and1.2 of the CPR
[4] C.A. No 24 of 1997

applicant's arguments on the respondent's financial viability is not the same. The application before us therefore has two additional features that were not before Weekes J.A.

14. Any determination as to the prospect of success must be considered in the light of the merits raised by the amended notice of appeal. Similarly any determination of the ability or inability of the respondent to repay the money, should the appellant be successful on his appeal, must be considered in the light of the respondent's present financial position. At the end of the day however it is for the applicant to satisfy the court that it is unjust in the circumstances for the respondent to enjoy the fruits of its success pending the determination of the appeal.

15. Despite the wide grounds contained in its application the applicant's submissions before us were limited to its having a good prospect of success on the appeal, the exceptional circumstance of the respondent not seeking to enforce the order earlier and the financial insecurity of the respondent.

Prospects of Success

16. This Court is in the fortunate position of having before it the judgment of the Board in the substantive appeal and its assistance in simplifying what was clearly a complex set of arrangements entered into by the applicant for the purpose of financing the construction of a National Stadium and Sporting Complex in Grenada. The respondent was a sub-contractor and completed certain works on the project. For our purposes it is sufficient to state that the dispute arose out of a sum of money held by CIB to which both parties claimed to be entitled. This is the sum of money now held by the UTC ("the sum").

17. The respondent claimed, and Rajkumar J. found, on the basis of the relevant contract documents and the oral evidence that the sum was held by CIB on trust for the sole purpose of applying it in payment of the suppliers and other providers of goods and services for the project, which trust the respondent, as such a supplier, was entitled to enforce for its own benefit. Accordingly the judge granted a declaration that the sum was held by CIB in trust for the respondent.

18. In addition the judge found that there was an assignment, or an agreement to assign, from ICS (Grenada) Corporation of its legal chose in action to recover payments due to it from the applicant. The judge was satisfied that either of these two positions entitled the respondent to the benefit of the sum.

19. Perhaps the clearest statement on the appellant's position in the substantive appeal is found in the judgment of Board delivered by Lord Carnwath:

> " Furthermore, while the argument as developed in the appendix appears complex, the essential points had emerged reasonably clearly from the exchanges in oral argument………They were that, on the true construction of the documents and the undisputed history, [the applicant's][5] claim was (not as the judge had thought) simply as an unsecured judgment creditor of ICS, but rather as the entity originally responsible both for raising money from and for repaying investors, and for using such funds to finance the project, and therefore that, once the project was completed and the bondholders repaid, it was to [the applicant](not ICS or CIB) that any residual monies should revert."

[5] The reference to "NS" in the judgment has been replaced with the words "the applicant" to make it easier to read in the context of this ruling

20. According to Lord Carnwath:

> "In the view of the Board it is arguable, to put it no higher, that under the trust deed the bonds were held by CIB solely for the benefit of the bondholders, and that on the discharge in full of [the applicant's] obligations to the bondholders, there was a resulting trust in favor of [the applicant](as the creator of the trust and the issuer of the bonds) in respect of any proceeds of the bonds remaining in the possession of CIB."

21. In accordance with the direction of the Board the notice of appeal was amended to permit the applicant to argue the case presented before the Board in the appeal. The respondent has not suggested that the amendment will not permit the applicant to proffer before the Court of Appeal arguments similar to those presented by it to the Board. Even without addressing the applicant's other submissions on Rajkumar J.'s finding of the existence of an assignment in favor of the respondent it is clear that there is merit in the appeal.

Exceptional or Special circumstances

22. The applicant identifies one exceptional or special factor that it submits is worthy of consideration, that is, the length of time taken for the respondent to seek to enforce the judgment. As put by the applicant what is relevant is "the substantial period measureable in years in which the respondent did not enforce the judgment." While not claiming that an estoppel arises the applicant submits that the change in the position of the respondent is a special circumstance that we should take into consideration. According to the submission the applicant relied on a clear common practice that the respondent would not seek to enforce the judgment.

23. This was not a ground advanced in the applicant's notice of application. While this is not

a reason for discounting the submission the difficulty that the applicant faces here is that its affidavit evidence does not allege any common practice and more importantly does not suggest that it relied on any clear or common practice in this regard. Neither does it suggest any injustice or prejudice to the applicant based on the failure of the respondent to enforce the judgment earlier.

24. Indeed, even if the facts demonstrated a change in position of the respondent, it is difficult to conclude that this is a valid consideration in determining whether or not to grant a stay of the execution of the order. This is not a case in which the applicant will now be called upon to raise a substantial sum of money to satisfy the judgment debt. The money to meet the judgment debt had been set aside since 2004. Neither is there any suggestion that the respondent is making the application at this stage for any purpose other than pursuant to its right to enjoy the fruits of its success.

25. That this right has been referred to as an immediate right in the case of **CA S. 143 of 2015 Mary Gomez and others v Ashmeed Mohammed** does not assist the applicant. The fact that the right to the fruits of the judgment arises immediately upon the pronouncement of the judgment does not mean that unless acted upon immediately that right is lost.

26. In any event, while it is evident that this is the first time that the respondent has sought to enforce the judgment, it is equally clear that the applicant's attempts to obtain a stay of execution of the order have been contested. Further the respondent has been consistent in its attempts to have the appeal concluded whether by way of dismissal of the entire appeal or by way of urging the applicant to take the necessary steps to have the appeal listed as soon as possible. The fact is that up to February 2015 the respondent was actively pursuing its attempts to have the appeal dismissed and thereafter to have the appeal listed It cannot therefore be said, nor has it been suggested, that the respondent has been content to sit back

and do nothing with respect to obtaining the benefit of its judgment. The position taken by the respondent, as indicated in its December letter, to seek to enforce the judgment before the expiration of the six-year period during which permission of the court is not required is perfectly reasonable.

27. In the circumstances of this case therefore the fact that no steps were taken to enforce the judgment prior to 2017 is not an exceptional or special circumstance relevant to the grant of a stay of the execution of the order.

Will the respondent be in a position to repay the sum if unsuccessful on the appeal.

28. The arguments before us centered on the financial security and/or insecurity of the respondent. The position of the applicant, as demonstrated by its affidavits, was that there was a concern that if paid out it would be unable to recover the money from the respondent. The applicant's concern is founded on two limbs: (i) conclusions drawn by its chartered accountant Madan Ramnarine ("Ramnarine") from his examination of the respondent's financial statements for the years 2013-2016; and (ii) searches in the Companies Registry which reveal that in 2013-2014 the respondent took steps to reduce its authorized share capital from USD 25,000.00 to USD 50,000.00 and that both shareholders Emile Elias and John Connon surrendered shares to the company for no consideration. Nothing is made of this latter fact in the submissions of the applicant.

29. From the financial statements Ramnarine arrives at three basic conclusions: (i) that the respondent was not sufficiently liquid to meet its current short-term debt obligations; (ii) that there were items of property, plant and equipment situated outside of Trinidad and Tobago, the value of the equipment held in Trinidad and Tobago could not be determined by the information presented and that in addition some of the items may be obsolete; and

(iii) that since the respondent held bank accounts in other islands if monies were deposited into those accounts the possibility of recovery might be low. He also challenges the method used by the respondent's accountant to prepare the financial statements. He posits that the method used does not accord with international standards.

30. His conclusion with respect to the inability to meet its short-term liabilities was drawn from what he described as the current ratio. According to Ramnarine the current ratio represents current assets divided by the current liabilities. This, he says, provides an indication of whether the respondent is able to meet its short-term debt using its short- term assets. He assesses the respondent's current ratio for 2015 to be 1.06 and for 2016 to be 1.11. In his opinion these ratios indicate that the respondent is barely able to cover its short-term debts.

31. In its submissions before us in support of the position that it has concerns over the respondent's ability to repay the applicant relies on the following facts:

(i) the respondent is incorporated in the Cayman Islands;

(ii) its head office and equipment in Trinidad is not owned by it but rather Emile Elias & Co;

(iii) it has bank accounts across the Caribbean;

(iv) the inconsistencies shown in its financial statements between its turnover, net profit after tax and the tax paid for the years 2014, 2015 and 2016;

(v) its financial accounts are not in compliance with international standards and

(vi) the current ratio, that is, the current assets divided by the current liabilities, is extremely poor;

32. With respect to the financial statements the applicant submits that inconsistencies with respect to the turnover of the respondent, its net profit after tax and the tax paid can only lead to the conclusion that the financial statements are not reliable.

33. The main evidence of the respondent came from its executive chairman, Emile Elias. With respect to its financial worth and business practices the evidence of the respondent is undisputed. The respondent admits to being registered in Trinidad and Tobago as an external company. However it states that its shareholding is fully owned by persons resident in Trinidad and Tobago with its head office and primary place of business situated in Trinidad and Tobago. It says all the profits made by it are retained or repatriated to Trinidad and Tobago. While it admits bank accounts in other Caribbean islands the evidence is that the respondent was advised by its accountants to maintain these accounts to facilitate the projects undertaken by it in those countries.

34. The evidence discloses bank accounts in Trinidad and Tobago with the First Citizens Bank Limited ("FCB") and in Dominica and St. Lucia with the National Bank of Dominica and the Bank of St. Lucia. Annexed to the affidavit were letters from the various banks confirming the amounts standing to the credit of the respondent. With respect to Trinidad and Tobago as of 9th June 2017 there was standing to its credit in FCB TTD 38,181,044.77 and USD 12,483, 822.78.

35. According to the respondent's auditor of over ten years, Michael Lee Kim ("Lee Kim"), as of 31st March 2017 the respondent had in its current bank account the sum of $160, 852,590.00 "with a very strong foreign currency banking." With respect to the fixed assets Lee Kim says that between 2014 and 2016 the respondent added to its fixed assets to the value of $19.8 million and has upgraded and continues to upgrade and refurbish all its fixed assets over the years. According to Lee Kim all the equipment owned by the respondent is fully paid and all supplier payments are regularly paid within the agreed credit period.

36. The evidence of Elias is that the respondent is not currently indebted to any of its bankers and continues to have on-going construction projects. He says that the unpaid amounts currently owing to it against certificates issued with respect to these projects and the value of the uncertified works executed, inclusive of VAT, amount to TTD 168,770,469.22. According to Elias the applicant's fears that the respondent is likely to immediately dissipate its funds outside of Trinidad and Tobago are totally unfounded and without merit.

37. While the evidence of the respondent's bank accounts are undisputed there is a difference of opinion between the accountants over the question of whether the respondent's financial statements are in compliance with the international standards and whether the current ratio calculation of 1.11 in 2016 and 1.06 in 2015 made by Ramnarine is correct.

38. The question of whether the financial statements are in accordance with international standards ought not to detain us much. The issue here is not the expertise of the accountants but rather the ability of the respondent to repay the money if called upon to do so. In pointing out the deficiencies that he sees in the financial statements Ramnarine does not suggest fraudulent practices he merely suggests that the statements lacks the detail that is required internationally resulting in his inability to assess the respondent's true worth.

39. Of greater concern is the evidence on the current ratio. Indeed in its oral submissions the applicant makes much of the point. Ramnarine is of the opinion that the ratios quoted above indicate that the respondent is barely able to cover its short-term debt. According to him from these financial statements it may be concluded that the respondent is not sufficiently liquid in order to meet its current short-term debt obligations.

40. Lee Kim, on the other hand, is of the opinion that the method used by Ramnarine to arrive at the current ratio was flawed and is not a proper reflection of the respondent's liquidity.

He is of the view that the current ratio was arrived at by Ramnarine without excluding the accruals figure as was proper. According to Lee Kim had the figure for accruals been excluded it would have resulted in a drastically more favourable current ratio figure. He does not however give what he considers to be a more accurate current ratio figure.

41. Fortunately we do not have to determine which of the opinions of the accountants is correct. Even if we treat the financial statements as unreliable the undisputed evidence is that as of 9th June 2017 the respondent had unencumbered cash in the bank far in excess of the sum. The applicant submits that cash is easily disposable and any reliance on the cash in the bank is therefore misplaced. While he is correct with respect of the easy disposal of cash at this stage all that we are is required to do is to ascertain whether if called upon to repay the judgment sum the respondent would be in a position to do so.

42. There is no evidence of the respondent having a propensity to remove its assets from the jurisdiction. Indeed the evidence is that profits made out of the jurisdiction are repatriated here. The fact that the respondent is incorporated in the Cayman Islands and has bank accounts in St. Lucia and Dominica makes no difference to its liquidity in Trinidad and Tobago. There has been no evidence of the respondent having a bad credit rating or not meeting its debts. Indeed the evidence is to the contrary. In addition there is no evidence that the respondent's head office and equipment in Trinidad are not owned by the respondent. In any event the evidence of Lee Kim is that the respondent has fixed assets to the value of 19.8 million dollars.

43. On the evidence before us it is clear that the respondent has more than enough cash in the bank within this jurisdiction to repay the sum if called upon to do so. Further there is evidence of ongoing projects of which unpaid sums due amount to some TTD

168,770469.22. In the circumstances on the evidence before us we can, and do, come to the conclusion that the respondent will be in a position to repay the sum if necessary.

The risk of injustice

44. The essential question therefore is whether, in these circumstances, there is a risk of injustice to one or other or both parties if we grant or refuse the stay sought by the applicant. If the stay is refused there is no risk that the appeal will be stifled. As noted earlier this is not a case of the applicant being required to now raise a large sum of money which may have the effect of crippling it. If the stay is granted and the appeal fails the sum will still be in the UTC and the respondent will be in a position to enforce the judgment. If the stay is refused and the appeal succeeds on the evidence there is no risk of the applicant being unable to recover the sum. Treated in this manner there is no reason why the respondent should not be entitled to the fruits of its success.

45. The applicant suggests that the fact that the appeal is fixed for hearing in May 2018 is a relevant consideration. The fact is that, once a court is satisfied that there is no risk of injustice in satisfying the judgment debt, the date of the hearing of the appeal, however imminent, is of no relevance. At the end of the day a successful litigant is entitled to the fruits of its success unless the applicant can show that in the particular circumstances of the case there is a risk of injustice to it if the respondent is allowed to access those fruits. The applicant here has failed to show such risk of injustice.

46. In the circumstances, despite the finding that there is merit in the appeal as now framed, the applicant has not satisfied us that there is a risk of injustice to it by the refusal of the stay of the execution of the order. The application for a stay of execution of the order of Rajkumar J. is therefore refused.

Judith Jones
Justice of Appeal