

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

**Civil Appeal No. P186 of 2016
Civil Appeal No. P190 of 2016
CV No. 04374 of 2015**

BETWEEN

- 1) RAIN FOREST RESORTS LIMITED**
- 2) SUPER INDUSTRIAL SERVICES LIMITED**

Appellants

AND

THE NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO

Respondent

**PANEL: I. ARCHIE, CJ
P. MOOSAI, JA
A. DES VIGNES, JA**

APPEARANCES:

Mr R. Maharaj SC and Mr N. Ramnanan for the 1st named Appellant

Mr N. Bisnath instructed by Mrs L. Mendonca for the 2nd named Appellant

Mrs D. Peake SC and Mr J. Mootoo instructed by Ms A. Bissessar for the Respondent

DATE OF DELIVERY: 12th June, 2017.

JUDGMENT

I. Facts and Procedural History

[1] By Notice of Motion dated 12 April 2017, the Claimant/Respondent, the National Gas Company of Trinidad and Tobago Ltd. (NGC), applies for, *inter alia*:

1. An order that final leave be granted to NGC to appeal to the Judicial Committee of the Privy Council (JCPC) against the judgment of the Court of Appeal delivered in Civil Appeal Nos. P186 and P190 of 2016 on 23 November 2016 (the said decision);
2. An order continuing the stay granted by the Court of Appeal on 23 November 2016 and on 27 March 2017 of the said decision pending the hearing and determination of the appeal to the JCPC.

[2] The substantive proceedings arise out of a contract for the construction of a Water Recycling Plant in the amount of approximately US \$162 million. Each party alleges breach thereof by the other. The contract provides for those issues to be determined by arbitration.

[3] On 23 December 2015, NGC instituted proceedings against Super Industrial Services Limited (SIS) and Rain Forest Resorts Limited (Rain Forest) seeking, *inter alia*, a freezing order/injunction to restrain dissipation of assets by SIS to the value of TT \$180 million; and an order that four mortgages and a debenture entered into between SIS and Rain Forest be set aside. Part of NGC's case is that these documents were created by SIS to defraud NGC. On the same date, the emergency judge in the High Court (Seepersad J), granted an *ex parte* order under which, *inter alia*:

- i. Assets of SIS within the jurisdiction were effectively frozen up to the value of TT \$180 million; and
- ii. Rain Forest was restrained from in any way dealing with or disposing of the property and assets of SIS and/or any part thereof charged and/or mortgaged to Rain Forest under those four deeds of mortgage and the debenture.

That interim order was continued on 29 December 2015 by another judge (also sitting in the vacation court). The matter was then adjourned to be heard by the docketed judge (Charles J).

[4] Before Charles J, SIS and Rain Forest sought to have NGC’s case automatically struck out on the basis of its (NGC’s) failure to apply for a date to be fixed for a Case Management Conference (CMC) within 28 days of the service of the defence, contrary to Rule 27.3 of the *Civil Proceedings Rules 1998* (CPR). The judge refused this application. She held in essence that that Rule was not meant to come into effect where the court had been actively managing the case before the defence was filed. She also, *inter alia*, continued the injunctions granted by Seepersad J on 23 December 2015 against SIS and Rain Forest. SIS and Rain Forest filed a procedural appeal pursuant to CPR 64.9 against the judge’s decision. In a majority decision dated 23 November 2016, the Court of Appeal concluded that the case stood “automatically dismissed” due to NGC’s breach of Rule 27.3.¹ Notwithstanding this outcome, the court unanimously granted a stay of the operation of its decision pending the hearing and determination of an application for conditional leave to appeal to the JCPC. The effect of such a stay was clearly to preserve the status quo. Consequently the injunctions granted by Charles J continued in operation.

[5] NGC filed its application for conditional leave on 12 December 2016. On 27 March 2017 the Court of Appeal:

- i. Granted conditional leave to appeal to the JCPC;
- ii. Granted an interim stay of the operation of the decision of the Court of Appeal on 23 November 2016 for a period of 42 days from the making of the order.

In granting conditional leave pursuant to section 109 (2) (a) of the *Constitution of Trinidad and Tobago Chap 1:01* (the Constitution), the Court of Appeal was of the opinion that the proposed appeal raised questions of interpretation and application in relation to Rule 27.3 which, by reason of their great general or public importance, ought to be submitted to the JCPC for final determination. The court also considered the issues raised to be reasonably arguable with a realistic chance of success.²

[6] NGC’s application for final leave to appeal to the JCPC was heard before this court on 1 May 2017. Neither SIS nor Rain Forest is objecting to the grant of final leave. However, both oppose

¹ See judgment of Jones JA dated 23 November 2016 at para [97].

² See paras [17]-[19], *Rain Forest Resorts Ltd et al v National Gas Company of Trinidad and Tobago* CA P186 of 2016 and P190 of 2016 per Jamadar JA.

the continuation of the stay first granted by the Court of Appeal on 23 November 2016 and thereafter continued on 27 March 2017 on the grounds that:

- i. This court, on an application for final leave, has no jurisdiction to grant such a stay;
- ii. If this court does in fact find that it is vested with the requisite jurisdiction to stay the operation of the decision of the Court of Appeal dated 23 November 2016, it must consider afresh the Mareva injunctions currently in place.

[7] Thus, the essential questions arising for decision are:

- i. Whether this court has the jurisdiction, on an application for final leave, to continue the stay granted to NGC by the Court of Appeal on 23 November 2016 and again on 27 March 2017, pending the hearing and determination of the procedural appeal before the JCPC;
- ii. Whether in the interests of justice there should be a stay of the operation of the decision of the Court of Appeal of 23 November 2016.

II. The Jurisdiction of the Court of Appeal

Submissions

SIS and Rain Forest

[8] Counsel for both SIS, Mr Bisnath and Rain Forest, Mr Maharaj SC, argue that upon the granting of final leave to appeal to the Privy Council, the jurisdiction of the Court of Appeal is terminated and it is no longer within this court's purview to extend the duration of the stay of execution previously granted, save and except as specifically outlined in the *Trinidad and Tobago (Procedure in Appeals to the Privy Council) Order in Council 1962* (Order in Council). The court's attention was drawn specifically to section 6 of the said Order in Council, which deals with the granting of stays of execution.

[9] They further submit that it is only in the circumstances outlined in section 6 that the Court of Appeal may grant a stay of execution, and to operate outside of this very strict statutory guideline would be for this court to infringe upon the jurisdiction of the JCPC, which has been vested with full judicial authority as it concerns the determination of the substantive appeal, as well as the interim relief sought. In consequence, it lies with NGC to seek a preliminary hearing

before the JCPC in order to secure the continued operation of the stay of execution. In support of this position, the court's attention was drawn to the authorities of *Miller and Ocean Breeze Hotel Ltd. v Miller*³ and *Reid v Charles*.⁴

NGC

[10] Mrs Peake SC argues that the application before this court is for a continuation of the stay granted by the Court of Appeal on two prior occasions,⁵ pending the hearing and determination of the appeal to the JCPC; or alternatively, for the grant of injunctive relief in the same terms as previously granted by Charles J. These are not orders to which section 6 of the Order in Council refer and the section is therefore irrelevant. Section 6 is only applicable where the judgment appealed from requires the appellant to pay money or do any act.

[11] Further, the powers conferred by section 5(b) of the Order in Council on a single judge of the Court of Appeal "to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require", are extraordinarily wide powers, giving the court great flexibility to do justice pending the hearing of appeals to the JCPC. Section 5(b) is sufficiently wide to embrace the making of the order sought in this case.

[12] Moreover, it cannot be the case that the Court of Appeal's jurisdiction to grant interim relief pending the hearing and determination of the appeal to the JCPC must be confined to section 6 of the Order in Council. Mrs Peake SC relies on the authority of *Kublalsingh v The AG of Trinidad and Tobago*.⁶

[13] In addition to the wide powers and jurisdiction given to the Court of Appeal under section 5 (b) of the Order in Council, the court also derives jurisdiction and powers under section 23 (5), 35, 38 and 39 of the *Supreme Court of Judicature Act Chap 4:01* (SCJA). In support of this, counsel relies on *Commissioner of Police v Bermuda Broadcasting Co Ltd*.⁷

[14] Mrs Peake SC therefore submits that whether the Court of Appeal exercises its jurisdiction under section 5 (b) of the Order in Council or exercises its statutory jurisdiction de hors the Order in Council in reliance on the authorities of *Bermuda Broadcasting* and *Kublalsingh*,

³ [2016] JMCA App 1.

⁴ (1987) 39 WIR 313.

⁵ On 23 November 2016 and 27 March 2017.

⁶ CA P142/2014.

⁷ [2008] UKPC 5.

“the interests of justice ... require” that the court continue the stay granted so as not to render NGC’s appeal to the JCPC nugatory.

Law and Analysis

[15] The statutory jurisdiction of the JCPC was established by the *Judicial Committee Act 1833 of the United Kingdom*.⁸ Its continuing jurisdiction derives from section 109 of the Constitution. Section 109 (1), (2) and (3) grant defined rights of appeal to the JCPC,⁹ under which an appeal shall lie from decisions of the Court of Appeal to the JCPC as of right, with the leave of the Court of Appeal or with the special leave of the JCPC itself.¹⁰ Leave under section 109 (2) calls for the exercise of a discretion which must be exercised judicially and not arbitrarily. The appeals procedure is governed by the Order in Council. Thus, section 96 of the SCJA states that the “provisions of the [Order in Council] shall apply to all appeals from the Court of Appeal to [the JCPC]”.

[16] The material sections of the Order in Council provide:

“5. *A single judge of the Court shall have power and jurisdiction –*

(a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;

⁸ Section 3 (1) of the Constitution.

⁹ *Grant v The Queen* [2004] UKPC 27 at para [11].

¹⁰ **109.** (1) *An appeal shall lie from decisions of the Court of Appeal to the Judicial Committee as of right in the following cases:*

- (a) final decisions in civil proceedings where the matter in dispute on the appeal to the Judicial Committee is of the value of fifteen hundred dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of fifteen hundred dollars or upwards;*
- (b) final decisions in proceedings for dissolution or nullity of marriage;*
- (c) final decisions in any civil, criminal or other proceedings which involve a question as to the interpretation of this Constitution;*
- (d) except in cases falling under section 108(d), any case referred to in that section;*
- (e) final decisions in disciplinary matters under section 81(3) to (5) of the Supreme Court of Judicature Act and under the Legal Profession Act;*
- (f) such other cases as may be prescribed.*

(2) *An appeal shall lie from decisions of the Court of Appeal to the Judicial Committee with the leave of the Court of Appeal in the following cases:*

- (a) decisions in any civil proceedings; where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee; and*
- (b) such other cases as may be prescribed.*

(3) *An appeal shall lie to the Judicial Committee with the special leave of the Judicial Committee from decisions of the Court of Appeal in any civil or criminal matter in any case in which, immediately before the date on which Trinidad and Tobago became a Republic, an appeal could have been brought with the special leave of Her Majesty to Her Majesty in Council from such decisions.*

(b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.

6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon.”

[17] Dealing firstly with the issue of the relevance and operation of section 6 of the Order in Council, we concur with counsel for NGC’s submission that this is not a case that falls for consideration under this section. The language of section 6 of the Order in Council is very specific and its meaning very plain. Where the judgment appealed against requires the appellant to pay money or do some act, the Court of Appeal may direct that the judgment be carried into execution or that execution be suspended (stayed) pending the outcome of the appeal. As was disclosed in the recital of relevant facts above, it is clear that the appeal pending before the JCPC in this matter is not against a decision which requires the appellant to pay any monies or to do any act. The application before this court contemplates the extension of the duration of injunctions currently in place, first granted by Seepersad J, and subsequently continued by decisions of the trial judge and the Court of Appeal on three separate occasions. The inexact use of the term ‘stay of execution’ in the immediate context of this case therefore refers to the stay of the operation of the procedural court’s decision (of 23 November 2016) pending appeal to the JCPC, without which the previously granted injunctions would be lifted and both SIS and Rain Forest left free to deal with their assets as desired. In these circumstances, attention is drawn to the decision of the New Zealand Court of Appeal in the case of *New Zealand Meat Board & Anor. v Paramount Export Ltd. (In Receivership and Liquidation) & Anor.*¹¹ In considering the application of rule 6 of their own legislation governing appeals to the Privy Council,¹² the

¹¹ CA 152/2003

¹² *New Zealand (Appeals to the Privy Council) Order 1910.*

wording of which virtually mirrors that of our own section 6, the Court of Appeal concluded that:

“[36] The bar on execution created by Rule 6 is subject to two qualifications, among others. The first is that, in terms of the introductory words to the rule, the bar is limited to judgments requiring the payment of money or the performance of a duty. It does not for instance apply to judgments which declare the rights and duties of parties. Nor does it apply where an unsuccessful plaintiff wishes to have an order preserving the property it claims, pending its appeal to the Privy Council...” [Emphasis mine]

[18] It is our view therefore, that on the immediate facts surrounding the application before this court, this case is not one which falls for consideration under section 6 of the Order in Council. It consequently follows that the authorities cited and relied upon by both SIS and Rain Forest are not ones which are applicable inasmuch as they purport to suggest that the current application is one which must be decided in keeping with section 6 exclusively.

[19] Section 5 (b) of the Order in Council empowers a single judge of the Court of Appeal “generally or in respect of any appeal pending before Her Majesty in Council to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require”. An appeal is “pending before Her Majesty in Council” from the date of the granting of conditional leave: *Reid v Charles*. This decision has been followed by the Courts of Appeal in Jamaica in *Caribbean Steel Co. Ltd. v Price Waterhouse (a firm)*¹³ and of the Eastern Caribbean in *Pacific Wire and Cable Co. Ltd. v Texan Management Ltd.*¹⁴

[20] Section 5 (b) confers great latitude on a single judge as well as the full court, pending an appeal to the JCPC, to do what the interests of justice or circumstances of the case require.¹⁵ Accordingly, in the instant case it is of broad enough scope, consistent with the defined right¹⁶ granted by section 109 (2) of the Constitution, to confer jurisdiction on this court to stay the operation of the decision of the Court of Appeal of 23 November 2016 and/or to grant injunctions where to do so would be in the interests of justice.

[21] Counsel for NGC, in the course of her submissions, referred us to the decision of the JCPC in *Bermuda Broadcasting*. It is to be noted that appeals to the JCPC in Bermuda are not governed by an Order in Council. The Board held that the Court of Appeal of Bermuda was a creature of

¹³ [2012] JMCA App 36 at para [31].

¹⁴ [2008] ECSCJ at para [31].

¹⁵ See also *Matadeen v Caribbean Insurance Co. Ltd.* CA No 153 of 1997 and No 163 of 1995.

¹⁶ See *Crawford v Financial Institutions Services Ltd* [2003] UKPC at para [18].

statute and had the jurisdiction conferred on it by the *Court of Appeal Act (Bermuda) 1964* (Court of Appeal Act) and the *Rules of the Court of Appeal*, which provided the Court of Appeal with the requisite jurisdiction to have continued the holding injunction, pending a resolution of the appeal to the Privy Council.

[22] Section 8 (1) of the Court of Appeal Act (Bermuda) 1964 provides that the Court "...shall have all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original and appellate jurisdiction". Section 9 empowers the President of the court to make rules "for carrying this Act into effect" and section 13 allows the court, upon hearing a civil appeal "... [to] allow the appeal in whole or in part or [to] dismiss the appeal in whole or in part or [to] remit the case to the Supreme Court to be retried in whole or in part and [to] make such order as the Court may consider just". Rule 2/25 of the Rules of the Court of Appeal, made under s. 9, empowers the court '... to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require...'

[23] The JCPC, in **Bermuda Broadcasting** in addressing the issue of jurisdiction, stated as follows:

*"Their Lordships have no doubt that these provisions in force in Bermuda would have provided the Court of Appeal with the requisite jurisdiction to have continued the holding injunction pending the resolution of a further appeal to the Privy Council. First, although their Lordships have not been referred to the statutory basis on which the Chief Justice had continued the original holding injunction granted on 7 June 2007 over the hearing of the appeal to the Court of Appeal, it has not been suggested that he lacked jurisdiction to do so. And if a judge sitting in the Supreme Court can grant an injunction pending the hearing of an appeal to the Court of Appeal, it appears to their Lordships that the Court of Appeal are empowered by s 8 (1) to exercise the like power pending the hearing of a further appeal to the Privy Council. Second, the language of s 13, '... may make such other order as the court may consider just', seems to their Lordships well wide enough to enable an injunction to be granted pending an appeal to the Privy Council. Thirdly, the power under r 2/25 '... to make such or other order as the case may require...' would, in their Lordships' opinion, confer, independently of any power conferred by s 8 or s 13, power to grant an injunction pending an appeal to the Privy Council."*¹⁷

¹⁷ At para [15].

[24] In our opinion, the sections of the Court of Appeal Act (Bermuda) 1964 and Rules of the Court of Appeal are *in pari materia* with sections 38 and 39 of the SCJA which provide as follows:

“38 (1) Subject as otherwise provided in this Act or in any other written law, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, in all civil proceedings and for the purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court.”

“39 (1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to – confirm, vary, amend, or set aside the order, or make any such order as the Court from whose order the appeal is brought might have made, or make any order which ought to have been made, and to make such further or other order as the nature of the case may require.”

[25] In our view, therefore, these provisions of the SCJA are wide enough to confer, independently of any power conferred by section 5 (b) of the Order in Council, jurisdiction on this Court to make “such further or other order as the nature of the case may require”, including the power to stay the operation of the decision of the Court of Appeal dated 23 November 2016.

[26] Where an appeal lies to the JCPC, the procedure is governed by the ***Judicial Committee (Appellate Jurisdiction) Rules 2009 – As Amended*** (the Appellate Jurisdiction Rules). Section 39 of these Rules is set out under the rubric “Stay of execution or conservatory order” and is as follows:

“39 – (1) Any appellant who wishes to obtain a stay of execution of the order appealed from or some conservatory order pending an appeal must seek it from the court below in the first instance.

(2) In exceptional circumstances the Judicial Committee may grant a stay of execution or a conservatory order.

Whilst not determinative of the issue before this court, it is worth noting that the Appellate Jurisdiction Rules clearly contemplate, save in exceptional circumstances, a prior determination by the local Court of Appeal before the JCPC embarks on a consideration of such an interim stay.

III. The Merits of the Application

[27] Having found that this court has jurisdiction to grant the stay sought, if to do so would be in the interests of justice, we now turn our attention to the merits of the application. The effect of NGC's application for a stay of the operation of the decision of the Court of Appeal¹⁸ would be to keep alive the injunctions as granted by the High Court and continued by the Court of Appeal.¹⁹

Submissions

Rain Forest

[28] Mr Maharaj SC submitted that if this court does in fact find that they are vested with the requisite jurisdiction to stay the operation of the decision of the Court of Appeal dated 23 November 2016, it must consider afresh the Mareva injunctions currently in place. In this regard, this court must determine: (1) whether NGC had a good arguable case against both SIS and Rain Forest; and (2) whether there was a real risk that the judgment would be left unsatisfied by reason of the disposal of the assets by both SIS and Rain Forest.

[29] Rain Forest relies upon its submissions regarding the lack of jurisdiction to grant a stay under section 6 of the Order in Council to sustain its position that NGC has failed to show that they have a good arguable case. As it relates to the real risk of dissipation, reliance was placed upon the affidavit evidence of Romila Marajh to show that there has been a change of circumstances from the time of the original *ex parte* grant of the Mareva injunctions to the present time. Firstly, Rain Forest submits that, given NGC's claim, should its appeal before the JCPC prove successful, the matter will proceed to trial and an order could be made as to whether or not the mortgages and debenture were fraudulently executed. Additionally, both SIS and Rain Forest have always maintained that they are willing to have the said mortgages and debenture released, which would in effect grant NGC the relief sought. There is therefore no need for the injunctions to remain in place. Nonetheless, based on valuations of the assets of SIS conducted by agents of NGC, Rain Forest posits that NGC can be satisfied that the real assets of SIS are more than

¹⁸ Decision dated 23 November 2016.

¹⁹ Decision dated 27 March 2017.

sufficient to satisfy the \$180 million claim. The court was also reminded that SIS has always indicated its willingness to give an undertaking not to dispose of or deal with the real property that is the subject matter of the pending proceedings.

[30] In light of the continued refusal of NGC to accept any undertakings as suggested by SIS and Rainforest and its insistence on the maintenance of the injunctions as granted, counsel for Rain Forest submits that NGC has failed to satisfy this court, having regard to what is now before it, that any judgment handed down on a successful appeal would not be able to be enforced. Finally, counsel referred the court to the case of *Finurba Corporate Finance Ltd. v Sipp SA*,²⁰ which, in addition to the arguable case and risk of dissipation requirements, suggests that the court must be satisfied as to the proportionality of the order. Therefore, where there is little value in making an order, this ought to be considered by the court and the application should be refused.

SIS

[31] Mr Bisnath for SIS adopts on behalf of his client the arguments as put forward by Rain Forest. Additionally, he expanded upon the point relative to the claim as advanced by NGC, as well as the hardships that would result if the injunctions remain in place. Relying also upon the affidavit of Romila Marajh, Counsel reminded the court that the claim against SIS and Rain Forest stood dismissed as of 4 April 2016, as a result of the Court of Appeal's decision dated 23 November 2016. He posits therefore, that, in light of the hardship alluded to in the affidavit of Ms Marajh, it would be oppressive to continue the injunctions pending the hearing of the appeal before the JCPC, the date of which has not yet been fixed.

[32] The court's attention was also drawn to the claim form as submitted by NGC. Based on its contents, counsel for SIS posits that NGC's substantive claim sought a declaration that certain mortgages and a debenture were fraudulently executed and an order that the Registrar General expunge same from the record. SIS contends that, at the time of the decision of 23 November 2016, the said mortgages and debenture had already been released, granting, in effect, the substance of the claim as advanced by NGC. Additionally, counsel for SIS reiterated the point advanced by his counterpart for Rain Forest that the real assets of SIS, based on the valuation conducted by NGC, were sufficient to satisfy the \$180 million claim. He also reaffirmed that

²⁰ [2011] EWCA Civ 465.

his client is prepared to give an undertaking not to deal with the real property that forms the subject matter of the claim. It is therefore inherently unjust in the current circumstances to maintain the imposed injunctions, and it was no longer open to NGC to advance that there continued to exist a real risk of the dissipation of assets such as to render the appeal nugatory.

NGC

[33] Mrs Peake SC argues that in the particular circumstances of the case, this court, like the two differently constituted panels of the Court of Appeal before this one, should exercise its jurisdiction to maintain the status quo by continuing the stays granted by the Court of Appeal, so as to ensure that any order that the JCPC may ultimately make, will not be rendered academic or nugatory. As it relates to the value of the claim and the real assets retained by SIS, Counsel posited that a Mareva injunction did not concern itself with value of the assets, but with the risk of dissipation, and, in that regard, the position that existed at the time of the granting of the injunctions by Charles J remains the same. This is why, counsel for NGC submits, two different panels of the Court of Appeal, in addition to the High Court judges below, saw it fit to, in effect, continue the existence of the injunctions as there remains a very real risk of NGC being deprived of the fruits of a successful appeal. Additionally, as was contemplated in the Order of Charles J, it remains open to SIS to pay into court or give security in the amount of the claim in order to rid itself of the injunctions as imposed. The court was also directed to the *Arbitration Act* which gives jurisdiction to grant an injunction as long as it is satisfied that a valid claim in arbitration exists and that there is a risk of the dissipation of assets.

[34] Counsel for NGC went on to submit that the risk of injustice is much greater if the stay is not continued than if it is continued. If SIS disposes of its assets and NGC is successful on the appeal, NGC's right to have the more than TT\$400 million dispute heard by the arbitrator would be rendered academic, as SIS will have no assets against which any award may be enforced. Thus, NGC will suffer irremediable prejudice and irreparable financial loss.

[35] Several reasons were also advanced by counsel as to why the releases of the mortgages and debenture provide little in the way of the reliefs sought. Firstly, the basis of the claim is fraud and any registered releases would only serve to treat the transactions as valid and subsisting for the period of time they remained on the Register of Deeds. This is why, NGC submits, the fraudulent instruments must be struck off from the Register and the transactions declared void

ab initio. As it relates to NGC's refusal of the undertakings as offered by both SIS and Rain Forest in place of the injunctions, Counsel submits that, as evidenced by the appeal, it is NGC's contention that the claim was not automatically struck out and the injunctions granted are still in operation. To discharge the injunctions and accept an undertaking would be to alter the status quo and make it impossible subsequently to restore NGC to the position it occupied before the Court of Appeal's decision of 23 November 2016. Further, counsel for NGC's submits that the conduct of both SIS and Rain Forest has served to establish that any undertaking given would be unreliable and/or worthless, given that Charles J was satisfied on the evidence that there was fraudulent intent behind certain actions of SIS,²¹ as well as the clear breach of the injunction by Rain Forest and SIS by the release of the mortgages and the debenture.

[36] Little thrift was also given by counsel for NGC to the assertion of hardship occasioned by misinterpretation of the terms of the continued injunctions by banks and other institutions. It was her position that the terms of the injunctions were set out in standard form.

Law and Analysis

[37] As a general rule, an appeal does not operate as a stay of execution.²² On the application for conditional leave, the Court of Appeal has already found that NGC, on the merits, has a realistic prospect of success. In *Andre Baptiste v Investment Managers Ltd*²³ our Court of Appeal, on the essential element of risk of injustice, stated as follows:

*“[13] 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 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?”*

²¹ Judgment of Charles J at paras [68] and [69].

²² CPR 64.16.

²³ CA No 181 of 2012.

We now move to consider the circumstances of the immediate case.

[38] The trial judge considered that the conditions to be satisfied for the grant of these injunctions were: (1) the claimant had a good arguable case; and (2) there was a real risk of dissipation or secretion of assets so as to render any judgment which the claimant may obtain nugatory.²⁴ In her decision dated 10 June 2016 the judge made preliminary findings in support of NGC's application for the continuation of the injunctions as previously granted. She held that:

1. NGC had established a good arguable case;²⁵
2. There was a real risk that SIS would dissipate/secrete its assets so as to hinder/defraud NGC should it receive an award in arbitration proceedings.²⁶

[39] In coming to the conclusion that there existed a real risk of dissipation, the judge agreed²⁷ with the submissions of Mrs Peake SC that:

1. It was open to the court to infer that they were sham transactions (the four mortgages and one debenture) entered into with intent to defraud NGC, a creditor, by putting its assets (SIS) away from NGC's reach.
2. The effect of the registration of the mortgages and debenture was to trick all creditors into thinking that they should not pursue any claim against SIS, since all its assets were encumbered.
3. The above transactions amounted to sharp practice and dishonesty and provided a proper basis to continue the injunctions against SIS and Rain Forest.
4. Even though expressed to be for valuable consideration passing between SIS and Rain Forest, all the dispositions were voluntary.
5. Significantly, the recitals in all the mortgages which indicated that a sum totalling \$230 million was advanced to SIS by Rain Forest are clearly false.

In her Reasons dated 21 June 2016, the judge went on to find that both SIS and Rain Forest were in breach of the Order made by her on 10 June 2016.²⁸ This occurred when they took it

²⁴ See *Zuckerman on Civil Procedure, 3rd Ed (2013)* at para 10.214; *Derby & Co. Ltd. v Weldon (No 1)* [1989] 1 All ER 469; *Thane Investments Ltd. v Tomlinson (No 1)* [2003] EWCAA Civ 1272.

²⁵ *Ibid* para [55].

²⁶ *Ibid* para [70].

²⁷ *Ibid* paras [66], [67] and [69].

²⁸ See para [35]-[36] of Reasons.

upon themselves to release the said mortgages and debenture, without a formal Order of the court, “on the ground that they were of the view that CPR 27.3 (4) applied...erroneously”.²⁹

[40] It is manifest, having regard to the preliminary findings of the trial judge above, that the conduct of both SIS and Rain Forest was sufficiently egregious to justify her conclusion that there was a real risk of dissipation. Moreover, they purported, in violation of an existing Order of the court, to release the mortgages and the debenture which were the subject matter of the injunctions.

[41] Consideration must also be given to SIS’ submission, supported by counsel for Rain Forest, that, at the time of the decision of the Court of Appeal of 23 November 2016, the said mortgages and debenture had already been released, granting, in effect, the substance of the claim as advanced by NGC. However, Mrs Peake SC rightly counters that, as the basis of the claim is fraud, these releases, which were registered in breach of an existing order of the court, would be treated as valid and subsisting for the period of time they remained on the Register of Deeds. Accordingly, what was required was an order of the court that these deeds be struck off from the Register and declared void *ab initio*.

[42] We are also of the view that NGC would not be sufficiently safeguarded by an undertaking³⁰ in the form suggested by counsel for both SIS and Rain Forest, namely an undertaking by SIS not to deal with the real property forming the subject matter of the claim. This is because the conduct complained of, namely: (i) the fraudulent mortgage/debenture transactions; and (ii) the releases thereof in breach of the trial judge’s order, casts serious doubts on the reliability of both SIS and Rain Forest to honour any undertakings given.

[43] It is common ground that both SIS and Rain Forest have a judgment in their favour at this point in time. Thus, any stay granted would result in some hardship or prejudice being suffered by them. Indeed, SIS has deposed in the affidavit of Romila Marajh of 28 April 2017 to the serious adverse effects on its business operations. NGC itself, having regard to the significant sums claimed (\$400 million in arbitration proceedings), would suffer like prejudice. On the merits, and on NGC’s application for conditional leave, the Court of Appeal held that NGC’s procedural appeal was reasonably arguable with a realistic chance of success.

²⁹ See para [36].

³⁰ See *Spry on Equitable Remedies, 8th Ed (2010)* at p 479.

[44] With respect to SIS' concern that any injunctions granted would continue indefinitely, this court notes that Charles J granted: (i) an injunction against SIS until the hearing and determination of arbitration proceedings; and (ii) an injunction against Rain Forest until the hearing and determination of this action. The arbitration proceedings commenced on 5 October 2016, and in Mrs Peake SC's estimation, will in all likelihood be concluded prior to the appeal before the JCPC. Neither SIS nor Rain Forest appeared to take issue with this estimation.

[45] In considering where the greater risk of injustice lies, a refusal to grant a stay carries with it a significant risk of dissipation of SIS' assets so as to render any judgment which NGC may obtain nugatory. Bearing in mind that the trial judge found that: (a) the mortgages and the debenture were sham transactions; and (b) SIS and Rain Forest acted in breach of the injunctions by releasing the mortgages and the debenture, we are persuaded, in all the circumstances, that the interests of justice would be best served by staying the operation of the decision of the Court of Appeal made on 23 November 2016 pending the hearing and outcome of the appeal before the Judicial Committee of the Privy Council.

IV. Disposition

1. Section 5 (b) of the Order in Council is of broad enough scope, consistent with the defined right granted by section 109 (2) of the Constitution, to confer jurisdiction on this court to stay the operation of the decision of the Court of Appeal of 23 November 2016 where to do so would be in the interests of justice.
2. Sections 38 and 39 of the Supreme Court of Judicature Act are also wide enough to confer, independently of any power conferred by section 5 (b) of the Order in Council, jurisdiction to make such further or other order as the nature of the case may require, including the power to stay the operation of the decision of the Court of Appeal dated 23 November 2016.
3. The interests of justice, in the immediate circumstances of this case, would be best served by the grant of a stay of the operation of the decision of the Court of Appeal made on 23 November 2016, until the hearing and determination of the appeal before the Judicial Committee of the Privy Council.

4. Final Leave is granted to appeal to the Judicial Committee of the Privy Council against the judgment of the Court of Appeal delivered on 23 November 2016.
5. Costs of the application to abide the final determination of the appeal to the Judicial Committee of the Privy Council.

I. Archie
Chief Justice

P. Moosai
Justice of Appeal

A. des Vignes
Justice of Appeal