

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Civil Division**

[Unreported]

Suit No: CV 2111 of 2006

**BETWEEN**

**BARRACK CONSTRUCTION LTD            -    PLAINTIFF**  
**(Judgment Creditor)**

**AND**

**NATIONAL HOUSING CORPORATION    -    DEFENDANT**  
**(Judgment Debtor)**

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.*

*Judge of the High Court*

*[In Chambers]*

**2010: March 26,**

**Sir. Maurice King Q.C. in association with Mr. Adrian King and Mr. Amiri Dear for the Defendant/Judgment Debtor**

**Mr. Alrick Scott in association with Sir Richard Cheltenham Q.C. for the Plaintiff/Judgment Creditor**

**DECISION**

- [1] **Background:** This is an application by the National Housing Corporation (“hereinafter sometimes referred to as “the Corporation”) seeking an order for a stay of execution of a writ of *feri facias* issued on behalf of Barrack Construction Ltd (“hereinafter sometimes referred to as “the Judgment Creditor” or “Barrack”).
- [2] The writ of *feri facias* was obtained against the background of an order made by **Cornelius J.** on July 18<sup>th</sup>, 2008 granting leave to Barrack to enforce as a judgment or order of the Court, an arbitral award in its favour, dated and published on September 6<sup>th</sup>, 2006, together with costs awarded by the Sole Arbitrator, Sir. Denys Williams.
- [3] On or about November 14<sup>th</sup>, 2008 the sum of \$2.5 million was paid to the Judgment Creditor on account of the Corporation’s indebtedness. Additionally, by letter dated February 4<sup>th</sup>, 2009, the Prime Minister and Minister of Finance wrote to the Judgment Creditor informing it that the Government of Barbados was committed to meeting its obligations in a timely manner and would attempt to do so in relation to the outstanding debt.
- [4] Following the grant of leave to enforce the award, the Judgment Creditor applied pursuant to **O 45 r. 12 RSC** for, and on 7<sup>th</sup> October, 2009 obtained, a writ of *feri facias*.
- [5] The writ commands the Chief Marshal, *inter alia*, to (i) seize in execution the Corporation’s goods, chattels and other property and (ii) cause to be made the sums of \$54,191,076.90 (being the arbitral award with and including interest); \$6,287,103.86 (being costs with and inclusive of interest); further interest at the rate of 8% on the arbitral award of costs from the 30<sup>th</sup> July, 2009 until payment; together with all Marshal’s poundage fees, costs and other legal incidental expenses; and immediately following execution to (iii) pay to the Judgment Creditor the amount levied in respect of the arbitral award, interest and costs, including interest on the costs from the date of the order.
- [6] The total outstanding debt (inclusive of costs and interest) stated in the writ of *feri facias* as at July 30, 2009 was \$60,478,180.76 and continues to mount at the annual rate of 8% until payment.
- [7] On or about November 25<sup>th</sup>, 2009, just over a month after obtaining the writ of *feri facias*, Sir. Richard Cheltenham, Q.C., the attorney-at-law for the Judgment Creditor, halted action on the writ and requested the Chief Marshal not to proceed with the execution until further advised.
- [8] In the interim, the Judgment Creditor pursued an application pursuant to section 33 of the **Supreme Court of Judicature Act, Cap. 117A** for charging orders against several parcels of land owned by the Corporation. The application in respect of the charging orders came on for hearing on divers dates between November 2009 and January 2010. Ultimately, on January 28<sup>th</sup>, 2010, the Judgment Creditor obtained a final Charging Order against the Corporation’s lands situated at Lodge Hill, St. Michael (“the Warrens Office Complex”) and at Hopeland, St. Philip to secure the Corporation’s indebtedness to the Judgment Creditor estimated at the date of the order to exceed \$ 60,000,000.00 Barbados dollars with interest accruing daily.
- [9] Shortly before the grant of the Charging Order, by letter dated January 22<sup>nd</sup>, 2010, Counsel for the Judgment

Creditor, Sir, Richard Cheltenham Q.C. wrote once again to the Chief Marshal and instructed him to proceed to execute the writ of *feri facias* without delay.

- [10] Faced with the impending execution of the writ of *feri facias*, the Corporation then applied on January 26<sup>th</sup>, 2010 pursuant to the **Rules of the Supreme Court of Judicature Act, 1982** and/or under the inherent jurisdiction of the Court seeking an order for a stay of execution of the writ.
- [11] The application for the stay was heard on March 26<sup>th</sup>, 2010. Counsel for both parties produced written submissions for and against the application and provided the Court with supporting authorities. The Court's decision was reserved following oral arguments.
- [12] **Basis of the application:** The Corporation's application was made pursuant to **Order 47 R.S.C.** which replicates the provisions of Order 47 of the corresponding English Rules which were in force prior to the commencement of the new English Civil Procedure Rules and provides, *inter alia*:

*1(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or at any time thereafter, by the judgment debtor or other party liable to execution*

*(a) That there are **special circumstances** that render it inexpedient to enforce the judgment or order,*  
*or*

*(b) That the applicant is unable from any cause to pay the money,*

*then, notwithstanding anything in rule 2 or 3, the Court may by Order stay execution of the judgment or order by writ of *feri facias* either absolutely or for such period and subject to such conditions as the Court thinks fit...*

*(3) An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his."*

- [13] As required by subsection (3), the "special circumstances" forming the basis of the Corporation's application were set out in the Fourth Affidavit of Lanette Napoleon Young filed on January 26<sup>th</sup>, 2010 and supplemented by the facts set out in her Fifth, Sixth and Seventh Affidavits filed respectively on March 2<sup>nd</sup> and 12<sup>th</sup>, 2010.
- [14] The Third and Fourth Affidavits of Alphaeus Barrack opposing the stay were filed respectively on February 25<sup>th</sup>, 2010 and March 23<sup>rd</sup>, 2010.
- [15] **The arguments for and against relief:** The main thrust of the Corporation's arguments for the grant of a stay of execution was that having previously sought and obtained a Charging Order over certain of the Corporation's assets, the Judgment Creditor's decision to proceed on the writ of *feri facias* would be an abuse of the process of the Court since the charged assets may on current market valuations far exceed the amount of the judgment debt.
- [16] Counsel for the Corporation urged the Court to find that the Judgment Creditor's decision to proceed with the writ of *feri facias* at this stage of the proceedings was an abuse of process. He submitted that just as had occurred in the case of **Robinson v. Bailey [1942] Ch 268**, the Judgment Creditor was attempting to use the procedure "to get a lever to force the [Corporation] to comply with its obligation." [See per Simonds J @ p. 271.]

- [17] Counsel for the Corporation drew the Court's attention to the Fifth Affidavit of Lanette Napoleon Young filed on March 2<sup>nd</sup>, 2010. He submitted that the Corporation had clearly established that the National Insurance Board had acknowledged payment in full satisfaction of the Corporation's obligations referred to in paragraph 6 of the Third Affidavit of Alphaeus Barrack filed on February 25, 2010 opposing the stay.
- [18] Sir. Maurice King, Q.C. submitted that the Memoranda of Satisfaction exhibited to the Fifth Affidavit of Lanette Napoleon Young, showed that there are now no prior charges in favour of the National Insurance Board over the Corporation's assets subject to the Charging Order which would have the effect of diminishing any funds to which the Judgment Creditor would be entitled in the event of a sale of the charged assets.
- [19] He further submitted that as the Judgment Creditor had appealed to the Court of Appeal and had sought, *inter alia*, variation of the trial judge's decision refusing to include in the Charging Order, the Corporation's Head Office on Reef Road and Country Park Towers on Country Road, the Judgment Creditor was unable to say with any certainty, prior to a decision of the Court of Appeal, upholding or rejecting the Judgment Creditor's appeal, what total assets of the Corporation would ultimately be subject to the Charging Order.
- [20] For his part, Counsel for the Judgment Creditor, Mr. Alrick Scott, noted that the Court's jurisdiction under **Order 47 r. 1** to grant a stay of execution was discretionary. He submitted that in exercising the discretion, the starting point and the foremost consideration to be borne in mind is that a successful litigant is entitled to the fruits of his judgment and is not to be lightly deprived of the fruits of that judgment except in "special circumstances". In support of his submissions he cited the cases of ***Winchester Cigarette Machinery Ltd v. Payne [1993] WL 963008*** and ***Roberts Petroleum Ltd v. Bernard [1982] 1 WLR 301***
- [21] Citing dicta from Lord Denning in ***TC Trustees (JS) (Successors) [1969] 2 QB 295 @ 302***, Counsel for the Judgment Creditor submitted that the Court's jurisdiction under **O 47 r. 1** to stay execution proceedings was not unlimited. Nor, he submitted, does the Court have an equitable jurisdiction to grant the stay. According to Mr. Scott, the only basis on which a Court could deprive a creditor of the fruits of his judgment under **O.47 r.1** was if "special circumstances" were established.
- [22] For 'special circumstances' to be made out, he submitted, the debtor had to show that there was some special feature about the case which will justify a Court in granting the stay, thereby displacing the principle that a successful litigant is entitled to the fruits of his judgment.
- [23] Mr. Scott also cited the case of ***Burnet v. Francis Industries Plc [1987] WLR 802*** and drew the Court's attention to 6 matters which, he submitted, would be relevant to the exercise of the Court's discretion under **O.47 r.1**. These were as follows: (i) the nature of the case; (ii) whether the debtor had given a commitment to pay the debt; (iii) the delay which has occurred thus far; (iv) the hardship or prejudice to the creditor; (v) the size of the debt; and (vi) whether there had been delay in applying for the stay.
- [24] Counsel for the Judgment Creditor submitted that the fact of that the Corporation was a public body and that levying execution on it may bring it to a standstill was not a relevant consideration or a 'special circumstance' which would justify the grant of a stay or to which the Court should properly have regard in the exercise of its discretion. In support of his submission, he cited the cases of ***Marine & General Mutual Life Assurance Society v. Feltham Fen Second District Drainage Board [1945] KB 394*** and ***Worral Waterworks Co. v. Lloyd (1865-66) L.R. 1 C.P. 719***.
- [25] As regards the nature of the case, Counsel for the Judgment Creditor submitted that there was no dispute as to the judgment and the proceedings involved a straightforward claim for a debt owed to the Judgment Debtor. He further submitted that the Corporation had given no commitment to pay and further had given no explanation as to why it had not made any further payments since the \$2.5 million which was paid on November 14<sup>th</sup>, 2008.
- [26] He drew attention to learning in the ***Supreme Court Annual Practice, 1999*** which suggests that a writ of *fiery facias* is usually stayed for such period and subject to conditions in such special circumstances for example, as where the judgment debtor makes a reasonable proposal for payment by specified installments.

- [27] He submitted that the stay of a writ of *feri facias*, in circumstances where the Corporation had given no commitment to pay the debt in full within a reasonable time and failed to explain the reasons for non-payment of the debt, would be manifestly unfair to the Judgment Creditor.
- [28] Turning to the issue of delay, Counsel for the Judgment Creditor drew attention to the fact that the principal award in excess of \$34 million had fallen due since June 27<sup>th</sup>, 2002. He submitted that the Plaintiff's right to his money was settled by the arbitrator's decision and award made on September 6<sup>th</sup>, 2006 which was upheld by the High Court in July 2008. He submitted that this meant that the Plaintiff has in reality been out of its money for over 8 years.
- [29] Given the extraordinary length of time in which the Plaintiff had been deprived of his money, he accordingly urged the Court to permit the Judgment Creditor to take one or more of the steps permitted by the Rules to enable it to recover its judgment debt within a reasonable time.
- [30] Counsel for the Judgment Creditor, drew attention to paragraph 21(d) of the Third Affidavit of Alphaeus Barrack filed on February 25<sup>th</sup>, 2010 which, he submitted, showed the hardship and prejudice caused by the Corporation's breach of contract and non-payment of the arbitral award. He pointed out that the Corporation continues to trade with monies belonging to the Judgment Creditor and that it has had the use of the Warrens Office Complex, while the Plaintiff has been out of business and without its money since 2002. He submitted that given these circumstances, it would be manifestly unfair to allow the Corporation to have the use of the Judgment Creditor's money by staying the writ of *feri facias*.
- [31] Turning next to the size of the debt, Counsel for the Judgment Creditor stated that the debt now stood in excess of \$60 million. He submitted that the size of the debt was unusual and the greater the debt, the greater the prejudice to the Judgment Creditor the longer the judgment remained unsatisfied.
- [32] On the question as to whether there had been delay in applying for the stay, Mr. Scott submitted that the Corporation's conduct showed that it had been tardy and unconcerned about seeking and obtaining a stay of execution on the judgment.
- [33] He informed the Court that the Defendant had initially been granted a 6 week stay of execution following the grant to the Judgment Creditor on July 18<sup>th</sup>, 2008 of leave to enforce the arbitral award. According to Mr. Scott, when the stay expired around the end of August, 2008, the Corporation had never applied for a further stay until November 20<sup>th</sup>, 2009 when an application was made to the Court of Appeal. Having not obtained an order for a stay before the Court of Appeal, the Corporation then commenced the current proceedings for a stay in the High Court on January 26<sup>th</sup>, 2010.
- [34] He submitted that in view of the foregoing facts, there could be no injustice to the Corporation if the writ of *feri facias* were allowed to take its usual course.
- [35] Finally, Counsel for the Judgment Creditor sought to rebut the Corporations' assertion that it was attempting abuse the Rules of Court by seeking to enforce judgment by means of the writ of *feri facias*.
- [36] He argued that the **O. 45 r. 1 RSC** specifically permit a judgment creditor to enforce a money judgment by way of one or more of the six (6) means listed. Citing commentary from the **Supreme Court Annual Practice, 1999**, he submitted that the six (6) methods listed in the Rule were not alternative, but cumulative and that in appropriate cases, such as the present case, it might be necessary for a judgment creditor to combine different means of execution to obtain the fruits of their judgments.
- [37] Mr. Scott argued that given the unusual size of the judgment debt, the ability of the Judgment Creditor to realize an amount of such magnitude using the various methods of execution would be both uncertain and difficult.
- [38] He drew the Court's attention to the Fourth Affidavit of Alphaeus Barrack and to a valuation report dated March 19<sup>th</sup>, 2010 which Mr. Stephen Wiltshire of Felicity Limited had prepared on behalf of the Judgment Creditor in

respect of the Warrens Office Complex (one of the properties subject to the charging order).

- [39] Mr. Scott observed that Mr. Wiltshire had expressed the view that the current national, regional and international conditions were likely to have an impact on the sourcing of a purchaser. He submitted that while this did not mean that the Judgment Creditor should not try to sell the property, the Court should bear in mind the genuine difficulty and uncertainty of selling such a building and the time it may take the Judgment Creditor to sell it.
- [40] He submitted that it could not be an abuse of the process of the Court to proceed under the writ of *feri facias* where the Judgment Creditor held a genuine apprehension as to its ability to sell the major asset subject to the Charging Order.
- [41] As regards the land at Rices, St. Philip, which was also subject to the Charging Order, Counsel for the Judgment Creditor pointed out that the valuation report had shown that construction had commenced on 2 of the lots in the subdivision. Mr. Scott stated that it was therefore unclear whether the Corporation was still the owner of all the lots in the Rices subdivision. He submitted that the land at Rices, St. Philip must be ignored unless the Corporation could state categorically that none of the lots had been sold and whether any agreements for the sale of lots in the subdivision had been entered into.
- [42] Citing dicta from the Australian High Court decision in ***Jeffrey & Katauskas Pty Limited v. SST Consulting Pty Limited [2009] HCA 43***, Counsel for the Judgment Creditor then sought to persuade the Court that the Corporation's application for a stay of execution was an abuse of process in many respects.
- [43] Firstly, he submitted that the Corporation was not making any effort to liquidate the debt and was uncommitted to paying the debt in full and that the only reasonable inference to be drawn is that the Corporation's application for a stay was an attempt to use the Court's process for an improper purpose, namely to delay the Judgment Creditor from obtaining the fruits of his judgment.
- [44] Secondly, Mr. Scott submitted that since filing an appeal against the order of ***Cornelius J.*** on August 18<sup>th</sup>, 2009, the Corporation had taken no step to advance the appeal for almost 2 years. He suggested that the Corporation had no faith in the appeal but had nevertheless filed the appeal with the intent to delay and frustrate the Judgment Creditor from obtaining the fruits of its judgment in a timely manner.
- [45] Counsel for the Judgment Creditor further submitted that having not obtained a stay before the Court of Appeal, it was an abuse of the Court's process to seek a stay before the High Court in relation to a matter which, in substance, was before the Court of Appeal.
- [46] Mr. Scott then drew the Court's attention to the several Memoranda of Satisfaction exhibited with the Fifth Affidavit of Lanette Napoleon Young on behalf of the Corporation which established that the Corporation had paid off judgment debts in favour of the National Insurance Board totaling almost \$15,000,000.00. He questioned why it was that the Corporation had not paid or attempted to pay the Judgment Creditor and suggested that this was further evidence of the Corporation's using the process of the Court to avoid and delay payment and to oppress the Judgment Creditor- which is an improper use of the Rules of Court.
- [47] Finally, Mr. Scott submitted that the payment by the Corporation of debts due to the National Insurance Board had been made in an attempt to persuade the Court that the value of the charged assets exceeds the judgment debt and that the Judgment Creditor could therefore recover the judgment debt, interests and costs from the charged assets. He, however, submitted that while the liquidation of the NIS debts would appear to be facilitative of the Judgment Creditor, it does not assist the Judgment Creditor who, he argued, is left with the obvious difficulty and uncertainty attendant on the recovery of the debt from the sale of the charged assets and is likely to be out of money for several years.
- [48] **Exercise of the Court's Discretion:** The Court has had little difficulty accepting the submissions which both Counsel have made regarding the nature and scope of the discretion which has been conferred by **O. 47 r.1** to stay the writ of *feri facias*.

- [49] In particular, it is accepted as a first or starting principle that a judgment creditor is entitled to the fruits of his judgment and has a right, subject to applicable Rules of Court, to enforce the judgment using one or more of the means of enforcement available to it under the Rules. [*Winchester Cigarette Machinery Ltd v. Payne* [1993] *WL 963008* and *Roberts Petroleum Ltd v. Bernard* [1982] *1 WLR 301*. Also *O.45 r.1 RSC, 1982*]
- [50] **O. 47 r. 1** obviously gives the Court the discretion to stay a writ of *fiery facias* to enforce a money judgment in either of 2 situations, namely, where it is satisfied:
- (a) that there are “special circumstances” that render it inexpedient to enforce the judgment or order; or
- (b) that the judgment debtor is unable from any cause to pay the money.
- [51] It goes almost without saying that the exercise of the Court’s discretion under **O. 47 r.1** either to stay or to permit enforcement of the judgment to proceed by way of a writ of *fiery facias*, will result in hardship or prejudice to one or other of the parties.
- [52] On the one hand, if a stay of execution is granted in either of the 2 situations contemplated by the Rule, a judgment creditor will be deprived of the fruits of his judgment by the curtailment of his right to enforce the judgment by way of a writ of *fiery facias* “either absolutely or for such period and subject to such conditions as the Court thinks fit”.
- [53] On the other hand, the hardship which will inure to a judgment debtor if a stay is refused and enforcement of the judgment is allowed to proceed by way of a writ of *fiery facias*, is self-evident. In such an eventuality, the judgment debtor, whether a natural person or a legal entity such as a corporation (be it public or private) is liable to have its day-to-day activities and operations severely dislocated, if not completely shut down following a levy of execution upon its goods, chattels and other property.
- [54] As the application before this Court is not one in which the Corporation has applied for a stay on the ground that it is unable to pay the debt, the sole issue for the Court’s determination is whether it is satisfied on the evidence before it that “special circumstances” exist which render it inexpedient to enforce the judgment by way of the writ of *fiery facias* which the Judgment Creditor obtained in October 2009.
- [55] The Court has examined the application, together with the affidavits of the respective parties and considered the submissions of both Counsel and the legal authorities which were cited. The Court has also considered the relevant circumstances in this case, and done its best to weigh the prejudice to the Judgment Creditor if the execution of the judgment by writ of *fiery facias* is stayed on the one hand, against the prejudice which will inure to the Corporation if the execution of its goods, chattels and other property under the writ is allowed to proceed on the other.
- [56] Having exercised its discretion, the Court is of the view that it is inexpedient for the judgment debt to be enforced by way of a writ of *fiery facias* and further finds that the balance of prejudice on the application lies in the Corporation’s favour having regard to the “special circumstances” which exist in this particular case and which are discussed below.
- [57] (i) The nature of the claim and the delay in payment thus far: The debt which the Judgment Creditor seeks to enforce by way of a writ of *fiery facias*, arose out of an arbitral award made and published on or about September 6<sup>th</sup>, 2006. The award settled contending issues between the Corporation and Barrack relating to breaches of a construction contract which were referred for final decision by an arbitrator in 2002 in accordance with the terms of the contract.
- [58] The arbitration hearing commenced in 2004 and in September 2006, the Sole Arbitrator, Sir. Denys Williams found that Barrack was entitled to repudiate the contract and awarded Barrack (i) the sum of \$34,490,518.00; together with (ii) interest at 10% per annum for the period 25<sup>th</sup> July, 2002 (the date of submission to arbitration) and 6<sup>th</sup> September, 2006 (the date of the award); (iii) interest at 8% per annum for the period 7<sup>th</sup> September, 2006 (the day following the award) until payment; and (iv) Costs of \$5,807,250.00 assessed and awarded by the Sole

Arbitrator on 28<sup>th</sup> September, 2006.

- [59] Following the grant by **Cornelius J** on July 18<sup>th</sup>, 2008 of leave to enforce the award as a judgment or order of the High Court, the sum of \$2,500,000.00 was paid to the Judgment Creditor on November 14<sup>th</sup>, 2008 on account of the Corporation's indebtedness. Since that date the Corporation has made no further payments to the Judgment Creditor on account of the debt.
- [60] (ii) The hardship or prejudice to the creditor: Although decided in the context of a third-party claim, **Burnet's case** (cited above) which was relied on by Mr. Scott, suggests that the extent of prejudice to the Judgment Creditor could be one of the relevant factors to be considered by a Court which is exercising its discretion under **O. 47 r.1** whether to grant a stay of execution or not. [See paragraph [23]]
- [61] It is to be expected that any judgment creditor who is deprived of the fruits of his judgment for any length of time, will, in varying degrees, suffer hardship. The hardship suffered by the Judgment Creditor in this particular case is exacerbated by its having (prior to 2002) been deprived of certain stage-payments due under the building contract by reason of the payments having been wrongfully (as determined by the arbitrator) withheld by the Corporation.
- [62] It is, however, not in dispute that, in addition to the basic award consisting of the stage-payments wrongfully withheld under the contract and other loss and damage, the Judgment Creditor was also compensated for the deprivation of its monies by (i) a further award of 10% interest on the basic award during the approximately 4 year period between the date of submission to arbitration in 2002 and the date of the award in 2006; and (ii) a further award of interest which will continue to accrue on the award at the rate of 8% from the date of the award until payment.
- [63] The hardship which the Judgment Creditor has already suffered, and continues to experience as a result of the Corporation's failure to pay the judgment debt in a timely manner has been well documented in several affidavits filed on behalf of the Judgment Creditor. While no admissions have been made by the Corporation, the Court is satisfied that the payment of the judgment debt in a timely manner is an important factor for the Court's consideration on the application.
- [64] The Court accepts that owing to the non-payment of the judgment debt, Barrack Construction Ltd has been unable to repay its considerable debts and has been forced to ward off the demands of its many creditors on a regular basis. However, the Court has taken note of the fact that the hardship and prejudice which the Judgment Creditor continues to experience is mitigated to some extent by the fact that the basic award carries interest which will continue to accrue at the rate of 8% *per annum* until the debt is paid in full.
- [65] (iii) The size of the debt: It is not disputed that the judgment debt in this matter now exceeds \$60 million and, as noted earlier, that interest continues to accrue on the debt at an astounding annual rate of \$2.8 million!! The sheer size of the debt is, as Counsel for the Judgment Creditor quite rightly pointed out, most unusual, particularly in this jurisdiction. In the view of the Court, the sheer magnitude of the debt in this case, is another "special circumstance" which cannot be ignored when considering whether enforcement of such a large debt can realistically be achieved by levying on the goods, chattels and other property of the Corporation under a writ of *feri facias*.
- [66] (iv) The market value of the goods to be levied: The Court has also examined the exhibits attached to the Second Affidavit of Alphaeus Barrack filed on January 14<sup>th</sup>, 2010 and has also studied the annexed affidavit of the Corporation's Deputy General Manager, Mr. George Edghill, with its several exhibits verifying the assets and liabilities of the Corporation as at December 2006.
- [67] The Court observes that Exhibit "GE1" attached to the Affidavit of Alphaeus Barrack filed on January 14<sup>th</sup>, 2010 discloses that the net market value (after depreciation) of the Corporation's Drawing Office and surveying equipment, plant and building equipment, furniture and office equipment, construction equipment and motor vehicles is a mere \$307,768.00. The net market value (after depreciation) of the Corporation's goods and chattels

of \$307,768.00 has not been disputed by the Judgment Creditor and has been accepted by the Court.

- [68] In the view of the Court, the relatively miniscule market value of the Corporation's goods and chattels when compared with the sheer size of the outstanding debt (approximately \$60 million), provides yet another "special circumstance" which ought not to be overlooked in the Court's determination as to whether it is inexpedient to enforce the judgment under a writ of *feri facias*.
- [69] With a depreciated market value of only \$307,768.00, the Court is satisfied that the Judgment Creditor will be unlikely to realize sufficient money from the levy of the Corporation's goods and chattels to make a significant dent in the outstanding debt.
- [70] In the circumstances, the Court is not convinced, given the "special circumstances" of the size of the outstanding debt and the relatively small value of the Corporation's goods and chattels, that the solution to the Judgment Creditor's dilemma is to be found in permitting the Corporation's goods and chattels to be levied upon under a writ of *feri facias*.
- [71] (v) The existence of a Charging Order: On January 28<sup>th</sup>, 2010, this Court issued a Charging Order against substantial assets of the Corporation, the collective value of which exceeded the outstanding amount of the debt at that date. The Charging Order which is now in place over the Warrens Office Complex and the lands at Rices, St. Philip, has, in the Court's view, essentially paved the way for the Judgment Creditor to obtain the necessary orders for sale over the charged assets which will put it further along the road to enforcing its judgment debt.
- [72] During the course of his submissions at the hearing on March 26<sup>th</sup>, 2010, Counsel for the Judgment Creditor, Mr. Scott, indicated that the Judgment Creditor had not yet obtained an order for sale, although, according to him, an unheard application for an order for sale of the charged properties had been filed and was awaiting a hearing before the High Court.
- [73] While the outcome of its application for an order for sale is not known to the Court, it is clear that the Judgment Creditor has evinced an intention to enforce the judgment pursuant to the Charging Order which it had sought and obtained, even in spite of the anticipated difficulties in finding a purchaser which were identified in the valuation report prepared by Felicity Limited. [See paragraphs [38] to [41].]
- [74] Counsel for the Judgment Creditor's submission regarding the difficulty associated with the enforcement of such a large judgment debt is far from new. The Court is aware that a similar argument was raised as far back as the year 2007, before **Cornelius J.** during an unsuccessful interlocutory application by the Judgment Creditor in Suit 1889 of 2006 to secure the amount in dispute under section 14(5) of the **Arbitration Act, Cap. 110** of the Laws of Barbados.
- [75] In her unreported decision in Suit No: 1889 of 2006, the learned trial judge observed that the Corporation, was a state corporation with sufficient assets in the jurisdiction from which the award may be settled by ordinary execution. In refusing to grant an order for security, **Cornelius J.** further observed that the fact that the Corporation's assets cannot be quickly liquidated was a fact which exists whether the Corporation's application to set aside the award was successful or not.
- [76] The Court has reviewed the valuation report of the Warrens Office Complex prepared by Alcon Property Services Inc on January 11<sup>th</sup>, 2010 on behalf of the Corporation which was annexed to the Third Affidavit of Lanette Napoleon-Young herein. According to the valuer's opinion, the market value of the Warrens Office Complex on that date was \$73 million dollars.
- [77] The Court has also examined the valuation report of the property at Rices, St. Philip prepared by Alcon Property Services Inc on January 21<sup>st</sup>, 2010 on behalf of the Corporation which was annexed to the Seventh Affidavit of Lanette Napoleon-Young herein. It is observed that the valuer's opinion as to the market value of the Rices property on that date was \$12.2 million dollars.
- [78] The Court has further reviewed the valuation report of the charged assets prepared by Felicity Limited on behalf

of the Judgment Creditor which was annexed to the Fourth Affidavit of Alphaeus Barrack herein, and accepts that (i) the Market and Forced Sale values of the Warrens Office Complex are \$77,000,000.00 and \$65,000,000.00 respectively; and that (ii) the Market and Forced Sale values of the parcels of land at Rices, St. Philip are \$6,903,000.00 and \$5,868,000.00 respectively.

- [79] As there is little real difference between the market values of the charged assets given by the valuers for both parties, the Court has accepted the March 8<sup>th</sup>, 2010 valuations for the charged assets given by Felicity Limited.
- [80] Based on the March 8<sup>th</sup>, 2010 valuation, the Court is satisfied that the total value of the charged assets exceeds the amount of the judgment debt.
- [81] The Court is of the view that short of the Corporation either paying the debt in full or alternatively, entering into an agreement with Barrack to liquidate or substantially reduce the outstanding indebtedness within a reasonable time, the only practical method of Barrack enforcing a debt of this magnitude is by way of a sale of the charged assets pursuant to the Charging Order which this Court granted in January 2010.
- [82] In short, the Court is satisfied that enforcement of such an enormous debt by way of the writ of *feri facias* is an inexpedient means of liquidating the debt as Barrack would realistically not be expected to realize much more than the depreciated market value of the Corporation's goods and chattels stated in the Corporation's financial statements to be around \$307,768.00.
- [83] Even if the Chief Marshall were, on the one hand, able to realize the ordinary market value of the goods and chattels of \$6,485,656.00 on the levy, the levy proceeds would make very little impact on reduction of the overall debt, due to its sheer enormity.
- [84] On the other hand, the Court is satisfied that if the levy on the Corporation's goods, chattels and other property were allowed to proceed, the statutory functions performed by the Corporation at its various locations across Barbados, and in particular at its head offices at Reef Road would be severely dislocated without the Judgment Creditor achieving any substantial reduction in the amount owed.
- [85] The impracticality of the Judgment Creditor proceeding to levy execution to recover such a large debt rather than proceeding under the Charging Order granted by this Court in January 2010, is yet another "special circumstance" which, in the view of the Court, must be taken into account alongside the other "special circumstances" which exist in this particular case.
- [86] *(vi) The Corporation's status as a public authority and its obligation to pay:* Counsel for the Judgment Creditor urged the Court not to take into account as a "special circumstance" justifying a stay, the fact that the Corporation is a public authority with public functions. He cited two authorities in support of the general principle that the mere fact that the levying of execution may bring the operations of a statutory body to a standstill was not a "special circumstance" which would justify a stay. [See paragraph [24]]
- [87] It is accepted that both cases establish the general principle that public corporations stand on the same footing, and are liable for their debts to the same extent as private companies and that a Court ought not to stay an execution against a public corporation merely because it performs public functions and its operations might be brought to a standstill by the levying of execution. ***Marine & General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board [1945] KB 394*** and ***Worral Waterworks Co. v. Lloyd (1865-66) L.R. 1 C.P. 719.***
- [88] In the view of this Court, these cases cannot be regarded as authority for the proposition that execution can never be stayed against a public corporation or body. It is clear to this Court that the cases establish no more than that when a Court is exercising its discretion under **O. 47 r.1**, public and private corporations or bodies stand on the same footing and that a public body does not stand in any preferred position as against its creditors simply because it performs public functions and its operations may be adversely affected by the levy.
- [89] In short, a Court hearing an application for a stay brought by a public of statutory entity under **O. 47 r. 1** is

required to decide the application on its own facts and circumstances and without giving any special consideration to the judgment debtor's status as a public or statutory body.

- [90] Where, as in the present case, the applicant for a stay is a public or statutory entity, the mere fact that the applicant is a public corporation ought not to preclude it from obtaining relief under the Rule, provided that the Court hearing the application is satisfied that there are "special circumstances" which render it inexpedient to enforce the judgment by way of a writ of *feri facias*.
- [91] (vii) Is the debtor committed to paying the debt?: Counsel for the Judgment Creditor submitted that the Corporation had given no commitment to pay the debt and had tendered no explanation as to why it had not made any payment in reduction of the debt other than the \$2.5 million paid on November 14<sup>th</sup>, 2008.
- [92] Referring to paragraph 6 of the affidavit of George Edghill attached to the Second Affidavit of Alphaeus Barrack filed on January 14<sup>th</sup>, 2010, Mr. Scott drew attention to Mr. Edghill's having deposed that the Corporation was well and truly able to satisfy its debt and to the Corporation's having assets worth approximately \$418,383,105.39 and liabilities of \$239,761,711.09. This meant, he submitted, that the Corporation's net worth was \$178,621,394.30 which exceeded the judgment debt, including interest.
- [93] He urged that against the background of the Corporation's net worth, the Court ought not to aid a debtor who had given no explanation for its failure to pay and who had shown utter disregard for the rights of the Judgment Creditor.
- [94] Having examined the matter, the Court has observed from the Fifth Affidavit of Lanette Napoleon-Young filed on March 2<sup>nd</sup>, 2010, that following the grant of the Charging Order to the Judgment Creditor in January, 2010, the Corporation has paid off judgment debts to the National Insurance Board totaling close to \$15 million.
- [95] Furthermore, the Corporation's acting General Manager deposed in paragraph 12 of the said affidavit that there now exist no prior charge in favour of the National Insurance Board over the Corporation's assets subject to the charging order.
- [96] The Corporation's acting General Manager further deposed that the judgments no longer have the effect of diminishing the funds available to the Judgment Creditor in the event of a sale of the charged assets.
- [97] Despite Mr. Scott's arguments to the contrary, the Court is satisfied that far from disregarding the rights of the Judgment Creditor, the liquidation by the Corporation of debts totaling \$15 million owed to the National Insurance Board is in actuality facilitative of the Judgment Creditor's rights under the Charging Order and essentially paves the way for the Judgment Creditor to recover the debt from the sale of the charged assets, the value of which far exceeds the amount of the debt.
- [98] (viii) Abuse of process: During oral arguments, each party to the action alleged that the other was abusing the process of the Court. On the one hand, Counsel for the Judgment Creditor urged the Court to find that the Corporation's application to the High Court in January 2010 for a stay of execution of the writ of *feri facias* was a misuse of the Court's process in view of the fact that the Corporation had applied to the Court of Appeal for a stay of all execution processes pending appeal but had failed to persuade the Court of Appeal to grant a stay of the proceedings when the parties had appeared before a single judge of the Court of Appeal in November 2009. Having failed to obtain a stay before the Court of Appeal, it was, he argued, an abuse of the Court's process for the Corporation to seek a stay before the High Court in relation to a matter which, in substance, was before the Court of Appeal.
- [99] In response, Counsel for the Corporation, Sir Maurice King, Q.C. cited the case of ***Ellis v. Scott [1964] 1 W.L.R. 976*** and drew attention to an extract from paragraph 47/1/2 of the 1985 edition of the U.K. Annual Practice which states very clearly that *"the power to stay execution under this Rule is separate and distinct from the power to stay execution pending an appeal."*
- [100] Having examined the matter, the Court finds, following ***Ellis***, that as the Corporation's application pursuant to **O.**

47 is separate and distinct from the application before the Court of Appeal for a stay of execution pending appeal, the argument that it has abused the Court's process cannot be sustained.

[101] On the other hand, Counsel for the Corporation, Sir Maurice King, Q.C. submitted that the Judgment Creditor's intention to proceed on the writ of *fiery facias* and execute on the Corporation's personal assets and equipment constituted an abuse of the process of the Court since the current market value of the charged assets far exceed the amount of the judgment debt. Sir Maurice urged the Court to find that in proceeding on the writ of *fiery facias*, the Judgment Creditor was attempting to get a lever to force the Corporation to comply with its obligation to pay the judgment debt. Citing dicta of Simonds J. in ***Robinson v. Bailey [1942] Ch 268 @ 271***, Sir Maurice submitted that having obtained rights under the Charging Order granted by the Court on January 28<sup>th</sup>, 2010, the Judgment Creditor should apply for enforcement of its terms and to do otherwise was an abuse of process.

[102] In response, Counsel for the Judgment Creditor, submitted that the Judgment Creditor was entitled to enforce its judgment by one or more of the six (6) methods listed in **O. 45 r. 1** of the Rules of the Supreme Court, 1982. Citing commentary on the corresponding rule at paragraph 45/1/3 of the 1999 edition of the U.K. Supreme Court Practice, Mr. Scott submitted that the Rules clearly anticipate that in appropriate cases, a judgment creditor was entitled to combine more than one means of execution to recover the fruits of his judgment and that this was such a case.

[103] Having reviewed the respective submissions and the applicable law, the Court is satisfied that the general provisions of **O. 45** must be construed in conjunction with the specific rules governing writs of *fiery facias* set out in **O. 47**. Accordingly, notwithstanding the general provisions of **O. 45** which, as Mr. Scott rightly correctly pointed out, permit a judgment creditor to combine more than one means of execution to recover the fruits of his judgment, the Rules also confer specific power on the Court under **O. 47 r.1** to stay a writ of *fiery facias* if "special circumstances" render it inexpedient to enforce the judgment by that means.

[104] In summary, while it is accepted as a general rule that a judgment creditor is entitled to the fruits of his judgment and may lawfully employ a single method or a combination of methods of execution to do so, the Court has a clear discretion under **O. 47 r.1** to stay the execution of a money judgment by way of a writ of *fiery facias* if "special circumstances" render it inexpedient to do so.

[105] This Court is not prepared to find that the Judgment Creditor has abused the process of the Court by seeking to proceed on the writ of *fiery facias*, with (as Sir Maurice submitted) the intention of getting a lever to force the Corporation to comply with its obligation to pay the judgment debt. Nonetheless, as earlier outlined, the Court is satisfied for purposes of **O.47 r. 1** that there are a number of "special circumstances" in this case which render it inexpedient for the Judgment Creditor to enforce the judgment by way of a writ of *fiery facias*.

[106] (ix) Was there delay by the Corporation in applying for the stay?: Counsel for the Judgment Creditor submitted that the whole course of the Corporation's conduct between July 2008 when it had been granted a stay of execution for 6 weeks and January 26<sup>th</sup>, 2010 when the current application was filed, was characterized by tardiness and an apparent lack of urgency in seeking a stay of execution on the judgment. He urged the Court to find that the Corporation would therefore suffer no injustice or prejudice if the writ of *fiery facias* were allowed to take its normal course.

[107] The Court has examined the submission and has already held, following ***Ellis (cited above)***, that a clear distinction is to be drawn between an application for a stay of execution under **O. 47 r. 1** and an application for a stay of execution pending an appeal. [See paragraphs [99]to [100].]

[108] Additionally, the facts clearly show that on or about November 27<sup>th</sup>, 2009 just over one month after it had obtained a writ of *fiery facias*, the Judgment Creditor wrote to the Chief Marshal and suspended further action on the writ until further notice. [See paragraph [7]]

[109] The facts also establish that the writ of *fiery facias* was left in abeyance by the Judgment Creditor for a further period of approximately 2 months. Indeed, it was not re-activated until January 22<sup>nd</sup>, 2010 when in a letter written

by Sir Richard and copied to the Corporation, to the Chief Marshal was instructed to proceed with the levy without further delay. [See paragraph [9]]

[110] In the face of the impending levy of execution under the writ of *feri facias*, the Corporation then applied on January 26<sup>th</sup>, 2010 pursuant to the **Rules of the Supreme Court of Judicature Act, 1982** and/or under the inherent jurisdiction of the Court seeking an order for a stay of execution of the writ.

[111] The Corporation having filed for relief under an urgent application **O. 47 r.1**, within a mere 4 days of its having received notice of the Judgment Creditor's intention to enforce the judgment by way of the writ of *feri facias*, the Court is satisfied that there was no tardiness or undue delay by the Corporation in seeking the stay.

[112] **Disposal and Order:** In summary, the Court (being satisfied pursuant to **O. 47 r. 1** that "special circumstances" exist in this case which render it inexpedient to enforce the judgment debt against the Corporation by way of a writ of *feri facias*) makes the following orders:

- 1) The writ of *feri facias* issued herein on October 1<sup>st</sup>, 2009 against the Corporation is hereby stayed pending enforcement by the Judgment Creditor of its rights under the Charging Order granted by this Court on January 28<sup>th</sup>, 2010, or until further order;
- 2) The Corporation shall have its costs on the application certified fit for two (2) attorneys-at-law;
- 3) There shall be liberty to apply.

**Maureen Crane-Scott**  
**Judge of the High Court**