

**BARBADOS**

**[Unreported**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL – CIVIL DIVISION**

**No. 19 of 2001**

**BETWEEN:**

**WILLIAM EVERETT LOCKE, JR**

**(Appellant/Plaintiff)**

**AND**

**BELLINGDON LIMITED**

**(First Respondent/First Defendant)**

**EASTERN RESORTS LIMITED**

**Second Respondent/Second Defendant**

**PARADISE BEACH LIMITED**

**(Third Respondent/Third Defendant)**

**SANDALS RESORTS INTER-NATIONAL LIMITED**

**(Fourth Respondent/Fourth Defendant)**

**Before: The Honourable Mr. Justice Errol DaCosta Chase, Chief Justice (ag.)**

**December 5 & 17, 2001**

**Mr. Clyde Turney and Ms. Elnith Kentish for the Appellant**

**Sir Henry de B. Forde, KA, QC, MP, Mr. Ramon O. Alleyne and**

**Ms. Wendy Straker for the Respondents**

**DECISION**

On November 2, 2001 Williams J.A., made an order on the application of the appellant/plaintiff the terms of which include the following:

(a) that the appellant/plaintiff within twenty-one (21) days, provide additional security in support of his undertaking as to damages given at the time of the grant of the said injunction in the further sum of U.S.\$2 million by way of a bond or guarantee from a commercial bank registered in Barbados under the Financial Institutions Act No. 16 of 1996 or from an insurance company registered under the Insurance Act No. 32 of 1996, such bank or insurance company being agreed by the attorneys-at-law for the third respondent and in default of agreement to be settled by the court.

(a) that in default of the appellant/plaintiff providing the aforesaid security within the time and in the manner aforesaid, the injunction will be discharged without further order.

(b) that there be a stay of execution for 21 days in respect of the order, and

(c) that there be leave (if required) to appeal to the full Court of Appeal.

On November 16, 2001, the appellant/plaintiff being dissatisfied with the terms of the order appealed to Court of Appeal seeking a reversal of the order as it relates to –

(a) the provision of additional security in support of the appellant/plaintiff's undertaking for damages given in the court below;

(b) further security for the respondents/defendants.

On November 22, 2001, the appellant/plaintiff on a certificate of urgency applied under Order 59, Rule 21(b) & (c) for an order that all further proceedings on the execution of paragraphs (a) and (b) of the order made by Williams, J.A., on November 2, 2001 (the November 2 order) be stayed pending the determination of the appeal (interlocutory appeal) filed on November 16, 2001 against the order. The application was supported by an affidavit filed on November 22, 2001 by E.O. Kentish, one of the Attorneys-at-Law for the appellant/plaintiff.

In paragraph 3 of that affidavit, counsel deposes that the effect of the said order... is that the time limited for providing the additional security by the appellant/plaintiff will expire on November 23, 2001.

When the matter came on for hearing on December 5, 2001, senior counsel for the respondents/defendants in resisting the application submitted, in effect, that the terms of the order are not such as to require execution on the part of the respondents. He contended that the order by its terms imposes obligations that are to be performed by the appellant/plaintiff. Following counsel's submission on this preliminary point, senior counsel for the appellant/plaintiff applied for and was granted leave to amend the appellant/plaintiff's summons filed on November 22, 2001.

The amended summons seeks a variation of the November 2, 2001 order to provide that –

(a) the appellant/plaintiff provide such security (if any) in support of his undertaking as to damages given at the time of the grant of the injunction on 27th April, 2000, as may be ordered, upon the final determination of the appeal filed herein on 16th November, 2001 against the order;

(b) the injunction granted by the High Court of Justice on 27th April, 2000 and continued by virtue of the order remain and continue in force until the final determination of the said appeal.

The variation sought by the term of the amended summons would in my view substantially emasculate the effect of the November 2, 2001 order and as such it is necessary to examine the factors upon which Williams, J.A., exercised his discretion to grant the appellant/plaintiff's application for an extension of the injunction granted by the High Court.

In the course of his judgment, he commented as follows (p 2):

It is plain from the three affidavits and from the submissions of counsel for the parties that there is consensus as to the main principles that are relevant to applications for a stay of execution. The starting and pervading rule is that the court should not, pending an appeal, deprive a successful litigant of the fruits of his litigation: *The Annot Lyle* (1886) 11 P114 at 116, C.A.

The usual argument for a stay is that the court should ensure that the appeal, if successful, will not be nugatory: *Wilson v Church* (No. 2)(1899) 12 Ch.D. 454, at 458, 459.

The Learned Justice of Appeal further commented:

"although on its face this dispute concerns mainly the shares in the third respondent, the real and substantial object of the appellant is to acquire that said real property known as Paradise Beach Hotel. It follows that, if the injunction is not continued and, at the end of a successful appeal, the real property has passed out of the control of the respondents, the appellant would probably have suffered irreparable loss which could not be adequately compensated in damages.

He then indicated that inasmuch as there was no suggestion that the appeal was a frivolous one, he considered the application to be a proper case for the exercise of his discretion to grant an extension of the injunction.

Turning his attention to the respondents' position, he said:

"It is equally clear ... that the successful respondents must be adequately protected in the event that the appeal fails.

It is my view that, in addition to the continuation or renewal of the appellant's undertaking in damages, further security ought to be provided by the appellant as an additional buttress to such undertaking."

As to the quantum of the further security, he said:

"In arriving at the further sum that should be secured as additional support for the appellant's undertaking in damages, I have taken the following main factors into account:

i) The agreement on the figure of U.S.\$19 million mentioned in the Letter of Intent;

ii) The above-mentioned offers of U.S.\$25 million and U.S.\$26 million;

iii) The strong inference from the last mentioned offers, and indeed the general likelihood, of an appreciation in the value of the real property since early 1999;

(iv) That the present appeal is not likely to be heard and finally adjudicated until the second quarter of 2002;

(v) That one or more of the respondents must be incurring significant expenses in the upkeep of the hotel property – although I cannot rely upon the hearsay figures stated in paragraph 18 of Mr. Alleyne's affidavit.

After considering those factors, and doing my best to balance the appellant's right of appeal against the need to give the respondents reasonable protection against loss and damage if the appeal fails, I have come to the conclusion that the appellant's undertaking in damages should be fortified within 21 days by a further U.S.\$2 million and I so order.

With regard to the question of further security for costs, he said:

"In my experience, the costs allowed on the hearing of a full appeal are usually no less (and often more) than those allowed in the court below. It seems just to me therefore, that the appellant should give further security for costs in the sum of twice the professional fees so agreed or allowed on taxation less the sum of Bds.\$190,000 already secured and I so order. The additional sum for security for costs is to be paid into court within 14 days after the same has been so ascertained, ... and if the appellant fails to give security as aforesaid, the appeal will stand dismissed with costs ...

In support of the appellant/plaintiff's application for a variation of the November 2, 2001 order, counsel contended, among other things, that the further security of U.S.\$2 million would have the effect of penalising the appellant/plaintiff. In this regard, it is to be observed that the application was certified as one of urgency by reference to the matters more particularly set out in the affidavit of Elnith Oliver Kentish and that nothing in the affidavit asserts that the quantum of the further security is excessive. In any event, the quantum of the further security in support of the appellant/plaintiff's undertaking in damages and for the respondent/defendants' costs are matters pending appeal to the Court of Appeal (paragraphs 2(i) and (ii) of the Notice of Appeal filed on November 16, 2001).

The powers of a single Judge of the Court of Appeal are set out in Order 59, Rule 21 in these terms:

21(i) Without limiting these Rules, in any cause or matter pending before the court, a single Judge of the Court may upon application make orders for –

a) giving security for costs to be occasioned by any appeal;

b) stay of execution on any judgment or order appealed from pending the determination of such appeal;

c) an injunction restraining the defendant in the action from disposing of or parting with the possession of the subject matter of the appeal pending the determination thereof;

and may hear, determine and make orders on any other interlocutory application.

(ii) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by any Judge of that Court having power to hear and determine the appeal.

In *Maraj v Straker* (1984) 19 Barb L.R. at p.193, the effect of Order 59, Rule 21(2) was considered by the Court and in his judgment at p.196 Williams, J (as he then was) said:

... it is my opinion that a single Judge of the Court of Appeal has the power to discharge or vary an order made by another Judge of the Court of Appeal. But I do not think that the provision contemplates that a single Judge would interfere with an order made by another Judge unless some sufficient reason for interfering is shown. And where the exercise of discretion is in question the position could hardly be any different from that indicated by Lord Esher, M.R., when in *Hansard v Lethbridge & T.L.R 179*, he said that the Court of Appeal "would only interfere with the exercise of discretion by a Judge in extreme cases".

In the present case, nothing has been advanced either by way of evidence or by principles of law to indicate that the circumstances of the appellant/plaintiff are so extreme as to warrant an interference in any substantial way by this Court of the discretion which Williams J.A. exercised in formulating the provisions of the order in relation to further security in support of the appellant/plaintiff's undertaking in damages and for the respondent/defendants' costs. In any event, the power conferred on a single Judge of the Court of Appeal to discharge or vary an order made by another Judge of the Court of Appeal cannot be construed as conferring a power to interfere with the order as on appeal: *Boyd v Bischoffroheim* (1894) 1 Ch. C.A. p1.

To my mind the Learned Justice of Appeal took all the relevant factors into account in arriving at the quantum of security that would have protected the interests of the respondents in the event of an unsuccessful appeal.

In the result, the application is refused.

This Court is however prepared, having regard to the circumstances of this application, to vary the time limited for compliance with the order to a further period that is appropriate for that purpose.

Chief Justice (ag.)