BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeals Nos. 31 and 34/2001

(Consolidated)

BETWEEN:

WILLIAM E. LOCKE JR.

(Appellant)

AND

BELLINGDON LIMITED

(First Respondent/First Defendant)

EASTERN RESORTS LIMITED

(Second Respondent/Second Defendant)

PARADISE BEACH LIMITED

(Third Respondent/Third Defendant)

SANDALS RESORTS INTERNATIONAL LIMITED

(Fourth Respondent/Sixth Defendant)

Before: The Hon. Sir David Simmons, K.A. B.C.H., Chief Justice, the Hon. Frederick L.A. Waterman, Justice of Appeal, and the Hon. Lindsay Irwin Worrell, GCM, Justice of Appeal (acting)

2002: January 14, 17 and February 4

Mr. G.C. Turney Q.C. and Miss E.O. Kentish for the Appellant Sir Henry deB. Forde Q.C. and Mr. Ramon O. Alleyne for the First and Second Respondents/Defendants

Sir Henry B. Forde Q.C. and Mr. Brian Clarke for the Third and Fourth Respondents/Defendants

DECISION

SIMMONS C.J.: The decision which we now give relates to a consolidated appeal from two interlocutory orders made respectively on November 2, 2001 by Williams JA and on December 17, 2001 by Chase JA. Some understanding of the history of the matters as they have proceeded thus far is necessary for a full appreciation of the issues which were before us.

The Parties

[2] The Appellant, Edward Locke ("Locke") is a non-resident of Barbados. He lives in Massachusetts, U.S.A. The First Respondent, Bellingdon Limited, ("Bellingdon") is a company [1] incorporated in the Isle of Man but not registered in Barbados as an external company under the provisions of the Companies Act, Cap.308. The Second Respondent, Eastern Resorts Limited, ("Eastern") is a U.K. company not registered and incorporated in Barbados as an external company. The Third Respondent, Paradise Beach Limited, ("Paradise") is a Barbados registered company and owns large premises known as Paradise Beach Hotel at or near a beautiful stretch of beach on the Island's Western coast. The Fourth Respondent, Sandals Resorts International Limited, ("Sandals") is not registered as a company in Barbados but is alleged to be the ultimate beneficial owner of the shares in Paradise. Two of the original defendants, Patrick Lynch, (the original Fourth Defendant) and Gordon Stewart (the original Fifth Defendant) were struck out from the action and are not proceeded against in the appeals.

The Main Action in the High Court

[3] On August 27, 1999, Locke commenced an action in the High Court alleging that certain contractual arrangements were concluded between himself and Lynch and Stewart as directors of Sandals for the sale by them to him of the shares in Paradise and the real property owned by it. Locke based his claim on a Letter of Intent dated March 16, 1999.

[4] In his Re-Amended Statement of Claim Locke claimed in summary, inter alia:

(i) A declaration that there is a valid and subsisting agreement between himself and Bellingdon for the sale of all of the shares in Paradise; [2]

(ii) A declaration that there is a valid and subsisting collateral agreement between himself and Paradise that it will not assign, transfer or encumber the freehold title to the property;

(iii) Specific Performance of the agreement for the sale of shares in Eastern and/or Paradise in accordance with a Letter of Intent of March 16, 1999;

(iv) Various Injunctions restraining directors of Bellingdon from disposing of the shares held by it in Eastern or Paradise and from exercising voting rights in Eastern or Paradise;

(v) Other Injunctions restraining Paradise and its directors from dealing with the shares in Paradise or selling or otherwise disposing or charging the freehold property.

(vi) Damages.

[5] The action was tried before Payne J over 12 days between September 2000 and April 2001. He gave judgment on June 8, 2001 and found that "the terms of the agreement between the parties as contained in the Letter of Intent, were sufficiently certain or ascertainable to create a binding agreement, and did create a binding agreement." Moreover, he found that payment of a deposit of US$100,000 was a fundamental term of the agreement but "the plaintiff failed and/or neglected to make the deposit of US$100,000 and in the premises the defendants were entitled to and did treat the agreement as at an end."

[6] In the result, Payne J refused the relief sought by the Plaintiff and ordered costs for Bellingdon, Eastern, Paradise and Sandals. He also permitted them to pursue an inquiry as to damages, stayed execution of the judgment for 6 weeks and continued an [3] interlocutory injunction ordered by Inniss J (acting) on April 27, 2000 for the length of the stay.

[7] Before the trial of the matter by Payne J, the Defendants had been enjoined by Inniss J (acting) in these terms.

"AND UPON the Plaintiff also by his Counsel undertaking to abide by any Order that this Court may make as to damages in case this Court shall hereafter be of the opinion that any or all of the First, Second, Third and Sixth Defendants shall have sustained such damages by reason of this Order which the Plaintiff ought to pay;

AND UPON the Sixth Defendant reserving its right to be separately represented at trial,

IT IS ORDERED THAT

1. The Defendants be restrained until trial or further order subject to, and in the manner hereinafter provided, namely:

(a) The First Defendant, whether by its directors, officers, servants, agents (including the Sixth Defendant), or any trustee from transferring:

(i) the shares held by it in the Second Defendant;

(ii) the debt owed to it by the Third Defendant and referred to in the Letter of Intent mentioned in paragraph 7.3(5) of the Amended Statement of Claim filed herein;

(b) the Second Defendant, whether by its directors, officers, servants, agents (including the Sixth Defendant) or any trustee, from transferring the shares held by it in the Third Defendant;

(c) the Second and Third Defendants from altering the issued and outstanding share capital of and in the Third Defendant, and

(d) the Third Defendant, whether by its directors, officers, servants, agents (including the Sixth Defendant) or any trustee from conveying, leasing or mortgaging the freehold of the premises known as Paradise Beach Hotel." [4]

The Substantive Appeal

[8] Dissatisfied with the judgment of Payne J, Locke filed a Notice of Appeal on July 16, 2001. We refer to this as "the substantive appeal". It has not yet been heard and determined.

[9] Pending the hearing of the substantive appeal, Locke took out a Summons before a single Judge in the Court of Appeal on July 10, 2001 in which he sought to continue the injunction ordered by Inniss J (acting) against Bellingdon, Eastern, Paradise and Sandals pending the determination of the substantive appeal or until further order. Secondly, he sought an order to stay the Order of Payne J as it pertained to the award of costs to the Defendants and the inquiry into damages "pending the determination of the appeal or until further Order."

[10] The Summons was heard by Colin Williams JA on August 14, 2001. He had before him, an affidavit with exhibits in support of the Summons and deposed to by Ms. Elneth Kentish, Attorney-at-Law, an affidavit with exhibits in opposition to the application by Summons sworn to by Mr. Ramon Alleyne, Attorney-at-Law, and a further affidavit of Ms. Kentish with exhibits in reply.

Orders of Williams JA

[11] Williams JA gave his decision on November 2, 2001 and made the following Orders:

"1. That the injunction granted herein on the 27th day of April 2000 by the Honourable Mr. Justice LeRoy Inniss, Acting Judge of the High Court, restraining the First Respondent/First Defendant, Second Respondent/Second Defendant, Third Respondent/Third Defendant and the Fourth Respondent/Sixth Defendant in manner therein set out be extended and the Respondents/Defendants restrained until the adjudication of the appeal or until further order in the manner following – [5]

(a) The First Respondent, whether by its directors, officers, servants, agents (including the Fourth Respondent/Sixth Defendant), or any trustee from transferring

(i) the shares held by it in the Second Respondent/Second Defendant;

(ii) the debt owed to it by the Third Respondent/Third Defendant and referred to in the Letter of Intent mentioned in paragraph 7.3(5) of the Amended Statement of Claim filed herein;

(b) The Second Respondent/Second Defendant, whether by its directors, officers, servants, agents (including the Fourth Respondent/Sixth Defendant) or any trustee, from transferring the shares held by it in the Third Respondent/Third Defendant;

(c) The Second and Third Respondents/Defendants from altering the issued and outstanding share capital of and in the Third Respondent/Defendant, and

(d) The Third Respondent/Third Defendant, whether by its directors, officers, servants, agents (including the Fourth Respondent/Sixth Defendant) or any trustee, from conveying, leasing or mortgaging the freehold of the premises known as Paradise Beach Hotel.

2. (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 US$2 million by way of a bond or guarantee from a commercial bank registered in Barbados under the Financial Institutions Act No.16 of 1966 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/Third Defendant and in default of agreement to be settled by the Court.

(b) 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.

3. (a) That the Appellant/Plaintiff give further security for the costs of this action by way of lodgement with the Registrar of this Court of a sum equal to twice the amount of the professional fees agreed or taxed pursuant to the judgment given on 8th June 2001 in this action less the amount of BDS$190,000.00 already paid into Court and that such additional security be paid into Court within fourteen (14) days [6] after the agreement on such bill of costs or its taxation.

(b) That in default of payment into Court of the additional sum for security for costs that the appeal of the Appellant/Plaintiff do stand dismissed with costs to the Respondents/Defendants to be taxed, certified fit for two Counsel."

There was a stay of execution for 21 days and leave was given to appeal to the full Court of Appeal if required.

Interlocutory Appeals

[12] Aggrieved by the Order of Williams JA, Locke filed a Notice of Appeal to the full Court of Appeal on November 16, 2001. We heard argument on that appeal on January 14 and 17, 2002 and shall deal with the arguments thereon later in this judgment; for there is yet more to be chronicled.

[13] On November 22, 2001, Locke applied by Summons under O.59.,R.21(1)(b) and (c) for an order that all further proceedings on the execution of paragraphs 2 and 3 (a) and (b) respectively of the Order of Williams JA be stayed pending determination of the interlocutory appeal from Williams JA This second interlocutory application went before Chase JA on December 5, 2001. He delivered a written decision on December 17, 2001. Chase JA was not persuaded to vary the Order of Williams JA except to the extent that, having regard to the circumstances of the application before him, especially the fact that time was running against the applicant Locke, he "varied the time limited for compliance with the Order to a further period that is appropriate for that purpose." He therefore required compliance with the provisions of the Order of Williams JA by January 14. 2002. The Order of Chase JA did not please Locke and he filed an appeal against it. [7]

[14] To the extent that there was an appeal filed from his decision of December 17, 2001, Chase JA on January 3, 2002 ordered that the appeals from his decision and that of Williams JA be consolidated and heard by the full Court of Appeal on January 14, 2002.

That is how the full Court of Appeal came to be seised of this consolidated appeal.

Reasons for Decision – Williams JA

[15] In his decision of November 2, 2001, Williams JA noted that when Locke obtained the interlocutory injunctive relief on order of Inniss J (acting), he was required to support the usual undertaking in damages by securing the sum of US$1 million. This was in fact paid into Court on October 19, 1999.

In addition, Locke was required, as a non-resident Plaintiff, to pay BDS$190,000 into Court by way of security for the costs of Paradise up to the

close of pleadings. This sum was paid into Court on October 4, 1999.

[16] The learned Justice of Appeal identified the issue in the case as a dispute concerning, in particular, the shares of Paradise which the Plaintiff Locke was seeking to purchase although his real and substantial purpose was the acquisition of the very desirable real property known as Paradise Beach Hotel. He observed that: “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.” In his view, the appeal was not frivolous and he found that it was a proper case for the exercise of his discretion to extend the injunction ordered by Inniss J until the adjudication of the [8] substantive appeal or until further order. He therefore made the following restraining orders and increased the quantum of the undertaking as to damages and the amount of security for costs as we indicate below.

[17] Bellingdon was restrained from transferring the shares which it held in Eastern and the debt owed to it by Paradise. Eastern was restrained from transferring the shares it held in Paradise; Both Eastern and Paradise were enjoined not to alter the issued and outstanding share capital of Paradise. Paradise was itself restrained from conveying, leasing or mortgaging the freehold of Paradise Beach Hotel.

[18] Thus, pending appeal or other order, Locke had succeeded in tying up the various types of property of the successful Respondents/Defendants. What was to happen if the substantive appeal failed?

[19] Williams JA was clear that the defendants had to be protected. Locke had already given an undertaking in damages as part of the Order of Inniss J (acting) on April 27, 2000 when the case was in its early stages. Bereft of the strict legalese of the Order, Williams JA therefore decided that the original undertaking should be “buttressed” by an additional sum. He ordered fortification of the undertaking within 21 days by a further sum of US$2 million on the same terms and conditions as had been ordered to be secured by Payne J on October 1. 1999 i.e. by way of a bond or guarantee from a commercial bank or insurance company.

[20] The sanction for failure to provide the additional security within the time and in the manner aforesaid was the automatic discharge of the injunction. [9]

[21] As to the question of further security for costs, Williams JA was of opinion that the costs awarded in the judgment of Payne J on June 8, 2001, should be agreed or taxed, and a sum be provided as further security for costs. Further security for costs was, in his opinion, “a sum equal to twice the professional fees so agreed or allowed on taxation less the $190,000 already secured.”

[22] Whatever sum was ascertained by agreement or taxation was to be paid into Court within 14 days of such ascertainment and deposited in an interest bearing account. If Locke failed to give the additional security for costs, the appeal would stand dismissed.

The Grounds of the Consolidated Appeal

[23] During argument there was no complaint against the decision of Chase JA and Counsel for Locke targeted his criticisms against the decision of Williams JA. His amended grounds of appeal complain that:

(i) the learned Justice of Appeal had no jurisdiction to order further security in support of the Plaintiff’s undertaking as to damages since no application for further security was made;

(ii) the learned Justice of Appeal had no jurisdiction to order further security for costs since no application for such security was made;

(iii) alternatively, there was not a proper exercise of discretion in ordering security for costs of the appeal without correlative security for costs of the cross appeal owing to the fact that Bellingdon, Eastern and Sandals were Respondents resident outside of the jurisdiction of the Barbados courts; [10]

(iv) the Order for the provision of further security for costs and for further security in the sum of US$2 million to fortify the undertaking in damages given to the Court when Inniss J granted the original injunction was unreasonable and made on wrong principles.

(v) The order for further security in respect of the undertaking was tantamount to the imposition of a penalty;

(vi) there was no evidence on the basis of which the further sum of US$2 million could be calculated;

(vii) the Respondents were unlikely to suffer loss for which the Plaintiff would be responsible because Williams JA had held that the value of the property had been increasing and no basis existed on which to order further security for the undertaking.

(viii) The Justice of Appeal did not deal with certain evidence in Ms. Kentish’s affidavit which exhibited a statement by a director of Sandals to the effect that Sandals wished to develop the property at Paradise Beach and it was not for sale.

The Issues of Law

[24] Grounds (i) to (vi) of the consolidated appeal raise two broad issues of law for our determination. We think that they may fairly be summarized thus:

(a) Did the learned Justice of Appeal properly exercise his discretion in regard to the quantum of the undertaking as to damages? [11]

(b) Did he properly exercise his discretion in regard to the quantum of security for costs?

[25] It is necessary, before embarking upon an analysis of the submissions on both sides and an evaluation of the evidence before Williams JA and his reasons for decision, to restate some of the legal principles that apply to an undertaking in damages and security for costs on an appeal.

The Relevant Legal Principles

(i) The principles relating to the exercise of discretion

[26] From the foregoing exposition of the history of this matter, it will be seen that the appellant is essentially complaining about the exercise of judicial discretion by Williams JA in relation to the fortification of undertaking as to damages by a further US$2 million and the increase in the quantum of security for costs.

[27] It is settled law that an appeal will not be allowed against a judicial exercise of discretion unless the appellate court is satisfied (a) that the judge below erred in principle either by failing to take into account or giving too much or too little weight to relevant factors or by taking into account irrelevant factors; and (b) that, as a result of the error, in principle the judge's decision "exceeded the generous ambit within which reasonable disagreement is possible" and may therefore be said to be plainly wrong.

[28] Sir Henry Forde Q.C. referred us to: Kloeckner and Co. S.A. v. Gatoil Overseas Inc. (1990) T.L.R., April 9, 1990; Hansard v. Lethbridge (1891-92) T.L.R. Vol.VIII, 179 and the local case of Maraj v. Straker (1984) 19 Barb. L.R.193. In these three cases, the learned judges, namely Sir Thomas Bingham LJ, Lord Esher MR and Denys Williams J (as he then was) [12] respectively, emphasized that a Court of Appeal will only interfere with the exercise of discretion by a Judge in extreme cases.

[29] These principles were reaffirmed by Sir Vincent Floissac CJ in Dufour v. Helenair Corporation [1996] 52 W.I.R. 188 at pp.190-191. The learned Chief Justice cited with approval the words of Viscount Simon LC in Charles Osenton and Co. Ltd. v. Johnson [1941] 2 AER 245 at p.250 in support of principle (a) at paragraph 27.

[30] Viscount Simon had said: "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then reversal of the order on appeal may be justified."

[31] On the second condition (at paragraph 27), Floissac CJ adopted the language of Asquith LJ in Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 AER 343 at 345: "It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

[32] In this appeal both sides accept those principles of law. They agree that we should only overturn the decision of Williams JA if we are satisfied that he attached no weight or insufficient weight to relevant considerations, or took into account irrelevant considerations, and [13] that his decision exceeded the generous ambit within which reasonable disagreement is possible.

These principles may also be found succinctly stated at 37 Halsbury's Laws of England (4th Edition) at paragraph 656.

(ii) The Undertaking as to Damages

[33] The Undertaking as to damages traces its origin to the middle of the nineteenth century. See Novello v. James (1854) 5 De G.M. & G. 876; Chappell V. Davidson (1856) 8 De G.M. & G. 1. The Second Edition of Ashburner's Principles of Equity credits Knight-Bruce VC with its creation – p.347.

[34] In Cheltenham and Gloucester Building Society v. Ricketts [1993] 1 W.L.R. 1545, Neill LJ at 1550 explained that "the undertaking is given to the court and is intended to provide a method of compensating the party enjoined if it subsequently appears that the injunction was wrongly granted." The injunction will, in all probability, prevent the person restrained from exercising his legitimate rights and, therefore, because that person's rights have been affected, the undertaking offers some relief or protection.

[35] An appellant applying for the continuation of an interim injunction is, in effect, asking the court to interfere with the respondent's rights before the appeal court has pronounced on the appellant's rights. That may be a justifiable course of action on the ground that it is necessary to protect the appellant's rights or interests pending appeal. But at the same time it must be recognized that a risk of harm to the defendant's rights and interests has equally been created. Justice itself commands us to be fair to both parties and their respective rights and interests must be protected at all stages.[14] The undertaking as to damages seeks to offer such protection to the defendant who may be disadvantaged by an interlocutory restraint.

[36] In requiring the appellant to give an undertaking as a condition for the grant or continuation of the injunction, the appellant is put on notice that he will be liable for losses of the respondent.

[37] As to the matter of fortifying an original undertaking when considering the continuation of an injunction, we conceive that the ability of the appellant to make good his undertaking is a matter that the court must consider in determining the balance of convenience. There is ample authority that, if a court considers an undertaking to be inadequate, it may fortify the undertaking by adequate security – See Whitworth v. Rhodes (1850) 20 L.J. Ch.105 and Jones v. Pacaya Rubber and Produce Co. Ltd. [1911] 1 KB. 455.

[38] Dr. I.C.F. Spry in the 4th edition of his book "The Principles of Equitable Remedies" at p.476 remarks that:

"The general considerations that govern the giving of an undertaking as to damages often lead to the imposition of other conditions on the

plaintiff….in appropriate cases he may be required, not only to give an undertaking as to damages, but also to lodge a security, or to undertake that he will do so, in order that the satisfaction of any order as to damages or otherwise may be sufficiently ensured."

(iii) Security for Costs

[39] The starting point for the law relating to the provision of security for the costs of an appeal is the Rules of the Supreme Court – See in particular O.59, Rules 21, 22 and 24 thereof. Essentially, when an application is made, a single Judge of the Court of Appeal has a discretion to award security for the costs to be occasioned by the appeal. An application must be supported by affidavit setting forth good and substantial grounds and reasons for the application. [15]

[40] The court has to balance the interests of the appellant and the respondent seeking at all times to do justice to both sides. The delicate nature of this balancing exercise was neatly expressed by Persaud JA in Una Welch v. Shafi Janali (1972) 19 W.I.R.66 at 67 in these terms:

"The court should guard against stifling the right of appeal which an unsuccessful litigant at first instance may have by ordering an appellant to give security for costs, or by fixing such security for costs as would make it impossible for him to prosecute his appeal. On the other hand, a respondent should not be made to suffer at the hands of an impecunious appellant who launches a frivolous appeal with the avowed object of depriving the respondent of the fruits of his judgment, or of creating unnecessary delay."

[41] Over the years, courts have developed some principles governing the award of security for costs at the Court of Appeal stage. For example, in deciding whether to award security for the costs of an appeal, the Court of Appeal is entitled to take into account the fact that the issues at the trial had been determined and, prima facie, it might be unjust to allow an appeal to proceed without securing costs for a successful respondent.

[42] It also seems to us from the decided cases, that, upon an exercise of the court's discretion, there are at least three factors or considerations which may be taken into account by the court.

[43] The first concerns the impecuniosity of the appellant who might be prevented by that very circumstance from being able to pay the costs of a successful respondent.

In Harlock V. Ashberry [1881] 19 Ch.D.84, Lord Jessel MR said: "For some time past it has been the settled practice, if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the [16] respondent's costs of the appeal if it should be unsuccessful." See also A.L. Smith LJ in Hall v. Snowdon, Hubbard and Co [1899] 1 Q.B.593 at 594.

[44] Secondly, the Court of Appeal may take into account the likely chances of success of an appeal without going into the merits of the appeal. In Kloeckner and Co A.G. v. Gatoil Overseas Inc. (Court Of Appeal Transcript, March 16, 1990) Bingham LJ at p.5 said:

"There will be some cases where a glance at the transcript may enable a view to be taken of the prospects. If the appeal appears to be quite hopeless, then it might well be that the court would the more readily order the appellant to give security. If, on the other hand, on a preliminary perusal of the transcript the appeal seemed very likely to succeed, then that might weight against making an order."

[45] Thirdly, the Court of Appeal must necessarily pay regard to the residence of an appellant. Generally, security for the costs of an appeal will be ordered where the appellant resides out of the jurisdiction of the court unless, of course, the non-resident appellant establishes that he has assets within the jurisdiction which are sufficient to answer a claim of the respondent and which would be available to execution - Grant v. Banque Franco – Egyptienne (1877) 2 C.P.D. 430 and Re: Apolinaris Co's Trade Marks [1891] 1 Ch.1.

[46] In Kloeckner (cited supra.) Bingham LJ at p.4 approved the following statement as a true representation of the existing practice.

"It is the settled practice of the Court of Appeal to award security for costs where an appellant would be unable by reason of impecuniosity to pay the costs of the appeal, and to award security for costs where the appellant is not resident within this jurisdiction and has either no assets here or insufficient assets to meet the costs if the appeal is unsuccessful, unless, in either case, there are reasons why, as a matter of discretion, security ought not to be awarded." [17]

[47] The onus is on the appellant to satisfy this court that the sums imposed by Williams JA as security for costs would halt further prosecution of the appeal. It is not enough for him to show that he does not have the assets in his own personal resources. He must also show that he is unable to raise the security from other sources. And there must be an affidavit setting out the evidential basis for those requirements.

The Submissions on behalf of the Appellant

[48] Mr. Turney Q.C. sought leave and was granted it not to argue the grounds of appeal seriatim but together since, in his view, similar arguments applied to the learned Justice of Appeal's approach to both the undertaking as to damages and security for costs.

[49] Counsel submits that the learned Justice of Appeal, in fortifying the undertaking as to damages by a further US$2 million had imposed an excessive and oppressive restraint on Locke's right of appeal. Whether he was a resident or not, he submits, he was entitled to have his appeal heard without the imposition of a stifling condition.

[50] Counsel relied upon Sir Lindsay Parkinson and Co. Ltd. v. Triplan Ltd [1973] 2 AER 273 at 283 et seq. Mr. Turney Q.C. uses it for the proposition that, in an application for security for costs, two of the circumstances which a court of appeal should consider are whether the appeal is bona fide and not a sham and whether the appeal has a reasonably good prospect of success.

[51] These were matters which Lord Denning MR had said in Sir Lindsay Parkinson at pp.285 and 286 could be taken into account. Also cited were Innovare Displays Plc v. Corporate Booking Services Ltd, (1991) T.L.R. February 20, 1991, and [18] Europa Holdings Ltd v. Circle

Industries (UK) Plc [1993] BCLC 320, and Re Unisoft Group Ltd (No.2) [1993] BCLC 532.

[52] Although on general principle one can have no objection to giving consideration to matters such as the genuineness of an appeal and its probable chances of success, we must necessarily point out that the citations above all related to applications under a specific provision of the Companies Act of the United Kingdom.

[53] When Sir Lindsay Parkinson was decided, the U.K. Companies Act 1948 was in force. The relevant section was 447. The other cases cited by Mr. Turney were brought under Section 726 of the Companies Act, 1985. With only a slight variation in language, the 1985 provision is virtually identical to that of 1948.

It provides:

"Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."

[54] On the other hand, under the Barbados Rules of the Supreme Court (R.S.C.) O.59.,R.21 the powers of a single Judge of the Court of Appeal in matters such as those before us are expressed in very wide discretionary terms. Thus it is provided:

"21(1) 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) a stay of execution on any judgment or order appealed from pending the determination of such appeal; [19]

(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.

(2) 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."

[55] It will be immediately obvious, upon a careful reading of the two provisions that the section in the U.K. statute is specific to the case of a limited liability company, where it appears that the company will be unable to pay costs.

Mr. Locke has sued and appealed in his personal capacity. R.S.C. Order 59.,R.21 is not as restrictive as the U.K. Companies Act provision. It is more elastic. In the circumstances I do not find that the English cases cited by Mr. Turney Q.C. are particularly helpful except as to the general point that an appeal court may take into account the prospects of success of an appeal.

[56] Admittedly, there is authority for the proposition that, on an application for security for costs pending appeal, a court is entitled to pay regard to the prospects of success of the appeal – per Lord Denning MR in Sir Lindsay Parkinson at p.285 "h" and Bingham LJ (as he then was) in Kloeckner and Co. AG v. Gatoil Overseas Inc. (cited above).

[57] But we do not accept that the learned Justice of Appeal should not have exercised his discretion as he did without saying explicitly that he found that the appeal had a good prospect of success. It was only one of several factors that he was called upon to weigh in the exercise of his discretion. [20]

[58] In this appeal, however, both Counsel agree that Williams JA never had before him the judgment of Payne J and the matter of considering the prospects of success of the substantive appeal was not properly argued before him. In fact, this court was left with the irresistible impression that the point was now being taken before us for the first time.

[59] Can Williams JA be faulted for not weighing among the factors which he did consider a point or factor which Counsel omitted to urge for his consideration? We think not. We do not believe that in such a situation it can properly be said that the learned Justice of Appeal failed to take into account a relevant consideration that could have affected the exercise of his discretion. The matter was, apparently, not present to his mind or the minds of Counsel. As a matter of practice, let us warn that this court will not allow a point to be argued before it if it is apparent that the point had not been raised in the court below. Such a tactic may well be considered an abuse of process.

[60] Nevertheless, Williams JA did observe that the appeal was "not frivolous" and it seems to us that, although such a finding is not the same as a finding going to the likelihood of success, it suggests that the learned Justice of Appeal felt some confidence that the appeal raised serious issues and was not being pursued for obstructive reasons.

[61] Counsel also urged before us that certain hearsay statements in the form of a newspaper report were admitted in evidence through Ms. Kentish's affidavit in reply. In the newspaper exhibit it was said that one of the directors of Sandals had said that the Paradise hotel property was not for sale. It was to be developed. Counsel [21] argued that in so far as Williams JA had given some weight to unsolicited offers of purchase, he ought to have adverted to the argument that there could be no loss of profit if disposition of the shares and the real property was frozen by reason of the injunction.

[62] Mr. Turney Q.C. also advanced an argument that there was what he called "A Cross Appeal" by the Respondents arising out of the judgment of Payne J and the learned Justice of Appeal did not impose any conditions or sanctions on the Respondents arising out of the "Cross Appeal". With the greatest respect, it does not seem to us that there is a cross-appeal properly so called. There is a Respondent's Notice which seeks to

affirm the judgment of Payne J. It was filed pursuant to R.S.C.O.59.,R.10(b) which permits a respondent to a notice of appeal to contend that the decision of the court below should be affirmed on grounds other than those relied upon by that Court.

[63] In any event, we should have thought that where, as in the present case, there is a community of interests between the Respondents, a court would be entitled in its discretion to decline to order security for costs when one of the parties resides within the jurisdiction of the court and owns property inextricably linked to the subject matter in dispute such as in the case of Paradise.

[64] In respect of the argument that Williams JA had no jurisdictional basis for increasing both the undertaking as to damages and the original award of security for costs in the absence of a specific application by the respondents for such increases, it must be remembered that what was before the learned Justice of Appeal was an application seeking extensions of the injunction and the stay of execution. It was the appellant's application true enough. [22]

[65] But in determining such an application a single Judge of the Court of Appeal has wide discretionary powers and is not precluded from invoking principles of equity and seeking to do justice between the parties as is the clear implication of Section 38(2) of the Supreme Court of Judicature Act, Cap.117A – See paragraph 69 below. The Judge may impose such conditions as he thinks fit.

[66] We do not see why it should have been necessary in this matter for the respondents to have made a separate application in response to the Summons of the appellant. We are satisfied that, on the appellant's application for extensions of the stay and the injunction, the single Judge of the Court of Appeal was empowered under the Act to attach conditions such as he did, without more.

[67] Further, where, as here, the respondents' affidavit in opposition to the appellant's Summons itself asked the court to increase the undertaking as to damages and the award of security for costs, there was evidential material before the Judge on the basis of which he could attach such enhanced conditions in his equitable jurisdiction.

[68] In respect of the appellant's contention that the learned Justice of Appeal did not evaluate the hearsay evidence that the property was not for sale, we can only express surprise that such evidence was admitted and not struck out under O.41.,R.S.C. But it really does not lie in the mouth of the appellant to complain. He got an injunction against the disposition of the shares and the real property. If the real property was not going to be sold, what was the purpose of continuing the injunction as he had sought? The learned Justice of Appeal nevertheless still continued the injunction. [23]

Submissions on behalf of the Respondents

[69] Sir Henry Forde Q.C., for the Respondents, contends that there was no need for a separate application to extend either the order for security for costs or the quantum of the undertaking. He cites the Supreme Court of Judicature Act, Cap. 117A where it is provided in Section 38(2) as follows:

"(2) The High Court and the Court of Appeal respectively, may, acting on equitable grounds, and without limiting any other powers exercisable by either Court, stay any proceedings or the execution of any process in any cause or matter before the Court, subject to such conditions as that Court thinks fits."

[70] Williams JA as a single Judge of the Court of Appeal was empowered to attach such conditions as he considered fit when he came to adjudicate the appellant's summons. For after appealing the judgment in the Court below, Locke took out the summons seeking, inter alia, an extension of the injunction and the stay of execution. It seems to us axiomatic that in considering such application for extension, the Court was instinctively called upon to consider whether any or any further conditions should be attached to the injunction and the stay in accordance with section 38(2) and without the need for a separate application.

[71] However that may be, Mr. Alleyne's affidavit in opposition to the Summons invited the Court to refuse the further stay prayed for unless there was fortification of the undertaking as to damages by US$10 million and an increase in the quantum of security for costs. This was resisted by Ms. Kentish in her affidavit in reply. What was not resisted by Ms. Kentish, however, was the evidence of Mr. Alleyne that Locke was ordinarily resident out of the jurisdiction and that he lacked the personal resources to complete [24] the purchase of the property. Indeed, at the trial, it was said by Locke and his witness that some foreign investors ("the joint venture partners") were putting up the purchase money.

[72] Sir Henry submits that, before Williams JA, there was substantial affidavit evidence on behalf of the Respondents, deposing to a number of factors or considerations, which would have assisted Williams JA in the exercise of his discretion. Much of that evidence was unchallenged by Ms. Kentish. Indeed, no evidence was adduced on behalf of Locke as to his ability to meet the undertaking as to damages and, since he lived abroad, he could be required to provide security in any event.

Resolving the Issues

[73] In the course of his decision Williams JA was of the view that the Appellant's undertaking in damages needed to be "buttressed". It is to be remembered that the sum of US$1 million was paid into court before the case came on for trial. The learned Justice of Appeal sought guidance as to the quantum of a buttressed undertaking in the fair market value of the real property as at 1999 (the year of the Letter of Intent). The parties had then appeared to agree that value at US$19 million. Williams JA was careful to say that he examined two unsolicited offers with caution even though they were for US$25 million and US$26 million respectively. He gave some weight to those offers as being evidence of an appreciation in the market value of the property.

[74] Specifically, however, he took 5 "main factors" into account in increasing the quantum of the undertaking. These were: the parties' agreement on US$19 million; the unsolicited offers; the likelihood of an appreciation in the value of the property since 1999; the [25] prospect of the appeal not being adjudicated until the second quarter of 2002; that expenditure was being incurred in the upkeep of the property.

[75] It was after consideration of those factors that he increased the undertaking in damages. He said he was doing his 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". Thus he fortified the undertaking by a further US$2 million secured by the bond or guarantee which I mentioned earlier.

[76] We are unable to say that in so exercising his discretion the learned Justice of Appeal was wrong in law or acted contrary to principle. It is a substantial fortification. But the real property in issue is also of substantial value. It was a question of striking a balance between what would be too oppressive to the appellant and what would give the several respondents a measure of protection and security.

[77] Our own researches have unearthed a case which may be of some interest. It is Re: D.P.R. Futures Ltd [1989] BCLC 634. In this case, the joint liquidators of a company in trouble issued proceedings against the respondents to recover £2.3 million alleged to have been unlawfully withdrawn by them from the company. Other losses were in excess of £8 million. Before the issue of the proceedings the liquidators had obtained ex parte Mareva injunctions against the respondents. There was a cross undertaking by the liquidators of £200,000. In the proceedings before Millett J the joint liquidators sought to continue the injunctions limiting their undertaking to £2 million. [26]

[78] Millett J held the undertaking of £2 million to be sufficient. At p.640 "e" the learned judge said of one of the liquidators:

"It is right to require him to give an undertaking of an amount commensurate with the size of the company's assets and to take the risk that he may not be authorized by the court to have recourse to them to meet his liability. If the value of such an undertaking is considered insufficient in any particular case he should be required to fortify it by obtaining a bond or an indemnity from a substantial creditor, but in either case of a fixed amount. The court cannot avoid the need to make an intelligent estimate of the likely amount of any loss which may result from the grant of an injunction…But any such estimate can be reviewed from time to time and further fortification required if necessary…."

[79] In his judgment, an undertaking of £2 million was more than sufficient to cover any realistic estimate of loss likely to be occasioned to the respondents from the continuation of the injunctions in that case.

[80] For the reasons stated, we are of opinion that the fortification of the undertaking in this case was neither unreasonable nor oppressive as had been contended by Mr. Turney Q.C. We cannot say that the conclusion reached by Williams JA was one that, exercising a discretion de novo, we would not ourselves have reached in all the circumstances of this case. Accordingly, the Order of Williams JA will stand both in respect of the manner of providing additional support for the undertaking as to damages and the sanction to be applied in the event of default. However, the period of 21 days will commence from the date of this Order.

[81] In respect of the increase in the security for costs, Williams JA noted that the sum of $190,000 was to secure only the costs of Paradise up to close of pleadings. The matter had progressed greatly by the time it came before him. A long trial involving very eminent and senior local and Caribbean Counsel had ended and [27] there was clear indication of an appeal. Moreover, the costs of four defendants now had to be considered. In any event, in accordance with the recommended practice, Mr. Alleyne had exhibited a skeleton bill of costs which showed that costs in this matter were estimated at that time at BDS$1.4 million.

[82] We cannot say that the learned Justice of Appeal should have overlooked those matters in increasing the security for costs. We go so far as to say that he was under a clear and present duty to bear such considerations in mind.

[83] Moreover, the appellant Locke, through the affidavit of Ms. Kentish, provided no evidence whatsoever of those essential requirements to object to an award of security for costs by Williams JA. The affidavit sworn to in support of Locke's Summons did not provide any evidence of the three factors which a Court of Appeal may take into account upon a consideration of security for the costs of an appeal and to which reference was made at paragraphs 43 to 45. There is nothing in his affidavit evidence to suggest that Locke is unable to raise the security either personally or through his "joint venture partners." On the other hand Mr. Alleyne deposed that Locke was a non-resident appellant who lacked the personal resources to complete the purchase and had said that he was relying on his "joint venture partners". There was nothing to suggest that the substantive appeal had a good chance of success.

The appellant has failed to discharge the onus imposed on him having regard to the existing practice as adumbrated by Bingham LJ. – See paragraph 46 above. [28]

[84] In the circumstances, having regard to (a) the fact that the original sum of $190,000 applied to one defendant/respondent only and up to the close of pleadings; (b) the fact that this matter has been tried and is under appeal; (c) the fact that provision has to be made for the costs of 4 respondents up to the stage of appeal; (d) the production of a skeleton bill of costs in an amount of BDS$1.4 million, (e) the non-residence of the appellant within the jurisdiction, and (f) O.62.,R.7(2)(a) that empowers the Registrar, on taxation, to take into account the value of property, we are unable, on legal principles and the evidence, to disagree with an increased award of security for costs.

[85] However, we think that the order for security for costs should be more easily determinable. The documentation filed in these matters from commencement of proceedings to the present time is voluminous. The Attorneys-at-Law have obviously put in a tremendous amount of work on these matters and we cannot ignore the well established principle of Bowen LJ in The Annot Lyle (1886) 11 P.114 that successful defendants should not be denied the fruits of their litigation.

[86] Under the R.S.C.,O.62, the process of taxation of costs can be drawn out. It involves the initial taxation by the Registrar, the possibility of review by the Registrar and then a possible appeal therefrom to a Judge in Chambers.

[87] Having regard to all the circumstances, we think it fair that the order of Williams JA as to security for costs be varied to make it more easily determinable. We order that a sum of BDS$1.3 million (discounting the previous payment of $190,000) be paid into Court within 21 days from the date of this Order. In default of payment so [29] ordered, all of the appeals will forthwith stand dismissed with costs to the Respondents to be taxed and certified fit for three Attorneys-at-Law.

[88] In the opinion of this court no ground has been sufficiently shown for interfering with the exercise by the learned Justice of Appeal of his discretion to fortify the undertaking as to damages and increase the award of security for costs. The consolidated appeal is accordingly dismissed. The costs of the consolidated appeal are certified fit for three Attorneys-at-Law and allowed to the Respondents.

MARAJ v. STRAKER revisited

[89] Counsel have invited us to revisit the decision in MARAJ v. STRAKER (1984) 19 Barb. L.R. 193 to determine whether it may have been given per incuriam or whether there is a conflict between the relevant provisions of the Supreme Court of Judicature Act, Cap.117A and the Rules of the Supreme Court made under the authority of that Act.

[90] In that case Denys Williams J (as he then was) upon a construction of O.59.,R.21(1) and (2) cited at paragraph 54 above, held that a single Judge of the Court of Appeal has the power to vary or discharge an order made by another single Judge of the Court of Appeal.

[91] Counsel suggest that the Maraj decision only construed O.59., R.21(1) and (2) but did not advert to Sections 60 and 53(2) and (3) of the Act whose interpretation may produce a result anomalous with that previously given in Maraj. [30]

[92] Section 60(1) of the Act provides that:

“Subject to this section and section 53, every appeal or reference to the Court of Appeal, and every matter preliminary or incidental to such an appeal or reference may only be heard before 3 judges of that court, and, if necessary, be determined according to the opinion of the majority.”

[93] Section 53(1) is to this effect:

“53(1) Subject to subsection (4) of section 60, a single Judge of the Court of Appeal may exercise any of the following powers of the Court of Appeal under the Criminal Appeal Act, namely….”

The section then spells out ten (10) powers of a single Judge in respect of criminal appeals.

Subsections (2), (3) and (4) deal with the powers of a single Judge in civil appeals. They enact as follows:

“(2) Subject to subsection (4), a single judge of the Court of Appeal may, as he thinks fit in any cause or matter pending before that Court,

(a) give any directions incidental to the appeal and not involving the decision of the appeal;

(b) at any time during the period of vacation prescribed by rules of court, make

(i) an order granting leave to appeal to the Court of Appeal, or

(ii) any interim order to prevent prejudice to the claims of any parties pending an appeal.

(3) An appellant who is aggrieved by the decision of a single judge made under subsection (1) is entitled to have the matter re-heard and determined by the Court of Appeal as constituted under section 60; and every order made under subsection (2) by a single judge, other than an order granting leave to appeal, may be discharged or varied by the Court of Appeal.

(4) Subsection (2) does not apply to an appeal under the Criminal Appeal Act.” [31]

[94] We hasten to point out that there is no subsection (4) of section 60 and there is, therefore, a clear error in the first line of section 53(1).

[95] Counsel question whether it is appropriate in an interlocutory civil appeal for one judge of the Court of Appeal to vary an interlocutory order in a civil appeal made by another Judge of the Court of Appeal.

[96] The Supreme Court of Judicature Act, Cap. 117A, was first enacted in 1981 when there was no separate Court of Appeal in Barbados. Provision for such a separate Court of Appeal was made by amendment to the 1981 Act in 1990. Section 53(2) which invests a single Judge of the Court of Appeal with authority to give directions incidental to a matter pending before the Court of Appeal and not involving the decision of the appeal is in very similar terms to section 52 of the Supreme Court of Judicature Acts, 1873 and 1925 of England. Both the English and the Barbadian statutes also provide that every such order made by a single Judge may be discharged or varied “by the Court of Appeal.”

[97] These statutes give the power to vary or discharge to the full Court of Appeal when, in a pending cause or matter, a single judge of that Court is called upon to give directions incidental to the appeal.

[98] Under section 60(1) cited above, the full Court of 3 judges may hear and determine every appeal or reference to that Court as well as every matter “preliminary or incidental to such an appeal”. Likewise, according to section 53(2), directions incidental to an appeal given by a single judge of the Court of Appeal, except an order granting leave to appeal, may be discharged or varied by the Court of Appeal. [32]

Thus the full Court of Appeal, not a single Judge, are given the power to hear and determine matters preliminary or incidental to an appeal – (section 60) as well as to vary or discharge orders made by a single Judge under section 53(2).

[99] The complication arises when one considers R.S.C.).59,R.21(2) – See paragraph 54 above. The Rules of the Supreme Court were made on February 16, 1982, by the then Judicial Advisory Council under section 46 of the Act and came into force on April 1, 1982. They are subsidiary legislation and, as such, in so far as they are at variance with the parent statute, they may be deemed invalid.

[100] It therefore seems to us that the R.S.C. allow a single judge of the Court of Appeal to hear and determine such matters as security for costs, stays of execution and applications for injunctions, pending appeal. Nevertheless to the extent that a single Judge is given authority to vary or discharge the order of another single judge, O.59.,R.21 does appear to be in conflict with the provisions of the parent Act. Certainly in this case, the matters in issue and the subject of the interlocutory appeals, went beyond "directions incidental to the appeal" under section 53(2) of the Act.

Using the language of section 60 of the Act, we think that those matters which were in issue before the single Justice of Appeal, were in the nature of matters "preliminary or incidental" to the substantive appeal. If we are right, then the order of a single Judge relating to such matters could only properly be varied by a court of three (3) judges. [33]

[101] In Maraj v. Straker, the learned judge did not construe the provisions of the Act vis-à-vis the content of the Rule and, we think, he fell into error. The conflict and anomaly between the two pieces of legislation will have to be cured by appropriate amendment. [34]

Chief Justice

Justice of Appeal Justice of Appeal