

IN THE HIGH COURT OF BELIZE A.D. 2023

CLAIM No. 42 of 2020

BETWEEN

DORIAN GRYFFYN

CLAIMANT/RESPONDENT

AND

FBS MARKETS INC.

DEFENDANT/APPLICANT

BEFORE THE HONOURABLE MADAM JUSTICE MARTHA ALEXANDER

Submissions Date: June 19, 2023

Delivery Date: July 18, 2023

APPEARANCES:

Mrs. Ashanti Arthurs Martin and Ms. Erin Alexis Quiros, Counsel for the Claimant/Respondent

Mr. Allister T. Jenkins, Counsel for the Defendant/Applicant

DECISION ON APPLICATION FOR STAY OF EXECUTION

INTRODUCTION

1. The applicant filed a notice of application dated April 12, 2023 (“the application”) seeking a stay of execution of the judgment order dated February 24, 2023 until the determination of the appeal. The application is supported by the affidavit of Igor Medet who states that the applicant will be ruined if the stay is not granted because of the huge award and the fact that the applicant has no assets in Belize to satisfy the judgment. The applicant also raises as a

special circumstance of the case that the respondent is impecunious and that sums paid to him would be spent and not be recoverable.

2. The respondent says that this is not a proper case for the exercise of the court's discretion to suspend execution, since the applicant has failed to meet the test of ruination to get the order.
3. I find that there is legitimate ground for granting the stay of execution and make the order. The applicant has satisfied the test of ruination and has a prospect of success in the appeal.

FACTS

4. I believe only the briefest of facts are necessary to give some context to the matter. The respondent opened a trading account with the applicant sometime in December, 2017 under specific terms and conditions of use contained in the "Customer Agreement" ("the agreement"). Deposits and withdrawals were made using a Skrill account only. At some point, the system was breached by third parties or suspicious activities by the respondent using multiple devices and so was disabled by the applicant. Subsequently, the applicant closed the Skrill account and all existing trades in progress at the time, informing the respondent of the reasons for the closure and that he could enable the trading account, through a verification procedure.
5. By January 21, 2019, the respondent who was experiencing issues with withdrawal of funds from the trading account requested an alternative means to withdraw funds but this was refused, as the agreement provided only for funds to be withdrawn using the same method to deposit the funds (i.e. the Skrill account). The agreement also contained a force majeure clause entitling the applicant, in exceptional circumstances, to decline the respondent's funds withdrawal and included a clause that the respondent, "*accepts the risks of financial losses caused by force majeure circumstances.*" The respondent sued for US\$1,123,611.90,

which were sums allegedly remaining in the trading account, and/or alternatively for damages in the same amount for breach of contract, frustration and unjust enrichment.

JUDGMENT

6. In a judgment issued on February 24, 2023 the court ordered:

“(1) Judgment is granted to the claimant.

(2) The Claimant’s claim succeeds and the Claimant is entitled to payment by the Defendant of the sum of US\$1,123,611.90 under the Customer Agreement which the Defendant breached by retaining the funds in the Claimant’s trading account when it was terminated by the Defendant.

(3) The Defendant shall pay interest to the claimant on the sum of US\$1,123,611.90 from January 21st, 2020 at the rate of 6% per annum until the date of this judgment (18th January, 2023); and thereafter at a rate of 6% per annum on the declining balance until the same is paid in full.

(4) The Defendant shall pay the Claimant the prescribed costs under the Civil Procedure Rules which are to be calculated and assessed on the sum of US\$1,123,611.90, totaling BZ\$126,236.12.”

7. The applicant filed a Notice of Appeal dated March 09, 2023 in Civil Appeal No. 7 of 2023 and now seeks a stay of execution of the judgment.

THE LAW ON STAY OF EXECUTION

8. There is a two-fold test for a stay of execution. The applicant must show that he has an appeal with some prospect of success and that without the stay of execution, he will be ruined. This test was set out in *Linotype-Hell Finance Ltd. v Baker*¹ where Straughton LJ stated:

¹ [1993] 1 WLR 321

“It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution.”

9. The ruination test has been adopted and applied by the Belize Court of Appeal in the case of ***Commissioner of Sales Tax et al v Sanitation Enterprises Ltd***² by Justice Sosa who in refusing a stay stated, “... while the appeal may arguably have some prospect of success, I do not think that the material contained in the affidavit evidence succeeds in showing that the Applicants would stand to be ruined absent a stay ... Undue hardship falls short in my opinion of ruin.”
10. There must be some evidence provided of impending ruin together with an appeal having some prospect of success for the court to exercise its discretion to grant a stay. The court will look at all the circumstances of the case in arriving at a decision.

ANALYSIS

11. It is a general practice for a person in whose favour a judgment is given to enjoy its fruits by enforcing it, so an appeal does not suspend execution. A judgment takes effect immediately. An applicant who seeks a stay, therefore, must persuade the court why it should suspend a judicial determination of the merits of a dispute.
12. The applicant submits that it has a good reason for appealing the judgment. It argues that it will likely face undue inconvenience and delay should it be made to approach the Court of Appeal to deal with the present application, as there is no guarantee that it will secure a hearing in the next session in October 2023. There is no dispute that the High Court has the power to entertain this application, having retained the jurisdiction, in cases of undue inconvenience and delay: see the Senior Courts Act.³ This position was confirmed recently

² Civil Appeal No. 36 of 2010

³ Rules 16(1)(c), 17 and 19 of Order II of the Court of Appeal Rules contained in Senior Courts Act

by Chabot J in *Edmond Tiabo v Englebert Tiabo*⁴, who after outlining the provisions of the Senior Courts Act concluded that the High Court did not lose this jurisdiction.

13. The Senior Courts Act provides:

“16(1) In any cause or matter pending before the Court a single judge of the Court may upon application make orders for –

...

(c) a stay of execution on any judgment appealed from pending the determination of such appeal;

17(1) Applications referred to in rule 16 shall ordinarily be made to a judge of the Court where this may cause undue inconvenience or delay, a judge of the Court below may exercise the powers of a single judge of the Court under that rule., but,

...

19(1) An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed from, except so far as the court below or the Court may order, and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.” [Emphasis added]

14. There is nothing that bars this court from disposing of the present application. I turn now to the principles that guide when a stay of a validly obtained judgment of the court can be granted.

GROUND FOR STAY

(a) Test of Ruin

15. The court has wide discretion in deciding the issue of a stay. It must be just to suspend execution of a judgment. A stay will be granted if the applicant would face ruin without the

⁴ Claim No. 502 of 2021

stay and an appeal has some prospect of success. An applicant is required, therefore, to show evidence that some serious risk of irreparable harm exists that will cause it to be ruined if the stay is not granted. In deciding whether or not to exercise its discretion to grant or refuse the stay, the court will look at all the circumstances of the case. Moreover, the evidence in support of a stay needs to be full and frank if the court is to exercise its discretion to suspend execution.

16. Generally, a bald assertion of likely ruin, without evidence, will not attract a stay. It is the applicant who must satisfy the court, by evidence, that without a stay, it will be ruined. In Mr. Medet's third affidavit in support, he states that the judgment sum is substantial, consisting of BZ\$1,123,611.90 plus costs of BZ\$126,236.12 and interest of 6% per annum from January 21, 2020 until the judgment date of January 18, 2023; and continuing at the same rate on the declining balance. Given that the applicant has no assets in Belize, it will be ruined if the stay is refused.
17. Mr. Medet identifies as "special factors", also, the fact that the respondent confirms he is impecunious in his first affidavit dated June 19, 2020; claims he is unemployed and receives welfare assistance and has debts that need to be paid. Mr. Medet asks that these factors be considered by the court to conclude that any sums paid to the respondent will be spent in its entirety and that it is likely that should the order be reversed on appeal, the applicant will not be able to recover the funds.
18. Counsel for the respondent submits that impecuniosity it is an irrelevant consideration and that the applicant's arguments that payment of the judgment award will be spent in its entirety by the respondent are speculative. There is no evidence that the respondent will "*automatically 'take and spend' in Sweden*" any or all the monies paid under the award. Further, she advances that there is no risk of irreparable harm to the applicant since it has no assets in Belize. Moreover, the applicant has provided no evidence of its financial means, its assets or how the payment of the judgment sum will lead to its ruin such as to satisfy the court to grant the stay. In any event, counsel for the respondent argues that there is

absolutely no “risk of enforcement” as the respondent does not have a final order from the courts in Belize, and there are no assets to enforce against in Belize so a stay is not needed.

19. I do not agree that impecuniosity is an irrelevant consideration in the circumstances of this case. The award is substantial and the issue of recoverability is a live one. Granted the applicant does not show, by detailed evidence, how a refusal of the stay will stifle its commercial growth and do irreparable economic harm. It focuses on the admitted impecuniosity of the respondent, the parties’ lack of assets in Belize, the amount of the award and how the applicant would recover sums paid if the appeal is successful. The cases support a finding that where an applicant will be unable to recover the money he is required to pay by the judgment if he wins an appeal, it is a valid and reasonable basis for granting a stay.

20. A pragmatic approach was taken to this question in ***Hammond Suddard Solicitors v Agrichem International Holdings***⁵ where that court set out the principles for the exercise of the discretion as dependent on:

“... all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?” [Emphasis added]

21. The approach in ***Hammond Suddard*** was followed by George-Creque JA in the Eastern Caribbean Court of Appeal case of ***Marie Makhoul v Cicely Foster***. George-Creque JA

⁵ [2001] ECWA Civ. 1915, LTL 18/12/2001 para 22

examined the nature of the case and the likely consequences flowing from enforcement of the judgment against the backdrop of the overriding objective to deal with cases justly. Finding that the appellant had failed to provide evidence to support why she was not making the payments save that the non-payment was “*mainly an oversight*”; and that she was not forthright or frank with the court, he refused to grant the stay. This case shows the need to be open and honest with the court to support a case of ruination. Unhelpful, bald assertions without factual basis or evidence will not attract a stay.

22. In ***Sagis Investment Limited v Radio Krem Limited***,⁶ the Belize Court of Appeal stated that, “[I]n relation to a judgment to pay money, it is a ground for granting a stay that the Defendant will be unable to recover the money the judgment requires him to pay if he wins on appeal.” In ***Sagis***, Barrow JA examined all the circumstances of the case and refused the stay stating, “I really cannot accept that the performance of the court’s order would cause any real harm to Krem or force it to forgo commercial growth.”⁷

23. The starting point for a stay is showing the risk of ruin and a court must make an order that accords with the interest of justice, by balancing the alternatives to see which of them is less likely to produce injustice. However, “*where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal.*”⁸

24. A court, therefore, ought not to exercise its discretion to grant a stay without taking into consideration all the circumstances of the case and only do so if the justice of the case demands a stay be ordered.⁹ In this exercise I, therefore, considered if a stay will create injustice by rendering an appeal, with some prospect of success, insignificant. Notably, the counsel for the respondent did not address the appeal or its prospect in her submissions.

⁶ Civil Appeal No. 13 of 2008

⁷ Ibid pages 12-13, para. 18

⁸ *Combi (Singapore) Pte Limited v Rammath Sriram* [1997] EWCA Civ 2164 per Philip LJ

⁹ *BCB Holdings Limited et al v Attorney General of Belize* Claim No. 743 of 2009

(b) Prospect of Success

25. At this stage, it is not for me to determine if the applicant's appeal will disturb the trial judge's order but to consider if there is a prospect of success in the appeal. A court will only grant the stay on the merits or if there is some prospect of success in the appeal and a risk of injustice in the circumstances. The applicant submits that its appeal has merit because it reveals errors of fact and law, including contradictory conclusions arrived at by the trial judge. The agreement contains express terms for terminating the trading account, which were used to close it. The applicant is relying on these terms to show that by using multiple devices and/or IP addresses to access the trading platform, it did have reasonable grounds to suspect the respondent had given unauthorized access to third parties.
26. I considered the argument that there was no evidence that the applicant was abandoning its strict legal rights for the trial judge to conclude there was a waiver of its rights. I noted that the applicant clearly identified, in its grounds, why it considered the trial judge to have fallen into error by implying an alternative method of payment. The applicant submits that a waiver of a breach in law only arises if, by conduct or words, it led the respondent to reasonably believe it is not insisting on its strict legal rights. There was no evidence of such conduct or words.
27. Whilst, at this stage, it is not for me to delve too deeply into the likelihood of success of the appeal, the applicant has put before me some valid considerations on its prospect of success. I did consider the likely impact if the applicant succeeds with its arguments on waiver, specifically that it never relinquished its rights to rely on the clear terms for refusing to allow funds to be withdrawn. I do not find that the appeal lacks any merit.
28. I considered all the circumstances, including the thin details of the applicant's financial status and if the failure to provide proper details meant that the application should be refused. This information no doubt would have helped in strengthening the present application but its absence must be balanced against other factors that would allow for the suspension. This is a substantial award; and the undisputed evidence points to the respondent's impecuniosity and both parties have no assets in the jurisdiction.

29. In *George Dueck v Thomas Pound et al*,¹⁰ a stay was granted where the judgment award was substantial and it was found that the judgment creditor would be unlikely to repay the debt if the applicants were successful in the appeal. The stay was granted despite the failure of the applicants to provide the court with detailed particulars of their financial position.

30. In the present case, I considered how likely it would be for the applicant to recover the monies from the respondent if the stay is refused and it wins the appeal. I also considered if real harm will befall the applicant or respondent by suspending the execution. I bore in mind counsel for the respondent's argument that without a final judgment, the risk of enforceability was slim to nil. The judgment is for a substantial sum; both parties have no assets in Belize; the respondent is impecunious and is not resident in Belize. These are special circumstances that I could and did consider in deciding this matter.

31. In the present case and considering all the circumstances, I find that the greater risk of injustice lies in refusing the stay.

32. Costs should follow the event and I would order that costs be in the cause.

DISPOSITION

33. It is ordered that:

- (i) The application to stay the execution is granted with costs to be in the cause.

Justice Martha Alexander
Judge of the High Court of Belize

¹⁰ Claim No. 409 of 2009 per Griffith J