



In The Court of Appeal of Bermuda

CIVIL APPEAL NO. 8 OF 2013

IN THE MATTER OF AN APPLICATION FOR INFORMATION ABOUT
A TRUST

RULING ON APPLICATION FOR INTERIM STAY

(In Court)

Date of hearing: 17th May 2013

Date of ruling: 20th May 2013

Mr Andrew Martin, MJM Limited, for the Applicant (“the Protector”)

Mr Narinder Hargun, Conyers Dill & Pearman, for the First Respondent (“R1”)

Mr Keith Robinson, Appleby Bermuda Ltd, for the Second Respondent (“the Trustee”)

Introduction

1. On 14th May 2013, sitting as a single Judge of the Court of Appeal, I gave a ruling dismissing the Protector’s application for a stay of execution pending appeal of an order made by Kawaley CJ on 24th April 2013. The order provided that the Trustee must disclose the Trust’s audited accounts to R1. The instant ruling is to be read in conjunction with that previous ruling.

2. The Protector has applied for an interim stay pending a renewed application for a stay to the full Court of Appeal. The full Court will be available to hear the renewed stay application in June, but it will not be available to hear the full appeal until November.
3. I am required to determine 2 issues:
 - (1) Whether I have jurisdiction to grant an interim stay (“jurisdiction”);
and
 - (2) If so, whether I should exercise that jurisdiction (“merits”).

Jurisdiction

4. The Court’s jurisdiction is derived from the Court of Appeal Act 1964 (“the Act”) and regulated by the Rules of the Court of Appeal for Bermuda (“the Rules”).
5. The relevant provisions of the Act include:

“Interpretation

1 In this Act, unless the context otherwise requires—

“appeal” means an appeal from the Supreme Court to the Court of Appeal;

Determination of civil appeals

13 Upon the hearing of a civil appeal the Court may allow the appeal in whole or in part or may dismiss the appeal in whole or in part or may remit the case to the Supreme Court to be retried in whole or in part and may make such other order as the Court may consider just.

Interlocutory matter; single Justice of Appeal

14 To the extent prescribed by Rules the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any Justice of Appeal in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions:

Provided that every order made by a Justice of Appeal in pursuance of this section may, on application by the aggrieved party and subject to any Rules, be discharged or varied by the Court of Appeal.”

6. The relevant provisions of the Rules, which were issued pursuant to section 9 of the Act, include:

“2/38 Interlocutory applications. Power of single Judge

38(1) In any cause or matter pending before the Court, a single Judge may hear, determine and make orders on any interlocutory application.

(2) Any order made by a single Judge in pursuance of this rule may be discharged or varied by the Court on the application of any person aggrieved by such order.”

7. The Protector submits:

- (1) The full Court has jurisdiction under section 14 of the Act and Order 2/38(2) of the Rules to vary my order refusing a stay.
- (2) I have jurisdiction under section 14 of the Act and Order 2/38(1) of the Rules to grant an interim stay pending the determination of her section 14 application to the Full Court.

8. R1 submits:

- (1) The jurisdiction of the Court is statutory, and the Court therefore has no inherent jurisdiction to grant an interim stay. This applies to both the full Court and the single Judge. R1 relies on the decision of the full Court in National Iranian Oil Company v Ashland Overseas Trading Limited, Civil Appeal No 15 of 1987, in which the Court held that, having granted conditional leave to appeal to the Privy Council, it had no inherent jurisdiction to grant a stay until the determination of that appeal.
- (2) The full Court’s jurisdiction under Order 2/38(2) of the Rules is limited to discharging or varying a positive order made by the single

Judge. Thus it cannot discharge or vary a negative order, such as an order refusing a stay.

- (3) The single Judge's jurisdiction to deal with interlocutory matters is limited to deciding the substance of interlocutory applications. It does not extend to making ancillary orders in aid of any application that a party may make to the full Court under Order 2/38(2) of the Rules.
 - (4) The jurisdiction of the single Judge is therefore to be contrasted with the jurisdiction of the full Court under section 13 of the Act to make such orders as it sees fit on the hearing of the substantive appeal.
9. R1 referred me to the decision of the full Court in Bierman and Bierman's Concrete Products Ltd v Minister of the Environment [2002] Bda LR 22 a paras 46 – 50. The case confirms that the powers of the single Judge are confined to interlocutory matters and that the Rules cannot override the Act. Neither of those principles is in dispute.
 10. In my judgment the policy behind section 14 of the Act was that any party aggrieved by the order of the single Judge could apply to the full Court, which would then consider the matter afresh. This involves the full Court having jurisdiction to make any order that the single Judge could have made.
 11. The drafting technique by which this result is achieved is to give the full Court power to discharge the order of the single Judge, so that there is no order of the Court in force, or to vary the order of the single Judge, so that there is an order of the Court in force but one which is different from the order as made by the single Judge. To this end, the words "*discharged or varied*" are to be broadly construed. I am satisfied, for instance, that the full Court has power to vary an order refusing a stay so that the order instead grants a stay.
 12. I therefore reject R1's submission, which was not supported by authority, that the full Court only has power to discharge or vary positive orders. It would, for example, be a surprising anomaly if the full Court had power to

discharge an order granting a stay but did not itself have power to grant a stay.

13. The jurisdiction of the full Court to discharge or vary an order made by the single Judge would on occasion be rendered nugatory if the single Judge did not have jurisdiction to stay his order pending a renewed application to the full Court. Thus, in order to give effect to the scheme of the Act, it is necessarily implicit in section 14 that the single Judge has power to order such a stay. I therefore reject R1's submission that the single Judge's jurisdiction to deal with interlocutory matters is limited to deciding the substance of interlocutory applications.
14. It is in the circumstances unnecessary for me to consider whether the Court has any inherent jurisdiction. However the fact that it was created by statute is not necessarily determinative of the issue. See Bennion on Statutory Interpretation, Fifth Edition, at 111:

“Where a court is freshly created by Act it can possess only the jurisdiction expressly or by implication conferred by that or an amending Act. However the courts are now tending to the view that, subject to any contrary enactment, every court has inherent jurisdiction to regulate its own procedures.

Inherent in the court is power to do those acts which the court needs must have to maintain its character as a source of justice (see Lord Diplock in Bremer Vulkan Schiffbau Und Maschinen Fabrik v South Indian Shipping Corpn [1981] AC 909 at 977) ...”

15. In summary, I find that I have jurisdiction to grant an interim stay of my previous ruling until the full Court can hear the Protector's renewed application for a stay.

Merits

16. The principles applicable to a stay were set out in my previous ruling. They were expressed succinctly by Sullivan J in Department for Environment v Downs [2009] EWCA Civ 257 at para 8:

“A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.”

17. Here, as in the substantive application for a stay, the “*solid ground*” relied on by the Protector is that once the accounting documents have been disclosed they cannot be undisclosed. That is true, but I am satisfied that the confidentiality agreement that R1 will be required to sign as a condition for obtaining such disclosure is an adequate safeguard against any harm that the Protector might otherwise suffer.
18. I declined to order a stay pending the hearing of the appeal as I was not satisfied that the Protector would suffer any real prejudice as a result. (Neither was I satisfied that R1 would have suffered any real prejudice if I had decided the application the other way.) There was therefore no good reason to depart from the premise that a successful litigant is entitled to enjoy the fruits of litigation.
19. Contrary to my initial view, I can on reflection find no convincing conceptual difference between declining to order a stay pending the hearing of the substantive appeal and declining to do so pending the hearing of a renewed application for a stay before the full Court. In both instances: (i) the full Court may find that the accounting documents ought not to have been disclosed – or, in the latter case, at least not yet; (ii) if so, the accounting documents can be retrieved; and (iii) there will be adequate safeguards in place preventing the misuse of the accounting documents, such that their premature disclosure will not have rendered the appeal, of which they form but a part, or renewed application for a stay, nugatory.
20. The sole factual difference between these two scenarios is that the full Court will be unable to hear the substantive appeal until November 2013 but can hear the renewed application for a stay in one month’s time in June 2013. The difference between six months and one month is not vast. But it is sufficient to tip the balance of convenience in favour of ordering a stay.

Decision

21. I grant the Protector’s application for a stay pending the determination of her renewed application for a stay by the full Court. The stay will last until such determination, or alternatively the end of the June 2013 session of the Court, whichever is sooner. It is conditional upon the Protector filing a renewed application for a stay within seven days after the date of this ruling.
22. Costs are reserved to the full Court.

Dated this 20th day of May, 2013 _____

Hellman J