



In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 435

BETWEEN:

JAMES A.L. PENISTON

(trading as)

EAST BANK CONSULTANTS

Plaintiff

-v-

LIVIO FERIGO

-and-

CIDALIA FERIGO

Defendant

RULING

(in Chambers)

Application to stay second action pending payment of costs ordered in earlier action which was struck-out-inherent jurisdiction of the Court-principles governing exercise of jurisdiction to grant a stay

Date of hearing: March 9, 2017

Date of Judgment: March 13, 2017

Mr Llewellyn Peniston in person

Mr Steven White, Cox Hallett Wilkinson Limited, for the Respondents

Introductory

1. The Specially Endorsed Writ of Summons in this matter was issued on November 24, 2016 seeking essentially the same relief (compensation for services rendered under a construction contract the benefit of which had been assigned to the Plaintiff) as was sought by the present Plaintiff against the first of the two Defendants to the present action in Civil Jurisdiction 2015: No.377 (“the First Action”). The First Action was struck-out on October 31, 2016: *East Bank Consultants-v-Livio Ferigo* [2016] SC (Bda) 88 Civ (31 October 2016) and costs were awarded to the Defendant. Those costs were taxed and allowed on February 8, 2017 in the amount of \$14,713.
2. The Defendants in this case apply by Summons dated March 1, 2017 for:

“(a) an order staying the Specially Endorsed Writ pending payment of the costs taxed but as yet unpaid by the Plaintiff in Case No. 377 of 2015 and/or(b)such further or other relief as may be appropriate”.

3. This Court has never seemingly before considered the principles applicable to staying proceedings on the grounds that costs in earlier related proceedings remain unpaid. The Plaintiff did not have the temerity to challenge the authorities which supported the proposition that such stay should ordinarily be granted head on. Instead he centrally and evocatively contended that *“the door of justice should not be slammed in the face of a litigant seeking to drink from the fountain of justice”*.
4. The factual underpinning for the assertion that a stay would be inherently technical and unjust was the assertion, not supported by the evidence before the Court in this action, that the Defendants had admitted the debt as demonstrated by evidence filed in the First Action. I accordingly reserved judgment for the primary purpose of reviewing the file in the First Action to determine if it was at least seriously arguable that the debt sued on in this action had been admitted by the Defendants.

Legal findings: principles governing the exercise of the stay jurisdiction

5. Mr White correctly submitted that this Court possessed an inherent jurisdiction to stay proceedings in reliance upon *Halsbury’s Laws*, Volume 11 (2015), paragraph 1043, which explains the corresponding English jurisdiction preserved by the Senior Courts Act 1981. Although the English statutory provision makes express reference to the power to grant a stay, I recently held that *“[t]his Court’s inherent jurisdiction is preserved without express reference to the power to grant a stay by sections 12 and 18 of the Supreme Court Act 1905”*: *Re Celestial Nutrifoods* [2017] SC (Bda) 10 Com (31 January 2017).
6. I accept the Defendants’ submission that there is a general common law rule that second proceedings relating to essentially the same subject-matter as earlier proceedings which were struck-out should be stayed until costs awarded in the earlier action have been paid. This rule is of considerable vintage. In *M’Cabe-v-The*

Governor and Company of the Bank of Ireland (1889) 14 App.Cas. 413 (HL), Lord Herschell stated (at 415-416):

“...It cannot be denied that in the present case the parties are the same, and that the plaintiff is ‘suing substantially by virtue of the same alleged title;’ and therefore I think that the present case has been properly disposed of in accordance with that rule, which I apprehend is not in any respect confined to the Courts of England but applies as well to the Courts in Ireland, arising as it does out of the inherent power which resides in the Court to prevent a second suit being brought upon the same cause of action until the costs in the first action have been paid...”

7. I also accept that although this Court possesses the discretionary jurisdiction to postpone the obligation to pay the costs of an earlier action until the end of the second action, this discretion must be sparingly exercised. As Ferris J observed in *Sinclair-v-British Telecommunications* [2000] 2 All ER 461 at 470:

“As the jurisdiction invoked by [the defendant] is discretionary it would, I think, be within the scope of the discretion to postpone liability in this way. But it seems to me that to do this would seldom, if ever, constitute a proper exercise of the discretion. It would remove altogether the disciplinary impact of the jurisdiction and would be likely to leave [the defendant] unsatisfied in respect of the costs awarded to it unless it loses the new action...”

8. It follows that the mere fact that the Plaintiff has a potential right of set-off in respect of his (for now) merely contingent claim in the present action, the position in every case where the stay principle relied upon is deployed, cannot constitute exceptional grounds for departing from the general rule. The present context is wholly different from the summary judgment context in which the successful plaintiff’s right to enforce his judgment is sometimes postponed pending the trial of the defendant’s counterclaim or cross-claim raised in the same proceedings in which judgment has been obtained. That is a distinct discretionary jurisdiction which is governed by its own distinctive rules. The Plaintiff’s reliance on Professor Jeffrey Pinsler’s ‘*The Court’s Response to Counterclaims in Proceedings for Summary Judgment*’ (2011) 23 SAclJ 517-537 was of no assistance in the present regard.
9. The Defendants’ counsel, without seeking to elucidate what might constitute exceptional grounds for declining to grant the stay he sought, did substantiate the further point that granting the stay did not necessarily infringe the Plaintiff’s fair trial rights: *Stevens-v-School of Oriental and African Studies*, The Times, 2 February 2001. I am, however, unable to extract from the brief summary of this judgment support for an improbable wider proposition. Namely, that imposing a stay on second proceedings until costs ordered in earlier proceedings are paid would never infringe the claimant’s fair trial rights. Justice is not, in this sense at least, completely blind.
10. I consider it to be self-evident that if a plaintiff of limited means has an obviously meritorious and substantial claim which he would be prevented from pursuing if required to pay the costs of an earlier action to a better resourced defendant, this Court

must have the jurisdictional competence to postpone enforcement of the earlier costs obligation, having regard to all the circumstances of the relevant case. The instances where such remedial jurisdiction is likely to be exercised will be rare. Having regard to the overriding objective, an initial action is unlikely to be struck-out on purely technical grounds where it is obvious that a plaintiff has a very strong case on the merits.

11. In my judgment, Mr Peniston was in terms of general principle right to submit that it would be unjust for the stay sought to be granted if the debt sought to be recovered had been clearly admitted so that it was obvious that he as the Plaintiff herein was going to be a net creditor of the Defendants, taking the costs obligation into account.

Findings: does the evidence in the First Action disclose a clear admission of the debt by the Defendants?

12. The need to look to the evidence filed in the First Action only arises because the evidence filed herein to date did not support the clear admission upon which the Plaintiff relied. A cursory review of the file in the First Action provides little more support either.
13. It is true that the principal of the assignor, Michael McLean of M& M Construction Ltd., deposed in paragraph 5 of his December 11, 2015 Affidavit that the Defendants' representative "*on at least five occasions, confirmed that the monies (\$34,493.89) remained outstanding*". However the First Defendant herein deposed that he believed that he had a strong counterclaim against the contractors and exhibited to his own Affidavit correspondence revealing that the debt had been disputed by his attorneys in June 2014 when formal demand for payment was made.
14. There is no basis for this Court to find based on any material before the Court in the present or the First Action that the debt upon which the Plaintiff is making his second attempt to recover has been clearly admitted by the Defendants. The merits of the Plaintiff's claim, in terms of his ability to demonstrate that he will succeed in proving that he is a net creditor of the Defendants, are not (at this point at least) obviously strong.

Findings: merits of application for a stay

15. It follows that the Plaintiff is entitled to a stay of the present action until the costs of the First Action are either paid or otherwise secured to the Defendants' satisfaction.

Costs

16. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, the Defendants are awarded the costs of the present application to be taxed if not agreed.

Dated this 13th day of March, 2017 _____
IAN RC KAWALEY CJ