

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2007/035

IN THE MATTER OF the winding up order of
Caribbean Ventures International Ltd. (In
Liquidation) by the High Court of Justice of
Dominica on the 29th day of July, 2005.

AND IN THE MATTER OF the compulsory
Liquidation Order of Bank Caribe Limited (In
Liquidation) by the High Court of Justice of
Dominica on the 2nd of July, 2004.

BETWEEN:

- [1] CAROSELLO ESTABLISHMENT
(Appeal dismissed by the Full Court of Appeal
on the 31st October 2007)
- [2] DAVID ALAN POLLOCK
- [3] KELLY IVERSON POLLOCK

Appellants/Applicants

and

- [1] CARIBBEAN VENTURES INTERNATIONAL LTD.
(In Liquidation)
- [2] MARCUS A. WIDE, Liquidator of Caribbean Ventures
International Ltd.

Respondents

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[2] DAVID ALAN POLLOCK
[3] KELLY IVERSON POLLOCK

and

Appellants/Applicants

[1] CARIBBEAN VENTURES INTERNATIONAL LTD.
(In Liquidation)
[2] MARCUS A. WIDE, Liquidator of Caribbean Ventures
International Ltd.

Respondents

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal [Ag.]

Appearances:

Mr. Marcus Foster for the Appellants/Applicants

Mr. Bota McNamara for the Respondents

2008: October 24, 27;

Civil Appeal – Civil Procedure - application for stay of execution pending appeal – application for stay of execution of receiver’s order

The respondents (CVIL) and Mr. Marcus A. Wide Liquidator of CVIL instituted proceedings against the first appellant (“Carosello”) and the second and third appellants (“Pollocks”) alleging, among other things, conspiracy, fraud, misappropriation and conversion by the appellants of a sum in excess of US\$3.4 million over a three year period. Central to this dispute is the dwelling house (“Villa Caribe”) situated at Seagrape Crescent where the Pollocks have resided. The respondents allege that Mr. Pollock caused CVIL to discharge Carosello’s indebtedness to a bank in Dominica through a series of loans for the acquisition of the Seagrape property and the construction of Villa Caribe. The Pollocks have denied any wrongdoing. Multiple claims, applications and appeals have been filed in these proceedings. In his judgment delivered 13th August 2007 in claim No. SLUHCV 0293 of 2006 the judge ordered the Pollocks to repay to CVIL the sum of US\$3.4 million and costs. At a hearing of the consolidated claims SLUHCV 0293/2006 and SLUHCV 0209/2007 on 23rd April, 2008, the judge ordered that the appellants pay to CVIL and the Liquidator (Mr. Marcus Wide) the sum of US\$3.4million with interest and costs. By order of 16th July, 2008, the judge appointed Mr. Marcus Wide as Receiver and ordered that the Pollocks give up vacant possession of the Seagrape property. The Pollocks were evicted on 4th October, 2008. The appellants have applied

for stay of execution of these orders and have sought the permission of the court to return to the Seagrape property.

Held: granting the applications with conditions and directing that costs shall be costs on the appeal:

- (1) A stay of execution should only be granted if the appellant would face ruin without the stay, provided that the appeal had some prospect of success. The appellants satisfied the evidential burden of proving that they would be ruined if the stay was not granted and that the appeal against the receiver's order was arguable.
- (2) Having regard to the affidavit evidence, the order, the law and submissions of counsel, and having taken into account the uncertainty as to when the transcripts of both proceedings will be available, the circumstances of the appellants and the grounds of the appeals cumulatively take the appellants' case outside the ordinary. Special circumstances have therefore been disclosed which should serve to prevent the ordinary rule not to grant a stay from applying.

Linotype-Hell Finance Ltd. v Baker [1993] 1 WLR 321, Turkey v Awadh [2004] EWCA Civ 1471 and Winchester Cigarette Machinery Ltd. v Michael John Payne and another (unreported) (QBD), No. FC3 93/6788/C Royal Court of Justice, 10th December 1993 applied.

JUDGMENT

- [1] EDWARDS, J.A. [AG.]: There are 2 applications for a stay of execution before me pending 2 different appeals. The first application was filed on the 8th October 2008 in appeal No. 35 of 2007 filed on the 5th September 2007. This application is seeking to stay the judgment of Cottle J. delivered on the 13th August 2007. The learned judge after a 2 day trial found that the 2nd and 3rd appellants ("the Pollocks") have been unjustly enriched and ordered that they repay to the 1st respondent ("CVIL") the sum of US\$3.4 million. He awarded the respondents costs and fixed the value of the claim at approximately EC\$9.2 million. The amount of prescribed costs was fixed at EC\$162,500.00.
- [2] The second application was filed on the 23rd October 2008 in appeal No. 33 of 2008. The notice of appeal also filed on this date is against an order made by Cottle J. on the 16th July 2008, wherein he appointed, without security, the 2nd respondent as receiver and manager of the assets of Carosello Establishment Ltd. Paragraph 6 of this order states:

“That any and all occupants of all that parcel of land registered in the Land Registry of Saint Lucia as Block 1255B 441 and 442 together with the building erected thereon and all the fixtures, fittings and furniture of all and every kind found therein being the property commonly known as Villa Caribe located on Seagrape Crescent, Rodney Bay served with this Order are to give up vacant possession of the said property within fourteen...days of service of the Order. Upon failure to comply with this Order Members of Her Royal Majesty’s Police Force are hereby directed to use whatever force needed to remove any occupants from the said property and hand possession to The Receiver.”

- [3] The application for the appointment of a receiver was made under Part 51 of the Civil Procedure Rules 2000 (“CPR 2000”) which deals with appointment of a receiver generally including an appointment to obtain payment of the judgment debt from income or capital assets of the judgment debtor. This application was filed on the 7th July 2008. There is dispute concerning the service of this application. The Pollocks depose that they were never served. An affidavit by Sally Ann Alfred sworn on the 8th July 2008 which was filed on the 23rd October 2008 states that it was served on the Chambers of Counsel Mr. Marcus Foster on Monday the 7th July, 2008 at 1:35 p.m. by leaving the documents with Christiana Cornibert. The order reflects that the applicants were not present and were unrepresented.
- [4] The grounds of appeal against the receiver’s order are that: (1) The appellants were deprived of their right to be heard challenging the appointment of a receiver as they were never personally served. (2) The order failed to give dates when accounts are going to be filed to comply with a mandatory requirement laid down in CPR 2000, r.51.7(1). (3) The order itself was filed well beyond the time allowed by CPR 2000 for drawing up and filing orders under CPR 2000, r.45.5(2). (4) There was a real likelihood of bias having this application heard by Cottle J. when his judgment is the subject of a pending appeal No. 35 of 2007. (5.) That the effect of the appointment of the receiver was to unfairly eliminate the pending appeal since the property at Seagrape Crescent Rodney Bay is the subject matter of the said appeal, for which security for costs had been put up by the appellants in the sum of EC\$267,750.00.

Preliminary Issues

- [5] There were 2 preliminary issues relating to: (1) whether the proceedings concerning the appointment of the Receiver were interlocutory proceedings requiring the leave of the court; and (2) whether the notice of appeal No. 33 of 2008 was timely. The first issue was resolved by ruling after hearing submissions of counsel by reference to section 26 (2)(g)(ii) of the Eastern Caribbean Supreme Court (St Lucia) Act Cap. 2.01 ("the Supreme Court Act") and CPR 2000, r.62.1(2). These provisions exclude an interlocutory order granting or refusing an application for the appointment of a receiver from requiring any leave to appeal and from being treated as a procedural order.
- [6] The second issue was resolved by reference to previous decisions of this court including *Michael Baptiste v Yoland Bain- Joseph*¹ which ruled at paragraph 9 as follows:
- "Having regard to the definition of "statement of case" under CPR 2.4, and the contents of a statement of case as prescribed by the relevant rules, the contents of the Notice of Appeal and Grounds of Appeal as prescribed by CPR 62.4, are obviously comparable to the statement of case for the purposes of CPR 26.3 (1)(a)."
- [7] Since CPR 2000, r.3.5 states that during the long vacation period time prescribed by these rules for serving any statement of case other than the statement of claim does not run, I ruled that the notice of appeal in No. 33 of 2008 was timely filed.

Relevant Background Facts

- [8] The respondents instituted an action SLUHCV 2006/0293 against Carosello Establishment Ltd. ("Carosello"), a corporate entity formed in Vaduz, and existing under the laws of Liechtenstein, and the 2nd and 3rd appellants. The statement of case alleged an advance or loan by the respondents to the appellants, breaches of fiduciary duties and trust against Mr. Pollock, and conspiracy, fraud, misappropriation, and conversion by the appellants of a sum in excess of US\$3,400,000.00 over the period 2000 to 2003. Mr.

¹ HCVAP 2006/026 (Grenada) delivered 07/02/08 by Edwards JA (Ag.), para. 9

Pollock was employed by the 1st respondent bank ("CVIL") in Dominica as Managing Director and Chief Financial Officer during this period.

- [9] The reliefs claimed included an accounting, tracing of all the funds into the hands of the appellants, repayment of all the moneys owed, US\$3,400,000.00, general, punitive and exemplary damages.
- [10] Carosello owns the 2 parcels of immovable property at Seagrape Crescent since March 2002, which are the subject of the receiver's order. The dwelling house on this property known as "Villa Caribe" was built after Carosello acquired the property. The Pollocks are non-nationals who have resided at Villa Caribe for several years, which they say is a vacation home. The respondents allege that Mr. Pollock caused CVIL to discharge Carosello's indebtedness to Bank Caribe in Dominica through a series of loans, for the acquisition of the Seagrape property and the construction of Villa Caribe.
- [11] Only the Pollocks defended the respondents' claim. In their defence and counterclaim they denied the wrongdoing alleged. Mr. Pollock claimed, among other things, that he was entitled to certain sums of money which he left in CVIL's account to be taken at a later date; and that the sum of money that he took were from the monies which were lawfully due to him and not CVIL's money. The Pollocks denied that Mrs. Pollock had been involved in Mr. Pollock's personal employment business. She claimed in her defence filed on the 31st May, 2006 that she was married to Mr. Pollock for the last 5 years. Concerning the freezing order made by the High Court on the 26th April 2006 against the Pollocks, which empowered the liquidator Mr. Wide to take possession of CVIL's property and assets located in Saint Lucia allegedly under the control of Mr. Pollock, the Pollocks contend that the respondents trespassed on their property and possessions; wrongfully detained their belongings, damaged their reputation and good standing in the community, invaded their privacy, and hampered them in putting forward their defence. For this they counterclaimed for general and exemplary damages.
- [12] On the 19th March, 2007 when the claim and counterclaim came up for trial the proof of service of the claim on Carosello was in issue. The court ruled and made an order setting

aside the default judgment entered against Carosello dated 15th March 2007. Paragraphs 3 to 5 of this order stated:

“The time within which to serve the present claim on Carosello Establishment having expired, Counsel for Claimant to file and serve a new claim against Carosello Establishment by the 26th March 2007. Claim 0293/2006 is to be consolidated with this new claim, and the evidence in Claim 0293/2006 is to stand as the evidence against Carosello Establishment in the new claim. The Case management of the New Claim against Carosello shall be dispensed with.”

- [13] The new claim against Carosello, SLUHCV 2007/0209, was filed and served on the 3rd April 2007. Carosello only acknowledged service of claim No. SLUHCV 2007/0209. Consequently, on the 31st May, 2007 default judgment was entered against Carosello for an amount to be decided by the court.
- [14] On the 31st October, 2007, the Full Court of Appeal dismissed the appeal of Carosello on appeal No. 35 of 2007 and the appellants’ application for a stay of execution filed on the 7th September 2007, whilst granting an application for security for costs against the Pollocks. The respondents’ application, which was filed on the 28th September 2007, had sought the dismissal of the 3 appellants’ appeal, and an order for security for costs. As a consequence of paragraph 5 of the court’s order and the parties apparent inability to agree on the terms, Rawlins JA (as he then was) on the 14th April 2008 fixed the amount of the security for costs at EC\$267,750.00 with other terms which the Pollocks eventually complied with. The deadline for depositing the security for costs was 19th May, 2008. On the 15th May, 2008 the Pollocks paid the amount of \$267,750.00 into an account at the Bank of Nova Scotia to which counsel Mr. Foster and Mr. McNamara are signatories. Under the terms of the order of Rawlins JA (as he then was) the appeal of the Pollocks was to proceed if the Pollocks paid the security for costs within the prescribed time.
- [15] On the 23rd April, 2008, a hearing on consolidated claims SLUHCV Nos. 2006/0293 and 2007/0209 took place in the High Court on a notice of application the date and service of which is unspecified, with the Pollocks’ appeal still pending in No. 35 of 2007. Only Mr. Bota McNamara was present. There was no appearance of Counsel for the Defendants. “Upon reading the Notice of Application and evidence presented to the Court during the trial herein on June 4th and 5th, 2007”, Cottle J. ordered :

“Carosello Establishment, and the Pollocks and Kelly Iverson Pollock, jointly and severally, do pay Caribbean Ventures International Ltd. (In Liquidation) and Marcus A. Wide the sum of US\$3.4 million dollars with interest from the 20th March, 2007 until payment in full. Together with costs in the sum of EC\$162,500.00”

- [16] The exhibited copy of the receiver's order bears the date stamp of the High Court showing it was filed on the 29th August, 2008, but it states that the order was entered on the 7th August 2008. The Pollocks depose that it was served on them on the 2nd September 2008. They gave the order to their lawyer with instructions to apply for a stay of execution. The application was filed on the 11th September 2008 and served, but there was no High Court judge available in the jurisdiction to hear it, they depose. They were evicted from their residence on Saturday the 4th October, 2008, while the application was waiting to be heard, having been notified on the 3rd October 2008 that a group of policemen had been instructed to take possession of the premises and evict them.
- [17] They depose that they took some of their personal effects, and stayed at the Ginger Lily Hotel on credit, and are now at a cheaper place, the Caribbean Jewel, on credit. They allege impecuniosity as a result of the colossal sums of money to the tune of over EC\$1,100,000.00 that they have spent to defend, counterclaim, and appeal the numerous ancillary and substantive legal proceedings against them. The freezing order has effectively deprived them from earning an income from their 3 boats which have been arrested. The security for costs deposit was “gathered up exclusively from loans from relatives in the United States, particularly Kelly Pollock's father and friend in said country”, They state that the property is legally owned by Carosello of which they are the beneficiaries, and it values approximately US\$4 to 5 million (EC\$10 - \$13 million). They contend that any legal dispute involving Carosello is to be resolved by the law of Liechtenstein and by the courts of Liechtenstein.
- [18] The Pollocks depose further, that Mr. Ponka, their neighbour, has informed them that a police officer has taken away sheets and towels from their home following their eviction, and the persons now occupying their home have disabled the security equipment and monitors which record all movements at the premises. Mr. Marcus Foster had, on the 19th March, 2008, made an application before Cottle J. to set aside the default judgment

entered against Carosello. Cottle J. dismissed this application on hearing both counsel for the parties. An application for leave to appeal was filed on the 7th April 2008, which was dismissed by Barrow JA on the 27th May 2008. The Pollocks depose that their counsel Mr. Foster has informed them that the learned judge made certain statements on the 19th March which reflected that he was biased against the appellants and therefore he ought not to have heard the application for the appointment of the receiver.

- [19] In their view, having regard to the severe hardship they are enduring, and the fact that the judgment of Cottle J. has been registered, there will be no prejudice to the respondents, were they allowed to re-occupy their home until the determination of appeal No. 35 of 2007.

Legal Principles Applicable To a Stay

- [20] The proviso to section 15 of the Supreme Court Act states that:

“(a) this Act shall not disable the High Court or the Court of Appeal, if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it; and (b) any person, whether a party or not to any such cause or matter who would formerly have been entitled to apply to any court to restrain the prosecution thereof ...may apply to the High Court or to the Court of Appeal, as the case may be,...for a stay of proceedings in the cause or matter, either generally, or so far as may be necessary for the purposes of justice.”

- [21] The modern authority on the circumstances in which a Court will exercise its discretion on the granting of a stay of execution was settled in the case *Linotype-Hell Finance Ltd. v Baker*.² Staughton LJ said that a stay could be granted if the appellant would face ruin without the stay, provided the appeal had some prospect of success. In a more recent case *Turkey v Awadh*³ Staughton LJ referred to the statement of Clarke LJ in *Hammond Suddards Solicitors v Agrichem International Holdings Ltd.*⁴ who said that “...the essential question is whether there is a risk of injustice to one or both parties if it

² [1993] 1 WLR, 321; [1992] 4 ALL ER 887. See also *Attorney General v Bernard Coard et al.* Civil Appeal No. 10 of 2004, per Gordon J.A. (Ag.) delivered 26/04/04 at para 9; *Carlisle Bay Limited and F.E.B.C. (Antigua) Ltd.* Civil Appeal No. 18 of 2003 delivered 10/05/04, Per Saunders C.J. (Ag.) at para 10

³ [2004] EWCA Civ 1471

⁴ [2002] EWCA Civ 2065

grants or refuses a stay.” The normal rule is for no stay and if a court is to consider a stay a case has to be made out.⁵

- [22] Ralph Gibson LJ in *Winchester Cigarette Machinery Ltd v Michael John Payne and another*⁶ summed it up in the following manner upon reviewing *Linotype* and several other decisions:

“I respectfully agree...that one starts with the assumption that a successful Plaintiff is not to be prevented from enforcing his judgment even though an appeal is pending. I also agree that the practice of the Court has moved on, in that the increased work of the court has produced more examples of "other reasons" in addition to proved improbability of recovery which Lord Esher MR contemplated in *Atkins v Great Western Railway Company*.... [I]n holding that balance, full and proper weight is given to those starting principles, that there must be good reason to deprive a successful Plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself such a reason...."[T]he factors normally taken into account are such matters as whether, if the judgment is enforced pending appeal and an appeal is successful, there will [be] good prospects of recovering any money, payment of which has been enforced under the judgment pending appeal, and likewise, questions of timing; how soon the appeal is going to be heard and how long the matters have remained outstanding and matters of that sort"

- [23] In the same case Hobhouse LJ said at page 10 that since the discretion to refuse or grant a stay of execution is unfettered, no authority can lay down rules for its exercise; all that can be done is to say that it must be exercised judicially and to provide guidance. In giving this guidance he stated at page 11:

"... it has been recognised that it is relevant that the Appellant might be unable to recover from the Respondent the sum awarded in the event of the judgment being set aside on appeal. It is also relevant that without a stay he will be ruined, regardless of the outcome of the appeal...or that the appeal would be impossible or academic....The Appellant must show some special circumstances which take the case out of the ordinary so that the ordinary rule should not apply and a stay be granted. If showing that such circumstances exist involves making good factual submissions, the facts have to be made good by evidence."

⁵ Thomas LJ in *Haydock Finance Ltd. v Louis Transport Equipment Consultants Ltd* [2005] EWCA Civ 450 at para 5

⁶ (QBD), No. FC3 93/6788/C Royal Court of Justice, 10th December 1993 at pages 6-11

Submissions and Law

- [24] Turning now to assess the prospects of success for this appeal, an appreciation of the law and rules governing the appointment of receivers is helpful. Section 16 of the Supreme Court Act states that:

“(1) Subject to the provisions of the Code of Civil Procedure and rules of court, ... a[n] injunction may be granted, or a receiver appointed, by an order of the High Court or judge of the High Court in all cases in which it appears to the High Court or judge to be just or convenient that that order should be made. (2) The order may be made either unconditionally or upon terms and conditions which the High Court or judge of the High Court thinks just.”

- [25] The only limit therefore to the appointment of a receiver is that the appointment should be just or convenient and the terms and conditions ought to be just.

- [26] Part 51 of the CPR 2000 speaks for itself and is conveniently set out below:

“Part 51

Appointment of Receiver

Scope of this Part

- 51.1 This Part deals with the appointment of a receiver and includes an application to appoint a receiver to obtain payment of the judgment debt from the income or capital assets of the judgment debtor.

Application for appointment of a receiver and injunction

- 51.2(1) An application for the appointment of a receiver must be supported by evidence on affidavit.
- (2) The applicant may also apply for an injunction to restrain the judgment debtor or other respondent from assigning, charging or otherwise dealing with any property identified in the application.
- (3) Where an application for an immediate injunction is made, the application for the appointment of a receiver and for an injunction may be made without notice.
- Rules 17.3 and 17.4 deal with applications for interim injunctions

Conditions for appointment of a receiver

- 51.3 In deciding whether to appoint a receiver to recover a judgment debt the court must have regard to the -
- (a) amount likely to be obtained by the receiver;
 - (b) amount of the judgment debt; and
 - (c) probable cost of appointing and remunerating the receiver.

Giving of security by receiver

- 51.4(1) The general rule is that a person may not be appointed receiver until that person has given security.
- (2) The court may however dispense with security.
 - (3) The order appointing the receiver must state the amount of the security.
 - (4) The security must be by guarantee unless the court allows some other form of security.
 - (5) The guarantee or other security must be filed at the court.

Remuneration of receiver

- 51.5 The receiver may be allowed such remuneration as the court directs.

Receiver's powers

- 51.6 A receiver's powers operate to the exclusion of the powers of the judgment debtor for the duration of the receiver's appointment.

Accounts of receiver

- 51.7 (1) The order appointing a receiver must direct on what dates the receiver must file accounts.
- (2) Unless the court orders otherwise the account must be verified by affidavit.
 - (3) The receiver must serve a copy of the account on the applicant.
 - (4) The applicant must obtain an appointment to pass the account.
 - (5) The passing of the account must be verified by a registrar.

Payment of balance into court

- 51.8 The receiver must pay into court any balance shown on the accounts under rule 51.7 as due from the receiver within 7 days of the passing of any account.

Default by receiver

51.9 (1) This rule applies if the receiver fails to -

- (a) attend for the passing of any account;
 - (b) pay into court any balance shown on the account as due from the receiver; or
 - (c) submit an account by the date ordered.
- (2) The applicant must ask the court office to fix a hearing for the receiver to show cause for the receiver's failure.
- (3) The court office must issue a notice stating the date, time and place of the hearing to show cause.
- (4) The applicant must serve the notice on the receiver at least 7 days before the hearing.
- (5) At the hearing the court may do any of the following -
- (a) give directions to remedy the default;
 - (b) give directions for the discharge of the receiver;
 - (c) appoint another receiver;
 - (d) disallow any remuneration claimed by the receiver;
 - (e) order the receiver to -
 - (i) pay the costs of the applicant as assessed by the court; and
 - (ii) pay interest at the statutory rate on any monies which may appear from a subsequent account to be due from the receiver."

[27] The relevant application was not part of the record before me. However Mr. McNamara said that it was for an equitable execution as well as to obtain payment of the judgment. The ultimate goal is to sell the property as quickly as possible to satisfy the judgment debt. Counsel for the respondent submitted that since there was no appeal pending for Carosello and the judgment debt was recoverable against the Seagrape property, enforcing the judgment by way of the receiver's order is not dependent on the human issues relating to the Pollocks and the prospect of success of their appeal. He rebutted counsel Mr. Foster's contention that the Pollocks had a beneficial interest in the Seagrape property, by arguing that Carosello cannot be validly infused with the Pollocks in Company law since Carosello is a separate legal entity and owner of the property, and the Pollocks' remedy would be against Carosello, and not the respondents.

[28] The application was not without notice, Mr. McNamara argued, and the rules are silent as

to whether the application ought to have been served personally on the appellants instead of on Mr. Foster, their counsel. Mr. McNamara also referred to the application for a stay pending in the High Court which echoes the same basis as the present application - the Pollocks fear that Villa Caribe and the assets of Carosello will be sold and that without the accommodation of Villa Caribe the appeal would be impossible to maintain and their appeal will be frustrated. I must note that on the 20th October, 2008 when this matter first came before me, the parties reported that Georges J. [Ag.] had stayed the hearing of the application for stay before him so as to allow the applications in this court to proceed.

[29] As for the manner in which the hearing before Cottle J. was conducted and the procedural irregularities on the face of the receiver's order, Mr. McNamara pointed to paragraphs 1, 16 and 17 of the order in support of his submissions that any apparent deficiencies in the order cannot amount to procedural irregularities.

[30] Paragraph 1 states:

"That Marcus A. Wide... be and is hereby appointed as Receiver and Manager, without security, of the following assets of CAROSELLO ESTABLISHMENT ..."

Paragraphs 16 and 17 state:

"16. The Receiver and his legal counsel shall pass his accounts from time to time, and for this purpose the accounts of The Receiver and his legal counsel are hereby referred to a Justice of this Honourable Court. 17. Prior to the passing of his accounts, The Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in his hands against his fees and disbursements, including legal fees and disbursements, and such amounts shall constitute advances against his remuneration and disbursements when and as approved by this Honourable Court."

[31] Learned counsel Mr. Foster's competing arguments were that a natural justice issue clearly arises. Having regard to the drastic nature of the enforcement process under Part 51 of the CPR 2000, the terms of the order, and the goal of the respondents, the Pollocks ought to have been personally served; and there is no record at his office confirming that his Chambers were served. Mr. Foster questioned the haste to enforce the judgment when the issues arising on the appeal all concern the liability of the Pollocks which is

inextricably linked with Carosello's acquisition of the property.

- [32] Disposing of the property before the appeals are heard, he argued will cripple the Pollocks in the prosecution of their appeal, and it would be manifestly unjust having regard to the fact that they complied with the security for costs requirement, despite their impecuniosity.
- [33] Contrary to Mr. McNamara's contention that the Pollocks failed to satisfy the evidential burden of proving that they will be ruined, in my opinion, they have satisfied that burden. I also find that the appeal against the receiver's order is arguable. I remind myself that appeal courts are slow to interfere with decisions taken in the exercise of a judge's discretion and of the settled criteria for this court to interfere.
- [34] Despite this, I find, having regard to the affidavit evidence, the order, the law and submissions of counsel, and having taken into account the uncertainty as to when the transcripts of both proceedings will be available, that the circumstances of the Pollocks and the grounds of the appeals cumulatively take the Pollocks' case outside of the ordinary. Special circumstances have been disclosed which should serve to prevent the ordinary rule not to grant a stay from applying. In my judgment it is desirable to suspend the operation of the receiver's order by allowing the Pollocks to occupy the Seagrape property under certain conditions.
- [35] The most important thing right now is that the property should be preserved and secured for the benefit of the respondents while the Pollocks occupy it until the appeal No. 35 of 2007 or No. 33 of 2008 is determined, whichever is first. Consequently an injunction ought to be granted in terms of paragraph 4 of the receiver's order and Mr. Marcus Wide and his counsel Mr. McNamara should have access to the premises and the dwelling house on a weekly basis to inspect the property and take inventory at a time to be agreed on by the parties. The costs of the applications are to be on the appeal. Further, case management of the appeals is set for Friday the 31st October 2008 at 2:00 p.m. when the parties will report on the arrangements made.

Order

[36] The applications for a stay of the execution of the judgment of Cottle J. delivered on the 13th August 2007 and a stay of the operation of the receiver's order made on the 16th July 2008 and entered on the 7th August 2008 are granted pending the determination of appeal No. 35 of 2007 or No. 33 of 2008, whichever is first, on the following conditions:

- (i) The appellants, David Alan Pollock and Kelly Iverson Pollock, may return to the property in question at Seagrape Crescent registered Block 1255B, Parcels 441 and 442 and occupy same from Wednesday the 29th October 2008 at 1:00 p.m. until the determination of appeal No. 35 of 2007 or No. 33 of 2008, whichever is first.
- (ii) The appellants are restrained from dealing with the property in terms of paragraph 4 of the suspended receiver's order.
- (iii) The respondent, Mr. Marcus Wide and his attorney-at-law, their servants or agents, shall be permitted to enter and carry out a weekly inspection of the said property including the dwelling house at a time to be agreed on by the parties and their counsel, and take inventory of the premises.
- (iv) The 2 appeals are adjourned for further case management directions on Friday the 31st October 2008 at 2:00 p.m. when the parties are to report on the adequacy of the arrangements in place.
- (v) The costs of the 2 applications shall be costs on the appeal.

Ola Mae Edwards
Justice of Appeal [Ag.]

