ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

EAST CARIBBEAN SUPREME COURT
(IN THE COURT AD 1999 OF APPEAL)

CIVIL APPEAL NO 22 OF 1999

BETWEEN

THE OFFICE FOR NATIONAL DRUG AND MONEY LAUNDERING CONTROL POLICY

Appellant/Applicant

and

(1) PAVLO LAZARENKL aka PAVEL LAZARENKO
(2) FIRSTAR SECURITIES LTD.
(3) NEMURO INDUSTRIAL GROUP LTD.
(4) GUARDIAN INVESTMENT GROUP LTD.
(5) ORBY INTERNATIONAL LTD.
(6) LADY LAKE INVESTMENT CORPORATION
(7) FAIRMONT GROUP LTD.
(8) PETRO MYCKOLAYIOVYCH KIRICHENKO aka PETRO KYRYTSCHENKO
(9) ALEXANDER LIVERANT

Respondent

Appearances:
Mr. John Fuller and Curtis Bird for Appellant/Applicant
Ms. Joyce Kentish for Respondents

1999: December 22

DECISION

[1] **GEORGES J:** Let me say at the very outset that this is in a sense an exercise in futility in that before the Court is a summons dated 17th December 1999 and filed 20th December 1999 to stay an Order of Mr. Justice Henry Moe made the 17th day of

December, 1999 varying a Restraint Order of the Court dated 28th October , 1999 whereby the Liquidators of Eurofed Bank Limited (In liquidation) were ordered to pay debts and legal fees of the first Respondent totalling **US$1,582,361.98**

[2] **FREEZING ORDER ON EUROFED BANK 28th OCTOBER 1999**

The Restraint Order was in effect an order freezing or restraining any dealings in all accounts at Eurofed Bank Limited (**"the Bank"**) and any other financial institutions in Antigua and Barbuda in the name of each or any of the Respondents or any corporation, company or trust where each or any of them was a director, trustee or beneficial owner.

[3] Provision was made for variation or discharge of the said order by any of the respondents by application to the Court at any time on giving two clear days notice to the solicitor for the Appellant.

[4] **APPLICATION BY RESPONDENTS AND INTERIM ORDER**

On application of the first, second, third, fourth, fifth, sixth and seventh named Respondents made by summons dated 9th December, 1999 Mr. Justice Henry Moe, on 17th December, 1999 made inter alia, an interim order varying the restraint/injunctive order made (**by him**) on 28th October, 1999 and ordered that the Appellant by the Liquidators (**of the Bank**) release forthwith the following sums of money from the accounts of the first, second, third, fourth, fifth, sixth and seventh respondents' accounts for the payment of the debts and legal expenses of the first-named Respondent namely:

(1) $1 Million United States Dollars to Jeffer Mangels, Butler & Marmaco, LLP;

(2) $300,000.00 United States Dollars to Ross, Suchoff, Hankin, Maidenbaum:

(3) $282,361.98 United States Dollars to the firm of Curtis Mallet-Prevost Colt & Mosle, LLP.

[5] **RESPONDENTS' UNDERTAKING TO REPAY**

The Respondents were ordered to give to the court an undertaking to repay the funds released should it be satisfactorily proven that the said funds were not their lawful property.

Leave to appeal the said order was simultaneously granted to the Appellant.

[6] **APPEAL AND APPLICATION TO STAY ORDER**

Notice of appeal dated 17th December, 1999 was duly lodged by the Appellant on 20th December, 1999 together with a summons for stay of the said order pending final determination of the appeal. The application for stay was most vigorously opposed.

[7] When it in fact first came on for hearing on Monday 20th December, 1999, Counsel for the Respondents (**Ms. Kentish**) claimed that she had only just been served with the summons and had not been given appropriate notice. She needed time. Application for an interim stay until the hearing of the summons to stay was also

opposed and refused by the Court. By consent, the hearing was adjourned to Wednesday 22nd December, 1999 when Ms. Kentish raised a preliminary point to the effect that this Court, being a court of coordinate jurisdiction with that which had made the interim order, had no jurisdiction to entertain the application for the stay after the Judge had himself refused a viva voce application made by Counsel for the Appellant.

[8] This was vehemently denied by Mr. Fuller who contended that what he had in fact done was to apply for leave to appeal which was granted.

[9] There is no note in the Judge's Chamber Book of any application for stay having been made at the time that the Order was made. Leave to appeal however constitutes part of the Order made. I am therefore guided by the Judge's notes on that aspect of the matter.

[10] **JURISDICTION TO STAY EXECUTION**

An application for stay of execution of a judgment or order appealed from pending the determination of the appeal would ordinarily be made to a Judge of the Court of Appeal in accordance with Rule 16 of the Court of Appeal Rules 1968, but where this may cause undue inconvenience or delay a Judge of the Court below may by virtue of Rule 17(1) exercise the powers of a single Judge of the Court of the Appeal.

[11] **ARGUMENTS**

The grounds for stay of execution in a nutshell are that the interim order for payment of the first Respondent's debts and legal expenses to the tune of over US$1.5 Million United States Dollars, was in the circumstances precipitate as the hearing of the respondents' summons dated 9th December, 1999 to vary or discharge the Restraint Order had not by then concluded.

[12] According to paragraphs 3, 4 and 5 of the Appellant's affidavit in support of the summons for stay of the order, the hearing of the summons commenced on the 16th December, 1999 and was adjourned after argument and testimony until 17th December, 1999 when further argument and testimony took place. At midday on 17th December, 1999 the Judge agreed to adjourn the matter until the 11th January, 2000. At that stage the Respondents had not as yet completed their case, nor had their witnesses completed their testimony. Upon the said adjournment, Counsel for the Respondents applied spontaneously for an order for interim payment and after hearing the application and the objections thereto by Counsel for the Appellant, the order was made as aforesaid.

[13] Mr. Fuller further contended that in the event that the Learned Judge should at the conclusion of the adjourned hearing find against the Respondents there would be no possibility of recovery of the funds which were ordered to be paid out under the interim order as they were on the face of it to be paid to third parties outside of the

jurisdiction and any undertaking given by the Respondents would be valueless because the first Respondent had himself declared that he has no assets to access.

[14] Notwithstanding that and without giving any reasons, the Learned Judge had made the order which he did Mr. Fuller complained; contending that an interim order for payment was wholly inappropriate in proceedings of this nature, would be arbitrary and without basis in fact and in law. Further, the order was directed to the Liquidators of the Bank who were not parties to the proceedings and were neither present nor represented and had had no input whatsoever. They were the persons now under pressure to pay he disclosed and threatened with contempt proceedings.

[15] In response, Ms. Kentish, Learned Counsel for the Respondents submitted that there was at the time a preponderance of evidence before the Judge to show that the funds were indeed owned by the first Respondent. There was before him, she pointed out, the sworn affidavit of the first Respondent's lawful attorney which asserted and made out a clear claim of ownership. There was also the evidence of Vladimir Ivanov, an employee of the Bank who had testified to the setting up of the accounts in the names of the corporate and other individual Respondents and had also testified that the original signature cards to those accounts had been signed by the first named Respondent. There was other compelling evidence before the learned Judge Ms. Kentish submitted which if believed would have given him good and sufficient reason to make the order which he did and which in all the

circumstances was fully justified.

[16] **THE LAW**

It is no part of my function as I see it to sit as it were on appeal on the merits of the interim order of 17th December 1999. In determining whether or not to grant a stay of execution I am guided by the principles set out at paragraph 59/13/1 of the 1995 Edition of the White Book at page 1009 under the rubric "When will a stay of execution be granted." There, the learned authors stress that an appeal does not operate as a stay on an order appealed against except to the extent that the court below or the Court of Appeal otherwise directs. The point is made that neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so and the Court does not "make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled" pending an appeal.

That said the learned authors go on to point out that the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory and the question whether or not to grant a stay is entirely in the discretion of the court and the court will grant it where the special circumstances of the case so require.

Further, execution might be stayed where for example the judgment is in favour of a person resident out of or about to leave the jurisdiction or if, under a court order, money is to be paid out of a fund and distributed among a large number of persons resident abroad and an injunction may even be granted restraining dealings with the fund pending appeal.

[17] **CONCLUSION**

It is my considered view that the liquidators as the persons most likely to be affected by any application for variation or discharge of the Restraint Order ought at the very least to have been served with notice of these proceedings for they are the individuals who are at the very heart of the Bank's liquidation/affairs.

And if for no other reason I would myself have ordered a stay, where as Mr. Fuller has (quite rightly in my view) pointed out, payment of not inconsiderable and apparently unverified sums is ordered to be paid to third parties who are resident out of the jurisdiction and where the possibility of recovery is most unlikely should such payments later prove to have been wrongfully ordered. I fully agree that the mere undertaking of the Respondents to repay could prove worthless having regard to all the circumstances. The Appellant's appeal would thereby have been rendered completely nugatory.

And that view is reinforced by the fact that the interim payment ordered could be made in an instant without there being adequate and proper safeguards for full reparation to the Appellant in the event that the Court should later find that the Respondents are not beneficially entitled to the money which is in itself an issue in serious dispute and will require full and mature consideration for its proper determination.

For the foregoing reasons there is in my judgment a real likelihood of the appeal succeeding and I would have granted the stay accordingly.

[18] At the conclusion of the hearing, shortly before noon the decision was reserved for 3 o'clock that very afternoon. Within minutes Mr. Fuller who had exited my Chambers returned and informed me that the Liquidators had in fact paid the sums ordered on 17th December, 1999. The offices of Messrs Lake & Kentish (for the Respondents) also confirmed by telephone shortly thereafter that they had received a facsimile message to that effect late that morning.

Any decision of the Court was thereby rendered nugatory as it had been overtaken by events.

[19] Speaking for myself, I did not in the first place quite frankly, expect the application for a stay to have been opposed having regard to all the circumstances. The learned Judge had after all immediately granted leave to appeal on making the order which he did and indeed a notice of appeal was promptly lodged by the Appellant together with an application for its stay.

[20] Experience shows that it is very seldom that applications for stay are opposed in such circumstances. Significantly, even a 48 hour stay (pending the actual hearing) was resisted (and refused by the Court) when the application first came on for hearing on Monday 20th December, 1999. In hindsight, this ought to have been

granted from the very outset.

The gut feeling is that learned Counsel for the Respondents was determined to thwart this appeal and has in fact succeeded in doing so. Unfortunately, as it has turned out, it is the liquidators who were neither present nor represented at the hearing of these proceedings who have been compelled to comply with the ensuing court order without the benefit of being heard or making an informed judgment of their own in the matter.

[21] This to my mind is an entirely undesirable and unsatisfactory state of affairs.

Ephraim F. Georges
High Court Judge