

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 24 of 2018**

BETWEEN

JUNKANOO ESTATES LTD

First Appellant

AND

YURI STAROSTENKO

Second Appellant

AND

IRINA STAROSTENKO

Third Appellant

AND

UBS (BAHAMAS) LTD (In Voluntary Liquidation)

Respondent

BEFORE: **The Honourable Madam Justice Charles, JA
The Honourable Mr. Justice Smith, JA
The Honourable Mr. Justice Turner, JA**

APPEARANCES: **No appearance by and on behalf of the First Appellant**

Second Appellant Pro Se

Third Appellant Pro Se

**Mr. Marco Turnquest with Ms. Chizelle Cargill, Counsel for the
Respondent**

DATES: **22 January 2024, 17 April 2024**

Civil appeal – Stay of taxation proceedings – Stay pending appeal - Section 6 of the Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964

The appellants seek a stay of the taxation of five Bills of Costs filed by the respondent. The respondent opposes the stay application. By way of preliminary objection, the respondent submits that the Court has no jurisdiction to entertain the stay application since there is no pending appeal, or application for leave to appeal, before this Court or the Privy Council.

Held: stay application dismissed with costs to the respondent, to be taxed if not agreed. The Registrar may proceed with the taxation of the respondent’s five Bills of Costs.

There is no pending appeal, no application for leave to appeal or any other application(s) before this Court nor the Privy Council, relative to the taxation of these five Bills of Costs. There is, therefore, no basis upon which to grant a stay of the taxation of these five Bills of Costs.

Ashley Dawson-Damer v Grampian Trust Company Limited and Lyndhurst Limited SCCivApp. No. 30 of 2022 considered

Garet O. Finlayson et al v Caterpillar Financial Services Corporation SCCivApp. No. 99 of 2022 considered

Nygard v Smith et al SCCivApp. No. 184 of 2019 mentioned

J U D G M E N T

Judgment delivered by the Honourable Madam Justice Charles, JA:

1. On 22 November 2023, the appellants applied for a stay of proceedings with respect to the taxation of five (5) Bills of Costs filed by the respondent (“UBS”) (“the stay application”). The application is supported by the Twenty-Fourth Skeleton Arguments filed on 21 November 2023 as well as by previous Affidavits made by the appellants in 2020 (which we accept only because of the purported indigence of the appellants), the Affidavit of evidence of fraud filed on 22 January 2024 and also the Twenty-Sixth Skeleton Arguments filed on the same day.
2. The respondent opposes the stay application and raises a Preliminary Issue that this Court has no jurisdiction to entertain the stay application since there is no pending appeal or leave to appeal application before the Privy Council or before this Court. The respondent relied on an Affidavit of Lena Bonaby filed on 17 January 2024 as well as their written Submissions filed on 19 January 2024.
3. UBS’s five Bills of Costs are set out at paragraph 5 of UBS’s written submissions filed on 19 January 2024 and, for ease of reference, are set out below.

First Bill of Costs

4. The First Bill of Costs relates to the Summary Judgment Order made by Evans J (as he then was) in Action No. 01620 of 2014. Evans J ordered the appellants to pay UBS the sum of \$920,164.87, being the principal sum owing to UBS at that date. On 2 February 2018, the appellants filed a Notice of Appeal, appealing the Summary Judgment Order. Also, on 2

February 2018, the appellants applied to this Court, differently constituted, to have the Summary Judgment Order stayed. That application was refused and UBS was awarded its costs. That Order has not been overturned on appeal. UBS filed its Bill of Costs on 28 March 2018.

Second Bill of Costs

5. On 11 August 2020, this Court, differently constituted, dismissed the appellants' appeal of the Summary Judgment Order ("11 August 2020 Judgment"). UBS was awarded its costs. UBS filed its Bill of Costs on 19 October 2020.

Third Bill of Costs

6. On 4 September 2020, the appellants applied to the Privy Council for special leave to appeal the 11 August 2020 Judgment ("First Leave Application"). On 10 November 2021, the Privy Council refused the appellants' application finding that the application raised no "*arguable point of law.*"
7. On 14 December 2021, the appellants, having bypassed this Court, returned after the Privy Council refused its application and applied to this Court for leave to appeal the 11 August 2020 Judgment. The appellants also sought to have a Notice of Motion filed in the Appeal on 2 February 2018 heard. UBS objected to both applications.
8. On 4 April 2022, this Court, differently constituted, acceded to UBS's two Notices of Preliminary Objections dismissing the appellants' applications and awarded costs to UBS.
9. UBS filed its Bill of Costs on 1 July 2022.

Fourth Bill of Costs

10. The appellants sought to have this Court, differently constituted, reopen the appeal, to hear and determine a Notice of Interlocutory Motion filed on 15 February 2018. UBS filed a Preliminary Objection on 16 September 2022, objecting to the Court hearing the Notice of Interlocutory Motion on the basis that it had already dismissed the appellants' appeal.
11. On 26 October 2022, the Court upheld UBS's Preliminary Objection finding that it was "**ostensibly functus officio in relation to the appeal as it has undeniably discharged all of its judicial functions.**" The Court determined that the appellate proceedings were at an end and the appellants had failed to establish that this was an appropriate case in which the Court should exercise its exceptional jurisdiction to re-open an appeal ("the 26 October 2022 Judgment"). UBS was awarded its costs of the application.
12. UBS filed its Bill of Costs on 14 November 2022.

Fifth Bill of Costs

13. On 23 March 2023, the appellants made an application to this Court seeking leave to appeal the 26 October 2022 Judgment to the Privy Council. UBS made a Preliminary Objection and, on 9 May 2023, the Court of Appeal upheld UBS's Objection, refused the appellants' application and awarded costs to UBS.
14. UBS filed its Bill of Costs on 1 August 2023.

Salient facts

15. As earlier stated, on 4 September 2020, the appellants applied to the Privy Council for special leave to appeal the 11 August 2020 Judgment ("First Leave Application"). On 10 November 2021, the Privy Council refused the appellants' application finding that the application raised no **"arguable point of law."**
16. Despite this, on 22 April 2022, the appellants made a second application to the Privy Council for leave to appeal the 11 August 2020 Judgment ("Second Leave Application"). On 3 May 2022, the Deputy Support Registrar of the Supreme Court of the United Kingdom informed the appellants that their application may not be issued stating that:

"...the application for permission to appeal has already been considered and refused by the Judicial Committee of the Privy Council.

There is no further route of appeal, and the JCPC cannot assist further."
17. Following that correspondence from the Deputy Support Registrar, on 3 May 2022, the appellants filed an "Application Notice" in the Privy Council seeking to review the decision refusing to issue the Second Leave application ("the Review Application)."
18. On 3 July 2023, the appellants made an application to the Privy Council seeking special leave to appeal the 26 October 2022 Judgment. On 13 December 2023, the Privy Council dismissed the appellants' application for special leave finding that the application **"does not raise an arguable point of law or a point of law of general public importance."**
19. On 23 January 2024, that is, a day after the hearing before us, the appellants received an email from the Case Manager of the Judicial Committee of the Privy Council advising on the status of their Review Application. The Case Manager wrote:

“Dear Mrs. Starostenko,

I am contacting you regarding your application for a review of the Registrar’s decision.

We apologise for the delay regarding this, and can assure you that your papers are now with a Justice for review.”

20. On 31 January 2024, our Registrar wrote to the Case Manager of the Privy Council inquiring about the status of the Review Application.

21. On 1 February 2024, the Case Manager of the Privy Council wrote:

“The matter is still in process, and an order will be drawn and sent out in due course.”

22. Not hearing from the Case Manager of the Privy Council, on 14 March 2024, our Registrar again wrote to the Case Manager of the Privy Council to inquire about the status of the Review Application. On 15 March 2024 the Case Manager of the Privy Council stated:

“The application to review the Registrar’s decision was considered by a single Justice (Lord Sales), who refused the application”.

23. The Case Manager of the Privy Council confirmed, in a subsequent email on the same day (15 March 2024), that **“The refusal was by way of a letter, the letter being dated 16 February 2024.”**

24. The short point is, the Review Application having been dealt with, there is no pending appeal, no application for leave to appeal or any other application(s) before this Court nor at the Privy Council relative to the taxation of these five Bills of Costs.

Submissions

Preliminary Issue

25. Counsel for the respondent, Mr. Turnquest, submitted that the appellants sought a stay of UBS’s Bills of Costs being taxed on the grounds that there are two pending appeals for determination before the Privy Council; both of which have been resolved as detailed in the Third and Fifth Bills of Costs contained in UBS’s Submissions which were filed on 19 January 2024 and also at paragraphs 6 to 10 of the Affidavit of Lena Bonaby filed on 16 January 2024 opposing the appellants’ application for a stay of the hearing of the taxation proceedings. In

paragraph 11, Ms. Bonaby deposed that on 3 May 2022, the appellants filed a Review Application in the Privy Council to “Review the Registrar’s Decision” refusing to issue the second leave to appeal application.

26. Mr. Turnquest submitted that since September 2018, the respondent has been unsuccessful in having its costs taxed due to the appellants’ objections.
27. On 28 November 2023, when the parties last appeared before the Registrar of this Court to commence the taxation process, the appellants objected to the Bills of Costs being taxed on the ground that they had filed a stay application. The appellants also asserted that the Bills of Costs should be stayed because they had two appeals pending before the Privy Council.
28. Before us, the appellants acknowledged that there are no pending appeals before the Privy Council. However, they submitted, both orally and in writing (see Appellants’ Twenty-Sixth Skeleton Arguments filed on 22 January 2024), that:

- i. There are strong merits in their action in the Supreme Court (on their counterclaim) and on the principles enunciated in **Amber Murphy v Hot Pancakes Limited (In Voluntary Liquidation) et al** SCCivApp No. 95 of 2020, “**the granting of a stay is the order that is likely to produce less injustice between the parties because the respondent, having costs already taxed by this Court, eve[n] tried to enforce its costs and therefore, would not be prejudiced by a stay of taxation, as it was already found by a single judge of this Court.**”

- ii. There are “*special circumstances*” in this case for the grant of a stay because the respondent is not “**a party who has succeeded in the action**” since this case is at an early stage of proceedings in the Supreme Court in that it has not gone through the case management directions stage and it is not ripe for determination, as found in the Supreme Court Ruling of Bowe-Darville J (retired) delivered on 8 May 2023 in consolidated actions 2014/CLE/gen/01620 and 2015/CLE/gen/01451: see Tab 5 of the exhibits attached to the Appellants’ Twenty-Sixth Skeleton Arguments.

- iii. The respondent will not “**be able to reimburse himself**” and that “**it would be possible for him to receive [his] money**” but only if it succeeded in the consolidated action after a trial

on the merits. Further, the trial was delayed for more than four years and the respondent's application for further particulars has only deprived the appellants of a trial date as found by Bowe-Darville J in the 8 May 2023 Ruling. This has caused hardship to them as they are now indigent because of UBS's conduct.

iv. The appellants alleged that, in 2018, the respondent attempted to use the costs taxed by this Court to deny them the means of further prosecuting their appeal but, in 2019, this Court refused the respondent's application to stay the proceedings. According to them, a stay of the taxation proceedings would serve the interests of justice.

v. A stay of taxation would serve the purpose of preserving the status quo until a final determination of this case following a trial and will cause no prejudice to the respondent, as was found by a single Judge of this Court: see incomplete Transcript of Proceedings dated 2 February 2018 before Sir Michael Barnett, JA (Ag.) as he then was.

Analysis and conclusion

29. The jurisprudence with respect to an application for a stay pending appeal is well settled: see: **Garet O. Finlayson et al v Caterpillar Financial Services Corporation** SCCivApp. No. 99 of 2022 (delivered on 26 April 2023) at paragraph 13 citing **Nygaard v Smith et al** SCCivApp. No. 184 of 2019 per Jones JA at paragraphs 12-14.
30. However, in the present case, there is no appeal pending in the Court of Appeal nor at the Privy Council which relate to the subject matter of these Bills of Costs. Therefore, there is no basis upon which to grant a stay of the taxation of these Bills of Costs.
31. We could end the appeal here but, for completeness, we will address the further submissions advanced by UBS.
32. Mr. Turnquest referred to **Ashley Dawson-Damer v Grampian Trust Company Limited and Lyndhurst Limited** SCCivApp. No. 30 of 2022 (delivered on 10 October 2023) where this Court (differently constituted) considered the issue of a stay of taxation proceedings pending the appellants' appeal to the Privy Council.
33. The Court in **Ashley Dawson-Damer** held that:

“17. There is no question that section 6 of the [Bahama Islands (Procedure in Appeals to Privy Council) 1964 Order confers power on the Court of Appeal in its discretion (when granting conditional leave) to stay or suspend the execution of the judgment appealed from pending the appeal to the Privy Council...”

34. The Court also re-affirmed and re-stated the principles in **Garet O. Finlayson** and, as we have stated, at paragraph 30 above, since there is no pending appeal before us nor at the Privy Council which relates to the subject matter of these five Bills of Costs, there is no jurisdiction to grant any stay relative to the taxation of these Bills of Costs under section 6 of the **Bahama Islands (Procedure in Appeals to Privy Council) Order, 1964.**

Conclusion

35. For all the reasons set out above, we dismiss the appellants’ Stay Application with costs to the respondent to be taxed if not agreed. The Registrar may proceed with the taxation of UBS’ five Bills of Costs.

The Honourable Madam Justice Charles, JA

The Honourable Mr. Justice Smith, JA

The Honourable Mr. Justice Turner, JA