COURT OF APPEAL

Before: Mr. V.A. Tomes, Deputy Bailiff

Between	A	Appellant
And	S	Respondent
	AND	
Between	S	Appellant
And	A	Respondent

Advocate R.J. Michel for S
Advocate J.A. Clyde-Smith for A

This is an application by S the respondent in the first appeal and appellant in the second appeal for an order, under Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964, (the Rules), that the Order of the Royal Court, set out in paragraphs (1) and (2) of the Act of the Royal Court (Matrimonial Causes Division) dated 1st July, 1988, (the Order) be stayed.

Rule 15 (1) of the Rules provides that except so far as the Court below or the Court of Appeal may otherwise direct - inter alia, an appeal shall not operate as a stay of execution under the decision of the Court below.

Rule 15 (2) of the Rules provides that where execution has been delayed by an appeal, interest for the period of delay at the rate of four per centum per annum shall be allowed unless the Court otherwise orders. I observe in passing, that the minimum rate of 4% bears no relationship to present day conditions and that if I should grant a stay and should A , the appellant in the first appeal and the respondent in the second appeal, succeed in maintaining the lump sum and arrears of maintenance now appealed against, the Court should "otherwise order" a realistic rate of interest on the amounts awarded and appealed against.

Paragraphs (1) and (2) of the Order which S now seeks to have stayed, provide:-

1) That the respondent (S) do pay to the petitioner (A) a further lump sum of £30,000 together with interest thereon of £9,000; and

2) That the respondent (S) do pay to the petitioner (A) by way of arrears of maintenance for the last 3 years, the sum of £8,200.

Paragraph (3) of the Order which is not directly relevant to the present application to stay the execution of paragraphs (1) and (2), provides that, with effect from the 1st July 1988, the respondent (S) do pay, or cause to be paid, to the petitioner (A), (a) the sum of £12,500 per annum towards the support of the petitioner (A) during their joint lives or until further order; and (b) the sum of £1,500 per annum towards the maintenance of D , the minor child, issue of the marriage between the petitioner (A) and the respondent (S), until he has reached the age of 16 years or continues to receive full time education, whichever is the later or until further order. I think this latter sub-paragraph must be read as if the word "ceases" were substituted for the word "continues", the intention being that maintenance should continue to be paid so long as the child continues to receive full time education.

Neither notice of appeal was served within one month from the date on which the judgement was pronounced, i.e. within one month from the 1st July, 1988, as required by Rule 3 of the Rules.

However, by Acts dated respectively the 9th and the 6th September, 1988, by consent, I enlarged, on applications made under Rule 16(1) of the Rules, to those dates respectively, the time within which the respective appellants should serve notices of appeal.

By her notice of appeal, dated 8th September, 1988, the petitioner (A) seeks an order to increase the amount of the further lump sum ordered to be paid by paragraph (1) of the Order from £30,000 together with interest thereon of £9,000 to the sum of £160,000 and seeks an increase in the amounts

of maintenance payable under paragraphs 3(a) and (b) of the Order from £12,500 to £15,000 and from £1,500 to £3,000 respectively. The petitioner (A) does not ask the Court of Appeal to make any variation in the amount ordered to be paid by way of arrears of maintenance under paragraph (2) of the Order.

By his notice of appeal, dated 6th September 1988, the respondent (S) seeks an order setting aside the whole of the Order. He submits that the award of the lump sum is excessive and that the awards of maintenance in paragraphs 3(a) and 3(b) of the Order are excessive. He does not attack the award by way of arrears of maintenance in paragraph 2 of the Order except on the general ground that the Order when taken as a whole is excessive when taking into account the actual means and assets of the respondent (S).

The first matter that I have to consider is whether I have jurisdiction to hear this application.

Rule 15(1) of the Rules is almost identical to Order 59 Rule 13(1) of the Rules of the Supreme Court and enables the Court below or the Court of Appeal or a single judge to direct a stay of execution.

It is appropriate, therefore, to have regard to the Supreme Court Practice, 1988, (the "White Book") for guidance: at page 895, paragraph 59/13/4 one finds this:- "The application must be made in the first instance to the court below (see r. 14(4)); but if it is refused, the application to the Court of Appeal is not an appeal: the jurisdiction is concurrent. (Cropper v Smith (1883) 24 Ch.D.305; Brown v Brook (1902) 86 L.T.373CA)."

Order 59, Rule 14(4) provides that "wherever under these rules an application may be made either to the Court below or to the Court of Appeal, it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the Court below".

We have no equivalent rule in Jersey.

Mr Michel argued that in Jersey, if the application is to be made to the Court below, it must be made immediately upon delivery of the judgement and that, thereafter, the Court below is 'functus officio' and that it was not possible for S to go back to the Court below. He cited, purportedly in favour of that argument, Stroud's Judicial Dictionary of Words and Phrases, 5th Edition, Vol. 2, at page 1064 and re V.G.M. Holdings Limited (1941) 3 All ER417. But those authorities referred only to a subsequent variation of a stay already granted and are authority for stating that where a judge has made an order for a stay of execution which has been passed and entered, he is 'functus officio', and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. In those circumstances the only means of obtaining any variation is to appeal to a higher tribunal.

I do not accept Mr Michel's argument. The authorities cited refer only to a variation after the question of a stay has already been decided. Paragraph 59/13/4 of The Supreme Court Practice states that: "The application should, if possible, be made to the Court below at the time it gives judgement (Tuck -v- Southern Counties Deposit Bank (1889) 42 CH. D.471, p478) or subsequently to the same Judge on notice (Republic of Peru -v- Wequelin (1876) 24 W.R.297). If it is refused, application can be made to the Court of Appeal within a reasonable time. An application to a Q.B. Judge (if not made at the trial) is made on notice; to a Chancery Judge by motion ..... Applications for a stay of execution are now normally heard by a single Lord Justice. Unless there is extreme urgency, the application should be made inter partes on summons (r.14). In cases of extreme urgency the Court may be prepared to grant a stay ex parte (though only until the stay application can be heard inter partes) but the Court will be reluctant to deal with the matter ex parte if the appellant has been dilatory in applying for a stay."

Thus, it is clear that in England, the Court below is not 'functus officio' once the judgement has been delivered, but has jurisdiction to hear a later application for a stay on notice, or by motion. The application can be made inter partes on summons or in the case of extreme urgency, ex parte.

In Cropper -v- Smith (supra) at p.313, Cotton, L.J. said this:-

"The 16th Rule of Order LVIII (the equivalent of Rule 13(1) R.S.C provides that an appeal shall not stay the execution of the decree appealed from, except so far as the Court below or the Court of Appeal may so order. That undoubtedly gives co-ordinate jurisdiction to the Court below and the Court of Appeal, and if it stood alone this Court might without any application having been made to the Court below, entertain an application to stay proceedings .... But then Rule 17 (the equivalent of Rule 14(4)RSC) provides that where the application may be made under any of the rules either to the Court below or to the Court of Appeal, then it shall be made in the first instance to the Court below. That prevents this Court from entertaining an application to stay proceedings until a similar application has been made to and refused by the Court below."

In Jersey Rule 15(1) of the Rules does stand alone. There is no equivalent to Rule 14(4) R.S.C. Thus, the Court below and this Court have concurrent or co-ordinate jurisdiction. Therefore, I find that I am entitled, without any application having been made to the Court below, to entertain the present application to stay execution. S has merely deprived himself of the opportunity to make an application to the Court below and, in the event of that application being refused, to make a new application not by way of appeal but on its merits to this Court. Thus, I find that I have jurisdiction to determine the present application.

Nevertheless, I have to consider the question of delay and the reason why no application was made to the Court below. In Cropper -v- Smith (supra at p.313, Cotton, L J. said: "The party who has delayed must show why he has delayed, and probably would not get any order, unless he gives a satisfactory explanation of the delay..."

The Order was made on the 1st July 1988. No "time to pay" was given by the Court and, therefore, the capital payments of £39,000 and £8,200 fell to be paid immediately the Order was made. Notice of Appeal by S was

not given, as I have said already, until the 6th September 1988, a period of two months after payment should have been made.

Mr Michel has acted as S's legal adviser only since September, 1988, and, therefore, is in no way responsible for any delay.

The Order and the judgement are both dated 1st July, 1988. Mr Michel explained that S was not present in Court when the judgement was delivered; that his previous Counsel did not tell him of the handing down of the judgement; that his previous Counsel had not taken the normal precaution of discussing with his client the several alternative decisions to which the Court might arrive and take instructions on the alternative scenarios; as his client was not present Counsel could not take instructions "sur-le-champ" and apply for a stay; that when judgement was delivered copies were not handed down; that the copy of the Act of the Court (the Order) reached S some time in August; and that the copy of the judgement did not arrive until the end of September. Mr Michel also claimed that as soon as S learned of the contents of the Order, he gave instructions for an appeal; that notice of appeal was served in late July, but that S's previous Counsel failed to file the notice and the record of service by the Viscount. Thus, there was, in fact, no appeal.

There had been a succession of technical errors because A's Counsel had given notice and had served and filed it; but his notice was defective because of failure to comply with technical requirements; thus, by consent, there had been extensions of time within which to appeal on both sides.

A summons for payment of the lump sum issued on the 23rd August, 1988. Thus S had become dissatisfied with his previous Counsel and this caused him to consult Mr Michel, and the application for a stay followed; when the action came before the Court on the 2nd September, 1988, it was adjourned sine die pending the outcome of the present application.

In the circumstances, I accept that S has given a satisfactory explanation of the delay.

Finally, therefore, I have to exercise my discretion on whether or not to grant the stay applied for, on its merits.

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 (The Annot Lyle (1886) 11P.D.114, p.116,C.A.; Monk -v- Bartram (1891) 1QB346).

But it has also been said that "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory." (Wilson -v- Church (No.2) (1879) 12Ch. D.454pp 458,459 C.A.).

In England, an affidavit is required: "As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds." (Atkins -v- G.W.Ry (1886)2 T.L.R.400).

No affidavit from S was produced. Mr Michel submitted that it was difficult to proceed without affidavits and that if I were to decide that I had jurisdiction I should consider adjourning the application for affidavits. He also submitted that there was no existing requirement in Jersey for an affidavit and that I might wish to make a practice direction.

I have no hesitation in saying that every application for a stay should be accompanied by an affidavit in future and I readily make a practice direction to that effect.

But I am not prepared to adjourn the present application for affidavits to be sworn. I prefer to deal with the application on the basis of the arguments put before me.

The difficulty is to reconcile the principle in The Annot Lyle and Monk -v- Bartram cases with that in Wilson -v- Church. But even without an affidavit I can apply the Atkins -v- G.W. Ry principle and grant a stay only if I am satisfied that there would be no reasonable probability of getting the lump sum and arrears of maintenance back if the appeal succeeds.

Mr Michel sought to persuade me that I should apply a different rule in a matrimonial case. He referred me to Rayden's Law and Practice in Divorce and Family Matters (14th Edition 628 para 12:

"If it appears that serious harm may be done if the order is put into effect before the hearing of an appeal, an application for a stay may be made..."

He also referred me to Guerrera -v- Guerrera (1974) 3 All ER 460, where Stephenson L.J. at p.462, said this:-

"Further, it should be pointed out that, in a case which involves the transfer of legal interests in real property, to say nothing of transfers of considerable sums of money, it would be better for the dissatisfied party to ask the judge for a stay if there is a serious intention to challenge the judge's order to transfer, and, if that is not granted, this court should be asked for a stay. It happens that in this case the husband is not persisting in his application to have the house remain in the joint names of himself and his wife. It cannot remain in their names because it has already been transferred to her name. The difficulty that might have been occasioned if he had persisted in that application and if that application had been successful therefore does not arise in this case: but it might arise in another case. Whether or not the wife will be prejudiced if (as I think) the judge has ordered her to pay too much, is uncertain. But there again it is undesirable that cash should be paid over, perhaps by parties who can ill afford to find the money, if it, or some part of it, has got to be paid back under an order of the court made on appeal...."

And at Page 464, Ormrod L.J. said:-

"So the simple rule should be recognized and in any appeal from any order requiring leave to appeal the application and its result should be recorded in the order of the Court. If that had been remembered, the rather disastrous situation in this case, in which not only was a stay refused but under the transfer of property order money has been paid while the appeal has been pending, producing a most unfortunate result, would have been avoided."

I do not regard Guerrera -v- Guerrera as of universal application. In that case the husband was to transfer the real property into the wife's sole name. On the husband delivering up to the wife vacant possession of the premises, the wife was to pay to the husband the sum of £1,100 which, no doubt she could ill afford and which was found to be too much. I am in no doubt that, on the merits, a stay should have been granted but it cannot constitute authority for removing the Court's discretion in every matrimonial case. As Rayden says, a stay is justified if it appears that serious harm may be done.

A is not out of, or about to leave, the jurisdiction. I do not believe that if £47,200 is paid to A she will dissipate it. It may well be that a portion of it would be used to meet liabilities but I am confident that the major part will be safeguarded and protected. A was married for twenty-four years and bore her husband five children. When she received the original lump sum of £70,000, she did not dissipate it, but invested it in a home for herself. It is true that Mr Michel said that it would be impossible to contemplate proceeding against her property; that it would be "morally impossible" to do so. But I am not concerned with sensitivity - I am concerned only with the question of reasonable probability of getting the money back and I am satisfied that there would be a very reasonable probability. In fact, there is no reason at all to think the money would be lost. All that Mr Michel was able to suggest was that A might put the whole of it as improvements to the home - I merely observe that this would not render a successful appeal nugatory, as the security would be there - or somehow invest it in a quoted company that failed. I feel that in that respect the capital might be safer with

A since Mr Clyde-Smith told me that S made long term investments that cost his company £272,000, the market value of which was £160,000. Mr Michel argued that neither S nor his company have free liquid funds and that their substantial assets are the company's stock in trade.

The history of this case is that an agreement was reached between the parties but full and frank disclosure had not been made by S. Consequently, matters were re-opened and the orders now appealed against were made. According to Mr Clyde-Smith there are securities with a market value of £160,000 which capital is not used for the business of the Company. If the securities cannot be realized, it should be a very simple matter for S to raise a loan. He has a valuable house. I find that no serious harm will be done if this money is paid now, even in the, I think unlikely, event that part, or the whole, has to be repaid.

Accordingly, I refuse the application for a stay; S 's summonses are dismissed; and he will pay A 's costs on a full indemnity basis. Mr Clyde-Smith has given his personal undertaking to repay the costs if S 's appeal is successful.

AUTHORITIES

*** referred to in argument**

B: referred to in the judgment

B* Court of Appeal (Civil) (Jersey) Rules, 1964: Rule 15.

B* R.S.C. O.59 Rule 13(1) (4),
Rule 14 (4).

B* Stroud's Judicial Dictionary of Words and Phrases
(5th Edn) (Vol. 2.) p. 1064. p. 1064.

B* re: V. G. M. Holdings Ltd., (1941) 3 All ER 417.

B Cropper -v- Smith (1883) 24 Ch.D. 305.

B The Annot Lyle (1886) 11 P.D. 114, p.116, C.A.

B Monk -v- Bartram (1891) 1QB 346.

B Wilson -v- Church (No 2) (1879) 12 Ch. D.454. pp. 458,59 C.A.,
B. Atkins -v- G. W. Rwy (1886) 2 TLR 400

B* Rayden's Law and Practice:Divorce and Family Matters (14th Edn)
p.628 para 12.

B* Guerrera -v- Guerrera (1974) 3 All ER460 at p. 462, and at p. 464.