IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

CIVIL APPEAL No. 35 of 2018

BETWEEN:

MARLAN COLE, Director, Food and Drug Department

GOVERNMENT ANALYST, FOOD AND DRUG DEPARTMENT

Appellants/Respondents

-and-

DR BALWANT SINGH'S HOSPITAL, INC.

Respondent/Applicant

BEFORE

Dr Justice Arif Bulkan – Justice of Appeal (ag.) – (in Chambers)

APPEARANCES

Mrs. Judy Stuart-Adonis for the Appellants/Respondents

Mr Devindra Kissoon for the Respondent/Applicant

April 19 & 30, 2018

DECISION

[1] The appellants approached the Court by way of Summons seeking a stay of execution of the judgment and orders of the Acting Chief Justice, Her Honour Roxane George SC, delivered on the 30th day of January, 2018. In that judgment George CJ (ag.) made absolute four prerogative orders earlier issued against the appellants, the essence of which quashed the decision to refuse to issue licences to the respondent to import eighteen specified drugs, directed the first named appellant to consider or reconsider the respondent's application to import the said drugs, directed the first named appellant to provide the respondent with a current list of all new drugs currently licenced for import or sale, and prohibited the first named appellant from revoking any import licences previously issued to the respondent. Against that decision Mr Marlan Cole, Director of the Food and

Drug Department, and the Government Analyst, filed an appeal, which is now pending. In the interim, they seek a stay of execution of the Orders made by the acting Chief Justice.

[2] The subject-matter of the dispute – as one might surmise from the parties involved – is one of considerable public importance, having to do with the importation and licensing of the pharmaceutical drugs for use in the treatment of illness and disease. The respondent applied for the prerogative orders in question, alleging that the appellants unreasonably refused to issue the licences since it had fully complied with the statutory requirements for registration of new pharmaceuticals. Despite such compliance, the respondent alleged, the appellants sought to impose additional conditions for registration based on an MOU not incorporated in the law. But in their application for a stay of execution, the appellants argue the opposite, claiming that the respondent failed to satisfy the drug registration requirement in accordance with the governing regulations. At the hearing of this Summons, both parties stuck tenaciously to these irreconcilable positions.

[3] As tempted as I was to delve into the evidence, which in any event was not before me, the best I could do – without the benefit of the record and without attempting to determine the actual appeal – was to navigate the conflicting claims in light of the principles governing the grant of a stay of execution. Although these have been articulated in this and other courts on innumerable occasions, I make brief reference to them below to ensure, as best as possible, that I exercise this discretion judiciously and reasonably.

[4] A convenient point at which to begin would be to bear in mind the 'basic rule', as stated in ***Blackstone's Civil Practice 2013*** (OUP), para 71.46, that 'a litigant is entitled to enjoy the fruits of its success.' This was taken from the dicta of Lord Justice Rimer, who laid down more fully and clearly in *BMW AG v Commissioners of HM Revenue and Customs* [2008] EWCA Civ 1028 at [11]:

> *'The starting point is that the ordinary principle, long established, is that a successful litigant is entitled to receive the fruits of his success, and the launching of an appeal by his opponent does not operate to stay his entitlement. Nor indeed is the contrary suggested. The starting point is, however, by no means also the finishing point, because it is equally well-established that the court has an unfettered discretion to order a stay of the order under appeal if the justice of the case demands it. In a case in which the question of the ordering of a stay arises, the role of the court is to make an order that best accords with the interests of justice.'*

[5] This court has repeatedly acknowledged its discretion with regard to applications such as these, captured in the oft-quoted statement of Singh JA in *Toolsie Persaud Ltd v AG* [2003-2004] GLR 195 at 200 that 'The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it.' In exercising that discretion, courts have generally been guided by two factors, namely: the merits of the appeal, and the consequences of preserving (or not) the status quo.

[6] What is also clear is that it is not enough to make bald averments in supporting Affidavits. Regarding the substance of the appeal, while the standard appears to have been somewhat relaxed insofar that an applicant for a stay merely has to show 'some' prospect of success or 'some merit' (again, see Singh JA in *Toolsie Persaud Ltd*, above at p. 200), the court will not lightly interfere with a lower court's discretion that was properly exercised: per Colin Williams JA in *Scotland DA Inc v AG and others* (1996) 53 WIR 66. This would suggest that an applicant for a stay must indicate provisionally by way of Affidavit how the lower court erred, whether by misdirecting itself on the law or failing to take some relevant fact or principle into account or by arriving at a verdict that was manifestly against the weight of the evidence. In other words, mechanical regurgitation of some stock phrase claiming that the applicant for a stay has 'good grounds of appeal' or simply that it has 'strong case' is inadequate.

[7] Equally, the applicant must show some special circumstance to justify the stay, which must also be deposed on the Affidavit: *The Annot Lyle* [1886] XI P 114. The most persuasive claim in this regard is that the appeal, if successful, would be rendered nugatory without a stay: *Commissioner General of Guyana Revenue Authority v Caribbean Chemicals* (2009) 75 WIR 272. Examples of this are commonly that if the stay is not granted and the appellant eventually succeeds, it would be difficult to recover damages paid out (see *Wilson v Church (No 2)* [1878] 2 Ch D 454) or to restore the status quo (see *Toolsie Persaud Ltd*, above). Ultimately, to return where I started, an order should be made that 'best accords with the interests of justice' (per Rimer LJ in *BMW*, above).

[8] Finally, before turning to the instant application, it would be apposite to acknowledge the obvious fact that this is not the hearing of the actual appeal. While avoidance of the substantive issues is impossible given that some view of the merits of the

appeal has to be taken, all that is before me is conflicting affidavit evidence, which necessitates caution when forming any provisional views.

[9] In his affidavit the first named appellant averred that they have 'good grounds of appeal' and 'a strong case against the respondent on the merits'. When pressed at the hearing to elaborate, counsel on his behalf submitted that the learned trial judge erred by neglecting and/or refusing to consider that the respondent could have availed itself of an alternative pathway to registration of the drugs in question. Here counsel was referring to a Memorandum of Understanding (MOU) between the Caribbean Public Health Agency and the Minister of Public Health in Guyana, an MOU that counsel alleges was endorsed in 2014 by the Ministers of Health of CARICOM member states. The difficulty with this submission is that the process for registration of 'new' drugs is governed by regulations 78 and 80 of the Food and Drug Regulations made pursuant to the *Food and Drug Act*, Chapter 34:03 of the Laws of Guyana – which regulations outline a process that does not require compliance with the said MOU, nor in fact does it even mention it. That being the legal framework, it is clear that the respondent could not be forced to follow the MOU, and still less could the decision of the learned trial judge be criticised as unreasonable or irrational for failing to insist upon compliance with a condition not currently contained in the law.

[10] Indeed, the simple issue in this action was a factual one of whether the respondent satisfied the court that it had complied with the registration requirements as laid down in the applicable regulations. Curiously, the evidence on this issue before me is conflicting. The respondent has asserted not only that it has fully satisfied the applicable licensing requirements, but also that proof of this was submitted to the court below. On the other hand, the appellants deny that the respondent complied with the law and its required processes. I find it difficult to imagine that the learned trial judge could have erred in deciding such an elementary issue as this. Either the application for registration had followed the required procedures or not; if it did, there would undoubtedly be a paper trail to verify that. Faced with the supporting documentation, it would have been straightforward for a judge to determine, as a matter of fact, whether there was compliance with the applicable regulations as alleged.

[11] Moreover, it would be extremely reckless (at a minimum) for the CEO of the respondent, Dr Madhu Singh, to have averred before me as she did, that the drugs subject to this action were properly evaluated by the relevant authorities and the proof submitted to the Court below. This is a definitive and unambiguous claim, the truth of which will eventually be tested when the record of appeal is prepared. That being the case, it becomes even more difficult to find that the learned judge misdirected herself on the law or came to a finding that cannot be supported on the evidence.

[12] In this application the first-named appellant described the Order of the learned Chief Justice to be 'nebulous', averring relatedly that the respondent already possesses a valid licence to import drugs into Guyana which are duly registered by the Government Food and Drug Department. It took me some time to decipher this claim, which was also disputed, partly because the said Order was not exhibited to the accompanying affidavit. Ultimately, it appears that this was really a dispute as to nomenclature and not substance, for while the respondent does have a 'permit' to import drugs, what is sought is a 'Certificate of Drug Registration/Marketing Authorisation' in relation to the drugs specified in the original application. Such a certificate would enable the respondent to import and market the said drugs in Guyana. Thus viewed substantively, the order of the learned Chief Justice, which quashes the refusal of the decision of the first named appellant to issue a licence to import the drugs in question, was not directed to a general permit to import drugs but rather the more specific certificate of drug registration that would entitle the respondent, if it is granted, to import the said drugs *as named in the application.*

[13] It is also worth noting that the learned Chief Justice did not direct the appellants to issue the said certificate of registration or import licence, but merely requires them to consider and/or reconsider the application within a certain time frame. By directing the application to be re-considered, the court was extremely circumspect and did not venture beyond its powers – such as by directing the actual issue of the licence. This was in keeping with the basic principle that mandamus is never granted to enforce the exercise of a discretion in any particular way, but solely to compel the performance of a duty, see: *Osman Ally v Income Tax Board of Review* [1981] GLR 213 at 219.

[14] Thus, for the reasons outlined above, it does not appear to me that the learned Chief Justice misdirected herself in law nor do I find it credible that she could have erred in resolving the simple issue of fact which arose for determination in this case. As such, the appellants have failed to satisfy me that their appeal has any merit or reasonable prospect of success.

[15] Regarding the second criterion of special circumstances, here again I find the affidavit in support of the application to be deficient. Given the subject matter of this dispute, one would have imagined it to be fairly easy to establish harm, yet beyond a bald assertion to that effect there are no particulars to satisfy even a low threshold in this regard. Paragraph 14 of Mr Cole's affidavit asserts that if the stay is refused, consumers would be put at risk by the availability in Guyana of drugs not 'dually assessed for efficacy, safety and quality'. However, this traverses again the substantive dispute between the parties regarding the procedures for registration, and as discussed above there is no persuasive reason for thinking that the learned Chief Justice could have been mistaken in finding that they were. Furthermore, if the drugs in question are unsafe and put consumers at risk, the least one would expect of the appellants would have been some evidence, of whatever nature, to verify such assertions. No court could refuse a stay faced with such evidence, given that there can be nothing more important than public health. But here there was nothing beyond unsupported statements regarding the origin of the drugs.

[16] The first named appellant also warned of the proverbial floodgates being opened were the Chief Justice's Order be allowed to stand, thereby facilitating 'clandestine operations' and the release of substandard drugs on the local market. I found this to be an inscrutable claim. The Order of the Chief Justice is for the appellants to re-consider the application for registration by the Respondent hospital in relation to certain specific drugs as itemised clearly. Presumably, a licence to import will only be granted once the conditions specified in regulation 78 of the Food and Drug Regulations are met; if granted, no importation of those specific drugs pursuant to such licence could be described as clandestine. In other words, a process is mandated by law before new drugs can be registered and imported into Guyana. The order of the Chief Justice does not subvert or facilitate the circumvention of that process.

[17] On the other hand, the respondent has averred that if it is prevented from importing the drugs in question, the life, safety and well-being of its patients would be endangered, particularly if information as to any local suppliers is concealed. Regarding the latter, it is incomprehensible to me why it would take an order of the court before the Food and Drug Department discloses which company or entity is licensed to import any drug into the country. Such information should be in the public domain for maintaining secrecy as to licensed importers/distributors of drugs could hardly be of benefit the public at large. Suffice it to say that the claim for information by the respondent is eminently reasonable, and I see absolutely no reason why the Order of the Chief Justice in relation to that aspect should be stayed. But given the claim of the respondent as to the necessity for these drugs, which remained uncontested, there is even less reason to grant the stay of that aspect of the Order that directs the appellants to reconsider the application.

[18] Ultimately, the dedication of the appellants is commendable, and as a citizen and consumer I am comforted by and admiring of their tenacity in policing the regulations which they are tasked with enforcing. However, their decisions must be rational in that they must be based on reasons and guided by processes outlined in the law. Having carefully considered the respective averments in this case together with the oral submission on behalf of the parties, I am not persuaded that the appellants were so guided in this matter. The appellants have therefore failed to satisfy me either that their appeal has some merit or that there are special circumstances which warrant a grant of the stay requested. In the circumstances, the order sought at paragraph (a) of the Appellants' Summons dated the 21st day of February, 2018 is refused. There will be no order as to costs.

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Arif Bulkan
Justice of Appeal (ag.)

Dated the 30th day of April, 2018