

There was a caveat lodged by or on behalf of the defendant, signed by the defendant "by the attorneys-at-law and Agents, Samuel and Samuel Per: Donald S. Fitzritson".

Attached to the said caveat was a copy of an alleged agreement for the sale dated 1st April, 1982, between the plaintiff and defendant for the said land. The agreement purported to be signed by the plaintiff "by his Agent, Samuel and Samuel, per Donald S. Fitzritson".

The plaintiff does not admit or acknowledge the agreement for sale; and denies that Messrs Samuel and Samuel and/or Donald S. Fitzritson were ever his agents.

An appearance was filed by Messrs Dunn Cox and Orrett on 25th June, 1990. No defence was filed. The plaintiff next issued a summons for judgment. At the hearing of the summons before me on 16th December 1991, the defendant was represented by counsel who did not oppose the order and so an order was made that the defendant deliver up possession of the said land on or before 28th February 1992, and that he should pay damages and mesne profits and compensation, and that the said caveat be removed.

On 27th February, 1992, a notice of change of Attorney was filed by Messrs Playfield, Junor, Pearson and Company on behalf of the defendant. That same day the new attorneys filed a summons to set aside the judgment of 16th December, 1991. This summons was dismissed by the Master on 23rd March 1992,

On 15th April 1992, the defendant's attorney filed a summons for a stay of execution of the judgment. This was struck out by the master on 23rd April 1992.

The defendant now comes before me by a new summons dated 24th April, 1992 for the order "that the judgment is default of defence made herein on the 23rd day of March 1992 (sic) and the Warrant of Possession if any, issued herein be stayed until the hearing of the appeal filed herein".

No warrant of possession has yet been applied for or issued.

The Submissions on behalf of the applicant.

Mr. Pearson for the plaintiff, first referred the court to section 596 - 597 of the Consolidated Judicature (Civil Procedure Code) Law which are couched in the following terms:

Stay of Execution 596

"Any party against whom a judgment had been given may apply to the Court for a stay of execution, or other relief against such judgment upon the ground of facts which have arisen too late to be pleaded; and the court may give such relief, and upon such terms as maybe just".

Letting aside of staying Writ of Execution 597

"The Court may at anytime, upon reasonable cause being shown, stay or set aside any writ of execution on such terms as justice may require".

In support of his argument Mr. Pearson then cited paragraph 61 of Halsbury's Laws of England 2nd edition, volume 14 which is similarly worded to paragraph 49 of volume 16 of the 3rd edition. It reads thus:

"Stay of Execution: When a judgment or order is for the payment of a sum of money or costs, the Court may stay execution until such time as it thinks fit: it has an inherent jurisdiction over all judgments which it has made, under which it can stay execution in all cases either for a definite or unlimited period. A stay may be granted upon facts which have arisen too late to be pleaded in the action".

Mr. Pearson conceded that in an application of this nature, the applicant must show special circumstances which ^{could} persuade the Court to exercise its discretion in his favour. He submitted that the following facts which appear in the affidavit in support of the application are special circumstances:

- (1) The applicant has been in quiet possession of the land since 1982.

- (2) He has done acts of ownership and expended large sums of money on improving the premises.
- (3) He has done all he could have done to complete purchase.
- (4) Portions of the premises have been let to tenants who would be caused grave hardship if evicted.
- (5) He would be deprived of revenue if his tenants were evicted.
- (6) He had promptly made an application to set aside the order for possession.
- (7) Upon the application to set aside being dismissed he filed a notice of appeal without delay.
- (8) He had obtained fresh legal advice since the judgment, and this advice was that he was a bonafide purchaser for value and therefore he had a good defence to the action.

He submitted that the court ought to stay execution on this basis that the order was not made on the merits of the case, and in view of the fact that the applicant was merely asking that the stay be made until the hearing of the appeal from the master's decision, the plaintiff/respondent would not be greatly inconvenienced.

He also submitted that the plaintiff was not legally in possession: the court should not act upon the assertion of Christopher Burke who deposed in an affidavit that he was agent of the respondent and on his behalf had taken possession of the premises: such "possession" was not taken under a writ issued by the court and so the court should disregard it. Further, he submitted, that the judgment dated 16th December, 1991, had been entered administratively and not judicially: Moreover the attorney Fitzarison from whom the defendant had bought the land, had held himself out to be the agent of the owner, and the applicant had a proper defence - that of being a bonafide

purchaser for value.

THE SUBMISSIONS ON BEHALF OF THE RESPONDENT.

Mr. Burke made the following submissions on behalf of the respondent.

- (1) The respondent did not apply ex parte for a judgment in default as provided by section 250 of the Civil Procedure Code. Instead he caused the defendant's attorneys to be served with a summons to enter judgment.
- (2) The defendant's attorney appeared before the court and said he was not opposing the order.
- (3) The defendant could have opposed the application for leave to enter judgment or applied for leave to defend out of time.
- (4) The judgment was not by default.
- (5) As indicated in the affidavit of Christopher Burke he had already taken possession of the land on behalf of the plaintiff (albeit without a warrant of possession).
- (6) The court should not therefore make an order which would be nugatory.
- (7) The court does not make a practice of depriving a successful litigant of the fruits of his judgment.
- (8) No special circumstances had been disclosed by the defendant/applicant.
- (9) As a general rule the only ground for a stay of execution is that if damages and costs were paid there would be no reasonable probability of getting them back.
- (10) The plaintiff/respondent's mother had died in 1971 and letters of administration had not been granted in 1992, so that the attorney Fitzritson could not have been the agent of her estate.

There now arise a number of questions for the courts decision.

1. What is the Nature of the Discretion which the court must exercise?

I have already referred to the passage in Halsbury's which Mr. Pearson cited in his arguments. Unfortunately both the 2nd and 3rd editions of Halsbury's by reason of the dates of their publication could not have benefited from the decision of a strong Court of Appeal (Lord Denning, Lord Diplock and Winn LJ) in the case of T.C. Trustees Ltd v. J.S. Darwen (Successors) Ltd [1969] 2 Q.B. 295. At p.302 Lord Denning with whom Lord Diplock and Winn LJ concurred gave the main judgment in which he outlined the "nature of the grounds on which the court exercises its jurisdiction to stay proceedings: He said:

"We were referred to a statement in Halsbury, 3rd edition, volume 16 (1956) "Execution" p. 34 But I think it is too widely stated. The authorities cited do not support it. It is true that the courts have an inherent jurisdiction to stay proceedings, but only on grounds which are relevant to a stay. It does not extend to grounds which are properly matters of defence of law or relief in equity, for those must be raised in the action itself.

(emphasis mine)

Lord Denning then went on to discuss the essential quality of what would constitute special circumstances. He continued thus at line E - F.

"Mr. Lipfriend raised a further point. He said that under RSC order 47 r.1 there is a power in the case of a writ of fi fa or elegit, to stay proceedings if there are special circumstances which render it inexpedient to enforce the judgment or in case the applicant is unable from any cause to pay the money. I think that is in appropriate here. The circumstances there again are circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness".

(emphasis mine)

Again in the earlier case of London Permanent Building Society v. deBaer

[1969] 1 ch. 321 at page 331 G to 332 B Plowman J said:

"Counsel for the defence submitted that all Order 45.2.11 does is to enshrine the inherent jurisdiction of the court to stay execution on judgments and orders. To support the proposition that such an inherent jurisdiction exists, counsel referred me to the statements in Halsbury's Laws of England, 3rd edition volume 16 (1956) p. 34 paragraph 49....."

In my judgment that proposition is too widely stated and is not supported by the two cases which are cited in the footnote in support of it".

After discussing the two cases to which he referred, the learned judge added this at page 333 line c:

"The rule is therefore one which applied only to money judgments and does not in my judgment, support the much wider statement in Halsbury's Law of England.

The decision of great relevance here is it was based on order 42 2.27 the wording of which is identical to our section 596 - it authorised a stay of execution only "upon facts which have arisen too late to be pleaded" see Halsbury's 1st edition vol. page 272 footnote 1. Mr. Pearson based his application on both sections 596 and 597 of the Civil Procedure Code. No doubt he did so of an abundance of caution. I shall deal firstly with section 597. It may be disposed of briefly. I do not think that section 597 applies in this case because that section applies to the setting aside or staying of a writ of execution, as the heading to the section indicates. And no writ has yet been issued or even applied for; and so I shall deal no further with that section, for although Mr. Pearson said he is seeking a stay of the judgment

and any process which may issue therefrom, it seems to me that in light of the situation in this matter, once the judgment is stayed there can be no issue of any process there for as the learned authors of Halsbury's Law of England 3rd edition, volume 16 says at page 2, "The word execution in its widest sense signifies the enforcement of or giving effect to the judgments or orders of a court of justice" I think that the word is used in this wider sense in section 596, where as section 597 refers to the narrower sense of the writs of enforcement already in existence.

In light of the cases cited above I accept as correct the statements of law which appears in Halsbury's Law of England 4th edition volume at paragraphs 451, 453 and 455. The main heading of which is "STAY OF EXECUTION".

Firstly, paragraph 451 sets out the general principle under the sub-heading "Stay of execution generally" under this subheading after stating that the court has an inherent jurisdiction to stay proceedings which are frivolous, vexatious or manifestly groundless, the learned authors state:

"The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matter which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself."

Paragraph 452 then deals with "stay of execution by writ of fieri facias. The law on this area is not relevant here for as has been shown above the principles which govern its operation are wider than the jurisdiction to stay which is under consideration here and as it stated in the penultimate sentence of paragraph 452,

"The power to stay execution by writ of fieri facias is quite separate and distinct from the power to stay execution pending appeal".

Paragraph 453 is particularly relevant. It is headed "Stay of Execution for matters occurring after judgment. After stating the wording of RSC order 45 r 11 which replaces the former order 42 r 27 which as noted above was worded in terms of see 596 of the Civil Procedure Code the learned authors state the

the following principle:

"The facts must be such as would or might have prevented the order being made, or, would or might have led to a stay of execution if they had already occurred at the date of the order".

At footnote 1 on page 272 they go on to note that order 42. r. 27 (and by implication section 596) "was narrower in its operation, as it authorised such a stay only upon "fact which have arisen too late to be pleaded in the action".

They further states:

Nevertheless the present rule should not be construed as giving an entitlement to a stay of execution as a method of attacking the validity of a judgment, but only of staying its enforcement

(emphashs mine)

2. Have the facts on which the application is based arisen too late to be pleaded?

I am of the opinion that none of the facts deposed in the affidavit in support of this application is one which arose too late to be pleaded. One of the strongest points that the applicant is making is this "after the judgment I understood that I was given bad legal advice when the matter came before the court". Even if this is true his only recourse is against his attorney who told the court that he would not oppose the order. He is bound by his attorney's conduct of the matter. This is not a matter which could have been pleaded. All the other facts apart from his promptness in seeking to set aside the judgment and his filing an appeal from that dismissal of application are matters which could have been pleaded and had arisen in sufficient time to have been pleaded - his quiet possession since 1982; that he was a bonafide purchaser for value; that he had done all he could to complete purchase; that he had done acts of ownership and expended large sums on the property. So the application fails on this test.

In my opinion this should be sufficient to dispose of this application, but I shall go on to consider the other elements on which the applicant should satisfy me.

It must be borne in mind that as Plowman J said in London Permanent Building Society vs deBaer at p. 334 line B

"It is explicit in the rule (here section 596) that the matters referred to are matters which would or might have prevented the order being made, or would or might have led to a stay of execution if they had already occurred at the date of the order".

And I wish to add, that nothing has occurred in this case since December, 1991 which if it had occurred before that date could have been pleaded and could have prevented the order being made or entitled the defendant to a stay of execution.

3. DO THE FACTS DEPOSED CONSTITUTE SPECIAL CIRCUMSTANCES?

I now turn to the question of whether the applicant's affidavit reveals special circumstances. An important example of such circumstances is given by the learned authors of Halsbury's at paragraph 455 namely - that an appeal would be negatory if a stay was refused, by reason of the respondents poverty. There is no such suggestion here. Moreover as Mr. Burke submitted the land will always be there and I might add that one would hardly expect the respondent who has so recently won his case, to cause the building on the land to deteriorate.

The serious nature of the circumstances required is shown by example of cases in which the court have held that the facts did not amount to special circumstances. The following are noted by Halsbury's paragraph 455 note 2:

An allegation on appeal that there was a misdirection at the trial (Monk vs. Burtram [1891] 1 Q.B. 346: That the party wishes to consider the advisability of appealing (Webber vs. London, Brighton and South Coast Rly Co. (1881) 51 LJQB 154. That witnesses have been indicted for perjury (Warwick vs. Bruce (1815) 4 M.S. 140).

I regard nothing in this case as being of exceptional circumstances. So here too the applicant fails.

I now turn to another feature of the application.

The submission that the order was not made on the merits.

Mr. Pearson submitted the order was a judgment in default of defence, and was not made on the merits and the court should follow the general practice of leaning in favour of matters being heard on the merits.

Mr. Burke pointed out that the respondent had not applied for judgment under section 250 of the Civil Procedure Code.

This section which forms part of "Title 26. Default of Pleading provides:

Recovery of land

250. In an action for the recovery of land, if the defendant makes default as mentioned in section 245, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs upon the production of a certificate by solicitor for the plaintiff, or in the case of a plaintiff in person of an affidavit that the action is not one to which section 258A of this law applies.

The Respondent had instead served a summons for leave to enter judgment on the defendant's attorneys who appeared at the hearing and did not oppose the order. I hold that in as much as the applicant's attorney was present throughout the hearing of the summons and did not oppose the making of the order, not apply for leave to file a defence out of time, he was implicitly saying the merits were all in favour of the Plaintiff/Respondent.

The applicants counsel took a deliberate decision not to contest the matter. He obviously decided that there was no basis for opposing the application of step. I might add that in Ferdinand Wagner (a firm) v Laubscher Brothers and Co. (a firm) 1970 2 ALL E.R. 174 the court held that the tests to be applied under an application to stay execution of judgment are quite different from those applicable under order 14 proceedings - (summary judgment) in which the question is whether there is an arguable point.

It seems to me to be quite plain that the applicant has failed to satisfy the terms of section 596 or 597. The main fact offered is one which concerns matters of defence law or relief in equity, and is therefore insufficient.

The application is therefore dismissed. The Respondent shall have his cost to be agreed or taxed.