STAY FOR THIS – THE BASICS OF STAYS OF EXECUTION PENDING APPEAL IN CIVIL CASES WTH REFERENCE TO JAMAICAN PROVISIONS AND CASES

PAPER FOR PRESENTATION AT

JAMAICAN BAR ASSOCIATION SEMINAR

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PART 1- PRELIMINARY MATTERS

1.0 What is the practical significance of this topic?

1.1 An appeal to the Court of Appeal against the judgment of the court below may be rendered nugatory if the judgment is executed against the party appealing it pending the hearing of the appeal. A stay suspends execution of the judgment and therefore prevents this. It is therefore essential to understand the procedure and principles applicable to the grants of stays of execution.

2.0 Are there rules applicable to stays of execution in relation to appeals to the court of appeal in civil proceedings?

2.1 Yes.

2.2 The present rules governing procedure in civil appeals to the Court of Appeal in both Resident Magistrate and Supreme Court civil appeals are the Court of Appeal Rules 2002. These rules contain rules as to stays of executions under section 2 under the heading "Civil Appeals".

2.3 Under the subheading " Scope of this section" rule 2.1 (1) provides that the section applies (with some exceptions which are set out) to "civil appeals" to the Court of Appeal from the Supreme Court, Resident Magistrate's Court and tribunals. It follows that the rules as to stays of execution in section 2 apply to both Resident Magistrate and Supreme Court civil appeals.

3.0 Are the Court of Appeal Rules predating the 2002 rules, namely the Court of Appeal Rules 1962, relevant and if so, how?

3.1. The 1962 rules may still be relevant because they too contain rules as to stays of execution. If the 1962 rules are, in any given case, the same as the 2002 rules, then case law interpreting the 1962 rules may still be persuasive now.

3.2 On the other hand, if there are differences between the 1962 and 2002 rules then it is essential to compare the differences to see if the 2002 rules have either added to or taken away jurisdiction under the 1962 rules.

3.3 Appendix 1 is a comparative table of the 1962 and 2002 rules in relation to stays of execution. Its purpose is to assist in the analysis of the differences where this is significant. The differences will be highlighted in this paper when relevant to the topic being considered.

4.0 What are the categories of decisions as to stays of execution?

4.1 From the comparative table, Appendix I, it will be gleaned that judicial decisions in relation to stays of execution fall into different categories. Decisions range from decisions on applications to: the court below (whether the Resident Magistrate's Court or Supreme Court); to a single Judge of Appeal; or to the Court of Appeal itself.

4.2 A decision of a single Judge of Appeal may also be discharged or varied by the Court of Appeal and so there is also this category of application to the Court of Appeal and decision of the Court of Appeal in relation to stays of execution.

5.0 Under the 2002 rules does an appeal operate as an automatic stay of execution of the decision of the court below?

5.1 No. Rule 2.14 of the 2002 rules makes this clear by expressly stating so.

5.2 The corresponding rule in the 1962 rules was rule 21(a) which was to similar effect. As we will see this 1962 rule did not however apply to Resident Magistrate civil appeals.

5.2 Forte P. (as he then was) in *Mitchell v Dabdoub & others SCCA 95/2001, judgment delivered on 26/10/01,* explained the rationale against automatic stays.

He said:

> *"Without a stay of execution, judgments can be executed before an appeal is heard. If the appeal is successful, then the judgments would already have been executed, and the party on whom it has been executed would have suffered. It is for this reason why the court is given the discretion to order a stay of execution after due consideration of the particular circumstances of the case before it."*

PART 11

STAYS OF EXECUTION IN CIVIL APPEALS FROM THE RESIDENT MAGISTRATE'S COURT – JURISIDCTION ISSUES

6.0 What jurisdiction, if any does a Resident Magistrate has to grant a stay of execution pending appeal?

6.1 The jurisdiction of the Resident Magistrate to grant a stay of proceedings on a judgment is governed by statute, namely section 256 of the Judicature (Resident Magistrate's) Act. Section 256 also sets out the procedure for initiating the appeal but the relevant part for present purposes reads:

> "There shall be no stay of proceedings on any judgment except upon payment into Court of the whole sum, if any, found by the judgment, and costs if any, unless the Magistrate, on cause shown, shall see fit to order a stay of proceedings."

6.2 In *Stewart v Rose (1997) 34 J.L.R. 294,* an application for stay was made by the defendant to an order for recovery of possession to a Resident

Magistrate. The application was refused and so an application for stay was then made to the Court of Appeal. The propriety of the initial application before the Resident Magistrate was not challenged. The court granted a stay because it concluded that the brief reasons of the Resident Magistrate did not indicate if there was any evidence led by the defence and if so the manner of its assessment. The affidavit of the defendant in support of the application asserted that the land was disposed to him by the plaintiffs precursor in title and that he the defendant had titled by adverse possession.

6.3 Downer J.A. elaborated on section 256 of the Judicature (Resident Magistrate's) Act in so far as the jurisdiction of the Resident Magistrate to grant a stay is concerned. He said that the provision:

> *"..... contemplates that if the appellant pays into court the whole sum found by the judgment he should be granted a stay of execution pending the appeal. Also, the agreed or taxed costs must be paid and if this is done, the appellant should be granted a stay pending the appeal. The third aspect is that the Magistrate is given a discretion if cause be shown to grant a stay pending appeal even if the whole sum if any or costs is not paid into court."*

6.4 Downer J.A. noted, however, that in this case before the court there was no order which obliged the applicant to pay any sum. Nevertheless, in granting the stay of execution pending the outcome of appeal, the court also ordered the applicant to pay the taxed or agreed costs in the Resident Magistrate's Court and further that the applicant pay

$10,000.00 in a joint interest bearing account in the names of the attorney-at-law on the record pending the determination of the appeal.

7.0 Did a single Judge of Appeal have jurisdiction under the 1962 rules to grant stays of execution in Resident Magistrate's civil appeals?

7.1 No.

7.2 The issue of the jurisdiction of a single judge of appeal under the 1962 rules was considered in *Garel v Edwards (1994) 31 J.L.R. 217.* It is appropriate to summarise this case and then consider whether it has been altered by the 2002 rules. In *Garel v Edwards,* the defendant applied to the Resident Magistrate for a stay of execution in respect of an order made against him for recovery of possession. The application for the stay was refused. After filing an appeal, the defendant/appellant then applied to a single judge of appeal for a stay. The single judge of appeal granted the stay. Thereafter, the plaintiff/respondent applied to the Court itself to discharge the stay granted by the single judge.

7.2 On the hearing of this application the attorney for the plaintiff/respondent made a preliminary objection that the single judge of appeal had no jurisdiction to grant the stay as he did.

7.3 The Court upheld this objection. The Court held that rule 33 of the Court of Appeal rules 1962 - by which a single judge of appeal had jurisdiction to grant a stay - did not apply to civil appeals from a

Resident Magistrate. This was so because rule 33 fell under Title II of the 1962 rules headed "Civil Appeals from the Supreme Court" and hence did not apply to civil appeals from the Resident Magistrate's Court. In these circumstances the court ordered the discharge of the purported order of the single judge of appeal and awarded costs to the plaintiff/respondent.

7.4 The Court also held that it did not have the inherent jurisdiction to grant such a stay. Neither did it have jurisdiction to grant the stay by virtue of its inheritance of the jurisdiction of the former Court of Appeal (this is discussed below).

8.0 Does a single judge of appeal now have jurisdiction under the 2002 rules to grant stays of executions in Resident Magistrate civil appeals?

8.1 It is submitted that the answer is yes and that the decision in *Garel v Edwards* has been altered by the 2002 rules. Under the Court of Appeal Rules of 2002, a single judge of appeal now has jurisdiction to grant a stay of execution in Resident Magistrate's civil appeals. It is submitted that this jurisdiction arises from rules 2.11(1) (b) and 2.14 of the 2002 rules.

8.2 The Court of Appeal rules 2002, including therein the rules as to stays of execution, now apply to civil appeals from the Supreme Court and more

significantly, to the Resident Magistrate's Court – (see 2.3 above). The rules refer to a single judge of appeal's power to grant a stay. Since these rules now apply to a single judge of appeal in relation to civil appeals from a Resident Magistrate, then it is submitted that a single judge of appeal now has jurisdiction to grant a stay in these cases.

8.3 These Court of Appeal rules can confer such jurisdiction on a single judge of appeal because they are made under the Judicature (Rules of Court) Act, which at section 4(2)(e), allows for rules of court to provide for a single judge to hear and dispose of "any interlocutory application". This section clearly applies to a stay of execution pending appeal because such an application is an interlocutory application.

9.0 What was the jurisdiction of the Court of Appeal under the 1962 rules to grant stays of execution in Resident Magistrate civil appeals?

9.1 The Court of Appeal decision of *Stewart v Rose* deals with this. The facts are that the defendant to an order for the recovery of possession in the Resident Magistrate's Court made an application by way of motion to the Court for a stay. This application to the Court was made after an application for a stay had been made to, and refused by, the Resident Magistrate. The defendant's notice of appeal was filed prior to the

application to the court but was out of time and so the defendant also applied for leave to file the appeal out of time.

9.2 The attorney for the plaintiff/respondent submitted that the court lacked jurisdiction in relation to both applications. The court rejected these submissions and held that it had jurisdiction in relation to both. For present purposes, however, we are only concerned with the decision of the court in relation to the jurisdiction issue as to stays of execution.

9.3 Both Downer J.A. and Walker J.A. (Ag.) relied on the jurisdiction of the former Court of Appeal to ground the present Court's jurisdiction. They referred to and relied on section 9 of the Judicature (Appellate Jurisdiction) Act which gave the present court its jurisdiction including the jurisdiction and powers of the former Court of Appeal prior to the appointed day (the appointed day as Walker J.A. pointed out was August 5, 1962). Both judges of appeal indicated that the powers of the former Court of Appeal included those set out in the old Civil Procedure Code, in particular section 576 thereof.

9.4 Both Downer J.A. and Walker J.A. (Ag) concluded (with Downer J.A. supporting his conclusion on this in more detail) that section 576 of the old Civil Procedure Code applied to the present Court of Appeal. Section 576 was reproduced in full in both judgments and reads as follows:

> *"576. An appeal shall not operate as a stay of execution, or of proceedings, under the decision appealed from, except so far as the court below or the*

> *Court of Appeal may so order; and no intermediate act or proceeding shall be invalidated except so far as the court below may direct."*

9.5 In reliance on section 576 of the old Civil Procedure Code the court unanimously held (Bingham J.A. concurring with Downer J.A. and Walker J.A. [Ag]) that the court had jurisdiction to grant a stay of execution in civil appeals to the present Court of Appeal from a Resident Magistrate.

9.6 Downer J.A. also appeared to suggest that the Court of Appeal had an inherent jurisdiction to grant stay (see page 299, paragraphs (C)-(E) of his judgment. However, Walker J.A (Ag.) in his judgment opined that the Court of Appeal had no inherent jurisdiction in relation to the question. In the beginning of his judgment in the question of jurisdiction of the Court of Appeal as to a stay of execution in the case, he said:

> *"Since the Court of Appeal has no inherent jurisdiction the answer to this question depends on whether the court is empowered by the constitution of Jamaica or the provisions of statue law of the Court of Appeal Rules 1962 to entertain this application for a stay of execution."*

9.7 Walker J.A's (Ag.) view is consistent with several Court of Appeal decisions in which the court affirmed the principle that it has no jurisdiction unless conferred by statue. See for examples, *Re. D.C. an infant (1966) J.L.R. 568* and *McGann v United States of America (1971) 12 J.L.R. 565.*

9.8 In reference to the decision on *Garel v Edwards* that the court lacked jurisdiction Downer J.A said that decision turned on an application before a single judge in chambers and distinguished it on that basis. Wlaker J.A also distinguished *Garel v Edwards* on that basis and considered it as decided per incuriam because section 576 of the old civil procedure code was not brought to the attention of the court.

10.0 Has the jurisdiction of the Court of Appeal to grant stays of execution in Resident Magistrate civil appeals been altered by the 2002 rules?

10.1 Yes.

10.2 Rule 2.11(1) gives a single judge of appeal the power to make an order for a stay of execution (rule 2.11 (1) (b)), and other orders including orders "...on any other procedural application" (rule 2.11 (1) (e). An application for a stay of execution is therefore a procedural application since this term clearly refers to all the orders referred to under the rule. Rule 2.10(1) under the heading "Procedural Applications to Court" provides that applications to the court (which would therefore include applications for a stay of execution) must in the first instance be considered by a single judge. The combined effect of rules 2.10(1) and 2.11(1) means that applications for a stay of execution to the court must be heard by a single judge in the first instance. It should be noted, however, that by rule 2.11(2) such an order can be discharged or varied by the court.

10.3 In these circumstances the 2002 rules, it is submitted, have altered the position under the 1962 rules in that whereas under the 1962 rules an application for a stay could be heard directly by the Court, under the 2002 rules it must be heard first by a single Judge of Appeal.

PART 111

STAYS OF EXECUTION IN CIVIL APPEALS FROM THE SUPREME COURT

11.0 What are the relevant provisions of the CPR?

11.1 The provisions are Rules 42.8, 42.9 and 42.13 which are set out below.

42.8: Time when judgment or order takes effect

"A judgment or order takes effect from the day it is given or made unless the court specified that it is to take effect on a different date."

42.9: Time for complying with judgment or order

"A party must comply with a judgment or order immediately unless -

a) The judgment or order specified some other date for compliance

b) The court varies the time for compliance including specifying payment by installments; or

c) The Claimant, on requesting judgment in default under Party 12 or judgment on an admission under Part 14, specified a different time for compliance."

42.13: Matters occurring after judgment: stay of execution

"A judgment debtor may apply to the court to stay execution or other relief on the grounds of –

a) Matters which have occurred since the date of the judgment or order; or

b) Facts which arose too late to be put before the court at trial and the court may grant such relief, upon such terms, as it thinks just."

12.0 Is there any significant difference(s) between the 1962 and 2002 rules on jurisdictional issues involving Supreme Court civil appeals?

12.1 Yes. A significant difference is that rule 22 (4) of the 1962 rules has no corresponding rule in the 2002 rules. Rule 22(4) provided that "Whenever under the provisions of the law of these rules an application may be made either to the court below or the Court, it shall be made in the first instance to the court below."

12.2 This rule had an impact on the cases now to be considered in relation to stays in Supreme Court civil appeals under the 1962 rules.

12.3 What is the jurisdiction of a Supreme Court Judge, if any, as to the grant of a stay of execution?

12.4 This issue was considered in the case of *Shields v Graham (1974) 12 J.L.R. 1947.* This is a judgment of a single Judge of Appeal, Swaby J.A., in respect of an application for a stay of execution pending appeal. Swaby J.A.'s decision will be considered in detail later in this paper but for present purposes we are concerned with his conclusion in relation to a stay granted by a Supreme Court Judge in the matter prior to the application for the stay before him.

12.5 The Supreme Court judge, referred to by Swaby J.A. as the "trial judge" granted a stay of execution to the defendant on the date of the judgment for damages, for six weeks, to enable the defendant to file her appeal. The defendant filed her appeal within the six weeks. It was in these circumstances that she applied before Swaby J.A. for an extension of the initial stay pending the determination of the appeal.

12.6 Swaby J.A. in the course of his judgment concluded that the initial stay granted by the Supreme Court judge was granted under the inherent jurisdiction of the trial court. In support of this conclusion he relied on and reproduced the following passage from 16 Halsbury's Laws of England 3rd edn:

> *"As to the inherent jurisdiction of the trial court – see 16 Halsbury's Laws of England (3rd edn.) under the heading Set. 10 STAY OF EXECUTION:*
>
> *'49. Stay of execution ... it (i.e., the court) has an inherent jurisdiction over all judgments or orders which it has made, under which it can stay execution in all cases – Poline v Gray, Sturla v Freccia, (1879) 12 Ch. D. 438 either for a definite or unlimited period – see Marine and General Mutual Life Assurance Society v Feltwell Fen Second district Drainage Board, [1945] K.B. 394.'*

12.7 A Supreme Court judge, Smith J. in the *Brown v Trelawny Parish Council (1967) 10 J.L.R. 213* concluded then that the Supreme Court did not have an inherent jurisdiction to grant a stay of execution – (see the facts of this case at page 217 paragraph F). Smith J. considered this in relation to a stay for six weeks granted by a Supreme Court judge on his

determination in an election petition case. It is submitted that the decision to the contrary in *Shields v Graham* must now be considered the authority on this point.

13.0 Can the jurisdiction of a single judge of appeal or the Court of Appeal in relation to stays of execution be invoked prior to the filing of an appeal against the judgment of the court below?

13.1 This issue was considered in relation to the 1962 rules in the cases of *Shields v Graham and Flower Foliage and Plant of Jamaica v Jamaica Citizens Bank Limited 34 J.L.R. 447* (the Flowers Foliage decision). The reference to the court below in this question from now in this paper is a reference to the Supreme Court.

13.2 Both cases refer to rule 22 (4) of the 1962 rules which prescribed that wherever an application can be made to the court below or the Court of Appeal the application must be made in the first instance to the court below. This rule does not appear in the 2002 rules but we must still first examine the effect of the 1962 rules to see if the cases considering this are still relevant.

13.3 The relevant facts of *Shields v Graham* have already been considered. In reference to rule 22(4) Swaby J.A. said:

> *"Rule 22(4) contemplates that at the time the application for stay of execution is made there should be in existence a pending appeal. In the absence of a pending appeal the application for a stay of execution for six weeks to enable the appellant to file her appeal made to the trial judge in this case was invoking the inherent jurisdiction of the court below or statutory powers, not being those under the Court of Appeal Rules, 1962."*

13.4 In the later Court of Appeal *Flower Foliage* decision Rattray P., obiter, appeared to doubt Swaby J.A's conclusion above – (see page 447, paragraphs G and H). However, there is no decision contrary to Swaby's conclusion that the jurisdiction of a single judge of appeal or the Court of Appeal is invoked on the filing of an appeal. It is submitted that even though it is a conclusion in a case under the 1962 rules, it is logically sound and would apply today under the 2002 rules.

13.5 Incidentally the chronology of events in the *Flowers Foliage* decision indicates that the application for the stay in the initial stage before the appeal was filed to a judge other than the trial judge. The propriety of this was never challenged on appeal and the case demonstrates that this is possible.

14.0 After the filing of an appeal under the 1962 rules is it necessary to apply for a stay of execution in the first instance to the court below before an application is made to the Court of Appeal?

14.1 In relation to an application for a stay to the Court of Appeal the relevant decisions are ad idem. A single judge of appeal in *Shields v Graham* and

the Court of Appeal in *Barnes v Bennette (1991) 28 J.L.R 531*, and *Flowers Foliage & Plants v Jamaica Citizens Bank* are ad idem on the point that by rule 22(4) an application to the Court of Appeal for a stay of execution pending appeal must first be made to the court below.

15.0 After the filing of an appeal under the 1962 rules was it necessary to apply for a stay of execution in the first instance to the court below before an application to a single judge of appeal?

15.1 In relation to an application for a stay pending appeal to a single judge of appeal there was an unresolved conflict in the recent decisions as to whether an application should be made first to the court below. The conclusions of the Court of Appeal in *Barnes v Bennette* on the one hand and *Flowers Foliage & Plants v Jamaica Citizens Bank* on the other hand were in complete opposition to each other on this point. The background to this conflict is the case of *Shields v Graham* which was followed in *Barnes v Bennette* but not followed in *Flowers, Foliage and Plants of Jamaica v Jamaica Citizens Bank* case and this case is summarized next.

15.2 In *Shields v Graham* an application was made to Swaby J.A. a single judge of appeal, for a stay of execution pending appeal. An initial stay had been granted by the court below. However, no application to the court below was made for stay after the appeal had been filed. A preliminary objection was made by the respondent's attorney to the effect

that the single judge had no jurisdiction to hear the application for a stay pending appeal because an application had not been made beforehand to the court below. The preliminary objection was upheld.

15.3 *Shields v Graham* was subsequently followed by the Court of Appeal in *Barnes v Bennette* on this point. In this case a single Judge of Appeal granted an application for a stay of execution pending appeal in relation to a judgment for damages. A prior application had not been made to the court below after the appeal had been filed. In these circumstances the respondents applied under the 1962 rules to the Court of Appeal to discharge the stay granted by the single judge on the basis that an application for a stay pending appeal had not been made initially to the court below. The respondent's application was successful in that the Court of Appeal discharged the stay by the single judge on this basis and also on the basis that the application had wrongly been made ex parte and ought not to have been.

15.4 The premise of Rowe P's reasoning in relation to the former basis was that it would be wrong to interpret the then relevant rules to give a single judge a wider jurisdiction than the court itself had, given that the latter had no original jurisdiction. His view was that if there were no necessity for an application for a stay to be made to court below before an application to a single Judge then a single judge would have a wider jurisdiction than the court itself. He said that this was wrong (given that

an application had to be made to the court below first before an application to the court of appeal itself – see pages 534 paragraph F-page 535,paragraph C).

15.5 However, in the later case *Flowers, Foliage & Plants of Jamaica v Jamaica Citizens Bank* a differently constituted court with a different President came to an entirely different conclusion on this issue. For present purposes the relevant facts are that after the appeal was filed a single judge of appeal granted a stay of execution without a prior application having been made to the court below. An application was subsequently made by the respondent to the Court of Appeal to discharge the stay granted by the single judge of appeal.

15.6 The court held that in respect of an application to a single judge of appeal for a stay of execution pending appeal there is no necessity for such an application to be made first to the court below.

15.7 Rattray P. concluded that there are two options open to the intending applicant for a stay of execution pending the hearing of the appeal. After filing the appeal the applicant may apply under section 21(1) of the Rules in which event the application is made first to the court below and if refused to the Court of Appeal as provided for by section 22(4).

He also concluded that the second option is for an application to be made after the filing of the appeal directly to a single Judge of Appeal, as

was done in the instant case under the provisions of Rule 33(1). The determination of this single Judge may on application of either party be discharged or varied by the Court. The rules therefore provide in both cases for a review process by the Court of Appeal (see page 450, paragraphs C-F).

15.8 In coming to the above conclusion the court distinguished and did not follow *Shields v Graham* on the basis that Rule 33(1) giving a single judge jurisdiction to grant a stay was not brought to the judge's attention. The court also relied on the fact that there is no reference to a single judge in rule 21(1) in so far as it indicates that an appeal does not operate as a stay unless the court below or court directs. The court's view was that this was a clear indication that in granting the stay in question the single judge in *Shields v Graham* was acting under rule 33(1) – See pages 450, paragraph G to page 451, Paragraph A).

15.8 This unresolved conflict then is the background to an analysis of this issue under the present rules. This is considered next.

16.0 Is it necessary in applications under the 2002 rules, for a stay to a single judge of appeal or the Court of Appeal for an application to be made first to the court below?

16.1 No. This issue was considered separately by two single judges of appeal into two separate decisions under the 2002 rules. The first decision is

that of Harrison J.A in *Thomas v Innis, SSCA 99 of 2002, Application 162 of 2005,* judgment delivered on February 14, 2006. The second decisions is that of Morrison J.A in *Cable and Wireless Jamaica Limited (T/A Lime v Digicel (Jamaica) Ltd (formerly Mossel Jamaica Limited) SSCA 148/2009, Applications No.196/09,* judgment delivered December 16, 2009.

16.2 In both cases a preliminary objection was made by the Respondent that an application to the court below ought to have bene made first before the single judge of appeal could determine the application before him. In both cases this objection was rejected.

16.3 In the *Thomas v Innis* decision Harrison J.A pointed out that counsel in reliance on the preliminary objection relied on authorities predating the 2002 rules. He also compared the old rules with the new rules and said "These rules unlike the former contain no requirement that a stay must first be applied for in the court below". In construing rule 2.14(1) he said that "It is my view that although rule 2.14 (a) uses the worlds "except so far as the court below or a single judge directs", it does not mean however that an applicant must first exhaust his remedies below before he seeks the assistance of the Court of Appeal." Morrison J.A in the *Cable and Wireless* decision came to the same conclusion in relation to rule 2.14 and on that basis rejected the preliminary objection.

17.0 Have the 2002 rules altered the jurisdiction of the court of Appeal in relation to Applications for stays in Supreme Court civil appeals?

17.1 Yes. It is submitted that whereas under the 1962 rules an application could be heard by the court itself without first referring it to a single judge of appeal this is no longer the case. It is submitted that the rules and reasons referred at paragraph 10.0 -10.3 in relation to Resident Magistrate civil appeals also apply to Supreme Court civil appeals. Therefore these rules now require the court to refer applications to it to a single judge for determination initially.

PART IV

ISSUES ON THE MERITS OF STAYS OF EXECUTION

18.0 Can an application for stay be made exparte?

18.1 No. This is impermissible under the 1962 and 2002 rules.

18.2 In *Barnes v Beneatte,* a decision under the 1962 rules, it was held that such an application ought no to be made exparte – see paragraph 15.3 of this paper.

18.3 Rule 1.1 (10) (h) of the 2002 rules applies part 11 of the CPR concerning applications to appeals to the Court of Appeal. Under part 11, rule 11.8(1), states that the general rule is that an applicant must give notice of his Notice of Application to each respondent.

19.0 What are the decisions where the merits of stays of execution have been considered?

19.1 This writer has found 12 Jamaican decisions in which single judges of appeal or the Court of Appeal itself considered the merits of granting a stay in each case. All of these cases except for *Stewart v Rose* and *Richard Spence and Leonie Spence v Maurice Hitchins and Audley Hitchins are* judgments of single judges of appeal. *Stewart v Rose* concerned a judgment of the Court of Appeal on an application for stay in relation to an order by a Resident Magistrate for recovery of possession. *Richard Spence and Leonie Spence v Maurice Hitchins and Audley Hitchins* is a judgment of the Court in relation to an application to discharge an order by a Supreme Court judge. It is unclear in this case whether a stay was granted. In the other cases, except *Gleaner Co. Ltd v Charles Wright* and *Spencer v DPP and AG* all the applications were granted. These cases are set out with the citation and decision in each case in Appendix 2 to this paper.

20.0 What is/are the test(s) applicable in Jamaica to whether a stay ought to be granted?

20.1 The authority most often cited with approval in the Jamaican decisions on this issue is the English Court of Appeal case of *Linotype-Hell Finance v Baker [1992] 4 All ER 887.* It has been cited with approval and in varying length in several Jamaican cases. The test in this case, extracted from the head note is "*Where an unsuccessful defendant seeks a stay of execution pending appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay he will be ruined and that he has an appeal with some prospect of success.*"

20.2 The other authority often cited, but to a lesser extent is the English case of *Hammond Suddard Solicitors v Agrichem International Holding ltd [2001] All ER (D) 258 (Dec).* It also has been cited with approval and in varying lengths in different cases.

20.3 This case is cited to support the proposition that whether to grant a stay of execution depends on all the circumstances of the case and that the essential factor is the risk of injustice. In *Cable and Wireless Jamaica Limited (T/A Lime) v Digicel (Jamaica) Limited*, Morrison J.A cited it with approval and quoted in particular "the increasingly cited statement by Clarke LJ "as he then was" that:

> *"... the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refused a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the*

appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent"

20.4 In two recent decisions of single judges of appeal, the *Cable and Wireless* decision above and *Capital Solutions ltd v Terryon Walsh, The Administrator General of Jamaica and Karlene Bisnott, SCCA No. 1 of 2010 Application Nos. 2 of 2010 and 6 of 2010, judgment delivered on 9/2/2010*, Morrison J.A. and Phillips J.A respectively referred to and relied on a passage in *Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited FC2 97/6273/C.* The passage emphasizes the criterion of the interest of justice in determining whether stay ought to be granted. The common passage quoted by both judges reads as follows:

> "In *my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similarly detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered, this assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered, but if there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Order 59, rule 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."*

21.0 Is the test predating the *Linotype* case still applicable or relevant?

21.1 In the Jamaican Court of Appeal case of *Gleaner Co Ltd v Charles Wright (1976)15 J.L.R. 18*, predating the *Linotype* case, the Court of Appeal held that the authorities established that no stay of execution should be granted unless evidence is adduced to show that respondent to the appeal will be unable to repay the amount of the judgment if the appellant be successful on appeal. The court applied this principle in this case and discharged a stay by a single Judge of Appeal on the basis that there was no evidence to satisfy this test.

21.2 The Court of Appeal decision of *Flowers, Foliage and Plant of Jamaica Limited and Jennifer Wright and Douglas Wright v Jamaica Citizens Bank Limited* mentioned previously is relevant. The case concerned a suit brought by the bank against the defendants/appellants in respect of money loaned by the bank to the defendant/appellant. This loan was secured by mortgages and personal guarantees.

21.3 The Supreme Court judge had ordered summary judgment for a sum in favour of the bank and interest thereon. He also refused an application by the appellants to restrain the bank exercising its power of sale under the mortgages.

21.4 A single judge of Appeal granted a stay of execution and the plaintiffs/respondents applied by motion in the Court of Appeal to discharge the stay. Counsel on their behalf argued that the single judge

of appeal erred in not making the stay subject to the condition that the amount of the judgment be paid by the plaintiff/appellants in escrow pending the appeal.

21.5 The Court of Appeal cited with approval *Linotype-Hell Finance Limited v Barker* and in particular an extract of the judgment of Staughton L.J. stating that the test for the grant of a stay mentioned above *"... was far too stringent a test and also does not reflect the court's current practice"*. The court held that there were triable issues concerning the validity of the guarantee and the legality of the upstamping of the mortgage. In the circumstances and having regard to evidence of potential ruin before it, it dismissed the motion to discharge the stay granted by the single judge of appeal.

21.6 This is not the say that the old test is irrelevant. This issue was considered in *Kingsley Thomas v Collin Innis SCCA No.99 of 2005. Application No. 162 of 2005,* a decision of a single judge of appeal, Harrison J.A. In this case the applicant/appellant was ordered to pay damages to the claimant/respondent with costs in the Supreme Court in an alleged libel claim. The applicant/appellant applied for a stay of execution pending his appeal.

21.7 One of the supporting grounds was that *"... if the judgment sum and costs whether agreed or taxed are paid over to the claimant and the appeal filed herein is successful there exists the possibility that the defendant may not be able to*

recover or may experience difficulties in recovering the said sums from the claimant in addition to any costs ordered to the defendants."

21.8 The learned single judge of appeal acknowledged that this was regarded as too stringent a test in the *Linotype-Hell* case. However, he said, *"This did not mean, however, that the court could not consider this factor as a criterion for deciding whether or not to grant a stay".* The judge granted a stay on the basis that he was persuaded there was an arguable appeal concerning the defence of justification and section 7 of the Defamation Act. More significantly and for present purposes, he indicated that he was influenced by the risk of the appellant being unable to recover what has been paid to the respondent if the judgment is enforced in the meantime. He indicated that this was a "material factor" one ought to bear in mind.

21.9 It would appear therefore that although the old test for a stay predating the *Linotype* case no longer applies in Jamaica, it is open for a judge or court to bear it in mind as a relevant factor.

22.0 How strong must the prospect of success of the appeal be to justify a stay of execution?

22.1 The *Linotype* case refers to the requirement that there must be *"some prospect of success"* of the appeal to justify the stay. Generally speaking in relation to merits this test has been the test applied in Jamaican decisions.

22.2 Notably, however, Harris J.A., a single judge of appeal in recent decisions appears to apply a somewhat stronger test. The learned single judge of appeal advocated this test in *Rahul Singh and Commonwealth Communications LLC and Ocean Petroleum Inc. v Kingston Telecom Ltd and Cable and Wireless Ja. Ltd SCCA 48 of 2006, Applications 72 and 80 of 2006, judgment of Harris J.A delivered on Dec 5, 2006.*

22.3 In this case the Supreme Court judge refused applications by the appellant (then defendants) to set aside a default judgment against them and for a stay of execution of process therefrom and stay of proceedings. In these circumstances an application was made before Harris J.A. for a stay of execution pending appeal.

22.4 The learned judge expressed the view that the applicant must show that his chance of success on appeal was real as opposed to some chance of success. She compared this test to the requirement in the Court of Appeal Rules 2002 that where leave to appeal is required it is necessary under the rules that there be a real chance of success in order to obtain leave.

22.5 In two later decisions, Harris J.A seemed to apply also a stronger test than "some prospect of success". The first decision is *National Commercial Bank Jamaica Ltd and NCB Trust and Merchant Bank Ltd v Robert Forbes SCCA 128 of 2007, Application No. 182 A of 2001, judgment delivered on 13/2/08.* In this case the learned judge approached her analysis of prospect of success by examining "whether the appellants have a good prospect of successfully pursuing their appeal". The second decision is *Milford Trading Company Limited v Garth Pearce SSCA No.31 of 2009, Application No. 46/09, judgment delivered on 28/5/09.* In this case similarly the learned judge approached her analysis of the prospect

of success of the appeal by examining "whether the applicant has a good chance of successfully pursing the appeal".

23.0 Is the failure of an applicant in an application for a stay to prove potential ruin fatal to the application?

23.1 In several cases single judges of appeal have granted stays despite concluding that the applicant failed to establish potential ruin.

23.2 In *Milford Trading Company Limited v Garth Pearce,* the applicant applied to a single judge for a stay of an order of the Master committing the managing Director of the Applicant company, a Mr. Brown, to prison for contempt of court. The single judge of appeal who determined the application, Harris J.A, concluded that the applicant/appellant had good chance of success on appeal because the provisions of the CPR had not been complied with in relation to obtaining a committal order against a director or body corporate. However, Harris J.A also indicated that the applicant had not established that it would be ruined if the stay were refused as there was no evidence that the stay would result in its insolvency or being wound –up. However, she said that exceptional circumstances were applicable because the order for committal put Mr. Brown's liberty in jeopardy and the justice of the case demanded that a stay be granted.

23.3 In the *National Commercial Bank Jamaica Ltd and NCB Trust and Merchant Bank Ltd v Robert Forbes* decision, a single judge of appeal, Harris J.A, again considered whether to grant a stay despite acknowledging that there was no evidence adduced by the applicants/appellants of potential ruin. She indicated in her analysis

that this may not necessarily operate against the appellants pursuing their application.

23.4 In this case the claimant/respondent was awarded damages against the appellants/applicants for breach of duty of care to him as a customer in relation to loans by them to him. Harris J.A concluded that the appellants had a "real chances of success" on appeal because the trial judge had not taken into account penalties due to the appellants/applicants and had also erred in assessing damages. Despite acknowledging the absence of evidence of potential ruin, she referred to evidence below indicating that the claimant/respondent was an unreliable customer and that a subdivision venture of his failed. In these circumstances she concluded that the applicants/appellants may experience difficulties in recovering damages and costs if they were successful on appeal and granted the stay, despite the lack of evidence of potential ruin.

23.5 In the *Cable and Wireless Jamaica Ltd (T/C Lime) v Digicel (Jamaica) Ltd* decision, a single judge of appeal, Morrison J.A also granted a stay despite indicating that he was "*inclined to agree*" that potential financial ruin had "*not really been established" on the evidence"* produced by the applicant Lime.

23.6 In this case Digicel filed a claim in the Supreme Court against Lime alleging that it breached confidentiality clauses in an interconnection agreement between them; both being providers of telecommunication services. Digicel also alleged that the conduct of Lime breached the Telecommunications Act. The agreement governed the terms on which cell phone calls originated and terminated on the network of each. To allow interconnection each party had to share confidential information but the agreement prohibited the use of confidential information to gain

commercial advantage. In essence the conduct complained of by Digicel was that Lime used confidential business information to interfere with Digicel's business.

23.7 Digicel obtained an injunction the Supreme Court to restrain Lime and in these circumstances Lime applied for a stay. Morrison J.A. concluded that an aspect of the order of the Supreme Court judge for injunction was too wide because as ordered it had the potential to do harm to Lime. This is so because the wording was wide enough to prohibit ordinary telemarketing activities of Lime. He considered that Lime therefore had established some prospect of success as to this aspect of the order. In the circumstances Morrison J.A granted a stay as to this aspect of the order for injunction despite the failure of Lime to establish potential financial ruin.

23.8 These cases demonstrate an emphasis on the interest of justice as a prevailing notion in the grant of stay and that this may override the need for evidence of potential ruin.

24.0 Can an applicant for a stay who/which has no claim to funds, the subject of the appeal, have locus standi?

24.1 Yes. This issue was addressed in *Terryon Walsh, The Administrator General of Jamaica and Karlene Bisnott.*

24.2 The subject of the applications, including an application by the applicant/appellant, a financial institution, was funds in an account with the applicant/appellant. The first respondent Terryon Walsh had filed a fixed date claim form in the Supreme Court in relation to this account which was solely operated by and in the name of an account holder who had died.

24.3 The first respondent's fixed date claim form sought, among other things, a declaration that she was the joint beneficial owner of the account and an order that the applicant take steps to note her as such. The fixed date claim form came up before a Supreme Court judge, Brown J. (Ag), who granted the declaration and orders sought and also granted liberty to apply.

24.4 The first respondent was thereafter unsuccessful in obtaining the funds from the account and so she filed an application in the Supreme Court seeking a court order for the applicant/appellant (then defendant) to comply with Brown J's order and pay over the funds. The applicant/appellant in response filed its own application in the Supreme Court for a stay of Brown J's order or permission to apply under the liberty to apply of Brown J's order. Both of these above applications were heard by Supreme Court judge Brooks J. He ordered that the applicant/appellant (then defendant) pay over the sums in the account within two days of the service of the order. He also refused leave to appeal.

24.5 It was in these circumstances that the single judge of appeal Phillips J.A came to determine the applicant/appellant's application for a stay pending appeal and for leave to appeal. The first respondent's counsel took a preliminary objection that the applicant/appellant had no locus standi because it was a disinterested stakeholder and so it should merely have complied with the order of the court below. The firstrespondent also filed an application to strike out the applicant's/appellant's notice of appel and refuse the stay of execution application.

24.6 Phillips J.A rejected the preliminary objection by the first respondent on the basis that the applicant had a clear interest in ensuring compliance with the mandate of its customer (though deceased) as well as its

understanding of the court order and to protect itself from any professed alleged third party claims. Phillips J.A in overruling the preliminary objection also cited with approval a passage from the judgment of Panton P. in the *Spences v Hitchins* –see paragraph 24.12 below .

24.9 The learned judge then analysed the issues in the case and concluded that there was a *"real prospect of success"*. It should be noted that this conclusion is not necessarily an indication that she was applying the test advocated by Harris J.A – (see the judgments of *Rahul Singh and Commonwealth Communications LLC and Ocean Petroleum Inc. v Kingston Telecom Ltd and Cable and Wireless Ja. Ltd* at paragraph **21.2** of this paper and *National Commercial Bank Jamaica Ltd and NCB Trust and Merchant Bank Ltd v Robert Forbes* and *Milford Trading Company Limited v Garth Pearce* at paragraph **21.5** of this paper). This is so because the judge approached the issues of whether to grant leave to appeal and the stay of execution.

24.10 Since the basis in the CPR for leave to appeal is a real chance of success then it was convenient in considering both applications i.e. for leave and the stay, to apply this test to both. In these specific circumstances Phillips J.A's application of this test cannot be interpreted as an adoption of this test generally in relation to stays pending appeal.

24.11 Phillips J.A ultimately granted leave to appeal and a stay of execution pending appeal. This is so, notwithstanding silence in the judgment as to whether the applicant would suffer ruin without it. To this extent, this is another case where potential ruin was not an essential determinant of an application for stay pending appeal.

24.12 *Richard Spence and Leonie Spence v Maurice Hitchins and Audley Hitchins, SCCS No. 127 of 2005, Application No. 29 of 06,* judgment of

Court of Appeal delivered on November 16, 2009 is another case where an intervening party's locus to apply for a stay was challenged. In this case, brothers, the Hitchins were parties to a Supreme Court suit where one sued the other in relation to an agreement for sale of property. A Supreme Court judge set aside the agreement for sale of property to the Spences. The Spences later successfully applied to intervene as third parties for the purpose of bringing an appeal against the order of the Supreme Court judge. A single judge of appeal struck out their appeal. The Spences then applied to discharge this order of the single judge of appeal and for a stay of the order of the Supreme Court judge below setting aside the agreement for sale. The Court of Appeal restored the appeal on the basis that Spences had a clear interest in the property and it was just and fair they should be heard on the appeal.

25.0 Can potential ruin be inferred?

25.1 It seems so based on the case of *Watersports Enterprises LTD and Jamaica Grande Limited and Grand Resort Limited v Urban Development Corporation SCCA No.110 of 2008. Application No. 159 of 08* judgment of single judge of appeal, Harrison J.A. delivered on February 4, 2009.

25.2 In this case, the applicant/appellant *Watersports Enterprises LTD* was ordered by a Supreme Court judge to quit and deliver up lands on which it had for a long time operated a water sports business. A critical issue was whether the applicant had exclusive right to occupy the lands against its owners by adverse possession. The Supreme Court judge below had rejected adverse possession on the basis that the applicant was a contractual licensee which had occupied the lands in question under agreements.

25.3 The single judge of appeal concluded that it appeared that the Supreme Court judge had erred in concluding that the applicant occupied under previous agreements without documentary evidence as to their terms.

The single judge of appeal also concluded that were the applicant to be evicted it would likely cause its business to be ruined. He concluded this although the judgment does not refer to any affidavit evidence in support of this. The judge granted the stay and to the extent that there is no indication of affidavit evidence of potential ruin he appeared to infer it.

25.4 Incidentally the case of *Stewart v Rose* –see paragraphs 6.4 appears to be a case where the Court of Appeal granted a stay to a defendant appealing a Resident Magistrate's order for recovery of possession even though there is no reference by the court to any affidavit evidence of potential ruin and neither did the court address this issue at all.

26.0 What kinds of terms can be imposed by judge/court to stays of execution to protect the interests of a respondent to an appeal?

26.1 Several, examples of which are set out below.

26.2 In *Stewart v Rose*, the Court of Appeal granted a stay of the order for recovery of possession of a Resident Magistrate against the defendant/applicant/appellant. The Court of Appeal granted a stay with conditions including a requirement that the applicant pay the agreed or taxed costs in the Resident Magistrate's court. It also ordered that the applicant pay $10,000 in a joint interest bearing account in the names of the attorneys-at-law on record pending the determination of the appeal.

26.3 Terms can also be imposed to expedite the appeal. In S*tewart v Rose* another term of the stay was that *"applicant to undertake steps to expedite the appeal".*

26.4 So too, in the *Capital Solutions Ltd v Terryon Walsh and the Adminstrator General of Jamaica and Karlene Bisnott,* the single judge of appeal Phillips J.A. ordered that the sums, the subject of the appeal, not be paid

out in respect of any other perceived third party claims before the resolution of the appeal and that the appeal be heard with some dispatch. She went on to say *"I therefore ordered that the stay of execution of the judgment of Brooks J be pending the outcome of the appeal or further order, so that if there is any undue delay on the part of the applicant in pursuing the hearing of the appeal, then the 1st respondent could make an application in respect of the stay, and this court could consider whether a further order should be made as a consequence thereof (see* ***Sewing Machines Rental Limited v Wilson & Another)".***

26.5 Security as to costs can also be imposed as a condition. In the *Rahul Singh and Commonwealth Communications LLC and Ocean Petroleum Inc. v Kingston Telecom Ltd and Cable and Wireless Ja. Ltd* decision, the first and second applicants/appellants were out of the jurisdiction and resident abroad in the USA. The single judge of appeal, Harris J.A concluded that if the respondent were successful on appeal and the judgment of the court below confirmed, the respondents would have difficulty in enforcing the judgments. A term of the stay she imposed therefore was *"1st and 2nd appellants are to pay into court the sum of $4,330,000.00 as security of costs of the appeal or enter into a bond for the said amount with two sureties resident in Jamaica within twenty one days of the date hereof, failing which the appeal shall stand dismissed with costs to be agreed or taxed if security is not provided in the amount specified within the time prescribed."*

27.0 How has the question of costs been determined in decisions where a stay has been granted?

27.1 This is set out in Appendix 2.

Part V

STAYS IN APPEALS OTHER THAN CIVIL APPEALS UNDER THE JUDICATURE (APPELLATE JURISDICTION) AND JUDICATURE (RESIDENT MAGISTRATE'S) ACT

28.0 Can a statute conferring a right of appeal to the Court of Appeal, other than the Judicature (Appellate Jurisdiction) Act and the Judicature (Resident Magistrate's) Act, also confer an automatic/statutory stay?

28.1 Yes. This issue was considered in the context of appeals to the Court of Appeal in two election petition cases. The two cases considering this issue were *Brown v Trelawny Parish Council* (a decision of a Supreme Court judge on this issue) and *Mitchell v Dabdoub, Mais, Walker and Anglin S.C.C.A. 95/2001*, judgment delivered on 25/10/2001 (a decision of the Court of Appeal on this issue).

28.2 In 1963 the Election Petitions Act (The Act) was amended. Section 20(6) which allowed the Supreme Court judge to determine the election petition and certify his determination was amended to be *"subject to an appeal under section 21A"*. Also, a new section 21A was inserted in the Act creating a right of appeal to the Court of Appeal where the decision of that court was now final and conclusive (prior to the amendment the decision of the Supreme Court judge was conclusive).

28.3 In *Brown v Trelawny Parish Council* a Supreme Court judge, Smith J. considered whether the insertion of the words "subject to an appeal under section 21A" created an automatic/statutory stay on the filing of an appeal to the Court of Appeal against Supreme Court judge's decision on an election petition. The background to how this issue arose is set out below.

28.4 An unsuccessful candidate in a Parish Council election challenged the result by an election petition under the Act. The Supreme Court judge who heard the petition (then Chief Justice) dismissed it but on the same date of the dismissal he granted a stay of execution for a period of six weeks.

28.5 As required by the Act the judge certified his decision by subsequently issuing a certificate to this effect to the Parish Council within the period of the six weeks stay.

28.6 Subsequent to this, but also within the period of the six weeks stay the unsuccessful candidate filed a notice of appeal against the determination of the Supreme Court judge. On the date of the filing of the appeal the Parish Council passed a resolution ("the resolution") acting on the Supreme Court judge's determination On the date of the filing of the appeal the Parish Council passed a resolution ("the resolution") declaring the seat in question vacant (based on the death by then of the successful

candidate and the Supreme Court's determination that he was validly elected).

28.7 In these circumstances the unsuccessful candidate brought an action in the Supreme Court against the Parish Council for a declaration that this resolution of the Parish Council was improper and illegal. One of the bases for this contention was that the resolution breached section 20(6) which it was further contended created an automatic/statutory stay on the filing of the appeal. It was also contended before the resolution breached the six weeks stay of execution of the Supreme Court judge which had been ordered prior to the filing of the appeal. The unsuccessful candidate also sought an injunction to restrain the Parish Council from taking further steps on the resolution.

28.8 The Supreme Court judge, Smith J. (as he then was, later to become Chief Justice), in determining this action for a declaration and injunction had to determine whether the words "subject to an appeal under section 21A" created an automatic statutory stay on the filing of an appeal. Smith J. expressed concern that if the House of Representatives or a Parish Council were free, while an appeal was pending, to act on the certificate under section 20(6) of the Act this could nullify completely a decision of the Court of Appeal in favour of an appellant. In his view the words "subject to appeal under section 21A" were inserted to avoid such situations.

28.9 He came to the conclusion that the words were intended to create an automatic/statutory stay which operated from the filing of the appeal but not before. He therefore granted the declaration and injunction on this basis. On the question of the stay of execution of six weeks by the Supreme Court judge, Smith J. concluded that the Supreme Court judge did not have an inherent jurisdiction to grant a stay. Smith J's on this aspect of the case considered at paragraph **12.7**

28.10 *Brown v Trelawny Parish Council* was subsequently considered on the question of automatic stay in the Court of Appeal decision of *Mitchell v Dabdoub and others*. Ms. Mitchell was returned as the successful candidate in 1997 election for a seat in the House of Representatives. Her opponent, Mr Dabdoub filed a petition under the Act challenging the validity of this result. The Supreme Court judge who determined the petition upheld it and determined that Mr Dabdoub was duly elected.

28.11 In these circumstances Ms Mitchell, the appellant, filed an appeal against the Supreme Court judge's decision and then filed an application in the Supreme Court for a stay of execution of the decision. However, she later withdrew this application on the basis that on the filing of the appeal an automatic/statutory stay operated based in turn on the *Brown v Trelawny Parish Council* decision.

28.12 Mr Dabdoub, the respondent to the appeal, then applied to the Court of Appeal by motion for an order that the Supreme Court judge's decision had not been stayed as there was no automatic/statutory stay in place under the Election Petitions Act.

28.13 The three Judges of Appeal who heard the matter all delivered written judgments. Forte P. and Langrin J.A. in the majority (Walker J.A. dissenting) declined to follow *Brown v. Trelawny* Parish Council, Forte P. on the basis that it was incorrectly decided and Langrin J.A. on the basis that it was decided per incuria. The majority held, contrary to the decision in *Brown v Trelawny Parish Council*, that the filing of an appeal under the Election Petitions Act did not create a statutory stay and so granted the motion of Mr Dabdoub on this basis.

28.14 The majority of the court in *Mitchell v Dabdoub* and others considered section 21A, (which by the time of his decision was section 22) of the Act in its entirety, in particular subsection (2) thereof. The majority relied on section 22(2) of the Act which they pointed out was not considered by Smith J. This subsection provided that "so much of the provisions of the Act, and with such modification, as may be prescribed by rules of court shall have effect in relation to an appeal under this section". The majority concluded that this made appeals under the Act subject to rules of court i.e. the then 1962 Court of Appeal rules. Rule 21 of those rules under Title II under the heading Civil Appeals from the Supreme Court

specifically provided that an appeal shall not operate as a stay of execution of the decision of the court below or the court. This rule, the majority concluded, applied therefore to appeals in election petition cases under the Act and its effect was that the filing of an appeal did not operate as a stay of execution. On this basis the majority declined to follow *Brown v Trelawny Parish Council* on this point.

28.15 Essentially therefore the basis of the majority decision in *Mitchell v Dabdoub* that *Brown v Trelawny Parish Council* was wrongly decided was that in the latter decision section 22 of the Act was not considered and that section 22 incorporated and applied the Court of Appeal rules as to stays of execution not being automatic.

28.16 It should be noted, however, that Langrin J.A. also expressed his view on the correct interpretation of the reference in section 20(6) (now section 20(f)) of the words *"subject to an appeal under section 22"*. Langrin J.A.'s view was that the words merely meant *"that section 20(f) is governed by section 22 which is the master provision and section 20(f) is subservient to section 22. It follows that if there is a conflict between section 20(f) and section 22 would prevail"*. He then concluded that *"In my view section 22 on any interpretation does not create a stay."*

28.17 Apart from their reliance on their decision that the 1962 Court of Appeal Rules as to stays of execution were incorporated the majority in Mitchell *v Dabdoub* also referred to and relied on the later Election Petitions Act

(Court of Appeal) Rules 1967, rule 2 of which expressly applied Title II of the Court of Appeal Rules 1962 to appeals under the Act. Title II contained the rule, section 21, making stays of execution in civil appeals discretionary.

28.18 Walker J.A., dissenting, declined to consider whether *Brown v Trelawny Parish Council* was correctly decided. In the first place Walker J.A., dissenting on this point also, had concluded that the Court had no jurisdiction to hear the motion. The reason for this is considered below. Apart from this he considered that if *Brown v Trelawny Parish Council* was wrongfully decided it could only be overruled in appropriate circumstances as in a later case where the interpretation of the provisions was raised in a court of co-ordinate jurisdiction as that in Brown, and there determined one way or the other and subsequently taken on appeal for a ruling. His view was that unless and until the decision was overruled it was good law. He declined to determine it in the context of the motion before the court as, in his view, did not constitute the appropriate circumstances as he had described did not exist

28.19 Of course, rules were subsequently enacted under section 22(2) of the Act, namely the Election Petitions Act (Court of Appeal) Rules 1967 referred to above. Although the majority in the *Mitchell v Dabdoub* decision referred to and relied on these rules, it should be noted that they had not been enacted at the time the stay of execution, the subject

of the *Brown v Trelawny Parish Council* decision, was ordered. Smith J. in *Brown v Trelawny Parish Council*, referred to this. At page 217, paragraph E-F he said –

> "On July 8, 1967, the Election Petitions (Court of Appeal) Rules 1967 were made. Rule 2 provides that –
>
> 'in relation to appeals under section 21A of the Election Petitions Law, Cap 107, the Court of Appeal Rules 1962, Title I Preliminary, and Title II Civil Appeals from the Supreme Court shall apply as far as practicable.
>
> The result is that whereas r.21 of the Rules of 1962 now applies to proceedings on an election petition, it is plain that it did not apply on December 9, 1966, when the stay of execution was ordered in this case'. "

28.20 It should also be noted, although Smith J. did not state this, that neither did the rules apply on the date of the filing of the appeal in the *Brown v Trelawny Parish Council* case, which is the date when Smith J. concluded that an automatic statutory stay came in to force.

28.21 The issue of whether a statute conferring a right of appeal to the Court of Appeal created an automatic/statutory stay was also considered in the Court of Appeal decision in *Frankson v The General Legal Council*, ex parte Basil Whitter (at the instance of Monica Whitter, S.C.C.A. 52/99) judgment delivered on 21/5/99.

28.22 The applicant, after a hearing before the Disciplinary Committee, set up under the Legal Profession Act ("the Act"), was found guilty of misconduct and was struck from the roll of attorneys-at-law entitled to practise. The applicant subsequently appealed to the Court of Appeal

and applied for a stay pending appeal (section 16 of the Legal Profession Act confers such a right of appeal).

28.23 The applicant also sought a declaration that on a proper interpretation of section 17(2) of the Act, the decision of the Disciplinary Committee did not take effect until a decision of the Court of Appeal confirmed it, in that event.

28.24 Before considering the decision of the court it is useful to reproduce section 17(2) of the Act (although it was not reproduced in the judgment of the court). Section 17(2) of the Act in reference to the order of the Disciplinary Committee provided that:

> "Where the Court of Appeal confirms the order (whether with or without variation) it shall take effect from the date of the order made by the Court of Appeal confirming it."

28.25 Now to the court's decision. The court held that this section did not create an automatic/statutory stay. Despite coming to this conclusion however, the court also held that it had no jurisdiction to grant an order for a declaration on this issue.

28.26 Finally, the court dealt with the issue as to whether it had the jurisdiction to grant a stay in its discretion. Bingham J.A, who delivered the judgment of the court, referred to rule 19 of the Fourth Schedule of the Act in order to come to a conclusion on this issue. Although the court did not reproduce or indicate the content of this rule it should be

noted that it gives the Disciplinary Committee the power to suspend filing of its order with the Registrar of the Supreme Court.

28.27 The court held that as part of its inherent jurisdiction it could have no less power than the committee had under this rule. So, "in the interest of justice" the court invoked its inherent jurisdiction to consider whether to grant a stay. Ultimately after consideration of the matter however the court refused the application for the stay.

28.28 The soundness of the court's decision that it had an inherent jurisdiction to grant a stay in the circumstances of *Frankson v. G.L.C.* or generally is dealt below.

28.29 As we have seen the Court of Appeal held in *Mitchell v Dabdoub* and *Frankson v General Legal Council* that the statute considered did not confer an automatic/statutory stay in respect of the right of appeal conferred by the statutes. Neither case however, excluded the possibility of a statute conferring such an automatic/statutory stay provided that there are express words to that effect. Langrin J.A. in *Mitchell v Dabdoub* impliedly conceded this as a possibility when in reference to the Supreme Court Judge's decision on the election petition he said:

> "A judge of the Supreme Court has delivered a judgment indicating that the petitioner is the duly elected candidate and is entitled to the seat. This is a vested right of the Petitioner which cannot be interfered with or derogated from except by precise and clear words of a statute."

28.30 So too, in *Frankson v The General Legal Council*, Bingham J.A., in delivering the judgment of the court in reference to his conclusion that the Legal Profession Act did not confer an automatic/statutory stay said, "If that was the intention of Parliament, then we would expect that the import of such a matter would require express words to have this effect."

29.0 Can a statute other than the Judicature (Appellate Jurisdiction) Act or Judicature (Resident Magistrate) Act or rule(s) made thereunder expressly apply the Court of Appeal rules as to stays of execution to appeals to the Court of Appeal?

29.1 The answer to this is clearly yes, based on the decisions in *Brown v Trelawny Parish Council* and *Mitchell v Dabdoub*.

29.2 As we have seen in *Mitchell v Dabdoub* the Court of Appeal held that section 22(2) of the Election Petitions Act incorporated and applied the Court of Rules 1962 as to stays of execution to appeals under the Election Petitions Act.

29.3 Further, the court in *Mitchell v Dabdoub* also held that in addition to the above rules made under the Election Petitions Act, the Election Petitions (Court of Appeal) Rules, 1967 incorporated and also applied the then Court of Appeal rules as to stays of execution to appeals under that Act. Smith J. in *Brown v Trelawny Parish Council* had come to a similar

conclusion but had indicated that at the material time they had not yet been in force.

30.0 In statutes conferring a right of appeal other than the Judicature (Appellant Jurisdiction) Act and the Judicature (Resident Magistrate's) Act does the Court of Appeal have jurisdiction prior to the hearing of the appeal to declare or make an order as to whether an automatic/statutory stay applies or not?

30.1 As noted earlier in *Frankson v the General Legal Council* the applicant also sought a declaration from the Court that, on a proper interpretation of section 17(2) of the Legal Profession Act there was an automatic/statutory stay which applied. The court held that that was not the case. However, it also held that it had no original jurisdiction to grant or refuse a declaration, that power being one for the Supreme Court to exercise.

30.2 This issue also arose in the later *Mitchell v Dabdoub* decisions. In this case the motion by Mr Dabdoub sought, among other orders, an order to the effect that the judgment of the Supreme Court judge declaring the applicant the successful candidate had not been stayed.

30.3 The respondent to the application, Ms Mitchell, through her attorneys-at-law, made a preliminary objection to the motion on the basis that the order sought was a declaratory one declaring the rights of the parties and such relief could only be granted on an originating motion. They argued

that as such the motion sought to invoke an original jurisdiction of the court and the court did not have it.

30.4 The majority of the court, Walker J.A. dissenting, rejected this submission. Forte P. and Langrin J.A. in the majority traced the history of the court, so far as it was relevant, to support their decision. A summary of their reasoning follows.

30.5 The majority pointed out that prior to 1958 and the Federal Supreme Court Regulations 1958 the Court of Appeal formed part of the Supreme Court of Judicature of Jamaica. Section 10 of the Judicature (Appellate Jurisdiction) Act grants the present Court of Appeal the jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings. Section 10 also grants the present Court of Appeal all the power, authority and jurisdiction of the former Supreme Court prior to the Federal Supreme Court Regulations, 1958 *"for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon...."*

30.6 The majority therefore examined the jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court regulations 1958 to ascertain whether it had the jurisdiction to hear matters incidental to the hearing of an appeal. The jurisdiction of the

former Supreme Court in relation to this was set out in section 8(2) of the then Judicature Court of Appeal Law which was reproduced in the judgment and provided that:

> *"For the purposes of this section, there shall be vested in the Court of Appeal all jurisdiction and powers vested in the Supreme Court, or Full Court, when exercising appellate jurisdiction, and for all the purposes of and incidental to the hearing and determination of any appeal..."*

30.7 In reference to this section and in coming to his conclusion that the court had jurisdiction to hear the motion Forte P said:

> *"This section in my view makes it very clear that the Court of Appeal has the jurisdiction to hear matters which are incidental to the hearing of an appeal. In my judgment, the question of whether the mere filing of an appeal amounts to an automatic stay, particular given the history and circumstances of this case, is a question of law incidental to the appeal."*

30.8 Langrin J.A. also in reference to this section and concluding that the court had jurisdiction on the motion said:

> *"It is clear from the foregoing that the Court of Appeal, prior to independence and as presently constituted, has the jurisdiction over a stay of execution pending appeal and is therefore entitled to clarify and determine any issue incidental to an appeal."*

30.9 Walker J.A., dissenting on this point, expressed the view that the order sought on the motion was declaratory in nature requiring the exercise of an original jurisdiction and prima facie ought to be obtained by action begun by writ of summons or originating summons in the Supreme Court. Walker J.A. did not, however, question the conclusion of the majority that the present Court of Appeal had statutory jurisdiction to

determine matters for any purpose of, and incidental to, the hearing and determination of an appeal.

30.10 He then identified three ways in which the matter could have been determined in the Supreme Court, not the Court of Appeal. First, he pointed out that the respondent, Ms Mitchell, had not pursued her application for a stay based on the advice tendered by the Solicitor General (in turn based on the decision in *Brown v Trelawny Parish Council*) to the Clerk of the House of Parliament that an automatic stay was in place. Walker J.A. said in these circumstances if the application of Mr Dabdoub, to be sworn in as a member of the House of Representatives were denied he could commence an action in the Supreme Court by writ or originating summons for a declaration that the Solicitor General's advice was wrong. Secondly, Mr. Dabdoub could seek relief under section 25 of the Jamaican constitution in respect of an alleged breach of constitutional right. Thirdly, he could bring proceedings in the Supreme Court for an order for Mandamus to compel the Speaker of the House to swear him in if the Speaker refused to do so.

30.11 Walker J.A. also expressed the view that the issue of the correctness of the Solicitor General's advice was not incidental to the hearing and determination of the appeal. His reasoning was that the Supreme Court judge's decision declaring Mr Dabdoub the successful candidate was not based on *Brown v Trelawny Parish Council* nor did the final outcome in

the appeal hinge in on that decision. In these circumstances he concluded that the interpretation of the relevant section(s) of the Election Petitions Act as to whether that was an automatic stay was not an integral part of the hearing and determination of the appeal. In his view the preliminary objection ought to have been upheld.

30.12 Two additional points should be made. Firstly, in *Brown v Trelawny Parish Council*, an action was commenced in the Supreme Court for a declaration that an automatic stay applied and this was the basis on which Smith J. adjudicated and determined this issue. This was one of the ways suggested by Walker J.A. to obtain declaratory relief in M*itchell v Dabdoub*. Secondly, Walker J.A. had been a member of the panel of the Court of Appeal in *Frankson v The General Legal Council* when, as we have seen, the court held that it had no jurisdiction to grant a declaration as to whether an automatic stay applied in appeals to the Court of Appeal from decisions of the disciplinary committee of the General Legal Council under the Legal Profession Act. However, the previous decision in *Frankson v The General Legal Council* was not referred to or considered by the Court of Appeal in the *Mitchell v Dabdoub* decision.

30.13 It should be pointed out that *Mitchell v Dabdoub* and *Frankson v The General Legal Council* were decided prior to the Court of Appeal rules 2002. Rule 2.15(2)(b) of the 2002 rules under the subheading "Powers of

Court" may be relevant if the issue was to arise now to be considered This rule gives the court the power ".... to make any incidental decision pending the determination of an appeal or an application for permission to appeal". Whether this provision can give the court the power to declare whether a statute confers an automatic/statutory stay is yet to be determined.

31.0 Do the Court of Appeal rules give the court the power to grant stays of execution in appeals to it from tribunals?

31.1 In some instances a statute may confer a right of appeal on the Court of Appeal from the decision of a tribunal. We have seen for example that section 16 of the Legal Profession Act confers a right of appeal from the Disciplinary committee of the General Legal Council to the Court of Appeal.

31.2 Neither the 1962 nor 2002 Court of Appeal rules directly confers a jurisdiction on the Court of Appeal to grant stays of execution in appeals to it from tribunals. They do so indirectly by applying the rules to civil appeals, including the rules thereunder as to stays of execution.

31.3 Rule 25 of the Court of Appeal Rules 1962 is the rule relevant to this prior to the 2002 rules. Rule 25 appeared under "Title II" under the heading civil appeals from the Supreme Court. It provided that:

> *"This title applies, subject to the provisions of section 6 of the Judicature (Supreme Court) Additional Powers of Registrar Law, to every appeal to the*

Court, including, so far as it is applicable thereto, any appeal to the Court from the Registrar of the Supreme Court or other officer thereof, or from any tribunal from which an appeal lies to the Court under or by virtue of any enactment, not being an appeal for which other provision is made by the enactment giving the right of appeal or by rules made under that enactment."

31.4 It is submitted that this rule gave the Court of Appeal jurisdiction in the *Frankson v General Legal Council* decision to grant a stay of the Disciplinary Committee's decision. However, this rule was not referred to or relied upon in that case.

32.5 The corresponding rule now in the Court of Appeal Rules 2002 is rule 2.1(1). This rule appears under "section 2, Civil Appeals" and under the subheading "Scope of this Section". It states:

"This section sets our special rules which, together with the rules in section 1 govern civil appeals to the court from ..... (c) tribunals....."