

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CvA. No. 19 of 2001**

**BETWEEN**

**OSWALD DOWNES  
Trading as  
“INDULGENCES DUTY FREE”**

**APPELLANT**

**AND**

**AIRPORTS AUTHORITY OF  
TRINIDAD AND TOBAGO**

**RESPONDENT**

**Panel: R. Hamel-Smith, J.A.  
J. Permanand, J.A.  
W. Kangaloo, J.A**

**Appearances:**

**Mr. M. Campbell for the Appellant  
Mr. F. Hosein for the Respondent**

**Date: June 21, 2002**

## JUDGMENT

### R. Hamel-Smith, J.A.

1. Were there a rule that made case management compulsory I entertain no doubt whatsoever that the appellant would never have found himself in the predicament that he now finds himself. The appeal is a clear illustration as to what can happen when some attorneys are allowed free rein in the conduct of civil litigation. As it has turned out, until the judge stayed the proceedings pending payment of the outstanding costs, costs that have exceeded the sum of \$300,000.00, the appellant was having the best of all worlds. It is now left to this Court to decide whether *enough is enough*.

2. The appellant was a tenant of the respondent and operated a confectionary shop in the Duty Free Area at Piarco International Airport which area fell within the respondent's jurisdiction. The respondent was his landlord. A dispute concerning the terms of the lease arose. He alleged that the landlord was in breach of one of the terms of the lease and this was having an adverse effect on his income. In a word, he claimed that subsequent to the execution of the lease the landlord had given him the undertaking that he would have the exclusive right to operate a confectionary shop in the area. The landlord denied ever giving such an undertaking. The appellant decided to stop paying the rent. It accumulated into a considerable amount, in excess of \$150,000.00. The landlord took steps to collect the arrears by levying on his goods. The appellant immediately filed an action on September 4, 1995 (HCA 2877/95) for wrongful levy and applied *ex parte* for, and was granted, an injunction ordering the return of the goods that had been seized under the levy. The hearing to continue that injunction was returnable on September 11. He never served the respondent with a summons. For some inexplicable reason, on September 5, he filed without leave a supplemental affidavit in support of the *ex parte* injunction. Further, on the same day, he filed an application for an injunction in similar terms to continue until after the determination of the summons returnable on September 11. The application to continue the *ex parte* injunction and the summons filed on September 5 was heard on September 11 by the same judge. On the first application, directions were given for the filing and serving of affidavits in opposition and reply. The *ex parte* injunction was continued to October 10. It was then adjourned on that date to November 3 on the appellant's application.

3. Brooks J. heard the matter on November 3 and ruled that there had been no summons to continue the injunction granted *ex parte* on September 4 and that the summons for an injunction filed on September 5 should be dismissed. Counsel for the appellant immediately applied for a fresh injunction but this too was refused. The appellant was ordered to pay the costs.

4. The dismissal of these applications for injunctions allowed the landlord to take steps to pursue the collection of the arrears once again. It did so but the appellant immediately applied for another injunction to have the goods released. This application was made in the same action in which the first two applications for injunctions were

refused. In the meantime, while this was pending, the appellant filed another action on November 10 (HCA 3678/95) for damages for wrongful levy. The respondent entered an appearance but to date no further action has been taken in these proceedings. In fact, it stands dismissed under Order 3 rule 6 of the RSC 1975 and the respondent is entitled to the costs of the action.

5. Meanwhile, the hearing of the summons in the first action took several days. It was part heard before Brooks J. on November 10 and adjourned on nine occasions and finally determined on January 8, 1996. While this summons was part heard, the appellant applied to another judge ex parte and obtained an injunction to prevent the respondent selling the goods that were seized under the levy. He then, on February 13, made a fifth attempt to obtain another injunction for similar relief again, seeking leave to use all the affidavits in the first action in support of that application. Not satisfied with the number of applications before the court, on February 23, he made a sixth attempt to obtain an injunction by serving the respondent with a summons seeking similar relief.

6. The last two applications were heard before Brooks J. and took some 9 days. They were eventually dismissed with costs. By the end of it all, the appellant's application for injunctive relief had been consistently denied and the respondent was entitled to have his costs taxed and paid immediately by the appellant. The respondent duly presented his bills for taxation. They were eventually taxed but the appellant was dissatisfied with the award. He filed for a review, as he was entitled to do. The respondent spent a considerable amount of time trying to arrange a time frame for the hearing of the review but the appellant refused to co-operate. The appellant refused to submit his written submissions. Between June 24, 1997 and October 1, 1998 the review was adjourned awaiting these submissions and finally on October 8 the registrar made a specific order that the appellant submit written submissions. He defied the order and the registrar, on October 29, 1998, decided to proceed with the review without them. An exercise that should have taken no more than one month, took almost two years and only after considerable costs were incurred due to the conduct of the appellant's attorneys.

7. In the meantime, on July 23, 1997 the appellant filed a third action (HCA 1854/97) for damages for breach of agreement and wrongful levy. It was later consolidated with the first action.

8. While the taxation was pending, the appellant filed two appeals against the dismissal of the injunctions and then later filed applications for leave to appeal against the orders for costs. It is obvious that the latter was an attempt to avoid having to pay the costs awarded against him. I say this because when the time arrived to present the appeals he withdrew the first application. He was ordered to pay the costs of that application. The second application was dismissed by the by the Court of Appeal with costs. The appeals against the dismissal of the injunctions were listed for hearing but the appellant refused to send the record to the respondent after it had requested a copy. The filing of skeletal arguments by the appellant was overdue and never filed. He eventually withdrew the appeals.

9. So much effort appears to have been put into the review of taxation exercise and the pending appeals that the appellant was required to apply to the court under Order 3 rule 6 for leave to proceed with the prosecution of the action. It lay dormant for more than a year without a step being taken by the appellant and the rule required that leave be obtained to resuscitate it. Consistent with his approach to the litigation as a whole, the application was filed on September 16, 1998 but never served on the respondent until November 9. No affidavit in support was served on the respondent. The application had to be adjourned to November 30. Curiously, on November 2, the respondent was served with a notice dated November 2, 1998 to which a number of affidavits filed by the respondent was attached. No application accompanied these affidavits. Then on November 10, the respondent was served with an undated notice in the first action for the further hearing of a summons filed on September 15. Sometime after February 25, 1999, the appellant served a copy of a summons dated September 15, 1998 seeking leave to deliver the statement of claim in the first action out of time. It had been served some 18 months out of time on March 21, 1997 but refused by the respondent. The appellant had to seek the court's leave to serve it out of time. It took him the better part of 2 years to serve the respondent with the summons for that leave. The respondent in 1996 had in fact made repeated demands of the appellant to serve the statement of claim but he never complied. The hearing of these applications (the 15 and 16 September applications) first came up before Jamadar J. and the appellant suddenly applied for an adjournment. The judge acceded to the request but ordered costs against him. Stollmeyer J. later heard the applications and in granting the relief ordered the appellant to pay the costs of both applications as a condition precedent to the further prosecution of the action. The appellant paid those costs on October 28, 1999.

10. Having taken the better part of two years to serve his statement of claim, the appellant ignored the respondent's request for an extension of time to serve its defence. The respondent was compelled to apply to the court for an extension. He did so by application dated November 23, 1999 and by a letter of November 24 it requested further and better particulars of the statement of claim before delivery of the defence. Since it had received no response to its several requests, the respondent filed its defence on December 1, 1999. This provoked a response from the appellant. He served a 'replacement' statement of claim, purportedly in response to the request for particulars. The particulars requested were not contained in that document and the respondent was constrained to make a further demand for them. No response was received from the appellant.

11. In the meantime, the respondent continued to make demands for the payment of the outstanding costs but with no success. The trial of the action was fixed for January 27, 2000 but it is obvious that the appellant was not in a position to proceed. The trial judge issued directions for the delivery of particulars requested of the statement of claim and for the delivery of the defence thereafter. It also directed that a bundle of documents be agreed and filed by the parties. The trial was adjourned to the March list. The respondent sought an amendment to its defence, made necessary by an amendment to the statement of claim, but the appellant refused to consent. Order 20 makes express provision for this to avoid unnecessary applications to the Court and to avoid incurring further costs. It may

be that the appellant was entitled to refuse on good grounds but he could have said so. The respondent served notice that it would apply for the amendment at the trial. In May 2000 the trial was once again adjourned to the July list for hearing on October 25, so the respondent proceeded by way of summons to amend. The amendment was allowed in the absence of the appellant's attorneys, in spite of several attempts to locate them. Consistent with his overall approach, the appellant immediately applied to the court without success to set aside the order allowing the amendment. Further unnecessary costs were again incurred on the part of the respondent. A further demand for the costs was made but the appellant stood his ground.

12. No doubt, exasperated by the appellant's refusal to pay the outstanding costs, and with costs mounting with each day, the respondent attempted to levy on his goods for the outstanding costs. The appellant lived with a woman and she filed an interpleader summons claiming that all the goods taken on the levy belonged to her, including a motor vehicle that was registered in the appellant's name. It seemed a waste of time to challenge the summons even in respect of the vehicle with the result that the levy was withdrawn and the goods returned to the appellant's house. There was, by consent, no order as to costs. Another demand was made for the outstanding costs, which by this time were in excess of \$300,000.00 but the appellant remained steadfast in his intention not to pay them or to make some satisfactory arrangement for payment

13. When the matter came up for trial once again, the respondent had filed the application for a stay. It was heard before the trial judge who granted the stay but unfortunately gave no reasons for his decision. *Graham v Sutton, Carden & Co.* (1897) 2 Ch. D 367 is authority for the following proposition:

*“Although mere non payment of the costs of an interlocutory application which the plaintiff has been ordered to pay, furnish no sufficient ground for ordering proceedings in the action to be stayed until payment, the Court has jurisdiction to order such a stay if the action is vexatious or has been vexatiously conducted by him.”*

It is plain from reading the affidavit filed by the respondent in support of the application that it was not based on the refusal per se to pay the outstanding costs but on the higher ground that the appellant was conducting the litigation in a vexatious manner that warranted a stay until payment. The judge therefore would have considered the issue before making the order he did and not simply based it on non-payment only. I am fortified in this view because there are ways in which an order for costs can be enforced without the need for a stay. The question remains therefore whether on the evidence led by the respondent the judge was correct in concluding that the appellant was indeed conducting the proceedings in a vexatious manner that entitled the respondent to a stay.

14. A party to litigation, in my view, is entitled to insist on the timely payment of costs that have been awarded to him in the course of the proceedings where no order has been made that prohibits him from immediately collecting those costs. Courts are at

liberty to defer the payment of costs by ordering them to be paid “in any event” but where the order is not so guarded, a litigant is entitled to call for payment. I would think however that even though there are avenues open to that litigant to facilitate the collection of those costs, if the opposing party is conducting the litigation in such a manner that costs are being unnecessarily increased over and above those generally incurred, as in this case, the affected party is entitled to seek the court’s protection by having it order a stay until the outstanding costs are paid. It would be unfair, if not manifestly unjust, to permit a party to cause the opposing party to be continually incurring costs by having to attend on application after application which have little or no merit, without any hope of recovering those costs when the offending party is ordered to pay them. This court is alive to the fact that some parties do not always have the wherewithal to pay outstanding costs but there are ways and means of satisfying the other side as to payment. One way is to post a bond or some other form of security to cover the costs, acceptable to the other side. No attempt was ever made to consider this option. Where a party completely ignores the demands for payment as is the case here and continues to abuse the procedures available to him in prosecuting his matter then a court has seriously to consider the appropriate remedy to be administered.

15. There can be no logical explanation and the appellant certainly has offered none, for the several applications for injunctive relief. While one application was part heard the appellant was seeking, *ex parte*, similar injunctive relief. There were six applications before the court at one time. The appellant has never offered any explanation for the default in the prosecution of the appeals nor has he said anything about the applications and refusals to file the submissions timely for the review of taxation. The respondent incurred substantial costs that were brought about by the persistent postponements of the appellant’s several applications, whether they were for injunctive relief, review of taxation or prosecution of his several appeals, none of which had any merit.

16. Whenever a judge refuses to continue an injunction obtained *ex parte* it is customary to seek directions for the further prosecution of the action. In this appeal, we are not told whether such directions were sought but the manner in which the appellant’s advisors proceeded at every step of the way it is unlikely that any such directions were sought. It was an action however that called out for specific directions that would have protected the appellant in some way. There is no doubt that the rent was due but when the injunction was removed, it was open to his attorneys to ask the court to order an early trial on payment of the outstanding rent into court or a bond to secure same pending the trial. Another option was to have consented to judgment for the outstanding rent but to have it stayed until the sole issue (the question of the breach of undertaking) was determined at an early trial or as a preliminary point. Much time and costs would have been saved had any of these options been adopted. There would have been no cause for a second levy by the respondent and consequently no need for any injunctive relief. No such directions were sought with the result that the appellant, or at least his advisors, considered that he was at liberty to file a multiplicity of actions (for the same relief) with impunity and to have as many bites of the cherry as he chose without having to answer to anyone for the extravagance. With a system of case management in place, these options

would have been considered with the saving of considerable time and costs on both sides and limited the issues to the alleged breach.

17. At the hearing of the application for the stay, the appellant did not seek to challenge the respondent's case but rested his case solely on the allegation that the respondent had agreed to defer the question of the outstanding costs until after the trial of the action. The agreement, he said, came about when the levy against him was set aside. The trial judge obviously rejected that allegation as untrue and there has been no appeal against his finding. I find it difficult to accept the appellant's explanation because the respondent had written time and time again for the costs and was doing all in its power to collect them so it is quite unlikely that it would have agreed to such a course in the circumstances. In any event, I would think that any such undertaking on the part of the respondent would have been recorded in the Master's order when the interpleader summons was discontinued. The respondent produced a copy of that order and it contains nothing of the sort. If it were indeed given then its absence from the order reflects poorly on those who had conduct of these proceedings on behalf of the appellant (not counsel who appeared before us). Further, the application for the stay followed closely on the heels of the inter-pleader summons so it is highly unlikely that any agreement was reached with respect to the outstanding costs. The trial judge was right to reject the appellant's allegation.

18. It is in this setting that the trial judge made the order for the stay and no good reason has been put forward to show that he erred in the exercise of his discretion. The conduct of these proceedings leaves much to be desired. It is true that the manner in which these proceedings were conducted and continue to be conducted was the doing of the appellant's attorneys but in the final analysis he is answerable vis-à-vis the respondent. He may seek redress against them if he is so advised but that is another issue. I find myself in agreement with the trial judge that the manner in which these proceedings were conducted required harsh medicine and he was perfectly in order to grant the stay until the outstanding costs were paid.

19. Two other judges in the course of the proceedings obviously sensed the shuffling of the appellant and ordered the payment of costs as a condition precedent to the further prosecution of the matter. It adds nothing to the appellant's case that he complied with those orders. In fact, it reflects to his disadvantage, as it seems to suggest that he is quite able to pay when it is to his advantage to do so.

20. I can understand the appellant's dilemma but his case glaringly illustrates what happens when the conduct of an action is left entirely in the hands of attorneys with no adequate supervision by the Court. It leaves the unfavourable impression that those responsible for the conduct of the litigation were unconcerned whether or not unnecessary costs were incurred, either on the appellant's side or the respondent's and whatever obstacle could be placed in the respondent's way to defer payment of the outstanding rent would be applied. It certainly gives the impression that the appellant had

access to limitless funds to pursue litigation in an extravagant way, which, I am certain, is not the case.

21. Contrary to the appellant's contention, it is of little concern whether the respondent is a public authority with adequate funds to litigate. The Courts' duty is to protect all litigants, the affluent as well as the impoverished, from abuse. It is manifestly unfair and improper to permit a party to conduct litigation in a manner that continually compels the opponent to incur costs that in ordinary circumstances would not necessarily be incurred and then, as in this case, with little or no hope of ever recovering them.

22. On reflection, it is unfortunate that the attorneys on record for the appellant were not required to offer some explanation, possibly on affidavit, for their handling of the matter. Had this been done, the opportunity to order that they pay the costs personally may have arisen. As a general rule, litigants rely entirely on their attorneys for guidance in dealing with court procedure and I have no doubt that the appellant fell within this general rule. It is only fair therefore that his attorneys should have been called upon for an explanation. In the final analysis, the appellant was not in a position to offer any, apart from the alleged undertaking. The trial judge was therefore left with nothing of substance to persuade him against making the order for the stay. I see no good reason to interfere with that order.

23. Accordingly, unless the appellant pays the outstanding costs or makes adequate arrangements for their payment, I am afraid that the stay will remain in force. Undoubtedly, at some stage, if default continues, it will be open to the respondent to move the court to have the actions dismissed.

24. I would dismiss the appeal with costs.

R. Hamel-Smith  
Justice of Appeal

I have read the judgment of Hamel-Smith J.A. and for the reasons given I too would dismiss the appeal with costs.

J. Permanand  
Justice of Appeal.

I have read the judgment of Hamel-Smith J.A. and for the reasons given I too would dismiss the appeal with costs.

W. Kangaloo  
Justice of Appeal.