

1989 June 2

(SAVVIDES, J.).

WORLD TIDE SHIPPING CORPORATION,

Plaintiffs,

v.

VASSILIKO CEMENT WORKS LTD.,

Defendants.

(Admiralty Action 64/75).

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- 5 *Admiralty — Practice — Stay of execution — Application for — The Cyprus Admiralty Jurisdiction Order, 1893, Rules 175, 176 — Form of the application governed by Rules 203. — It may be made orally, but the Judge may order a written application — The application need not be accompanied by an affidavit.*
- Civil Procedure — Stay of execution — Application for — It may be made ex parte and need not be accompanied by the affidavit — The Civil Procedure Rules Order 48 Rule 8(1)(ee).*
- 10 *Assignment — Of choses of action — Law governing the matter — There being no specific provision in the Contract Law, Cap. 149 and since the English Law of Property Act, 1925 is not applicable to Cyprus the matter is governed by Equity — An assignee takes subject to equities — What counterclaims may be set off by the*
- 15 *debtor against the assignee — Review of authorities — Debts accrued due before notice of assignment by the assignor to the debtor, may be set off against the assignee, whether or not it became payable before or after the date of assignment — The same rules apply when the counterclaim is inseparately connected with the assigned debt.*
- 20 *Admiralty — Practice — Stay of execution pending appeal — Appeal directed against dismissal of counterclaim, but not against the judgment in favour of the plaintiff — The Court has power to stay execution.*
- 25 *Admiralty — Practice — Stay of execution — Discretion of the Court — Principles applicable.*

This is an application for stay of execution of a judgment for U S Dollars 95 336 issued in favour of the plaintiff against the defendants — applicants pending the appeal lodged by the latter not against such judgment, but against that part of the judgment, whereby their counterclaim had been dismissed

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The plaintiffs opposed the application on the following grounds namely that the application was made ex parte, that it was not supported by affidavit, that the judgment debt had been assigned and therefore even if the appeal succeeds, the judgment on the counterclaim can no longer be set off against the judgment in favour of the plaintiffs and, finally that since there is no appeal against the judgment, there is no power to stay its execution

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The principles applied by the Court in rejecting the aforesaid ground of opposition appear sufficiently in the hereinabove headnotes

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Having in mind that the counterclaim arose out of a transaction inseparably connected with the judgment debt, that it is not frivolous and vexatious, the plaintiffs are resident abroad and have no assets in Cyprus and that if stay is not granted and the appeal succeeds, its effect will be rendered nugatory, the Court granted stay, but, in view of the danger for the plaintiffs of losing their security from executing the judgment forthwith, it imposed a condition relating to the giving of security by the defendants applicants in the form of a Bank Guarantee in favour of the plaintiffs

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Order accordingly
No order as to costs

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Cases referred to

Chrysostomou v Chalkousi and Sons (1978) 1 C L R 10,

Government of New Foundland v Newfoundland Railway Co [1888] 13 App Cas 199,

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Lee Parker and Another v Izzet and Others [1971] 3 All E R 1099,

Business Computers Ltd v Anglo-African Leasing Ltd [1977] 2 All E R 741,

The Mersy Steamship Company v Shuteleworth and Co [1883] 11 Q B D 531

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Application.

Application for stay of execution of the judgment of this Court until the final determination of an appeal pending before the Supreme Court

M. Christofides, for applicants-defendants.

G. Michaelides, for respondents-plaintiffs.

Cur. adv. vult.

5 SAVVIDES J. read the following decision. This is an application for stay of execution of the judgment of this Court in the above intitled action pending the final determination of an appeal pending before the Supreme Court.

10 The applicants, defendants in the above action (hereinafter to be described as «the defendants») are the judgment debtors of the respondents, plaintiffs in the action (hereinafter to be described as the plaintiffs) by virtue of a judgment delivered on the 23rd August, 1988.

15 Plaintiffs' claim against the defendants was originally for U.S. Dollars 345,053.70 as balance of freight and/or hire and/or demurrage relating to the carriage by plaintiffs of cement from Cyprus to Nigeria. At the stage of the pleadings the plaintiffs reduced their claim to U.S. Dollars 145,053.70 but they introduced a new cause of action for damages for breach of contract. The
20 defendants denied any indebtedness to the plaintiffs and counterclaimed against them damages for breach of the contract for carriage of cement, for shortlanded goods and services rendered to the plaintiffs.

25 By a judgment delivered by me on the 23rd August, 1988, I awarded to the plaintiffs the sum of U.S. Dollars 95,366 in respect of their original claim and struck out their additional claim for damages for breach of contract on the ground that such claim which was introduced by the petition and was not mentioned in the writ of summons could not be granted once they had not
30 applied to amend the writ of summons accordingly. I also dismissed the counterclaim of the defendants having found that there was no breach of contract by the plaintiffs.

35 As a result of the aforesaid judgment the defendants lodged an appeal against the dismissal of their counterclaim but not against the award to the plaintiffs of the sum of U.S. Dollars 95,366.- The plaintiffs, on their part, lodged also an appeal against the striking out of their additional claim for damages for breach of contract and the award of interest at 9% as from the date of the judgment and not as from the 1st July, 1975.

The application was made *ex-parte* and the facts relied upon, in support thereof, as set out therein are briefly that if the defendants succeeded in their appeal then on the basis of their counterclaim they were entitled to recover a higher sum which by way of set off would have extinguished the plaintiffs' claim. Also that the plaintiffs are foreigners and of doubtful financial condition so that in case the amount of the judgment was paid and the defendants succeeded on their counterclaim the defendants would be deprived of their right to set off the amount of the judgment which was awarded in favour of plaintiffs against their counterclaim or execute any judgment against the plaintiffs in satisfaction of the counterclaim. Finally that various irrevocable letters of assignment have been given by the plaintiffs to two assignees in respect of the whole amount of the judgment and at the same time the defendants were served with a decision of the First Instance Court of Athens, Greece, attaching a sum of U.S. Dollars 79,782.- out of any amount which might be adjudged to the plaintiffs.

When the application came up for hearing before me, I gave directions that notice of the application should be served on the plaintiffs.

The plaintiffs opposed the application. Their opposition was supported by an affidavit sworn by Miss Eliana Iacovidou of Nicosia, an advocate at the law office of plaintiffs' advocates. The main grounds raised in the said affidavit are:

(a) That the defendants by their notice of appeal did not challenge the award of U.S. Dollars 95,366.- in favour of the plaintiffs.

(b) Plaintiffs by their appeal do not challenge the award of U.S. Dollars 95,366.- but the dismissal of their additional claim for breach of contract and the date from which interest should have been awarded in their claim.

(c) The application is bad for irregularity as it is not accompanied by affidavit.

(d) The financial condition of the defendants is not sound.

(e) That the defendants may be directed to pay the amount of the judgment to Court and all those who have a claim in respect thereof may be called to raise their claims for the approval of the Court before any distribution of the amount so deposited is ordered.

Copies of the Notices of both appeals have been produced before me in the course of the hearing of the present action as exhibits 1 and 2 and they are as follows

5 *Exhibit 1* Notice of Civil Appeal No 7727 by defendants directed against «that part of the judgment relating to

(A) The dismissal of defendants' counterclaim in so far as it concerns the claim for damages caused to them by the plaintiffs as a result of their failure to transport 6675 metric tons of cement in breach of an agreement between them and/or as damages for
10 breach of contract by the plaintiffs to nominate one or more ships for the transportation of the aforesaid quantity of cement (Amount of damages 6675 x U S D 10 = U S D 66, 750 -)

(B) The dismissal of defendants' claim for shortages as well as their claim for set off of the amount in respect of shortages»

15 *Exhibit 2* Notice of Civil Appeal No 7731 by the plaintiffs directed against «that part of the judgment relating to

1 The dismissal of plaintiffs' claim for damages amounting to U.S. Dollars 255,212 50 for breach of contract for the transportation of 25,000 tons of cement from Lamaca or Limassol
20 to Nigeria, in January, 1975

2 The dismissal of plaintiffs' claim for interest at 9% as from 1 7 1975 on the amount of the judgment that is U S Dollars 95,366 - and the award of such interest as from 23 8 1988»

Both the application and the opposition are based, as
25 mentioned therein, on the Civil Procedure Rules, Order 35, rules 1, 18, 19, 40, Order 48, the Cyprus Admiralty Rules and the inherent jurisdiction of the Court

The arguments advanced by counsel for defendants in support of their application and in reply to the contention of counsel for
30 plaintiffs may be briefly summarized as follows

(a) Under the provisions of section 47 of the Court of Justice Law and the provisions of Order 40, rule 7, of the Civil Procedure Rules the Court is invested with a wide discretion to order stay of execution

35 (b) It has been the practice of the Court in actions where there is a counterclaim, when giving judgment on the claim, to stay

execution thereof pending the determination of the counterclaim so that justice is done to both litigants.

(c) No affidavit in support of the application is needed as the application is made «ex-parte» and under the provisions of Order 48, rule 8, no such affidavit is required. 5

(d) The fact that the relevant part of the judgment in favour of the plaintiffs was not challenged on appeal is irrelevant as the power of the Court under s.47 of the Courts of Justice Law is not subject to any such limitation but is a general power which may be exercised even in cases in which there is no appeal 10

The question of assignment has nothing to do in this case as any assignment is subject to any set off arising out of the same contract or transaction as the subject-matter of the assignment and that the debtor has the same rights of set off against the assignee as against the principal creditor. 15

Counsel for the plaintiffs on the other hand contended that:

(a) The application should have been accompanied by an affidavit and the failure of the defendants to file such an affidavit renders the proceedings null and void. In support of his contention in this respect counsel for the plaintiffs sought to rely on the corresponding to our Civil Procedure Order 35, rule 18, old English Order 58, rule 12 and also to Order 48, rule 9 of the Civil Procedure Rules. 20

(b) There is no appeal against the award of U.S. Dollars 95,366.- in favour of the plaintiffs and, therefore, this part of the judgment has become final and conclusive. Therefore, the stay applied for does not amount to anything more than asking that this amount does remain in the hands of the defendants as security for their unfounded counterclaim. 25

(c) Once the judgment has become final and conclusive and there has been assignments of the amount of U.S. Dollars 95,366.- to third persons, to the knowledge of the defendants, such amount does not belong to the plaintiffs any more, but it belongs to the assignees. Therefore, nothing is left to be set off against the counterclaim of the defendants. 30 35

The present application being an application in an Admiralty Action, resort should have been first to the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction and the application should have been argued on the basis of such rules.

Provision for stay of execution does exist in our Admiralty Jurisdiction Rules under the heading «Execution» as follows under Rules 175 and 176:

5 «175: The Court or Judge may, at any time after the issue of a writ of execution, on the application of any person, direct that proceedings under the writ may be stayed for such time and on such terms as shall seem fit.

10 176: Any such application may be made without notice to any party but the Court or Judge, on the hearing of the application, may direct that notice thereof be given to any party interested any, may adjourn the hearing of the application for that purpose».

As to the form of an application Rule 203 provides as follows:

15 «A party desiring to obtain an order from the Court or Judge shall ordinarily make oral application for the same, but the Court or Judge may, on the application being made, direct that a written application be furnished.

Where a written application is furnished it shall be filed with the Registrar».

20 Section 47 of the Courts of Justice Law, 1960 (Law 14/1960) provides that the trial Court or the Court of Appeal before which an appeal is pending at any time, if it so deems proper and irrespective of the fact that a writ of execution was issued or not to order stay of execution of the Judgment for such period and on
25 such terms as the Court may deem fit.

The definition of «Court» as explained in section 2 of the law means the Supreme Court or any other Court established under the provisions of the law, or any judge thereof.

30 Therefore under the above provision express power is given to the Court, both the Supreme Court and the lower Courts, to order stay of execution and therefore the inherent jurisdiction of the Supreme Court need not be resorted to.

35 Under the Civil Procedure Rules Order 35, rule 18 an appeal shall not operate as a stay of execution except so far as the Court appealed from or the Court of Appeal, or a Judge of either Court may order and that before any order staying execution is entered, the person obtaining the order shall furnish such security (if any) as may have been directed.

Under Order 48, rule 8, which deals with the form of applications, an application for stay of execution pending appeal may be made ex-parte (rule 8(1)(ee)) and need not be (unless required by the Court or Judge) be supported by affidavit (rule 9(2)).

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Having dealt with the relevant provisions in the law and the relevant rules I shall proceed now to examine the various questions posing for consideration.

Affidavit in support of the application:

Neither the Admiralty Rules which are the special Rules applicable to the exercise of the Admiralty Jurisdiction nor the Civil Procedure Rules on which both parties sought to rely require that an ex-parte application for stay should be accompanied by an affidavit.

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Under the Admiralty Rules such an application may even be made orally which obviously does not require an affidavit; and under the Civil Procedure Rules, Order 48, rule 8(1)(ee) and rule 8(2) such application need not be accompanied by an affidavit.

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In view of the above provisions in our Rules of Court, the provisions of the English Rules of the Supreme Court do not come into play.

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Therefore, the submission of counsel for plaintiffs that the application is bad for irregularity cannot be sustained.

Effect of assignment

As to the form and effect of an assignment of a chose in action useful reference may be made to the case of *Chrysostomou v. Chalkousi & Sons* (1978) 1 C.L.R. 10 in which we read the following at pp. 11, 12:

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«Regarding assignment of a debt there exists no express provision about it in our Contract Law, Cap. 149; sections 37 and 40 of Cap. 149, which correspond to sections 37 and 40, respectively, of the Indian Contract Act, 1872, can only be regarded as provisions which do not relate directly to the matter of the assignment of a debt and which, in circumstances such as those of the present case, do not operate, in any way, so as to exclude the assignment of a debt (see, also, the commentary on section 37 of the Indian Contract Act in Pollock and Mulla on the Indian Contract and Specific Relief Acts, 9th ed., p.333).

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We have, therefore, to consider what is the law governing the assignment of a debt in Cyprus:

In England it is regulated by a statute, namely the Law of Property Act 1925, which is not applicable in Cyprus.

5 In our view we have to apply the principles of Equity which were applicable before, and are still applicable after, the enactment of the said statute in England.

10 A debt, such as the one involved in the present proceedings, is a legal chose in action, as defined in Snell's Principles of Equity, 27th ed., p.69; and, as it appears from the same text-book (at pp.70, 74, 77), there can be an equitable assignment of a legal chose in action.

15 Such an assignment does not have to be in any particular form (see *Inland Revenue Commissioners v. Electric and Musical Industries, Ltd.*, [1949] 1 All E.R. 120, 126; affirmed on appeal, [1950] 2 All E.R. 261) because Equity looks to the intent rather than to the form; and an equitable assignment of a debt made between an assignor and an assignee is complete even if no notice has been given to the debtor concerned (see 20 *Goringe v. Irwell-India Rubber and Gutta Percha Works*, [1886] 34 Ch. D. 128).»

25 In the present case it is common ground that a notice in writing of the assignment has been given to the defendants - debtors. What has, however to be examined is the effect of such assignment against the debtors.

In Snell's Principles of Equity, 27th ed., at pp.79, 80, we read the following as to the effect of Assignment of Equities:

30 «Whether the assignment is legal or equitable, the assignee takes subject to equities having priority over the right of the assignee. The assignee of a thing in action cannot acquire a better right than the assignor had, or, in other words, the assignee takes the thing in action subject to all the equities affecting it in the hands of the assignor which are in existence before notice is received by the debtor.
35 For the same reason, the debtor has the same rights of set-off against the assignee as against the original creditor.

Thus if after the debtor has notice of an assignment a claim arises out of a contract which is independent of that in which the assigned debt arose (as where L is liable to T on a bond, and T owes L arrears of rent), he cannot set off that claim against the assignee, even though the contract was made before notice of the assignment. But if the set-off directly arises out of the same contract or transaction as the subject-matter of the assignment, the defendant may set it up against the assignee even though it did not accrue to him until after notice of the assignment».

Also in Halsbury's Laws of England, Fourth Edition, vol. 6, at p. 37 under paragraph 61 we read:

«Assignee subject to equities. In the case of an equitable assignment of a chose in action the debtor or fundholder has as against the assignee the same equities and the same rights of set-off and other defences as he would have had against the assignor at the date at which notice of the assignment is given to him.»

and at p. 39, under paragraph 64:

«... The debtor may not set-off an independent debt which has accrued since notice of assignment, though due upon a contract made before such notice, but he may set off a debt which has accrued since notice of assignment if it has arisen out of a transaction inseparably connected with the original debt, or if it was the intention of the parties that one should be set off against the other. He may also meet the plaintiff's claim by a counterclaim for unliquidated damages, provided that this arises out of the same contract and is not something outside the contract, as, for example, a claim for damages for fraud against the assignor in connexion with the transaction, which is a personal claim.»

In support of the proposition explained above as to the right of the debtor against the assignee to set off a debt against his counterclaim which arises out of the same transaction there is a series of English cases. It suffices if reference is made to some of them.

In the *Government of Newfoundland v. Newfoundland Railway Co.* (1888) 13 Ap. Cases, p. 199 the Privy Council said that «the set off availed against the assignees of the Company, the claim and

counter-claim having their origin in the same portion of the same contract, the obligations which gave rise to them being closely intertwined».

5 In *Lee Parker and Another v. Izzet and Others* [1971] 3 All E.R. 1099, the above case was referred to and distinguished from the facts of the case under consideration. At p.1108 we read the following in the judgment of Goff J.:

10 «For the sake of avoiding misunderstanding I must add that of course the Taylor v. Beal right can only be exercised when and so far as the landlord is in breach and any necessary notice must have been given to him. In so far as the repairs fall outside the landlord's covenants in the lease there can in my judgment be no set-off against the plaintiffs, despite *Newfoundland Government v. Newfoundland Ry Co.* That case is
15 plainly distinguishable because there the defendants were express assignees of the statutory contract; and in any case the cross-claims arose out of the same contract. Lord Hobhouse said:

20 'But then it is said that the rule of law deducible from the authorities is, that when a debt or claim under a contract has been assigned and notice given to the debtor, which may be assumed to have been done in this case, the debt or claim is so severed from the rest of the
25 contract that the assignee may hold it free from any counter claim in respect of other terms of the same contract. So, at least their Lordships understood the argument. And as such a limitation of the right to set off a counter claim is new to them, they are led to examine carefully the cases relied on to support it ... But Mr. Justice
30 Willes only entered upon that examination because the two debts had no common origin, and, in default of such an agreement, no connection with one another'.

Then Lord Hobhouse approved of the principle as laid down by Bovill CJ in the following terms:

35 'No case has been cited to us where equity has allowed against the equitable chose in action a set-off of debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it'.

It is true Bovill CJ in the words just quoted spoke of matters not connected with the debt claimed or in any way referring to it and not 'actually arising out of the same contract' but in my judgment there is clearly no sufficient nexus in the present case».

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In *Business Computers Ltd. v. Anglo-African Leasing Ltd.* [1977] 2 All E.R. 741, concerning the right of debtor to set off against assignees sums owed by assignor to debtor it was held that:

«Although a debtor was entitled to set off against the assignee of a debt, any debt from the assignor in favour of the debtor which either had accrued due before the debtor received notice of the assignment, whether or not it was payable before or after the date of the assignment, or which had arisen out of or was closely connected with the same contract as had given rise to the assigned debt, the debtor could not set-off as against the assignee a debt of the assignment nor was connected with the assigned debt, even though it had arisen under a contract which had been made between the debtor and the assignor before the date of the assignment.»

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With the above principles in mind I have come to the conclusion that the contention of learned counsel for plaintiffs that in the circumstances of the present case the amount of U.S. Dollars 95,366.- belongs absolutely to the assignees and not to the plaintiffs and, therefore, nothing is left to be set off against the counterclaim of the defendants, is untenable.

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Defendants' counterclaim has arisen out of a transaction inseparably connected with the judgment debt. On the basis of the equitable principle that the assignee takes subject to any equities in favour of the debtor, the assignees cannot acquire a better title to the debt assigned than the assignors themselves, and any claim of the assignees is subject to the defendants' right of set off in respect of their counterclaim.

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I come now to the last question raised by counsel for plaintiffs in opposing the application, that once the judgment in favour of plaintiffs for US Dollars 95,366 has not been challenged by the appeal the judgment has become final and conclusive and the aforesaid amount payable forthwith, any stay of execution pending the determination of defendants' appeal against the dismissal of their counterclaim would have amounted to making of

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an order against the plaintiffs for giving security towards defendants' counterclaim.

Reference has already been made to the relevant provisions empowering the Court to make an order staying execution.

5 In the notes in Annual Practice, 1960 under Order 58, rule 12, (the Rules of the Supreme Court which were in force prior to 1960, the old Rules) which corresponds to our Order 35, rule 18 of the Civil Procedure Rules we read the the following at p. 1695:

10 «The Court does not, 'make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled,' pending an appeal (*The Annot Lyle* [1886], 11 P.D. at p. 116, C.A.; *Monk v. Bartram* [1891] 1 Q.B. 346)

15 But it has also been said that 'when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory' (*Wilson v. Church (No. 2)* [1879], 12 Ch. D. at pp. 458, 459, C.A.). It is in the discretion of the Court to grant or refuse a stay (*Becker v. Earl's Court Ltd.* [1911] 56 S.J. 206; *The Ratata*, [1897] P. at p. 132; *A.G. v. Emerson* [1889] 24

20 Q.B.D., pp. 58, 59)

..... Execution might be stayed, for example, where the judgment is in favour of a person resident out of, or about to leave, the jurisdiction (see *Woolton v. Sievier* [1913] 30

25 T.L.R. 165, C.A.).»

It is always in the discretion of the Court to grant or refuse stay of execution. Such discretion however should be exercised by the Court judicially and bearing in mind all the circumstances of the case.

30 For the purpose of exercising my discretion in the present case I consider the following circumstances as important.

(a) Defendants' counterclaim has arisen out of a transaction inseparably connected with the judgment debt.

35 (b) The counterclaim of the defendants does not appear to be frivolous and unsubstantial.

(c) The judgment is in favour of persons resident abroad who have no place of business in Cyprus and no assets whatsoever in Cyprus.

(d) If payment of the judgment debt is not ordered and defendant's appeal on the counterclaim succeeds then the effect of the appeal will be nugatory as the defendants will not be able to set off the judgment debt against any amount which they may recover on the counterclaim which as I have already mentioned is inseparably connected with the judgment debt 5

On the other hand I have to bear in mind plaintiffs fear of losing their security of executing the judgment forthwith

In *The Mersev Steamship Company v Shuttleworth & Co* [1883] 11 Q B D 531 which was an action for a liquidated demand admitting the claim, but setting up a counterclaim for unliquidated damages to a greater amount the Court of Appeal affirmed the judgment of the Q B D refusing an application to sign judgment for the plaintiffs upon the claim and for payment of the amount thereof by the defendants into Court to abide the result of the action. In the judgment of the Court of Appeal (per Cotton, L J) we read the following (at p 532) 10 15

« The contention for the present plaintiffs is that whenever the claim of a plaintiff is admitted he is entitled to have the money paid into court. I cannot agree to that argument a plaintiff is not entitled to have the money paid into court unless the counter-claim is frivolous and unsubstantial. I agree with the reasons and with the judgment of the Queen's Bench Division» 20

Bearing in mind the above I cannot agree with the submission of learned counsel for the plaintiffs that once the judgment debt has been admitted and not challenged on appeal a stay of execution cannot be granted for the purpose of setting off such amount against a counterclaim of the defendants 25

Bearing in mind all the above circumstances I have decided to exercise my discretion in favour of the defendants but subject to their giving security for the amount of the judgment debt and costs so that the position of the plaintiffs as judgment creditors or their assignees will not in any way be hindered 30

In the result the application is granted and an order is made staying execution of the amount of the judgment pending the final determination of Civil Appeal No 7727 on condition that the defendants will furnish a Bank guarantee to the satisfaction of the Registrar of this Court for the amount of the judgment and costs 35

within twenty days from today. If defendants fail to furnish such security within the aforesaid period the order for stay will be discharged

In the circumstances of the case I make no order for costs

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Application granted.
No order as to costs.