

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/014

MARIE MAKHOUL

Appellant/Applicant

and

CICELY FOSTER

Respondent

Before:

The Hon. Mde. Janice George-Creque

Justice of Appeal

On written submissions of:

Sir Gerald Watt, QC and Dr. David Dorsett for the Respondent

2009: August 26.

Civil Appeal – Civil Procedure – stay of execution – risk of injustice – whether applicant will be financially ruined – equitable considerations

The applicant (Ms. Makhoul), the claimant in the court below, sought a declaration of entitlement to a building standing on the respondent's land. The claim was dismissed, judgment was given on the respondent's counterclaim and Ms. Makhoul was ordered to pay mesne profits of \$700.00 and prescribed costs. Ms. Makhoul appealed and sought a stay of execution pending determination of the appeal. Ms. Makhoul states that she will be financially ruined if a stay is refused as her only source of income is derived from rental of the building, without which she would be unable to meet her loan obligations or afford the cost of her medical treatment. The respondent (Ms. Foster) argues that if the stay is granted she would be out of possession of her land and the building and would lose the rental income. It is further argued that if the appeal subsequently fails there is the real risk that Ms. Foster may be unable to recover any losses incurred in respect of rental income for the period she was out of possession given Ms. Makhoul's circumstances.

Held, refusing the stay of execution with costs in the appeal:

- (1) Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if the stay is granted or refused. This

calls for an examination of the nature of the case and the consequences flowing from enforcement of the judgment.

- (2) The burden is on the applicant to satisfy the court that she will be personally and financially ruined without a stay. It is not enough for the applicant to merely make a bald assertion to the effect that she will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay. The applicant has failed to provide such evidence.
- (3) The exercise of the discretion to grant a stay engages equitable considerations. The applicant has not made full and frank disclosure to the court having failed to provide a reason for non payment of the costs ordered in the court below.
- (4) Having considered all the factors and circumstances, the court is satisfied that the risk of injustice in granting a stay would be greater to the respondent than to the applicant.

Linotype-Hell Finance Ltd. v Baker [1993] 1 WLR 321 considered. *Hammond Suddard Solicitors v Agrichem International Holdings* [2001] EWCA 1915 applied.

JUDGMENT

- [1] GEORGE-CREQUE, J. A.: The applicant (Ms. Makhoul) has applied for a stay of execution of the judgment of the trial judge delivered on 28th May 2009, wherein she dismissed in its entirety Ms. Makhoul's claim against the respondent (Ms. Foster) pending a determination of the appeal against the said decision.¹ Ms. Makhoul's claim was for a declaration of entitlement to a building standing on the respondent's (Ms. Foster) land, situate in St. John's, Antigua. The trial judge also discharged an interim injunction which was previously granted in Ms. Makhoul's favour against Ms. Foster, and further gave judgment on Ms. Foster's counterclaim and ordered Ms. Makhoul to pay mesne profits in the sum of \$700.00 and prescribed costs.
- [2] The applicant contends in her grounds for a stay that if execution is undertaken, before the appeal is heard, then the appeal would be rendered nugatory and that without a stay she would be ruined. In her affidavit in support filed on 3rd June

¹ Counsel for the applicant made clear at the Case Management hearing that no stay was being sought in relation to the 2nd named respondent.

2009, Ms. Makhoul states that the rental from the building is her only source of income and that she is not employed. She further states that she maintains herself from that income as well as meets her loan obligations to Royal Bank of Canada, and her various medical expenses as she suffers from ovarian cancer the treatment of which is very expensive and which involves frequent trips to Trinidad and Tobago. She states that without a stay of execution she will be financially and personally ruined and that she will not be able to afford further treatment. Nothing further is said or produced to establish the extent of her loan obligations, or the cost of her medical treatment.

- [3] The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgment in his favour particularly after a full trial on the merits.
- [4] The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of *Linotype-Hell Finance Ltd. v Baker*² where Staughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasised that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.
- [5] The authority of *Hammond Suddard Solicitors - Agrichem International Holdings*³ is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear⁴ [see para 13]. They went on to state the principle thus:

“...Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of

² [1993] 1 W.L.R. 321 at pg. 323

³ [2001] ECWA Civ 1915, LTL 18/12/2001

⁴ *Supra* at paragraph 13

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?"⁵

- [6] I propose to approach the circumstances of this case based on the formulation of the principle as set out in the *Hammond Suddard* case as to my mind it affords a more pragmatic approach in keeping with the overriding objective of Civil Procedure Rules 2000 (CPR) which is to deal with cases justly. This calls for an examination of the nature of the case and the consequences flowing from enforcement of the judgment.
- [7] Ms. Makhoul's claim was basically for an order declaring her to be the owner of the building and consequentially the ability to earn an income from the rental of the building. The ownership and entitlement of the land on which the building stands is not in dispute and belongs to Ms. Foster. I also bear in mind the fact that Ms. Makhoul's relationship with Ms. Foster was, or is, one of landlord and tenant in respect of the land on which the building exists. The building has been adjudged to be part and parcel of the land the trial judge having found that it was affixed to the land and not capable of being removed without more.
- [8] If a stay is not granted then Ms. Makhoul would lose possession of the building and the ability to earn a rental income from sub-letting to a third party provided this could be lawfully done, in light of the fact that it is not in dispute that Ms. Foster is the owner of the land on which the building stands⁶. If she turns out to be successful on appeal, then subject to the caveat aforesaid, Ms. Foster may be required to compensate her for the loss in rental income sustained during the time she was kept out of possession. I do not consider that the fact that she is out of possession of the building would in any way stifle her appeal or render the appeal nugatory given the nature and subject matter of the claim which has given rise to the appeal. Further, were no stay granted and the appeal was successful, the

⁵ Supra at paragraph 22

⁶ The permission to sublet was at the heart of the proceedings below in respect of the notice to quit.

risks of the applicant being able to recover from the respondent appears minimal since the land on which the building stands is in any event, Ms. Foster's. Save for a relationship in the nature of landlord and tenant, or some like relationship, the applicant would not be in a position to lawfully remain in occupation of Ms. Foster's land. On the other hand, if a stay was granted, it would appear that Ms. Foster would be out of possession of her land and the building and would lose the rental income from the property, and in the event that the appeal failed then Ms. Foster will be able to enter into possession. However, there is the real risk that she may be unable to recover any losses incurred in respect of rental income for the period she was out of possession as according to Ms. Makhoul such sums would be expended by her in meeting her medical and other obligations.

[9] Unfortunately, the bald assertions by Ms. Makhoul that she will be personally and financially ruined, without establishing a factual basis for the assertion is most unhelpful in the exercise of a discretion to grant a stay and in assessing fairly, where the justice of the case lies. The burden is on her, as the applicant for the stay, to satisfy the court in this regard, the respondent having a judgment on the merits in her favour. This she has failed to do.

[10] Another disturbing factor which ought to be taken into account is the fact that Ms. Makhoul was ordered to pay costs and expenses occasioned by the vacation of the earlier trial date on 29th October 1988 all together totalling \$10,100.00. To date, those costs have not been paid. Ms. Makhoul in her affidavit of 29th July 2009 stated at paragraph 5 that it was "mainly an oversight that this sum was not paid as we had expressed in January 2009, an intention to pay prior to trial." She then exhibited a letter from her solicitors dated 16th January 2009 but that letter refers to costs and expenses and the fact that they were awaiting instructions from Ms. Makhoul in providing a time frame for their payment. No reason for non payment was put forward then or in her affidavit.

[11] This failure coupled with the bald statements from Ms. Makhoul has inexorably led to the conclusion that Ms. Makhoul has failed to be full and frank with the court in respect of this application. The exercise of the discretion to grant a stay engages equitable considerations. It would appear to me, having considered all the factors and circumstances that the risk of injustice in granting a stay would be greater to the respondent rather than to the applicant and I am inclined to refuse a stay in the circumstances.

[12] Whilst I do not consider it necessary to delve too deeply in the likelihood of success of the appeal, suffice it to say that the bulk of the grounds of appeal, as counsel for the respondent has rightly pointed out, fail to identify the basis on which the trial judge is said to have erred and begs the question whether they amount to grounds of appeal at all. Taking the first ground of appeal as an example, it simply states “that the Learned Trial Judge erred in dismissing the Claim of the Claimant without more”, but that takes the matter nowhere since you are not told what the error is said to be.

Conclusion

[13] The application for a stay is hereby refused. The costs of this application shall be costs in the appeal.

[14] I am grateful for the assistance rendered by counsel for the first respondent in their written submissions. Despite CPR, PD No. 3 of 2008, and also the further directions given at case management on 23rd July 2009, no written submissions were received from counsel for the applicant.

Janice George-Creque
Justice of Appeal