

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/025

BETWEEN:

DAWN SIMON

Appellant

and

RALSTON TONGUE

Respondent

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal

Appearances:

Mr. Steadroy C.O. Benjamin for the Appellant

Ms. Cherissa Roberts-Thomas for the Respondent

2009: February 24.

REASONS FOR DECISION

- [1] EDWARDS, J.A.: This is an application filed on 15th December 2008 for stay of execution of the judgment of Thomas J delivered on 16th September 2008 which set aside the order of the Registrar of Lands and awarded costs \$2500.00 to the respondent.
- [2] The Registrar of Lands by a decision dated 9th November, 2007 had determined that the applicant/appellant had successfully established a claim for prescriptive title to the land more particularly described in the Land Register as Registration Section: Sutherlands, Block 64 1892C, Parcel: 59 of which the respondent is the registered proprietor.

- [3] Despite the directions given by this court by order made on 20th January 2009, the appellant still has not filed an affidavit of service evidencing service on the respondent personally, although the appellant's counsel Mr. Steadroy Benjamin was served by the Deputy Chief Registrar on 22nd January 2009 with a copy of this order by fax transmission.
- [4] There is no indication that the respondent is opposing this application for stay.
- [5] Paragraph 7 of the affidavit of Nicole Edwards in support of the application for a stay of execution of the judgment pending the determination of the appeal filed on 26th November 2008 states that "There is a grave risk of injustice to the appellant if there was to be execution of the judgment". Paragraph 8 states that the appellant has good and arguable grounds of appeal in relation to the judgment delivered by the High Court Judge. The rest of the affidavit speaks to the judgment being delivered, the appellant having appealed, the appellant having been informed by counsel Mr. Benjamin that the learned judge erred in making the order that he made, and that it is just and convenient that the judgment be stayed in the circumstances. The submissions in support of the application only address the prospects of success of the appeal.
- [6] Having regard to this affidavit, I do not think that any injustice or prejudice to the respondent will occur if I proceed to determine this application on its merit without any proof that the respondent had been personally served.
- [7] The normal rule is for no stay and if a court is to consider a stay a case has to be made out.¹ The starting principle is that there must be good reasons to deprive a

¹ Thomas LJ in *Haydock Finance Ltd. v Louis Transport Equipment Consultants Ltd.* [2005] ECWA Civ 450 at paragraph 5

successful claimant of the right to enforce his judgment and the mere existence of an arguable ground of appeal is not by itself such a reason.²

- [8] The modern authority on the circumstances in which a court will exercise its discretion on the granting of a stay of execution was settled in the case *Linotype-Hell Finance Ltd v Baker*.³ Staughton LJ said that a stay could be granted if the appellant would face ruin without the stay, provided the appeal had some prospect of success.
- [9] The authority *Hammond Suddard Solicitors v Agrichem International Holdings Ltd*.⁴ establishes that the essential question for the court is whether there is a risk of injustice to one or both parties if it grants or refuses a stay,⁵ and the evidence in support of the application for a stay must be full, frank and clear.⁶
- [10] Lord Justice Hobhouse in *Winchester Cigarette Machinery Ltd v Michael Payne and another* also provided guidance in his judgment as to the quality of the evidence that ought to be in an affidavit in support of an application for stay.⁷ The appellant must show some special circumstances which takes his case out of the ordinary so that the ordinary rule should not apply and a stay be granted. Hobhouse LJ said that if showing that such circumstances exist involves making good factual submissions, the facts have to be made good by evidence.

² Lord Justice Ralph Gibson in *Winchester Cigarette Machinery Ltd. v Michael John Payne and another* pages 6 to 11. See citation at footnote 7

³ [1993] WLR, 321; [1992] All ER 887

⁴ [2001] ECWA Civ 20065

⁵ At paragraph 22

⁶ At paragraph 13

⁷ (Unreported Judgment) (QBD) No. FC 393/6788/C Royal Court of Justice, 10th December 1993 at pages 6-11

[11] Having considered the affidavit and submissions in support of the application for stay in my judgment the affidavit contains no good evidence for the grant of a stay of execution. In the circumstances I dismiss the application with no order as to costs.

Ola Mae Edwards
Justice of Appeal