

ANTIGUA AND BARBUDA

**THE EASTERN CARIBBEAN SUPREME COURT
IN TH HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO ANUHCV 2012/0272

BETWEEN:

FLAT POINT DEVELOPMENT LIMITED

AND

Applicant/Defendant

MARY DOOLEY

Respondent/Claimant

Appearances:

On the written representations submitted by:

Mr Wesley George of WalwynLaw for the Applicant

Ms Michelle Sterling of Rikka Bird and Associates for Respondent

.....
2015: December 3

2017: March 7
.....

Decision

[1] **LANNS, J. [Ag]** : On the 15th July 2015, His Lordship the Honourable Mr Brian Cottle, having tried the substantive matter herein on the 17th day of June 2015, delivered judgment in favour of the Respondent/Claimant the following terms:

1. The Defendant transfers and conveys to the Claimant the unit within Block D4-03 forthwith.
2. The Defendant pays damages at the fair letting value of the unit over a five (5) year period less any portion of time the Claimant was permitted to occupy the unit.

3. The parties are to agree on a fair letting value. Where the parties are unable to agree, the Claimant is at liberty to apply for assessment.
4. The Defendant makes good the defects which were identified by Mr D'Ornellas in his report. If the Defendant fails to make the repairs within ninety (90) days, the Claimant is at liberty to institute the repairs; the cost of such repairs shall be for the Defendant to meet.
5. The Defendant pays the Claimant's prescribed costs on the Claim.

[2] Comes now the Applicant/Defendant for an order staying the execution of the judgment.

[3] The grounds of the application are stated to be:

1. This application is made pursuant to Section 18 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act Cap 143. the Court has jurisdiction to stay any pending proceedings, if it thinks fit to do so
2. The application is also made pursuant to Rule 26.1 (2) (q) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000. it is within the Court's general powers of management to stay the whole or part of any proceedings generally until a specified date. or event.
3. The Applicant prays to this court to find that it is just and convenient to stay the execution of the judgment of the Honourable Mr Justice Cottle pending the outcome of the Applicant's appeal.
4. Refusal of an order to stay proceedings may result in undesirable consequences to the Applicant.
5. In the premises, the Applicant respectfully asks this Honourable Court to grant the Orders sought and to make an order as per Draft Order filed herein, together with any such Order which this Honourable Court may find just.

[4] Ms Jacqueline Walwyn swore to and filed an Affidavit in Support of the Application, and Mary Dooley (the Respondent) filed an Affidavit in Response.

[5] The Application is opposed.

Issue

- [6] The main issue for determination is whether the court should grant a stay of the judgment of the learned Judge, this in turn is dependent upon whether the Applicant has met the threshold requirements for the granting of a stay of execution.

The submissions

- [7] In summary, the submissions¹ of the Applicant are grounded on the following points

1. The Applicant has filed an appeal against the decision of Cottle J. and would wish to have the judgment stayed pending the hearing of hearing of the appeal
2. All the relevant circumstances are set out in the supporting Affidavit. There are sufficient facts contained in the supporting affidavit for the court to accept that a stay should be considered an exception rather than the rule.
3. The Honourable Judge erred in his findings of fact and law. If a stay is not granted and the Defendant is compelled to fulfill the Order of Cottle J, all awards given to the Claimant will be difficult to retrieve as the Claimant resides out of the jurisdiction and has no assets in the Island of Antigua and Barbuda. The Defendant would also be put to expense to retrieve costs awards and damages payable to the Claimant. The appeal therefore would be rendered useless.
4. There is sufficient evidence for the court to conclude that the Defendant will suffer if a stay is not granted. The Defendant will be compelled to pay the Claimant damages which she is not entitled to based on the fresh facts not made known to both the Claimant and the Defendant, and also the erring of Cottle J. The Defendant will be put to great expense both to fulfill the order of the court and to undo same if fulfilled.
5. The Honourable Justice Cottle erred in fact and law and taking into consideration the new facts which were previously unknown to the Claimant and the Defendant, it is clear that the remedies granted to the Claimant ought not to have been granted.

- [8] In summary, the submissions of the Respondent are grounded on the following points:

1. The starting principle to be applied when considering a stay of execution is that there must be a good reason to deprive a successful Claimant of the right to enforce his

¹ Submissions are said to be informed by, and intended to comply with the principles set out in the case of C--Mobile Services Limited v Huawei Technologies C Limited , BVI HCMAP2014/0017.

judgment, and the mere existence of an arguable ground of appeal is not by itself such a reason.²

2. The Applicant in its supporting Affidavit states that it is unable to fulfill the order of the Judge because of a caution placed on the subject property by a third party. This is not a good or sufficient reason. This allegation does not constitute evidence that will cause the court to conclude that the Applicant/Defendant would be ruined. Additionally, that allegation has not been made good by evidence to support the allegation. Even if evidence was produced, it would not address the issue whether the Applicant/Defendant would be ruined. Further, that allegation amounts to fresh evidence, as it was not before the court the court below (Cottle J).
3. It is open to the applicant to apply to the Registrar to remove the caution on the basis that the court has ordered that the subject land be transferred. The Registrar would be bound in the circumstances to remove the caution. This allegation of the caution is not evidence that the applicant would be ruined if a stay were not granted.
4. There is no evidence before the court that transferring the subject property in a state where the defects are corrected will result in the Applicant's ruin.
5. Nor is there any evidence before the court that the Applicant might be unable to recover from the Respondent any sum awarded in the event the appeal be successful, and no such evidence could be produced since the subject property is in the jurisdiction and the Applicant has had the benefit of the sum of UD\$638,000.
6. There is no evidence before the court to indicate that the Applicant has any realistic prospect of success.
7. The Applicant has not met the threshold required under the authorities cited herein by the Respondent for the granting of a stay of execution.

THE LAW

- [9] The law with respect to the grant of a stay was settled in **Linotype-Hell Finance Ltd v Baker**³ which was approved and applied by our own Court of Appeal in **Carlisle Bay Limited v FEBC (Antigua) Limited**⁴ and **Courtesy Taxi Cooperative Society v Lucien Joseph**⁵

² Peggy Huggins et al v Joseyl Morris, Civ App NO.009 of 2008 relied on

³ [1993] 1 WLR 321

- [10] In **Linotype-Hell Finance Ltd v Baker**, supra, Stoughton LJ noted that a stay could be granted if the Appellant would face ruin without a stay, provided the appeal had some prospect of success. The onus is on the Appellant to establish that the appeal has some prospect of success.
- [11] In **Carlisle Bay Limited**, supra, Saunders, CJ [Ag] noted that "in determining whether or not to grant a stay, one starts with the basic premise that a person who has a judgment should not lightly be deprived of the benefit of that judgment. But one must approach the matter as a matter of common sense and balance of advantage, provided that in holding that balance, "full and proper weight is given to those starting principles that there must be a good reason to deprive a successful plaintiff of the right to enforce his judgment and that the mere existence of an arguable ground of appeal is not by itself, such a reason."⁶

Applying the law

- [12] In the affidavit in support of the Application for a stay, the Applicant has not put forward any fact evidencing that it would face ruin if a stay were not granted. It has not stated that it is impecunious, and cannot afford to pay the damages at the fair letting value of the unit for a period of five years, less any portion of time that the Claimant was permitted to occupy the unit. Nor has it stated that it would be ruined by being required to make good the defects which were identified by Mr. Ornellas in his report. Nor has the Applicant stated that it would be ruined by the costs order made by the learned trial Judge.
- [13] The true reason for the Application for the stay is set forth in the supporting affidavit of the Applicant at paragraphs 11 to 16 where Ms Walwyn deposed:

" 11. During these proceedings and prior to the trial of this matter, the Claimant's solicitor filed a caution on behalf of a Mr Tommy Hopkins with respect to the same unit which was the subject of these proceedings before the Honourable Mr Justice Cottle. The said Tommy Hopkins was not a party to these proceedings, nor was a witness statement entered by Mr Hopkins on behalf of the Claimant."

⁴ Antigua and Barbuda Civil Appeal No 18 of 2003; Judgment of Saunders CJ[Ag] delivered on 10th May 2004

⁵ St Lucia Civil Appeal No 43 of 2008, Judgment delivered 21st May 2009

⁶ See paragraph 13 of the Judgment.

- "12. It was only after these proceedings that the applicant became aware that the caution filed by Mr Hopkins related to the same unit which was the subject of the this claim."
- "13. Upon reviewing the documents in support of the said caution, it became apparent that Mr John Hughes entered into a subsequent Deed of assignment with the said Mr Hopkins during the pendency of this matter with respect to the unit which is the subject of this action."
- "14. As a result of the caution entered by the said Mr Hopkins, no dealings or disposition can be made with respect to the unit which the Applicant was ordered to transfer."
- "15. The Applicant therefore as a result of the action of the Claimant's solicitors who also acted on behalf of the said Mr Hopkins is severely prejudiced as it is unable to fulfill the order of the Honourable Mr Justice Cottle. ... "
- "16. If the order of the Honourable Mr Justice Cottle is not stayed an injustice will result."

[14] I have difficulty understanding why these matters as deposed in paragraphs 11 -16 should be taken to be good reasons for staying the execution of the judgment. I am in total agreement with learned counsel for the Respondent, that it is open to the Applicant to invoke the relevant provision(s) of the Registered Land Act, and apply to the Registrar of Lands to remove the caution (s) placed thereon to enable it to comply with the Order of Court. In my opinion, even though the learned judge did not expressly say that the caution should be removed, it is implicit in his judgment that it should be removed, and if it were necessary, the 'Judgment After Trial' in paragraph 1 thereof, opens the door for an application to the Registrar of Lands to have the caution removed, on the basis of paragraph 1 of the said "Judgment after Trial" which, as quite correctly noted by counsel for the Respondent, supersedes the caution placed on the subject property..

[15] In the premises, the court is of the opinion that the caution placed on the property which is the subject of this Application is not a good reason to deprive the Respondent of the execution or enforcement of her judgment. In any event, there is no evidence upon which the court can make a

finding that the Applicant will be ruined if a stay of execution were not granted. The Applicant did not even see it fit to exhibit a copy of the cautions which it alleges have been placed on the subject property to prevent any dealing therewith..

[16] As to the prospects of success on appeal, I take the view that this determination is within the purview of the Court of Appeal, and the High Court ought not fetter the hands of the Court of Appeal. However, the Applicant has chosen to bring this Application before the High Court, after having filed its Notice of Appeal on the 17th August 2015, without conveniently and easily applying concurrently, to Court of Appeal for a stay of execution of the judgment pursuant to CPR 62.20. (1) which sets out the powers of the court in relation to an appeal: "In relation to an appeal, the court of Appeal has all the powers and duties of the High Court including in particular, powers set out in Part 26."

[17] However, proceeding on the footing that I do have jurisdiction to determine the application, under CPR 26. 1 (q), I am inclined to say: After having perused the Application, the grounds advanced,⁷ the affidavits in support of the Application, particularly paragraphs 11-16; and 21-22; and the Affidavit in opposition to the Application; and having considered the submissions of Counsel for the parties; and having regard to paragraphs 13, 14 and 15 of the judgment of Cottle J, which show that the learned judge did in fact consider the sale and purchase agreement; and, taking into account all the circumstances, I am not of the view that the chances of success on appeal are impressive. I am of the considered opinion that the chances of success are nil.

Conclusion

[18] The court accepts the submissions of the Respondent in preference to those of the Applicant/Defendant, in particular, that it is the Respondent/Claimant who has suffered prejudice, having been kept out of the fruits of her judgment for so long, and that staying the execution of the judgment would require further delay and prolong the transfer of the property for which the respondent has paid US\$ 638,000.00 and which the Applicant has had the benefit of.

[19] Notably, Cottle J. on the 15th July ordered the Respondent to effect the transfer of the property forthwith. The judgment was handed down on the 17th July 2015. The Applicant filed its Application on the 11th September 2015 -- almost two months after, grounding it in the main on the

⁷ Which grounds are for the most part, insubstantial.

extant cautions on the property. I am mindful that the word 'forthwith' does not necessarily mean, 'same day' but I am of the view that the transfer should have been completed by the time the Application for a stay was filed. Indeed, in the case of **Abdul Wahab Mohammed Sameen v Palliyaguruge Vithanage** Sumanawathie Abeyewickrema and others (Appeal No. 48 of 1961), the Privy Council underscored and explained how the word 'forthwith' is to be construed: "In their Lordships opinion the word 'forthwith' means 'as soon as practicable' but in the view of their Lordships, what is practicable must depend upon the circumstances of each case. Based on the observations of the Privy Council, the word 'forthwith' can be construed as meaning 'as soon as practicable', or as soon as reasonably practicable. What is practicable or reasonably practicable depend on the facts of the case. What then are the facts?

[20] I have already alluded to the fact that the Applicant made no attempt to have the caution removed, so as to make it practicable to comply with paragraph 1 of the 'Judgment After Trial'. Instead, it has delayed the process, and comes at the last minute to further prolong it. Since delivery of the judgment, the Respondent/Claimant would have remained without any aspect of the judgment satisfied for a period of over 17 months and counting. In my opinion, to grant a stay would prolong and sustain the prejudice that the Respondent has suffered over the years and will result in an injustice for the Respondent as opposed to the Applicant/Defendant. Notably, the Respondent has been without the use of the property since the year 2010, hence the reason for paragraph 2 of the 'Judgment After Trial'

[21] The Applicant has failed to convince me that there is any good reason for staying the execution of the judgment of the learned judge pending the hearing of the appeal. In particular, the Applicant has failed to convince me that if further proceedings are not stayed, any judgment rendered in their favour on appeal will be rendered useless. Additionally, the applicant has failed to convince me that if a stay is not granted and the Defendant is compelled to fulfill the Order of Cottle J, all awards given to the Respondent/Claimant will be difficult to retrieve as the Claimant resides out of the jurisdiction and has no assets in the Island of Antigua and Barbuda. The Defendant has also failed to convince me that it would be put to expense to retrieve costs awards and damages payable to the Claimant. I am cognizant of the fact that the subject land is within the jurisdiction of Antigua and Barbuda, and as stated before, the Applicant/Defendant has had the use and benefit of the sum of USD638,000.

- [22] The Court is of the opinion that should the Appeal be advanced, and the Court of Appeal finds that the Applicant/Defendant, has made out its case and allows the appeal. the Court would go on to make an order as it sees fit.
- [23] In the final analysis, there is no evidence upon which the court can make a finding that there were any good grounds for staying the execution of the judgment of Cottle J.
- [24] For all the above reasons, and in the interest of justice, the Application by the Applicant/Defendant for a stay of execution of the Judgment of Mr Justice Cottle delivered on the 17th July 2015, is denied, with costs to the Respondent/Claimant to be assessed if not agreed.
- [25] The assistance of counsel is gratefully appreciated.
- [26] Last but by no means least, I do apologise for the delay in delivery of this decision. It seemed to have fallen through the cracks, and I was not told that counsel made any query about it which would have triggered that it was long outstanding.



PEARLETTA E. LANNS
High Court Judge [Ag]