

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.18 OF 2003

BETWEEN:

CARLISLE BAY LIMITED

Appellant

and

F.E.B.C. (ANTIGUA) LIMITED

Respondent

Before:

The Hon. Mr. Adrian Saunders

Chief Justice [Ag.]

On written submissions of:

Mr. John Fuller for the Appellant

Ms. Ann Henry and Mr. Craig Christopher for the Respondent

2004: May 10.

JUDGMENT

- [1] **SAUNDERS, C.J.[AG.]**: This application is for a stay of execution of a judgment debt. The judgment was delivered on 30th July, 2003. It arose out of a case in which F.E.B.C. (Antigua) Limited brought a claim against Carlisle Bay Limited for a debt secured by a charge on land. The matter was tried before Mitchell, J who found that the debt was indeed due and repayable. He ordered Carlisle Bay to pay FEBC the sum of US\$968,416.00 plus US\$94,900.00 in costs. The monies ordered to be paid included a substantial sum representing interest on the principal debt owed. Carlisle Bay has appealed the judgment and they have brought this application for a stay pending the appeal. It was determined that the application should be dealt with on written submissions by a single judge.

[2] Before I refer to the material contained in the application for a stay, I should give a brief synopsis of the following: the claim made by FEBC, the Defence of Carlisle Bay, the findings of the judge at trial and the Grounds of Appeal filed by Carlisle Bay. Regarding the claim and the defence to it, I can do no better than to quote from the trial judge's judgment:

"The claim is that on 9th January, 1996, FEBC (Antigua) loaned Carlisle Bay the sum of US\$300,000.00 together with interest at 1.67% per month or 20% per year to be repaid by 8th July, 1996. Also claimed and exhibited is a registered Land Charge dated 5 January 1996 by Carlisle Bay in favour of FEBC (Antigua). It was registered against the Registers of Condominiums Units 9, 15, 19 and 29. It is in the amount of \$335,000.00 together with interest at 20% per annum. FEBC (Antigua) claims the sum of \$300,000.00 less payments made plus interest "pursuant to section 3 of the Supreme Court (Amendment) Act, 1970". The defence in brief is a denial that the money was paid to or received by Carlisle Bay, and claims that the loan agreement was intricately bound with the construction agreement made with FEBC (UK)."

[3] The trial judge took the view that the questions that arose in the case were twofold. Firstly, whether there was a loan agreement and secondly, if there was, whether it was so bound up with the construction agreement that its enforcement was conditional upon the completion of the construction project. The judge found for FEBC on both issues.

[4] In the course of his judgment the judge alluded to a matter that neither party addressed either in their pleadings or their submissions. This matter concerned section 72(3) of the Registered Land Act. That section provides that a chargee is only entitled to sue for the money secured by the charge if certain conditions are met. But even where these conditions are met, the Court may in its discretion stay the suit until the chargee has exhausted all his other remedies. By implication the judge must have found that the conditions for bringing the suit were met. The judge further reasoned that, as the validity of the charge itself appeared to be in issue, the Court would exercise its discretion in favour of allowing the suit to proceed.

- [5] In holding for FEBC, Mitchell, J. found as a fact that there was a valid loan agreement and that its terms were contained in the Deed of Charge. This finding of fact was based to a significant degree on the judge's perception of the evidence. The judge was wholly unimpressed with the witnesses for Carlisle Bay. As to the interest awarded, FEBC had claimed for interest pursuant to the old Supreme Court (Amendment) Act 1970 instead of pursuant to the Eastern Caribbean Supreme Court Act, Cap 143. The judge found, notwithstanding, that the claim by FEBC for interest was sufficiently pleaded, that this claim was rooted in the terms of the Deed of Charge and that it was of no moment that FEBC had pleaded the wrong statute in the claim for relief.
- [6] Carlisle Bay's single ground of appeal is that the Learned Judge erred in his findings of fact and law. The findings of fact specifically mentioned are:
- [i] That the amount claimed was in fact owed;
 - [ii] That terms contained in a letter, exhibited at trial but apparently not signed by FEBC, were not in fact agreed by the parties;
 - [iii] That the loan was repayable irrespective of whether the construction project was or was not completed;
 - [iv] That the true amount representing the actual sale price of one of the charged units, that previously had been sold by FEBC, was properly accounted for by FEBC;
 - [v] That the testimony of certain witnesses for Carlisle Bay should be rejected.
- [7] The findings of law which, in the Notice of Appeal, Carlisle Bay claims are erroneous are:
- [i] That FEBC was entitled to sue before exhausting its rights under the legal charge;
 - [ii] That interest should be awarded in all the circumstances; and
 - [iii] That the charge was in fact the principal loan agreement.
- [8] In support of its application for a stay, Carlisle Bay contends that it owns real estate valued at over US\$35 million and that the net unencumbered equity of this property is in excess of US\$30 million; that F.E.B.C. is a shell company with no connection to Antigua and Barbuda; that if the judgment debt is paid, F.E.B.C. will export the funds; and, in the event of a successful appeal, the judgment of the

Court of Appeal will be rendered nugatory as the Appellant will be unable to recover the funds.

- [9] FEBC have countered that they have completed several projects in Antigua valued in excess of \$18 million and that they have an ongoing construction program with West Indies Oil Services of Antigua. FEBC also contends that the grounds of appeal have little substance in them. They have not indicated that they have any significant assets within the jurisdiction.
- [10] The law with respect to the grant of a stay was settled in **Linotype-Hell Finance Ltd v Baker**¹ where Staughton 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 the affidavits that have been filed on behalf of the Appellants, the latter have put forward the fact that they have unencumbered assets of over US\$30 million as a circumstance in their favour. But this is also a factor that the Respondents can legitimately use in the Respondents' favour because it clearly suggests an unlikelihood that the Appellants would be ruined by being required forthwith to pay the judgment debt. With assets of that magnitude the Appellants ought to be able to raise the requisite funds to pay off the judgment debt.
- [12] Regarding the prospects of success, I have perused the judgment of Mitchell, J. It appears that in this case, the Judge's assessment of the testimony, the credibility of the respective witnesses, must have played a critical role in the adjudicative process. In these circumstances, appellate Courts are notoriously slow to interfere². Notwithstanding this, and my own *prima facie* view that, looked at as a

¹ [1993] 1 WLR 321

² See: *Benmax v. Austin Motor Co.* (1955) 1 A.E.R. 326 and also See *Grenlec vs. Peters*, Grenada Civil Appeal No. 10 of 2002

whole, the chances of success are not impressive, I would not go so far as to say that the prospects of success, on the first two of the three findings of law challenged, are nil.

[13] 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"³. The Court has a wide and unfettered discretion. Moreover, it is open to the Court to grant a stay subject to conditions.

[14] Taking into account all the canvassed factors, I believe the ends of justice will be served in this case if I ordered that a stay be granted, until the determination of the appeal, but on condition that, within 30 days of the date of this judgment, the Appellants do pay the judgment debt and costs either into Court or into an interest bearing bank account agreed and controlled by the solicitors of the respective parties or their nominees.

Adrian Saunders
Chief Justice [Ag.]

³ See: *Winchester Cigarette Machinery Ltd. V. Payne* [1993] E.W.J. No. 5504, per Ralph Gibson LJ