GRENADA

IN THE COURT OF APPEAL

HCVAP 2007/028

FIRST CARIBBEAN BANK INTERNATIONAL (BARBADOS) LTD.

Appellant

and

BRADFORD NOEL

Respondent

and

HCVAP 2007/027

BRADFORD NOEL

Appellant

and

FIRST CARIBBEAN BANK INTERNATIONAL (BARBADOS) LTD.

Respondent

Before:

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| Hon. Mr. Denys Barrow, SC | Justice of Appeal |
| Hon. Mr. Hugh Rawlins | Justice of Appeal |
| Hon. Mr. Errol Thomas | Justice of Appeal [Ag.] |

Appearances:

Ms. Claudette Joseph, Ms. Celia Edwards and Mr. Ian Sandy for the Applicant
Mr. Richard Williams and Mr. Trevor St. Barnard for the Respondent

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2008: March 11& 12, 2008.

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ORAL DECISION

[1] BARROW, J.A.: These are the decisions in the two matters, Civil Appeal Nos. 27 of 2007 and 28 of 2007. Although only one of these matters is listed, Counsel who appeared would of course appreciate that two separate matters were dealt with in the one hearing

and these are the reasons for the decision of the three members who sat on those matters. I make the point because the panel is differently constituted.

[2] This is an application by Dr. Noel for an injunction to restrain the bank from selling the property that is the subject of the appeal and to stay execution of the judgment that awarded costs to the bank and which decided that Dr. Noel's case failed. The judgment dismissed Dr. Noel's claim for specific performance of an alleged contract to sell him the property or alternatively, damages for its breach.

[3] So far as is relevant to the application, the facts which need to be stated are essentially that Dr. Noel had made a bid for the property and his bid was not successful but rather the bid of a third party was accepted. One appreciates that the facts are far wider than what I just stated, but those are the essential facts for the purposes of this application. It is not disputed that the bank has entered into a contract, by accepting the bid of the third party, to sell the property to the third party. The situation is, therefore, that two separate parties consider, or may consider that they have a claim for specific performance of a contract to sell them the property. The judge dismissed Dr. Noel's claim for specific performance and for damages and Dr. Noel now asks for an injunction to restrain the bank from disposing of the property. The essential ground of the application is that if the injunction is not granted the bank will sell the property and the substratum of the appeal would forever be lost to Dr. Noel and the appeal would be rendered nugatory in that event.

[4] Counsel for Dr. Noel relied on Ketchum International Inc. v. Group Public Relations Holdings[1] to establish that the Court of Appeal has an original jurisdiction to grant an injunction. That case stated that there was such jurisdiction to preserve assets from unjustified dissipation so that an appellant's success on appeal would not be rendered valueless. It was stated that the jurisdiction was similar to the grant of a Mareva injunction and similar also to an application for the stay of execution of a judgment pending appeal.

[1] [1997] 1 WLR 4

[5] We think that a factor to be considered on an application such as this is that the bank has succeeded at first instance. That must not be ignored or minimized. There has been a judicial determination on the merits in favour of the bank. This factor would naturally lead to the consideration of a related factor, what are the merits of the proposed appeal? More specifically, the question arises, does Dr. Noel have a good arguable appeal? We would say only in this regard that we have considered this factor and have given due weight to it. We say no more because it would be undesirable for the three-judge panel to express even a provisional view, if it can be avoided, in light of the reality that when the substantive appeal comes on for hearing, at least one of the three judges who sat on this application may unavoidably be a member of the constitution of the Court which will be hearing this appeal. Neither party would be entirely at ease, justifiably, to have a judge hear their appeal who has already pronounced, even if in a very tentative way, on the merits.

[6] We prefer instead to regard the fact of the judgment as itself a determination of the merits that is effective until set aside. There is nothing to say, until the appeal is heard, that a judgment is wrong. The presumption must be that the judgment is correct. The Court of Appeal must therefore be more disposed to refusing an injunction in a normal case than to grant one at this stage. This is consistent with the stay of execution approach, where the normal rule is that no stay is granted.

[7] But assuming that the appeal were to succeed, would the disposal of the property before the decision render the appellant's success nugatory? We are not persuaded that would be the case. As noted, Dr. Noel sought specific performance and, in the alternative, damages. We do not accept that if specific performance is not available to the hypothetically successful Dr. Noel, an award of damages is valueless. We don't think that any elucidation of that proposition is necessary.

[8] The question, why should the Court of Appeal, by refusing an injunction at this stage, deny Dr. Noel his preferred remedy is answered by recognizing that Dr. Noel's obtaining an order for specific performance is quintessentially a matter of discretion. He never had a right to it.

[9] In view of the third party's potential claim for specific performance, there was no greater than an equal probability that Dr. Noel would have been awarded a decree of specific performance if he had succeeded in the court below. In view of Dr. Noel's loss at first instance, and of the third party's rights, we are not persuaded that Dr. Noel has a good arguable case that he would obtain an order for specific performance if he won his appeal. On that basis, satisfied that an award of damages would be the likely remedy that Dr. Noel would obtain if he succeeds on appeal, and satisfied that such an award would be neither valueless nor nugatory, we see the balance of justice coming down in favour of refusing the injunction and we so do.

[10] As to the application for a stay of execution of the order that Dr. Noel must pay costs, Counsel failed to put before us any factor that cases such as Linotype-Hell Finance v Baker[2] state may avail an applicant. There is no suggestion that it will be ruinous or even a major hardship to leave the order for costs to be carried into effect. Counsel's argument that Dr. Noel has assets to secure the payment of costs is incapable of succeeding. The principle is that the successful party is entitled at once to the fruits of his judgment. The unsuccessful party is not entitled to put the successful party on hold because the former can show that he will pay at a later stage, if forced then to do so. The obligation is to pay now. We therefore refuse the stay.

[2] [1993] 1 WLR 321

[11] We have heard counsel on the matter of costs. We award the costs of this application in the sum of $2,000.00 to the bank. We award the costs of the appeal in Civil Appeal No. 28 of 2007 in the sum of $2,500.00 to the bank.

Denys Barrow, SC
Justice of Appeal

Hugh Rawlins
I concur. Justice of Appeal

Errol Thomas
I concur. Justice of Appeal [Ag.]