SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2012/0050

BETWEEN:

COMMERCIAL WAREHOUSE LIMITED

Applicant

and

SABINA JAMES ALCIDE

Respondent

Appearances:

Peter Foster, and Diana Thomas for the Applicant
Dexter Theodore and Eghan Thomas for the Respondent

2012: 2nd August
30th August

DECISION

[1] **BELLE J:** On the 25th day of May 2012 the Applicant filed an application for a stay of execution of an order made pursuant to a judgment of Georges J (Ag) in SLUHCV2007/0846 delivered on 22nd day of August 2011.

[2] The Application was supported by the affidavit of Marguerite Desir of Grand Riviere in the Quarter of Gros Islet, Saint Lucia also filed on 25th May, 2012 and set out the grounds for the application and the evidence in support.

[3] In the said Affidavit Mrs Desir stated that on 30th September 2011 she caused a Notice of Appeal to be filed in the matter against the learned judge's decision. The Notice of Appeal was subsequently amended. Mrs Desir added that the judgement affects the interests of The Applicant Commercial Warehouse Limited and the Bank of Saint Lucia Limited as Mortgagor and Mortgagee respectively of Parcel 1257B 6, even if they were not parties to the claim.

[4] Mrs Desir states, and the parties have agreed that it is a matter of record, that the learned judge in his judgement improbated the Deed of Sale of Parcel 1257B 6 by Bella Butcher to Commercial Warehouse Limited...But no improbation was made of the Mortgage which is registered to the property.

[5] Mrs Desir noted that she had been advised and believed that if an improbation is inscribed on the deed the original and all copies are inscribed upon and cancelled. She also believed that there was no procedure to reverse the inscribing of an improbation and cancellation of a deed. Without the stay, the court's judgment in the Petition in opposition if the Petitioner is successful would be of no effect.

[6] Mrs Desir set out to establish the prejudice to the Applicant. She stated that the expenses incurred by the Applicant were detalied in her affidavit in support of the Petition filed on 24th January 2012. At paragraph 10 of the said affidavit Mrs Desir states:

> *"The Petitioner incurs expenses in meeting its obligations to its tenants on a monthly basis. I am the one who has overseen these transactions throughout the years since May 2007 situate on Parcel 1257B 6*
>
> *(i) Electricity Bills for Walk in Freezers and Common Lights: Prior to the middle of 2009 the tenants paid a higher rent and the Petitioner paid the electricity bills on behalf of the tenants as a common expense. In or about 2009 the Petitioner took a decision to make a capital investment and to install a meter panel. This reduced the rental to the tenants but it also allowed the Petitioner to have a better handle on all expenses and income.*
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> *(ii) Mortgage Loan- The monthly payments to reduce the balance due on the loan.*
>
> *(iii) Repairs and maintenance on the building and the surroundings in general.*
>
> *(iv) Electrical Works- This includes the installation of the panel and ongoing maintenance of electrical panel and generator.*
>
> *(v) Management Fee- This fee is paid to me as the Managing Director of the Petitioner for running the office from my home. It includes reimbursements for stationery, travel expenses, telephone, faxes, collecting the rent, making the deposits, responding to tenants' queries, solving tenants' issues, supervision of cleaning and repairs, regular monitoring and inspection of the compound and the like. This also includes administrative duties such as preparing letters to tenants, lease agreements and legal transactions.*
>
> *(vi) Insurance- Annual insurances for the entire property.*
>
> *(vii) Donations-Donations carried on by the Petitioner previously made by Albertha Butcher, Deceased who was a shareholder of the Petitioner.*

(viii) *A sum of $25,000.00 is allocated for savings. This would be pooled and act as a source from which large expenses could be paid including director's fees and insurances. The capital expenditure in 2009 came from this account.*

(ix) *Bank Charges / Returned Cheques / Miscellaneous expenses, including the account's fees, legal fees, collection fees and the like.*

(x) *Liability to the Government of Saint Lucia for income tax and property tax."*

[7] Mrs Desir outlined the damage being done to the Petitioner/ Applicant as follows:

> *"Since the judgment I have had considerable difficulty collecting the rent from the tenants to meet these expenses. Rent is due on the 1st of each month for all tenants. For example, Mr Thalai Thome from Fancy Foods advised me, on my telephoning him on 11th October 2011 when we were chasing him for the October rent, that he was not paying the rent to me. He said he was advised to put the rent in an escrow account where both his and my lawyer have access. When I asked him later for a letter to that effect he then said he was advised to pay the rent and get a receipt. I have collected the cheque from him.*
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> *Further the owner of the largest tenant, Mr Brenden McShane of Sea Island Cotton, said he is confused and does not know who to pay the rent to. His staff paid us a cheque on 12th October 2011 for $15,000.00 but they called on 13th October 2011 to say that a stop payment was put on the cheque.... They also indicated that they would like a letter from my lawyers to tell them what to do. They have started to pay the rent to the estate of Bella Butcher and not to the company.*
>
> *As a result of a delay in the payment of rent for October 2011 for the first time in the history of the loan a late fee of $50.00 was imposed on 10th October 2011 for the late payment. I was not aware of this as monies could have been transferred from the savings account to the chequing account. However as a matter of course the rent monies are deposited into the chequing on a monthly basis, and these funds are automatically transferred to the loan account by standing order. I only noticed this after 12th October 2011 when I collected the statement for the proceedings. I have now had to make arrangements to transfer funds from the Savings Account to the Chequing account for payment of the loan."*

[8] Mrs Desir went on to indicate that the Petitioner/ Applicant's savings account would be depleted if this state of affairs continues. Mrs Desir stated that the Claimant,(meaning the Petitioner) had granted the hypothec to the Bank of Saint Lucia and consequently the loan was now being paid from the savings account at a rate of $10,457.83 monthly. This along with other expenses accruing as the company operates its business fall to be paid by the Applicant. Mrs Desir concluded that Commercial Warehouse would suffer ruin since the property is its only asset and rent is its only income.

[9] This statement of affairs formed the factual basis for the application for a stay.

[10] The Respondent who was the claimant in SLUHCV2007/0846 argues that the application for the stay should fail because the Applicant was represented at the hearing in the matter and therefore does not qualify under Article 381 of the Code of Civil Procedure to oppose the court's judgment.

[11] Impliedly the respondent is arguing that the fact that a representative of the Applicant was a party to the proceedings which the Applicant now opposes, should be enough to cause the court to reject the application for a stay. Counsel also argues that the Respondent has not suffered any damage since the Applicant is no longer the owner of Parcel 1257B 6, and therefore expenses which Mrs Desir complains of do not have to be paid.

[12] Counsel also argues that the Applicant had no real prospect of success at the hearing of the Petition and the likelihood of ruin was no longer a good reason for the court to impose a stay. In support of this latter assertion he cited the Court of Appeal's decision in **Marie Makhoul v Cicely Foster** HCAP2009/014 in which George-Creque J.A. (now acting Chief Justice Perriera) rejected an application for a stay on the ground that the Applicant had made a bald assertion that she would be ruined and had not adduced evidence that showed that ruination would occur.

[13] The stay should only be imposed, counsel argued, if the Applicant demonstrated an arguable case with a possibility of success and that some injustice had been done to it.

[14] According to the Respondent the court has to investigate whether injustice would be done to any of the parties and the Applicant was not even a party at the trial. Counsel submitted that the Respondent would suffer much greater injustice than the Applicant if the stay was granted and the respondent who had already waited 3 years for a decision still had to wait even longer to receive the benefit of the court's decision.

[16] Both parties agree that the principles which apply to this application for a stay involve consideration of two questions:

1. Whether the appellant has a realistic prospect of success in his appeal?
2. Whether the appellant would suffer substantial prejudice if a stay were refused.

[17] In **Courtesy Taxi Cooperative Society Ltd v Lucian Joseph** HCVAP2008/043 the Court of Appeal per Olivetti JA (Ag) quoted from the decision of Clarke LJ in **Hammond Suddard**

Solicitors v Agrichem International Holdings Limited [2001] EWCA Civ. 2065 in the following terms:

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

[18] The Applicant's application is based on the legal argument that the decision of the learned judge in the Suit which is now appealed could not be fair because the Applicant was affected by the decision of the court even though it was not party to the proceedings. Counsel cited a number of authorities which support the view that the Article 381 of the Code of Civil Procedure which provides for the Opposition to a decision of the court is designed for matters of this nature. That provision states:

> *"Any person whose interests are affected by a judgment rendered in a case in which neither he nor persons representing him were parties, may file an opposition to such judgment"*

[19] The Applicant's argument is that the Applicant is a corporate person and therefore separate from Margaret Desir. There can be no lifting of the veil in this case because there is no allegation that the Applicant company is a mere sham. Furthermore there was no pleading for lifting the veil in the decision being opposed. The issue therefore cannot now be raised. I agree with this submission. It is trite law that a company is separate legal personality from its shareholders and directors.

[20] I find that the case law does support Mr Foster's position on the application for a stay and there seems to be nothing peculiar about this case to cause the court to distinguish it from the authorities. The fact is that the Applicant would not have been present at the proceedings to instruct counsel on evidence to be led nor on cross-examination of witnesses. Neither was there anyone present to tender pre-trial nor post trial arguments on the behalf of the Applicant in particular on the effect of the remedy of improbation of the deed.

[21] The Applicant was and is also deprived of any opportunity to file and prosecute an appeal against the learned judge's decision to improbate the deed hence there must be substantial grounds to

argue that the failure to make the Applicant a party to the case has resulted in prejudice to the Applicant.

[22] Counsel for the Respondent argues that the Applicant could have filed a suit and become a party to the matter. I am not sure on what grounds the Applicant would have filed a suit. It is true that the Defendant could have sought to add the Applicant as a Defendant in the suit but it was the Defendant's prerogative as a Defendant to decide how to conduct her defence. Her stewardship as an executrix was being challenged and she was fully entitled to defend the Claim against her as executrix and nothing more. The Claim for improbation of the Deed of sale was not the only order being sought from the court and it was not inevitable that such a remedy would have been imposed.

[23] But counsel for the Applicant makes the point with the support of authorities that the Respondent should have ensured that the Applicant was a party to the suit before seeking the judgment against the Applicant. See **Prospere v Prospere And Another** (2007) 69 WIR where the Privy Council held that Mrs Prospere though fully alive to proceedings was not a party or represented in the proceedings which was fatal to a plea of res judicata.

[24] In the circumstances it appears that the Petition for the opposition has a good prospect of success. It also appears that the stay is required to ensure that an injustice is not done because the Registrar of Lands' act of improbating the Transfer would be difficult if not impossible to reverse since one of the parties to the transfer is now deceased. Hence if the Applicant is successful on the Petition or later on appeal that success would be of no avail. The court would have to make an order to reverse what has been done, and serious damage and loss would have already resulted if all of the obligations entered into by the Applicant are to be fulfilled.

[25] Counsel for the Respondent argues that improbation would mean that the Applicant has no further responsibility to pay for the land, pay taxes or maintain the property. While it may be true that the Applicant would not have responsibility in law to do certain things, it remains liable to pay a mortgage to the Bank of Saint Lucia and would also lose its only asset which is the property transferred to it by Bella Butcher. The improbation would remove a substantial part of the substratum of the Applicant Company and the basis for its operations.

[26] Counsel for the Respondent's argument that there was no likelihood of success in the Petition in opposition appears to be based on the equation of a Petition in Opposition with an appeal. In the Opposition the applicant does not have to prove that it would be successful at a retrial of the merits when the Applicant is included in the suit. All it has to prove for a stay to be imposed is that it stands a good chance of success in the Petition in opposition and that substantial prejudice/injustice would be suffered by the applicant if the stay is not imposed and the court's order is carried out. The opposition is not itself a retrial of the merits of the issues decided by Georges J.

[27] It must also be that the case law is to be applied mutatis mutandis. In the case of an appeal only a party can obtain a stay. But in the case of an opposition it is obvious that the petitioner cannot claim to have been a party to the proceedings. In the Petition in opposition the Petitioner is saying that it is entitled to be a party and procedurally should be treated as a party unless proven otherwise.

[28] The relevant article: 383 of the Code of Civil Procedure states:

> *"The proceedings upon oppositions by third parties are the same as upon ordinary suits. They do not prevent the execution of the judgment unless the court or judge order a stay of execution."*

[29] The drafters of the Civil Code would not have styled Article 383 the way they did if a stay of execution was deemed impossible because the Petitioner was not a party to the suit.

[30] In my view the loss to the Respondent would also be substantial because of the delay but this can be rectified by payment of interest on monies due after the accounting ordered is done. That contingency operates in her favour. The respondent will still be able to enforce her judgment if the Opposition fails, while even if successful the Applicant would have to recover from the effects of the loss suffered by the enforcement of the court's order if no stay is imposed. There is no contingent machinery in operation in its favour.

[31] Finally Counsel for the Respondent mentioned as a matter of procedure that the Opposition was not properly brought in the suit being Opposed but was brought as a separate suit. Counsel for the Applicant sought to argue that this was not incorrect since in cases where the court is being asked to set aside a decision fraudulently obtained a new suit is filed.

[32] I am of the view for the record, that the matter should have been part of the existing suit in which the offending decision was made in the absence of the Petitioner. The relevant Article 382 of the Code of Civil Procedure states that,

> *"The opposition is formed by means of a petition to the Court, which must contain the grounds of opposition, and proper conclusions, and must be served upon the parties in the cause, or upon the solicitors who represented them, if it is made within a year and a day after judgment. The truth of the allegations contained in the opposition must be sworn to, as in the case of an opposition to annul."*

[33] Some of the authorities available to the court seem to establish this very practise under the Code Civil of Quebec. Counsel's allusion to filing a separate suit in cases of judgments obtained by fraud is based on the common law position. I view Article 381 as part of a different legal tradition.

[34] However if filling a separate suit is an irregularity, it is an irregularity which can be rectified by an application to consolidate the matters.

[35] As I understand it counsel for the respondent was not asking for any kind of sanction to be imposed to address the alleged irregularity and the court will impose none.

[36] In the circumstances I would impose a stay of execution of the Court's order in suit SLUHCV 2007/0846 improbating the Deed of Sale to the Applicant pending the outcome of the Applicant's Petition in Opposition.

[37] In my view costs of this application should be awarded after the decision in the Petition in Opposition, to be assessed if not agreed.

Francis H V Belle
High Court Judge