IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2011/235

BETWEEN:

BLAIRCOURT PROPERTY DEVELOPMENT LTD

Respondent/Claimant

and

[1] ARTHERTON MARTIN
[2] DR. CLAYTON SHILLINGFORD
[3] FREDERICK BARON
[4] SEVERIN MC KENZIE
[5] FLOYD CAPITOLIN
[6] JOAN ETIENNE

Applicants/Defendants

Appearances:

Miss Cara Shillingford for the appellants/applicants
Mrs. Heather Felix Evans for the Respondents

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2015: October 30th
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ORAL JUDGMENT

[1] **Stephenson J.:** This is an application for a stay of enforcement of judgment of the Learned Judge Thomas pending the hearing and determination of an appeal against his decision to grant damages and exemplary damages.

[2] As a preliminary point, the respondents ask that the application should be dismissed as being vexatious, oppressive and an abuse of process of the court or in the alternative that the application be stayed pending the outcome of the application before the Court of Appeal.

[3] The respondent to the application filed an affidavit in support of his application for a stay or dismissal of this application and in his affidavit he says that he was served with a "notice of application for variation of court order and for extension of time pursuant to the Rules 62.16 and 62.16 and 61.16A for a stay of proceedings and affidavit in support of application filed on 22nd June 2015. The documents served on the deponent were exhibited to his affidavit as "RA4".

[4] The deponent further deposed that he read the documents and understood them to mean that the applicants/appellants applied to the court of appeal for a stay of execution of the judgment and order of 22nd December 2015 which is identical to the relief being sought in the application that is before me.

[5] Mr. Alexis deposed that he received a notice of hearing of the said application which is set for week commencing 9th November 2015; a copy of the said notice was also exhibited as "RA 5".

[6] I have examined the exhibits tendered by Mr. Alexis and I agree that the documents which he was served with are in fact an application by the appellants/applicants in the application before me for a stay of execution of the judgment.[1] I have also examined exhibit "RA5" and agree that it is a notice of hearing from the Chief Registrar for the application to be heard in the week of 9th November 2015. There is no doubt that the application before the High Court and the Court of Appeal are substantially the same and there is a hearing fixed for the application to be heard by the Court of Appeal.

[7] Learned Counsel Mrs. Felix Evans contended that therefore there are two applications before two courts on substantially the same issue and that when such a circumstance arises it creates an inconvenience to the court. Counsel

[1] See Paragraph 9 of the Appellants application filed on the 22 June 2015 and served on the Respondent

submitted that when there are questions and issues which are substantially the same, that the principle is, that it should be determined by one court only. Counsel further submitted that it would be highly inappropriate for this court to proceed to hear the application. In support of her submission Counsel made reference to Halsbury's Laws of England Volume 37 paragraph 446. Which states

> *"Prima facie it is vexatious and oppressive for the plaintiff to sue concurrently in two English Courts or tribunal and the court will stay the second proceedings. A defendant will not be called upon to meet in substance and in reality the same claim or charge he has already answered in earlier action. If there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of the courts, and the court will necessary stay one of the actions. The same principles apply to proceedings other than actions."*

[8] Counsel also invited the court to have regard to the decisions in Slough Estates Ltd –v-Slough Borough Council & Anor (the Slough Case)[2], Thames Launches Ltd –v- Corporation of the Trinity House of Deptford Strond[3] and the The Royal Bank of Scotland –v- Citrusdal Investments Ltd [4] in furtherance of her application. Counsel submitted that in these cases the courts set out the principles that the courts ought to apply when confronted with a situation where a single party puts the substantially the same issue for concurrent determination.

[9] In the **Slough Case**: Ungoed – Thomas J had this to say

> *"… A stay is a discretionary remedy, as I have said to be excercised in accordance with well-established judicial principles and that includes the principle that it should not cause injustice to the plaintiffs. It has been repeatedly laid down that the jurisdiction should be excercised with the greatest caution …"* [5]

[2] [1967] 2 All E R 270
[3] [1961] All E R 26
[4] 1971 3 All E R 558
[5] Slough Case at page 276

[10] Learned Counsel Felix Evans also submitted that section 18 of the Eastern Caribbean Supreme Court (Dominica) Act[6] empowers the court to direct a stay of proceedings in any cause or matter pending before it.

[11] Mrs. Felix-Evans submitted that the duplication in the case at bar is Vexatious, oppressive and an abuse of the process of court.

[12] Counsel submitted that the Court of Appeal is a superior court to the High Court and every appeal from the High Court shall lie to the Court of Appeal and if this application is heard the part who is aggrieved is entitled to exercise its right of appeal and the exercise of this right of appeal will necessarily be before the Court of Appeal which in this case will be faced with the very embarrassing situation of having to hear an appeal in respect of the embarrassing situation of having to her an appeal in respect of a matter which already before it in its "original" jurisdiction. If this application is allowed to continue and a decision given conceivably the decision of this may be different from the decision of the Court of appeal on the same question.

[13] Mrs. Felix Evans submitted that the law is clear that the applicants cannot pursue both proceedings simultaneously and the appropriate court of action is for the applicants to elect which proceedings pursue. In the circumstances Counsel submitted that in view of the reasons which she stated and the fact that the appeal before the Court of Appeal is broader and includes the application currently before this court that it would be more appropriate for the applicants to elect to proceed with the proceedings before the Court of Appeal. That the most reasonable and appropriate action by the High Court faced with this situation is to stay or even dismiss the application. Counsel also asked for her costs in this proceedings.

[6] Chapter 4:02 of the Laws of the Commonwealth of Dominica

[14] Miss Shillingford Counsel for the Applicants/Appellants submitted that there was no application for stay or her application to stay that the Respondent did not serve on her any notice on her of his current application.

[15] Learned counsel submitted that Rule 62:19 of CPR 2000 states that an appeal does not operate as a stay of execution unless the court orders otherwise.

[16] Counsel submitted further that there is nothing in the rule that prohibits the application and further that the cases referred to by Counsel Mrs. Felix Evans are irrelevant to the case at bar, that the reference made to the Halsbury's las of England speaks to a situation that is not the situation in this case.

[17] Miss Shillingford contended that a decision was made by a High Court Judge which is being appealed. That there is nothing in the Halsbury's speaking to the staying of an application.

[18] Learned counsel maintained that there is no abuse of process and that the application in the case at bar was filed in the High Court as a matter of convenience. Learned counsel further contended that the cases presented by the respondent refers to a stay of proceeding not a stay of application and that the proper course should be a choice of proceedings if there is a duplication of proceedings and she is not admitting that there is a duplication of proceedings . Counsel further submitted that the **Slough Case suggests** that even if there was duplication the court should put an election to counsel as to which application they should proceed on. Learned counsel submitted that because there is no duplication in the case at bar the court should not have to the put the applicant to an election.

[19] Counsel concluded by submitting that there was in her view no duplication of proceedings and therefore there should be no application by the respondent for a stay of application. Further it was submitted that to make an application for a stay of proceedings is to invite the court into error and there is not authority presented by the respondents on point where the court would grant an application and counsel invited the court to decide the application on its merits.

[20] Further, counsel invited the court if it disagrees with her and finds that there is a duplication to put an election to the Applicants and if that is the case she would be electing to proceed with her application in the High Court.

[21] In her response Learned Counsel Mrs. Felix Evans reiterated that the Respondent is asking that the application be struck out and at the minimum stayed. Counsel disagreed with Miss Shillingford's statement that what is before the court is an application and not a proceeding and in doing so she made reference to the definition of proceedings found in the Black's Law dictionary which stated that any application is a court proceeding.

[22] Learned counsel made further reference to the **Slough Case at Page 275 which said that** in proceedings which are identical that the remedies are identical prima facie the proceedings are vexatious.

Court's consideration and decision

[23] I have examined the application currently before this court and exhibit "RA 4" which is the Notice of application before the Court of Appeal that is listed to be heard in November 2015 and note that paragraph 4 of the said application states the appellants are applying for "A stay of proceedings before the High Court in DOMHCV235 of 2011." Further Paragraph 9 of the grounds stated by the applicants states

" *A Stay of proceedings is necessary for the following reasons:*

(a) *If the judgment is paid there would be no reasonable prospect of getting it back if the appeal were to succeed.*
(b) *There is a strong likelihood that the defendant company which is a separate legal person, may become judgment proof if the appeal is allowed, in the absence of a stay of proceedings.*
(c) *In the absence of a stay of proceedings the appellants will experience financial hardship"*

[24] The application filed currently before the court is *inter alia* "that enforcement of and /or proceedings on the judgment of the Honourable Errol Thomas dated 22nd December 2014 be stayed until the hearing and determination of the appeal"

[25] I am of the considered view that it is quite plain that the applicants are making the same application before the High Court and the Court of Appeal and therefore I disagree with Learned Counsel Miss Shillingford when she submitted that there was no duplication of applications before the court.

[26] Having found that there is a duplication of the claims before the court I agree with the submission of Mrs. Felix Evans when she cited the passage from Halsbury's Laws of England. This is according the passage cited, is prima facie vexations and oppressive and in such situations the question or issue should be pursued in only one of the courts and I so hold.

[27] Learned Counsel applies for the application to be dismissed as an abuse of the process of court and Learned Counsel Miss Shillingford in her submissions said if the court were minded to find that there was a duplication of proceedings that the She should be put to her election and if that is the case her election would be to proceed with the application for stay before the High Court.

[28] The substantive application is for a stay of enforcement of the High Court judgment pending the hearing and outcome of the appeal. As stated before

the granting of a stay is a discretionary remedy which I understand has to be excercised sparingly and with caution. There are well established judicial principles which have to be applied in matter such as these and they are:

1) The court should take into account all the circumstances of the case.
2) That a stay is the exception rather than the general rule.
3) That the party seeking a stay must provide clear and convincing evidence that the appeal will be stifled or rendered insignificant unless a stay is granted.
4) The Court in exercising its discretion is required to also consider and apply the balance of harm test and in doing so it will carefully consider what is the likely of the prejudice that will be visited on the successful party.
5) The court is also required to consider the possibility of the appeal succeeding, and will grant the stay where it is shown that there are strong grounds of appeal enabling the court to be satisfied that there is a strong likelihood that the appeal will succeed.[7]

[29] It is noted that this includes a determination on the prospect of the success of the appeal[8] and this includes considering the merits of the appellants appeal so far as it arises.

[30] If I were to yield to Miss Shillingford's option I would in the process of deciding whether or not to grant stay have to engage in such an exercise I am of the considered view is better left to the Court of appeal.

[7] As applied by the Court of Appeal in C-Mobile Services Limited –v- Huawei Technologies Co. Limited BVIHCMAP2014/0017v(On appeal from the Commercial Division

[8] Re: Linotype – Hell Finance –v- Baker [1992] 4 All E. R. 887 applied in The Attorney General of Grenada –v- Bernard Coard et al [2004] ECSCJ No 56

[31] It is also noted that the matter is listed for the week of the 9th November 2015 which is very shortly. Therefore in the circumstances I would decline to grant Miss Shillingford the option which she has rightly said she is entitled to have.

[32] I would therefore dismiss the applicants' application for stay of proceedings on the ground that there is a duplication of application amounting to an abuse herein. I order as to costs that the applicants pay the respondent's costs to the sum of $650.00.

M.E.B. Stephenson
High Court Judge