

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2009/0094

BETWEEN:

**POMME-GRANATE LTD (formerly CPCT (SVG) LTD
(acting through its director INGRID PUNNETT)**

CLAIMANT/RESPONDENT

and

**[1] GREGORY BROWNE
[2] SHELLY-ANN SUTHERLAND**

DEFENDANTS/APPLICANTS

Appearances:

Mrs. Patricia Marks-Minors for the claimants/respondents.
Mr. Roderick Jones for the defendant/applicant.

2018: Jul. 11

Jul. 30

DECISION

BACKGROUND

[1] **Henry, J.:** This is an application for stay of execution of a judgment. On 31st May 2002 Mr. Gregory Browne and Ms. Shelly-Ann Sutherland leased land from Pomme-Granate Ltd. for the purpose erecting a wooden dwelling house. The land ('the subject land') is situated at Belvedere, in the State of Saint Vincent and the Grenadines. The lease gave a right of first refusal to Mr. Browne

and Ms. Sutherland to purchase the subject land either at the end of the lease or if the property was being sold before.

[2] In 2006, the lease was extended for 3 years inclusive of the right of first refusal. However, in 2008 Pomme-Granate Ltd. notified Mr. Browne and Ms. Sutherland in writing that the lease would not be extended further and the property would not be offered for sale. Pomme-Granate Ltd. subsequently brought action¹ against Mr. Browne and Ms. Sutherland to recover possession of the subject land. It also sought *mesne profits* and costs. Mr. Browne and Ms. Sutherland filed a defence and counterclaim but it was struck out by Thom J. They appealed without first seeking leave. The appeal was struck out a nullity.

[3] The matter proceeded to trial. Ms. Ingrid Punnett testified on behalf of Pomme-Granate Ltd. in the capacity of director. By judgment delivered on September 26th 2016 Cottle J. ordered Mr. Browne and Ms. Sutherland to deliver up possession of the property within one month; pay the amount of \$2000.00 per year from January 1st 2009 to 31st December 2011 and \$3000.00 per year from January 2012 until possession is given up; and prescribed costs of \$7,500.00.

[4] Mr. Browne and Ms. Sutherland appealed that decision. They have now applied² for a stay of execution of the judgment pending the outcome of their appeal. On 18th April 2018 Pomme-Granate Ltd filed a request for the issue of a writ of possession. It opposed this application and filed an Affidavit in Opposition³.

ISSUE

[5] The issue is whether Mr. Browne and Ms. Sutherland should be granted a stay of execution of the judgment?

¹ By Fixed Date Claim Form filed on 20th March 2009.

² By Notice of Application filed on 18th May 2018.

³ On 13th June 2018.

ANALYSIS

Issue - Should Mr. Browne and Ms. Sutherland be granted a stay of execution of the judgment?

- [6] The Court may grant a stay of execution of a judgment pending the outcome of an appeal⁴. An appeal must be filed within 42 days of the date of delivery of the judgment.⁵ Mr. Browne and Ms. Sutherland applied for and obtained leave to appeal. They filed a Notice of Appeal on the date that the judgment was delivered, well within the stipulated timeline.
- [7] An order granting a stay of execution is the exception rather than the general rule. In determining such an application the Court must consider the appellant's prospects of success. If they are realistic and not fanciful, the Court is likely to grant a stay. The Court takes into account all the circumstances of the case, applies the balance of harm test and considers the likely prejudice to the successful party.
- [8] An appellant or prospective appellant is required to 'provide cogent evidence that his appeal will be stifled or rendered nugatory unless a stay is granted.' A stay will not be granted if the appellant makes nothing more than a bald assertion that he or she would be ruined, without supplying satisfactory evidence in support. Very good reasons must be provided why the Court should deprive the successful party from 'reaping the fruits' of its success. These guiding principles were distilled by Blenman J.A. in **C-Mobile Services Limited v Huawei Technologies Co. Limited**⁶ from the judgment in **NB v London Borough of Haringey**⁷.
- [9] The parties referred respectively to other cases which echoed those principles, including: **Dawn Simon v Ralston Tongue**; **Courtesy Taxi Co-operative Society Ltd. v Lucien Joseph**; **Hammond Studdards Solicitors v Agrichem International Holdings Ltd.** and **Linotype-Hell**

⁴ Civil Procedure Rules 2000 ("CPR") 26.1(2) (q).

⁵ CPR 62.5(1) (c).

⁶ Territory of the British Virgin Islands High Court Commercial Appeal BVIHCMAP2014/0017 (delivered on 2nd October, 2014).

⁷ [2011] EWHC 3544 (Fam), per Mr. Justice Mostyn as articulated by Ma J. in **NB v London Borough of Haringey and Wenden Engineering Services Co Ltd. v Lee Shing UEY Construction Co Ltd.** HCCT No. 90 of 1999.

Finance Ltd. v Baker.⁸ They accept that the principles articulated in those cases govern the determination of whether a stay should be granted pending an appeal. I will apply those principles to this case.

- [10] Mr. Browne and Ms. Sutherland advanced two principal grounds in support of their application for a stay of execution. They contended that if the writ of execution is executed before the hearing and determination of their appeal this would cause them undue hardship. They argued that they have a realistic prospect of succeeding before the Court of Appeal.
- [11] They filed a joint affidavit in support of their application. They averred that their previous counsel Mr. Andreas Coombs has since migrated and that they had to retain new counsel. They indicated that the writ of possession was filed for recovery of possession and the sum of \$36,307.76.
- [12] Mr. Browne and Ms. Sutherland submitted that there are two issues to be decided by the Court:
1. On a balance of probability will they suffer greater injustice or prejudice than Pomme-Granate Ltd. if the stay is refused? and
 2. Do they have a realistic prospect of success?
- [13] They submitted further that the applicable law is outlined in CPR rule 62.16 (1) and empowers a single judge of the Court to grant a 'stay of execution on any judgment or order against which an appeal has been made, pending determination of the appeal.' It must be pointed out that 'court' in this provision refers to the Court of Appeal. The interpretation is captured in CPR 62.1. The relevant rule is referenced earlier at paragraph [6].
- [14] Mr. Browne and Ms. Sutherland argued that on the strength of their collateral contract with Pomme-Granate Ltd., they forwent the search for another property to purchase, confident that the subject property was now theirs once they had engaged their lawyer to prepare the Deed of Conveyance and remit the payments to Pomme-Granate Ltd. as agreed. They contended that in reliance on the

⁸ ANUHCVP2008/0025; SLUHCVP2008/0043; [2001] EWCA Civ. 2065; and [1993] 1 WLR 321 respectively.

collateral contract they invested their savings in improving the property in anticipation of eventually owning it.

- [15] No such pleadings or evidence were before the Court. Accordingly, these are not matters which the trial judge could have properly considered. To the extent that they intend to rely on those averments before the Appeal panel, Mr. Browne and Ms. Sutherland have not demonstrated that they have a reasonable prospect of succeeding on appeal. Furthermore, in the absence of evidence that they are likely to be ruined if a stay is not granted, I am unable to find that would be the case.
- [16] Mr. Browne and Ms. Sutherland submitted that they would suffer great ruin if a stay is not granted. They argued that they would lose their home, garage and ability to sustain themselves and meet their expenses. They contended that if the stay is granted the only inconvenience Pomme-Granate Ltd. will endure is being without the use of the land pending the appeal. They submitted that they will suffer greater harm compared to that inconvenience. They argued that if the stay is denied and they succeed at appeal they will incur great cost in reconstructing both the dwelling house and the garage on the subject land. They submitted that it is practical and sound in the circumstances for the Court to grant the stay pending appeal.
- [17] Cottle J. found as a matter of fact that there was no option to purchase the land and further that the express terms of the lease permitted Mr. Browne and Ms. Sutherland to construct a two bedroom dwelling house. They did not then and do not now contend that they were authorized to build a concrete structure.
- [18] Cottle J. observed further 'It is common in these islands for tenants to be allowed to build chattel houses which can be removed at the end of a tenancy.' It does not appear from the judgment that Mr. Browne and Ms. Sutherland had a different arrangement with Pomme-Granate Ltd. whereby they were permitted to put down a permanent building. They have not so averred in their joint affidavit in support of the present application. They have not set out in it any insurmountable

difficulties or unforeseen or unreasonable expenses that they face in removing and relocating their building.

- [19] They have not presented any facts from which I can find that they are likely to face financial ruin if the stay is granted. They are in the situation decried by Blenman JA in **C-Mobile Services Limited v Huawei Technologies Co. Limited**. They have merely made a bald assertion of impending ruin without providing cogent evidence in their affidavit. This will not suffice.

Grounds of Appeal – Is Chance of Success Realistic?

- [20] Mr. Browne and Ms. Sutherland submitted that the learned trial judge erred in his finding that there was no option to purchase in the lease agreement and when he failed to consider as a material fact that Pomme-Granate Ltd. offered the subject land to them for sale, which they accepted. It is now well-established that an appellate Court will not lightly set aside the findings of fact or the inferences a trial judge draws from them. It does so only if satisfied that the judge misdirected himself on the law or if the appellate Court is satisfied that the judge was plainly wrong.⁹
- [21] The trial judge's determination of whether the parties had agreed to an option to purchase is determinable partly on fact and partly in law. The Court must look first at the language used in the lease and consider whether it provides for such an option. The uncontroverted evidence is that the 'lease' stated 'you will have the right of first refusal either at the end of the lease or if the property is offered for sale prior to the expiry of the lease in which case credit will be given to you for the unexpired portion of the lease'.
- [22] The learned trial judge pointed out that Mr. Browne's and Ms. Sutherland's legal practitioner cited the case **River Doree Holdings Ltd. v AG of St. Lucia**¹⁰ regarding the issue of creation of an option to purchase. The learned judge noted that the case provides good guidance as to the effect

⁹ Michael Francois v Ryan Richards GDAHCVAP2013/0033, per Michel J. applying principles enunciated in Watts v Thomas [1947] AC 484.

¹⁰ SLUHCVP2012/0028.

of an option to purchase. In this regard, he remarked that an option to purchase was there described as a distinct contract between the lessor and lessee.

[23] He concluded that there was no such contract between Pomme-Granate Ltd. and Mr. Browne and Ms. Sutherland. They have advanced no contrary factual or legal submissions which suggest that they have a realistic chance of succeeding on this issue on appeal. I hold that there is none.

[24] Likewise, Mr. Browne and Ms. Sutherland have supplied no evidence that they had a distinct contract with Pomme-Granate Ltd. to purchase the subject land. They have no pleadings before the Court which reveal such contentions. This is not an issue on which they are expected to have a realistic chance of success on appeal.

[25] They argued that the learned trial judge erred in law by failing to consider that once they had accepted the option to purchase, the relationship of landlord and tenant ended between the parties. They have pointed to no evidence or pleadings which support their contention that they accepted an offer to purchase the subject land. The judgment makes no reference of any such averments. This ground does not appear to hold much hope for Mr. Browne and Ms. Sutherland of succeeding before the Court of Appeal. I perceive no such chances.

[26] Mr. Browne and Ms. Sutherland argued that in addition to the written lease agreement there was an oral contract for sale of the property to them, as evidenced by a proposed payment plan which is before the Court. They submitted that a contract of sale was concluded between the parties on the basis that Pomme-Granate Ltd. had made an offer to them which they accepted. They contended that there was also consideration.

[27] In the absence of testimony from Mr. Browne and Ms. Sutherland, the Court had only Ms. Punnett's account to consider. According to Cottle J. she denied the existence of an agreed option to purchase. She admitted that she had granted Mr. Browne and Ms. Sutherland a right of first refusal. Cottle J. had to accept her testimony. He did so and found that no such option to purchase existed. It is very unlikely that the Court of Appeal will make a different finding. Mr. Browne's and Ms. Sutherland's chances on this aspect of their appeal are slim to non-existent.

- [28] Mr. Browne and Ms. Sutherland contended that to their detriment they relied on the strength of the contract for sale and invested heavily in the development of the property. They argued that the doctrine of proprietary estoppel should apply. They submitted that Pomme-Granate Ltd. must in those circumstances fulfill its contractual obligation to complete the sale.
- [29] They submitted further that the case of **Steve Joseph v Leona Cornelius and Addison Cornelius**¹¹ is an authority in which the Court outlined the conditions for proprietary estoppel. They noted that Michel JA quoted Lord Walker and stated:
- ‘Most scholars agree that the doctrine is based on 3 main elements, although they express them in slightly different terms; a representation of assurance made to the Claimant, reliance on it by the Claimant; and detriment to the Claimant in consequence to his (reasonable) reliance.’
- [30] The learned judge found that Pomme-Granate Ltd. did not conduct itself in a manner which was capable of constituting a representation that Mr. Browne and Ms. Sutherland were to have an interest in the land. He observed that there were fruitless negotiations with a view to a sale, after which Pomme-Granate Ltd. notified Mr. Browne and Ms. Sutherland that the lease would not be renewed and the land would not be sold. He concluded that proprietary estoppel did not arise on the facts.
- [31] Mr. Browne and Ms. Sutherland did not supply contradictory pleadings or evidence. Ms. Punnett’s testimony stands as the undisputed account of what transpired between the parties. Mr. Browne’s and Ms. Sutherland’s submissions appear unlikely to meet with success at the appellate level. I find that in light of the foregoing considerations they have failed to demonstrate that they have reasonable prospects of success at that stage.
- [32] The last ground of appeal outlined by Mr. Browne and Ms. Sutherland is that the learned judge erred in law by not construing that Pomme-Granate Ltd. was estopped from reneging on the sale of the land. This ground is related to and almost a mirror of the one previously considered. This is an

¹¹ ANUHCv2009/0045.

attempt by Mr. Browne and Ms. Sutherland to convince the Court of Appeal that the learned trial judge's assessment of the facts were faulty and further that a promise or contract to sell the subject land had been made. Having regard to the learned judge's factual finding on this point, there seems to be little merit in this assertion, particularly since Mr. Browne and Ms. Sutherland did not provide evidence in the case.

- [33] Mr. Browne and Ms. Sutherland have failed to demonstrate that they have a realistic prospect of succeeding on appeal, or that they will suffer greater prejudice than Pomme-Granate Ltd. if the stay is denied. If the stay is denied they will have to relocate from the subject lands. This should not prove more difficult than what the parties appeared to and were reasonably expected to contemplate when they entered into the lease.
- [34] Even if they prevail on appeal, Mr. Browne and Ms. Sutherland would have only the option of purchasing the land, not title to the land. There is no guarantee that they would be successful in negotiating a successful purchase. On the other hand, if the stay is granted, Pomme-Granate Ltd. would be without its property until an undetermined time in the future, and without a guarantee of receiving rent or other compensation from Mr. Browne and Ms. Sutherland.
- [35] The Court is always conscious of its duty to ensure as much as reasonably possible that successful litigants enjoy the fruits of their victory. This is one of the foundational pillars of the system of justice. Only in exceptional cases, will it consider deviating from that cornerstone and stay the execution of a judgment.
- [36] Pomme-Granate Ltd. is the owner of the subject land. Based on their submissions, Mr. Browne and Ms. Sutherland possess only a notional 'equitable hope' not anchored by pleadings or evidence. In all the circumstances, Pomme-Granate Ltd.'s interest trumps theirs. The balance swings strongly in Pomme-Granate Ltd.'s favour.
- [37] Mr. Browne and Ms. Sutherland have not established that their appeal has a realistic chance of success on any of the proposed grounds. They have not supplied any evidence that their appeal

would be rendered nugatory if they were to succeed. There is no evidence that they will face financial ruin if the stay is refused. I therefore dismiss their application for a stay of execution.

Costs

[38] Mr. Browne and Ms. Sutherland must pay Pomme-Granate Ltd.'s costs to be assessed pursuant to CPR 65.11, if not agreed. Pomme-Granate Ltd. is required to file and serve its application for costs on or before September 17th 2018 supported by affidavit evidence.

ORDER

[39] It is ordered:

1. Gregory Browne's and Shelly-Ann Sutherland's application for a stay of execution is dismissed.
2. Gregory Browne and Shelly-Ann Sutherland shall pay to Pomme-Granate Ltd. costs to be assessed pursuant to CPR 65.11, if not agreed.
3. Pomme-Granate Ltd. must file and serve its application for costs on or before September 17th 2018 supported by affidavit evidence.

[40] I wish to thank counsel for their written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar