

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G 413 OF 2013
CIVIL CAUSE NO. 9 OF 2016

BETWEEN



THOMPSON RESORTS LIMITED

Second Defendant/Appellant

CASTAWAYS' TIMESHARE LIMITED

Third Defendant/Appellant

AND

CARL CLAPPISON

Plaintiff/Respondent

SEA GRAPE ESCAPE LIMITED

Plaintiff/Respondent

THE PROPRIETORS, STRATA PLAN NO. 381

First Defendant/Respondent

Appearances: Mr. Ian Huskisson & Charmaine Richter of Travers Thorp Alberga
for the Second Defendant/Appellant
Mr. Hector Robinson, Nicosia Lawson of Mourant Ozannes for the
Third Defendant/Appellant
Mr. James Kennedy of Samson and McGrath & Co. for both of the
Plaintiffs/Respondents
Mrs. Cherry Bridges of Ritch & Connolly for the First
Defendant/Respondent

Before: Hon. Justice Richard Williams

Heard: 25 July 2016

Oral Judgment: 25 July 2016

Transcript of
Judgment provided: 28 July 2016

HEADNOTE

Practice - Appeal to the Court of Appeal - stay of execution pending appeal.

JUDGMENT



Introduction

1. This matter comes before me in my capacity as a Single Judge of the Court of Appeal.
2. Having regard to the need for there to be reasons for my decision to be given promptly, I feel it appropriate to deliver an Ex Tempore Judgment. A perfected transcript of this Judgment will be provided to the parties.

The Application

3. This is an application by the Appellants, Castaways' Timeshare Limited ("CTL") and Thompson Resorts Limited ("TRL") for a stay of paragraph 1 of the Order containing the Judgment of Mangatal J. pending the hearing and determination of an appeal against a part of her Order dated 17 May 2016. At Paragraph 1, the Learned Judge ordered that:

"By-law 2 of the 1st Defendant is ultra vires and the By-laws of the 1st Defendant must be modified by the existing Executive Committee by deleting By-law 2 and lodging the modified By-laws with the Registrar of Lands forthwith."

4. The submissions in support of a stay of execution were primarily made by Mr. Robinson, but were adopted by Mr. Huskisson. The application is supported by the affidavit sworn on 8 June 2016 by Mr. Kel Thompson, a director of TRL and CTL. TRL has involvement in the following capacities highlighted by Mangatal J.:

- (i) as the original owner of the land and the developer of the Strata;
- (ii) as the legal or beneficial owner of at least 12 units at the Strata;

- (iii) it manages the Strata through the Strata Management Agreement entered into in December 2003;
- (iv) it operates the rental pool agreement with individual owners; and
- (v) it owns and operates the Reef Resort¹. CTL is a Cayman Islands incorporated limited liability company which owns 4 units in the Strata Development No. 381.



5. The Respondent, the Proprietors of Strata Plan No. 381 (a body corporate consisting of all the Strata Proprietors contained in Strata Plan No. 381), although stating that it took a neutral position in the proceedings before Mangatal J., supports the application for a stay of execution. Mrs. Bridges states that:

"We see the merits of the application for a stay, otherwise it will render the appeal nugatory, will create a conveyancing nightmare and for any third parties coming along. If the by-laws are amended, we will be stuck with that and render the appeal nugatory. The appeal is due to be heard in less than a month but we recognise that Court might not give its decision right away."

6. The application is opposed by the Respondents, (i) Carl Clappison ("Clappison") who is a registered proprietor of a 1/6th share in parcels H45 and H46² within the Castaways' Coves Strata development located in East End, Grand Cayman and (ii) Sea Grape Escape Limited ("Seagrape") a registered proprietor of parcels H29 and H30 in the development³. They contend that this Court should not grant a stay of the Learned Judge's decision in favour of CTL. The reasons for Clappison's opposition are contained

¹ A timeshare resort adjacent to the Strata.

² His wife also owns a 1/6th share in these parcels.

³ Mr. Beric Evans was a plaintiff at the time of the issuing of the Originating Summons, but he transferred his 1/2 share interest in the two parcels to Seagrape in May 2015 who was later joined/substituted as a Plaintiff.

in his unsworn affidavit. Mr. Kennedy gave an undertaking to the Court to have the sworn copy filed at Court. No party objected to the Court considering the content of the unsworn affidavit.



Issue

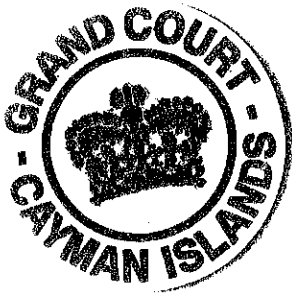
7. The issue which arises for determination is whether this Court should grant a stay of execution of paragraph 1 of the Learned Judge's Order pending the hearing and determination of the appeal. The issue about whether any conditions should be attached to any order for stay, if made, was also canvassed.

Background

8. The background to this matter and the submissions made before the Grand Court are diligently and fully set out between pages 2 to 15 of the Learned Judge's detailed Judgment. I have carefully reviewed that background, which I have regard to, and I see no benefit in repeating that same detail herein.
9. TRL and CTL, exercised their unrestricted right to appeal, when they filed their Notice of Appeal on 2 June 2016. By the appeal they seek an order reversing Paragraph 1 of the Learned Judge's Order. They filed their Memorandum of Grounds of Appeal on 28 June 2016. The appeal is scheduled to be heard before the Court of Appeal, just over four weeks hence, on 24 August 2016.

The Law

10. Rule 20(1) of the Court of Appeal Rules (2014 Revision) ("the Rules") reads as follows:



"20(1) Except so far as the court below or the Court might otherwise direct-

- (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the Court below; and*
- (b) no intermediate actual proceedings shall be invalidated by an appeal"*

This rule means that the service of a Notice of Appeal does not of itself operate as a stay.

An application has to be made to the Court.

11. The Applicant is to persuade the Court that the stay of execution is necessary, by showing that there is good cause. This is because a successful litigant is entitled to the fruits of his judgment without fetter, particularly after a full trial on the merits. Section 19(3) of the Court of Appeal Law (2011 Revision) ("the Law") provides as follows:

"No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties to the action, or upon good cause shown to the Court or to the Grand Court."⁴

12. The parties agree that the judgment of Creswell J. in *Herriot African Trade Finance Fund Limited v Deutsche Bank (Cayman) Limited* [2001 (1) CILR 34], wherein he conducted a review of the relevant Cayman Islands authorities, sets out the principles on which a stay of execution is granted.

13. At paragraph 13 Creswell J. stated:

⁴ My emphasis by underlining.

“The Cayman authorities indicate a more flexible approach to the grant of a stay than that adapted in Re A. & B.C. Chewing Gum Ltd. - see Smellie, C.J. in a Parmalat Capital Fin. Ltd. and Quin, J. in re Lancelot Investor Fund Ltd. The expression “good cause” in s.19(3) of the Court of Appeal Law is not specifically a reference to the merits of the appeal. See further Cotton and Brett L.JJ. in Wilson v. Church (no.2) and Smellie, J. in Wahr-Hansen v Bridge Trust Co. Ltd.”



14. Creswell J. went on to state at paragraph 22:

“In my opinion, the relevant legal principles are as follows:

(a) the Court of Appeal Law (2006 Revision), s.19(3) provides so far as material: “No stay of execution... shall be granted upon any judgment appealed against save ... upon good cause shown to the Court or to the Grand Court”;

(b) the critical test is whether good cause has been shown;

(c) the onus is upon an appellant to show good cause (i.e. good reasons) for the imposition of a stay pending appeal;

(d) in considering whether good cause has been shown, the court will have regard to all the circumstances of the case, including, without limitation

(i) whether the appeal would be rendered nugatory if a stay is not granted (Wilson v. Church (13) (12 Ch. D. at 458 – 459));

(ii) whether the appellant can show a good arguable case;

(iii) whether the appeal is in exercise of a true right of appeal and not for some collateral purpose;

(iv) the balance of convenience (see Quintin v. Phillips Petroleum Co.(9)); and

(v) appropriate regard should be had to the reasons given by the first instance judge for refusing a stay;

(e)

(f) the question whether or not to grant a stay is entirely in the discretion of the court; and

(g) indications in past cases do not fetter the scope of the court’s discretion.”

15. Whether the Court exercises its discretion to grant a stay or not depends on all the circumstances of the case, an essential question being whether there is a risk of injustice to a party if the Court grants or refuses a stay. For example, 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? The Court's jurisdiction to grant a stay is based upon the principle that justice requires that the Court should be able to take steps to ensure that its judgments are not rendered valueless.⁵

Submissions Made in Support of the Application for a Stay

16. It is contended that the order made by the Learned Judge will have "*long-lasting and irrevocable effects*" upon the management of Castaways' Cove and the Reef as a resort.

At paragraph 14 of her Judgment the Judge indicated that the question for determination



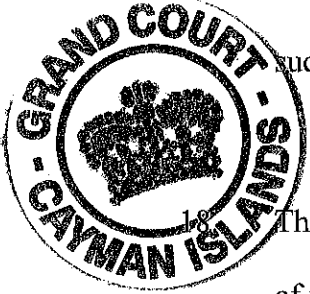
"is a very important one, not only to the parties involved in this case. Indeed, it may hold significance for other developments in the Cayman Islands where the strata development is part of a resort. The evidence in this case reveals that it is common practice in respect of such resorts to appoint a manager to manage the operations, as well as conferring enhanced rights on the developer of the resort."

The Judge went on to say at paragraph 145:

"It is also my considered view that the Legislature should examine the specific concerns raised in this case and the tensions that undoubtedly exist between the interests of developers and proprietors of strata units in a Strata development forming part of a resort."

⁵ *Marie Makhoul and Marguerite Desir v Sabina James Alcide* SLUHCVAP No. 30/2011 – also *Hammond Stoddard Solicitors v Agrichem International Holdings* [2001] EWCA Civ 2065.

17. It is submitted that the ordered amendment will establish new legal rights or mandatory provisions to govern the relationship between the Appellants and other interest holders in Castaways' Cove and that these could not be reversed retrospectively following a successful appeal.



18. The practical effects of the amendment are contended to be twofold. Firstly a dismantling of the structure of the governance of Castaways' Cove as a resort in conjunction with the Reef. Secondly that, if a stay were not granted and the appeal was successful, if someone purchased a unit within Castaways' Cove prior to the appeal decision he would be entitled to rely upon the By-laws which existed at the time of completion and it would be legally and practically impossible to impose retrospectively upon the purchaser the By-laws that were in place prior to the Learned Judge's decision. It is submitted that this would undermine the goal of consistent management and maintenance of the properties as one resort. It is submitted that a purchaser is entitled to rely upon the Land Register as it stands at the time of purchase and that any decision by the Court of Appeal could not impose on the purchaser By-laws which did not exist at the time of purchase.

19. The Appellants contend that there is an arguable case and that the appeal will involve consideration of the relevant principles of statutory interpretation in the matter involving *"novel and publicly momentous points of law."*

20. It is submitted that there is no collateral purpose to the application for a stay, as it is simply an application to maintain the status quo which could not be returned to if the appeal was successful. It is contended that, as the issues are of such public importance in

the Cayman Islands where similar Strata arrangements have historically existed, it cannot be said that there is a collateral purpose for the application.

21. The Appellants contend that the balance of convenience when considering preserving the status quo by the granting of the stay of execution falls in their favour. It is argued that this is particularly so as the appeal would be rendered nugatory if the stay was not granted. It is submitted that if the application is refused, the governance of Castaways' Cove will be irreversibly altered with new legal rights and obligations created. It is highlighted that the current wording of By-law 2 has been in place for the past 13 years and there would be no prejudice to the Respondents pending the hearing of the appeal, especially as the Appellants undertake to pay into Court the full amount of costs of the judgment until the determination of the appeal.⁶



The Respondents' Submissions

22. It is submitted that by removing the By-law and thereby introducing "*democratic control*" by a democratically elected Executive Committee coupled with the "*requirement for proper accounting and meetings*" there will not be a "*seismic shift of control*" as suggested by the Appellant.
23. The Respondents argue that the appeal would not be rendered nugatory if a stay were not granted. It is contended that Appellants' submission that the appeal would be rendered nugatory because a purchaser prior to the determination of the appeal can assert an irrevocable right to rely upon the By-laws as they now stand is "*logically and legally*

⁶ See paragraph 33 of the Skeleton Argument of Mr. Robinson dated 20 July 2016.

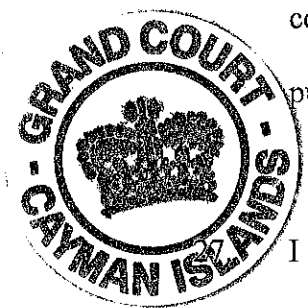
flawed.” In support of this contention, reference is made to the First Schedule of the By-laws. The First Schedule sets out under the heading “*Amendment of By-laws*” how the By-laws in the Second Schedule, which is the Schedule where the relevant By-law 2 appears, may be amended by resolution by proprietors. It is contended that there is no need for the Schedule to mention amendment by the Court of Appeal as that is trite law and that any submission made that such a power does not exist is one made “*without any legal authority or merit*” and amounts to “*a challenge to the function and powers of the judiciary over its citizens.*” It is argued that a purchaser upon reviewing the By-laws will be aware that they are subject to such possible amendment and that they would then be bound by such amendment.

24. It is contended that there are no good arguable grounds of appeal shown and that the pleadings before the Court simply “*rehash*” those unsuccessfully placed before the Learned Judge without any analysis of the suggested errors of law made by her. It is submitted that this is an indicator that the appeal is brought for some collateral purpose rather than a genuine appeal.

25. When considering the balance of convenience, reliance is made upon the content of Mr. Clappison’s unsworn affidavit in relation to a special assessment raised just after the judgment was handed down. It is suggested that there was “*an ulterior motive to bulk out costs to owners pending the holding of an AGM after the appeal.*”



26. Although no application for an injunction has been applied for by the Respondents in relation to expenditure⁷, quite some time was occupied at the hearing in relation to the special assessment which the Committee had been discussing in April 2016.⁸ I am informed that, to date, 73% of the special assessments have been paid by owners. It was also raised that the Court may feel it appropriate, if it does order a stay, to impose conditions in relation to expenditure and further special assessments. It does appear that there is an agreed requirement for expenditure to be made in relation to the elevators and painting. Having reviewed the invoices, which at first glance appeared to contain discrepancies when compared with the figures and a special assessment, having received the clarification from Mrs. Bridges, on the balance of probabilities I am unable to conclude that the assessment in that amount has been raised for an improper or collateral purpose.



I note that in Mr. Clappison's affidavit he refers to a written indication being given by him in June 2016 to the Appellants that the stay of execution pending appeal would be objected to unless certain conditions were met. The first was that the Executive Committee must provide an engineer's report demonstrating essential work on the elevator, coupled with two competing quotes. The second was a suspension of the painting works until after the determination of the appeal and the holding of the AGM. The third was an agreement not to levy any further special assessments until the determination of the appeal and AGM unless all owners were given notice and agreed that it was necessary, although the latter could not reasonably withhold their agreement

⁷ It may be that such an application, if made pending the hearing of the appeal, would have to be heard by the Grand Court and not by a Single Judge of the Court of Appeal.

⁸ Respondents indicated in inter-partes correspondence that they may be making an application for an injunction.

that the elevator work is essential. Although not vital, due to the need to have the Resort in good order for customers, there is merit in having the painting work completed before the winter season starts. In the short period of time before the appeal, if a stay were granted, it would not be appropriate to fetter the Committee's ability to levy, when necessary, further special assessments. These findings should be treated with a degree of caution, as I have not had the benefit of hearing oral evidence and the parties have not been able to cross examine. In any event it is questionable whether the granting of conditions of this nature would be appropriate or are of the type contemplated when ordering a stay.



Conclusions

28. The issue that has greatly occupied my mind is whether the non-granting of the stay of execution may render the appeal nugatory. I accept that the proprietors may, as long as the appropriate procedures are followed, amend the By-laws. I also accept that the Grand Court and the Court of Appeal may order an amendment if a By-law is ultra vires. Both of these courses of action would be binding on any purchaser of a unit no matter what the Land Register may show at the time of purchase.

29. The concern is what would be the consequences for a new purchaser who completed pending the determination of the appeal, and for the Appellants, if the ordered amendment to the By-laws is now made and registered and then reversed by the Court of Appeal. It is debatable whether the Court of Appeal's decision would override the purchaser's right to rely upon the By-laws as they appeared on the Land Register at the time of completion, as the resulting ordered amendment would not be due to the By-law



being ultra vires. As Mrs. Bridges rightly states, this could result in “*a conveyancing nightmare*” and as Mr. Robinson contends this may undermine purchasers being able to rely upon entries on the Land Registry.

30. I accept that one would be entitled to expect both conveyancing attorneys involved in a purchase to be aware of these proceedings and to advise their clients accordingly in relation to the potential effect on the By-laws pending determination of the appeal. However, I have a concern that if, a stay is not granted and the amendment is made at this stage, the appeal will be rendered nugatory.

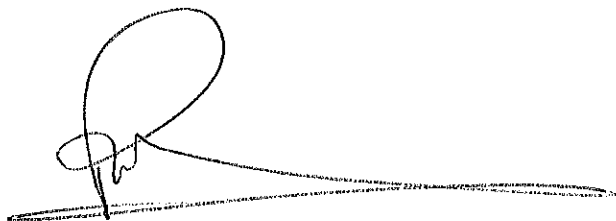
31. Although not having the in-depth knowledge that the Judge at first instance would have had at this stage to determine the issue of whether or not there is a good arguable case, this is not an application in which the appeal can be termed as being frivolous or vexatious. Having regard to the observations of the trial judge about the important nature of the issues⁹, the appeal from the pleadings raises extremely important matters for determination by the Court of Appeal. I am satisfied that it is an arguable appeal.

32. Accordingly, I am of the opinion that good cause has been shown and there will be a stay pending the hearing of the appeal. I have deliberately not ordered that it be pending the determination of the appeal. This is because the continuation of the stay of execution may be something that the Court of Appeal, having had the benefit of much fuller argument at the appeal hearing, may wish to reconsider pending the delivery of its decision. In reaching my decision to retain the long-standing status quo in relation to the By-laws,

⁹ Set out at paragraph 16 above.

when considering the balance of convenience and any prejudice caused as a result of stay of execution being granted or not granted, I have also had regard to the fact that the appeal is due to be heard in just over four weeks' time.

33. Costs should be the normal order for these proceedings, namely costs reserved.



THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

