[2017] JMCA App 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2016

APPLICATION NO 69/2017

BETWEEN	**SNIVELY JUNIOR BARRETT**	**APPLICANT**
AND	**HERON DALE**	**1st RESPONDENT**
AND	**PEARNEL CHARLES, JUNIOR**	**2nd RESPONDENT**
AND	**PATRICE CHARLES-FREEMAN**	**3rd RESPONDENT**

Canute Brown instructed by Brown, Godfrey & Morgan for the applicant

Miss Sasha-Lee Hutchinson instructed by Keith Brooks for the 1st respondent

Linton Gordon and Obiko Gordon instructed by Frater, Ennis & Gordon for the 2nd and 3rd respondents

26 September and 19 October 2017

IN CHAMBERS

PHILLIPS JA

[1] This is an application for a stay of execution of the judgment of Dunbar Green J delivered on 24 July 2015, wherein she denied the applicant's application for declarations against the respondents and awarded costs to the respondents pending the appeal of that judgment.

Background

[2] Mr Peter Lawrence (deceased) entered into a lease dated 27 March 2001 with regard to a dwelling house on lands at Lot 10 Knapdale in the parish of Saint Ann (the property) with the applicant. That lease contained an option to purchase the said premises for $4,600,000.00 within 45 days after written notice had been given to the applicant that the registered certificate of title for the said property was available. Mr Lawrence died on 25 July 2001, and by his will dated 26 May 1999, he named the 1st respondent and Mr Christopher Gibbs the executors of his estate, and named the 2nd and 3rd respondents as the beneficiaries of the said property. Probate of Mr Lawrence's will was granted to the 1st respondent and Mr Gibbs in 2003 and on 3 December 2008, the property was transferred to the 2nd and 3rd respondents. The lease expired March 2002 (one year prior to the grant of probate in 2003) and the option to renew the lease was not exercised. After the expiration of the lease, the applicant held over paying rent of $15,000.00 as a statutory tenant. The property is a 'controlled premises' for the purposes of the Rent Restriction Act.

[3] On 31 May 2011, the applicant filed a claim seeking declarations that the lease was a binding contract that created an equitable interest in the land and that the devise to the 2nd and 3rd respondents had lapsed entitling them only to the purchase price agreed by the applicant. He also sought orders that would result in the land being re-transferred from the 2nd and 3rd respondents to the 1st respondent and Mr Gibbs, and for specific performance of the agreement and damages.

[4] The 2nd and 3rd respondent's filed a fixed date claim form dated 17 February 2012 against the applicant for rent owing between 2005 to 2009, recovery possession of the property and mesne profit in the sum of $50,000.00 per month from 1 October 2009 and continuing.

Reasons of Dunbar Green J

[5] The claims filed by the applicant on 31 May 2011 and that filed by the respondent on 17 February 2012 were consolidated and heard by Dunbar Green J between June and July 2015. In her reasons for judgment, the learned judge considered four main issues: (1) whether the option to purchase was exercisable after the lease had expired; (2) whether the applicant was entitled to specific performance of the agreement; (3) whether the respondent's in their claim for recovery of possession had satisfied the statutory requirements for an order for recovery of possession; and (4) whether the respondents were entitled to mesne profits and if so, at what rate.

[6] On the first issue, the learned judge found that although the applicant was entitled to continue to enjoy his rights under the expired lease as a statutory tenant, those rights did not include the option to purchase as it was not a term of the tenancy agreement, but was separate. She also found that the option to purchase did not survive the expiration of the lease and so at the time the land was registered on transmission to the 1st respondent, there was no equitable interest in favour of the applicant. Accordingly, the applicant was not entitled to specific performance of the option to purchase because that option expired with the lease, and further in any event,

the option was invalidated because of the rule against perpetuities. The learned judge therefore refused to grant the declarations sought by the applicant.

[7] The learned judge also found that there was no evidence that a caveat had been registered on the certificate of title for the property (despite claims made by the applicant in his witness statements), nor was there evidence that had established that the 1st respondent or Mr Gibbs was aware of the option to purchase. She also found that since the devise was made before the option to purchase was granted, the gift would only lapse if the option had been exercised by the applicant when it was open to him to do so. Accordingly, she found that there was no basis for the court to order a transfer of the property from the 2nd and 3rd respondents to the 1st respondent and Mr Gibbs in their capacity as executors or to grant specific performance in relation to the option.

[8] In deciding whether to grant recovery of possession, the learned judge found that before recovery of possession is granted, the landlord must prove that he had a definite intention to act consistent with the statutory reasons for requiring possession as stated in the notice to recover possession. The learned judge cited with approval the dicta of Lord Denning in **Betty's Cafés Ltd v Phillips Furnishing Stores Ltd** [1958] 1 All ER 607 to support her finding that although the reason for requesting recovery of possession in the instant case was that the 2nd and 3rd respondents required the property for their own use, there was no evidence to show that at the time of the hearing the 2nd and 3rd respondents required the property for their own use. The learned judge also refused to grant an order for recovery of possession because there

was no evidence placed before her indicating that less hardship would be caused to the 2nd and 3rd respondents by granting the order rather than refusing it, nor was evidence offered to show that they were unable to secure alternative accommodation. She therefore found that the 2nd and 3rd respondents had not satisfied the evidential requirements for the grant of recovery of possession.

[9] The learned judge found, in reliance on **Stirling v Leadenhall Residential 2 Ltd** [2001] 3 All ER 645, that since the applicant was a statutory tenant in lawful possession, while he was liable for non-payment of rent, he was not liable for mesne profits.

[10] The learned judge refused to order payment of rent because she found that the 2nd and 3rd respondents had failed to prove that the applicant owed rent.

[11] In all the circumstances, the learned judge dismissed both the claim filed by the applicant and that filed by the 2nd and 3rd respondents and awarded costs on the application brought by the applicant to the respondents to be taxed if not agreed, and costs to the applicant on the application filed by the respondents to be taxed if not agreed.

The appeal

[12] On 20 January 2016, the applicant lodged an appeal against the decision of Dunbar Green J on the following grounds:

> "**a.** The learned Judge in the Court below erred in law, in holding that the option that provided that the Grantor

promised to give notice to the Grantee as soon as title for the land became available and that the Option should be exercised within forty five days of the receipt of that notice was not time bound and offended the Rule against Perpetuities.

b. The learned Judge misdirected herself in law as to whether the [applicant] had an equitable interest in the demised premises as to when a person, on taking a transmission as personal representative is vested with the estate of a deceased person. By failing to apply the provisions of Section 130 of the Registration of Titles Act she wrongly concluded that the date of the entry of the registration of the instrument of Transmission was the effective date of the vesting of the estate and not the date of death of the deceased.

c. The learned Judge erred in law in holding that the Option to purchase the demised premises was terminated at the end of the term of the lease even though the [applicant] could not exercise the option without the condition undertaken by the Grantor to give notice of the availability of the title, being first fulfilled and that the Grantor died during the term.

d. The Learned Judge erred in law in her interpretation of the Registration of Titles Act and its application to the receipt of the trust property by the [2nd and 3rd] Respondents, in circumstances where there were aware of the pre-existing rights of the [applicant], evidenced by their filing of a Claim exhibiting the Agreement granting the option to purchase the property and the evidence of the [applicant] that the [3rd] Respondent stated that the sale price had to be increased. The Learned Judge's failure to resolve this issue of fact led to her treatment of the [applicant's] claim, *in personam*, as being untenable and defeated by the Title of the [2nd and 3rd] Respondents."

[13] The respondents had also lodged a counter-notice of appeal filed 17 February 2016 on the basis that *inter alia* the learned judge erred when she dismissed the action for recovery possession. On that appeal, the respondents are seeking a forthwith order for recovery of possession against the applicant.

The application for a stay

[14] On 12 April 2017, the applicant filed a notice of application for a stay of the judgment of Dunbar Green J delivered 15 December 2015 pending appeal. That application was made on the following grounds:

> "1. The [applicant] has a real prospect of succeeding on this Appeal against the Judgment
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> 2. The Respondent has taken steps to enforce the Judgment, being costs awarded pursuant to Default Costs Certificate, by causing to be issued out of the Supreme Court a Writ of Seizure and Sale that the Applicant was informed by the Bailiff of the Court on the 6th April, 2017, will be executed soon, but the Applicant is unable to satisfy the debt.
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> 3. Rule 2.11(2) of the Civil Procedure Rules, 2002 provides, and in the exercise of the Court's Inherent Jurisdiction, that a Judge may make an Order for a stay of execution of a judgment against which an appeal had been made, pending the determination of the appeal."

[15] In his affidavit filed 12 April 2017, in support of this application, the applicant indicated that he had filed a claim against the respondents that had been dismissed with costs to the respondents. He also indicated that the respondents had filed a counter notice which was also dismissed with costs to the applicant. He deponed that he had been reliably informed that his attorneys had not taken steps to obtain the costs awarded in his favour because they are awaiting the hearing of the appeal. However, he deponed that in the week prior to the filing of his affidavit, bailiffs visited his home with a warrant of seizure and sale for an amount in excess of $1,000,000.00. He stated that the bailiffs had marked some items of household furniture and made a list of other

household items, some of which belonged to his wife and mother. He deponed that the bailiffs "left saying I am to come up with the cash or they will come back to take the things". He deponed that their actions caused great distress to his elderly mother and that a seizure of the goods would cause hardship to his family at this time. He also indicated that he was unable to pay the sums requested immediately as he was unaware that a bill of costs had been laid, he was not therefore prepared to make payments of such a large sum of money, and so he needed time to settle the amount due on the bill.

[16] On 21 August 2017, Obiko Gordon, attorney-at-law for the 2nd and 3rd respondents, filed an affidavit opposing the application for a stay on the basis that the 2nd and 3rd respondents were being prevented from acting on, and benefitting from their legal ownership of the property; that the applicant had no real prospect of success in the appeal; and that the 2nd and 3rd respondents will suffer severe prejudice should the judgment be stayed.

[17] On 8 September 2017, Mr Norman Godfrey filed an affidavit in response to that filed by Mr Obiko Gordon wherein he deponed that despite the fact that the appeal is pending, the 2nd and 3rd respondents had filed a claim against the applicant in the Saint Ann Parish Court for recovery of possession, mesne profits in the sum of $80,000.00 per month from August 2015 to May 2016, interest at 6% per annum and costs. In relation to the award of costs that was made in the applicant's favour, Mr Godfrey deponed that he had not yet taken steps to quantify those costs because he was awaiting the outcome of the appeal. He further stated that the instant application was

not an attempt to prevent the respondents from benefiting from the fruits if their judgment but noted that the substantive appeal would have an impact on the proceedings that are presently before the Parish Court.

Submissions

[18] Mr Canute Brown indicated that the applicant had an appeal with a real prospect of success and that the applicant would be severely prejudiced if a stay was not granted because he was unable to satisfy the sums being claimed as costs by the 1st respondent, and any removal of the household furniture that had been marked would cause great distress to the applicant and his family.

[19] Mr Linton Gordon, counsel for the 2nd and 3rd respondents, contrary to the position taken in the affidavits of Obiko Gordon, submitted that he had no objection to the court granting a stay as requested by the applicant, as the 2nd and 3rd respondents had also filed a counter-notice of appeal challenging the learned judge's refusal to grant them recovery of possession. Mr Gordon, however, indicated that although he was prepared to consent to the stay, he would only do so as long as it would not affect the right of the 2nd and 3rd respondents to claim interest from the applicant in relation to any sums owing to the 2nd and 3rd respondents referable to the agreement. Mr Gordon also confirmed, as Mr Godfrey had deponed, that the 2nd and 3rd respondents had filed a claim in the Saint Ann Parish Court for *inter alia* recovery of possession of the property but he further indicated that that claim has not yet been disposed of.

[20] Counsel for the 1st respondent, Miss Sasha-Lee Hutchinson, objected to the stay on the basis that the applicant's appeal disclosed no real prospect of success since the learned judge was correct in her findings, and that the 1st respondent would be severely prejudiced if the court were to deny him the fruits of the judgment. The 1st respondent had however not filed any affidavit deponing to the position being advanced by her. Counsel relied on the learned authors of Halsbury's Laws of England, 4th edition reissue, volume 27(i), paragraph 110, to support her argument that the learned judge's finding that the option to purchase had not survived the expiration of the lease, and her finding that the gift to the 2nd and 3rd respondents had not lapsed because the applicant had not exercised his option to purchase when it was open to him to have done so was not palpably wrong. However, counsel's main contention, in reliance on **Little v Magle** 1914 CanLII 327 (SKDC) and **Bird and Others (Assignees of Robertson, a Bankrupt) v Bass and Others** (1843) 134 ER 841 was that the judgment could not be stayed because execution of the judgment had commenced with the bailiffs marking the goods prior to execution of the warrant of seizure and sale.

[21] Mr Brown in reply to Miss Hutchinson stated that the process of seizure had not been completed and so the judgment could be stayed, and he indicated that the cases relied on by Miss Hutchinson were distinguishable as they all related to matters concerning the unlawful possession of goods.

Discussion and analysis

[22] As a single judge of appeal, rule 2.11(1)(b) of the Court of Appeal Rules permits me to order "a stay of execution on any judgement or order against which an appeal

has been made pending the determination of the appeal". As this court had stated in **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 25, at paragraph [16]:

> "in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:
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> (a) The applicant's prospect of success in the pending appeal.
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> (b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.
>
> (c) The financial hardship to be suffered by the applicant if the judgment is enforced."

[23] In the instant case, while there appears to be little merit in the ground of appeal that indicates that the learned judge erred when she found that the option to purchase had lapsed and was invalidated by the rule against perpetuities, there may be *prima facie* some merit in the argument that the option to purchase had created an equitable interest in the property that was binding on the executors of Mr Lawrence's estate. Nevertheless, since Mr Gordon was willing to concede to the application provided that it did not interfere with the ability of the 2nd and 3rd respondents to claim interest, I would refrain from embarking upon any detailed analysis of the prospects of success of the appeal.

[24] Obiko Gordon did depone in his affidavit that the 2nd and 3rd respondents would suffer severe prejudice if a stay is granted since they would be prevented from acting on and benefitting from their legal ownership of the property. However, the 2nd and 3rd respondents are indeed receiving some benefit from their legal ownership of the property since the applicant is paying rent for the said premises in the sum of $15,000.00 per month and moreover, there is no evidence that they would suffer any financial ruin if the stay were to be granted. While the grant of a stay would prejudice the 1st respondent in that it would restrict his ability to recover costs immediately that had been awarded to him by Dunbar Green J, the goods have been marked and can therefore be sold and the proceeds given to him, once he is successful on appeal, and so he would therefore be protected in respect of recovery of the costs awarded to him. Further he had not deponed to any affidavit indicating that his inability to recover costs at this time would severely prejudice him, or how it would operate to his detriment, or that he could be severely adversely affected financially if a stay was granted.

[25] However, the applicant deponed that he will suffer severe prejudice if the application is not granted as he was unable to pay the sums owing which are in excess of $1,000,000.00. He also deponed that the seizure of the household furniture would cause great hardship to himself and his family. In all these circumstances, while I cannot say that the applicant will suffer greatly financially if a stay is refused, it is indeed evident that the applicant would suffer much more severe prejudice than the respondents if a stay is refused, because he is currently unable to pay the sums owed as he had said that he had not made any preparations to pay such a large sum of

money, and the items marked for seizure and sale are all being utilised in his home, and the removal therefrom would severely inconvenience and "cause great distress" to his elderly mother and other members of his family.

[26] The only issue remaining therefore was whether I am authorised to stay a judgment after the warrant had been executed. In **James Jackson v Curtis Arthurs** [2011] JMCA App 18, while the court found that it was unable to undo the action of the bailiff with regard to the seizure of the goods and chattels, it nonetheless ordered that no further execution occur pending the appeal or until order of the court. In the instant case, although the warrant for seizure and sale had been partially executed, and items of furniture have been marked, no goods belonging to the applicant have been seized or sold. Accordingly, in my view, I can indeed order a stay of execution of the judgment (see **The Contractor-General of Jamaica v Cenitech Engineering Solutions Limited** [2015] JMCA App 47 and **Regina (H) v Ashworth Hospital Authority and Others; Regina (Ashworth Hospital Authority) v The Mental Health Review Tribunal for West Midlands and North West Region and Others** [2002] EWCA Civ 923).

Conclusion

[27] In all the circumstances, there are some arguments raised by the applicant that disclose some prospect of success, and the risk of prejudice to the applicant if a stay is refused would be much greater that than which would accrue to the respondent if a stay is granted. Further, since there was no objection from the 2nd and 3rd respondents to this application, and also I have satisfied myself that I can indeed order a stay in this

matter as the goods have not yet been seized, I am hereby ordering a stay of the execution of the judgment of Dunbar Green J made on 24 July 2015 pending the determination of the appeal or until further order of this court. There shall be no order as to costs.