

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAYMAN ISLANDS APPEAL NO. C.I. MISCELLANEOUS NO. 8/87
GRAND COURT CAUSE NO: 68 OF 1987

22-12-87

IN THE MATTER OF THAT REGISTERED LAND KNOWN AS
SOUTH SOUND, BLOCK 21B, PARCELS 16 & 6

AND IN THE MATTER OF AN AGREEMENT FOR SALE OF SHARES IN
THE DAYTONA LAND CO. LTD. DATED THE 15TH APRIL 1986.

BETWEEN:	CHARLES KRAUSE PAUL COMMARATO CARLTON ACKROYD	PLAINTIFF/RESPONDENT
AND:	DAYTONA LAND CO. LTD	SECOND PLAINTIFF/RESPONDENT
AND:	EDMUND C. BODDEN MARY S. TKACH-BODDEN	DEFENDANT/RESPONDENT APPELLANT/DEFENDANT

Mrs. M. B. Tkach-Bodden in person.

Mr. Parkinson for the plaintiffs.

ORDER

The appellant, Mrs. Bodden, seeks a stay of execution, pending appeal, of orders made by Douglas J. on 17th September 1987 that The Soundings (a house) be sold by public auction, that the plaintiffs have possession of the property, and that she pay to them damages for trespass at the rate of \$500 per month from 20 December 1986 until she vacates the property.

At the outset, I should say that no application for a stay was made to Douglas J. However, Mr. Parkinson takes no objection on this point.

At this hearing, Mrs. Bodden appeared in person. She had been represented before Douglas J. by Mr. Chilcott, a Canadian lawyer. He was on 14th August 1987 granted limited admission by Douglas J. for the matrimonial proceedings brought by Mrs. Bodden against her husband and for this present matter.

In each case, she had been granted subsidised legal aid and in each case she had also been granted a certificate by the Clerk of the Court under section 4 of the Legal Practitioners Law, 1969, (as amended by section 2 of the Legal Practitioners (Amendment) Law, 1987) that the Clerk was satisfied that despite all reasonable efforts to

obtain the services of an attorney-at-law in the Cayman Islands, no one here was willing or able to act. Mr. Chilcott was instructed by Mrs. Bodden, in both matters, on that basis.

Mrs. Bodden explained that the reason that Mr. Chilcott was not present on this occasion was that she could not afford to pay his travelling and subsistence expenses, and that she had been unable to obtain the agreement of the Clerk of the Court to do so.

The Poor Persons (Legal Aid) Law says, in section 3, that the Court may grant a certificate to a person entitling him to free or subsidised legal aid, for the preparation of his case and generally throughout such proceedings and in any appeal. "Legal aid" is not specifically defined but section 5 says "the effect of the grant of a certificate shall be that the person.....shall have assigned to him the services of one.....or more legal practitioners who shall be entitled to such fees as may be prescribed and such travelling and other expenses incurred in the investigation and conduct of the proceedings as shall be certified by the Clerk of the Court to have been reasonably so incurred."

Section 8 says, in effect, that when the services authorised by the certificate have been discharged, it may be presented to the Treasury which will then pay the practitioner concerned the total amount to which he is entitled on the certificate.

It is therefore clear that the Law, though expressed in simple terms, contemplates that the attorney-at-law will in the first instance bear the costs of the case and will recover them at the end. This is in fact the usual practice here.

I imagine that when the Law was drafted, it was envisaged that this public service would be provided by lawyers resident in the Cayman Islands, and that it was not unreasonable to expect them to wait until the end of their cases before re-imbursing them. In any case of course, their travelling expenses are unlikely to be great, and the need for subsistence will very rarely arise.

When the Legal Practitioners Law 1969 was amended (in itself a necessary step because, previously, limited admission could only be granted under that law to lawyers instructed by Caymanian attorneys-at-law), no consequential amendments were made to the Poor Persons (Legal Aid) Law. The result, which is unfortunate, is that if the letter of the law is to be observed, a person who has been found to be in need of legal aid will either have to bear the costs himself initially, or else persuade the visiting lawyer to do so. I do not think that many overseas lawyers will be prepared to accept instructions on that basis.

Obviously it is necessary to monitor the occasions on which the overseas lawyer does need to come to the Cayman Islands and to keep his expenses to reasonable proportions, but that responsibility is already vested in the Clerk of the Court by section 5 of the Poor Persons (Legal Aid) Law. The Clerk can only certify for reasonable expenditure.

In the course of the present hearing, Mrs. Bodden asked me to order that her filing fees and Mr. Chilcott's travelling and

subsistence expenses should be met. I said at the time that I would make such an order so far as it was in my jurisdiction to do so. I now think I was wrong. The matter is an administrative one. It may be that there is a need to amend the law further to make more practicable arrangements for overseas lawyers who are engaged under the 1987 amendment, but I also think that it ought to be possible in the meantime for the Clerk of the Court to devise a practical expedient. The Clerk would of course wish to know in good time when the lawyer is to come to the Cayman Islands and will also be entitled to such information as will enable her to form a view as to whether the visit is a reasonable one. It would be for the legally-aided person to provide this information. But it should be possible for the time being to make some practical arrangement to meet his reasonable expenses.

The present proceedings arose out of a written agreement made on 15th April 1986 between the individual plaintiffs and the defendants Mr. and Mrs. Rodden. It was an agreement whereby those plaintiffs would sell to the Roddens their shareholdings in Daytona Land Company Ltd., which is a party to these proceedings.

That company is the legal owner of The Soundings. One of the terms of the agreement between the individual plaintiffs and the defendants was that so long as the agreement (which provided for the purchase of the shares by instalments) was honoured, the defendants would be entitled to possession of The Soundings.

The agreement also provided in paragraph 9 (b) that in the event of default by the purchasers, the individual plaintiffs would give them 60 days notice to remedy it, and that if they did not do so within that time, the individual plaintiffs would procure the company to sell The Soundings. The market value was to be agreed between the parties to the contract. In default of agreement, it was to be determined by a reputable land agent to be agreed between them. If they could not agree on that, the matter was to be referred to arbitration. The proceeds of sale were to be applied first in favour of the balance due to the individual plaintiffs. The surplus (if any) was to go to the Roddens.

At the hearing before Douglas J., Mr. Chilcott opposed the plaintiffs on two grounds.

The first was that they had failed to comply with the requirement to submit the matter to arbitration, as described above. The second was that the agreement was "fraudulent", there being a "fundamental breach" on its face. In the recital prefacing the agreement, the individual shareholders were described as being the owners of all the shares that comprised the issued capital of the company. In fact they only owned 90 percent. The other shares were owned by Mr. Rodden.

Each of these arguments was rejected by Douglas J.

I was also informed by Mr. Parkinson at the present hearing that Mr. Chilcott had not disputed the fact of the default and it is apparent from the judgment of Douglas J. that Mr. Chilcott, as an alternative submission, had also urged the judge to give Mrs. Rodden 60 days to raise the money to meet the default. He declined to do so.

In the course of the judgment, reference was made to sections 72 and 75 of the Registered Land Law. Before me, Mrs. Bodden herself referred to those sections and to sections 70 and 73. Early in his own submissions, Mr. Parkinson described the proceedings as being taken "to realise a security under the default provisions of a sale of shares" but later he said that the agreement was not a charge (ie. within the meaning of the Registered Land Law).

With respect I do not understand the references to the Registered Land Law. The contract was for a sale of shares being the majority shareholders in a company. The company itself was not a party to it. By paragraph 5(b) the vendors did for their part contract to give the purchasers possession of The Soundings and clause 9(b) contains an agreement between the parties that in the event of default, the vendors will procure a sale of The Soundings. But I cannot see that the contract in any way creates a charge within the meaning of the Registered Land Law by the purchasers, in favour of the vendors, over The Soundings.

In her present application, Mrs. Bodden re-iterated the two grounds of objection taken by Mr. Chilcott at the hearing.

Mr. Parkinson's response to this can be shortly stated. He says that if a stay is granted, the successful plaintiffs will be deprived of the fruits of their litigation, and their assets will be wrongly tied up. He referred me to the case Erpford Properties Ltd. v. Cheshire County Council [1974] 2 All E.R. 448. At page 454, Megarry J., as he then was, referred to the words of Cotton L.J. in Wilson v. Church (No. 2) (1879) 12 Ch.D. at 458, when he said "when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory". Before quoting that passage, however, Megarry J. had said "There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous.....".

Mr. Parkinson argued that the same principle applies here. He said that this is clearly a case where the appeal has no real prospect whatsoever of succeeding, and that it is therefore frivolous.

In relation to the first ground, he said that the defendants had been requested in writing to agree to the appointment of a land agent but had failed to respond. It was clear that before Mr. Chilcott had made his submission that the proceedings should be stayed pending arbitration, Mrs. Bodden had taken several steps in the matter. The learned judge therefore correctly refused to grant a stay.

The second ground was also patently bad. The allegation of a fraudulent and fundamental breach could not be sustained. The recital was itself not a part of the agreement. The description of the individual plaintiffs as being the holders of all the issued shares in the company's capital was clearly inadvertent and it was in any case immaterial. No one had been misled. All the parties knew, when the agreement was made, what the respective shareholdings in the company were. The true, intended nature of the contract was evident from the body of the agreement.

The fact is that when I began to hear the present application, with Mrs. Bodden conducting it in person, Mr. Parkinson had not of course put forward his grounds of opposition. Her lack of representation is something that has caused me some concern. Nevertheless, having heard Mr. Parkinson, I have to say that his objections are in my view well-grounded. I cannot see that Mr. Chilcott's presence on the present application could have made any difference. Both of the grounds which he relied on before Douglas J. are before me. What he was saying was clear but I also consider that Mr. Parkinson's response here was equally clear. An appeal on those grounds in my judgment could have no real prospect of success.

In her affidavit supporting her application, Mrs. Bodden did however refer to three other matters.

She said that she was not present when Douglas J. delivered his decision in chambers on 22nd September and she said that she did not receive a copy of his reasoned decision until 10th October.

Mr. Parkinson also said that he had not been present when the decision was given in chambers, and he said he obtained his copy from the Court's Registry on 29th September. A judge may order in chambers, in the absence of the parties, that a reserved decision do issue. In those circumstances, I think it is important that both parties be notified, simultaneously, by the Registry when this is done. In the present case however, there is nothing to show that Mrs. Bodden was discriminated against and she has not been prejudiced in lodging her appeal by the fact that she received her copy on 12th October, and the reasons she herself gave for raising the point did not go to the substance of the appeal.

Mrs. Bodden also relied in her affidavit on the contention that The Soundings was, as between her husband and herself, the matrimonial home, and that in matrimonial proceedings between them, I had already made interim orders to preserve her interest in it pending suit. This point does not appear to have been taken before Douglas J. They were of course, rulings between the husband and wife, which in the circumstances of this case cannot affect the outcome of this present suit involving the rights of third parties.

Finally, she also contended that there had previously been other defaults in agreements made with the plaintiffs which they had not chosen to enforce by means of a sale, and that they were in fact receiving a higher rate of interest than they would obtain from a financial institution and were therefore not suffering hardship. These are not in my judgment in themselves sound grounds for appeal in this case. Mrs. Bodden did however, also ask me to take into account the fact that The Soundings is the matrimonial home in favour of exercising a discretion to stay the proceedings.

A stay is a matter of discretion. As I have indicated, I agree with Mr. Parkinson's submission that the appeal has no real prospect of success. In the circumstances of the case, I consider that I should exercise my discretion so as to refuse to grant a stay.

There will be an order accordingly. Mrs. Bodden must pay the plaintiff's costs on this application.

D. Hull

David Hull
Puisne Judge

22 December 1987.