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IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
C.I.C.A. Misc. No. 1 of 1985

13-03-85

IN THE MATTER OF section 77 of the Registered Land Law

AND IN THE MATTER of several charges between Paradise Manor Ltd. as Chargor, and The Bank of Nova Scotia as Chargee, pertaining to West Bay Beach South Registration Section, Block 13 B, Parcels 11, 12, 14, 124, 125H61 and 125H80

AND IN THE MATTER OF a Debenture created by Paradise Manor Ltd. in favour of The Bank of Nova Scotia

BETWEEN	THE BANK OF NOVA SCOTIA	PLAINTIFF
AND	PARADISE MANOR LTD. (In winding-up)	First Defendant
AND	WILLIAM W. BECKER	Second Defendant
AND	MARGUERITE L. BECKER	Third Defendant

R. Alberga Esq. Q.C. (with him Foster, Esq.) for applicants
 second and third defendants
 C. Adams Esq. (with him Ritchie, Esq.) for first defendant/respondent
 C. Cohen Esq. Q.C. (with him Shea Esq.) for respondent/plaintiff.

RULING

This is an application to a single Judge of the Court of Appeal for a stay of execution pending the determination of an appeal to that Court. The learned trial Judge refused to grant a stay.

One point should be made at the outset. This is not an appeal from the decision of the learned trial Judge refusing a stay. One does not, therefore, approach the matter in the way one approaches an appeal from a decision involving an exercise of a discretion. Naturally, one takes account of the decision and the reasons therefor. But this is a completely separate application and the exercise of my discretion under

section 16 (3) of the Court of Appeal Law is unfettered save as provided in that provision of law. (See O 59/13/4 of the English Rules of the Supreme Court and O 59/14/6). The jurisdiction is concurrent (Cropper v Smith 1883 24 Ch.D. 305).

However, in the context of this case, a stay may not be granted unless "good cause" is shown.

The respondent development company, Paradise Manor Ltd (PML), is now in liquidation. The respondent bank, Bank of Nova Scotia (BNS) held several registered charges over land owned by PML. The applicants are the guarantors of moneys advanced by BNS to PML and secured by the several charges and a debenture. The first applicant is also the beneficial owner of PML.

BNS applied to the Grand Court under section 77 of the Registered Land Law for authority for a variation of section 75 of that Law contained in those charges, namely a power therein providing for sale by private treaty, to be acted upon. The proposed sale by private treaty was embodied in a contract between BNS and Georgetown Associates (GA) for the sale of substantially all the land and buildings owned by PML for \$7,500,000. The contract was subject to BNS obtaining the authority of the Court to sell by private treaty. The order of the learned Judge authorised BNS to act upon the variations. The guarantors have appealed against that decision. The liquidator of PML supports the guarantors' application for a stay for the protection of unsecured creditors. The liquidator bases the case for a stay on the assertion that the consideration for the proposed sale is under value. That is also the basis for one of the grounds of appeal of the guarantors.

So far as the liquidator is concerned I think that it can be said here and now that a sale at any of the valuations canvassed before the learned trial Judge would not protect the unsecured creditors as there would still remain a substantial balance owed by PML to BNS. On any view there

would be nothing left for the unsecured creditors.

One of the terms of the contract between BNS and GA was in the following terms:

"COURT ORDER

The obligations of the Vendor and the Purchaser hereunder shall be terminated, and this agreement shall be null and void and of no further force and effect unless each of the following have been satisfied by March 31, 1985. In the event of termination of this agreement under this clause, the Deposit shall immediately be returned to the Purchaser.

1. The Vendor shall have obtained an order or orders of a court of competent jurisdiction in Cayman approving the within sale, on the terms herein and all appeal rights whatever under such orders shall have expired at the time of Closing;"

2....

Learned counsel for BNS relied strongly on that clause in resisting an order for a stay contending, inter alia, that by reason of that clause a stay would in effect amount to a reversal of the trial Judge's decision and deprive BNS, as the successful litigant, of the fruits of that litigation. Quite obviously an appeal cannot be heard by the Court of Appeal before the Summer Session which is well after the completion date of 31 March 1985.

On a literal interpretation of that clause the contract will become "null and void and of no further force and effect" on 31 March in any event because all appeal rights will not have expired by that date. On the face of things the contract will automatically terminate on that date unless there is a variation of it or some enforceable ^{understanding} to the contrary.

Learned counsel for BNS has stated that his understanding is that completion will take place before 31 March in spite of the existence of appeal rights provided that there is no stay. He also says that, if there is a stay which cannot be lifted before the determination of the appeal in the Summer Session, he anticipates that GA, the purchaser, will rely on that clause for the termination of the contract.

The point may be made here that there is no evidence on the record that G.A. will use this provision as an escape provision in the event of a stay. Further, there is no evidence of a variation of the contract or any understanding to prevent its termination by reason of the existence of appeal rights on 31 March. It should be noted that there is no reference at all to a stay in this provision. In no way does it govern the consequences of a stay. It deals with the consequences of the existence of appeal rights which will continue at least until the determination of the appeal in the Summer Session (unless abandoned, which is unlikely). So any variation or understanding affecting the clause could continue accordingly. In the absence of evidence of GA's intention in relation to the grant of a stay I do not see how I can rely on that clause, which is completely silent on a stay, as supporting the objections of BNS to the grant of a stay. In my view, it was for BNS to demonstrate that the grant of stay would prejudice its position under the contract when there is nothing in the contract itself or anywhere else to support that contention. Surmise on the part of counsel is not sufficient. I cannot assume that BNS will be prejudiced under the contract by a stay when there is nothing in the contract to that effect and the contract itself, on the face of it, will terminate in the absence of action by the parties to it to preserve it. Any such action would be peculiarly within the knowledge of those parties.

The foregoing disposes of the main plank in the arguments on behalf of BNS in opposition to the stay.

However, it remains for the applicant to demonstrate "good cause" for the grant of a stay.

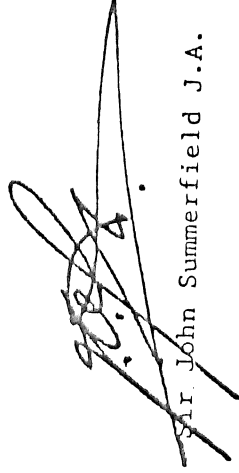
There is no doubt that the appeal is a bona fide one. The grounds of appeal are substantial meriting consideration by the Court of Appeal. The learned trial Judge himself recognised that substantial grounds of appeal existed. Probably the strongest ground of appeal relates to the contention of the guarantors that the right of sale has not as yet arisen

by reason of non compliance with statutory provisions which must be complied with before the right of sale arises. If the sale takes place it will be irreversible in the event that the appeal succeeds. If the property is sold at less than its true market value the burden on the guarantors to meet the balance due under their guarantee will be that much heavier. Although the guarantors would have recourse against BNS for damages if the sale is for less than the true value of the property, that would involve protracted, complex and expensive litigation and there would be difficulty in quantifying the loss. On the other hand, in the event of a stay, the sum owed to BNS would continue to earn interest.

In my view there is not demonstrable prejudice to BNS if the status quo is maintained. But if the sale goes through and the appeal succeeds the task of unscrambling the egg will be Herculean.

I am of the opinion that good cause has been shown. There will, therefore, be a stay pending the determination of the appeal. The applicants must, however, take all steps possible to have the appeal heard at the earliest date available.

Costs in cause.



Sir John Summerfield J.A.

13th March 1985.