In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 439

B E T W E E N:

(1) DENTON HERBERT MCNEIL SIMONS
(2) PAUL ANTHONY SIMONS
(3) MARK LINLEY ST. CLAIR SIMONS

Plaintiffs

and

(1) HOWARD HAYWARD
(2) DEDRA HAYWARD
(3) PATRICIA PARSONS
(4) CHRISSY HAYWARD
(5) SHAVON HAYWARD
(6) VALERIE SMITH
(7) JASON GIBBONS

Defendants

REASONS

Before:	**Hon. Alexandra Wheatley, Acting Puisne Judge**
Appearances:	**Mr Johnathan O'Mahony of Conyers, for the Plaintiffs**
	Mr Bruce Swan of Bruce Swan & Associates, for the First and Second Defendants
Date of Hearing:	12 April 2024
Date of Ruling:	12 April 2024
Date of Reasons:	11 June 2024

Trespasser Possession Proceedings; Order 113 of the Rules of the Supreme Court; Nature of Set Aside Application – Whether Interlocutory or Final Order; Stay of Execution; Leave to Appeal; Section 12 of the Court of Appeal Act 1964; Unified Right of Possession; Promissory Estoppel;

REASONS of Acting Justice, Alexandra Wheatley

INTRODUCTION

1. By an Originating Summons dated 29 December 2023 (**the Originating Summons**) the Plaintiffs brought trespasser possession proceedings under Order 113 of the Rules of the Supreme Court 1985 (**RSC**) against the Defendants on the basis that they remained in occupation of the property located at 28 North Shore Road (**the Property**) without the license or consent of the landowners, i.e. the Plaintiffs. On 8 February 2024 which was the return date of the Originating Summons, the First, Third and Sixth Defendants were in attendance, and all appeared as litigants in person. After hearing from the parties present, I made an order for possession (**Possession Order**) which was to be effective from 17 February 2024.

2. On 17 February 2024, the First and Second Defendants filed an application seeking to set aside the Possession Order under the RSC Order 113, Rule 8 and also sought leave to file a defence. At the hearing of the Set Aside Application on 20 February 2024 the First and Second Defendants were represented by Mr Bruce Swan. I dismissed the Set Aside Summons for which I provided an Ex Tempore Ruling (**Set Aside Ruling**).

3. Thereafter, on 22 February 2024 the Plaintiffs filed a Writ of Possession (**Writ of Possession**). The First and Second Defendants then filed a Notice of Appeal with the Court of Appeal on 26 March 2024 purporting to appeal the Possession Order. The First and Second Defendants subsequently filed an application on 11 April 2024 seeking an order to stay the execution of the Possession Order, i.e. the Writ of Possession, (**Stay Application**) pending the outcome of the Appeal. Given the date of execution of the Writ of Possession being days away, i.e. 16 April 2024, the application was listed before me on an urgent basis on 12 April 2024.

4. On 12 April 2024, I denied the Stay Application pending the outcome of the Appeal and awarded the costs of the Stay Application to the Plaintiffs, to be taxed if not agreed. These are my reasons for that decision.

LEGAL ARGUMENTS

5. The Defendants relied on their affidavit sworn on 11 April 2024 (**Defendants' Affidavit**) for this application. Mr Swan submitted that the Set Aside Ruling was not an interlocutory decision, but rather a final one. Consequently, he said that leave to appeal is not required. Mr Swan further submitted that as the Possession Order was a final order, the appeal was made in time as there would have been six weeks for the First and Second Defendant to lodge their appeal, i.e. by 2 April 2024. The Notice of Appeal was filed with the Court of Appeal on 26 March 2024.

6. Turning to the Plaintiffs' first position as to why the Stay Application should be dismissed, Mr O'Mahony submitted that there is in fact no appeal before the courts. Mr. O'Mahony relied on the case of *The Bank of Bermuda Limited v Junos* [2010] BDA LR 60, a decision of Ground CJ, which confirmed the position that an order refusing an application to set aside a possession order is interlocutory in character. As such, Mr O'Mahony submitted that leave is required to appeal the Set Aside Ruling in accordance with section 12 (2) (a) of the Court of Appeal Act 1964 (**the Act**).

7. Mr O'Mahony further highlighted that as this is an interlocutory order, the application for leave to appeal must be made no later than fourteen days from the date of the decision in accordance with Rule 2, 3 (a) of the Rules of the Court of Appeal for Bermuda 1964 (**COA Rules**). Therefore, the First and Second Defendants had until 5 March 2024 to file their application seeking leave to appeal.

8. Furthermore, Mr O'Mahony noted that section 12 (2)(a) of the Act provides that "*no appeal shall lie to the Court of Appeal*" without obtaining leave. Therefore, it was submitted that there is no active appeal. As the Stay Application has been made on the basis that it is pending the outcome of the Appeal, it follows that there can be no stay granted pending the Appeal because there is no appeal.

9. Mr O'Mahony also highlighted that the Possession Order required the Defendants to vacate the property by 17 February 2024, and that following the hearing of the Set Aside Application on 20 February 2024, the Plaintiffs filed the writ of possession on 22 February 2024. Counsel for the Plaintiffs had notified Mr Swan regarding its position that there was no active appeal considered to be lodged due to the Set Aside Ruling being interlocutory in nature on 5 April 2024. Notably Mr Swan did not respond to this correspondence and neither did he file any application for leave or any application for leave to appeal out of time when this issue was first brought to his attention.

10. Having heard Mr O'Mahony on the law, Mr Swan remained adamant that the matter ceased to be interlocutory in nature from the time the Set Aside Ruling was made, i.e. on 20 February 2024.

11. Mr Swan continued with his submissions as to why a stay should be granted in this matter. He argued that there were serious matters for the Court of Appeal to consider, as the First and Second Defendants would become homeless and also that the Second Defendant having a young child residing at the Property. Therefore, he argued that the detriment to the Frist and Second Defendants was very high in comparison to there being little to no detriment to the Plaintiffs. It was submitted by Mr Swan that the Court has a balancing act when considering the strength of the appeal and the possible harm to the parties.

12. Mr Swan also argued that the action was invalid because the Plaintiffs' father, who is a joint owner of the Property, was not heard or joined to these proceedings. He stated that it was essential to hear from the father as he was the one who made the promises to the First Defendant. Mr O'Mahony said this was simply not necessary as the Plaintiffs' father's position had been clearly set out in the affidavit evidence which also included a copy of the father's will, evidencing that there was no provision for the First Defendant therein.

13. In relation to the ownership of the Property, Mr O'Mahony noted that the Plaintiffs own a 50% share of the Property with their father owning the remainder. Mr O'Mahony relied on *Bull v Bull* [1955] 1 QB 234 for the legal principle that with joint tenants, as well as tenants in common, there is a unified right of possession. This means that each owner is entitled to exclude third parties from the whole of the Property.

14. Mr Swan was asked by me during the hearing as to what his response to the Plaintiffs' position that even if the First Defendant had a right to inherit the property, or a right of first offer for its purchase, what legal principle would apply to support the First Defendant would therefore have a right to occupy the property now. Mr Swan said that the First Defendant's position was that he was entitled to remain at the property until either of these events occurred. At this point Mr O'Mahony objected to this assertion as this position has not been put forward in the evidence presented by the First Defendant in support of either the application to set aside the Possession Order, or in relation to Stay Application.

15. I agreed with Mr O'Mahony that this evidence had not been presented previously, and that Mr Swan could now not attempt to give his own evidence of the First Defendant's position. More importantly, I highlighted that in the First Defendant's affidavit sworn on 16 February 2024 (**First Defendant's Affidavit**), which was filed in support of the set aside application, the First Defendant stated that his position is that the agreement with the Plaintiffs' father was that in

exchange for him carrying out maintenance at the Property, the First Defendant would be able to remain at the Property in one of the apartments in lieu of paying rent.

16. Furthermore, in this same affidavit, the First Defendant conceded that no maintenance has been carried out on the property since 2013. Consequentially, there can be no other conclusion than the First Defendant no longer having a right to remain at the Property, as he was no longer carrying out maintenance as had been previously agreed with the Plaintiffs' father.

17. As an alternative argument, Mr O'Mahony submitted that even if the appeal were live, that no stay should be granted. Mr O'Mahony relied on two Bermuda cases which set out the test that the Court must apply in stay applications, namely *Hong Kong and Shanghai Banking* v *Newocean Energy* [2021] CA (Bda) 21 Civ and *Ivanishvili v Credit Suisse* [2022] SC (Bda) 56 Civ. In *Credit Suisse*, the former Chief Justice Hargun set out the two-limb test to be applied when considering whether a stay should be granted being (1) solid grounds of appeal must be established, and (2) the strength of the appeal.

18. It was submitted by Mr O'Mahony that the Defendants cannot even get over the first hurdle of there being solid grounds of appeal. On the Defendants' own evidence, it is purported that the First Defendant was promised by the Plaintiffs' father that he would inherit the property or that he would be able to purchase the Property at a reduced rate. Mr O'Mahony argued that even if this were accepted (which it is not) neither of these propositions give the Defendants any current right of occupation.

19. Mr O'Mahony further submitted that for the purposes of a trespasser claim (as is this case), a plaintiff is required to demonstrate that he has a better title than that of the trespassing party which Mr O'Mahony says has been done. He noted that it was previously accepted by the Court that there was a lack of any evidence provided by the First Defendant which supported his assertions. Moreover, with the father's will now being produced, there can be no doubt that the First and Second Defendants have no right of occupancy.

20. The last issue that was raised was that of proprietary estoppel. Mr O'Mahony noted that there seemed to be confusion surrounding this argument, as Mr Swan cited "*propriety*" estoppel in the Notice of Appeal but referenced "*promissory*" estoppel in the supporting affidavit. Mr O'Mahony relied on his submissions made in the Set Aside Ruling wherein I had concluded that based on the evidence presented, there was no evidence that the First and Second Defendant acted to their detriment on reliance of the father's purported promise to gift the house to the First Defendant (which was the First Defendant's position given to the Court at the first hearing). Furthermore, Mr O'Mahony noted that the authority of *Gillett v Holt* [2001] Ch 210 was never cited during the Set Aside Application. It was also reiterated that any agreement between the father and the First Defendant for him to reside in the Property was based on the

First Defendant carrying out maintenance for the Property in lieu of rent. The First Defendant, in his own evidence, stated that he stopped carrying out any maintenance on the Property in 2013. Again, no detrimental reliance can be shown.

CONCLUSION

21. I accepted that the Set Aside Ruling is interlocutory in nature in accordance with *The Bank of Bermuda Limited v Junos*. Therefore, the Set Aside Ruling requires leave to appeal as is required by section 12(2)(a) of the Act. As a direct consequence of there being no appeal, no relief can be granted for an application to stay execution pending an appeal.

22. Should this position be wrong, I accepted the alternative argument presented by Mr O'Mahony that even if there was an active appeal, the test as set out in *Credit Suisse*, is not met. Specifically, I reject that any solid grounds of appeal have been presented to the Court by Mr Swan as the First and Second Defendants, in my view, unequivocally have no current right to occupy the Property. The First and Second Defendants also fail to reach the second limb of there being merit in the appeal. This because I do not accept that promissory estoppel applies having already found that there was no detrimental reliance and I accept Mr O'Mahony's submissions that the father is not required to be a plaintiff in this matter as the Plaintiffs individually have their own rights to exercise against trespassers.

DATED: 11 June 2024

ALEXANDRA WHEATLEY

ACTING PUISNE JUDGE OF THE SUPREME COURT