

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 110 OF 2008

APPLICATION NO. 159/08

BETWEEN	WATERSPORTS ENTERPRISES LTD.	APPELLANT
AND	JAMAICA GRANDE LIMITED	1ST RESPONDENT
AND	GRAND RESORT LIMITED	2ND RESPONDENT
AND	URBAN DEVELOPMENT CORPORATION	3RD RESPONDENT

Dr. Lloyd Barnett, Keith Bishop and Miss Kerry-Ann Ebanks instructed by Bishop and Fullerton for Appellant/Applicant.

Stephen Shelton, Miss M. Wong and Gavin Goffe instructed by Myers Fletcher Gordon for Jamaica Grande Ltd.

Mr. Christopher Samuda instructed by Samuda and Johnson for Grande Resort.

John Vassell Q.C. and Miss Tenesha Watkin instructed by Vacianna and Whittingham for Urban Development Corporation.

IN CHAMBERS

December 9, 2008 and February 4, 2009

HARRISON, J.A.

The Application

1. This is an application by WaterSports Enterprises Ltd. (the Applicant/ Appellant) to stay execution of the order of Brooks, J., made on the 25th of September, 2008.

2. The terms of the order of the learned judge are as follows:

1. Watersports Enterprises Limited does not have any estate or interest in any of the lands comprised in Certificates of Titles registered at Volume 1211 Folio 653 and Volume 1094 Folio 240 and Volume 1094 Folio 241 of the Register Book of Titles;
2. Watersports Enterprises Limited does not have any estate or interest in either of the land comprised in Certificates of Title registered at Volume 1236 Folio 249 or Volume 1059 Folio 240 of the Register Book of Titles;
3. Judgment for the Defendants against the Claimant in Claim No. 2004 HCV 02189;
4. The injunctions granted in Claim No. 2004 HCV 02189 are hereby discharged;
5. The Registrar of Titles shall forthwith remove Caveat No. 1317519 from affecting Certificates of Title registered at Volume 1211 Folio 653, Volume 1094 Folio 240, Volume 1094 Folio 241, Volume 1236 Folio 249 and Volume 1059 Folio 240 of the Register Book of Titles;
6. A Case Management Conference to be held on the 7th of October 2008 at 9:00 for 45 minutes in respect of Fixed Date Claim Form No. 2004 HCV 2364 to provide directions concerning an enquiry as

to damages allegedly suffered by Jamaica Grande Limited as a result of Watersports Enterprises Limited having lodged Caveat No. 1317519;

7. Watersports Enterprises Limited shall quit and deliver up on or before the 31st day of October 2008, to Grande Reports Limited and/or The Urban Development Corporation, all those parcels of land forming parts of the lands comprised in Certificates of Title registered at Volume 1236 Folio 249, Volume 1059 Folio 240, Volume 1211 Folio 653, Volume 1094 Folio 240 and Volume 1094 Folio 241 of the Register Book of Titles;
 8. Costs of all other parties to be paid by Watersports Enterprises Limited, such costs to be taxed if not agreed;
 9. Certificate for two counsels granted in respect of each claim.
3. In consequence of the foregoing, the order sought inter alia, by the Applicant is as follows:
- "1. That the judgment of Mr. Justice Brooks delivered on the 25th day of September 2008 be stayed pending the outcome of the appeal, in particular the order which requires the Appellant to vacate on or before the 31st October 2008 the premises it occupied and conduct its business from since the 1960s.; and
-"

The Grounds in Support of the Application

4. The grounds on which the Applicant is seeking the orders are, inter alia, as follows:

- a. The Appellant has a good and arguable case on appeal in that the learned judge misinterpreted Section 24 (4) of the Urban Development Corporation Act (UDC) thus depriving the Appellant of its property or rights to private property it has occupied openly and undisturbed for well over 40 years in breach of the protection of its property rights granted by section 18 of the Constitution;
- b. The learned judge misdirected himself by concluding that the agreement signed between the Appellant and the hotel operators which was made after the expiration of the limitation period refers to land occupied by the Appellant and to which UDC's name is endorsed on title and/or makes it clear that Watersports did not have exclusive rights to occupy any of the UDC's lands.
- c. The learned judge erred in law in not finding that the doctrine of proprietary estoppels applied having regard to the substantial expenditure that the Appellant had incurred in building structures on the lands in question with the knowledge and/or acquiescence of the Respondents or their predecessors in title.

- d. The learned judge although acknowledging that the Appellant was entitled to recover damages for the remainder of the contract erred in holding that it was not necessary to appoint a date for the assessment of damages due and payable to the Appellant.
- e. There is no indication that the premises occupied by the Appellant is needed for exclusive use by any of the Respondents as in recent times Grand Resort has provided more comfortable office space for the Appellant.
- f. The Appellant is unable to find suitable docks and/or areas of the sea to construct piers, jetties, offices and stores house to relocate its businesses.
- g. Five weeks was unreasonable for the Appellant to relocate its business to include over 12 medium and large boats, 67 regular employees, several offices, compressor rooms, store rooms and other facilities;
- h. The actions of the Respondents have impaired the financial fortunes of the Appellant, as the Appellant was not allowed to solicit business on the hotel property with the result that the resources needed by the Appellant to relocate and fund the

purchase of land and to construct offices and other buildings and piers and jetties is not available at this time;

- i. The eviction of the Appellant will ruin its business and
- j. The Appellant is likely to face numerous law suits from its suppliers, guests and lessors of boats among other persons.

The Relevant Factual Background

5. The facts reveal that the Applicant had been operating a Watersports business for over forty (40) years on properties registered initially in the name of the Urban Development Corporation (UDC) and Mallards Reef Hotel Limited. There were several agreements between Watersports, and adjacent hotel operators granting exclusive concession rights to Watersports. In December 2002, Watersports entered into an agreement with Jamaica Grande Limited, (Jamaica Grande) whereby Watersports would be the exclusive provider of water sports services to Jamaica Grande's guests. Jamaica Grande owned and operated a hotel adjacent to the beach, at the northern section of the Ocho Rios Harbour. However, Watersports also provided watersports activities for persons other than the hotel guests.

6. In 2004 Jamaica Grande terminated its contract with Watersports as a result of the sale of the premises to Grand Resort Limited. Jamaica Grande sought to have Watersports remove its operation from the hotel property as well as from beach land adjacent to the hotel property. Watersports lodged caveats against the titles for the

hotel property as well as for the beach land. It also brought a claim in which it sought damages for breach of the 2002 contract and the resulting loss of profit, relocation costs, a Declaration of proprietary estoppel, a Declaration that the Applicant had a licence coupled with an interest and/ or an irrevocable licence and/ or the Applicant had a licence only determinable by reasonable and adequate notice. The Applicant also claimed an injunction prohibiting Jamaica Grande from terminating the said 2002 contract. Watersports also sought declarations as to its interests in the parcels of land in question. Both Jamaica Grande Limited and the UDC filed Fixed Date Claim Forms claiming among other things discharge of the caveats lodged against the titles.

The Applicable Principles

7. It is an established principle that a single judge of Appeal or the Court should not grant a stay of execution pending the hearing of an appeal unless the appellant can show that the appeal has some prospect of success.
8. The present approach to applications for a stay pending the hearing of an appeal has been highlighted in **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887 the headnote of which reads as follows:

'Where an unsuccessful defendant seeks a stay of execution pending an appeal to the Court of Appeal, it is a legitimate ground for granting the application that the defendant is able to satisfy the court that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success. The old rule that a stay of execution would only be granted where the appellant satisfied the court that if the damages and costs were paid there would

be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and does not reflect the court's current practice.'

9. Although the **Linotype** case dealt with a money judgment, it is clear that a major consideration as to whether to grant a stay must be the prospect of success of the appellant when his appeal is heard. In their arguments before me, counsel for the respective parties recognised that the onus is on the appellant to show that the appeal has some prospect of success. A stay may be granted if the appellant discharges that onus; but if he does not, there is no point in a stay.

10. Under the Civil Procedure Rules 2002 (the CPR), Rule 42.9 states that a party must comply with a judgment or order immediately, unless, inter alia, the court varies the time for compliance. It is also abundantly clear that unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. As a single judge of appeal it follows that it is within my discretion whether or not to grant a stay. Whether I should exercise my discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. These principles are reinforced by the CPR and must be exercised in the light of the overriding objective of dealing with cases justly.

The Submissions

11. In my view, the crucial issue which will be argued in the appeal is whether or not the applicant had established that it had exclusive rights to occupy the UDC's lands by

virtue of adverse possession as at 1984. Dr. Barnett submitted that there was uncontradicted evidence which showed that the applicant had been using the peninsula without interruption for the conduct of its business since 1972, and that accordingly it had acquired a possessory title to the UDC lands.

12. Mr. Vassell Q.C submitted on the other hand, that the applicant had failed to establish its right to a possessory title. He argued for instance, that a concession was granted to the applicant in 1976 and that it was determined in 1979. He submitted that the effect of that evidence was that certainly in 1976 the occupation of the land was pursuant to an agreement hence that period between 1976 and 1979 would not run during the alleged limitation period.

13. Mr. Vassell Q.C also submitted that the evidence before the learned judge had indicated that subsequent to the 14th March 1980, the appellant's occupation of the beach lands and hotel property was derived from an order of the Supreme Court which was subject to limitations and therefore could not have been considered adverse.

14. Mr. Vassell added one more string to his bow. He submitted that based on the applicant's own case, during the 1980's, the Ocho Rios Angling Association had built a substantial pier which was connected to the peninsular and had carried out its operations from that location. He therefore argued that this showed that the applicant's possession was not exclusive hence adverse possession could not arise.

15. The learned judge said in his judgment that a factor which affected the applicant's interest in the UDC land was that it had permission to occupy it. The judge made reference to the cross-examination of Mr. Smatt and the several agreements which were entered into between the applicant and various hotels over the years and concluded that those agreements were along the same lines as the agreement entered into in 2002. He then examined the latter agreement in detail and had this to say:

"The agreement made it clear that Watersports did not have an exclusive right to occupy the UDC land or any portion of the hotel property. Paragraph 5 of the agreement specifically reserved rights to Jamaica Grande's "Agents, Employees, Workmen, Guests and all persons authorised by Jamaica Grande such swimming, wading, sailing, fishing and beach rights in respect of the beach, jetty and waters adjacent to or forming part of the property owned by Jamaica Grande and all such rights to enter as may be reasonable in connection therewith.

Paragraph 6 of the agreement went on to impose a number of obligations on Watersports, including:

- a. a restriction on encumbering "the property of Jamaica Grande or any part thereof to which Watersports may have access (6 (b));
- b. permitting Jamaica Grande's servants, agents and others to "pass and re-pass over and along any jetty, pier, beach and other property occupied" by Watersports (6 (e));
- c. to keep Jamaica Grande indemnified against any claim for loss or damage arising out of its operations (6 (g)), and significantly;
- d. on the termination of the agreement "to deliver up the property occupied by Watersports to Jamaica Grande in such - good order, state and condition as the same ought to be... fair wear and tear excepted(6(o))"

16. The learned judge therefore concluded that by virtue of the above provisions it was abundantly clear that the applicant's presence, on the UDC lands as well as on the hotel property, was by virtue of agreements. He therefore held that the applicant's obligation to deliver up the property upon the termination of the agreements was definitive of its status with regard to the lands. He also held that so far as the UDC was concerned time would not run against it while its lands were the subject of a lease.

17. I now turn to the issue of proprietary estoppel.

18. Dr. Barnett submitted that the learned judge erred in law in failing to determine what was the appropriate amount of time required under the equitable principle of proprietary estoppel to permit Watersports to remain on and to continue to use the UDC land having regard to the fact that Watersports had expended money and effort in establishing structures on that land. Miss Wong submitted however, that the ground of appeal dealing with the issue of proprietary estoppel has no chance of success.

20. The learned judge found inter alia, that the appellant had nothing other than a contractual licence and that that licence came to an end upon the sale of the hotel property to Grande Resort.

Conclusion

21. In my judgment, there is merit in the submissions of Dr. Barnett. It would appear from reading the judgment of the learned judge that he had drawn certain conclusions from the 2002 Agreement although there was really no documentary evidence placed before him as to the actual terms of any of the previous agreements.

There is clearly in my view, a good and arguable case on appeal as it relates to the possessory title of the applicant in respect of the UDC lands.

22. I also agree with Dr. Barnett when he submitted that should the applicant be evicted from the peninsula at a stage before the appeal is determined this would likely cause its business to be ruined.

23. The application is therefore granted pursuant to paragraph 1 of the Notice of Application for Court Orders. There shall be no order as to costs as prayed for in paragraph 2.