

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

2014/CLE/gen/01620

Between

UBS BAHAMAS LTD.

Plaintiff

AND

JUNKANOO ESTATES LTD

First Defendant

AND

YURI STAROSTENKO

Second Defendant

AND

IRINA TSAREVA-STAROSTENKO

Third Defendant

Before: The Honourable Mr. Justice Milton A Evans

Appearances: Marco Turnquest, Chizelle Cargill with him for the Plaintiff.

**Mr. Phillip Lundy for First Defendant
The Second and Third Defendants Pro se.**

Hearing Dates: 7th November, 2017

RULING

THE APPLICATION

1. On the 23 March 2015 I made an Order granting Summary Judgment to the Plaintiff on their claim for Possession of Mortgaged property due to the Defendants' default on the Mortgage terms. The Defendants have by Summons dated the 24 April 2017 made application for leave to appeal the aforesaid Order and for a stay of Judgment pending the outcome of that appeal.
2. The affidavit in support of the Summons filed on the 24 April 2017, by the Defendants indicate that they propose to seek to argue 24 separate grounds of Appeal. I will not endeavour to set them out in this ruling as to do so would result in prolixity. In any event having reviewed the same I can safely say that only the first three can properly be considered grounds of Appeal as the others are a mixture of submissions and evidence.
3. The first three grounds which in my view require consideration were set out as follows:-

"35. Ground 1 of appeal is that the summary judgment of 23 March 2015 was given at a time when there had been confusion as to the date of the hearing, as was made clear by Counsel who then acted for the Appellants and, as a result, neither they nor their affidavit in opposition to the application

for summary judgment with the voluminous correspondence exhibited were not (sic) before the Supreme Court on 23 March 2015 and Counsel was not prepared.

Ground 2 of appeal is that the defence which the Appellants filed on 4 November 2014 and wished to raise before the Court was not considered by the judge.

Ground 3 of appeal is that the Appellants have a good defence against the claim for possession and had a real prospect of success. The defence is not just that the debt was abated by the Counterclaim but that the event of alleged default was brought about by the Respondent's own breaches of duties and obligations to the Appellants in the relationships regulated by the contracts between the parties..."

- 4. The Plaintiff in this matter has strenuously objected to the application for leave to appeal being granted. In their written submissions Counsel sets out the grounds for opposing the application as follows:-**

"i. The Defendants' proposed appeal is hopeless as their former Counsel conceded the application and this concession is binding on them.

ii. Some of the judges in the Court of Appeal have indicated in prior hearings that in their view the Defendants' Counsel conceded the Summary Judgment application.

iii. The Defendants have delayed for over two years to make this application.

iv. The Plaintiff would be greatly prejudiced if the Court allowed the Defendants to pursue their frivolous appeal as they have been in breach of the Mortgage terms since 16 April 2013, and notwithstanding the Plaintiff having an order for

possession and judgment in the amount of \$920,164.87, from 23 March 2015, it has been unable to execute on the same for over two and a half years.

v. The Defendants have failed to comply with the Court's Summary Judgment Order for over two and a half years and have failed to move out of the Property as ordered.

BACKGROUND FACTS

5. The action before the Court arose out of a Mortgagee's action for possession of a residential property at Lyford Cay belonging to the First Defendant. The Mortgage was granted by the First Defendant to secure its indebtedness under an agreement with the Plaintiff contained in a Commitment letter dated the 23 August 2011. The second and third Defendants signed as guarantors under the Mortgage and are also in occupation of the property in question.
6. On the 28 February 2014 the Plaintiff issued communication to the Defendants alleging a default in the Mortgage terms and demanded repayment of the whole outstanding balance. No repayment being forthcoming the Plaintiff brought the current action before the Court. On the 23 March 2015 the matter came on for hearing before me and Mr. Charles Mackay who represented all defendants at that time indicated that based on the authorities which he had seen he was not in a position to defend the claim. He did however, indicate that his clients wanted to pursue a Counterclaim against the Plaintiff.
7. As a result of the concession made by Mackay I made an Order for judgment in the sum of \$920,164.87 together with interests and cost. I further ordered that if the aforesaid judgment debt was not paid by the 13 April 2015 the Defendants were required to vacate the premises and hand over all documents in their possession relating to the property. It is from this judgment that the Defendants seek to obtain leave to appeal.

8. It is of importance to note that the Defendants had previously sought to appeal the aforesaid ruling to both the Court of Appeal and to the Privy Council. However, their application was dismissed due to the fact that the Defendants had never sought nor obtained the leave of this Court prior to filing the purported Notice of Appeal.

THE LAW

9. The factors which are normally taken into consideration by the Court in deciding whether to grant or refuse leave to appeal when made out of time in the civil jurisdiction, are well known to wit, (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the appeal succeeding, and (4) the degree of prejudice to the would be respondent. In refusing leave **Lord Sumption** speaking for the Board in the Privy Council noted that it was still open to the Defendants to apply to this Court for leave to appeal. In his comments he observed as follows:-

“On such an application, a number of matters will have to be considered. They will include (i) whether the appeal would be arguable, (ii) what explanation is proffered in the Defendants’ evidence for the delay in seeking leave, and (iii) what if any prejudice that delay may have caused to UBS. The Board expresses no opinion of its own on any of these matters nor on the appropriate outcome of the application.”

SUBMISSIONS

Arguable Case

10. The primary submission by the Defendants is that they were deprived of the ability to defend the application for Summary Judgment due to the concession made by Mr. Mackay which they say he ought not to have made as neither sought nor obtained their consent to do so. They contend that they had a defence to the claim which he made no real effort to put forward and also failed to advise them of the date for the hearing before the Court. They further contend that they have a good defence to the

claim and ought to be given the opportunity to pursue the same. However, they say that this could only be done if the Order for Summary Judgment is set aside on Appeal.

11. Counsel for the Plaintiff contends that much of what purports to be grounds of Appeal put forward by the Defendants relate to information which was not before the court when the Summary judgment was granted. He contends that the real issue is that raised as to whether the Defendants' attorney had authority to consent to judgment as he did in this matter. He submits that Mr. Mackay clearly had an implied authority, as between himself and his clients, to consent to the Summary Judgment application without reference to his clients. Further that there was no reason for anyone to question Mr. Mackay's authority as he had been acting for the Defendants for months and the Order did not involve matter collateral to the action.

12. In support of his submission that the proposed appeal has no chance of success Mr. Turnquest referred to the case of **Yeung Yat Kwong Peter v Harvest China Investment Ltd (2016) HKC1528**. In that case Judge Andrew Li in the District Court of Hong Kong had to deal with an application by a defendant seeking to set aside a perfected order that its Counsel had agreed to in its absence. In dismissing the application the learned judge observed as follows:-

"25. In my judgment, this application has been totally misconceived and completely devoid of merits. ...

27. Second, even taking the 2nd Defendant's present application at its highest and accepting that Ms.Ng and the former solicitors had no authority to enter the consent order for the moment, this matter at best is something between the 2nd Defendant and Ms.Ng and/or its former solicitors. As the court is now functus officio, the redress the 2nd defendant has will be against Ms.Ng and the former solicitors if it considers that they had been negligent and/or acting outside the scope

of their authority and/or in breach of their duty as agent or employee, etc. It is not for the 2nd defendant to try to re-open a case against the 1st defendant of whom it had specifically agreed to withdraw the contribution notice under the 2015 Consent Summons.

30. Lastly, I do not find there is any evidence (including the latest documents exhibited to the 2 affirmations) to suggest that the 2nd defendant's former solicitors, being a reputable firm of solicitors experienced in civil litigation, had anything other than actual or implied authority when acting on behalf of the 2nd defendant. As such, any acts done by them armed with such authority will have the effect of binding on the 2nd defendant as a matter of law: see for example *Waugh v H.B Clifford & Sons* [1982] 1 Ch 374 per Brightman LJ at 387 A-B &388 d-f'

13. In *Waugh's* case the Court **Brightman LJ** in discussing the issue of an attorney's implied authority noted as follows:-

"The law thus became well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matter 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant, to compromise the suit without actual proof of authority, subject to the same limitation; and that a compromise does not involve 'collateral matter' merely because it contains terms which the Court could not have ordered by way of judgment in the action ..."

14. After considering the implied authority as between the legal advocate and his or her client, he continued:-

'It follows in my view that a solicitor (or counsel) may in a particular case have ostensible authority vis-à-vis the opposing litigant where he has no implied authority vis-à-vis his client. I see no objection to that. All that the opposing litigant need ask himself when testing the ostensible authority of the solicitor or counsel is the question whether the compromise contains matter 'collateral to the suit'. The magnitude of the compromise, or the burden which its terms impose on the other party, is irrelevant.' He set out the justification for the principle: 'I think it would be regrettable if this Court were to place too restrictive a limitation on the ostensible authority of solicitors to bind their clients to a compromise . . . So many compromises are made in court or in counsel's chambers, in the presence of a solicitor but not the client. This is almost inevitable where a corporation is involved. It is highly undesirable that the Court should place any unnecessary impediments in the way of that convenient procedure. A party on one side of the record and his solicitor ought usually to be able to rely without question on the existence of the authority of the solicitor on the other side of the record, without demanding that the seal of the corporation be affixed; or that a director should sign who can show that the articles confer the requisite power upon him; or that the solicitor's correspondence with his client be produced to prove the authority of the solicitor.'

15. A review of these authorities will show that there is strong authority to support the position that an attorney has implied and/or ostensible authority to compromise an action on behalf his client. It follows in my view that where an attorney takes a position on the law and concedes a point of law he ought to also be considered to be within his authority. However, the issue in this case is can the client resile from that position if they are of the view that that decision was

wrong and has caused them loss. Mr. Turnquest says that the legal position on this is clear and raises no arguable point to be considered by the Court of Appeal.

16. The Defendants' position is that the concession by Mr. Mackay has deprived them of the opportunity of having their defence considered and that justice requires that they be given the chance to be heard. In considering this point it is useful to consider Comments made by **Lord Sumption** with regard to Mr. Mackay's conduct as follows:-

"It is apparent from the transcript of the hearing, which has been put before the Board, that no real attempt was made to present the defendants' case at this hearing. Counsel for the defendants had by mistake put the hearing into his diary for 25 March, as a result of which Mr. and Mrs. Starostenko were not present and Counsel was not properly prepared. An affidavit had been sworn on behalf of the defendants which, when read with the voluminous correspondence exhibited, could be said to support the defence to which the Board has referred. However, it was still in the process of being filed and was not before the court. Counsel for the defendants observed that "to that extent" the application for summary judgment was opposed. But he added that Counsel for the Bank had drawn his attention to certain authorities to which, he said, he had no answer. This appears to have been a reference to authorities such as National Westminster Bank Plc v Skelton [1993] 1 All ER 242, 246 (per Slade LJ) to the effect that a counterclaim was not normally a sufficient basis for resisting a mortgagee's summary application for possession. It appears not to have been appreciated that the defence which the defendants wished to raise was not just that the debt was abated by the cross-claim, which might in some circumstances have amounted to an equitable set-off, but that the event of default which was said to have made the debt payable was brought about by UBS's breaches

of duty. This may or may not have been a good point, but Counsel's concession meant that that was never decided. Evans J gave judgment for the debt claimed and for possession in default of payment, without prejudice to the defendants' right to pursue their counterclaim."

17. In the circumstances of this case it seems to me that if leave is given the only point which is arguable is whether the Court of Appeal has discretion to, in the interest of justice, vacate the Order and allow the Defendants to raise the point identified by **Lord Sumption**. If the decision in **Yeung Yat Kwong Peter v Harvest China Investment Ltd** is correct the Defendants would be bound by the concession and their only recourse would be to take action against Mr. Mackay. As far as I am aware this matter has not been litigated in this jurisdiction as neither party has provided any local authorities on the same. It is also obvious that **Yeung's case** is not binding on any Court in our jurisdiction. Whereas I have my own views on this issue I cannot say that the Court of Appeal will inevitably hold the same view. I cannot say without more that the Appeal would be hopeless as asserted by the Plaintiff.

18. In the case of **PAUL ANTHONY SMITH v. COSWORTH CASTING PROCESSES LIMITED** [1997] EWCA Civ 1099 (26th February, 1997) Lord **Woolf** in the English Court of Appeal provided some guidance as to the grant of leave to appeal which was in part as follows:-

"1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word "realistic" makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.

2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.

3. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. Where leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave. There may be only one issue that the judge or judges giving leave felt it was necessary to draw to the attention of the parties and the court hearing the appeal. It is a misconception to assume that because only one aspect of the proposed appeal was mentioned in any reasons which were given, that leave was granted under a misapprehension that there were not other issues to be determined on any appeal unless the reasons make this clear."

Delay.

19. In opposing the grant of leave the Plaintiff also submits that the Defendants have abused the Court's process by intentionally failing to make their application for leave to appeal promptly. They contend that as a result of the Defendants' chosen course of litigation, over two and a half years of Court time has been wasted on a point that was blatantly obvious from the outset. The plaintiff further contends that the course of action chosen was meant to simply frustrate the Plaintiff and delay execution of the Summary Judgment Order.

20. It is to be noted that when the matter was before the Court of Appeal the Plaintiff objected to leave being granted and a stay ordered on the basis that no application for leave had been made to this Court. Mr. Murrio Ducille a very senior and experienced Counsel after arguing that the order was a final order and no leave was required conceded the point and asked for an opportunity to put it right by applying for leave in the Supreme Court. However, instead of making the relevant application to this Court the Defendants sought to Appeal the Court of Appeal's decision to the Privy Council. That application for leave was refused by the Judicial Committee with the advice to the Defendant to make the necessary application for leave to this Court. That was in February of 2017.

21. The Second and Third Defendants who now appear pro se contend that what they did they did acting on advice from Counsel. The intervening time apparently was taken up with missteps and failed attempts to get the current application properly before the Court. The Defendants deny that they have been deliberately stalling or drawing out these proceedings.

PREJUDICE

22. The Plaintiff submits that in addition to the costs which they have incurred and have not been compensated for by the Defendants the premises which are still occupied by the Defendants has become run down and the value of their security is diminishing. In these circumstances they say that the Court should not grant leave to appeal as to do so will only drag out these proceedings, which works to the prejudice of the Plaintiff.

FINDINGS

23. As noted earlier the available authority appears to be against the Defendants in this matter with regard to the one point which I consider warrants consideration. However, I cannot agree that an appeal on that point would be hopeless. The interesting factor is that there is still before the Court a Counter claim in which the Defendants intend to raise issues that may affect the issue

determined on the Summary Judgment Application. These details were not available to the Court as Mr. Mackay failed to have the relevant affidavit filed in time for the hearing in March 2015 and did not seek an adjournment to do so. These are matters which the Court of Appeal may consider if they are persuaded on an appeal that there is discretion in the circumstances of this case to set aside the Order.

24. The delay in this matter is regrettable however, I cannot say without more that the delay was intentionally contrived by the Defendants to frustrate the Plaintiff in its efforts to enforce its judgment. It is also noted that the Plaintiff had in fact given an undertaking to the Court not to proceed with the enforcement of the aforesaid Order.

25. I am concerned that the premises at issue has been said to be diminishing in value. This has not been refuted by the Defendants who in any event claim to be indigent. This issue can be addressed by the position which I have determined is applicable to the application for the stay of the enforcement of the Order for Judgment.

Application for stay.

26. The Defendants in applying for a stay submit that if leave is granted but not stay ordered the appeal if successful may be nugatory. In **Citibank, N.A v McDonald [2004]BHS J No.453 , 1491/2003 Lyons J** in his judgment opined as follows:-

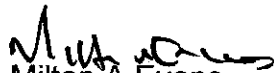
“If a party is claiming that the appeal if successful may be nugatory, that party must give evidence as to why. For example, that possession has taken place, and there is a contract on the house that is in the process of going through. If the contract for sale is concluded, and the applicant wins their appeal, they will not get possession of the house back.”

It is clear that this would be so if the Plaintiff were to take possession and proceed with a sale of the premises prior to the determination of the Appeal. By the same token the Defendants who have possession are either unable or unwilling to properly maintain the premises.

CONCLUSION

27. In these circumstances of this case and for the reason given above I grant leave to the Defendants to lodge an appeal but I refuse the application for a stay of the Order for possession. This would allow the Plaintiff if they so desire to take possession and carryout the necessary repairs/steps to safeguard the value of the premises. However, I further order that there be no sale of the premises without a further Order from this Court or from the Court of Appeal.

Dated the 21st day of December AD, 2017


Milton A Evans

Justice