THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA No. 181 of 2012
[H.C.A. No. 1120 of 2004]
[CV 2008-00977]

Between

ANDRE BAPTISTE

Appellant

And

INVESTMENT MANAGERS LIMITED

Respondent

Before the Honourable Madame Justice Rajnauth-Lee, J.A.

Appearances:

Mr. David M. Rajkumar instructed by Ms. Sharlene Jaggernauth for the Appellant.
Mr. Colin Kangaloo instructed by Ms. Shashi Seecharan for the Respondent.

Dated the 29th May, 2013.

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JUDGMENT

The Application

1. By notice of application dated the 11th October, 2012, the appellant seeks an order that there be a stay of execution of the judgment of Boodoosingh J. delivered orally on the 28th June, 2012, until the hearing and determination of the appeal.

2, Rule 64.18 (1) (b) of the Civil Proceedings Rules 1998 ("CPR") empowers a single judge to order a stay of execution on any judgment or order against which an appeal has been made, pending the determination of the appeal. The order is of course subject to variation or discharge by the full Court, pursuant to Rule 64.18(2).

The Appeal

3. This case arose out of a written agreement made between the parties (and one Ms. Sharon McCarthy, who is not a party to this appeal) for the transfer of shares and real property for the sum of $1,000,000.00 payable to the appellant (and Ms. McCarthy). The trial judge granted specific performance of the agreement and ordered that the appellant (and Ms. McCarthy) transfer fifty percent (50%) plus one (1) ordinary share of the issued share capital in 33rd Avenue Limited to the respondent. The trial judge also granted an injunction restraining the appellant from parting with or disposing of the assets of 33rd Avenue Limited otherwise than in accordance with his order. The appellant filed a notice of appeal on the 9th August, 2012.

4. The appellant submits that he has an arguable appeal with good prospects of success. He contends that the trial judge erred in finding as a fact that the respondent had paid the sum of $1,000,000.00 to 33rd Avenue Limited at the direction of the appellant (and Ms. McCarthy). He also submits that the trial judge erred in law in failing to consider the legal effect of the respondent's paying 33rd Avenue Limited instead of the appellant and Ms. McCarthy personally. The appellant also contends that if the stay is not granted, (a) he will be prejudiced, (b) the appeal will be rendered nugatory, and (c) if the respondent is granted the majority shareholding in 33rd

Avenue Limited, the respondent could sell two (2) properties belonging to 33rd Avenue Limited and the appellant would not be able to recover the properties. One of the properties is the appellant's home.

5. The application is supported by the affidavit of the appellant filed on the 11th October, 2012 as well as the supplemental affidavit of the appellant filed on the 4th March, 2013. Two (2) affidavits in opposition were filed on behalf of the respondent: the principal and supplemental affidavits of Ms. Shashi Seecharan filed on the 4th December, 2012 and the 22nd March, 2013 respectively.

Facts

6. By an agreement in writing dated 2003 ("the agreement") and made in October, 2003 between the appellant and Ms. McCarthy on one hand, and the respondent on the other, it was agreed that upon the conveyance of the beneficial interest in the property situate at 33 St. Clair Avenue ("the St. Clair property") to 33rd Avenue Limited or to a wholly owned subsidiary of 33rd Avenue Limited, the respondent would pay the sum of $1,000,000.00 to the appellant and Ms. McCarthy and they would transfer 50% plus one ordinary share of the issued share capital of 33rd Avenue Limited to the respondent. It is not disputed that the St. Clair property was in the sole name of the appellant and the shares were in the names of the appellant and Ms. McCarthy.

7. The respondent alleged that, in accordance with the terms of the agreement, the St. Clair property was conveyed to 33rd Avenue Limited by deed of conveyance dated the 23rd October, 2003 made between the appellant and 33rd Avenue Limited.[1] The respondent also alleged that, at the direction of the appellant and Ms. McCarthy, it paid the sum of $1,000,000.00 to 33rd Avenue Limited on the 31st October, 2003 by two cheques in the sum of $500,000.00 and $100,000.00 respectively and on the 6th November, 2003 by a cheque in sum of $400,000.00.[2]

[1] See paragraph 4 of the Statement of Claim filed filed on the 23rd April, 2004.

[2] See said paragraph 4.

8. When the appellant and Ms. McCarthy refused to transfer the shares, the respondent claimed specific performance of the agreement. By their Defence, the appellant and Ms. McCarthy ("the defendants") alleged *inter alia* that the agreement was not dated and/or was not to be given effect by the signatories (namely Mr. Jerry Narace and the appellant and Ms. McCarthy) unless: (a) a strategic plan and/or business plan for 33rd Avenue Limited (b) measures for reducing or liquidating a mortgage or debts or charges affecting the St. Clair property, were agreed.[3] Accordingly, it was contended that the agreement did not constitute an agreement or the full agreement between the parties or was provisional only and not enforceable.[4] Further, the defendants did not admit that the respondent had paid the sum of $1,000,000.00 to 33rd Avenue Limited or at their direction.[5] In its Reply, the respondent relied on the letter dated the 14th January, 2005 from Chersons, the defendants' Attorneys at Law, as amounting to an acknowledgement by the defendants that the respondent had paid the monies pursuant to the agreement.[6]

Summary of the Judge's Findings

9. The trial judge considered that the main issues were:

a) Was the money payable to 33rd Avenue Limited or to the defendants in all the circumstances;
b) Was the money in fact paid;
c) Was there compliance with the terms of the agreement by the parties?

10. The judge accepted on the evidence that the sum of $1,000,000.00 was paid to 33rdAvenue Limited based on the undisputed evidence of the payment of the three (3) cheques. The primary issue, according to the trial judge, was whether the monies were due to the defendants personally. He found as a fact that the money was paid to 33rd Avenue Limited at the direction of

[3] See paragraph 4 of the Defence.

[4] See paragraph 6 of the Defence.

[5] See paragraph 11 of the Defence.

[6] See paragraph 8 of the Reply.

the appellant in furtherance of the agreement. He also found that there were no conditions attached to the agreement as alleged by the defendants and that there was no agreement on any additional terms. He refused to look outside of the terms of the agreement to find any additional terms on the basis that the appellant, being a prudent business person, would have catered for such important matters in the agreement. The judge also considered that the appellant had accepted as correct the minutes of the board meeting of the 16th October, 2003, and there was no mention of those additional matters in the minutes.

Application to strike out evidence

11. The respondent has filed an application to strike out paragraph 7 sub-paragraphs (vi-xii) and (xv-xix) of the appellant's supplemental affidavit as well as Exhibit AB7 (the Bye-Laws of 33rd Avenue Limited) on the grounds that the evidence is irrelevant, opinion evidence, scandalous/prejudicial and that the Bye-Laws were not put forward as evidence before the trial judge. I have carefully considered the application and I find no merit in it.

Test: Whether a stay of execution should be granted

12. The test in this jurisdiction for whether a stay of execution should be granted is whether the appeal has good prospects of success and, additionally, whether there are any special circumstances which would justify exceptionally the grant of a stay: See Weekes J.A. in **National Stadium (Grenada) Ltd. v N.H International (Caribbean) Ltd. and Others** Civ. Appeal 48 of 2011 (unreported). Additionally, where an appellant can satisfy the court that if a judgment is paid, there would be no reasonable prospect of getting it back in the event of a successful appeal, a stay may be granted: See **Atkins v Great Western Railway** (1886) 2 TLR 400.

13. Whether the court should exercise its discretion to grant a stay of execution of a judgment pending the hearing of an appeal against the judgment depends upon all the circumstances of the case, but the essential factor is the risk of injustice: See Clarke L.J. in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd.** [2001] All ER (D) 258 (Dec). In weighing the risk of injustice in the circumstances of this case, the court must consider among other matters,

if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks to the appellant?

Good Prospects of Success

14. Mr. Rajkumar submitted that the appeal had good prospects of success. He submitted that the trial judge erred in many of his findings of fact. In particular, he argued that the judge erred in finding as a fact that the monies were paid over to 33rd Avenue Limited at the direction of the appellant. He also submitted that had the judge considered the issues of variation, waiver and equitable assignment, he would have found for the appellant.

When an Appellate Court will Disturb a Trial Judge's Findings of Fact

15. It is well established that an appellate court will not interfere lightly with a trial judge's findings of fact. In **Visham Lalla v Suruj John Lalla** Civ. App. No. 102 of 2003, Mendonca J.A. set out the principles which guide appellate courts [at paragraph 24]:

> "*It is well established that a court of appeal would not lightly interfere with a trial judge's finding on issues of fact. This is because a trial judge, as he is in a position to see and hear the witnesses, is in a position of advantage over a court of appeal. The principles which guide an appellate court that is asked to upset a judge's finding have been often stated and it is not necessary to cite the many authorities in which the principles have been rehearsed. I think reference need only be made to Civil Appeal No. 116 of 1996 Ettienne v Ettienne where the principles were adequately set out by de la Bastide C. J. He stated (at p. 8):*
>
> > *'An appellate court ought not to upset a trial judge's finding of fact, simply because the appellate court would have come to a different conclusion. Due weight must be given to the advantage which the trial judge has as a result of being able to see and hear the witnesses give their evidence and to form an*

impression from that of their credit-worthiness. For his finding to be upset there must be some demonstrable flaw in the process by which he reached it. It may be for instance that he drew an inference which was not justified or failed to draw an inference which was. Another ground on which the appeal court may interfere is that the trial judge failed to take account of some relevant piece of evidence or to appreciate its proper significance, or conversely that he took into account something which he ought not to have taken into account, or attributed to it a significance \which it did not rightly have'."

16. The Privy Council in **Harracksingh v Attorney General and Another** [2004] UKPC 3 considered the principles upon which an appellate court ought to review the findings of fact of a trial judge. Sir Andrew Legatt, delivering the judgement of the Board, stated that the trial judge's decision ought not to be disturbed unless it could be demonstrated that it was affected by material inconsistencies and inaccuracies or the judge had failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise had gone plainly wrong.[7]

17. In the case of **Sherief Ramsaran v Essau Hoodan** [1997] UKPC 47 (7th October, 1997) the Privy Council affirmed the decision of the Court of Appeal which had disturbed the trial judge's finding of fact. In the Court of Appeal, de la Bastide C.J. said (at page 4):

"..... it is very well established that a Court of Appeal will only with great reluctance and in special circumstances interfere with the findings of a trial judge on issues of fact ..... However, it is also well established that if a Court of Appeal is satisfied that the judge..... failed to weigh in the balance matters of substantive evidence which bear on the question whether a particular witness was or was not telling the truth, then the Court of Appeal will substitute its own decision for that of the trial judge, even on an issue of fact."

[7] See paragraph 11 and the case of **Watt v Thomas** [1947] 1 All ER 582 at page 590 per Lord Macmillan.

18. de la Bastide C.J. went on to cite the judgment of the Privy Council in **Attorney General and Victor Cockburn v Samlal** (1987) 36 W.I.R. 382 in which Lord Ackner referred to the importance of carrying out a balancing operation when weighing the credibility of a witness. In the circumstances of **Ramsaran v Hoodan** (supra), the Court of Appeal had found (at page 8) that there was an error on the judge's part since he had left out of account in the balancing operation "a very compelling piece of what may be described as real evidence".

Whether monies were paid at the direction of the appellant

19. Mr. Rajkumar argued that the trial judge arrived at his finding of fact that the monies were paid to 33rd Avenue Limited without a proper consideration of the relevant evidence. He submitted that Mrs. Rani Lakhan-Narace, the respondent's witness, had given direct evidence that the appellant gave no directions to her to pay the sum of $1,000.000.00 to 33rd Avenue Limited which at that time had opened a bank account at Scotiabank, Arima. Mrs. Lakhan-Narace was the chairperson of 33rd Avenue Limited. At paragraph 15 of her witness statement, she said that after the deed was executed, the sum of $1,000,000.00 was paid by the respondent to 33rd Avenue Limited in accordance with directions from the appellant.

20. Mrs. Lakhan-Narace was cross examined on this paragraph. The following is the trial judge's record of the relevant evidence:

> "*Neither Defendant gave instructions to put money into the Arima account.*
> *A: Don't accept that.*
> *Page 15: Can you recall when such direction was given.*
> *A: I don't remember.*
> *Q: Was any such direction given to you by Mr. Baptiste.*
> *A: No.*
> *Mr. Narace took no part in the company business.*
> *It was me that the direction should have been given by.*
> *He did not attend any more meeting after 16th October, 2003.*
> *He gave no instructions to me about 33rd Avenue business.*

Not aware of any such directions being given by anyone else.
I have seen all the minutes of the company. If that was said, it should be me."

21. The trial judge in his oral decision considered that the defendants had sent a letter to the respondent through Chersons, the defendants' Attorneys, on the 14th January, 2004. The judge reasoned that although the letter raised certain concerns, nowhere was there any complaint of the failure of the respondent to pay the defendants personally. He observed that, at the last paragraph of the letter, the defendants intimated that they no longer wished to continue with the agreement. The judge noted that the last sentence of the letter read:

> ***"Of course this will result in the refund to you of the moneys already paid pursuant to the Agreement and this our clients intend to do within the next three (3) months."***

22. The judge also considered that Mr. Prescott S.C., appearing at the trial on behalf of the defendants, had submitted that that sentence in the Chersons' letter should be construed as a reference to debts paid by the respondent with regard to 33rd Avenue Limited. The judge did not accept that submission. The judge also rejected the appellant's explanation in cross examination that he did not give instructions for the Chersons' letter of the 14th January, 2004 and that he had not seen the letter before 2008. He also rejected the appellant's assertion that he had not before read the contentions of the affidavits filed on behalf of the respondent in the earlier proceedings.

23. The judge found that ***"the moneys already paid"*** in the last sentence of the Chersons letter was a reference to the said $1,000,000.00 and concluded that on a balance of probabilities the monies referred to in the agreement were to be paid, as directed by the appellant and Ms. McCarty, to 33rd Avenue Limited in light of the difficulties it had been facing.

24. The trial judge also considered that the minutes of the board meeting held on the 16th October, 2003. The minutes reflected the agreement of the Board that a new bank account would be opened at Scotiabank, Arima, in the name of 33rd Avenue Limited and that the sum of $500,000.00 was to be deposited into that account. The minutes also reflected that both the

appellant and Ms. McCarthy were present at the meeting. As noted earlier, the appellant had accepted in cross-examination that the minutes were correct[8]. The judge observed that the change of directors was done immediately on the 16th October, 2003, and that the deed of conveyance was executed shortly after on the 23rd October, 2003.

25. The trial judge also reasoned that there were two meetings of the reconstituted Board of 33rd Avenue Limited on the 10th November, 2003 and the 9th December, 2003. The Board became reconstituted after Mrs. Lakhan-Narace and Ms. Michelle Gonzales were appointed directors at the meeting of the 16th October, 2003. These board meetings were held after the cheques were paid into the bank account of 33rd Avenue Limited on the 31st October, 2003 and the 6th November, 2003. The appellant was present at the meetings of the 10th November, 2003 and the 9th December, 2003, while Ms. McCarthy was present at the meeting of the 9th December, 2003. The judge observed that no issue was raised at the board meetings that the money was paid to 33rd Avenue Limited and not to the defendants personally.

26. In addition, the appellant had contended that he had not executed the deed of conveyance and pleaded that it was a forgery. Under cross examination, however, he conceded that the signature might have been his, but he was still not sure. The trial judge accepted the evidence of Ms. Patricia Simon, Attorney-at-Law, and Ms. Ann Mitchell, the clerk, who witnessed the execution of the deed. Indeed, he found that the appellant executed the deed of conveyance and that this was done pursuant to the agreement.

27. The trial judge found that on the whole the appellant's evidence was unbelievable. He observed that the appellant shifted his story to suit his convenience. The trial judge preferred the versions of the evidence given by Mrs. Lakhan-Narace and Mr. Jerry Narace, two of the respondent's witnesses. The trial judge accepted their evidence which he found was consistent with the supporting documentation place before him. As to the other defendant, Ms. McCarthy, although she signed a witness statement which was filed, she did not present herself for cross examination and her witness statement was struck out.

[8] See paragraph 10 of this judgment

28. I have considered the trial judge's findings of fact in the light of Mr. Rajkumar's submissions and I do not find any demonstrable flaws in the process by which he arrived at his findings of fact. I am of the view that although it is true that the trial judge did not expressly consider the cross examination of Mrs. Lakhan-Narace (set out above at paragraph 20), it is reasonable in the circumstances of this case to conclude that the judge had that evidence in mind when he assessed the evidence of the witnesses and made findings on their credibility.[9] I am also of the opinion that, whilst it would been far better for the judge to have dealt with the evidence of Mrs. Lakhan-Narace expressly and to have indicated how he weighed it as against the other evidence in the matter, it cannot be said that the trial judge's findings of fact were affected by material inconsistencies and inaccuracies or that he failed to weigh in the balance matters of substantive evidence to such an extent that a court of appeal ought to substitute its own decision. To my mind, the trial judge's findings of fact were reasonable and ought not to be disturbed.

Errors of Law

29. Mr. Rajkumar submitted that the judge failed to consider the legal effect of the respondent's paying 33rd Avenue Limited instead of the appellant and Ms. McCarthy personally. He argued that in order for the respondent to succeed at law, it had to prove that there was a variation of the agreement supported by consideration or an assignment to 33rd Avenue Limited of the equivalent sum owed to the defendants by the respondent.

30. On the other hand, Mr. Kangaloo, on behalf of the respondent, submitted that the issue of a variation of the agreement not supported by consideration was only raised *en passant* in the court below. He also submitted that the issue of the variation of the agreement unsupported by consideration should have been pleaded by the defendants. He further argued that had the issue of variation been raised frontally, the respondent would have been entitled to rebut same by raising the issue of waiver/forbearance on the pleadings and on the evidence.

[9] See Kangaloo J.A. in **Philomen Dean v Chanka Bhim** Civ. App. No. 92 of 2007 (paragraph 10).

31. I wish to say at the outset that I do not accept that the defendants had to plead the issues of variation and the lack of consideration. This is a matter of law for the determination of the trial judge based on the evidence of the witnesses. In addition, I agree with the appellant that the issues were raised. The defendants, at paragraphs 5(4) (b), 11 and 12 of their written submissions before the trial judge, raised the issues of variation and consideration. In particular, at paragraph 12, the defendants submitted that the respondent, by its failure to pay the agreed sum or any part to the defendants pursuant to the agreement, had given no consideration for the alleged implied variation of the terms of payment set out in the agreement.

32. It is not disputed that the trial judge did not expressly consider the issues of variation, waiver and/or equitable assignment. As mentioned earlier, Mr. Rajkumar argued that had the trial judge considered the issue of variation, he would have found that there was no consideration to support it with the result that the respondent's claim would have failed. Mr. Kangaloo, on the other hand, contended that the law of waiver provides a complete answer to Mr. Rajkumar's arguments.

33. The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement.[10] The agreement which varies the terms of an existing contract must be supported by consideration.[11] A variation which is not contractually binding (e.g. for want of consideration) may nevertheless have certain limited effects.[12] Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has *waived* his right to require that the contract be performed in this respect according to its original tenor.[13]

[10] **Chitty on Contract** (31st edition) Volume 1 General Principles para. 22-032

[11] Ibid para. 22-035

[12] Ibid para. 3-081

[13] Ibid para. 22-040

34. A waiver may be oral or written or inferred from conduct.[14] A waiver is also distinguishable from a variation of a contract in that there is no requirement for consideration for the forbearance moving from the party to whom it is given.[15] The authors of **Chitty on Contract** (31st edition) Volume 1 General Principles suggest that it may be more satisfactory to regard this form of waiver, that is, "waiver by estoppel" as analogous to or even identical with, equitable forbearance or "promissory" estoppel.[16] Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective. The waiver must be clear and unequivocal. The other party must have altered his position in reliance on it, or at least must have acted on it.

35. The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct, he has agreed or led the other party to believe that he will accept performance in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered.[17] Where one party has induced the other party to accede to his request, the party seeking the forbearance will not be permitted to repudiate the waiver and to rely on the letter of the agreement.[18]

36. In the case of **W.J. Alan & Co. Ltd. v El Nasr Export and Import Co.** [1972] 2 Q.B. 189, Lord Denning M.R. set out the principle of waiver as follows (at page 213):

> "*If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so….*"

37. In my view, Mr. Kangaloo has correctly submitted that a defence of waiver can be sustained on the facts of this case. I am of the opinion that had the trial judge considered the

[14] Ibid para. 22-041

[15] Ibid para. 22-044

[16] Ibid para. 22-044

[17] Ibid para. 22-042

[18] Ibid para.22-043 and **Levey & Co v Goldberg** [1922] 1 K.B. 688.

issues of variation and waiver, he would have been entitled to infer that the defendants, by their conduct, as reflected in the evidence before him, had waived the contractual requirement that the monies be paid to them personally. Accordingly, it is my view, contrary to Mr. Rajkumar's submission, that even if the variation of the agreement was not supported by consideration, this did not amount to an error of law on the part of the trial judge. Further, as to the issue of assignment raised by Mr. Rajkumar, I am of the opinion that it is not relevant and does not advance the appellant's case.

38. Mr. Rajkumar has also submitted that the trial judge erred in law when he made the finding that the monies were paid to 33rd Avenue Limited at the direction of the defendants ***"in light of the difficulties it had been facing"***. He argued that the judge erred, when, despite his own prohibition, he looked outside the terms of the agreement and made such a finding. Even if Mr. Rajkumar is correct, and the trial judge made an error of law in this regard, it is my view that it did not impact on the correctness of his decision.

39. As to the issues of hardship, injustice and inequity raised in the notice of appeal, the trial judge did not accept that that the respondent had acted with unclean hands or that the appellant had suffered any hardship other than that perceived by him. I do not believe that the trial judge was wrong.

40. Accordingly, I am of the view that the appellant has not discharged the burden placed on him to satisfy this court of good prospects of success. For this reason alone, his application must fail.

Special Circumstances and the Risk of Injustice/Prejudice

41. It has been submitted on behalf of the appellant that special circumstances exist which justify exceptionally a stay of execution. Mr. Rajkumar argued that if a stay is refused and the appeal succeeds, but the judgment is enforced in the meantime, there is a significant risk that he would be unable to recover the property which is the subject matter of the judgment in the court

below. At paragraph 7 of the appellant's supplemental affidavit filed on the 4th March, 2013, he deposes *inter alia* as follows:

i. ***The subject matter of this application is the controlling interest in my Company, 33rd Avenue Limited, a private limited liability company limited by shares incorporated under the Companies Act, 1995 Chapter 81.01 of the Laws of Trinidad and Tobago.***

ii. ***This controlling interest in the form of 50% plus one share is unique and irreplaceable and my attorneys have advised me and I verily believe that the Law regards it as such. In addition, there is no public market for these shares.***

iii. ***The Company has two main assets, my home in Goodwood Park since 1996 and the property in St Clair which, before conveyance to the Company, had been solely owned by me and which had housed the trading operations of the Company rent-free from 1999 to 2005. Together these properties are now worth in excess of $9,000,000.00 and continue to pay the mortgages and all other expenses related to these properties.***

iv. ***The equity in these properties is conservatively $3,000,000.00, that is to say, the amounts that would remain in the hands of the seller after the mortgages and other property-related debts are discharged.***

v. ***Once the controlling interest in the Company has been transferred to the Respondent, there is nothing to prevent it from selling those shares or transferring those shares or otherwise placing them out of my reach in the event that my appeal is successful. Once this is done I cannot go out into the open market to purchase similar shares and then sue the respondent for the purchase monies, because the shares are not shares in a public company and are not traded on any exchange.***

vi. ***Further, the Articles of Incorporation of the Company place no restrictions on share transfers or share ownership.***

vii. ***In addition, Bye-Law 14.1 of the Bye-Laws of the Company places no restrictions on share transfers or share ownership.***

viii. ***I am also advised by my attorneys that if the stay is not granted and the shares are transferred to the respondent, the respondent can take steps to dilute my percentage shareholding so that in the event that those shares are returned to me after the determination of the appeal in my favour they would represent a diminished value and diminished voting rights. I am advised by my attorneys that I have pre-emptive rights in respect of attempted dilution of my shareholding, but that these pre-emptive rights can be rendered illusory should the respondent issue shares at a price that I simply cannot afford to pay in order to maintain my percentage shareholding. Or it can make use of the exception under section 38(2) of the Companies Act to exclude my pre-emptive rights.***

42. The Appellant also submitted that the respondent could use its majority shareholding to replace him as a director as well as to create a security interest such as a mortgage on the properties which include the appellant's home at Goodwood Park. He also argued that the respondent could enter into a contract for the sale of shares and/or sale of the properties owned by 33rd Avenue Limited.

43. However much I may sympathize with the appellant that there is some risk that he may be personally affected by the loss of his home and a diminution of the value of his shareholding if a stay is not granted, I am of the view that he has no good prospect of success. In my judgment, a stay of execution cannot be granted in the circumstances of this case.

44. In any event, Mr. Kangaloo has correctly submitted that the overriding duty of directors is to act honestly and in good faith with a view to the best interests of the company, and not

necessarily in the best interests of the shareholders.[19] However, it has also been pointed out that where the powers of directors are or have been exercised in a manner that is oppressive or is unfairly prejudicial to, or that unfairly disregards the interest of any shareholder, that shareholder can launch an oppression action under the provisions of the **Companies Act** Chap. 81:01. In my view, the appellant is therefore not without the protection of the law even if a stay is not granted.

45. I wish to add that Mr. Kangaloo has pointed out and I accept that the respondent has shown no intention to place the properties out of the appellant's reach. The appellant had complained that there was an attempt to place the St. Clair property in the name of a company called Blue Book Company Limited ("Blue Book") which was not a wholly owned subsidiary of 33rd Avenue Limited and that this was contrary to the agreement. Mrs. Lakhan-Narace, at paragraphs 16-25 of her witness statement, explained that the respondent's instructions to its Attorneys had always been that Blue Book should be a wholly owned subsidiary. In any event, according to Mrs. Lakhan-Narace, on being notified that this was not so, she instructed the respondent's Attorneys to effect the necessary share transfer to make Blue Book a wholly owned subsidiary. In addition, Mrs. Lakhan-Narace referred to the minutes of the board meeting of the 10th November, 2003, which reflected the agreement of the Board that the St. Clair property was to be conveyed to Blue Book. As observed earlier, the appellant was present at that meeting.

46. In all the circumstances, the application is dismissed with costs.

……..
MAUREEN RAJNAUTH-LEE
Justice of Appeal

[19] See section 99 of the **Companies Act** Chap. 81:01 and the Canadian case of **Maple Leaf Foods Inc v Schneider Corp.** 1998 CanL11 (ON CA) paragraphs 33-34.