IN THE COURT OF APPEAL
TURKS AND CAICOS ISLANDS

Appeal No. CL-AP 1/22
from CL 82/21

BETWEEN:

TURTLE COVE HOTEL AND RESIDENCES LTD

Appellant/Applicant

-and-

TIDES DEVELOPMENT PROJECT, INC.

Respondent

Appeal No. CL-AP 2/22
From CL 79/21

BETWEEN:

PHOENIX DEVELOPMENT LTD.

Appellant/Applicant

-and-

TIDES DEVELOPMENT PROJECT, INC.

Respondent

Before: **The Hon. Mr. Justice C. Dennis Morrison, P**

Appearances: **Mr. George Missick instructed by Geordins for the Appellant/Applicant**
Mr. Tony Gruchot instructed by Graham Thompson for the Respondent

Date heard: **4th March, 2022**

Date delivered: **7th March, 2022**

RULING

MORRISON P

1. These are both appeals from decisions of Simons J ('the judge') given on 1 and 2 February 2022.

2. The appellants in both appeals have applied for a stay of execution of the judge's orders pending the hearing of the appeals. The applications are made pursuant to rule 34(1)(c) of the Court of Appeal Rules ('the CAR'), which provides that in any case pending

before the court, "... a single judge of the court may, upon application, make orders for ... a stay of execution of any judgment appealed from pending the determination of such appeal".

3. The single issue which arises at this stage is whether the applications should have been made to the court below in the first instance, as the respondents contend, or whether it is properly before me as a single judge of the Court of Appeal, as the appellants maintain.

4. For the respondents, Mr Gruchot directs me to rules 21(1) and 22(4) of the CAR. Rule 21(1) provides as follows:

> "Except so far as the court below **or** the court may otherwise direct –
>
> (a) an appeal should not operate as a stay of execution or of proceedings under the decision of the court below;
>
> (b) no intermediate act of proceeding shall be invalidated by an appeal." (Emphasis mine)

5. And rule 22(4) provides that:

> "Wherever under the provisions of the Act or of these Rules an application may be made either to the court below or to the court, it shall be made in the first instance to the court below."

6. On the basis of these rules, Mr Gruchot submits that the appellants are obliged to apply for the stays they seek to the Supreme Court in the first instance. In this regard, Mr Gruchot points out that (i) rule 21(1) is in terms virtually identical to Order 59, rule 13(1) and (4) of the White Book[1] (save that the obligation to apply to the court below under the English rules is subject to an exception "where there are special circumstances which make it impossible or impracticable to apply to the court below"); and (ii) the usual practice in England and Wales is for the application for a stay to be made initially to the court below, in which case, if refused, it can be renewed in the Court of Appeal.

7. For the appellants, Mr Missick submits that the respondents' objection is misconceived. He points out that this is an appeal as of right and not an interlocutory appeal, in respect of which leave to appeal would be required. In these circumstances, he says, rule 22(4)

[1] White Book 1999, Order 59, rule 13 – note 59/13/9

has no application. Further, Mr Missick submits, section 16(1) of the Court of Appeal Ordinance empowers the court to make orders, of its own volition or on application, for the preservation or disposal of any property concerned in the proceedings and this is precisely what the applications for stays of execution seek to do. Accordingly, Mr Missick submits that the applications are entirely in order and that I ought therefore to proceed to hear them.

8. Neither counsel was able to direct me to any TCI authority on how the rules should be applied in these circumstances. But Mr Gruchot did refer me to the White Book commentary, which explains that, although the Supreme Court and the Court of Appeal enjoy concurrent jurisdiction to grant a stay, the application must be made in the first instance to the court below. If it is refused a fresh application can then be made to the Court of Appeal. This, as can be seen, mirrors CAR 21(1) and 22(4).

9. Having considered the provisions of the Ordinance, the CAR and the submissions of counsel, I think that Mr Gruchot' s objection is well founded. In the context of this matter, nothing turns, in my view, on the distinction which Mr Missick has sought to make between an interlocutory appeal, for which leave to appeal is required, and an appeal from a final judgment, which is an appeal as of right. By the plain language of the CAR, although both the court below and the Court of Appeal have concurrent jurisdiction to grant a stay of execution of a decision of the Supreme Court, the application for a stay "shall be made in the first instance to the court below".

10. Nor is section 16(1) of the Ordinance of any assistance. What is in issue in these cases is whether the respondents as registered chargees of property may be allowed to enforce the statutory rights attaching to their charges. In my view, no issue of preservation or disposal of "property" arises on these applications in the sense in which the phrase is used in section 16. But in any event, any reference to the power of the court under section 16 is purely academic, since what the appellants have applied for in this case are stays of execution under rule 34(1)(c) of the CAR.

11. I therefore direct that the applications for stays of execution in these matters are to be made before the judge on notice to the respondents at the earliest convenient date. Naturally, should the judge refuse the applications, the appellants will be at liberty to

renew them before this court. The respondents are to have the costs of these applications, such costs to be taxed if not agreed on the standard basis.

7th March, 2022

/s/ C. Dennis Morrison, P