JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2015

APPLICATION NO 71/2015

BETWEEN	**JOYCELIN BAILEY**	**APPLICANT**
AND	**DURVAL BAILEY**	**RESPONDENT**

Joseph Jarrett instructed by Joseph Jarrett & Company for the applicant

Miss Catherine Minto instructed by Nunes Scholefield DeLeon & Co for the respondent

24 November 2015 and 18 March 2016

IN CHAMBERS

PHILLIPS JA

[1] On 17 April 2015, the applicant filed an application seeking a stay of execution of the final judgment of B Morrison J delivered on 27 March 2015 pending the outcome of the appeal filed on 10 April 2015. The sole ground on which the applicant is seeking that order was stated to be pursuant to rule 2.15 of the Court of Appeal Rules, 2002 (CAR). The application was supported by the applicant's affidavit sworn to on 15 April 2015.

[2] In order to be able to fully comprehend the issues between the parties in the court below, a summary of the background facts will have to be provided. I have

gleaned the same from a perusal of the statements of case and the witness statements filed for and on behalf of the parties.

The respondent's claim in the court below

[3] The respondent filed a claim form on 19 December 2008 that sought orders, which in the main, B Morrison J granted on 27 March 2015 as follows:

> "(1) A Declaration is hereby made that the [respondent] is entitled to a one half (1/2) interest in All that parcel of land part of Harmony Hall in the parish of Saint Mary, and being the land comprised in the Certificate of Title registered at Volume 1136 Folio 618 of the Register Book of Titles.
>
> (2) An Order is hereby made directing the Registrar of Titles to cancel Transfer Number 1157534 and the entry made pursuant thereto on the Certificate of Title, and/or to make a new entry re-transferring the property into the [respondent's] and the [applicant's] name as joint tenants.
>
> (3) An Order is hereby made that the Registrar of the Supreme Court be permitted to execute a Transfer or any other relevant documents necessary to have the Certificate of Title registered at Volume 1136 Folio 618 of the Register Book of Titles transferred into the [respondent's] and the [applicant's] name pursuant to the Order made at (2) above.
>
> (4) An Order that all costs incidental to executing and enforcing Orders 2-3 herein, is to be borne by the [applicant] solely.
>
> (5) An Order that the [applicant] account to the [respondent] for any and all rents collected by the [applicant] for rental of the said property, within fourteen (14) days of the date of this Order.
>
> (6) An Injunction restraining the [applicant] and the interested parties from selling, disposing of, or so dealing with the property registered at Volume 1136

Folio 618 of the Register Book of Titles to the detriment of the [respondent].

(7) A Declaration that the [respondent] is entitled to fifty percent (50%) of the sums which were held by the parties in investment and saving accounts with **NCB Trust and Merchant Bank Limited (now NCB Capital Market[s] Limited)** and the **Bank of Nova Scotia Jamaica Limited** which said sums have been transferred by the [applicant] to an account for her own benefit.

(8) An Order that the [applicant] give an account to the [respondent] of the sums wrongfully withdrawn by the [applicant] from the afore-said [sic] accounts, within seven (7) days of the date of this Order and, a further Order directing the [applicant] to pay over to the [respondent] his half interest in the said investment and saving accounts within fourteen (14) days of the date hereof.

(9) Interest on the [respondent's] half share in the said investment and saving accounts at the commercial banks' prime lending rate from the date when the [applicant] withdrew these sums to the date of this Order or earlier payment.

(10) A Declaration that the [respondent] has a fifty percent (50%) interest in the following motor vehicles:

(a) Mitsubishi Van and
(b) A 1989 Toyota Pickup owned by the parties.

(11) An Order that the [applicant] give an account to the [respondent] of the sums recovered by the [applicant] on the sale of the Mitsubishi vehicle and of the insurance proceeds for the Toyota pickup within seven (7) days of the date of this Order and, a further Order directing the [applicant] to pay over to the [respondent] his half interest in the said vehicles within fourteen (14) days of the date hereof.

(12) Costs of the Claim to be the [respondent]

(13) Liberty to Apply"

[4] Habeeb and Keoneshia, the children of the marriage, were joined as "interested parties" on the basis that they had a "purported interest" in the Harmony Hall property and the relief claimed could affect that interest. In the particulars of claim, the respondent pleaded that he and the applicant were husband and wife, having been married on 16 June 1974. By instrument of Transfer Number 943409 they were both registered as joint proprietors of the property part of Harmony Hall in the parish of Saint Mary being land registered at Volume 1136 Folio 618 of the Register Book of Titles.

[5] The respondent claimed further that by Transfer Number 1157534, registered on 21 August 2001, the applicant caused his interest to be transferred into her name and that of the children of the marriage, without his prior knowledge and/or consent. He pleaded that he had not signed the transfer and that he had not received any compensation for his interest in the said property. He therefore claimed that the transfer had been effected fraudulently, and he had reported the same to the Fraud Squad. He claimed that the applicant had attended at the offices of the Fraud Squad and admitted that she had deprived the respondent of his interest by fraud and that she promised to compensate him for the said interest.

[6] The respondent also pleaded that he and the applicant were joint account holders in certain investments held by NCB Trust and Merchant Bank Limited (now NCB Capital Markets Limited), a subsidiary of National Commercial Bank Jamaica Limited,

valuing in excess of $5,600,000.00 and also in respect of certain savings accounts in Bank of Nova Scotia Limited. He claimed that he had discovered that the applicant had withdrawn all the monies from the investment and savings accounts and placed the same into accounts that were solely in her name. He claimed that those actions were fraudulent and had deprived him of his 50% share of the funds that had been held in those accounts at those institutions.

[7] In his witness statement, the respondent set out his working history, the time in his life that he met the applicant and indicated the type of employment that she was engaged in at the time. He detailed the opening of the first joint savings account at the Bank of Nova Scotia, High Gate, Saint Mary, into which he lodged $20.00 and he placed the applicant's name on the account. He stated that she put no funds into that account, but he made deposits therein from his salary. He described how they purchased their first home at Tremolseworth and by the time the repairs and additions were effected to the house he stated that he and the applicant "were now both saving together and we only had one account at the Bank of Nova Scotia, Highgate branch". He stated that they later purchased their second Tremolseworth property which was adjoining the first and on which they initially had commenced doing "a little planting". They continued to save any excesses not used on their expenses in respect of their married life together.

[8] He deponed that they opened accounts in NCB to which they transferred the funds as the applicant was of the view that they could obtain better interest rates. He said that he was made redundant from the Public Works Department and his redundancy payments were placed into those accounts. Having been made redundant

he decided to go on his own as a truck driver. He explained how he came by the funds to buy the truck. He withdrew $100,000.00 from the said joint account, borrowed $30,000.00 from the bank and obtained $20,000.00 elsewhere to pay for the truck. He denied that it was ever discussed with the applicant that it was to be a "joint venture business". His operation of the truck, he said did very well. It paid off the loan to the bank and paid their monthly expenses. The earnings from the operation of the truck, he said, were given to the applicant to be placed in the joint accounts held by them. He indicated that he had receipts showing that the amounts in the accounts kept on increasing as they endeavoured not to withdraw any funds therefrom, but just kept the funds rolling over, as the funds in the accounts were supposed to be held for "our pension". He said he relied on her to lodge the funds earned by the operation of the truck into their jointly held accounts and he only had accounts with her name on them, although he knew that she kept other accounts. He stated that he had no idea what sums were being placed into those other accounts.

[9] He made it clear however that at the time that he had started operating the truck the applicant had been working and earning an income and later she had started a little "flower business" which he had assisted her with it when he could. He would, *inter alia*, buy plants, attend flower shows, help to make wreaths and travelled to Saint Thomas to get "Coya [sic] dust" for sale in the flower shops. He stated that it was funds from the truck business that helped to start and then develop the "flower business". He was aware that funds were taken from the savings account to assist with the expenses for the "flower business".

[10] In 1996, he stated that they purchased the Harmony Hall property for $1,000,000.00; $900,000.00 of which came from one of their joint Highgate branch savings accounts and they borrowed the remaining $100,000.00 from the Bank of Nova Scotia in Highgate.

[11] He deponed that having gone to the post office to collect mail, he noticed that his name was no longer on the statements from NCB Capital Markets Limited in respect of the accounts, but instead they bore the names of the applicant and the two children of the marriage. The applicant's response to his enquiry as to these changes was, "[m]i tek it for me and mi pickney dem". He claimed that over an extensive period the applicant had been filtering away the money from the accounts and taking his name off the bigger accounts.

[12] Having discovered her actions in respect of the accounts, he became concerned about the Harmony Hall and Tremolseworth properties. He carried out certain investigations and discovered that his name had been removed from the title in respect of the Harmony Hall property, and in lieu thereof, the children's names were registered on the title, allegedly by way of gift from him. He stated that it had been fraudulently achieved as he had not signed any such transfer and he reported the same to the Fraud Squad. Pursuant to the efforts of the police, he said that there were attempts to arrive at a settlement but these, he said, had not proved fruitful.

[13] There were two vehicles that were also the subject of the claim, one was a Mitsubishi van which had been registered in both their names, but which he claimed

had been involved in an accident, and had been written off by the insurers, and the applicant had collected the entire insurance proceeds in respect of the same. The other, a 1989 Toyota pickup, had been purchased with funds from the parties' US savings account, although it had only been registered in the applicant's name as she had obtained a government concession in order to clear it. He claimed a 50% interest in the same.

[14] The respondent relied on the expert report of Beverley Y East who deponed that, having been given 11 documents which had the respondent's known signature thereon, such as his driver's licence and Jamaican passport, she was requested to ascertain whether the transfer, dated 8 August 2001, filed pursuant to the Registration of Titles Act, which transferred his interest in respect of the Harmony Hall property to the applicant and the children of the marriage was signed by him. She made several findings in respect of the elements noticed in the various signatures and stated, on page 11 of the report, that after careful examination, it was her professional opinion, that the respondent had not signed the impugned transfer.

The applicant's case in the court below

[15] The applicant's main contention was that the transfer of the respondent's interest in the Harmony Hall property was done with his prior knowledge and consent. It was her further contention that he had consented to the transfer at the same time that he had admitted to having an extramarital affair. She pleaded that she had not committed any fraud, had not admitted to the same at the Fraud Squad and put the respondent to strict proof of his allegations. It was her contention, as she stated in her

witness statement, that the respondent was making these false allegations of fraud out of malice. However, she accepted that the police officers had encouraged the parties to settle their differences, and pursuant to that encouragement she had offered the respondent compensation which had not been accepted. She posited that in any event, the property had been purchased with funds mainly from the earnings of her horticultural business. It was also stated in her witness statement that it was she who had purchased the property, negotiated the price with the vendor, paid the legal fees and the balance purchase price. She also stated that any contribution to the purchase of Harmony Hall by the respondent was through the "joint venture business" owned by both of them.

[16] The applicant claimed that the horticultural business had been started in 1988 and the earnings from that endeavour provided financing for the family. She denied the amounts claimed to be in their accounts, but in any event claimed that 70% of the sums in the accounts were provided by her horticultural business and the remaining amounts by the "joint venture business" relating to the operation of the truck, which was owned by both parties. She further claimed that the latter business had been financed by her although the truck had been put in their joint names.

[17] With regard to the withdrawals from the accounts, the applicant claimed that the respondent had access to the accounts and withdrew funds as he sought fit. She deponed that the respondent even built a two-storey dwelling house valued in excess of $12,000,000.00 at Club Lane in the parish of Saint Mary, which had been built during the pendency of the marriage. That property is registered at Volume 1140 Folio 25 of

the Register Book of Titles and her name was not on the title and she claims a 50% interest in the same. She pleaded that the funds that she had withdrawn from the parties' joint accounts were to pay for the education of the children of the marriage. She averred that the respondent had withdrawn funds up to 2008 after the marriage had broken down, and even withdrew money from the her pension account. She had also received no monies from him neither in respect of alimony nor for the further education of the children.

[18] With regard to the motor vehicles, she stated that the Mitsubishi van had been sold and the proceeds thereof given to their son Habeeb, and the insurance proceeds in respect of the Toyota pick-up had been used to purchase a Nissan bus which is utilized in her business. She denied acting fraudulently at any time and in any way whatsoever.

[19] In her witness statement, the applicant outlined her job history and stated that between 1977-1987 she was deployed at the Ministry of Agriculture which was where she developed an interest in horticulture, and where she was able to increase her savings due to arrangements permitting her to travel and work overseas. She claimed that she obtained a gratuity when she retired from the Ministry. She commenced her horticultural business and stated that she had received no financial or other assistance from the respondent in the development of it. It was she who had opened the account at the Bank of Nova Scotia for the operation of her said horticulture business and had put the respondent's name on it "because we were married", but she said that he had played no part in it. She claimed further that the majority of the funds in the joint accounts were therefore hers as the funds had come mainly from her business and

from the "joint venture business", in which she had a one-half interest. She claimed further that the majority of the funds to purchase the truck had also come from her. She further stated that she had received no funds for maintenance for herself and none in respect of the further education of her children with the respondent.

[20] It was the applicant's contention that the respondent's earnings at the time the truck was purchased could not have contributed in any way to the loan repayments that had been undertaken to purchase the truck, as his net pay fortnightly was only $513.73.

[21] She referred to the payment of property taxes in respect of Harmony Hall and stated that the payment of the same had been made by convenience and that the respondent would be repaid in respect of any outgoings relative to the same.

[22] In respect of the motor vehicles, the applicant confirmed the allegations in her pleadings but stated that in any event the funds to purchase the same had, all in the main, come from her.

[23] The witness statement of Habeeb Bailey offered very little assistance to the determination of this application as most of what he had to say was based on information that "was to the best of [his] knowledge" without any indication as to the source of the same. He indicated though, for what it was worth, that the respondent had no interest in the horticulture business and that the trucking business was a "joint venture business" between both parents. He denied that he had ever been a party to any fraudulent transfer of any land as alleged by the respondent.

[24] The matter was heard in the court below over three days and on 27 March 2015, the learned judge, having heard evidence from the parties relating to these vastly conflicting stories, found in favour of the respondent and granted the orders stated in paragraph [3] herein.

The application for stay pending appeal

[25] As indicated, the applicant filed a notice of application for stay of execution on 17 April 2015 and the applicant's affidavit in support of the application for a stay pending appeal set out the various findings of fact and law that the learned judge had made in the court below with which she took issue. She also stated the basis on which she relied for the grant of the stay including her potential financial ruin and the irremediable harm that she would suffer if the stay was not granted. She also set out the grounds of appeal on those findings which I set out below.

[26] I must say that I consider myself somewhat hampered in the disposal of this application having not had sight of the notes of evidence or the reasons for judgment of the learned judge as I was informed that they were not yet available. Counsel indicated that certain statements had been made by the learned judge when the judgment was being delivered and on that basis the notice and grounds of appeal had been filed. The notice of appeal filed on 10 April 2015 contained the following grounds:

> "(a) **<u>Findings of fact Appealed against</u>**:
>
> 1. The Trial Judge erred in finding that the [respondent] did not sign the Transfer for the Harmony Hall property.

4. That the evidence of the Handwriting Expert Beverley East supported the finding of fact that the [respondent] did not sign the Transfer for Harmony Hall Property.

5. That the [applicant] wrongfully caused the [respondent's] name to be transferred from the Joint Bank Account.

6. That the [respondent] was entitled to 50% interest in the Mitsubishi Van.

(b) **Findings of law:**

7. That the Trial Judge erred in finding that the [applicant] acted fraudulently in transferring the [respondent's] name from the title for the Harmony Hall property.

8. That the [applicant] acted fraudulently in transferring the [respondent's] name from the Joint Bank Account.

9. That the [applicant] acted fraudulently in depriving the [respondent] from his 50% share in the Mishibushi [sic] Van."

As a consequence, the applicant sought the following orders:

"1. Order setting aside the Judgment of the court below.

2. Costs to the [applicant] to be taxed if not agreed."

[27] The application for stay of execution of the judgment first came before Panton P for consideration on paper and on 29 April 2015, he made the following order:

> "Stay of execution granted. If the respondent [is] unhappy, written submissions may be made, and matter put back before me for reconsideration."

The respondent promptly filed submissions in opposition to the grant of the order and the application was therefore re-submitted for consideration. On 14 October 2015, the

matter was fixed for *inter partes* hearing at a date convenient to both counsel, namely, 24 November 2015 when it came before me.

Submissions

For the applicant

[28] Counsel for the applicant embarked on a rather unusual course, in that he submitted that the "notes of evidence", were they on hand, would disclose a certain state of affairs namely:

1. That the respondent had received most of the funds generated by the trucking business.
2. Specific details with regard to how the purchase of the truck was financed.
3. What the respondent did with the funds he had received from the trucking business and why; for example placing the name of Clifford Bailey on the title for the Club Lane property in order to deceive, that is, to hide the true ownership of the property.
4. That the expert witness did not have the original documents for her examination and therefore the production of her report, would have fallen short of the best practices approach bearing in mind what she had been required to do.

[29] Counsel submitted based on the evidence adduced by the parties that:

(i) if the applicant had to repay the respondent the amounts withdrawn from the accounts she would be faced with financial ruin;

(ii) she had no other savings left as she had been the only person supporting the children of the marriage, in the case of her daughter Keoneshia, for her degree in the United States of America and in the case of her son Habeeb, in his efforts to set himself up in business, and as the respondent had refused to assist the children financially since 2001;

(iii) the respondent had deprived the applicant of millions of dollars between 2001-2009 from the family's trucking business, which he had used to build a five bedroom house in Richmond, Saint Mary with his son, Clifford Bailey, from another relationship;

(iv) in the court below the evidence was that both parties had access to the accounts and neither needed nor asked for the consent of the other to withdraw funds therefrom as that was their arrangement and understanding and so the order made by the court

that granting the respondent 50% interest in the same was "wrong and very unfair";

(v) Ms Beverley East, the expert, agreed that it was not possible to sign one's signature the same way all the time and that it was preferable to work with original documents; and

(vi) Panton P had been sufficiently satisfied to grant the stay of execution of the judgment of Morrison J.

Counsel therefore requested that I should also order that there be a stay of execution of the judgment pending appeal as prayed.

For the respondent

[30] Counsel for the respondent referred to the test that ought to be satisfied on an application for the grant of a stay of execution of a judgment. She referred to the principles which have been settled, for some time, and enunciated in **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887; **Hammond Suddard Solicitors v Agrichem International Holdings Limited** [2001] EWCA Civ 2065; and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited and Paul Lowe** [2011] JMCA App 1. Based on those well known principles, counsel asked the following questions:

(i) Has the applicant shown that she has a good chance of success on her appeal or that the appeal has any merit?

(ii) Has the applicant established that she would be ruined if a stay was not granted?

(iii) Where does the balance of justice lie?

[31] Counsel submitted that while the court ought not to embark on a detailed analysis of the merits of the appeal, she argued that based on certain aspects of the pleadings and unchallenged documents she would illustrate why the appeal was "wholly unmeritorious and wholly unlikely to succeed".

[32] With regard to the Harmony Hall property, counsel indicated that she would not dwell on the very detailed analysis of the expert report of Ms East, but instead drew the court's attention to the signature of Habeeb Bailey on the instrument of transfer, by which the respondent's name had been removed from the property, to demonstrate that Habeeb's name had been spelt with two "b's" in the middle of his name as against two "e's", namely, "Habbeb Bailey" as opposed to "Habeeb Bailey" which is how it was spelt in all the affidavits and even in the said document itself. Counsel argued further that Mr Bailey had been referred to on the certificate of title for the property as a "University Student" which would beg the question; ought he not to have known how to spell his own name? This, counsel submitted, would lead one to the conclusion that his signature on the instrument of transfer had also been forged. The transfer would therefore be invalid and the learned judge was correct when he ordered its removal from the Register Book of Titles.

[33] Counsel also referred to paragraph 4 of the respondent's particulars of claim which read:

> "4. That the [respondent] **did not execute** the relevant Transfer and did **not make a gift** of his share or interest in the property to the [applicant] or **HABEEB BAILEY** or **KEONESHIA BAILEY**. Further the [respondent] did not receive any compensation for his share or interest in the said property." (Emphasis and underline as in original)

Counsel stated that the applicant's "unambiguous plea" in response was as follows:

> "8. That **no admission is made to paragraph 4**. The [applicant] repeats paragraphs 3, 4 and 5." (Emphasis and underline as in original)

Consequently, counsel submitted, the applicant could not on appeal, challenge that averment having not done so in the court below.

[34] With regard to the joint accounts, counsel submitted that the evidence showed a pattern of transfers, removing the respondent's name from the accounts, which counsel submitted was not a coincidence. It was consistent, she argued, with the applicant's testimony of having discovered what she described as "love letters" allegedly sent from the respondent's mistresses. Counsel referred to several cases on the law relating to the use and operation of joint accounts namely **Jones v Maynard** [1951] 1 Ch 572; **Falconer v Falconer** [1970] 3 All ER 449; **Lisa Annette Officer v Leslie William Officer** Suit No E 681/2002, delivered 22 May 2006; and **In re Bishop (deceased) National Provincial Bank Ltd v Bishop** [1965] 1 Ch 450 and canvassed the principles therein disclosed. She finally concluded with reference thereto and

particularly with regard to the pleadings and the evidence in the instant case, at paragraph 22 of her written submissions, filed on 20 May 2014, that:

> "…it is admittedly the general and well settled principle that **each party to a joint account had the power to draw from and deplete all of the funds in the account without accounting to the other account holders.** However, there are well settled **exceptions** to the principle, particularly:
>
> a. where the monies in the joint account were **designated for a specific purpose**
>
> b. where it was **agreed that the account was to have a restricted or limited operation**, as is the case of fixed deposit or investment accounts. That is, that no withdrawals were going to be made from the account." (Emphasis and underline as in original)

Counsel submitted that there was sufficient evidence before the court for the learned judge to have concluded that the funds were being rolled over as savings for the parties' pension. They were therefore being held for a specific purpose and for limited operation in a fixed deposit account at the NCB Capital Markets Limited and the sums were not being withdrawn at the maturity date. On the bases aforementioned, counsel therefore submitted that there was no prospect whatsoever of success of the appeal on that ground.

[35] Counsel further posited that the applicant had merely stated that she would be ruined if the stay was not granted but had given no evidence to ground that assertion. She relied on cases such as **Calvin Green v Wynlee Trading Ltd and Naylor & Turnquest** [2010] JMCA App 3 and **Milford Trading Company Limited v Garth Pearce** SCCA No 31/2009, Application No 46/2009, delivered 28 May 2009, to support

her contention that without the evidence which ought to have been provided in the applicant's affidavit in support of the application for a stay, it ought not to succeed.

[36] Counsel reminded the court that the applicant was challenging a judgment and requesting a stay of execution which would have the effect of restraining the re-transfer of an interest which had originally been owned by the respondent, and held jointly with the applicant, and the court, she argued, ought not to support that stance being taken by the applicant. Counsel also contended that the applicant had not provided any documentary evidence to support any of her allegations with regard to the millions of dollars she claimed that the respondent had allegedly withdrawn from the accounts and she certainly had not shown that she had paid any sums towards the children's education. There were no records provided that indicated that they had attended schools abroad. Indeed, it was counsel's contention that the applicant was inconsistent, and claimed as it suited her, that she had earned vast sums from her horticulture business, and at other times that she was in dire financial straits. Neither position appears to be credible, counsel contended, and so the application ought not to succeed on that ground.

[37] With regard to the balance of justice, counsel argued that the respondent has retired, the truck is no longer in operation and he has lost his savings and pension. On the other hand, the applicant is still operating her horticulture business and so has a steady source of income. She had claimed that 70% of the funds removed from those accounts were hers, yet she seemed still not prepared to repay the respondent the remaining 30% which would, on her case, have been owned by him. This, counsel

submitted, was untenable and the court should act accordingly and refuse the application.

Discussion and Analysis

[38] It is well settled law that there must be a good reason for depriving a claimant of the fruits of his judgment (see **Winchester Cigarette Machinery Ltd v Payne and Another (No 2)** Times Law Reports, 15 December 1993). In order to depart from that position it is incumbent on the applicant to demonstrate a sound basis for doing so.

[39] A single judge of this court has jurisdiction to grant a stay of execution of a judgment pursuant to rule 2.11(1)(b) of the CAR which stipulates that a stay of execution can be granted from any judgment or order against which an appeal has been made pending the determination of the appeal. The CAR also makes it clear that except so far as this court or the court below or a single judge of this court may otherwise direct, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below (see rule 2.14(a)).

[40] The principles governing the exercise of a judge's discretion to stay the execution of a judgment have been examined in several authorities such as **Linotype-Hell Finance Ltd v Baker**, wherein it was stated that two criteria must be satisfied: (i) the applicant must show that she has a good chance of success on appeal, and (ii) that if the stay is not granted she will be finically ruined. That position has been somewhat widened in **Hammond Suddard Solicitors v Agrichem**, where Clarke LJ (as he then was) stated, at paragraph 22:

> "...the court has a discretion whether or not to grant a stay. Whether the court should exercise its 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. In particular, 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 of the appellant being able to recover any monies paid from the respondent?"

In **Combi (Singapore) Pte Ltd v Sriram and another** [1997] EWCA 2162, Phillips LJ set out clearly how the court should pursue that balancing exercise that is necessary in order to arrive at a fair and just result, and thus satisfy the interests of justice. He stated:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice. The starting point must be that the normal rule as indicated by Ord 59, r 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

[41] These principles have been endorsed by several cases in this court and it is my view, on an analysis of the principles enunciated therein, that it is clear that in the exercise of the discretion whether or not to grant a stay a judge should have regard to the following:

1. The applicant's prospect of success in the pending appeal; and
2. The real risk of injustice to one or both parties recovering or enforcing the judgment at the end of the appeal.

[42] However that is not the end of the matter. Consideration must be given to the type of order that the applicant is requesting ought to be stayed. The question may arise, as in this case, as to whether that order ought properly to be the subject of a stay. In **Norman Washington Manley Bowen v Shahine Robinson and Neville Wiliams** [2010] JMCA App 27, Morrison JA (as he then was) held that the court had no power to stay a purely declaratory order. What he made clear was that declarations merely pronounce and do not create rights that can be enforced by the court. The declaratory order declares the parties' rights but contains no orders enforcing them. On the contrary, executory orders direct the parties to act in a certain way, either to pay money or to refrain from interfering with the parties' rights. One must be careful therefore when examining the orders made by the court in the instant case, to ascertain whether the orders are purely declaratory and not subject to a stay or are otherwise and the court may see fit to act accordingly.

The applicant's prospect of success in the pending appeal

[43] I recognize that it is inappropriate to conduct a detailed analysis of the parties' respective cases on an application such as this, as the matter is on appeal and an in depth consideration and determination of the matter will be done at the hearing of the appeal by the full court. However, it is necessary to examine the parties' competing contentions in order to ascertain if the applicant has crossed the threshold of satisfying me that there is a real prospect of success on appeal, for as stated that is one of the criterion which must be demonstrated, in order to succeed on this application.

[44] In examining that criterion, one must recall the proper role of the appellate court. The Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, in an appeal from the Republic of Trinidad and Tobago, canvassed cases over the years which have dealt with this aspect of the law. Lord Hodge, who delivered the judgment on behalf of the Board, endorsed yet again (at paragraph 12) the powerful speech of Lord Thankerton in **Thomas v Thomas** [1947] AC 484 where he stated, at pages 487-488:

> "I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper

> advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[45] In **Thomas v Thomas**, Viscount Simon and Lord Du Parcq approved the dictum of Lord Green MR in **Yuill v Yuill** [1945] P 15, where at page 19 he stated that:

> "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

[46] Lord Hodge in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** commented on the often utilized phrase that the court of appeal must be satisfied that the judge of first instance has gone "plainly wrong", and indicated that the phrase has been criticized as it "does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts" (see Lord Donaldson in **Piggott Brothers & Co Ltd v Jackson** [1992] ICR 85). However, Lord Hodge stated, at paragraph 12 of the judgment, that the phrase:

> "...directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."

[47] It is clear therefore that the court of appeal will be very hesitant to and will only in the rare case, interfere and contemplate reversing the findings of primary fact, found

by the trial judge, where there has been no evidence to support the conclusion, or there has been a misunderstanding of the evidence or no reasonable judge could have reached that conclusion (see Lord Neuberger in **In re B (A Child) (Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911).

[48] In the instant case there are three main assets which are the subject of the judgment namely: (i) the property at Harmony Hall; (ii) the joint accounts; and (iii) the two motor vehicles. It will be necessary to examine the orders of the court against the respective claims of the parties, and the evidence adduced, to assess whether the material which was before the learned judge and as reviewed from the papers which were submitted to me, there is a reasonable prospect that the court could conclude that the learned judge had gone plainly wrong. In doing that one would also have to assess whether the orders made were declaratory in nature on the bases of the principles discussed earlier, and therefore not subject to a stay of execution in all the circumstances of the case, and/or whether in spite of that, the other consequential orders which were also made are amenable to such an order.

[49] In respect of the Harmony Hall property, *prima facie*, as the parties were both registered on the certificate of title for the property, the legal and beneficial estate would be presumed to be owned equally by both of them (see **Stack v Dowden** [2007] 2 All ER 929). There was evidence that the property was purchased together and that the parties resided there during their married life. The learned judge may have assessed the fact that the respondent had stated that he had not signed the instrument of transfer by way of gift or otherwise; he had reported the matter to the Fraud Squad

and the parties had attended on the officers there; and the evidence adduced in respect of the expert report had supported the conclusion that the transfer had not been signed by him. I will refrain from commenting on the manner in which the signature of Habeeb Bailey was affixed to the instrument of transfer as counsel for the applicant indicated to me that that matter had not been referred to in the court below. It will therefore be an interesting point for this court to review and assess as to its potency in its deliberations in the appeal.

[50] The learned judge appeared to accept the evidence of the respondent. In keeping with the authorities, it will be a matter for this court to assess whether on those facts he had gone plainly wrong. Was there evidence to support the learned judge's conclusion? Did he misunderstand the evidence? On the face of it, it would seem an uphill and difficult task to convince the court to interfere with his findings of primary facts. The case is one of fraud and the evidence must be cogent to satisfy the tribunal of fact, but without any documentary evidence to the contrary, there does seem to be evidence on which the learned judge could have concluded as he did, which would therefore, *prima facie*, appear to defeat the applicant's realistic chances of success on appeal in relation to this aspect of the grounds of appeal.

[51] With regard to the finding by the learned judge that the respondent is entitled to 50% of the sums which were in the investment and savings accounts, and for an accounting and the repayment of the sums withdrawn therefrom, I agree with the submissions of counsel for the respondent that the general principle in relation to joint accounts is that monies held therein belong to the account holders in equal shares. In

Jones v Maynard, the leading case on the subject, Vaisey J had this to say, at page 575:

> "In my judgment, when there is a joint account between husband and wife, and a common pool into which they put all their resources, it is not consistent with that conception that the account should thereafter (in this case in the event of a divorce) be picked apart, and divided up proportionately to the respective contributions of husband and wife, the husband being credited with the whole of his earnings and the wife with the whole of her dividends. I do not believe that, when once the joint pool has been formed, it ought to be, and can be, dissected in any such manner. In my view a husband's earnings or salary, when the spouses have a common purse, and pool their resources, are earnings made on behalf of both; and the idea that years afterwards the contents of the pool can be dissected by taking an elaborate account as to how much was paid in by the husband or the wife, is quite inconsistent with the original fundamental idea of a joint purse or a common pool.
>
> ...
>
> I think that the principle which applies here is Plato's definition of equality as a 'sort of justice': if you cannot find any other, equality is the proper basis. When moneys were taken out of the joint account for the purpose of making an investment, the intention which I attribute to the parties is equality, and not some proportional entitlement to be arrived at by an inquiry as to the amounts contributed respectively by the husband and wife to the common purse. Where one is searching for justice, as one must, and cannot find any other secure and sound basis, I think that equality is the best rule."

[52] As counsel for the respondent indicated the court will not "pick apart" the sums in joint accounts in order to determine who contributed what proportions and who had the greater income. Additionally, the doctrine of the presumption of advancement which previously may have been relevant to disputes between husband and wife and

contributions by a husband to assets in the wife's name, being presumed a gift, has less applicability in modern times as wives are now much less dependent on their husbands for financial support. I agree with the words of Lord Denning MR in **Falconer v Falconer**, at page 452 that:

> "That presumption found its place in the law in Victorian days when a wife was utterly subordinate to her husband. It has no place, or, at any rate, very little place, in our law today..."

[53] In the instant case the facts do not support such a claim, and quite correctly, the applicant did not attempt to rely on it before me. The real point however is stated in the *locus classicus*, **In re Bishop (deceased) National Provisional Bank Ltd v Bishop**, where in circumstances where the husband and wife operated joint accounts and withdrew sums and placed investments into the names of one spouse or on other occasions the name of the other. The Court held at pages 458-460:

> "…in the absence of some circumstances or some evidence of intention that the joint account was to have a limited operation or was set up and kept up for some special purpose, each spouse has power to draw on the joint account not only for the benefit of the spouses but for his or her own benefit.
>
> ...the circumstances in relation to the joint account have to be regarded in order to ascertain the reason for its existence and to see whether it existed for some specific or limited purpose.
>
> ...in considering what the intention of the parties is, one has to look at the surrounding circumstances. For example, one may take the surrounding circumstances into consideration so as to decide whether a transfer into the name of the wife is a gift or whether a resulting trust is intended…"

[54] So in the instant case, this court will have to assess whether the joint accounts were for some specific purpose and were to have a limited operation. There was evidence that the accounts had been established for the parties' savings and for their pension. The amounts in the accounts were rolled over and allowed to increase for that purpose. Withdrawing sums willy-nilly without the consent of the respondent and or taking his name off the accounts and transferring his interest noted on the accounts into the names of the children in lieu thereof, does not *prima facie* appear on the evidence to be in keeping with the original purpose relative to the opening and operation of the accounts. On the face of it therefore, it may be difficult for this court to interfere with that finding of the learned judge who appeared to believe the evidence of the respondent over that of the applicant. The applicant has not shown in my view that she has a real prospect of success on this aspect of the grounds of appeal.

[55] With regard to the finding by the learned judge that the respondent is entitled to 50% of the two motor vehicles and an accounting in respect of sums received relative to them, in my view, this conclusion is based entirely on the issue of credibility, and in this case, which of the parties the learned judge ultimately believed. There was no documentary evidence adduced by either side which could throw any light upon that finding. *Prima facie* therefore that finding also appears difficult for this court to contemplate reversing.

The real risk of injustice to one or both parties recovering or enforcing the judgment at the end of the appeal

[56] With regard to the risk of irremediable harm and detriment that may be caused with the grant of the order of the stay, the applicant has not indicated why she would suffer ruin if the stay was granted. The evidence seems to disclose that she still operates her horticulture business and she appears to have always withdrawn sums to give to her adult children either for their education and or the operation of a business. On the other hand, on the evidence, the respondent appears to be without savings, pension or a means of earning an income in the manner that he had done over several years previously. If the stay of execution is granted there would be no detriment to the applicant as the respondent's interest in the Harmony Hall property has already been transferred, and the funds in the joint accounts withdrawn and the motor vehicles sold. The detriment and irremediable harm is with the respondent as he has lost his interest in the property, the accounts and the motor vehicles. There is no evidence that these sums will be returned with dispatch if the respondent were to be successful on appeal. The balance of justice appears to lie with the respondent. As indicated, I am of the view that the facts, as presented before me, seem to suggest *prima facie* that this appeal has no real chance of success, and that the court may find it difficult to contemplate interfering with the decision of the learned judge. As a consequence, in the circumstances of this case, I am minded to refuse the application for stay of execution of the final judgment pending appeal.

Conclusion

[57] I am not of the view that the declaratory orders granted to the respondent can be stayed. As a consequence, the application could not succeed in respect of orders (1) (7) and (10) of the judgment of Morrison J. However, orders (2), (3), (4), and (5) in relation to the Harmony Hall property and orders (8), and (9) in relation to the accounts and order (11) in relation to the motor vehicles all contain directions requiring the applicant to do an act or to pay money. However, bearing in mind the view I have taken of the matter, the accounting exercise as ordered by the learned judge should proceed and payment be made once the accounting process has been completed.

[58] It is clear, that the stay in relation to the injunction should be refused, as in the light of the evidence before me, it would not be in the interest of justice for the applicant and her children to be in a position to dispose of the property in the interim pending appeal, thereby rendering the respondent's proprietary claim as a co-owner of the legal and beneficial estate otiose. I would therefore refuse a stay of order (6) of the judgment until the determination of the appeal.

[59] In the circumstances, the application for a stay of the judgment pending appeal is refused. Costs are awarded to respondent to be taxed if not agreed.