JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2016

APPLICATION NO 164/2016

BETWEEN	**CLAUDETTE CROOKS-COLLIE**	**APPLICANT**
AND	**CHARLTON COLLIE**	**RESPONDENT**

Kevin Williams and Miss Khian Lamey instructed by Grant Stewart Phillips & Co for the applicant

Miss Sashawah Newby for the respondent

15, 17, 18 November; 5, 9 and 21 December 2016

IN CHAMBERS

SINCLAIR-HAYNES JA

[1] The applicant, Mrs Claudette Crooks-Collie, has applied for a stay of execution of the judgment of Palmer J (Ag) as he then was, which gave Dr Charlton Collie, the respondent, a 20% share in property located at Plymouth Avenue in Saint Andrew (Plymouth) pending the appeal of the learned judge's decision.

The background

[2] Plymouth, which is registered in the sole name of Mrs Crooks-Collie, is the source of contention. According to Dr Collie, pursuant to the Property Rights of Spouses Act (PROSA), Plymouth is the family home. Dr Collie asserted that he is entitled to 50%

share in Plymouth because he expended money improving the premises, he paid some bills and had built a life with the applicant at Plymouth. It was his evidence that while they cohabited together, all his personal belongings were at Plymouth.

[3] His claim was trenchantly opposed by Mrs Crooks-Collie who contended that there was never any intention of the parties that Plymouth be treated as the family home. Mrs Crooks Collie asserted that the property was both purchased and renovated without financial assistance from Dr Collie. According to her, Dr Collie's contributions to the maintenance of and improvement to Plymouth were insubstantial.

[4] Dr Collie, she averred, had agreed to the signing of an agreement confirming that Plymouth was not to be the family home. She contended that property in Cherry Gardens had been purchased with a view to build a family home. Those plans were however abandoned as their relationship crumbled.

[5] The learned judge accepted Dr Collie's version of the facts and ruled that:

> a. That the Respondent is entitled to 20% share of all that parcel of land part of Barbican, now known as Barbican Heights, in the parish of St. Andrew being the Lot numbered Four Hundred and Sixty Nine on the Plan of Barbican Heights aforesaid and being part of the land comprised in the Certificate of Title registered at Volume 1170 Folio 106 ("the family home") pursuant to the Property Rights of Spouses Act.
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> c. That the said property be appraised by DC Tavares Finson Ltd in order to ascertain its current market value no later than thirty (30) days after the grant of these orders;

The following consequential orders were made subject to the right of the Defendant to compensate the Claimant to the equivalent of his 20% share:

> d. That the appraisal report be delivered to the Respondent within fourteen (14) days after its completion whereupon the Respondent will have thirty (30) days in which to exercise her right of first option and pay the deposit of ten (10) percent of the half appraised value.
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> e. That the said property be sold at its appraised market value on the open market, if the Respondent fails to exercise her right of first option, and the net proceeds of the sale divided equally between the Applicant and the Respondent;
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> f. That the Attorney-at-Law with carriage of sale be TAMEKA JORDAN, of MCDONALD, JORDAN AND CO Attorneys-at-Law for the Claimant herein;
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> g. That the parties co-operate in all actions to facilitate the sale of the premises including but not limited to the advertisement of the property for sale.
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> h. That all reasonable costs attendant upon sale including but not limited to the advertisement in the newspapers, realtors' commission, cost of transfer and discharge of any existing mortgage be borne by the parties equally.
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> i. That the Registrar of the Court is empowered to sign all documents necessary to effectuate the court's order herein in the event that either party refuses or neglects to do so within fourteen (14) days of being requested to do so by the relevant Attorney-at-Law.
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> j. That the cost of this valuation is to be borne equally by the parties.

[6] Being displeased with the learned judge's decision, Mrs Collie filed notice and grounds of appeal.

The grounds of appeal

[7] The grounds of appeal filed on behalf of Mrs Collie are as follows:

> "(a) The Learned Trial Judge erred as a matter of law at para [4] he incorrectly identified that the sole issues *'...are as to whether a declaration ought to be made, whether under the Property (Rights of Spouses) Act ('PROSA') or in equity for a share of the property at Plymouth, and if so, in what proportion*.' To the contrary, the Learned Trial Judge ought to have applied the arguments advanced on behalf of the Appellant in identifying the core issues as,
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> i. whether to award the respondent, his claim for 50% interest in the subject property at Plymouth avenue (hereinafter referred to as the "Plymouth property");
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> ii. whether the extent and/or scope of the purported improvements asserted and relied on by the Respondent were to be accepted as credible and substantial by the Trial Judge; and
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> iii. what if any legal significance, was to be given to those purported improvements having regard to the statutory criteria under s.14 of PROSA required to satisfy a finding that the Respondent's purported contribution to the Plymouth property vested him with an interest in the same.
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> (b) Although finding on the facts and on the law that the Plymouth property was the 'family home' within the meaning of the definition ascribed to it under s.2 of PROSA, the Learned Trial Judge failed to properly construe and appreciate the interrelationship between s.6 which creates a statutory presumption of an equal share rule in the family home, as against s.7(1) of the Act which empowers a court to deviate from the statutory equal share rule out where '...**it is unreasonable or unjust**'.

(c) In so doing and in failing to understand the crucial distinction provided under sections.6 &7 of PROSA which was critical to his properly analysing the facts before him, the Learned Trial Judge failed to have sufficient regard to and/or appreciate and/or apply his mind to on the factual circumstances before him he ought properly to have concluded, on a balance of probabilities, that it was unreasonable and unjust to apply the equal share rule and instead, to find as a matter of fact and law that the Respondent had failed to establish any entitlement to an interest in the subject property whether 50% or 20% or any other percentage that could have been permissible by variation under s.7 of PROSA.

(d) Further, this failure on the part of the Learned Trial Judge to appreciate and/or have regard to and/or pay sufficient regard to the proper construction of Ss.6 & 7 of PROSA in his application of the law to the claim went against the weight of the plethora of legal authorities presented in the legal submissions advanced on behalf of the Respondent.

(e) Although the Learned Trial Judge appreciated that s.7 of PROSA permitted him to vary the equal share principle which led [sic] him to vary the rule to give the Respondent a 20% interest in the Plymouth property this finding of law and application of s. 7 of PROSA cannot be substantiated as a matter of fact and of law having regard to all of the factual circumstances of the matter before him in which the Appellant, by way of her Affidavit and viva voce evidence provided a strong and substantial basis to vary the rule so as to deny the Respondent any share in the Plymouth property at all.

(f) The Learned Trial Judge failed to appreciate the Appellant's account of the chronology of the relationship between the parties which establishes that the marriage was a marriage of short duration and accordingly the court ought to have taken into consideration this fact as required under s. 7(1)(c) of PROSA and therefore ought not to have given the Respondent any share at all in the disputed Plymouth property as correct application of s.7(1) of PROSA

ought properly to have led to a conclusion that the Respondent was not entitled to any share whatsoever in the Plymouth property.

(g) In varying the equal share rule but according the Respondent a 20% share interest in the Plymouth property the Learned Trial Judge failed to take into account the evidence before him, which on a proper consideration and application of the principles established in the legal authorities submitted on behalf of the Appellant provided ample grounds for him to hold that it would be unjust and unreasonable for the Respondent to be deemed entitled to any share at all in the Plymouth property having regard to the length of the marriage being 17 months and the fact that the Plymouth property was already owned by the Appellant some nine (9) years prior to the marriage in March 2012.

(h) The Learned Trial Judge failed to properly analyse the statutory criteria under s.7 of PROSA which, on an application to the facts and evidence before him, lead [sic] in the trial demonstrated that the court was entitled to find that not only one but two of the s.7 factors were present and ought to have been applied in considering the question of varying the equal share rule.

(i) The Learned Trial Judge erred as a matter of fact and law in preferring the evidence of the Respondent that the parties had at all material times displayed an intention to treat the Plymouth property as the 'family home' and in taking into account the period of time of the pre-marriage relationship between the parties and failed to take into account the significance in law of the fact that the Respondent, during the period prior to the marriage was married up until 2011 when his divorce was granted.

(j) The Learned Trial Judge erred as matter of fact and law when he held that the alleged pre-marriage intentions shared between the parties were to be treated as relevant while he ought to have found to the contrary due to the requirements that as the Claimant was married at that time, he could therefore

not be a spouse for the purposes of PROSA. See paragraphs **[55]**, **[56]**, **[57]** and **[58]** of the draft judgment.

(k) In considering the intention of the parties as an important factor, the Trial Judge made a material error in his findings of law by treating as important the question of a common intention, a legal concept which, prior to the enactment of PROSA on April 1, 2006 amounted to a concept under the rules of equity as well as a principle employed by the courts under s.17 of the Married Women's Property Act now repealed, In doing so, he failed to heed that on the coming into force of PROSA, s.4 of that Act clearly stated the rules of equity would no longer apply and that the provisions of PROSA are to have effect in place of the rules and presumptions of the common law and of equity in relation to transactions between spouses relating to property and in other cases for which provisions have been made under PROSA between spouses and other third parties.

(l) The Trial Judge erred in his application of the principle of common intention which [sic] when accepting the Respondent's argument that the period of the relationship and cohabitation prior to the marriage is to be treated in accessing whether they had a common intention to integrate their affairs.

(m) The Learned Trial Judge's findings of fact set out above went against the weight of legal authority cited on behalf of the Appellant which established that the definition of spouse under the provisions of PROSA refers to a single man and single woman which therefore prohibits a married person from falling within the definition of spouse under PROSA.

(n) The Learned Trial Judge ought to have accepted that evidence of the Appellant which emphasized that at no time was her home at Plymouth intended to be the family home or matrimonial home and that it was the reason and purpose for the Deed of Arrangement which she had insisted was to be a precondition of marriage although the Claimant failed to sign it as

promised. In rejecting the Appellant's evidence in this regard the Learned Trial Judge asked and answered the wrong question which he posed at paragraph **[59]** to the effect that the Appellants requirement that the Respondent signing of the Deed of Arrangement as a precondition of the marriage was not credible as she could not answer why after waiting for so long to marry the respondent, she would not proceed with the marriage notwithstanding the fact that the Deed of Arrangement was never signed.

(o) The Trial Judge wrongly answered this question at paragraph **[60]** when he refused to permit to be tendered in evidence the unsigned Deed of Arrangement and in so doing he cast doubt on the Appellant's insistence that there was a term in the Deed of Arrangement which the Respondent demanded be changed and this together with his finding lead [sic] him to come to the wrong conclusion in refusing to accept the Deed of Arrangement, albeit unsigned, as being evidence that established the Appellant's consistent and unwavering intention that the Plymouth property was never intended to be property shared between the parties. In this regard, the Trial Judge was wrong in concluding that the court was being asked to speculate and this implied that the Appellant was dishonest in proceeding with the marriage in any event notwithstanding that failure on the part of the Claimant to execute the Deed.

(p) The Trial Judge further fell into error in not accepting the Appellant's evidence in relation to her acquisition of the Plymouth property supported by the evidence that the Respondent had failed to demonstrate any significant and material contribution on his part or any shred of evidence that would have vested in him an interest in the Plymouth pursuant to Ss. 6 & 7 or s.14 of PROSA. In these circumstances the Learned Trial Judge's refusal to reject the explanation tendered by the Respondent claiming that he had never seen the Deed of Arrangement caused him to fall into error in failing to take into account the significance of the pre nuptial agreement, albeit unsigned, which

demonstrated that the Appellant had the clear, unequivocal and unambiguous intention to preserve her sole interest in the Plymouth property.

(q) The Learned Trial Judge further fell into error in not accepting the evidence of the Rev Bosworth Mullings who gave Affidavit and viva voce evidence on behalf of the Appellant concerning the agreement arrived at between the parties prior to the marriage which provided evidence of the Appellant's insistence on a pre-nuptial agreement.

(r) The Learned Trial Judge erred in his findings of fact and law in accepting the Respondent's evidence as to the existence of his relationship with the Appellant in assessing the intention of the parties to integrate their affairs. In this regard the Learned Trial Judge made erroneous findings of law in treating with the actions of the parties when he incorrectly held that these actions were consistent with the assertion of the alleged mutual intention that Plymouth would become the family home after the wedding [paragraph **58**].

(s) Further, the Learned Trial Judge erred in ordering costs in full to the Respondent in circumstances where he held that the equal share rule under s. 6 of PROSA be varied pursuant to S. 7(1) (b) and (c) of PROSA so as to entitle the Respondent to a 20% interest in the Plymouth home, without apportioning same on the basis of the same 80:20 ratio.

(t) The Learned Trial Judge erred in failing to order that for similar reasons, the costs of the valuation of the Plymouth property be borne by each party in proportion to the 80:20 ratio [w]hich he ordered."

Applicant's Submissions

[8] In relying on the case, **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA 27, Mr Kevin Williams, for the

applicant, rightly confined his application to Orders 2 to 4 of the learned judge's decision which orders he submitted were executory and therefore amenable to a stay.

[9] Mr Williams acknowledged that a successful litigant is entitled to the fruits of his judgment but submitted that the circumstances of this case warrant a stay. Counsel submitted that the applicant's appeal has a real prospect of succeeding and without a stay there is a real risk of injustice to Mrs Crooks- Collie who will face ruin.

[10] Counsel referred the court to McIntosh JA's (Ag) (as she then was) statement at paragraph [45] in **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2010] JMCA App 25 that:

> "...The interests of justice require another consideration namely, whether the applicant has some prospect of succeeding in the appeal. That consideration is directly linked to the interests of justice because... if the appeal had no prospect of success, it would not be in the interests of justice to deprive the respondent of the fruits of judgment."

Counsel also directed the court's attention to the dicta at paragraphs [32] –[34] in the case **Crown Motors Limited et al v First Trade International Bank & Trust Limited (In Liquidation**) [2016] JMCA Civ 6 that:

> "[32] It is settled law that a successful litigant is entitled to the fruits of his judgment. The orthodox principle which guides the court in the exercise of its jurisdiction to grant a stay of execution is that a stay ought to be granted if an unsuccessful defendant faced ruin without the stay and he has an appeal which has some prospect of success. Straughton LJ's statement in **Linotype-Hell Finance Ltd v Baker** heralded the modern approach to the grant of a stay of execution. He expressed that the old rule requiring an appellant to satisfy the court that if the damages and costs

> were paid there would be no reasonable prospect of recovering them if the appeal succeeded is now far too stringent a test and was not reflective of the courts current practice."

[11] Counsel argued that in the exercise of its discretion, the court must also consider the risk of injustice to the applicant. For that proposition, he relied on Clarke LJ's dicta in **Hammond Suddard Solicitor's v Agrichem Agricultural Holdings Ltd** [2001] EWCA Civ 2065 that:

> "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?" (Emphasis supplied)

[12] It was also Mr Williams' submission that in exercising its discretion whether to grant the application for a stay of execution, the court must perform a balancing exercise. For that submission he relied on the cases, **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank of Jamaica Ltd) v Y P Seaton** [2015] JMCA App 18; **Combi (Singapore) Pte v Sriram and another** [1997] EWCA 2162 and **Joycelin Bailey v Durval Bailey** [2016] JMCA App 8.

[13] Without a stay, he said, Mrs Crooks-Collie will be ruined. Counsel postulated that Mrs Crooks Collie is a businesswoman. She is the president of Money Masters Limited

which engages in portfolio review and restructuring, fixed income instruments, blind trading, local and international equities, cambio trading and loan provision. Her business requires capital injections at various times and she leverages Plymouth to obtain the necessary financing to satisfy the capital needs of the business.

[14] Counsel submitted that if the application for a stay is not granted and Plymouth is sold, without Plymouth or any other asset of similar value that can secure the financing necessary, Mrs Crooks-Collie will be ruined because her business requires financing.

[15] If the application is granted there would be no detriment to Dr Collie because Mrs Crooks-Collie has provided an undertaking from Jamaica National Building Society which demonstrates her ability to satisfy the judgment in the event that the appeal is unsuccessful.

[16] It was counsel's further submission that the decision of this honourable court will have far reaching consequences as regards the principle of division of matrimonial property in that it will clarify the factors to be considered in instances such as the present and also determine the role of equity in this and similar circumstances.

[17] Mr Williams contended that it has been demonstrated that there is a real risk of Mrs Crooks-Collie suffering irremediable harm if the stay is not granted. There was no similar likelihood detriment to Dr Collie. In conducting a balancing exercise it is evident that the pendulum swings in favour of the applicant.

[18] Counsel pointed out that Dr Collie had lodged a caveat against the certificate of title for the property. He posited that whereas Mrs Crooks-Collie will lose her home, Dr Collie is the owner of a dwelling house at 19 Long Mountain Road, Kingston.

[19] Mr Williams urged the court to consider the following effects on the applicant and her daughter if the application is refused:

> a) Plymouth is home to the applicant and her sixteen (16) year old daughter, who has known the Plymouth property as her only home since she was three years old.
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> b) Their daughter would be preparing for external examinations shortly and an execution of the judgment is likely to destabilize her and cause emotional distress which would sabotage her prospect of success in these examinations.
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> c) Plymouth is leveraged to secure financing for her business. If judgment is executed after deduction of the costs incidental to the sale, it is unlikely that she will be able to afford to find and purchase a property similar to Plymouth as at age 51 years, she would not qualify for a mortgage to enable such purchase.
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> d) The negative effect on her business if she does not have Plymouth. If the respondent should enforce the judgment and sell Plymouth the applicant would not be able to afford a property of equal or greater value. Not having a property of equal value would prohibit her in the amount of capital she could possibly leverage to satisfy the capital needs of Money Masters Limited as those needs arise.

[20] It was Mr Williams' further submission that at first instance the value of Plymouth was accepted by the parties, based on the valuation of DC Tavares dated July 2010, as

being $85,000,000.00. Based on that value, Mrs Crooks-Collie has estimated that a 20% value in Plymouth is likely to amount to $17,000,000.00 before deductions.

[21] Mr Williams pointed the court's attention to Dr Collie's evidence before the learned judge that Mrs Crooks-Collie was in a better financial position than he. He specifically directed the court's attention to Dr Collie's evidence that "the [Mrs Crooks-Collie] is a business woman and she makes significantly more money than [he]". In support of that statement Dr Collie had exhibited his pay slip for the month of September 2013. On that payslip his net salary was $275,080.57.

[22] Counsel however urged the court to accept the Mrs Crooks-Collie's evidence which was before the learned judge, that the salary slip which Dr Collie exhibited reflected only his salary from the University Hospital of the West Indies. He had not disclosed his earnings as a lecturer of the University Hospital of the West Indies nor the income he derived from his private practice. Counsel submitted that the court ought to take cognizance of the fact that Dr Collie did not challenge that aspect of Mrs Collie's evidence.

[23] Mr Williams contended that on Dr Collie's evidence, it is apparent that he will be unable to repay the equivalent of 20% of the value of the Plymouth property, should the appeal succeed. Counsel posited that if a stay is not granted and the applicant is forced to pay such a large sum to purchase Dr Collie's 20% interest or if Plymouth is sold on the open market and the proceeds of sale of the Plymouth paid to Dr Collie, the

consequences would be disastrous. The Mrs Crooks-Collie's appeal would be stifled and any success would be a mere pyrrhic victory.

The respondent's submissions

[24] Miss Newby, on the other hand, submitted that Mrs Crooks-Collie has failed to demonstrate that she will be ruined if called upon to pay the damages. According to her, Mrs Crooks-Collie has misconstrued the ruin or damage contemplated by the courts in these applications. She relied on Harris JA's statement at paragraph [32] of **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Paul Lowe** [2011] JMCA App 1 that:

> "An assertion of ruination speaks to the inability to meet the payment of a sum awarded under a final judgment as well as costs. The applicant has not shown any detriment by demonstrating that an estimated amount could accrue as damages exceeding that which it would be in a position to pay. A bald statement that it would be ruined if it is required to make payment consequent on an assessment of damages is insufficient."

[25] Ms Newby argued that Mrs Crooks-Collie's statement that she will be ruined does not in fact relate to the satisfaction of the judgment by her at all. It actually relates to her application to discharge the caveat on the property to facilitate borrowing funds on behalf of her company.

[26] It was her submission that Mrs Crooks-Collie's bald assertion of ruination is insufficient. Counsel argued that Mrs Crooks-Collie must demonstrate that if she has to pay his 20% share she will be ruined. It was also Ms Newby's contention that Mrs

Crooks-Collie's use of the property as security for one of her companies does not fall within the parameters of ruin contemplated by the courts.

[27] Counsel postulated that there is no factual basis for the appellant's claims of greater injustice. Any risk purportedly facing the appellant in respect of the said property, is as a result of her dilatory conduct which ought not to be weighed in her favour.

[28] If the orders are granted, counsel submitted, Dr Collie will suffer more prejudice and injustice because he may literally have an empty judgment. If the caveat is lifted and Mrs Crooks-Collie is allowed to borrow funds using the property as security, Dr Collie will be exposed to the risk that he may not be able to recover the fruits of his judgment. If the protection offered by the caveat is removed, Dr Collie will be exposed to the real risk that his interest could be dissipated in the event of a default by the Mrs Crooks-Collie's company over which he has no control. Counsel argued that in any event the security provided is woefully short of offering any measure of security to Dr Collie's interest.

[29] It was Ms Newby's submission that Mrs Crooks-Collie had not placed before the court any documentation outlining the bank's commitment to act in the manner asserted by her. On the evidence presented, if the orders are granted, Dr Collie will be greatly prejudiced and certainly more so than Mrs Crooks-Collie.

[30] According to counsel, Mrs Crooks-Collie has not put the court in a position to properly make the orders sought. It is not in the interests of justice for this court to

grant the orders sought because Mrs Crooks-Collie has failed to demonstrate that she has an appeal with any merit or that she will be ruined if a stay is not granted.

[31] It is evident, counsel submitted, that it is Dr Collie who will not suffer irremediable harm in the event that a stay is granted and the caveat lifted as prayed.

Law/ Analysis

[32] Although a successful litigant ought not to be deprived of the fruits of judgment, if an appellant with a real prospect of succeeding on appeal is confronted with ruin if a stay is refused, it is in the interests of justice that the application be granted. Phillips LJ in **Combi (Singapore Pte) v Sriram and another** [1997] EWCA 2162, whose statement this court has endorsed, made that quite plain:

> "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 maybe caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if the stay is not ordered, then a stay should not 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 perceived strength of the appeal."

The statement of McIntosh JA (Ag) in **Jamalco (Clarendon Alumina Works) v Lunnette Dennie** (as outlined in paragraph [9] of this judgment) succinctly restated the principle.:

[33] In balancing the scales, in my view, the scale is weighted in favour of Mrs Crooks-Collie. A crucial consideration is the likely destabilization of her daughter whilst she is preparing for such an important examination. The sale of her home and the uncertainty of her mother being able to afford a suitable replacement at this delicate period in life weigh heavily in the balance. The loss of Mrs Crooks-Collie's home; the possible uprooting of her family (including her aged mother) from the community and the place she has made into their home for the past 14 years would represent an irreversible loss. Another significant consideration is Dr Collie's ability to repay the sums awarded in the event that Mrs Crooks-Collie succeeds on appeal. On the other hand, Dr Collie is the owner of a house.

[34] The determining consideration however is whether Mrs Crooks-Collie has a real prospect of succeeding on her appeal.

Does Mrs Crooks-Collie have a real prospect of succeeding?

[35] In respect of the family home, there is a presumption that the parties are entitled to equal shares in the family home. Section 6 of The Property (Rights of Spouses) (PROSA) Provides:

"(1). Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home—

(a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;

(b) on the grant of a decree of nullity of marriage;

(c) where a husband and wife have separated and there is no likelihood of reconciliation.

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one half share of the family home."

Section 7 however confers on the court the power to vary that rule. Section 7 provides:

"(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-

a) that the family home was inherited by one spouse;"

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) That the marriage is of short duration.

(2) In subsection (1) "interested party" means-

(a) a spouse;

(b) a relevant child; or

(c) any other person within whom the Court is satisfied has sufficient interest in the matter."

[36] In addressing the presumption of equal shares the learned judge expressed the view that:

> "[65] In the circumstances I accept that Plymouth is a family home for the purposes of PROSA and that in the circumstances it is suitable that the equal share principle be varied for the reasons already stated . Despite that finding, I do not accept the Defendant's position that the Claimant's share should be varied to give him a zero share in Plymouth. In view of the degree of investment made by Mrs-Crooks Collie, both of time and expense, I believe Dr Collies share should be varied to 20% of the value of the family home."

[37] In determining whether Dr Collie was entitled to share in the property or what could be considered a just apportionment, the point at which he could lawfully be deemed a spouse was important. The learned judge had to have been satisfied that at the material times Dr Collie was a spouse within the meaning of PROSA. Section 2-(1) of PROSA defines spouse. It reads:

> "(1) 'spouse' includes-
>
> (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;
>
> (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years.
>
> Immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case maybe.
>
> (2) The terms 'single woman' and 'single man' are used with reference to the definition of 'spouse' include widow or widower, as the case may be, or a divorcee."

[38] The unchallenged evidence is that Plymouth had been acquired solely by the applicant several years before their marriage. The parties commenced a relationship in 2003 whilst Dr Collie's previous marriage subsisted. At the time of Plymouth's acquisition, Dr Collie was still married to someone else. Dr Collie eventually divorced his first wife in 2011 and he and Mrs Crooks-Collie were married in March 2012. The marriage was short lived. By August or September 2013 cohabitation ceased and they occupied different bedrooms. By November 2013 he had removed from the home.

[39] Dr Collie however said that the intention at the time of purchase was that the property would be their matrimonial home after his impending divorce. Mrs Crooks-Collie is however adamant that the property was acquired to accommodate her daughter and her elderly mother.

[40] The learned judge pointed out that Dr Collie's assertion that there was an agreement in 2003 that they would acquire the property as their intended matrimonial home while he awaited his divorce was doubtful because his petition for the dissolution of his first marriage was only filed in 2010.

[41] In awarding 20% share in the property to Dr Collie the learned judge was obviously mindful of section 7 of PROSA. At Paragraph 63 of his decision he said: "I agree with the submissions of the defendant that the short length of their marriage and the fact that Mrs. Crooks-Collie was the sole purchaser and renovator of the house are factors that cause me to vary the equal share principle".

The learned judge's statement which followed his observation is however criticized by Mr Williams. The judge said:

> "[56] Notwithstanding, his evidence is not seriously disputed as to the fact that he moved his furnishings to Plymouth and began to treat it as his home from 2008. **Though this was a period during which he was still married to his ex wife, from at least 2008 the two were displaying their intention to treat Plymouth as their home**.
>
> [57] The period from 2008 is relevant to the extent that Dr Collie began to expend paid [sic]. He began to take on the roles of man of the house though in law he was still married to someone else. The period cannot be relevant to determine the period during which Plymouth was the family home for the purposes of PROSA, **but is relevant in determining the intention of the parties as to how Plymouth was to be viewed once they were married.**" (Emphasis added)

At paragraphs [61] and [62] the learned judge said:

> "[61] **The living arrangements of the parties prior to the marriage** and after the wedding, at least up to the time of their separation, are useful to guide as to their common intention. The parties lived there together with their daughter since at least 2008. Prior to going to live there permanently, Dr. Collie went there most intermittently but still did renovation to the property grounds. The type of improvement was not of a temporary nature for the political function, and was clearly a situation of the one stone killing two birds as his evidence is that the area to the wash room was muddy and needed to be paved anyway."
>
> **[62] After moving in Dr. Collie changed several bills to his name. Whether he paid them every single time himself is not as relevant as the fact that it conveyed an intention consistent with a full integration into the running of the family home.** He participated in the life and expenses of his daughter and he says that due to the busy lifestyle of Mrs Crooks-Collie essentially ran the household. He paid to maintain the grounds and he says he paid the helper as well. It is true that in terms of the

> amount of money expended, Mrs Crooks-Collie paid the lion's share. But that he was integrally and heavily involved in the running [sic] the house, is evident." (Emphasis added)

[42] Mr Williams contended that by that statement, the learned judge fell into error. PROSA, as Mr Williams submitted, concerns persons who are married to each other or single persons who have cohabited together for five years. Dr Collie's marriage during those years to another disentitled him from consideration under PROSA. The relevant date was therefore the date of the marriage. If Dr Collie had been single and the parties had cohabited together for five years, those years would have been relevant. Up to November 2011, Dr Collie would not have been a single man. The relevant date was therefore March 2012 to November 2013, the point at which they separated.

[43] It was also Mr Williams' submission that the intention of the parties is no longer relevant in respect of matters brought under PROSA. The learned judge doubted Mrs Crooks-Collie veracity that Cherry Gardens was intended to be the matrimonial home. That fact notwithstanding Dr Collie seems to face an insuperable hurdle that he qualified as spouse within the meaning of PROSA during the period the learned judge found that the intention to deem Plymouth the family home was formed.

[44] Any application pursuant to PROSA, concerns spouses as defined by PROSA. Dr Collie did not fall within any of the categories stated above. The relevant years were therefore those subsequent to Dr Collie's divorce. Mr Williams' argument that the learned judge erred in considering the parties intention prior to Dr Collie's divorce is therefore not without a real prospect of success.

The Deed of Arrangement

[45] Mrs Crooks-Collie contended that she and Dr Collie agreed to sign a document as a condition precedent to their marriage. The document was never signed and Dr Collie denied having any knowledge of such a deed. He only became aware of it after they were married. It was his evidence that the signing of such a document was dismissed because it was not their desire that the marriage should commence shrouded in distrust.

[46] It was Ms Newby contention that there was no agreement between the parties. The Draft Deed of Arrangement was merely a draft document which did not express the consensus of the parties. Counsel submitted that section 10 of PROSA speaks to a finalized document which outlines the consensus of parties. She argued that the facts of the instant are entirely different from that envisaged by PROSA. The contents of the draft agreement were within the sole knowledge of Mrs Crooks-Collie as Dr Collie was never presented with the document. It is yet unclear as to when the document was prepared, she submitted.

[47] Counsel submitted that there was no proper basis on which the document could have been tendered into evidence. The learned judge was therefore correct in disregarding the document because it was not executed by the parties and therefore there was no agreement between the parties within the meaning of section 10 of PROSA.

[48] Counsel pointed out that there was no evidence from the attorney who drafted the document as to the instructions received or when the document was produced which could have enabled the learned judge to determine its relevance. It was counsel's further submission that the purported agreement, being unsigned, unwitnessed and without the relevant legal certification, precluded the court from giving any effect to it. In support of that proposition, Ms Newby referred the court to section 10(5) which requires compliance with sub-sections 3 and 4. In the circumstances, she submitted that the learned judge properly dealt with the said document.

[49] Counsel further submitted that the court is only empowered to enquire into an agreement that does not comply with the formalities under section 10 if it is satisfied that the non-compliance has not materially affected the interest of a party to the agreement. It was however her submission that in light of the fact that Dr Collie disputes ever having had sight of the said agreement, there was no legitimate basis upon which the learned judge could have admitted it into evidence.

Law/analysis

Section 10 of PROSA provides:

> "...
>
> (3) Each party to an agreement under subsection (1) shall obtain independent legal advice before signing the agreement and the legal adviser shall certify that the implications of the agreement have been explained to the person obtaining the advice.
>
> (4) Every agreement made pursuant to subsection (1) shall be in writing signed by both parties whose signatures shall-

(a) if signed in Jamaica, be witnessed by a Justice of the Peace or an Attorney-at-Law;

(b) if signed in a country or state other than Jamaica, be witnessed by-

(i) a person having authority by the law of such country or state to administer an oath in that country or state; or

(ii) a Jamaican or British High Commissioner or Ambassador, as the case may be, or a Jamaican or British Envoy, Minister, Charge d'Affaires, Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or Consul Agent exercising his functions in that country or state.

(5) Subject to subsection (7), an agreement to which this section applies shall be unenforceable in any case where

(a) there is non-compliance with subsection (3) or (4); or

(b) the Court is satisfied that it would be unjust to give effect to the agreement.

...

(7) Notwithstanding subsection (5) (a), the Court shall have jurisdiction to enquire into any agreement made under subsection (1) and may, in any proceedings under this Act or on an application made for the purpose, declare that the agreement shall have effect in whole or in part or for any particular purpose if it is satisfied that the non-compliance mentioned in that subsection has not materially prejudiced the interests of a party to the agreement.

..."

[52] Undoubtedly the purported agreement failed to comply with the requirements of section 10(3), (4) and (5) of PROSA and thus could not be tendered into evidence. The learned judge was therefore unable to consider the said purported agreement. That fact notwithstanding, evidence was given by Pastor Mullings that he provided both pre and post martial counselling for the parties. He refused at one point to continue counselling them or to perform the ceremony because of the many unresolved issues. He however recanted and met with the parties.

[53] That meeting primarily concerned Mrs Crooks-Collie's request that Plymouth not be treated as the matrimonial home. The matter was however resolved by Dr Collie agreeing to sign the agreement after the marriage subject to modification. It was also his evidence that Dr Collie agreed that the land in Cherry Gardens would have been suitable for their matrimonial home. He agreed to perform the ceremony because of concessions they had made.

[54] After the marriage, the parties experience marital problems which caused him to resume counselling them. It was agreed that divorce was the only resolution. He reminded Dr Collie about their agreement concerning Plymouth but Dr Collie's reply was that "the court will decide". On Pastor Mullings' evidence, Dr Collie's acquisition of an interest in Plymount was palpably an issue.

[55] In considering Pastor Mullings' evidence the learned judge said:

> "[60] The Deed of Arrangement could not be tendered in proof of any draft agreement so the Court is unable to determine what this mysterious 'term' was that the Claimant

> demanded be changed. Could it have been the condition regarding Plymouth? Did the agreement contain anything about Plymouth at all? The Court is not entitled to speculate but the fact that the marriage took place anyway, leads me to wonder if this was in fact the intention of the Deed of Arrangement. **The evidence of Pastor Mullings does not help much in this regard as no date is given as to when many of the events he speaks of took place.** Though the parties discussed it at the sessions according to him, which is disputed by Dr. Collie, clearly it was still not signed and the marriage proceeded despite it not being signed. **The discussions the pastor speaks of seems to have been just prior to the parties finally separating, based on the final resolution of those meetings**." (Emphasis added)

[56] The learned judge's statement that the discussions with the pastor occurred just before the separation belies the evidence. The pastor's evidence was that he counselled Dr Collie and Mrs Crooks-Collie before the marriage and before the separation. The learned judge misunderstood the purport of the pastor's evidence. An important issue is, were it not for this misunderstanding, whether he would have held the view he did that it was the parties' intention that Plymouth should have been the family home. The learned judge also deduced the parties intention from a period that was arguably irrelevant. In any event, as pointed out by Mr Williams, intention is not material.

[57] Although questions of fact are entirely for the learned judge, misunderstanding of the facts might justify the interference of the appellate court.

Dr Collie's contribution

[58] Any improvement to the property which would have conferred an interest in Plymouth to Dr Collie must therefore have been done after his divorce. Dr Collie installed air conditioning units, paved the pool area and sections of the yard. He

installed decorative globe lights, home appliances, painted the house, refurbished the front door, constructed a kennel and provided gardening accessories. He also paid some utility bills.

[59] The paving of the drive way was however done in 2007, outside of the relevant period as he was still married and cohabited with his former wife. Mrs Crooks-Collie's evidence was that Dr Collie installed the air conditioning units for his own comfort. Noteworthily is the fact that air conditioning units, decorative lightings, home appliances and gardening accessories are not fixtures.

[60] The pertinent question is whether those improvements to Plymouth were sufficient to convey an interest of 20% or at all to Dr Collie in light of the evidence that the property was acquired many years before their marriage which was of short duration; and the fact the Dr Collie's major contribution to the improvement of the property, that is, the paving of the pool area was done outside of the relevant period.

[61] Had the learned judge not erroneously considered the irrelevant years, would he have arrived at the conclusion that although the marriage was short lived, Dr Collie was entitled to an interest? The learned judge considered the year 2008 as relevant in determining the parties' intention. In light of the plain language of PROSA it is not an unmeritorious argument that the intention of the parties in respect of Plymouth becoming their family home while Dr Collie was a married man, would have been offended the spirit of PROSA.

[62] In support of counsel's contention that in determining whether a stay ought to be granted, consideration must be given to the fact that the applicant has a prospect of succeeding on appeal, he directed the court's attention to McIntosh JA (Ag) statement in **Jamalco (Clarendon Alumina Works) v Lunnette Dennie,**

[63] In respect of the family home, section 10(1) and (2) of PROSA provides:

> "10(1) Subject to section 19 -
>
> (a) spouses or two persons in contemplation of their marriage to each other or of cohabiting may, for the purpose of contracting out of the provisions of this Act, make such agreement with respect to the ownership and division of their property (including future property) as they think fit;
>
> (b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.
>
> (2) Without prejudice to the generality of subsection (1), an agreement may–
>
> (a) define the share of the property or any part thereof to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation;
>
> (b) provide for the calculation of such share and the method by which property or part thereof may be divided.

[64] Mr Williams' contention that the intention of the parties is no longer relevant in respect of matters brought under PROSA is also meritorious.

[65] Any application pursuant to PROSA, concerns spouses as defined by PROSA. Dr Collie did not fall within any of the categories stated above. The relevant years were therefore those subsequent to Dr Collie's divorce. Mr Williams' argument that the learned judge erred in considering the parties intention prior to Dr Collie's divorce is therefore not without a real prospect of success.

[66] Had the learned judge not erroneously considered the irrelevant years, would he have arrived at the conclusion that although the marriage was short lived, Dr Collie was entitled to an interest. The learned judge considered the year 2008 as relevant in determining the parties' intention. In light of the plain language of PROSA it is not an unmeritorious argument the intention of the parties in respect of Plymouth becoming their matrimonial home while Dr Collie was a married man, would have been offended the spirit of PROSA.

[67] The circumstances of this case in my view, justify a stay of execution of the said judgment pending the appeal. I therefore make the following orders:

1. Subject to paragraph 2 and 3 hereof, there shall be a stay of execution of the Judgment of the Hon Mr Justice Dale Palmer (Ag) pending the hearing and determination of the appeal filed herein.

2. Within 45 days of this order the appellant shall present to the respondent's attorney-at-law an irrevocable letter of undertaking from Jamaica National Building Society (JNBS) in relation to the provision of security of $20,000,000.00 Jamaican currency for the

interest claimed by the respondent in the property registered at Volume 1170 Folio 106. For avoidance of doubt, the said JNBS letter of undertaking shall remain in force and be of full effect pending the hearing and determination of this appeal or further order of the court.

3. If the appellant fails to provided the said JNBS letter of undertaking to the respondent as ordered the stay of execution granted at paragraph 1 of this order shall be dissolved without further order of the court at the expiration of 45 days of this order.

4. Upon the presentation of the aforesaid letter of undertaking by Jamaica National Building Society to the respondent's attorney-at-law the respondent shall prepare, execute and deliver to JNBS all documents/instruments necessary to discharge caveat No 1850980 lodged against the certificate of title registered at Volume 1170 Folio 106 of the Register Book of Titles.

5. Costs of this application to be costs in the appeal.

6. Liberty to apply generally to both parties

7. Appellant's attorney-at-law to prepare file and serve this order.