JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 59/2012

APPLICATION NO 141/12

BETWEEN	**MONTIVAL SALMON**	**APPLICANT**
AND	**FLORENCE SALMON**	**RESPONDENT**

H Charles Johnson instructed by H Charles Johnson & Co for the applicant

Mrs Ingrid Lee Clarke-Bennett and Miss Shanna Stephens instructed by Pollard Lee Clarke & Associates for the respondent

13 November; 14 December 2012 and 28 March 2013

IN CHAMBERS

McINTOSH JA

Introduction

[1] The applicant sought an order for a stay of execution of the judgment of Pusey J handed down on 20 April 2012 in the terms reflected in the formal order filed on 24 April 2012 which reads thus:

> "UPON THIS MATTER coming on for hearing on the 20th day of April 2012 and upon hearing the representations of

counsel, Mrs Ingrid Lee Clarke-Bennett and Miss Shanna G Stephens instructed by Pollard Lee Clarke and Associates, Attorneys-at-Law for the Defendant, Claimant's daughters Dawn Salmon and Maxine Salmon present, Defendant not appearing or being represented and after making telephone contact with Counsel for the Defendant's office, Mr H Charles Johnson to advise that the court will be proceeding in his absence, THE COURT HEREBY ORDERED as follows:

1. That the Defendant has no equitable interest in the subject property and that his interest therein is only to he extent of being a trustee holding the property in trust for the benefit of the Claimant;

2. That the Defendant is liable to repay to the Claimant the proceeds of mortgage granted by National Commercial Bank Jamaica Limited on the 9th day of December 1996 in the sum of Three Hundred and Forty-Five Thousand dollars ($345,000.00) and any interest accrued thereon;

3. The Court further declares that by virtue of the defendant's breach or breaches of trust the property rightly reverts back to the Settler/Claimant Florence Salmon.

4. That the Registrar of the Supreme Court is empowered to sign any documentation on behalf of the Defendant necessary to give effect to the Court's Orders;

5. That the Defendant bears the costs of this application to be agreed or taxed."

[2] The record shows that on 31 January 2007 when the respondent's fixed date claim form first came up for hearing in the court below, certain case management orders were made including an order that "Deponents of any affidavits filed by either party [were] to attend Court for the hearing of this matter for cross-examination". As the years went by and the state of the respondent's health was said to have deteriorated significantly, an application was made for her to be excused from cross-examination. That application was granted,

unopposed, on 11 October 2011 and, in the presence of the defendant (now the applicant) and his attorney, trial was set for the 20 April 2012. The applicant therefore had firsthand knowledge of the trial date. However, neither the applicant nor his attorney attended for the trial.

[3] In a move which must have been born of a generous spirit, the learned trial judge sought to contact counsel by telephone seemingly with a view to determining how late he expected to be and whether he was prepared to accommodate counsel's delay. Suffice it to say the learned trial judge's efforts bore no fruit and he proceeded to deal with the matter, as he was entitled to do, by virtue of rule 39.5(b) of the Civil Procedure Rules 2000 (the CPR) which provides that if the judge is satisfied that notice of the hearing had been served on the absent party or parties in accordance with the Rules, then,

> "(a) …
>
> (b) if one or more, but not all parties appear the judge may proceed in the absence of the parties who do not appear."

Clearly the learned trial judge was satisfied that the requirements had been met and there is no complaint to the contrary. He then proceeded with the matter and made the orders as outlined in paragraph [1] above which were consistent with those sought by the respondent in paragraphs 3, 4, 7, 11 and 14 of her amended fixed date claim form.

[4] Part 39.6 of the CPR provides for an application to be made by a party to proceedings

where judgment was given in that party's absence. The rule reads as follows:

> " 39.6 (1) A party who was not present at the trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.
>
> (2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.
>
> (3) The application to set aside the judgment or order must be supported by evidence on affidavit showing -
>
> (a) a good reason for failing to attend the hearing ;and
> (b) that it is likely that had the applicant attended some other judgment or order might have been given or made."

[5] The applicant did not avail himself of this provision however but sought instead to challenge the learned trial judge's decision by way of an appeal and an application to have execution of the judgment stayed pending the determination of the appeal. I heard submissions in the application on 13 November 2012 and after taking time to fully consider them, I gave my decision on 14 December 2012, refusing to stay execution of the judgment of Pusey J and I now give my reasons for so deciding.

The application

[6] Cognizant of the requirements to be met by a successful applicant for a stay of execution Mr Johnson submitted two supporting affidavits, one from the applicant himself and the other from Miss Claudine Blake, the attorney who was to have appeared at the trial, both seeking to establish not only that he had a good arguable appeal but also that the justice of the case

favoured the grant of a stay to him. Indeed, the averments in the affidavits are reflections of the grounds listed in the application which read as follows:

> "(a) That the Defendant's failure to attend trial on the 20th of April 2012 was unintentional as he mistakenly thought that the matter was set for the 28th of April,2012.
>
> (b) That Counsel for the Defendant was on her way to Court from Mandeville, Manchester when she experienced motor vehicle problems. On realizing that it was no longer possible to reach Kingston in time for Court Counsel through her paralegal contacted the Court and Counsel for the Claimant in an effort to seek an adjournment of the matter.
>
> (c) That it was always the intention of the Defendant and his Counsel to attend the trial and defend the claim.
>
> d) That the Claimant and Defendant are joint tenants of the subject property and there are various contentious issues in relation to the ownership and interest of said property.
>
> (e) That the Defendant has a good arguable case and in the interest he should be given an opportunity to be heard at a trial.
>
> (f) That if the Order of his Lordship is allowed to stand it will cause irremediable harm to the Defendant."

[7] Further, in her affidavit Miss Blake referred to the criteria for the grant of a stay of execution and the cases from which they derive, such as **Lino-type-Hell Finance Ltd v Baker** (1992) 1 WLR 321 and **Watersports Enterprises Ltd v Jamaica Grande Ltd and Others,** SCCA No 110/2008 delivered on 4 February 2009 wherein Harrison JA in delivering the judgment of the court on 4 February 2009, had this to say:

> "(a) …a stay should not be granted unless the appellant can show that the appeal has some prospect of success and

(b) The essential question is whether there is a risk of injustice to one or the other or both parties [if the court] grants or refuses a stay."

Miss Blake averred that the learned trial judge's order sought to deprive the applicant of his legally protected interest in the subject property and his would be the greater injustice if the order was not stayed.

Submissions

[8] In his oral submissions Mr Johnson provided some background information relative to the respondent's claim, submitting that it arose out of a dispute over a house and a lot of land in Ocho Rios which, on the record, is owned by the respondent/mother and the applicant but to which the respondent alleged she had been denied access. The dispute was taken to mediation counsel submitted but it was not resolved and so was returned to the court for its determination.

[9] He referred to the order that had been made for the affiants to attend for cross-examination, indicating that on the trial date, all the affiants were absent save for the respondent. If there was a breach of attendance on both sides, counsel contended, there should be an adjournment for all parties to be present, especially since it was only the first trial date.

[10] Further, Mr Johnson submitted, the applicant has some prospect of success in the appeal in that the learned trial judge erred in regarding him as a trustee holding the property in trust for the respondent, with no beneficial interest in it, as this was clearly

inconsistent with the title on which he is registered as a joint owner, thereby entitling him to an equitable interest in the property.

[11] Counsel placed reliance on sections 67 to 69 of the Registration of Titles Act (the RTA) and on the affidavit of Miss Claudine Blake. By virtue of section 68 of the RTA the title of the applicant is indefeasible argued counsel. Further, proof of title is proof of ownership to the world and one is not permitted to look behind the title, he submitted, referring to section 71 of the RTA. Additionally, he contended that there are many inconsistencies in the respondent's evidence clearly showing the reason for the order for cross-examination. Based on the issues raised, Mr Johnson submitted, there is a good case to be argued on appeal and if a stay is not granted there is a risk of greater injustice to the applicant because his legal right would be obliterated by an order which was wrongly made.

[12] In her response Mrs Clarke-Bennett referred to the grounds in the application and submitted that the learned trial judge did not only make telephone contact with the office of the applicant's attorney but delayed the start of the matter for two hours affording the applicant's attorney ample opportunity to attend or, alternatively, to instruct other counsel to deal with the matter. Bearing in mind that this claim had been before the court for six years the learned trial Judge was therefore well within his right to proceed in accordance with the provisions of rule 39.5 of the CPR, counsel argued. The applicant had deliberately chosen not to attend court, she submitted, opting instead to keep another appointment and a letter faxed to the court while counsel on the other side was present for the hearing, could not suffice

to secure an adjournment.

[13] Mrs Clarke-Bennett submitted that the respondent was not disputing that both names were on the title, hence the claim for a determination of their respective interest and for severance. It was counsel's contention that in the circumstances, the court must consider whether there is a presumption of advancement but any such presumption is rebuttable by evidence that a gift was not intended. The court must necessarily consider the conduct of the parties to determine where the respective equitable interest lies, counsel argued and she referred to the classic line of cases such as **Pettitt v Pettitt** [1970] AC 777 and **Gissing v Gissing** [1970] 2 All ER 780 which were cited with approval in **Stack v Dowden** [2007] UKHL 17. In essence, counsel submitted, whilst the registered title is in the name of both parties, the court may well have to look behind that to establish where the equitable interest lies.

[14] It was counsel's further contention that on the evidence before the court the applicant could not establish that he was entitled to a beneficial interest in the property as he had made no contribution to its acquisition, being only nine years old at the time of its acquisition and there was no indication that his parents intended to make a gift of the property to him. The evidence disclosed that his name was added to the title so that he could use it as collateral for a loan. Counsel found support for the contention that there is no presumption of advancement in circumstances where a name is added to a title to be used as collateral in the case of **Cecellia Davey v Riley Davey** SCCA No 9/2004

(unreported) delivered on 30 March 2007. The court held that this "displaces any notion of the presumption arising" she submitted. Additionally, counsel contended, the applicant agreed to repay the mortgage on the property and to hold the property in trust for his siblings. In admittedly failing to repay the mortgage he had put the property in crisis, counsel submitted, thereby breaching the trust.

[15] Counsel referred to the case of **Rahul Singh and Commonwealth Communications LLC and Ocean Petroleum Inc v Kingston Telecom Ltd and Cable and Wireless Ja Ltd** SCCA No. 48/2006 Application Nos 72 and 80/2006 a judgment delivered 5 December 2006, where Harris JA said:

> "An appellant therefore in seeking a stay of execution must satisfy the court not only that his appeal has a real chance of success but that also without the stay he would be ruined."

She argued that the applicant has not alleged that he would be ruined if a stay is not granted. The interest of justice clearly lies with the respondent who is 90 years old and in a very frail condition as she suffers from numerous medical problems. Mrs Clarke-Bennett further submitted that the respondent has been kept out of possession of the premises which is her matrimonial home and is obliged to occupy rented premises, the applicant of his own choosing, does not reside in the premises. Counsel submitted that position taken by the court has consistently been that a claimant is entitled to the fruits of his judgment and ought not to be deprived thereof unless there is some good and compelling reason for doing so (see **Winchester Cigarette Machinery Limited v Payne and Another (No**

2) [1993] TLR 647). She argued that the applicant had failed to satisfy the criteria for a stay of execution and that the application should accordingly be dismissed.

Disposal

[16] The parties have correctly identified the two requirements for the grant of a stay of execution as well established in a number of authorities issuing from this court (see **Watersport Enterprises Ltd v Jamaica Grande Ltd & Others** SCCA No 110 /2008 delivered 4 February 2009; **Reliant Enterprise Communications Ltd & Anor v Infochannel Ltd** SCCA No 99/2009 delivered 2 December 2009; **Cable and Wireless Jamaica Limited v Digicel Jamaica Ltd** SCCA No 148/09 Application No 169/09 delivered 16 December 2009; **Calvin Green v Wyn Lee Trading Ltd & Anor** [2010] JMCA App 3; **William Clarke v Gwenetta Clarke** [2012] JMCA App 2 and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Services Limited & Lowe** [2011] LMCA App 1, all approving **Combi (Singapore) Pte v Sriram and another** [1997] EWCA 2162, where it was held that the proper approach must be to make the order that best accords with the interest of justice). Therefore all that remains for the court's determination is whether the applicant has been able to satisfy the two requirements. I will consider each in turn, taking care to point out however, that a successful applicant must satisfy both (see **Rahul Singh** per Harris JA).

Does the applicant have a real prospect of succeeding in its appeal?

[17] In his notice of appeal and in his submissions before me the applicant complained

that the learned trial judge was in error in proceeding with the hearing in light of the unintentional absence of the applicant and his counsel. However that does not appear to me to have any prospect of resulting in a finding in his favour as the learned trial judge was clearly acting in accordance with the powers granted to him by virtue of rule 39.5.

[18] Further, the applicant complained that it was unjust for the court to act upon the affidavit evidence of the respondent alone without the test of cross-examination especially as she asserts that she has memory challenges. This, the applicant said was not in the interest of justice which required that the matter proceed to trial and the applicant be allowed to present his case. However, it is to be borne in mind that the respondent would not have been subject to cross-examination in light of the order made without opposition from the applicant or his counsel, excusing her from cross-examination. There was no complaint about that order. And even if she had not been excused, she was present for the trial - it was no fault of hers that the applicant was not.

[19] Another complaint by the applicant was that he has been deprived of his interest in the subject property to which he is legally entitled being registered on the title thereto as a joint tenant. Bearing in mind that the respondent claimed a determination of their respective interest in the property and severance of that interest, even if the court were to find on appeal that questions of his legal and beneficial entitlement as a registered part owner on the face of the title were to be fully ventilated at a trial, thereby according him a measure of success in the

appeal, that interest would seem to me to translate into the proceeds of the inevitable sale of the property. Therefore, in my opinion, there need be no stay of execution of the judgment of the learned judge. The applicant has not asserted that should the respondent be paid the sum ordered in the judgment he would not be able to recover it if he was successful on appeal and certainly, if the premises were sold funds would be available to reimburse him.

[20] This brings me to the second requirement which the applicant must satisfy even if he has managed to clear the first hurdle and for that the court must determine on the material provided what order would best accord with the interests of justice in the circumstances of this case. In **Paymaster** Harris JA referred to the approach taken by the courts in recent times in seeking to impose considerations of the interest of justice as an essential factor in ordering or refusing a stay. The learned judge of appeal referred to the case of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 where it was held that "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 a similar vein, Phillips JA in **Dalfel Weir v Beverley Tree (also known as Beverley Weir)** [2011] JMCA App 17 held that a successful applicant must show that the granting of the stay is the order that is likely to produce less injustice between the parties.

Where does the interest of justice lie in this case?

[21] It seems to me that the greater risk of injustice is to the respondent who at the great age of 90 years and with failing health has been kept out of her matrimonial home, obliging

her to occupy rented premises. Even on the applicant's case he has no greater right to possession of the premises than the respondent. Further, the unchallenged evidence is that he does not himself occupy the premises so that it is difficult to see what injustice he would suffer at this time if the order were to remain in place until the hearing of the appeal. He stated as a ground for his application that if the order of the learned trial judge is allowed to stand it would cause him irremediable harm but he advanced nothing before this court to support that bald assertion. As stated previously, any interest to which the applicant may be found to be entitled can only be a financial one in the circumstances of the case so that even if the respondent disposes of the property and the court holds that he is entitled to a share of the proceeds his interest may still be pursued. At the end of the day, no compelling reasons were advanced to persuade this court that the claimant should be deprived of the opportunity to pursue the fruits of her judgment. Accordingly the application for a stay was refused with costs to the respondent to be agreed or taxed.