

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO COA2020CV00006**

**APPLICATION NO COA2020APP00026**

<b>BETWEEN</b>	<b>HERBERT BARNETT</b>	<b>APPLICANT</b>
<b>AND</b>	<b>HILDA MAY BARNETT</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>PAULA BARNETT SHIELDS</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**Garth McBean QC instructed by Byfield, Mellish and Campbell for the applicant**

**O'Neil Brown instructed by O'Neil Brown & Co for the 1<sup>st</sup> respondent**

**21 and 30 July 2020**

**IN CHAMBERS (BY TELECONFERENCE)**

**FOSTER-PUSEY JA**

[1] On 11 December 2019, by a draft judgment, Mr Justice B Morrison ('the judge') handed down judgment in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Paragraph [65] of the draft judgment, in which the judge outlined the terms of his decision, reads:

"I therefore award judgment for [the 1<sup>st</sup> respondent] and [the 2<sup>nd</sup> respondent] herein in the following terms:

- (i) That it be declared that [the 1<sup>st</sup> respondent] is entitled to half legal and beneficial interest in the property comprised in Certificate of Title registered at Volume 945 and

Folio 153 of the Register Book of Titles at Lot 117 Lagoon View, Bogue Hill, St. James.

- (ii) That [the applicant] pays to [the 1<sup>st</sup> respondent] the value of her share in the property as may be assessed and declared by the court. Alternately, that the said property be sold by private treaty at a price to be agreed by [the 1<sup>st</sup> respondent] and [the applicant] or in the event that the parties hereto are unable to reach a consensus as to the price of the said property, at a price set by an independent reputable valuator and the net proceeds of sale divided in the proportion of the respective entitlements of [the 1<sup>st</sup> respondent] and [the applicant]. That either party is at liberty to purchase the share of the other.
- (iii) That a valuator of the property is to be ordered within 60 days hereof by a licensed Real Estate Valuator agreed on by the parties. If there is no agreement, within 30 days of this Order, then the Registrar of the Supreme Court, shall appoint a Valuator.
- (iv) That the guaranteed account at Halifax Bank was the property of [the 1<sup>st</sup> respondent].
- (v) That [the 2<sup>nd</sup> respondent] is solely entitled to the proceeds of the sale of the property at Aldercroft and that [the applicant] is not entitled to any share or interest therein.
- (vi) That [the applicant] pays the costs of this matter, to be agreed or taxed."

[2] It will be observed that the first three sub-paragraphs of the judge's decision related to Lot 117 Lagoon View, Bogue Hill, Saint James ('the Bogue Hill property').

[3] On 22 January 2020, the applicant filed his notice and grounds of appeal in this court. The applicant based his appeal on the following grounds:

- “(a) The learned judge erred in law and in fact in concluding that there was no joint investment account at Halifax even though the funds were invested for a fixed period of time.
- (b) The learned judge erred in concluding that the account was the property of the 1<sup>st</sup> Respondent alone even though the funds came from the proceeds of sale of their last matrimonial home in England and despite the admission of the 1<sup>st</sup> Respondent that the funds was [sic] “partly mine”.
- (c) The learned judge erred in his application of the law affecting jointly held bank accounts.
- (d) The learned judge erred in not treating the conversion of funds belonging to [the Applicant] as a breach of trust and/or contract by the 1<sup>st</sup> Respondent.
- (e) The learned judge wrongly took into account the circumstances of their matrimonial dispute as a justification for her use of the jointly owned funds for her own benefit.
- (f) The learned judge erred in failing to treat [the Applicant's] work at Aldercroft as both evidence of a common intention for joint ownership as well as detriment suffered by [the Applicant].
- (g) The decision was unfair to [the Applicant] in that only inferences unfavourable to [the Applicant] were taken into account by the learned judge.
- (h) [The Applicant] will if necessary seek leave to add further grounds of appeal.”

[4] In summary, grounds of appeal (a) – (e) deal with the judge’s treatment of the issues concerning the Halifax joint bank account, ground (f), the judge’s treatment of the Aldercroft property and ground (g) the judge’s alleged unfavourable inferences in relation to the applicant.

[5] Upon a review of the judge's draft reasons it is clear that there was no dispute before him that the applicant and the 1<sup>st</sup> respondent, as joint tenants, together owned the Bogue Hill property. The issues which were in dispute between the parties concerned the Halifax bank joint account and the Aldercroft property.

[6] The applicant has not appealed any of the orders which the judge made in respect of the Bogue Hill property. He has, however, as will have been seen above, appealed the judge's ruling that the guaranteed account at Halifax bank was the property of the 1<sup>st</sup> respondent as well as the order that the 2<sup>nd</sup> respondent is solely entitled to the proceeds of the sale of the property at Aldercroft.

[7] However, by notice of application filed on 7 February 2020, the applicant has applied for a stay of execution of the orders made by the judge in respect of the Bogue Hill property. He has asked that the court order the 1<sup>st</sup> respondent to take no further steps to arrange for valuation or sale of the property until further order of the court.

[8] Among the grounds on which the applicant seeks the order are that:

"(3) A stay of execution ... until this ... Court hears and determines the appeal is in the interest of justice, considering that the learned judge may be overruled at

a time when the elderly litigant has already lost his home and the "damage caused thereby is irreparable"

- (4) The appeal has a realistic prospect of success.
- (5) The Applicant will suffer severe financial hardship if the orders of the learned judge are enforced."

[9] In his affidavit in support of the application for stay of execution, the applicant deposed that he had not contested the 1<sup>st</sup> respondent's "half share of the property", but had claimed, "that my half interest in funds which were in a joint account in Halifax Bank in England should have been set off against her interest in the house." He complained that the judge made a fatal error when he found that the guaranteed account at Halifax was the 1<sup>st</sup> respondent's property in the face of her evidence that the account had savings for both of them.

[10] The applicant indicated that the 1<sup>st</sup> respondent lived in a house owned by the 2<sup>nd</sup> respondent, in respect of which the judge did not agree with his claim for a beneficial interest. On the other hand, at paragraph 1 of his affidavit, he deposed that "if the 1<sup>st</sup> respondent were to enforce the judgment, I would be forced to sell my home and would face grave financial hardships".

[11] Mr McBean QC, for the applicant, submitted that there is a real prospect of success in the appeal. In respect of grounds (a) – (c) he pointed out that the judge, having accepted at paragraph [52] of his reasons, that "the account contained both their shared funds, savings, part proceeds from the sale of Warwick Road and that same was at all times administered by [the applicant]", ought to have found that the applicant had a beneficial interest in the account. Furthermore, the evidence before the judge suggested

that it was an investment account. Queen's Counsel did not advance any submissions in respect of the appeal concerning the Aldercroft property.

[12] In response to an enquiry I made, Queen's Counsel acknowledged that it did not necessarily follow that, had the applicant succeeded in his claim for half of the proceeds in the Halifax bank account, the judge would have decided to rule that the applicant's entitlement be set off against the amount that he would need to pay for the 1<sup>st</sup> respondent's half share in the property. He stressed that that would have nevertheless been the applicant's desire, bearing in mind the value of the British pound.

[13] Mr Brown, on behalf of the 1<sup>st</sup> respondent, opposed the application. He submitted that both the applicant and the 1<sup>st</sup> respondent were old and so a delay in the enforcement of the judge's orders would also cause hardship to her. He argued that the judge's orders in respect of the Bogue Hill property do not deprive the applicant of his home, all he needs to do is pay the 1<sup>st</sup> respondent the value of her share. Each of them can also purchase the share of the other.

[14] Insofar as the prospects of success of the appeal are concerned, counsel emphasized that the judge made findings of fact which would have to be manifestly perverse for this court to overturn them.

[15] In response to an enquiry which I made, counsel submitted that the orders made by the judge concerning the Bogue Hill property and the Halifax bank account had nothing to do with each other. There was no dispute concerning the ownership of the Bogue Hill property, the real dispute concerned the entitlement to the funds in the Halifax bank

account and ownership of the proceeds of sale from the Aldercroft property. In his view, the appeal, since it does not challenge the ruling concerning the Bogue Hill property, cannot support a stay of execution of the orders relating to that property.

### **Analysis**

[16] The principles to be applied when the court considers an application for a stay of execution are well established.

[17] As Phillips JA stated in **Kenneth Boswell v Selnor Developments Limited**

[2017] JMCA App 30, at paragraph [48], the primary consideration of the court is:

"... whether there is some merit in the Applicant's appeal and whether the granting of a stay is the order that is likely to produce less injustice between the parties."

I now consider the question of the merits of the appeal.

[18] I believe that there is some merit in the applicant's appeal in respect of the Halifax bank account. There is some evidence that could support a conclusion that it was an investment account, especially bearing in mind the evidence of the expert witness concerning different interest rates for different periods of time in respect of monies in the account. It is correct that it may be challenging to overturn the judge's findings of fact, however, there does appear to be sufficient evidence to justify an investigation of this issue.

[19] Unfortunately, this does not assist the applicant in his application for a stay of execution. This is because he is seeking the stay of orders made by the judge in respect

of the Bogue Hill property. There was no dispute before the judge concerning ownership of the Bogue Hill property. The applicant has acknowledged that he did not contest the 1<sup>st</sup> respondent's "half share of the property". As a consequence, there is no challenge to or appeal of the orders made concerning that property. Queen's Counsel, in his oral submissions, also acknowledged that there was no guarantee that the judge would have ordered a set-off, had he found that the applicant was entitled to a share of the funds in the Halifax bank account.

[20] While the applicant may have hoped that, if he had been successful in claiming a portion of the proceeds in the Halifax bank account, the funds he so acquired could have been set-off against the amount he would have to pay if he decided to purchase the half interest of the 1<sup>st</sup> respondent, there was no guarantee that a judge would have so ordered.

[21] I agree with Mr Brown's submissions that these were discrete issues before the judge, they were not linked, although the applicant may have had a certain hope.

[22] In my view the merit in an appeal, where a stay of execution is sought, must relate to the issue, matter or property in respect of which the stay is sought. The appeal in this matter does not involve the Bogue Hill property in respect of which a stay of orders has been sought, and so on this basis the application cannot succeed.

### **Risk of injustice**

[23] I will nevertheless say a few words concerning the risk of injustice in this matter. I believe that, as Mr Brown has submitted, the 1<sup>st</sup> respondent, being very old, will be

inconvenienced if the orders relating to the Bogue Hill property are stayed. Furthermore, the judge's order does not require the applicant to vacate the property as he can purchase the 1<sup>st</sup> respondent's share in the property.

### **Conclusion**

[24] In all the circumstances, the application for stay of execution is refused with costs of the application awarded to the 1<sup>st</sup> respondent to be taxed if not agreed.