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NOTICE TO PARTIES OF THE COURT'S MEMORANDUM OF REASONS FOR DECISION

SUPREME COURT CIVIL APPEAL NO COA2023CV00080

APPLICATION NO COA2024APP00080

BETWEEN	**RODRICK BROWN**	**APPLICANT**
AND	**KIMBERLEY FACEY**	**RESPONDENT**

TAKE NOTICE that this matter was heard by the Hon Miss Justice Edwards JA, the Hon Mr Justice D Fraser JA and the Hon Mrs Justice G Fraser JA (Ag), on 29 April and 2 May 2024, with D'Angello G Foster instructed by Cardinal Law for the applicant and John Clarke for the respondent.

TAKE FURTHER NOTICE that the court's memorandum of reasons, as delivered orally in open court by the Hon Mr Justice D Fraser JA, is as follows:

The application and background

[1] This is an application, filed on 14 March 2024, seeking the following orders:

> "1. The order made on March 1, 2024 by the Honourable Mr Justice Evan Brown JA be varied to allow for a stay of execution of the orders made by the Honourable Mrs Justice N. Hart-Hines on the [sic] September 22, 2023 pending the determination of this appeal.
>
> 2. No order as to costs

3. Such further and other relief as this Honourable [Court] may deem just."

[2] This application has come before the court against the following background. On or about 6 July 2020, the applicant and the respondent engaged in sexual relations together at the applicant's house in Saint Andrew. With the consent of the respondent, during this engagement, the applicant video recorded the respondent performing sexually intimate acts on him. Shortly after that encounter, the applicant sent the video to the applicant via WhatsApp. Subsequently, on or around 13 July 2020, the respondent noticed that images and videos showing the respondent engaging in those intimate acts with the applicant were being circulated online on various Instagram pages, websites and social network pages locally and overseas, as well as on a number of pornographic websites.

[3] On 5 October 2020 the respondent brought a claim in the Supreme Court against the applicant seeking among other things damages for breach of confidence and injunctions to prevent further release of her images. On 30 December 2020 the Supreme Court made an order prohibiting the applicant from sharing intimate photographs or videos of the respondent. The applicant subsequently filed a complaint with the General Legal Council ('GLC') which included intimate photographs of the respondent. On 30 April 2021 the Supreme Court struck out the defence of the applicant on the basis that he had breached the non-disclosure order of 30 December 2020 in his GLC complaint and entered judgment for the respondent with damages to be assessed. Following a subsequent unsuccessful application for relief from sanctions, the matter was set for assessment of damages.

[4] On 22 September 2023, at the assessment hearing, Hart-Hines J amongst her other orders made the following awards to the respondent: a) General damages of i) $11,000,000.00 plus interest at 3% from 5 October 2020 to the date of the order, for breach of confidence; and ii) $480,000.00 for the cost of future medical care; b) Special damages – $100,000.00 plus interest at 3% from 13 July 2020 to the date of judgment and c) costs to be taxed or agreed.

[5] In each of the proceedings in the court below in which the respondent was successful, costs were ordered against the applicant. None of the costs (some of which are disputed) nor any portion of the general or special damages awarded against the respondent have been paid.

[6] On 2 November 2023 the applicant filed in this court a notice of appeal against the orders of Hart-Hines J. The grounds of appeal allege that the award for breach of confidence was "inordinately excessive" and that the post-traumatic stress disorder for which the respondent was awarded costs for future medical care was not made out. Then, on 29 February 2024 the applicant also filed in this court an urgent without notice application seeking a stay of execution of the orders of Hart-Hines J. On 1 March 2024, Brown JA ('the learned single judge of appeal') made orders i) granting an interim stay of execution ii) conditional on the applicant paying to the respondent's attorneys-at-law the sum of $2,500,000.00, within 14 days of the date of the order, and iii) stipulating that on fulfilment of the condition the matter was to be set for *inter partes* hearing and the parties advised accordingly.

[7] During the hearing before this court, after consultation with his client, counsel for the applicant sought, in the alternative to an unconditional stay, an extension of six to eight weeks to comply with the condition stipulated by the learned single judge of appeal that the applicant should pay the sum of $2,500.000.00, in order for the stay to be granted.

The law, submissions and analysis

[8] An appeal having been filed against the judgment of Hart Hines J, the learned single judge of appeal was empowered by rule 2.10(1)(b) of the Court of Appeal Rules ('CAR') to grant the stay of execution. Rule 2.10(3) empowers this court to vary or discharge that stay provided the application was made within 14 days of the order. Though the application was not heard within 14 days, the application was filed within the time frame limited by the rule.

[9] There are two tests this court needs to consider in resolving this matter. Firstly, the test for setting aside or varying the order of a single judge of appeal is whether the single judge was wrong in law or in principle or had misconceived the facts: **Vinayaka Management Limited v Genesis Distribution Network Limited, Nohaud Azan and Ashnik Land Holdings Limited** [2022] JMCA App 32 at paras. [53] to [55]. In some circumstances, which have not been advanced here, the court will also need to consider whether there has been a change of circumstances since the decision of the single judge which dictates a different outcome: **Estate of Owen Dean Smith v Nilza Smith** [2021] JMCA App 16.

[10] Secondly, the test that should be applied in determining whether a stay of execution should be granted is a) whether there is an appeal with some prospect of success, and, if so, b) whether there is a real risk of injustice if the stay is granted or refused: **Greg Tinglin et al v Claudette Clarke and another** [2020] JMCA App 24 at para. [15] relied on in **Earl Ferguson v General Legal Council** [2023] JMCA Misc 4 at para. [52].

[11] Mr Foster, on behalf of the applicant, highlighted that the matter was not heard on its merits, so the relevant details of the facts were never determined. He relied on the Republic of Trinidad and Tobago High Court of Justice case of **Therese Ho v Lendl Simmons** Claim No CV2014-01949 judgment delivered 26 October 2015 and the case of **Max Mosely v News Group Newspapers Limited** [2008] EWHC 1777 (QB). They were deployed in support of his submissions that, based on the facts in these cases, compared to those in the applicant's case, the damages awarded to the respondent were exorbitant.

[12] He stressed the financial hardship of the applicant together with the looming application in the court below to finalise a charging order over property owned by the applicant in enforcement of the judgment, as indicative of the need for the unconditional stay to be granted. In the alternative, he sought a six to eight-week extension of time

to fulfil the condition, as he submitted the applicant would need to obtain personal loans to meet it.

[13] For the applicant's appeal to have some prospect of success some basis must be demonstrated on which it could be determined that Hart Hines J fell victim to an error of law or made an award which was so inordinately disproportionate as to be plainly wrong. See **Jamaican Redevelopment Foundation, Inc v Clive Banton and Sadie Banton** [2019] JMCA Civ 12 at para. [108] and **Jamaica Public Service Company Limited v Rosemarie Samuels** [2021] JMCA App 15 at paras. [35] and [42]. The distinctions between the cited cases and the instant case, so far as can be discerned from the limited information placed before the court, are important in this regard. This is so especially as the applicant has not placed before this court any of the witness statements, medical evidence or other material that was before the assessment court.

[14] In **Therese Ho v Lendl Simmons** only photographs were disseminated, to a relatively small audience and the victim in that case did not have the social standing in society of the respondent in this case. In **Max Mosely v News Group Newspapers Limited** the victim had high social standing and there were pictures and one video recording disseminated. In the instant case there were images and videos which were very widely disseminated including on pornographic websites. The seriousness of this case relative to the cited cases was relevant to the award made by Hart Hines J. After updating, the award made was significantly more than that in **Therese Ho v Lendl Simmons** but less than that in **Max Mosely v News Group Newspapers Limited**. We, therefore, agree with counsel for the respondent that insufficient material has been placed before this court to support the likelihood of a finding at the hearing of the appeal that the award made was "inordinately disproportionate".

[15] As we have found that the applicant has not demonstrated that he has some prospect of success in his appeal, we need go no further to consider where the issue of risk of injustice lies. However, had it been important to our decision, the balance lies firmly in favour of the respondent. Firstly, it has not been shown that there is a good

reason for the respondent to be deprived of the fruits of her judgment (See **Jamaica Public Service Company Limited v Rosemarie Samuels** at para. [20]). Impecuniosity is a hardship but not a factor that by itself a judgment debtor can validly complain exposes him to a risk of injustice. Secondly, no aspect or portion of the award has been paid, even though aspects are unchallenged. Thirdly, the respondent resides within the jurisdiction and the applicant has not put forward any reason to fear that he would be unable to recover any sums due to him if he paid the award and was subsequently successful on appeal. Conversely the applicant resides outside of the jurisdiction though he has some local assets.

[16] In the premises we are constrained to find that it has not been demonstrated that the learned single judge of appeal was wrong in law or in principle or had misconceived the facts, in making the challenged order. We also are of the view that an extension of time to comply with the condition imposed by the learned single judge of appeal should not be granted. Accordingly, the application of the applicant to vary the order of the learned single judge of appeal is refused. The application for an extension of time within which to fulfil the condition stipulated by the learned single judge of appeal is also refused.

[17] After hearing submissions from counsel on the issue of costs, the court orders costs to the respondent to be agreed or taxed.