



[2012] JMSC Civ 193

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. E810 of 2002

BETWEEN DOREEN HARLEY CLAIMANT/RESPONDENT

AND NORMAN HARLEY DEFENDANT/APPLICANT

Ms. Carol Davis for the Claimant/Respondent.

Mr. Keith Bishop instructed by Bishop & Partners for the Defendant/Applicant.

September 21, 25 and November 9, 2012.

REASONS FOR RULING

Fraser J

THE APPLICATION

[1] By Notice of Application dated July 24, 2012 the Defendant/Applicant sought the following orders, that:

- a. the Orders made by Mr. Justice Morrison on 24th July 2012 be set aside;
- b. Claimant's application to be adjourned to abide the outcome of the Defendant's application for Stay at the Court of Appeal; and
- c. Cost of this Application to be costs in the Claim.

[2] The grounds on which the Defendant/Applicant sought the orders were as follows:

- a. The Defendant and his Attorneys-at-Law erroneously noted the date for the matter to come before Mr. Justice Morrison as Wednesday the 25th July 2012 at 9:30 a.m.;
- b. On the 23rd July Mrs. Justice Harris, JA gave the opinion in writing that: It is my opinion that the applicant [Norman Harley] ought to seek to discharge my order made on the preliminary

point. If he is successful, then the matter can be heard on its merits.”

- c. The Defendant has a valid appeal at the Court of Appeal;
- d. Mr. Justice Morrison adjourned the matter to the 24th July 2012 to facilitate a letter or response from the Court of Appeal and it was only received by the Defendant's Attorney-at-Law on the 24th July 2012 in the morning;
- e. The Defendant is registered on the Duplicate Titles and there is no proof of fraud to displace his status or to deprive him of possession or ownership;
- f. Pursuant to Part 39 and Part 26 of the Civil Procedure Rules, 2002.

THE RELEVANT FACTS

[3] On March 26, 2010 Harris JA ordered as follows:

...Appellant [Norman Harley] to file a statement of account prepared by a certified accountant and pay into court one half of the net balance of the proceeds of sale...within seven days of the date hereof, failing which the defence shall stand struck out...

[4] On February 7, 2011 F. Williams J (Ag.) as he then was, made a further Order supplemental to that of Harris JA in the following terms:

That the Defendant be permitted to file within seven (7) days from the date hereof a detailed statement of account prepared by a Certified Accountant in respect of Unit 203 registered at Folio 01-3230-052-0130 and mortgaged in the names of the Claimant and the Defendant detailing such matters as the price and payments made from the proceeds of sale affecting the Claimant and the Defendant, exhibiting supporting documentation where available.

[5] On May 27, 2011 in Chambers, pursuant to a Notice of Application dated March 22, 2011 filed by the claimant, Marsh J in the absence of the defendant or his representative ordered as follows:

- a. That the Defence of the Defendant herein be struck out for failing to obey the Order of the Court of Appeal dated 26th March 2010.
- b. That the Defence of the Defendant be struck out for failing to obey the Order of the Court dated 7th February 2011.
- c. That there be judgment for the claimant on the Claim (the properties owned by Harley Corp Guarantee and Hargal Limited having been struck out by Order of the Court of Appeal).
- d. That the sum of \$1,002,719.23 paid into Court by the Defendant, be paid out to the Attorney-at-law for the Claimant in part payment of the sum due to the Claimant for her share of the Miami property.
- e. Costs

[6] By Notice of Application for Court Orders filed in the Court of Appeal on June 23, 2011 the Applicant sought the following orders:

- a. A Stay of all proceedings in the Supreme Court...arising from the judgment of Mr. Justice Marsh delivered on May 27, 2011 until a determination of the appeal herein;
- b. An Order prohibiting the respondent from dealing with any property which is the subject of the order made by Mr. Justice Marsh on May 27, 2011 until the determination of the appeal herein;
- c. An Order prohibiting the Accountant General Department from paying to the Respondent's Attorney-at-Law the sum of \$1,002,719.23 paid into Court by the Appellant;
- d. Costs to be cost in the Appeal.

[7] On September 27, 2011 Harris JA refused the application for a stay and awarded costs to the respondent to be agreed or taxed. The refusal was based on a preliminary point that the defendant had not complied with the previous Order of Harris JA made on March 26, 2010.

[8] By letter dated October 3, 2011 written to counsel for the claimant and copied to the Registrar of the Court of Appeal, counsel for the defendant maintained that the Order of Harris JA had in fact been complied with.

[9] By Notice of Application/Motion for Judgment filed January 26, 2012 and heard in open court the Claimant sought orders to give effect to the Order

of Marsh J made in Chambers on May 27, 2011. Those orders were made by Morrison J on July 24, 2012 and are the orders sought to be set aside by this application.

- [10] As pointed out in the Notice of Application, the day before Morrison J made those orders, July 23, 2012, the opinion of Harris JA already set out above, but repeated here for convenience, was sent in a letter to counsel for the Defendant/Applicant in the following terms:

It is my opinion that the applicant ought to seek to discharge my order made on the preliminary point. If he is successful, then the matter can be heard on its merits.

- [11] On the facts, it appears that Morrison J was unaware of this opinion of Harris JA at the time he made the orders.
- [12] The Court of Appeal has now set the 12th November 2012 for the hearing concerning whether or not the Order made by Harris JA on September 27, 2011 should be set aside.

THE MAIN ISSUE

- [13] Whether on the peculiar facts of this case the Supreme Court has jurisdiction to grant a stay or can a stay only be granted by the Court of Appeal?

THE SUBMISSIONS

The Submissions of Counsel for the Defendant/Applicant

- [14] In submissions in support of the application, counsel for the Defendant/Applicant used as his starting point the Judicature (Supreme Court) Act. Section 27 provides that the “...*the Supreme Court shall be a superior Court of Record and shall have and exercise jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say – The Supreme Court of Judicature...*”. Counsel further pointed out that section 28 provides that “*Such jurisdiction shall be exercised so far as regards procedure and practice in the manner provided by this Act and the Civil Procedure Rules...*”
- [15] Counsel submitted that the Supreme Court and the Court of Appeal both have concurrent jurisdiction to grant a stay of execution of a judgment.

- [16] Counsel advanced it was significant to note that when the matter came before Morrison J in the Motion Court on 12th July 2012, it was adjourned by the learned Judge to July 24, 2012 awaiting the response from the Court of Appeal. Counsel indicated that the matter was adjourned with a promise in open Court from Morrison J that if the Court of Appeal would hear an Application for Stay, he would exercise his jurisdiction to grant a Stay until that Application was heard. Counsel indicated that at no time did counsel for the claimant express any objection to the position of Morrison J.
- [17] Counsel submitted that, the general rule in granting a stay of execution is to show that if damages and costs were paid, they would not be adequate remedies. In this case even if the appeal succeeds, the Defendant/Applicant would not be able to get back his properties if a stay was not granted and the properties were disposed of. In addition, the Court would look to see whether or not the Defendant/Applicant had a good prospect of success. See ***Linotype-Hall Finance Limited v. Baker*[1992] 4 All ER 887.**
- [18] Counsel argued that where a Court makes an Order or gives an opinion that the matter should proceed to the Court of Appeal, a Judge of the Supreme Court could take notice of this Order/opinion and stay any execution until the Court of Appeal determines the matter.
- [19] Counsel further argued that another matter for consideration was that at this stage, the matter must go before a three judge panel in the Court of Appeal and access to a three bench Court of Appeal is not as easy as access to a single Judge of Appeal. Therefore it would not be as easy to secure access to the Court of Appeal as it was to access the Supreme Court.
- [20] The court was also requested to take note of the fact that the Application for the Stay in the Court of Appeal had been refused on a preliminary point. Further, that it having by letter dated October 3, 2011 been shown by counsel for the Defendant to counsel for the Claimant that the learned Judge of Appeal might have been wrong, to date that letter has not been challenged in any way.

- [21] Given all the circumstances, counsel submitted that a Judge of the Supreme Court could legally and properly grant a stay of the Order of Morrison, J until November 12, 2012 when the matter is to be heard by the Court of Appeal.
- [22] Counsel also relied on the overriding objective in Part 1 of the Civil Procedure Rules in submitting that all litigants should have equal access to and ultimately their “day in court”.
- [23] Counsel finally submitted that, though the Orders made by Morrison J were similar to those made by Marsh J, it was actually the Orders of Marsh J that were the subject of the appeal and in respect of which the Stay had been refused on a preliminary point by the Court of Appeal. Therefore counsel argued, in all the circumstances nothing would stand in the way of a Judge of the Supreme Court granting a stay of the Orders of Morrison J.

The Submissions of Counsel for the Claimant/Respondent

- [24] Counsel's submissions were very brief. Ms. Davis indicated her agreement with the position that ordinarily the Supreme Court and the Court of Appeal would have concurrent jurisdiction to grant a stay.
- [25] However she maintained that the Supreme Court could not grant a stay where to do so would be inconsistent with an order of the Court of Appeal. The Court of Appeal having, for whatever reason, refused the Defendant/Applicant's application for a stay, the Supreme Court could not now properly grant a stay which the Court of Appeal had refused.
- [26] The effect of the Court of Appeal's refusal to grant a stay was that the Claimant was permitted to implement the judgment of Marsh J, which was what the Order of Morrison J did. If a stay was now granted by the Supreme Court it would be in conflict with the Order of the Court of Appeal. If a stay was being sought based on the fact that the Court of Appeal had indicated a willingness to revisit the preliminary point on which the initial application for a stay was refused in the Court of Appeal, then the proper place to seek that stay was in the Court of Appeal not the Supreme Court.
- [27] The Overriding Objective counsel stated, had no application in the instant case.

THE ANALYSIS

- [28] It is accepted by all parties and the Court, that in a number of circumstances the Supreme Court and the Court of Appeal will have concurrent jurisdiction to grant a stay of an order of the Supreme Court which is the subject of an appeal to the Court of Appeal
- [29] It is also similarly accepted that as a general rule to obtain the grant of a stay of execution, the Applicant would have to show that if damages and costs were paid, they would not be adequate remedies. In this case if a Stay is not granted and the Defendant/Applicant is successful on appeal, damages and costs would not be an adequate remedy. If the hand of the Claimant is not stayed and the properties are disposed of to bona fide purchasers for value without notice of any impediment to sale, the Defendant/Applicant would not be able to recover those properties.
- [30] Counsel for the Defendant/Applicant also maintains in effect that equity would favour the imposition of a stay as, prior to the application for the orders granted by Morrison J, counsel for the Claimant had been advised that the basis of the Order made by Harris JA on September 27, 2011 was wrong. Counsel for the Claimant had however not sought to counter that assertion nor even favour counsel for the Defendant with the courtesy of a response.
- [31] In terms of the inadequacy of damages and costs and the "balance of the equities" this court would have ruled in favour of granting a stay. The issue which has prevented such a ruling surrounds the question of jurisdiction.
- [32] The fact is there is at present a subsisting ruling of a Judge of the Court of Appeal refusing a stay of the orders of Marsh J on May 27, 2011. Even though only made on a preliminary point which will be reviewed by the Court of Appeal for error of fact by virtue of the opinion of Harris JA, unless and until that review reverses the Order of September 27, 2011 the refusal of the Stay by the Court of Appeal stands.
- [33] The Court of Appeal having refused a stay I find that the Supreme Court does not have jurisdiction to grant a stay in respect of the same orders which were the subject of the refusal by the Court of Appeal. Admittedly counsel for the defendant has pointed out that, though substantially the

same in nature and obtained to give effect in open Court to the orders made by Marsh J in Chambers, the application for a stay made before me, is in respect of the orders of Morrison J and not the orders of Marsh J appealed from and in respect of which the stay was refused by the Court of Appeal.

[34] This submission gave the court cause for pause. However I am impelled to the same conclusion. Though the orders made by Morrison J are newly made orders, they merely give effect to the orders of Marsh J contained in his Order of May 27, 2011 which, by virtue of the ruling of the Court of Appeal, is presently not stayed. Had Morrison J been aware of the opinion of Harris JA he may well have declined to make the orders sought. The orders however having been made, giving effect to those which the Court of Appeal ruled should not be stayed, I am still of the view that the Supreme Court does not have jurisdiction to stay those orders. In light of the previous ruling of Harris JA on September 27, 2011 and the subsequent opinion of the learned Judge communicated July 23, 2012, I find that it is the Court of Appeal that should be moved to grant a stay pending the outcome of the the hearing on November 12, 2012, that will determine whether or not the ruling made on September 27, 2011 was made in error.

[35] I do not agree with the submission of counsel for the Defendant that a court of three judges would have to hear an application for a stay in the Court of Appeal. I see no reason why a single Judge of Appeal could not hear such an application. It also seems remarkable and inconsistent that that a single judge of the Supreme Court would have jurisdiction to grant a stay in Chambers, but if the application were made in the Court of Appeal it would have to be heard in open court by three judges.

THE RULING

[36] For the foregoing reasons on September 25, 2012, I ruled that I did not have the jurisdiction to grant the Stay sought, which if desired, should be pursued in the Court of Appeal.