

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 76/2011

APPLICATION NO 199/2012

BETWEEN	NORMAN HARLEY	APPLICANT
AND	DOREEN HARLEY	RESPONDENT

Keith Bishop instructed by Bishop and Partners for the applicant

Ms Carol Davis for the respondent

16 and 19 October 2012

IN CHAMBERS

BROOKS JA

[1] The present application is for a stay of execution of orders made by Morrison J on 24 July 2012. The stay is sought while the determination of Mr Norman Harley's applications to set aside an order by Harris JA is pending. Mr Harley also seeks a stay of the order of Marsh J. If the application sounds complicated, it is only a hint of the intricate windings that this claim for division of property, between Mr Harley and his former wife, Mrs Doreen Harley, has taken since it was filed in 2002, despite the fact that it has not yet been tried on its merits.

[2] An outline of the various relevant orders will assist understanding the present application. They are:

- a. On 15 April 2004, Daye J made an *ex parte* order restraining Mr Harley, for a period of 14 days, from selling or dealing with a property located in Florida. The ownership of that property, among others, is disputed between the parties.
- b. On 5 May 2004, Sykes J discharged the order made by Daye J and ordered Mr Harley to file, on or before 30 July 2004, a statement of account of the sale as well as to pay, on or before 31 August 2004, one-half of the net proceeds of sale into court.
- c. Mr Harley failed to comply with the order made by Sykes J. In May 2007, Morrison J refused his application for relief from sanctions.
- d. On 26 March 2010, Harris JA allowed Mr Harley's procedural appeal against the order refusing relief and ordered, among other things, that, Mr Harley should, within seven days of the order, file a statement of account of the sale and pay one half of the proceeds of sale into court. Harris JA also ordered that the statement of account should have been prepared by a certified accountant. The learned judge of appeal further ordered that failure to comply would result in Mr Harley's defence standing as struck out.
- e. On 7 February 2011, Williams J, in response to an application to strike out the defence, ordered Mr Harley to file "a detailed statement of account

prepared by a Certified Accountant", along with supporting documentation, in respect of the sale within seven days of the date of his order. Again, Williams J ordered that failure to comply would result in the defence standing as struck out.

- f. On 27 May 2011, Marsh J acceded to an application to strike out the defence on the basis that the document filed by Mr Harley did not comply with the order of Williams J or the order of Harris JA.
- g. Harris JA, on 27 September 2011, refused Mr Harley's application for a stay of execution of the orders of Marsh J, pending an appeal from those orders.
- h. On 23 July 2012, in a response to another application for a stay of execution of the orders of Marsh J, Harris JA ruled that the proper procedure was to apply to discharge her order made on 27 September 2011.
- i. On 24 July 2012, Morrison J gave judgment on the claim to Mrs Harley and made specific orders concerning the division of the properties in dispute.
- j. On 25 September 2012, Fraser J refused an application to set aside the order of Morrison J.

[3] Based on the above, there is, at present, a judgment of the Supreme Court in favour of Mrs Harley concerning the division and disposal of the various properties. The judgment is based, not on a trial of the disputed issues, but in default of a defence

being in place for Mr Harley. Mr Harley, in seeking to have the claim tried on its merits, has started with an attempt to discharge the order of Harris JA that was made on 27 September 2011. His appeal against the order of Marsh J remains in place, but has not yet been heard.

[4] Mr Bishop, on behalf of Mr Harley, submitted that the application to discharge the order of Harris JA is set for 12 November 2012 and since valuable properties are involved, it was fairer to all concerned if Mrs Harley be prevented from being able to enforce the orders made by Morrison J, until the hearing of that application. He argued that Mrs Harley would not be prejudiced by the grant of a stay of execution as she has caveats lodged against all the real property.

[5] In response to the application, Ms Davis, on behalf of Mrs Harley, argued that the basis for the grant of any stay of execution must be that there is a real prospect of success for the substantive matter that is imminent, in this case the application to discharge the order of Harris JA. Learned counsel submitted that Mr Harley's application had no prospect of success. She pointed out that the order of Harris JA made on 26 March 2010 has, up to now, not been complied with. Accordingly, Ms Davis argued, the defence had already been struck out before the application came before Marsh J. In the absence of a real prospect of success then there should be no stay of execution.

The analysis

[6] It stands to reason, as Ms Davis has submitted, that it would be pointless to grant a stay of execution to an appellant pending the hearing of his appeal, if that appeal has no real prospect of success. The court hearing the application for the stay of execution must, however, bear in mind that it is not the appellate tribunal and so a balance has to be struck.

[7] In the instant case, a grant of a stay would ensure that a successful appeal would not be rendered nugatory and the proximity of the date for hearing should also be taken into account in striking that balance. On the other hand, a refusal would allow Mrs Harley the freedom to press on with securing the fruits of her judgment.

[8] A guiding principle in deciding where to strike the balance, is that set out in the judgment of Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited FC** [1997] EWCA 2164. The learned Law Lord identified the correct approach thus:

"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 may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should 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.” (Emphasis supplied)

That principle was approved by this court in **Paymaster (Ja) Limited v Grace Kennedy Remittance Service Ltd et al** [2011] JMCA App 1.

[9] In applying that principle to the instant case, I find that the circumstances lean in favour of granting the stay of execution pending the hearing of the application to discharge the order of Harris JA. The reason for taking this view is that a sale by Mrs Harley, of any of the properties will result in severe prejudice to Mr Harley if this court were to find that Harris JA erred in making the order which she did on 27 September 2011. If eventually, it were to be found that Mr Harley should have been allowed to pursue his defence, then the loss of property to which he may be entitled would render his application to discharge the order of Harris JA, nugatory. It is said that each parcel of real property has its own intrinsic value and that damages is not usually an adequate remedy for loss of such property (see **Adderley v Dixon** (1824) 57 ER 239 and **Turner v Baldin** [1951] 82 CLR 463).

[10] On the other hand, Mrs Harley has not advanced any real prejudice that she would suffer in the event that the stay were granted. She did depose that at one stage two police officers attended at her home stating that they had instructions from Mr Harley to evict her. She, however, effectively dissuaded those persons and there is no evidence of there having been any threat of repetition. She has lodged caveats against the registered titles to the various properties and so there is little likelihood that any of

them may be sold without her being alerted as to the transaction. In any event, steps may be taken to prevent Mr Harley from "stealing a march" in this regard.

[11] In addition to the above, it cannot be ignored that the application is soon to be heard, a mere matter of a month from now. It is unlikely that a delay of that duration could cause irremediable prejudice to Mrs Harley.

[12] Although Miss Davis has submitted that there is no merit in the application, it may be that this court may take the view that the documents produced by Mr Harley were sufficient to satisfy the order made by Harris JA on 26 March 2010. I am not prepared to express a view on that aspect. In light of the existence of that possibility I will not say that there is no merit in the application.

Conclusion

[13] For the reasons stated above, I find that the course which is likely to cause the least irremediable prejudice, is to grant a stay of execution of the order of Morrison J pending the hearing of the application to discharge the order of Harris JA. There should, however, be a condition that Mr Harley should take no steps to deal with or alienate any of the properties, the subject of the claim, until the disposition of the application or until further order of the court.

Costs

[14] Although Mrs Harley has failed in her bid to resist the application for the stay, I would not grant costs to Mr Harley. The substantive issue turns on whether he failed to

obey an order of the court. The nature of the application is such that the costs should abide the outcome of the application to discharge the order of Harris JA.

Order

- [15] (1) Execution of the orders made by Morrison J on 24 July 2012 is hereby stayed until 12 November 2012 or until further order of the court;
- (2) The applicant is hereby restrained until the resolution of his application to discharge the order of Harris JA, made on 27 September 2011, from selling, leasing, mortgaging or otherwise taking any step to alienate his interest in any of the properties, the subject of the claim herein;
- (3) The costs of this application are to be costs in the application to discharge the order of Harris JA. Such costs are to be taxed if not agreed.