[2017] JMCA App 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 53/2016

APPLICATION NO 113/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**MYRNA DOUGLAS**	**1st APPLICANT**
AND	**JACQUELINE BROWN**	**2nd APPLICANT**
AND	**EASTON DOUGLAS**	**RESPONDENT**

Mrs M Georgia Gibson-Henlin and Mrs Stephanie Williams instructed by Henlin Gibson-Henlin for the applicants

Miss Carol Davis for the respondent

22 July 2016 and 7 April 2017

MORRISON P

[1] I have read in draft the reasons for judgment of our brother F Williams JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

PHILLIPS JA

[2] I too have read the draft reasons for judgment of F Williams JA. I agree with his reasoning and conclusion and have nothing to add.

F WILLIAMS JA

[3] At the time the court considered this matter on 22 July 2016, it ordered as follows:

> "i. The order dated 6 June 2016, made by the Honourable Miss Justice P Williams JA (Ag) is varied.
>
> ii. There shall be a stay of execution of the sale of the property located at Maryland called Windsor Castle and registered at volume 1238 folio 938 of the Register Book of Titles pending the determination of the appeal.
>
> iii. Costs of the application are costs in the appeal."

We promised then that brief reasons were to follow. This is a fulfilment of that promise.

Background

[4] The application that came before us for consideration was filed on 13 June 2016, and sought: (i) to vary or discharge the order dated 6 June 2016, of P Williams JA (Ag) (as she then was); and (ii) to stay, pending appeal, the sale of a property registered at Volume 1238, Folio 938 of the Register Book of Titles (which, for the purposes of this application, will be referred to as the Maryland property). The application was supported by (a) the affidavit of Coleasia Edmondson, attorney-at-law of the firm on record for the applicants, sworn to on 13 June 2016; (b) her supplemental affidavit sworn to on 12 July 2016; and (c) her further supplemental affidavit sworn to on 15 July 2016.

[5] The application before us arose from the refusal of the learned single judge of appeal to grant an order to stay the execution of the sale of the Maryland property

pending the determination of the applicants' appeal, amended notice of which had been filed on 24 May 2016.

[6] The 1st applicant, Myrna Douglas, had filed in the Supreme Court an amended fixed date claim form on 28 April 2005, seeking declarations of her interest in three properties acquired throughout her marriage to the respondent (one of which - the Maryland property - forms the subject of this application). The 2nd applicant is the daughter of the 1st applicant and the respondent; and the names of all three parties appear on the certificate of title for the said property. The claim was adjudicated on by Campbell J who delivered judgment on 13 September 2013. The respondent thereafter applied for consequential orders for the sale of the properties. Importantly, on 8 July 2015, the learned judge made the following orders, which established the terms under which the sale of the properties was to be conducted:

> "i. That there be valuations by Allison Pitter & Company, (or such other reputable valuator as may be agreed by the parties) of each of the properties at Mountain Spring, Maryland and Carvalho Drive aforesaid, the cost of the said valuations to be borne by the parties. In the absence of agreement, the Registrar of the Supreme Court is to appoint a valuator.
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> ii. That the properties at 14A Carvalho Drive, Mountain Spring Drive and Maryland aforesaid be sold.
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> iii. That the Defendant's Attorney-at-Law has carriage of sale of the said properties.
>
> iv. That the properties at Mountain Spring, Maryland and 14A Carvalho Drive be listed for sale with real estate dealers as agreed by the parties (or same to be appointed by the Registrar of the Supreme Court from lists of 2 submitted by the Claimant and the

Defendant to the Counterclaim and by the Defendant) for a period of 3 months from the date hereof.

v. That in the event that each of the properties at Mountain Spring, Maryland and Carvalho Drive are not sold within 3 months of the date hereof, then the parties are to accept the highest offer made by a potential purchaser (other than the parties) and accepted by any one party.

vi. That the Defendant be permitted to purchase the interest of the Defendant to the Counterclaim in the property located at 14A Carvalho Drive aforesaid. The Defendant is to make an order for purchase for half of the sum stated in the valuation prepared pursuant to these orders, within 21 days of the receipt of the said valuation for Carvalho Drive. In the event that the Defendant makes no offer to purchase as aforesaid, the property located at Carvalho Drive shall be sold on the open market in accordance with the orders herein.

vii. That the Registrar of the Supreme Court be empowered to take all necessary accounts with respect to the sale of the properties at 14A Carvalho Drive, Mountain Spring and Maryland respectively.

viii. That the Registrar of the Supreme Court be empowered to execute any document or documents with regard to the sale and/or transfer of the property and/or shares in the event that either party refuses to sign same (a party being deemed to have refused to sign if they refuse and/or neglect to sign a document within 14 days of being requested so to do.

ix. Myrna Douglas, Jacqueline Douglas Brown and Easton Douglas and/ or their servants or agents etc., to quit and deliver up possession of the respective premises (except where either of them is the purchaser thereof under the terms of this order) on the letter of commitment being issued or within 45 days of the agreement of sale being signed in the event it is a cash sale."

[7] Subsequent to the orders being made, several events transpired. On 25 November 2015, the valuation report for the Maryland property was received by the attorneys-at-law for the applicants. The report was dated 18 November 2015. The property was appraised to be valued between $3,500,000.00 and $3,750,000.00.

[8] The Carvalho property was purchased by the respondent in accordance with order vi.

[9] On 4 February 2016, the applicants' attorneys-at-law were informed by the respondent's attorney-at-law that there was an offer to purchase the Maryland property by a third party for the sum of $3,750,000.00. On 15 February 2016, the applicants refused that offer and counter-offered to purchase the respondent's share in the property for one-third of $3,800,00.00. That offer was given with instructions that the purchase price and associated costs be deducted from the balance which was to be paid up by the respondent on completion of the sale to the respondent of the applicants interest in the Carvalho property.

[10] On 9 March 2016, the respondent's attorney-at-law informed the applicants' attorneys-at-law of another offer (which was described as 'non binding') by another third party for $4,700,000.00. On 4 April 2016, the applicants' attorneys-at-law sent to the respondent's attorney-at-law, an agreement for the applicants' purchase of the Maryland property. At this point, it became apparent that both sides had differing views of the meaning and effect of paragraphs v and vi of the order. This caused some delay.

[11] The respondent's non-acceptance of the applicants' offer to purchase his interest in the Maryland property prompted an application by the applicants filed on 6 April 2016. That application, amended and refiled on 11 April 2016, sought clarification of order v of the terms governing the sale of the properties. The applicants contended that order v did not exclude them from making an offer to purchase the Maryland property, so long as such an offer came within three months of the receipt of the valuation report and that 'offer' does not include a conditional non-binding offer. As previously mentioned, the valuation report was received by the applicants' attorneys-at-law on 25 November 2015. As such, on their view of the order, their offer would have been properly exercised on 15 February 2016 and the registrar would be empowered to sign the applicants' sale agreement under order viii and the latter non-binding offer would be of no effect. The application was supported by the affidavit of Coleasia Edmondson filed 6 April 2016, affidavit of urgency of Stephanie Williams filed on 7 April 2016; and the affidavit of Stephanie Williams filed on 12 April 2016.

[12] The learned judge on 9 May 2016, refused to grant the order for clarification. The reason for his refusal was that order v was clear and required no clarification, as that order expressly excluded any of the parties from making an offer. The learned judge however granted a stay of execution of the sale of the Maryland property for a period of two weeks from the date of that order, within which time the appeal was expected to have been filed. The learned judge also granted permission to appeal. (The order granting the stay of execution expired on 24 May 2016.)

[13] The central issue addressed in the grounds of appeal filed against the decision of Campbell J was that the learned judge erred in finding that there was no need for clarification, as there was no ambiguity in the order. As such, in the notice of appeal it was contended that there were several deficiencies in the orders made by Campbell J, in that, for example, the parties should not be restricted from purchasing the property and that the time within which to make an offer to purchase the property would, of necessity, start to run after the valuation report was received. Therefore (according to the applicants' contention), the applicants' offer to purchase the Maryland property made on 15 February 2016, would have been properly made within the permitted time period and ought to be accepted by the respondent.

[14] In addition to filing their notice of appeal, the applicants also sought, by application filed on 25 May 2016, to obtain in this court an order for a stay of execution of the sale of the Maryland property. This application was brought on the bases that: (i) it was recognized that, pursuant to rules 2.14(a) and 2.11(1)(b) of the Court of Appeal Rules (the CAR), the filing of an appeal does not operate as a stay of proceedings; and (ii) a single judge has the power to make an order for a stay of execution of any judgment or order against which an appeal has been made pending the determination of an appeal. Further, it was put to the court that if the stay of execution of the sale was not granted, the respondent would sell the property; whereas the applicants desire to maintain ownership of the property, having sentimental ties to it. The sale proposed by the respondent would also render the appeal nugatory, it was contended. Filed with

the application for a stay were (i) an affidavit in support; and (ii) an affidavit of urgency - both sworn by Coleasia Edmondson on 25 May 2016.

[15] The matter went before the single judge of appeal on the said 25 May 2016, but was adjourned due to a lack of urgency and proof of service of the application. The respondent thereafter replied by way of affidavit sworn on 31 May 2016. The applicants subsequently responded to the respondent's affidavit by affidavit sworn on 1 June 2016, by Coleasia Edmondson. In addition, by notice of intention to rely on affidavits, the applicants relied on the affidavits which had been before Campbell J in the application for liberty to apply to clarify.

[16] On 6 June 2016, the learned single judge of appeal refused to grant the stay of execution.

[17] This led to the making before this court of this application to vary or discharge the single judge's order.

Applicants' submissions

[18] As previously foreshadowed in paragraph [12] (when the notice of appeal was being mentioned), the main submissions of the applicants were to the effect that: (i) if no stay was granted by this court then the appeal would be rendered nugatory, especially in circumstances where there was already in existence a sale agreement proposed by the respondent with a third party as prospective purchaser; and (ii) further, it was contended that the clarification sought in respect of Campbell J's order was required in circumstances in which there was a difference of interpretation of

the orders between the attorney-at-law for the respondent and those for the applicants. This difference centred on, on the one hand, the contention by the applicants that, on a proper interpretation of the order, they could purchase the property within 90 days of the valuation report being received; and, on the other hand, as the respondent's attorney-at-law contended, the applicants were precluded from doing so. Thus, on the applicants' interpretation, an offer could not properly be made until the valuation report was received. It was further put to the court that a consideration of the risk of prejudice, having regard to the evidence, favoured the applicants and that this aspect of the application before the single judge of appeal had been wrongly considered and adjudicated on by her.

[19] Several cases were relied on by counsel which included **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6, and **Dalfel Weir v Beverley Tree** [2016] JMCA App 6 which, although differing on the facts from the instant case, contain principles that are generally applicable to the circumstances of this case, mainly in support of the contention that the receipt of a valuation report should properly precede an offer.

Respondent's submissions

[20] Conversely, counsel for the respondent submitted that the orders made by Campbell J clearly reflected the intention of the court and required no clarification: simply put, under order v, the parties were precluded from purchasing the properties. Counsel further contended (in relation to the applicants claiming a sentimental

attachment to the property in question), that that claim only recently arose, no interest in the purchase of the property having been previously expressed by the applicants.

[21] It was also submitted that the receipt of the valuation report was not a prerequisite to listing the property for sale; and that the date of its receipt would not have affected the time period in which offers were to have been made. Thus, order iv was to be read with order i, which clearly show that the applicants were given no option to purchase the property in question. Additionally, it was submitted that the applicants' offer was $900,000.00 less than the highest offer and, as such, it would have been unreasonable for the respondent to have accepted that offer.

The law

Consideration to vary or discharge order

[22] Rule 2.11(2) of the CAR provides that: "[a]ny order made by a single judge may be varied or discharged by the court". There can, therefore, be no doubt that we have the jurisdiction to entertain an application to vary or set aside the order of the learned single judge of appeal.

[23] While on the one hand it is important for decisions of the courts to be seen as final, on the other, the scheme of the CAR makes it open to this court to consider whether circumstances exist requiring it to vary or discharge the orders of the single judge of appeal and to grant a stay of execution of the sale of the Maryland property pending the appeal.

Stay of execution

[24] As rightly submitted by counsel, pursuant to rule 2.14(a)(b) of the CAR, "[e]xcept so far as the court below or the court or a single judge so direct- an appeal does not operate as a stay of execution or of proceedings under the decision of the court below; and no intermediate act or proceeding is invalidated by an appeal". Thus, it is incumbent on a party wishing to stay execution of any judgment or order to make such an application. Otherwise, in these circumstances, any act on the part of the respondent to sell the Maryland property in accordance with the terms of the orders granted by Campbell J would not be deemed invalid – even were the applicants later to succeed on appeal.

[25] In the case of **Combi (Singapore) Pte Limited v Ramanath Sriram and Sun Limited FC** [1997] EWCA 2164, Phillips LJ traced the history of the considerations governing the grant or refusal of an order for a stay of execution. He made reference to the case of **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887, stating the principles then operating to be:

> "...if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

[26] The current standard by which the court assesses applications for a stay of execution was stated by Phillips LJ at page 3 as being as follows:

> "...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. The starting point must be that the normal rule as indicated by Ord 59, r 13 is that there is no stay but, where the justice of that approach is in doubt, the answer may well depend upon the perceived strength of the appeal."

[27] In assessing the competing arguments of the parties regarding prejudice regard may be had to the respective parties' affidavit evidence in the application for a stay of execution. The affidavit of Coleasia Edmondson sworn on 25 May 2016 recounts that Campbell J's order provided that the registrar of the court could execute any document for the sale or transfer of the property within 14 days of being requested to do so where either of the parties refuses to sign. As such, even without the signatures of the applicants, there was a real risk of the property being sold if the stay was not granted, in circumstances where there is a proposed sale transaction with a third party.

[28] In response, in the affidavit of Easton Douglas sworn on 31 May 2016, the respondent set out several statements as to the alleged prejudice to be suffered by him, if the order prayed was granted:

> "5. At the material time I expressed an interest in purchasing the interest of the 2nd Appellant in the property known as 14A Carvalho Drive. This was therefore inserted

> into the order, and indeed my purchase of the 2nd Appellant's share of this property is now complete.
>
> 6. At no time however did the Appellants express any interest in purchasing my share of the properties. It was therefore always the intention that once a valuation had been obtained, the properties would be sold to the highest bidder (other than the parties) as indicated in the Order.
>
> 7....I say that we have received an offer from [a third party] to purchase the land at Maryland for the sum of $4,700,000. A copy of the said offer is attached hereto marked "**ED1**". Being the highest offer received, the order permits same to be accepted by any one party, and I have accepted it.
>
> 8. The Defendants have now belatedly sought to purchase the said land at Maryland for the sum of $3,800,000.
>
> 9. In addition to the fact that the Defendants were precluded from making offers for this land, they now seek to purchase same for approximately $900,000 less than what has been offered on the open market.
>
> ....
>
> 12. I verily believe that the Appellants are pursuing this appeal in an attempt to frustrate the purchaser, such that he would withdraw his offer. I would then be stuck with only the Defendant's offer, which is much less than the offer that has been received on the open market. I believe that this would be very unfair to me and I humbly ask that this application be refused. Should the open market sale proceed, the Appellants too will share in the increased sum to be paid by the 3rd party."

[29] It becomes clear from a consideration of these matters, that, if a stay of execution of the sale of the Maryland property is granted as prayed by the applicants, then the respondent would face the possibility of losing the offer made by the third party (that offer being $900,000.00 more than any other offer made). In that sense there is a possible loss to the respondent. That loss, however, (if any) would be

monetary and quantifiable. In other words, there would have been no real perceivable prejudice to the respondent; or at least none that could not be recovered in costs and the proceeds from an eventual sale. On the other hand, preserving the status quo of the matter by granting a stay, would allow the applicants to pursue their appeal free of the pressures of an imminent sale. Whether or not the applicants succeed in their appeal, the property would have been preserved and might, at the end of the hearing of the appeal, then be sold. However, if the stay should be refused, the appeal may well be rendered nugatory by the sale of the property to a third party. Were the applicants to succeed on appeal, they would have lost their right, if any, to purchase the property, (one to which they are claiming a sentimental attachment, albeit perhaps doing so belatedly). It is worthy of mention as well that the certificate of title for this property was originally in the names of the applicants alone; and that the respondent's name was later added to it by way of gift (transfer # 682970). We also took into consideration that before us was presented material that had not been presented to the learned single judge – that is, the draft agreement of sale exhibited to the further supplemental affidavit of Coleasia Edmondson, sworn to on 15 July 2016, showing the imminence of a sale of the property.

[30] Although the respondent contends that the prejudice to him includes the possibility of a reduced sale price for the Maryland property, if the sale is stayed, that is a factor that would affect all the parties.

[31] As identified earlier, the question of whether there appears to be merit in the prospective appeal features as an important consideration in deciding whether a stay of

execution ought to be granted. The proposed appeal calls for the determination of issues such as: what was the objective of order v and whether it should be interpreted in tandem with order i. A proper consideration and resolution of these issues will help the court to determine whether the applicants' offer was permissible under the terms for the sale of the property and whether it was properly exercised.

[32] Based on the submissions placed before this court, it seems that the applicants may have some merit in their appeal. For one, the applicants' contention that time could only begin to run on receipt of the valuation seems to have some support in dicta in the case of **Dalfel Weir v Beverly Tree**. In that case, at paragraph [21], Morrison P (Ag) (as he then was) opined as follows:

> "[21]... In these circumstances I find it impossible to suppose that the court making the first order could have intended that the applicant should lose his first option because, as has now happened, the updated valuation did not become available until the very day when, on a literal reading of sub paragraph (d), his right to exercise it expired."

[33] In the same judgment, Phillips JA (with whom Morrison P agreed, in a majority decision), observed, in relation to that case, as follows at paragraph [67]:

> "[67] ...[T]he valuation must first be obtained before the property could be sold by private treaty or by public auction, and before the first option granted to the applicant could be exercised. In fact, the valuation was to be utilised to arrive at the value of the one-half share in the family home, namely Lot 9. The updated valuation was to be undertaken by DTCF. That too was clearly the intention of the court. The date in respect of which the option ought to have been exercised

> was clearly meant to be subsequent to the receipt of the valuation..."

[34] Additionally, when one reads the order in its entirety (without attempting in any way to resolve the matter at this stage), such a reading seems to give some weight to the applicants' contention that they were not to have been excluded from participating in the sale of the Maryland property and that the order called for clarification. For example, paragraph ix of the order reads as follows:

> "ix. Myrna Douglas, Jacqueline Douglas Brown and Easton Douglas and/or their servants or agents etc., to quit and deliver up possession of the respective premises (except where either of them is the purchaser thereof under the terms of this order) on the letter of commitment being issued or within 45 days of the agreement of sale being signed in the event it is a cash sale." (Emphasis added)

[35] The question naturally arises: if the intention was to have excluded the applicants, then why were these words included in the order? The answer to this question is one that will, of course, be explored at the hearing of the appeal.

Conclusion

[36] Considering all the circumstances of this case, and balancing the prejudice to the parties, it appeared to us that there was a greater risk of irremediable harm to the applicants if the stay was not granted pending the determination of the appeal. It is our view that the appeal would indeed have been rendered nugatory if a stay was not granted and the property sold to a third party before the determination of the appeal. The grant of a stay of execution pending appeal was the order we thought would most accord with the interests of justice.

[37] In the result, it was for the foregoing reasons that we made the orders set out at paragraph [1] hereof.