JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 23/2012

MOTION NO 20/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**HAROLD MILLER**	**1ST APPLICANT**
AND	**OCEAN BREEZE HOTEL LIMITED**	**2ND APPLICANT**
AND	**CARLENE MILLER**	**RESPONDENT**

Ransford Braham QC instructed by George Soutar QC for the applicant

Michael Hylton QC and Miss Melissa Mcleod instructed by Hylton Powell for the respondent

4, 27 November, 18 December 2015 and 15 January 2016

PHILLIPS JA

[1] The applicants (Harold Miller and Ocean Breeze Hotel limited) filed an amended notice of motion asking this court to grant conditional leave to appeal to Her Majesty in Council from the decision of the Court of Appeal delivered on 17 July 2015 on certain conditions, namely that:

> "(a) The Appellant/Applicant shall within 30 days from the date of the order enter into good and sufficient security in the sum of $1,000.00 for the due prosecution of the appeal; and
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> (b) The Appellant /Applicant shall within 90 days of the date of this order take the necessary steps for the progress of procuring the preparation of the record and the dispatch thereof to England."

[2] The applicants also sought a stay of execution of the judgment of the Court of Appeal until the hearing and determination of the appeal by Her Majesty in Council, and that the costs of and incidental to the application be costs in the appeal to Her Majesty in Council.

[3] The applicants relied on section 110(1)(a) of the Constitution of Jamaica for the grounds of the application, indicating that the decision of the Court of Appeal in respect of which they wished to appeal to Her Majesty in Council was a final decision in civil proceedings, and that the matters in dispute were in excess of the value of $1000.00.

[4] The affidavit in support of the application was deposed to by the 1st applicant on his own behalf as well as on behalf of the 2nd applicant in his capacity as principal shareholder. He testified that the main issue in the court below related to who was entitled to the beneficial interest in a hotel known as Yardley Chase in the parish of Saint Elizabeth, which is located on lands purchased by the respondent and himself during their marriage. The learned trial judge had given judgment in the 1st applicant's favour and ordered that the respondent transfer her interest in Yardley Close to him.

[5] The Court of Appeal, he stated, overturned that order and ruled that the 1st applicant and the respondent were equally entitled to the beneficial interest in the land and buildings situated at Yardley Close. It was the contention of the 1st applicant that the court had examined the separation agreement between the 1st applicant and the respondent which was executed when the marriage was at an end, and had found that although the 1st applicant had made a greater financial contribution than the respondent, that contribution had been offset by his failure to meet the maintenance expenses in relation to the children of the marriage as required by the separation agreement.

[6] The 1st applicant deponed as set out in the said notice of motion that the decision in the Supreme Court constituted a final decision in civil proceedings with the matters in dispute exceeding a value of $1000.00 and on that basis he had a right of appeal to Her Majesty in Council. The 1st applicant stated that he had a good arguable appeal, in that the Court of Appeal had erred, and he set out five issues which he considered worthy of consideration by the Privy Council, namely, the fact that there had been:

(i) a misapplication of the Property (Rights of Spouses) Act (PROSA) as the court had relied on the common law and equity in error in determining the disputed issues in relation to the joint intention to hold the property in equal shares;

(ii) a finding which failed to take into consideration the conclusions of the court below which had the benefit of seeing and hearing the witnesses;

(iii) a rejection by the court of the trial judge's findings of fact and an examination of the matter "afresh" with only the transcript of the evidence in the court below, which was an abuse of the powers of the court.

(iv) an examination by the court of the settlement agreement between the parties but the agreement had not been examined in its entirety, which was therefore an error,

(v) a finding that although the 1st applicant had made a greater financial contribution, that was offset by his failure to satisfy his obligations to maintain the children, which amount had not been ascertained and so his contribution was being offset by an amount unknown.

[7] As Mr Michael Hylton QC and Mr Ransford Braham QC were of the view that the matter fell within the provisions of section 110(1)(a) of the Constitution, with which the court agreed, we granted the applicants conditional leave to appeal to Her Majesty in Council on the conditions set out in paragraph [1] herein. The only issue remaining

therefore was whether this court ought to grant a stay of execution of the judgment of this court pending the hearing and determination of the appeal by Her Majesty in Council.

[8] On 18 December 2015, we made the following order with reasons to follow in due course:

> "It is hereby ordered that the execution of the following orders, namely orders five, six, seven and eight as amended of the judgment of the Court of Appeal dated 17 July 2015 shall be suspended pending the appeal to Her Majesty in Council:
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> (5) The first appellant and the first respondent shall secure a valuation of the property within 30 days of the date hereof. In the event that they shall fail to agree on a valuator, the Registrar of the Supreme Court shall be empowered to appoint a valuator. The cost of the valuation shall be paid by the parties in equal shares, but the payment shall be advanced by the first respondent.
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> (6) The property shall be sold and the proceeds of sale divided equally between the first appellant and the first respondent, subject to order 7 below. The first respondent shall have an option to purchase the first appellant's interest within 90 days of the date hereof. The purchase price shall be one half of the value of the property as found by the valuator. Should he fail to enter into a binding agreement to purchase the first appellant's interest in the property within that time, the first appellant shall be entitled within 30 days thereafter to enter into an agreement to purchase the first respondent's interest in the property. Should she fail to enter into a binding agreement within that

time the property shall be sold on the open market by public auction or by private treaty.

(7) The first respondent shall compensate the first appellant, in respect of her interest, for the use and occupation of the property from 7 November 2007 (the date of their stipulation in the Connecticut court), to the date of sale.

(8) The parties shall have liberty to apply to the Supreme Court in respect of the execution of any of the orders or any issue that arises therefrom **save and except orders five, six and seven which have been suspended**."

These are the reasons for that decision.

[9] Before analysing the competing contentions of the parties on the application for the stay of execution, it is however necessary to grasp the facts, in brief, of the matter in the court below and the rulings made by this court on the several issues arising before it.

Background

[10] The facts of the case have been quite helpfully summarised in the judgment of Brooks JA.

[11] The 1st applicant and the respondent, having emigrated from Jamaica, were living in the United States of America (the United States) where they met and married. The marriage lasted 15 years. During the marriage they acquired six parcels of real estate, four in the United Sates and two in Jamaica. At the end of the marriage they entered into a separation agreement wherein they agreed that three of the four

properties in the United States would be transferred to the respondent and the remaining one, there, would be transferred to the 1st applicant. By that agreement also, a property situated at Top Hill in the parish of Saint Elizabeth was to be transferred to trustees on trust for the three children of the marriage. The second property in Jamaica was not mentioned in the separation agreement. The interest in that property was therefore an issue in the court below and indeed, on appeal, the court recognised that the crux of the case was whether a judge in considering the division of property which was not included in an agreement between the spouses, was entitled to consider the allocation of the property dealt with in that agreement.

[12] The property, as indicated, is at Yardley Chase in the parish of Saint Elizabeth, and was part of a larger tract of land. It was purchased in 2004 and the title was taken out in the names of the 1st applicant and the respondent. Between 2004 and 2007 both parties participated in the construction of a hotel on the property. The respondent was employed to a bank in the United States and the 1st applicant travelled to and from Jamaica to supervise the construction of the building and later the management of the hotel. Unfortunately the respondent was dissatisfied with the 1st applicant's reporting to her on the operation of the hotel and unhappy about his relationship with its female manager. They separated in 2007, the respondent claiming that she had been prevented from entering the hotel. She later filed divorce proceedings and they signed the separation agreement on 1 December 2008.

[13] The respondent claimed that she was entitled to the sole beneficial interest in the property as she had provided most of the financing to purchase the same, and also

for the construction of the hotel, although she acknowledged that the 1st applicant had carried out the transaction for the purchase of the hotel and had mainly been involved in the construction of the building. However it was her position that if the court did not find favour with her contention with regard to the sole beneficial interest therein, she was prepared, the joint interest therein having been severed, to pay for the 1st applicant's interest in the property, such as it was. She also sought an order for the 1st applicant to account for his sole use of the property. On the other hand, the 1st applicant claimed that he had been the sole source of the funds in respect of the purchase of the property and that he had provided the majority of the monies used to build and equip the building.

[14] The learned trial judge dismissed both claims and ordered the respondent to transfer her interest in the property to the 1st applicant. Being dissatisfied with the result, the respondent appealed. It was her contention that the learned trial judge had made several findings based on a misunderstanding of the evidence. On behalf of the 1st applicant it was submitted that the learned trial judge had clearly rejected the exaggerated claims of contribution to the property by the respondent, that the errors made by the learned trial judge were more perceived than real, that based on the quality of the evidence the learned trial judge was entitled to arrive at the conclusions that he had, and that he had made the correct decision.

[15] Brooks JA on behalf of this court examined the trial judge's findings and concluded that the submissions on behalf of the respondent had merit and the court proceeded "to make its own assessment of the manner in which the interest in Yardley

Chase ought to be allocated". The court examined two main issues: (i) whether the learned judge had made fundamental errors of fact that undermined his conclusions and (ii) the calculations to be used to apportion shares in the Yardley Chase property in the parish of Saint Elizabeth.

[16] On the first issue, the court found that the learned judge had made two errors of fact that undermined his reasoning. The first was the learned judge's finding that Mr Miller purchased the property in circumstances where both parties claimed to have solely funded the purchase and there was agreement that the 1st applicant effected the sale transaction and assisted in the construction of the hotel. The second error of fact held to be "plainly wrong" by this court was the learned judge's finding that the 1st applicant did not have legal representation when he signed the separation agreement since a record of the proceedings in the Connecticut court showed that the 1st applicant did indeed have legal representation. The court was of the view that the fact that the 1st applicant was not represented by a Jamaican attorney-at-law had not caused him any prejudice.

[17] In deciding the second issue in the appeal, that dealt with the apportionment of shares in the property, the court relied on the principles expounded in **Brown v Brown** [2010] JMCA Civ 12, **White v White** [2001] 1 All ER 1, **Miller v Miller; McFarlane v McFarlane** [2006] UKHL 24, **Forrest v Forrest** (1995) 48 WIR 221 and **Phipps v Phipps** SCCA No 77/1999 delivered on 11 April 2003, and sections 14 and 15 of PROSA to highlight the factors that could be considered when dividing matrimonial property. In applying these factors to the instant case, the judges of appeal found, *inter alia*, that

the contents of the separation agreement, the intention of the parties at the time of the acquisition of the properties, their respective contributions to the property, and their financial contribution to the children, were all relevant to deciding this issue. In applying these considerations they found that each party was entitled to a 50% share in the property with the added component that the 1st applicant should be given the first option to purchase the respondent's interest therein and that the respondent was entitled to an accounting and payment for use and occupation of the hotel based on its value.

[18] The following were the orders made by the Court of Appeal:

> "(1) The appeal is allowed.
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> (2) The judgment and order of the Supreme Court made on 27 January 2012 is hereby set aside.
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> (3) It is hereby declared that, as between themselves, the first appellant, Carlene Miller, and the first respondent, Harold Miller are equally entitled to the beneficial interest in all that parcel of land with buildings thereon situated at Yardley Chase in the parish of Saint Elizabeth comprising 4640.15m^2 and depicted in a checked survey plan by D St A Dixon, commissioned land surveyor, dated 19 September 2006 (hereafter called "the property").
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> (4) It is hereby declared that the joint tenancy of the first appellant and the first respondent in the property is severed.
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> (5) The first appellant and the first respondent shall secure a valuation of the property within 30 days of the date hereof. In the event that they shall fail to agree on a valuator, the Registrar of the Supreme Court shall be empowered to appoint a valuator. The cost of the valuation shall be paid by the parties in

equal shares, but the payment shall be advanced by the first respondent.

(6) The property shall be sold and the proceeds of sale divided equally between the first appellant and the first respondent, subject to order 7 below. The first respondent shall have an option to purchase the first appellant's interest within 90 days of the date hereof. The purchase price shall be one half of the value of the property as found by the valuator. Should he fail to enter into a binding agreement to purchase the first appellant's interest in the property within that time, the first appellant shall be entitled within 30 days thereafter to enter into an agreement to purchase the first respondent's interest in the property. Should she fail to enter into a binding agreement within that time the property shall be sold on the open market by public auction or by private treaty.

(7) The first respondent shall compensate the first appellant, in respect of her interest, for the use and occupation of the property from 7 November 2007 (the date of their stipulation in the Connecticut court), to the date of sale.

(8) The parties shall have liberty to apply to the Supreme Court in respect of the execution of any of these orders or any issue that arises therefrom.

(9) Each party shall bear its own costs in respect of Claim No 2009 HCV 1204. The first appellant shall have the costs of this appeal. Such costs are to be taxed if not agreed."

Applicants' submissions

[19] Mr Hylton indicated that no issue would be taken as to whether the applicants had an arguable appeal, (although counsel was not of that view), as the order had been made granting leave to appeal to Her Majesty in Council as the appeal was being pursued, pursuant to the Constitution, he stated, as of right. Nevertheless, Mr Braham

for the applicants submitted, what he considered to be several arguable grounds in the applicants' appeal. I will summarize Mr Braham's arguments for ease of reference as follows:

(i) As the court of appeal found that the trial judge was wrong to have held that the respondent had provided greater funds than the 1st applicant towards the purchase of the property, in the result, there was no finding on the conflicting evidence as to which party had made the greater financial contribution to the purchase of the property.

(ii) The issues in dispute ought to have been decided pursuant to section 14(2) of the PROSA but the court failed to do this appropriately in terms of the weight to be given to the respective financial contributions of the parties.

(iii) There being no finding as to the extent of the financial contributions by either party the matter should be remitted to the Supreme Court for determination.

(iv) The court failed to take into account or to give proper weight to the full terms of the separation agreement.

(v) The court acted pursuant to the principles of common law and equity in determining the division of property contrary to section 4 of PROSA.

(vi) The court relied on authorities decided before the promulgation of PROSA and therefore failed to apply PROSA, which is an entire statutory regime.

(vii) The court placed great emphasis on the common intention of the parties to share the property equally rather than focus on section 14(2) of PROSA.

(viii) The court erred in its specific finding in respect of payment of maintenance by the 1st applicant, bearing in mind that the parties had entered into the separation agreement by the time the property was purchased, and so maintenance had not been taken into account, but in any event if any sums were owed those sums should have been treated as a debt.

(ix) The court relied on authorities not relevant to the matter under consideration.

(x) The court failed to take into account the fact that the 1st applicant had repaired the hotel from his own

resources and that he alone had financed the cost of the construction of a dwelling house on the property.

(xi) The court misconstrued the finding of the trial judge with regard to whether the 1st applicant funded the purchase of the property.

(xii) The court gave no weight to the evidence that the judge in the court below considered, which was evidence in the 1st applicant's favour which the court recognized as such.

(xiii) The court failed to appreciate the significance of the 1st applicant not having the benefit of a Jamaican lawyer at the relevant time.

[20] Mr Braham submitted that, in respect of appeals to the Privy Council, this court is governed by the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (Order in Council) and the relevant rules in this application are rules 4, 5 and 6. Mr Braham argued further that the orders in this case were governed by rule 6 of the Order in Council. Additionally, he submitted, the respondent had not indicated in any way whatsoever that she would suffer prejudice if the stay was ordered, contrary to the evidence of the 1st applicant who had indicated that he resided on the property, and as a consequence the sale of the same would cause him extreme dislocation.

Respondent's submissions

[21] Mr Hylton submitted that there are three reasons why the application must fail. Firstly, orders (3) and (4) of the Court of Appeal's decision were declarations and were not subject to a stay of execution. He relied on the dictum of Morrison JA (as he then was) in **Norman Washington Manley Bowen v Shahine Robinson and Another** [2010] JMCA App 27 in support of the principle that there cannot be a stay of a declaratory judgment and further that if the decision did not require the person to take or refrain from taking any action of any kind then the question of a stay of execution cannot arise. Mr Hylton submitted therefore, that the application for stay in relation to orders three and four of the Court of Appeal decision must fail.

[22] Secondly, Mr Hylton submitted that, in respect of orders (3), (4) and (6) of the Court of Appeal's decision, they do not require the 1st applicant to do anything and pursuant to the Order in Council therefore cannot be stayed. The stay of execution was limited to the specific provisions of rule 6. Mr Hylton referred to dictum of Rowe P in **Vehicles and Supplies Ltd v Minister of Foreign Affairs, Trade and Industry et al** (1989) 26 JLR 390 which held that once the rule provides the basis on which a stay may be granted, the court was bound by that limitation so circumscribed. Mr Hylton relied further on **McCalla v The Disciplinary Committee of the General Legal Council** (1995) 32 JLR 28 for assistance in the interpretation of the words "to pay money or do any act" to submit that where the order creates a choice or the person was not coerced to do or refrain from doing an act, then the court had no power to stay execution of that order. Mr Hylton submitted that orders (3), (4) and (6) do not require

the 1st applicant to do or pay anything, they are merely declaratory rights of the parties in the subject property, which set out the process for the sale of the property and the division of the proceeds of sale. He further argued that the payment of costs also does not fall within rule 6 "to pay any money or do any act". He relied on **Jamaica Flour Mills Ltd v West Indies Alliance Insurance Company Ltd** SCCA No 92/1994 delivered 16 May 1997 in support of that contention. Mr Hylton therefore submitted that these orders do not fall within rule 6 of the Order in Council and that the court had no jurisdiction to grant a stay of execution of the same.

[23] Mr Hylton further posited that rule 5(b) was not applicable to the application for a stay of execution as rule 6 specifically addressed stays of execution, and so the specific provision was the relevant rule and not one relating to a general power.

[24] Finally, Mr Hylton's initial submission was that there was no affidavit evidence to justify a stay of execution of the Court of Appeal's decision but subsequently, counsel for the 1st applicant, filed an affidavit which has been summarised in paragraphs [4] – [6] herein which brought about a slight adjustment to Mr Hylton's stance, stating that the affidavit evidence adduced had still not justified a stay of execution of the Court of Appeal's decision. Mr Hylton relied on the fact that there was no evidence to suggest that the appeal would be stifled if a stay was not granted. There was no evidence, he submitted, that the judgment debt could not be satisfied or that the 1st applicant would suffer hardship if the judgment was not stayed. Mr Hylton relied on **Western Cement v National Investment Bank and Others** [2013] JMCA App 12 to underpin the fact, that although the affidavit in support was filed subsequently, no financial information

had been contained therein to show that the applicants could not pay the judgment and as a consequence the appeal would be stifled.

[25] Mr Hylton submitted that, in any event only a portion of order (5) required the appellant to do any act, namely to arrange the valuations and to pay a portion of the costs for the same. Mr Hylton accepted, however, that order (7) did require the 1st applicant to pay compensation to the respondent.

[26] Mr Hylton further submitted that the claim by the 1st applicant that he would be prejudiced by the sale of the property was irrelevant as the paragraphs dealing with that aspect of the decision were purely declaratory, and as indicated execution of those declaratory orders could not be stayed. Mr Hylton reiterated the relevant test in relation to the grant of a stay of execution of a judgment is namely that the successful litigant should not be deprived of the fruits of his litigation as stated in **Beverley Levy v Ken Sales Ltd** SCCA No 81/2005 delivered 22 February 2007. On these bases, he argued that the application for a stay of execution would ultimately fail.

[27] Mr Hylton also challenged any claim made by the 1st applicant that the respondent could not repay any sums which had been paid to her, but which may ultimately be ordered to be paid to the 1st applicant, there being no evidence he submitted, to posit such a suggestion. Mr Hylton also pointed out to the court that the sums ordered to be paid to the respondent by way of compensation, represented sums which the 1st applicant had withheld from her, he being in sole possession of the property in the intervening period, and the monies therefore represented funds to be

refunded to her. Mr Hylton therefore submitted that the application for a stay of execution should be refused, but if the court was not minded to do so, then in the alternative, the court could stay execution of order (7), save that the respondent should be permitted to recover the amount owed in respect of the 1st applicant's sole use and occupation of the property from his share of the proceeds received in respect of the sale of the property.

Analysis

[28] The procedure in respect of appeals to the Privy Council is governed by The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962. The relevant rules of the Order in Council, in this application are rules 4, 5 and 6, which read as follows:

> "4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only –
>
> (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding £500 sterling for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay costs of the appeal (as the case may be); and
>
> (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the

necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

5. A single judge of the Court shall have power and jurisdiction—

(a) to hear and determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;

(b) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.

6. Where the judgment appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as Her Majesty in Council shall think fit to make thereon."

[29] In summary, leave to appeal to Her Majesty in Council can be granted but on certain conditions demonstrating that the 1st applicant had entered into good and sufficient security for the due prosecution of the appeal and that he has taken the

necessary steps for the purposes of procuring dispatch of copies of the record to the United Kingdom. A single judge can hear and determine any such application where an appeal lies as of right and in respect of any appeal pending before Her Majesty in Council, and make and give such directions as he shall deem fit. If the judgment requires the appellant to 'pay money or do any act', then the court when granting leave to appeal shall either direct that the judgment shall be carried into effect or that it should be suspended pending the appeal. If the judgment is directed to be carried into effect then the person holding the judgment before execution of the same shall enter into good and sufficient security.

[30] The fact that the court in exercise of its power to grant a stay in appeals to the Privy Council is circumscribed by the rule itself was made clear in the case of **Vehicles and Supplies Ltd v Minister of Foreign Affairs, Trade and Industry et al**. In that case, Rowe P at page 394 of the judgment, citing with approval the dictum from **G. R. Mandavia v Commissioner of Income Tax** [1957] Eastern African Law Reports p. 1, delineated the limited powers that this court can exercise pursuant to rule 6. In particular, in answer to a contention that the court had an inherent power to grant a stay, stated that:

> "An appeal against the decision of a court does not ipso facto act as a stay of execution of the judgment or order pronounced. Where the statute which confers the right of appeal intends to provide for a stay of execution pending the determination of the appeal, it expressly so provides and the court is bound by the limitations imposed by the statute."

Rule 5(b) of the Order in Council does not stay execution of judgments generally. This point was also clarified by Rowe P in **Vehicles and Supplies Ltd v Minister of Foreign Affairs, Trade and Industry et al** at page 394 where he said:

> "Rule 5 (b) of the Privy Council Rules does not in terms refer to stay of execution and its generality does not contain language from it which can be confidently inferred that there was a clear intention to confer upon the single judge and ultimately upon the court itself, the power to grant a stay of execution whenever the interest of justice so demand."

It is therefore clear that an application for stay of execution of the decision of the Court of Appeal is governed by the Order in Council rule 6.

[31] I agree with Mr Hylton, endorsing the dictum of Morrison JA (as he then was) in **Norman Washington Manley Bowen v Shahine Robinson and Another,** referring to the passage of Mr P W Young QC, in 'Declaratory Orders', 2nd Edition, (at paragraph 2408), where at paragraph [13] he said:

> "The effect of the court's order is not to create rights but merely to indicate what they have always been…Because of this, if an appeal is lodged against a declaratory order, conceptually there can be no stay of proceedings..."

I also agree, that, as was held in **Jamaica Flour Mills Limited v West Indies Alliance Company Limited and Others**, an order of costs does not require the applicants to "pay any money or do any act" and therefore cannot be stayed.

[32] It is therefore important to examine carefully the orders made by this court to see whether the orders are merely declaratory in respect of which a stay cannot be granted or whether the orders require the applicants to pay money or to do any act, in

which case the order can be made. Orders (1) and (2) of the decision do not require the payment of money or the applicants to do any act and cannot therefore be stayed. On the face of it, orders (3) and (4) are purely declaratory and as indicated also cannot be stayed.

[33] With regard to order (5), I am minded to agree with the learned Queen's Counsel Mr Braham that the 1st applicant is directed in that order to secure a valuation of the property, and inherent therein, is an order directed to obtain a valuator. It is only if the parties cannot agree on the appointment of a valuator that the registrar will appoint one. The 1st applicant is also required to pay the costs of the valuation although, ultimately, it is an obligation to be shared equally.

[34] In order (6), the property was directed to be sold with the proceeds of the sale being divided equally. The 1st applicant therefore, if he was desirous of retaining possession (and ultimately ownership of the property) would have to exercise the option to purchase the respondent's interest as directed by the court. The act that he can do therefore is to enter into a binding agreement to purchase the respondent's interest in the property. If he fails to do so, the property can be sold by public auction or private treaty. The 1st applicant therefore would be compelled to act within 90 days of that order as directed by the court in order to protect his interest in the property.

[35] Order (7) requires the 1st applicant to compensate the respondent in respect of her interest for use and occupation of the property from 7 November 2007 to the date of sale which is clearly requiring payment of money and the doing of an act.

[36] In my view, orders (5), (6) and (7) all require acts to be undertaken by the 1st applicant or the payment of money, and so pursuant to the interpretation of rule 6, which has already been decided by this court, can be subjected to a stay of execution.

[37] In deciding whether to grant a stay, this court must also consider the risk of injustice to both parties in the matter. Based on the 1st applicant's affidavit filed 2 November 2015 he has deponed that he would indeed suffer prejudice if a stay of the order is not granted. In support of this contention he deponed that he operates a small guest house on the property from which he earns an income and so a sale of the property would destroy his livelihood. Five staff members are employed to the property that would cease to do so if the property is sold. Moreover, he stated that he could not afford to purchase the respondent's share in the property. The respondent has not indicated that she would be prejudiced by a grant of the stay of execution of the judgment. The interests of justice would therefore demand that the stay of execution, as indicated, should be granted.

Conclusion

[38] Orders (5), (6) and (7) are orders that can be subjected to a stay and the 1st applicant indicated that he would suffer prejudice if a stay was not granted. In all the circumstances, therefore I agreed with the other members of the court to a suspension of orders (5), (6), (7) and as a consequence order (8) as amended (seeking execution of the said orders) as set out in paragraph [8] herein.

P WILLIAMS JA (AG)

[39] I have read in draft the reasons for judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

F WILLIAMS JA (AG)

[40] I too have read the draft reasons for judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.