

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2022CV00101

APPLICATION NO COA2022APP00200

BETWEEN	MALVIA ELAINE BRADY	APPLICANT
AND	EVERETT BLAIR BRADY	RESPONDENT

Lemar Neale instructed by Nea | Lex for the applicant

Arnaldo Brown instructed by Arnaldo Brown & Company for the respondent

8 and 23 November 2022

IN CHAMBERS

BROOKS P

[1] This is an application by Mrs Malvia Brady for a freezing order and a preservation order against her estranged husband Mr Everett Brady. The orders are sought pending the outcome of Mrs Brady’s appeal to this court. According to Mrs Brady, Mr Brady has threatened to leave her destitute. She asserts that, in furtherance of his threat, and since serving divorce proceedings on her, he sold a property which was in his name, without accounting to her for any of the proceeds of the sale. She also fears that he may sell other assets.

[2] A judge of the Supreme Court (‘the learned judge’) refused a similar application that Mrs Brady, made in that court, pursuant to her claim for property division, maintenance, and custody of their minor children. She has appealed that decision and

has made this application for the interlocutory orders pending the determination of her appeal.

[3] The learned judge refused leave to appeal. On this being pointed out to counsel on behalf of Mrs Brady, Mr Neale, he contended that leave was not required as this case fell within the provisions of section 11(1)(f) of the Judicature (Appellate Jurisdiction) Act which exempted interlocutory grants or refusals of injunctions. It is noted, however, that rule 17.1 of the Civil Procedure Rules treats injunctions, preservation orders and freezing orders as distinct remedies. Since these remedies are all in the nature of restraint (a freezing order was previously known as a Mareva injunction, being derived from **Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva** [1980] 1 All ER 213, [1975] 2 Lloyd's Rep 509, CA), and in the absence of full arguments on the matter, it was decided to treat with the present application as if leave to appeal was not required. The court may, however, take a different view.

The evidence in brief

[4] In her affidavit supporting her application, Mrs Brady deposed that the couple had amassed several parcels of real estate and motor vehicles. Some of the real estate, she said, were acquired in their joint names while others were acquired in the names of either Mr Brady's name or her name. Some of the vehicles were likewise registered in either their names or in the name of a company, Brady and Sons Construction Company Limited ('the company').

[5] She contends that Mr Brady threatened more than once that she will never "see a dollar of his money". She says he has emptied the joint bank accounts they had and has sold one of the parcels of property. She has reason to believe, she says, that he has sold vehicles that belonged to the company, for which Mr Brady is the beneficial owner. Mr Brady has also excluded her from the company, having locked her out of the premises and removed her from the post of secretary of the company. In light of those actions, Mrs Brady contends, there is a real risk that Mr Brady will try to dispose of his

assets to frustrate any order granting her ownership of any of the assets that were acquired during the marriage.

[6] Mr Brady denies that he has embarked on any mission of dissipation, as alleged by Mrs Brady. He accepts that he has sold one parcel of real estate but that the transaction had commenced before the parties had separated. The sale, he said, was necessary to settle the company's debts. He admits that he has excluded her from the company, for which he is the sole shareholder and director, but justifies it by accusing her of several actions that are inimical to the company's interest.

Submissions

[7] Mr Neale, on behalf of Mrs Brady, submitted that although the standards for granting applications such as these are high, Mrs Brady's evidence about the risk of Mr Brady dissipating his assets satisfies those standards. He stressed that the threats of dissipation that Mr Brady is said to have issued, and the evidence that Mrs Brady has given about the disposal of assets, show that she has a good arguable appeal that the learned judge erred in refusing the injunction.

[8] Mr Neale argued that although the company is a separate legal entity, Mr Brady is its guiding mind since he is the sole shareholder and director.

[9] He argued that the learned judge, in refusing to grant the injunctions, conflated the tests for the issue of a freezing order with the test for a preservation order.

[10] Mr Brown submitted on behalf of Mr Brady that Mrs Brady does not have a good arguable appeal and that her challenge of the learned judge's decision has no real prospect of success. It is, he said, a challenge of the exercise of discretion by the learned judge. Learned counsel submitted that the learned judge made no error which would justify this court disturbing her decision. There is no risk, he said, of Mrs Brady being left destitute, as there is the matrimonial home and other properties, which are either in the joint names of the parties or in Mrs Brady's sole name.

[11] Learned counsel submitted that the company is a separate legal entity from Mr Brady and no order should be made which impinges on that entity.

Analysis

[12] There is no doubt that, in a proper case, a single judge of this court is empowered to grant the remedy that Mrs Brady seeks. F Williams JA, in **West Indies Petroleum Limited and others v Scanbox Limited and others** [2022] JMCA App 28 provided relevant guidance about the jurisdiction of a single judge and the consideration that a single judge must engage when considering applications for preservation orders. Also arising from that guidance is the principle that freezing orders are only granted in exceptional cases and when the applicant shows at least a “good arguable case” case. The requirements for a preservation order, the case guides, are less stringent but still stipulate that the applicant meets the requirements of necessity and proportionality (see paragraph [78] of the judgment).

[13] Each case is considered on its own merits.

[14] It is also beyond dispute that this court will not disturb the exercise of discretion by a judge at first instance if that judge has not been demonstrated to have been palpably wrong in that exercise (see **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[15] Although the learned judge’s reasons have not yet been provided in writing, she did give oral reasons to the parties at the time of handing down her decision. It appears that the learned judge referred to the standard that is required for issuing a freezing order and found that Mrs Brady had not satisfied that standard.

[16] As a prelude to what is to follow, it is important to note that this is not the hearing of the appeal. The court, in considering the appeal, will hear full arguments from counsel and have the benefit of the learned judge’s reasoning. At this stage, the issues concerning a preservation order are:

- a. whether the orders sought are necessary and proportionate in the circumstances; and
- b. whether Mrs Brady has at least a *prima facie* case.

There is no need to show evidence of the risk of dissipation of assets as in the case of a freezing injunction (see **Polly Peck v Nadir (no. 2)** [1992] 4 All ER 767 per Lord Donaldson MR).

[17] The issues regarding the freezing order are:

- a. whether Mrs Brady has a good arguable appeal;
- b. whether she has demonstrated that there is a real risk of dissipation;
- c. whether damages are an adequate remedy; and
- d. where the balance of convenience lies.

[18] In the absence of reasons from the learned judge, at this time, it is not plain that Mrs Brady has a good arguable appeal. The first point that needs to be made is that, at this stage, the learned judge's refusal to impose restrictions against the company cannot be impugned. The company is a separate legal entity and was not named as a party to the proceedings. Although Mr Brady is the sole director and shareholder, Mrs Brady has not shown that she has any entitlement to company property.

[19] The second observation that may be made is that the nature of the assets and how they are held militate against either a freezing order or a preservation order. The couple has assets in terms of real property which are in their joint names. The fact that the assets are mostly real property is important as this type of asset is not readily disposed of and the nature of the holding is important. Along those lines, it may be said that although there may be a dispute as to whether the premises in which Mrs Brady resides, is the matrimonial home, there is little likelihood that it can be sold while she occupies it.

[20] Mrs Brady also has property in her sole name, which was acquired during the marriage. These assets would be relevant in any consideration of the assets in the context of section 14 of the Property (Rights of Spouses) Act, which deals with the division of property owned by the parties. In the circumstances, it cannot be said that Mrs Brady could be left without a fair share of property acquired during the marriage. Accordingly, it cannot be said, at this stage, that the learned judge was patently wrong in refusing to grant the unusual orders that Mrs Brady sought.

[21] For those reasons it cannot be said that the orders sought in this application are either necessary or proportionate to the risk that Mr Brady could dissipate the assets and either avoid accounting for or concealing any proceeds of sale beyond the reach of the court.

[22] On the above reasoning, it is unnecessary to consider the remaining issues.

Orders

[23] The orders are, therefore, as follows:

1. The application for court orders, pending appeal, filed herein on 26 September 2022 is refused.
2. The orders made by Dunbar-Green JA on 11 October 2022 are hereby discharged.
3. Costs of the application to the respondent to be agreed or taxed.