[2021] JMCA App 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2021CV00024

APPLICATION NO COA2021APP00038

BETWEEN	**DWAYNE HOWELL**	**APPLICANT**
AND	**ATOYA NEWMAN**	**RESPONDENT**

Kevin Williams instructed by Grant, Stewart, Phillips & Co for the applicant

Ruel Woolcock instructed by Ruel Woolcock & Co. for the respondent

18 May and 1 June 2021

IN CHAMBERS

FRASER JA

Introduction

[1] This is an application for a stay of execution of the judgment of Barnaby J, the learned trial judge ('LTJ'), delivered on 5 February 2021, (neutral citation number [2021] JMSC Civ 15). The stay is sought pending the hearing and determination of the appeal or until further order of the court. The application also requested an order that costs of the application be costs in the appeal. At the time of delivery of her judgment Barnaby J had granted a stay of its execution for 42 days. On 6 April 2021, I granted an interim stay of execution of the judgment, until the *inter partes* hearing of the application on 18 May 2021.

[2] The details of the order appealed are:

> "1. The Claimant and Defendant are equally entitled to the legal and beneficial interest in 23 Moreton-Park Terrace in the Parish of Saint Andrew which is now registered at Volume 956 Folio 69 of the Register Book of Titles (the Property).
>
> 2. Within thirty (30) days from the date of this Order, the Property shall be valued by D.C. Tavares & Finson Realty Limited and the cost of the valuation report borne equally by the parties."

[3] The six grounds of appeal set out in the notice of appeal filed 4 March 2021 are as follows:

> (A) "The learned trial judge, having found that the marriage was one of short duration, failed to further find that it would be unjust and unreasonable in circumstances of the case before her to apply the equal share rule adumbrated in section 6 of the Property (Rights of Spouses) Act ('PROSA') in respect of the parties' respective share and interest in the property at 23 Moreton Park Terrace, Kingston 10.
>
> (B) The learned trial judge erred when she found that, notwithstanding the fact that the marriage was of short duration, the court could nonetheless look to evidence of the Claimant/Respondent's contribution to family life to reinforce the equal share rule, especially in circumstances where the Claimant/Respondent's case and the evidence before the court was that the Respondent made a direct and equal financial contribution to the property and not based on contribution to family life.
>
> (C) The learned judge erred as a matter of fact and law in her finding that the Respondent's contributions to family life were such that it could give her a greater share in the property above and beyond her direct financial contribution especially since there was little or no evidence before the court as to the Respondent's contribution to family life.

(D) The learned trial judge erred in her finding that the parties' common intention, so far as being able to be ascertained, was not that each party would be entitled to a share in the property in proportion to their direct financial contribution to its acquisition.

(E) The learned trial judge's finding that the Appellant's conduct contributed significantly to the early demise of the marriage so that there ought to be a finding that the equal share rule should apply is against the weight of the evidence and contrary to the law.

(F) The learned trial judge's findings of fact and/or law, especially as it related to the finding that the parties were equally entitled to the property, were against the weight of the evidence and/or not consistent with the law."

The relevant law

[4] Pursuant to rule 2.11(1)(b) of the Court of Appeal Rules, a single judge of the court has the power to grant a stay of execution. This was confirmed by Phillips JA in the case of **Joycelin Bailey v Durval Bailey** [2016] JMCA App 8 at paragraph [39].

[5] There is no dispute between the parties as to the principles applicable to the grant or refusal of a stay of execution. The decision whether or not to grant a stay is an exercise of discretion by the court, that will depend upon all the circumstances of the case (see **Hammond Suddard Solicitors v Agrichem Agricultural Holdings Ltd** [2001] EWCA Civ 1915). The first hurdle an applicant for a stay has to overcome is to establish that his appeal has a real prospect of success. If that is not the case, the court need go no further; the application should be refused (see **Beverley Levy v Ken Sales Limited and Marketing Limited** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 81/2005, Application No 146/2006, judgment delivered 22 February 2007 at page 8 and **Jamalco (Clarendon Alumina Works) v Lunnette Dennie** [2010] JMCA 25 at paragraph [45]).

[6] Provided that first hurdle is successfully negotiated, the court then has to conduct a balancing exercise to determine the order which best accords with the interests of justice (see McDonald-Bishop JA (Ag) (as she then was) in **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank of Jamaica Ltd) v YP Seaton & Others** [2015] JMCA App 18 at paragraph [80], quoting Morrison JA, (as he then was), in **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16 at paragraph [10], and **Hammond Suddard Solicitors v Agrichem Agricultural Holdings Ltd**).

[7] This balancing exercise is particularly critical where there is a risk of harm to one party or another, whichever order is made. In such circumstance, the balancing of alternatives by the court is aimed at deciding which of them is less likely to produce injustice (see Phillips JA in **Joycelin Bailey v Durval Bailey** at paragraph [40] quoting Phillips LJ in **Combi (Singapore Pte Ltd v Sriram and another** [1997] EWCA 2162).

[8] Though there is no dispute as to the principles that govern the exercise of the court's discretion to grant a stay, the parties disagree concerning whether the applicant has satisfied the conditions for the exercise of the court's discretion in his favour. He contends that he has, the respondent that he has not.

Does the appeal have a real prospect of success?

The main issue and relevant evidence

[9] The marriage between the parties having broken down, the respondent applied for a declaration under the Property (Rights of Spouses) Act ('PROSA') that she was entitled to a 50% share of property located at 23 Moreton-Park Terrace in the parish of Saint Andrew and registered at Volume 956 Folio 69 of the Register Book of Titles ('the property'). The applicant resisted the claim and sought a declaration that he was entitled to 85% and the respondent to a 15% share in the property.

[10] Having perused the documents filed in this application, and the judgment of Barnaby J, the main issue for the determination of the trial court was: whether the parties are entitled to an equal share in the property, or the "equal share rule" under section 6 of PROSA should be varied pursuant to section 7 of PROSA, because, in the circumstances of this case, it would be unreasonable or unjust for each party to be entitled to one-half share?

[11] The facts accepted by the LTJ were that the applicant was significantly older than the respondent when they met. They began a romantic relationship and, on the applicant's timeline, began cohabiting in 2012 at the applicant's home in Portmore. The applicant had a job and solely owned his house, while the respondent was a student pursuing Caribbean Examination Council certification.

[12] The applicant subsequently sold his house and they moved into rented property. They purchased the property, their family home, in December 2013. On the title for the property they are registered as tenants in common in equal shares. The LTJ noted that the respondent offered what she had to assist in the purchase of the home, her National Housing Trust benefit, and paid the mortgage for that benefit up to October 2018. On the applicant's part he applied the proceeds of the sale of his house in Portmore to the acquisition of their home, as well as a mortgage he obtained from National Commercial Bank. Approximately three and a half years after acquiring the property, the parties got married on 24 June 2017. The marriage was short. The LTJ found that the parties separated in early 2018. They had one minor child who, at the time the claim was filed in February 2018, was three years old.

[13] The LTJ outlined that the applicant's contention was that, pursuant to section 7 of PROSA, the equal share rule should be varied, as it would be unreasonable and unjust for the respondent to be awarded a 50% interest. The reasons advanced by the applicant for his contention were that the marriage was very short, the respondent had not given up her "life" or her future to take care of the household and children, and the applicant's direct financial input into the acquisition of the property, came from the sale

of his house in Portmore, which he had solely owned 10 years prior to meeting the respondent.

The LTJ's findings

[14] The LTJ found at paragraph [4] of her judgment that the respondent should succeed in her claim and obtain the declaration sought. The LTJ stated that the respondent was:

> "[E]qually entitled to the legal and beneficial interest in the Property which is the family home. Although the marriage between the parties was of short duration and the [respondent's] financial contribution to the acquisition of the Property was significantly less than the [applicant's], having regard to all the circumstances of the case, including the [applicant's] conduct in contributing to the breakdown of the marriage, it would not be unfair or unjust to apply the equal share rule to its division."

The submissions

Counsel for the applicant

[15] Counsel for the applicant submitted that the respondent's case was predicated on the basis that the property was the family home and hence fixed with a statutory trust entitling her to 50%. Further, that she had made an equal direct financial contribution to its acquisition. Counsel advanced that the respondent gave no evidence of a common intention for the parties to share equally in the benefit of the family home, while the applicant in his evidence expressly denied such an intention. Counsel also argued that the respondent never presented her case to the trial court on the basis that she should obtain an equal share on the basis that the conduct of the applicant was the cause of the breakdown of the marriage.

[16] Counsel assailed the finding of the LTJ that there was other evidence which contradicted the applicant's evidence refuting a common intention for the parties to share equally. Counsel complained that "the learned trial judge placed the entire burden of proof on the [applicant] and none on the [respondent], who was the Claimant in the

court below, to explain and justify what the parties' intention were". Counsel submitted that on those bases there was merit in ground D.

[17] Counsel also contended that it was never the case of the respondent that her contribution to the development of the family life of the parties was such that she should be entitled to an equal share of the property. Therefore, the LTJ's findings in that regard were not in accord with the evidence. Counsel also took issue with the LTJ's finding that it was the applicant's abuse that had led to the breakdown of the marriage and that it was a basis which could support the respondent being awarded an equal share in the property. This in a context where that was not a basis relied on by the respondent for the determination of her share and counsel argued that there was no decision or section of PROSA which supported that approach by the LTJ. On the basis of those submissions, counsel maintained that grounds B, C and E had real prospects of success.

[18] In relation to grounds A and F, counsel submitted that the LTJ's finding that it did not matter to the applicant that he contributed more to the acquisition of the property, was against the weight of the evidence. Counsel maintained that both his affidavit and *viva voce* evidence highlighted his more than 75% contribution and that he should be awarded the greater share. This in a context where the respondent admitted in cross-examination that her contribution was less than 25%.

[19] Counsel also advanced that the LTJ's finding that the interest which the parties intended to have in the property was accurately reflected on the certificate of title, in terms of both their legal and beneficial interests, inequality in financial contribution notwithstanding, was against the weight of the evidence. For this submission, counsel relied on his contention that the notes of evidence should show that the applicant made inquiries of a para-legal at the office of his attorneys-at-law when he saw that the initial documents did not reflect his position on ownership of the property. Counsel complained that "the learned trial judge never weighed on a balance of probabilities the evidence as a whole, deciding instead to place the entire burden of proof on the

Appellant, instead of finding that the Respondent (a) lead no case as to common intention and (b) provided no proof of common intention".

[20] Counsel argued that based on **Suzette Sam v Quentin Sam** [2018] JMCA Civ 15, in assessing a claim under PROSA, the intentions of the parties are relevant as a starting point. Counsel however contended that the effect of the authority cited is that, even if the parties' intention can be clearly discerned on the evidence, it must give way, where section 7 of PROSA has been engaged, as in this case, by the marriage being of short duration. In that context it was unreasonable and unjust for the respondent to be awarded a 50% share, when most of the direct financial contribution to the purchase of the property came from the sale of the applicant's house, which he owned a decade before meeting the respondent. Based on the foregoing, counsel submitted that the grounds A and F also have a real prospect of succeeding at the hearing of the appeal.

Counsel for the respondent

[21] Counsel for the respondent submitted that the applicant's appeal does not have a realistic prospect of success and, on that basis, the respondent should not be deprived of the judgment of the court below. Commencing his response in relation to ground B, counsel for the respondent indicated that the respondent's case has been misconstrued by the applicant. He submitted that, in the court below, there was no averment in the affidavit in support of the fixed date claim form that the claim for an equal share was based on equal financial contribution to the acquisition of the property. Counsel also argued that, pursuant to the reliance by the applicant on section 7 of PROSA, the respondent's contribution to family life was a live issue, which came out in evidence before the LTJ. Counsel argued that, while contribution to family life is a relevant consideration where section 7 is at play, it was not the case under PROSA, and not the respondent's position, that her claim for an equal division could stand on a footing, based on her contribution to family life.

[22] In respect of ground A (and it appears also ground C), counsel submitted that the LTJ found that the property was the family home, and therefore pursuant to section 6 of PROSA, each spouse was entitled to one-half share in the family home, where a husband and wife have separated and there is no reasonable likelihood of reconciliation. Counsel advanced that the applicant having made an application pursuant to section 7 of PROSA, to vary the equal share rule based on the short duration of the marriage, the LTJ correctly applied the law as prescribed by this court in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47.

[23] Counsel contended that **Carol Stewart v Lauriston Stewart** established that, while section 7 opens a gateway to consider whether the equal share rule should be varied, equality is the norm and a court considering whether the equality rule has been displaced "should not give greater weight to financial contribution to the marriage and property than to non-financial contribution". Counsel pointed out that there was cogent evidence of the respondent's non-financial contribution to the marriage through her contribution to family life, which the LTJ properly took into account at paragraphs [20] – [21] of her judgment. Counsel also relied on the case of **Donna Marie Graham v Hugh Anthony Graham** (unreported), Supreme Court, Jamaica, Claim No 2006HCV03158, judgment delivered 8 April 2008, which established that under section 7, the burden of proof to satisfy a judge that it was unreasonable or unjust to apply the 50:50 norm, was on the person who asserted that the norm should be varied. Counsel argued that the LTJ having considered evidence of the relevant financial and non-financial factors, was not satisfied that it would be unreasonable or unjust not to displace the equality norm.

[24] Responding to ground E, counsel submitted that conduct of a spouse is but one of the matters for consideration when a section 7 gateway is opened. He argued that the LTJ looked at conduct based on the ruling of Brooks JA, as he then was, in **Carol Stewart v Lauriston Stewart**. Further, that there was ample evidence of physical and verbal abuse of the respondent by the applicant. It was therefore, he contended,

incorrect to say that the finding that the conduct of the applicant contributed significantly to the early demise of the marriage, was against the weight of the evidence and contrary to law. He maintained that the conduct did not result in the applicant getting less than he should. It merely reinforced the 50/50 rule; the equality norm.

[25] In respect of ground D, counsel submitted that the respondent's case was not based in common intention. Counsel acknowledged that PROSA does not allow a spouse to base his/her claim on the common intention of the spouses regarding any property in dispute between them and the respondent did not advance such a case in the court below. Counsel however maintained that, in keeping with the guidance outlined in the cases of **Miller and another v Miller and another** [2017] UKPC 21 and **Suzette Sam v Quentin Sam**, the LTJ recognised, at paragraphs [24] – [26] of her judgment, that the parties' intention was a useful starting point in her deliberations.

[26] Based on the evidence, counsel submitted the LTJ was correct to have found that despite the applicant's denial that the actual common intention between the parties was to share the family home equally, other evidence belied that view. Counsel noted that, at paragraph [26] of her judgment, the LTJ considered that "other evidence" whereby the applicant knowing the property was to be registered in both their names as tenants in common in equal shares, "allowed the matter to proceed without objection on account of the paperwork said to be involved in having his intention reflected".

[27] Counsel concluded his submissions by indicating that ground F was in essence a summary of grounds A – D and to the extent that he submitted there was no merit in those grounds, by extension there was no prospect of success under this ground as well.

Analysis

[28] The marriage of the parties having broken down, the respondent applied under PROSA for a declaration of equal entitlement to a share in the family home. She relied

on section 6 of PROSA, which establishes a strong but rebuttable presumption that the family home is to be shared equally between the parties. The applicant invoked section 7 of PROSA on account of the short duration of the marriage, which is one of the factors that opens the door for the court to consider whether the equal share rule under section 6 should be varied. It was in that context that the LTJ in her judgment considered the legal effects of financial contribution, contribution to family life, the role of the common intention of the parties and the behaviour of the parties, in the determination of the share of the family home, which should be awarded to the parties.

[29] With the exception of the issue concerning the legal significance accorded by the LTJ to the abusive behaviour of the applicant, which she found proved, the recurring main or supplemental complaint in the grounds, concerns not so much the LTJ's outline of the law, but rather her application of the law to the evidence, such as there was.

[30] Against that background, without the notes of evidence being yet to hand, it is difficult to assess the viability of most of the grounds. It would therefore be unwise, if it is not necessary, to pronounce on their prospects of success in the absence of the evidence. As it turns out however, there is one ground, ground E, which raises a primarily legal point (even though there is admittedly some evidential dispute), that is thought to be somewhat novel or at least without firm and extensive precedent.

[31] Counsel for the applicant argued, concerning ground E, that the LTJ erred in determining that her finding that the applicant's abuse significantly contributed to the breakdown and short duration of the marriage, was a basis which could support the respondent being awarded an equal share in the property. He posited that neither PROSA nor any decided authority justified the approach taken by the LTJ. Counsel for the respondent, opposed that position, submitting that the case of **Carol Stewart v Lauriston Stewart**, relied on by the LTJ, supported the approach taken by her and that further there was ample evidence to substantiate the finding arrived at.

[32] Section 7 (1) of PROSA provides as follows:

> "7.—(1) Where in the circumstances of any particular case the Court is of opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant **including** the following—
>
> (a) that the family home was inherited by one spouse;
>
> (b) that the family home was already owned by one spouse at the time of the marriage or he beginning of cohabitation;
>
> (c) that the marriage is of short duration." (Emphasis supplied)

[33] Among the categories of persons defined as "interested party" in subsection (2) is a spouse.

[34] In listing three "gateway" factors, which allow the court to consider whether the equal share rule should be varied, the wording of section 7(1) makes it clear, these are not the only factors that the court may consider, as the sub-section uses the word "including". In **Carol Stewart v Lauriston Stewart**, Brooks JA observed at paragraph [32] that:

> "[T]here does not seem to be a common theme in those three factors by which it could be said that only factors along that theme may be considered."

However, having said that, later, in his conclusion at paragraph [76], Brooks JA did suggest a limiting of the nature of any additional factor by stating:

> "[In order to displace the statutory rule for equal interest in the family home, the court must be satisfied that a factor, as listed in section 7 of the Act or **a similar factor**, exists." (Emphasis supplied)

[35] Interestingly, at paragraph [34], Brooks JA had earlier indicated that,

> "What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the

> spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, **behaviour** and other property holdings become relevant for consideration." (Emphasis supplied).

[36] The inclusion of "behaviour" in the analysis could be viewed as supportive of the approach taken by the LTJ. It should however be noted that the matter of conduct did not receive substantial consideration in the **Carol Stewart v Lauriston Stewart** case. The main consideration was the question of the unequal contribution of the parties to the family home. The unique approach to be taken regarding the determination of entitlements to the family home and the factors that might influence that determination when the equal share rule is challenged, compared to the wider considerations that become applicable when entitlements to other property of spouses is in issue, was highlighted by Brooks JA at paragraph [35]. He said:

> "The proposition that matters such as contribution may only be considered if a section 7 gateway is opened may, perhaps, be an unconventional view. It is, however, based on a comparison of sections 7 and 14 of the Act. Whereas, by section 14, the legislature specifically allows the consideration of financial and other contributions in considering the allocation of interests in property, other than the matrimonial home, such a factor is conspicuously absent from section 7. Similarly, what may, inelegantly be called, a 'catch-all' clause, placed in section 14(2)(e), to allow consideration of 'other fact[s] and circumstance[s]', is also absent from section 7. From these absences it may fairly be said that the legislature did not intend for the consideration of the family home to become embroiled in squabbles over the issues of contribution and other general 'facts and circumstances', which would be relevant in considering 'other property'."

[37] Section 14(2)(e) referred to in the preceding quote, actually reads in full as follows:

> "(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account."

[38] It seems clear, therefore, that the range of factors which may be considered as relevant to the determination of spousal interests in the family home do not appear to be as open and diverse in section 7, even though section 7(1) uses inclusive rather than exclusive language, as they are in section 14 when the division of "other property" is being contemplated. It remains to be explored the effect the conduct of the parties may have, if any, on their respective entitlements on a division of their interests in the family home. Even if in **Carol Stewart v Lauriston Stewart** Brooks JA was correct in his indication that "behaviour" or conduct of the parties would be relevant to the determination of a section 7 application, that would not be the end of the matter. It will still be left to be determined whether the LTJ was palpably wrong in the effect she found the behaviour of the applicant, which she accepted as proved, had on the outcome of the claim, in the context of all the relevant considerations. Accordingly, I find that, at least on ground E, the applicant's appeal has a real prospect of success.

The balancing exercise: which order best accords with the interests of justice?

[39] Having concluded that the applicant's appeal has a real prospect of success, the court must now turn to the determination of whether, as a matter of discretion, the stay sought should be granted. To arrive at that decision, the court must determine which order best accords with the interests of justice (see **Sagicor Bank Jamaica Limited (formerly known as RBTT Bank of Jamaica Ltd) v YP Seaton & Others** at paragraph [80], referencing **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** at paragraph [10]). In the circumstances on this case, where it is contended that harm will be occasioned to one or other of the parties whichever order is made, the consideration of which order best accords with the interests of justice,

must be resolved by ascertaining which alternative is less likely to produce injustice (see **Joycelin Bailey v Durval Bailey** at paragraph [40] referencing **Combi (Singapore Pte Ltd v Sriram and another**). That determination is a question of fact. The respective affidavit averments of the parties therefore have to be examined.

Analysis

[40] In his affidavit sworn the 3rd and filed 4 March 2021, the applicant stated that he would suffer irreparable harm if the judgment was not stayed and he was ultimately successful in the appeal, for the following reasons:

a. He would suffer financial ruin. He has been paying both the NHT and NCB mortgages and maintaining the property;
b. There is not much equity in the property. Both mortgages are for a duration of 25 years and only approximately seven years has elapsed on them. More is owed on the mortgages than the property is currently valued at. Considering the current value of properties in the area he would not be able to afford to purchase another property; and
c. Considering the position of the respondent, she had not lived at the property since 2018 and was not in a destitute position. He however further expressed a concern that the respondent would not be in a position to return to him, any portion of the net proceeds of sale paid to her, if the property was sold in advance of the appeal.

[41] The respondent, on the other hand, concerning the negative effect the stay would have on her relative to the applicant, by affidavit sworn and filed 21 April 2021, stated that:

a. The applicant was given the first option to purchase her interest in the property. If he exercised that option, he would not have to purchase another house;

b. There is agreement by the applicant that she is entitled to at least a 15% interest in the property. Only the applicant lives in the family home since she departed in February 2018 and he has solely benefitted from all rental income derived therefrom;
c. If the applicant were to exercise his option to purchase her share and then was successful on appeal, she would return any excess amount paid to her for her interest in the property, as she is not financially destitute and is more than capable of refunding the applicant; and
d. Though she could not get another benefit from NHT at this time, if she were able to liquidate her interest in the property, she could use a portion of the proceeds to make up a deposit on a new home. Whereas if the stay was granted to the applicant she would be deprived of that desire until the final determination of the appeal.

[42] Neither party provided any documentation to support his/her financial position. Concerning the claim that there was not much if any equity in the property at this point in its mortgage history, counsel for the respondent invited the court to bear in mind the endorsements on the registered title for the Property. Those disclose that in December 2013 the consideration paid for the property was $12,500,000.00, with the mortgage from NHT being in the sum of $3,070,444.52 with interest and from NCB being in the sum of $4,686,255.00 with interest. Counsel maintained that based on those endorsements there would be equity in the property. Further, he maintained that, even if there was no such equity, that would favour the applicant if he sought to acquire the respondent's interest.

[43] Counsel for the applicant countered those arguments by submitting that, as counsel for the respondent well knows, the amount owing on the mortgages would be a function of the sums borrowed, times the duration of the loans and the interest rates.

[44] Given the paucity of supporting evidence for the respective positions of the parties, the court has to consider the fact that, if the stay is granted the respondent will be delayed in obtaining the fruit of her judgment, in a context where it is agreed that she has some interest in the property. As she has stated, her inability to realise her interest in the property will prevent her from raising the deposit to acquire some other property, now that she has moved out of the property since 2018. The fact that the applicant is at present the sole beneficiary of the rental income may well have to be set off against the fact that he is now solely responsible for the payment of both mortgages; a fact which has not been denied by the respondent. Those factors are therefore neutral in the equation of consideration.

[45] If the stay is not granted, it is not clear that the applicant would be able, on his own, to muster the funds to purchase the respondent's interest. If not, the property will have to be sold. While the respondent has relocated since February 2018, this is where the applicant still lives. He has stated that if the property is sold, he would not be able to acquire another in the area given current property values. Assuming the property is being properly maintained, and it would be in the applicant's interests so to do, its value should appreciate. That will go some way to minimise the prejudice that may be occasioned to the respondent by a delay in the realisation of the parties' separate interests.

[46] The court also has to consider that on the one hand, the applicant says that the respondent is not financially destitute and hence the inference is she can afford to await the final outcome of the appeal to realise her interest; while on the other hand, he expresses a fear that, if her interest is realised and he is successful on appeal, she will be unable to repay him. The respondent has said that were she to realise her interest now, she would seek to utilise a part of the proceeds to make up a deposit to acquire another property. No basis has been shown to indicate that the respondent would not manage her resources in such a manner that would permit her to satisfy any obligations that might be imposed on her based on the outcome of the appeal.

[47] On balance I find the decision to maintain the *status quo* is the order that best accords with the interests of justice. As it stands the applicant is managing the property and the attendant financial benefits and costs that come with it. The respondent is living elsewhere, and has been since February 2018, neither contributing to, nor taking anything away from the property. In these circumstances, the maintenance of the *status quo* is the alternative less likely to produce injustice, pending the final determination by this court of the respective interests of the parties in the property.

Order

[48] In light of the foregoing the court makes the following order:

1. The judgment of Barnaby J issued on 5 February 2021, neutral citation number [2021] JMSC Civ 15, is stayed pending the hearing and determination of the appeal herein or until further order of the court.
2. Costs of the application to be costs in the appeal.