REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

PORT OF SPAIN

CV: 2009-04381

Between

DAVID DESLAURIERS

LEANORA DESLAURIERS

Applicants

V

GUARDIAN ASSETS MANAGEMENT LIMITED

Respondent

Before the Honourable MR. Justice R. Rahim

Appearances

Mr. I. Benjamin for the applicants

Mr. C. Seuchand instructed by Ms. S. Indarsingh for the respondent.

Reasons for decision on application of the 1st February 2018

1. By application filed on the 1st of February 2018, the applicant applies for an extension of time to comply with the order of this court made on 27 October 2014. That order was an order of enforcement and was made in relation to the sale of property belonging to the applicant and commonly referred to as the Victoria property.

2. The applicant seeks alternatively an order staying the said order or a variation thereof. In the essence the applicant is asking that the respondent not be permitted to enforce the said order until the 31st first of March 2018. In his oral submissions, Mr. Benjamin for the applicant has stated clearly that his application is a fresh application for a stay. He has therefore, it appears abandoned his application for a variation of the order or for the extension of time within which to comply and with good reason having regard to the fact that the order has been perfected, there is no time set out in the order within which there is to be compliance and the order has been affirmed by Their Lordships of the Privy Council. The application therefore falls to be considered squarely within **Part 26.1 (1)(f)** CPR.

3. The history of these proceedings is well known and is a matter of public record so that the court does not intend to revisit same. Suffice it to say that there is another property that features in this application namely that commonly known as the Hevron Heights property. Possession of Hevron Heights has already been delivered to the respondent pursuant to another order of this court however the property has not yet been sold. The original claim was made in respect of monies outstanding in relation to the construction of the Hevron Heights property. Possession of the Victoria property has however not yet been delivered to the respondent for the purpose of sale in compliance with the order made on the 27 October 2014. The intervening events which would have caused the delay in compliance were that several appeals in relation to both liability and enforcement were filed. All appeals have since been finally determined by their Lordships of the Privy Council. The end result is that the court's order of 27 October 2014 stands and there is yet to be compliance with same.

4. The respondent objects to the application on two grounds. Firstly, it submits that this court has no jurisdiction to treat with the issue of the stay. Secondly it says that there is no merit in the application and asks the court to dismiss the application should it find that it has jurisdiction. The applicant argues that the submissions of the respondent are misconceived in that its application is in no way tied to the previous appellate proceedings and it is in fact a fresh application based on new circumstances. The applicant also submits that based on the facts put before this court in support of the application in respect of which there has been no affidavit in opposition, its application is meritorious. I shall deal with the two broad arguments separately.

JURISDICTION

5. The court is of the view that the argument of the respondent on this issue is of no merit. The respondent argues that when it comes to a stay of the proceedings, the court vested with jurisdiction is in fact the Court of Appeal. Attorney-at-law argues that the Court of Appeal having stayed the enforcement order pending the determination of the enforcement appeal and thereafter having stayed its order pending the outcome of the Privy Council appeal, the proper forum for another stay would be that of the Court of Appeal. The respondent relied on the first instance authority of my sister Donaldson-Honeywell J in ***Lutchman Lochan and another v Jaqpersad and another*** CV2009-02354. In that case the learned judge in August 2015, refused to extend a stay of execution granted in respect of an injunction made on the 15th July 2010 restraining the respondent from entering upon the applicant's property. The basis of the refusal was the fact that the latest decision in the case was made by the court of appeal in February of 2014 so that in the court's view, the application to extend the stay ought to have been made before the Court of Appeal. At the time of reliance on this authority by the respondent before this court, attorney was unaware that the refusal was itself the subject of a procedural appeal and that same had been compromised between the parties by an agreement for an extension of time. See **Civ App S243 of 2015** and the order of the 16th November 2015. Several other extensions were granted in that matter by the court of appeal either by way of consent or otherwise. Suffice it to say that the reasoning of Donaldson-Honeywell J for dismissal of the application for

the stay appeared to have never been dealt with on its merits having regard to the compromise arrived at by the parties. This court however respectfully disagrees with the general proposition set out in that case in so far as one is in fact set out. The reasoning of this court is set out below.

6. Further, it is to be noted that the application before the court is no longer one to vary the enforcement order but it is one for a stay simpliciter. In that regard the court accepts that the learning set out in the authorities of ***Bibby and Another v Partap and others*** and ***Preston Banking Co v Willaim Allsup & Sons*** represents good law. However, in the context of the application before this court those cases are in the court's view not relevant.

7. The previous stays granted in this case have all been stays conditioned on the occurrence of particular events, namely, the disposition of the respective appeals. The relevant appeals have all been determined and the operation of enforcement of the order for sale reverts to the terms of the order made by this court on the 27th October 2014, which order has been affirmed by Their Lordships of the Privy Council. To find that the jurisdiction of this court to stay the whole or part of its enforcement order to a certain date, based on new facts, has been ousted because of stays granted subject to appeals which themselves have been determined would in the court's view, be wholly inconsistent with the powers given to the court by **Part 26.1 (1)(f)** CPR in given circumstances.

8. The general common law principle is that a court has the jurisdiction to vary the terms of its order to scour the terms of the order. In other words, by way of example, despite the fact that an order may have already been perfected, particularly in relation to enforcement orders, it may become necessary for a court to extend the time for a sale (whether one is set out in the order or not), or adjust the reserve price of property because of a change in property values which may have occurred between the date of the making of the order and the sale of the property. Surely, in those circumstances it could not be reasonably argued that the court has no jurisdiction to vary the order to treat with the change of circumstances so long as the court does not change the substance of its order. This is the effect of the liberty to apply provision which is implied in orders.

9. See the learning on the liberty to apply provision as set out ***in Halsbury's 4th Edition, Volume 26, paragraph 554, page 278*** as follows; *"The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a respondent as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of an applicant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur."* See ***Fritz v Hobson*** (1880) 14 ChD 542 (following *Viney v Chaplin* (1858) 3 De G & J 282); ***Chandless-Chandless v Nicho*** [1942] 2 All ER 315, CA, ***Kevan v Crawford*** (1877) 6 ChD 29, CA; ***Pawley v Pawley*** [1905] 1 ChD 593, ***Bund v Green*** [1875] WN 213, ***Poisson and Woods v Robertson and Turvey*** (1902) 50 WR 260, CA. and the classic authority of ***Cristel v Cristel*** [1951] 2 All ER 574, CA.

10. In the court's view, the circumstances here are no different and cannot be distinguished. The order of October 2014 has been subject to several challenges which no doubt have resulted in a delay in compliance with the terms of the order. The applicant has not sought to have the material provisions of that order varied in any way whether in substance or in form. What she seeks is a reprieve from compliance until the 31st March 2018 by way of a stay of the order. Whether or not same should be granted is dependent of course on different considerations which shall be discussed later on in these reasons but the court finds that it

does in fact have the jurisdiction under the common law to make such an order and that the general powers of management set out at **Part 26.1 (1)(f)** (which deals not only with case management prior to trial but also extends to enforcement proceedings) recognizes the jurisdiction.

11. By way of example, the said order sets a reserve price of Sixteen Million Dollars. It is an unreasonable argument to suggest that the parties could not approach the court to have the reserve price adjusted whether by consent or otherwise. The fact that a variation is being made by consent does not determine and cannot be determinative of whether the court is vested with jurisdiction. The same principle must equally apply to an application for a stay based on new circumstances.

12. Another example is to be found in the event of a sale of the Hevron Heights property prior to a sale of the Victoria property. Should such an event occur and the proceeds of sale of the Hevron Heights property be sufficient to liquidate the judgment debt in full inclusive of interest and expenses, it may be the case that the applicant may then approach this court for an order at the least staying the sale of the Victoria property. To suggest that in such an event, the proper course would be to revert to the Court of Appeal for such an order in the circumstance where there are no proceedings pending before first approaching the court in which the original order was made and in respect of which all appeals have been exhausted would be to put the cart before the horse. It may well be that the Court of Appeal does in fact have the jurisdiction to treat with such an application but that does not mean to say that this court does not at this stage.

13. In that regard it is to be noted in passing that when asked by this court, attorney at law for the Respondent indicated, upon having received instructions from his client in court, that the Hevron Heights property will only be put up for auction at the same time as the Victoria property. The judgment debt inclusive of interest and costs, now stands in excess of forty million dollars ($40,000,000.00) so that it appears that the respondent intends to proceed with the recovery effort in relation to both properties having regard to the quantum of the debt as it now stands. *See paragraph 2 of letter of instructing attorney for the respondent*

*dated the 1st December 2017, annexed as exhibit **L.D.3** (third document therein) to the affidavit of the applicant of the 9th January 2018.*

14. The recent history of this claim also serves to illustrate the point. Prior to the present application, by way of earlier application of the 9th January 2018, the applicant also applied for a stay until the 2nd February 2018. During the hearing of the application of the present application, attorney for the applicant informed the court that the application of the 9th January had not been treated with. Quite an odd assertion having regard to the fact that this court treats with its applications with due dispatch. No response was made by attorney at law for the respondent to the assertion. However, the record shows that this was not the true state of affairs. Upon the instructions of this court, the office of attorney at law for the respondent was contacted in relation to the application of the 9th January 2018 and on the 11th January 2018, Instructing Attorney at law for the respondent informed the court office that there was no objection to an extension of time to the 1st February 2018. It must therefore mean that attorney at law for the defendant and by extension the defendant, would have at that time accepted that the court was vested with the relevant jurisdiction to either stay or extend the time for compliance with the order. As a consequence of the non-objection this court made such an order on the 11th January 2018 staying the order until the 2nd February 2018 and the office of Instructing attorney for the respondent was so informed on the said date.

15. When placed in context therefore the application before this court is essentially one to extend the stay previously granted. The court therefore finds that it is vested with the jurisdiction to extend the stay.

MERITS OF THE APPLICATION

16. A judgment creditor is entitled to the fruits of his judgment immediately. To successfully deprive him of such fruits would require a demonstration of such a change of circumstances that it would make it manifestly unfair to permit him to recover the fruits of his judgment immediately. It therefore lies with the applicant to demonstrate good grounds for the grant

of a stay. In assessing the merits, the court should also consider, the issue of prejudice to either party and the overriding objective of the CPR.

17. In support of her application the claimant relies on her affidavit filed on the 9th January 2018 (original affidavit), further affidavit filed on the 1st February 2018 and supplemental affidavit filed on the 15th February 2018. The applicant's first affidavit of the 9th January, gives the reason for seeking the stay or as it was then put, the short extension of time to comply with the original order as that being the dismissal of both appeals and the lifting of the 2016 stay by the Privy Council on the 9th November 2017. The applicant deposed that she and her attorneys were expecting a decision in January 2018 and that the early decision took her by complete surprise. In those circumstances, having made arrangements for she and her family to stay at the Victoria property for a few months, a short extension of time within which to vacate the premises were required. The applicant also deposed that one of her grandchildren was taken to hospital the very week of the application. The parties subsequently exchanged correspondence and the applicant them made the application of the 9th January 2018 which was dealt with in manner appearing above. Thus the short stay was granted and the application brought to an end.

18. By her further affidavit, the applicant deposed that she surrendered the keys to the Hevron Heights property to the respondent on the 19th January 2018. This was done under cover of letter of the 12th January 2018. By the third paragraph of that letter, attorney for the applicant informed attorney for the respondent that persons who had "purchased" units (the inference being unnamed persons who had agreed to purchase the uncompleted units) were interested in taking over the site and completing the development. According to the letter, those persons, referred to in the letter as investors would seek a meeting with the respondent for that purpose.

19. By paragraph 5 of the further affidavit, the applicant deposed that the investors met with two persons from the respondent and expressed their interest subject of course to agreement. There was however no agreement made as according to the applicant at paragraph 6 of the further affidavit, the respondent turned them down.

20. Additionally, the applicant deposed that under letterhead of RLM & Co, the Chambers of Learned Senior Counsel Mr. Ramesh Lawrence Maharaj dated the 31st January 2018 attorney at law Nyala Badal wrote to her attorney at law (annexed to the supplemental affidavit as **L.D.5A**), indicating therein that his two clients are interested in funding the completion of the Hevron Heights property and paying off the judgment debt. The inference to be drawn is of course, should that occur, the respondent will have no need to sell the Victoria property in satisfaction of part of the judgment debt. It is in those circumstances, that the applicant seeks the order extending the stay until the 31st March 2018, in order to, according to her further affidavit, "bring these arrangements closer to fruition". This then is the reason sought for the extension of the stay.

21. Although there has been no affidavit filed in opposition, the respondent has made it clear in court that it has received no proposal from Mr. Maharaj SC or his clients but has received the letter by Mr. Maharaj to attorney for the applicant. It has also stated quite emphatically that both properties are to be put up for sale.

22. So that when the chaff is dusted off, what remains as the reason for the extension of the stay is that of an offer that is yet to be made for the purchase of the Hevron Heights property by unnamed persons. Whether the offer is a genuine one or not, is not a matter for this court to pronounce upon, neither is it a matter in respect of which this court ought to speculate. This court has no reason to doubt the contents of the letter of the 31st January 2018 under the letterhead of Learned Senior Counsel, the source being that of eminently credible learned senior counsel. In that regard the court does not accept the submission of the respondent that this court should find that the alleged interest in the purchase by two persons is not genuine on the basis that the applicant has used such reasons before over the years, but no sale was ever forthcoming. Firstly, the court is of the view that it appears that the applicant has made earnest attempts to have the property sold over the years but has been unsuccessful. This court has had conduct and management of this claim since the year 2011 and is uniquely positioned to make such an assessment.

23. Secondly, the issue is not one of whether the present assertion that there are two potential purchasers is a genuine one, but the issue is whether, on the assumption that it is genuine,

the said reason amounts to a good reason in law (having regard to all of the circumstances and other considerations), upon which the court should exercise its discretion to delay the respondent's entitlement to possession of the property.

24. The court therefore has considered the following;

a. No discernable or tangible preliminary offer has been made to the respondent to date, some two weeks after the letter of the 31st January;
b. The respondent has indicated in no unsure terms that it is not interested in an offer and shall put both properties up for sale by way of public auction at the same time.
c. Substantial interest has accrued on the original debt since the date of judgment some seven years ago and continues to accrue on a daily basis.
d. That the respondent has been deprived of the use of its funds since the applicant defaulted in payment of the loan, having regard to the nature of the business of the respondent with which this court is familiar having conducted the trial and determined many applications in the claim.
e. That the continued accrual of interest is more prejudicial to the financial interest of the applicant than it is to the respondent in that the amount outstanding and owing by the applicant continues to rise thereby diminishing any sum payable to her after sale of Victoria and reconciliation of the outstanding balance, interest and costs.
f. That there ought to be finality to litigation.
g. That one extension has already been granted to the applicant for a wholly unrelated purpose.
h. That while the court presumes that the representation of the applicant that there are two persons or entities willing to purchase is genuine, the history of this claim demonstrates that over the years several representations of like kind have all borne no fruit despite the efforts of the applicant and it may therefore be unfair to the respondent to grant an extension of the stay based on similar types of expressed interest in purchasing having regard to the paucity of information available on the expressions of interest at the least.

25. When considered in the round therefore, the court finds that the grounds for the extension of the stay set out in the applications do not amount to good or sufficient reason to deprive the respondent of its entitlement to enforce the order even for a limited period. To so extend the time would in the court's view not be reasonable in all of the circumstances. Nothing stands in the way of an offer being made by the unknown persons even though the process of sale is put in train. Further, a court ought not to simply adopt the approach that the time being sought is only one month therefore it ought to be granted. The stay should only be granted so long as there is a legal basis for so doing and it is the finding of the court that there is none in this case. It means therefore that the grant of the order would not be just in all of the circumstances and the court so finds.

26. The application is therefore dismissed and the parties shall be heard on the issue of costs.

Dated the 19th February 2018

Ricky Rahim
Judge