[2016]JMSC Civ 181

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008M02627

BETWEEN	**GIFTON GEORGE GRIFFITHS**	**PETITIONER**
AND	**PAULINE AMYLIN GRAHAM GRIFFITHS**	**RESPONDENT/ APPLICANT**

IN OPEN COURT

Ms. Annishka Biggs instructed by Raphael Codlin & Co. for the Applicant/Respondent

Mrs. Verleta V. Green for the Petitioner

Heard: October 13 and 26, 2016

Dissolution of Marriage – Division of Property – Maintenance – Contempt Proceedings – Interpretation of Court Orders

McDONALD J.

[1] The Further Amended Notice of Application for Court Orders filed on the 27th of May 2016 seeks several orders, but the Attorneys-at-Law for the parties requested the Court, at the hearing, to determine only the order being sought in paragraph 3 and for the orders being sought in relation to committal proceedings for failure to pay maintenance at paragraphs 1 and 2 to be adjourned to an early date.

[2] The order being sought at paragraph 3 reads:-

> *That sums being held in joint account in the name of Verleta Green and Raphael Codlin & Co. be released in full to the firm of Raphael Codlin & Co.*

Background

[3] A Petition for Dissolution of Marriage was filed by the Petitioner on the 23rd of October 2008. On the 13th of June 2011 Brooks J (as he then was) ordered, *inter alia*, that the Petitioner pay the Respondent $20,000.00 per month for maintenance until the resolution of the claim or earlier order if the Court.

[4] At paragraph 6, it was declared by consent that the Petitioner and Respondent are each entitled to a 50% beneficial interest in Lot 38 Straun Castle, Manchester registered at Volume 1303 Folio 244 of the Register Book of Titles.

[5] Paragraphs 7 and 8 of Brooks J's order read as follows:-

> *7. It is ordered that the property shall be sold and the net proceeds of sale paid into an interest bearing account in the names of Verlita [sic] Green and Raphael Codlin & Co. pending the outcome of the hearing.*
>
> *8. The Petitioner shall have the first option to purchase the interest of the Respondent.*

[6] Pursuant to paragraph 8 of the order of Brooks J (as he then was), on the 13th of June 2011 the Petitioner exercised his option to purchase the Respondent's half (½) share in the property. However he was unable to obtain the funds to complete the purchase within the stipulated time and on the 3rd of December 2013, the Court granted him an extension of time for payment of the balance of the purchase price to the 27th of June 2014.

[7] On the 23rd of June 2014, he paid his Attorney, Mrs. Green, Three Million Dollars ($3M) being the balance of the purchase price. On the 26th of June 2014, he paid over a further $452,030.00 to Mrs. Green to complete the purchase price and costs. The Attorneys in the matter met on the 2nd of July 2014 and had discussions and subsequently One Million Dollars ($1M) was handed over by Mrs. Green to Mr. Codlin and she deposited the net proceeds of sale in her client account in an interest bearing deposit account with the Bank of Nova Scotia,

Oxford Road. Further, an order was made by Straw J on the 24th of September 2014 for the sum of One Million Dollars ($1M) which is part proceeds of the purchase price of Lot 38 Straun Castle is to be paid over to the Respondent's Attorneys on or before the 25th of September 2014 and for the remaining balance to be placed into a joint account.

[8] Since the commencement of these proceedings the Petitioner claims that he has paid off the balances outstanding on the mortgage on the said property. While the parties have agreed that they are entitled to equal shares in relation to the business (Manchester Real Foods Ltd.), no audited accounts have been produced as ordered by the Court. This is said to be due to the parties' financial constraints to hire the Auditor, Mr. Townsend.

[9] Counsel for the Respondent/Applicant, Ms. Biggs informed the Court that both parties have agreed to meet outside of this forum to settle the issues in relation to the business assets.

[10] On the 24th of September 2014, Straw J made court orders, as follows:-

> *By consent:*
>
> 1. *Both parties are entitled to equal share of the business Manchester Real Foods Ltd.*
>
> 2. *Both parties agree to appoint Mr. Peter Townsend to do audited accounts of the said Manchester Real Food Ltd. (Both Attorneys to draft letter as to terms of engagement as to Mr. Townsend).*
>
> 3. *Both parties to bear the costs of Mr. Townsend's professional services.*
>
> 4. *Mr. Townsend to attend the adjourned hearing on the 8th of December 2014 at 10:00 am to report on the financial assessment of the business Manchester Real Foods Limited.*
>
> *It is ordered that:*
>
> 5. *The sum of One Million Dollars which is part proceeds of the purchase price of Lot 38 Straun Castle is to be paid over to Raphael Codlin and Co. on or before September 25, 2014.*
>
> 6. *The remaining balance of $1,052,027.50 is to be deposited in an interest bearing account in the joint names of both Attorneys*

> *Raphael Codlin and Verleta Green on or before the 3rd of October 2014.*
>
> *7. Any interest earned on the money deposited in any interest bearing account whether jointly or otherwise is for the benefit of Mrs. Griffiths.*
>
> *8. …*
>
> *9. …*
>
> *10. …*
>
> *11. …*

[11] Pursuant to paragraph 6 of the order of Straw J made on the 24th of September 2014, the sum of $1,052,027.50 was deposited into an interest bearing account in the joint names of the parties' Attorney-at-Law.

Respondent's/Applicant's Case

[12] With regards to the instant Application, the grounds on which the Respondent is seeking the order contained in paragraph 3 (as set out above) were set out as follows:

> *5. The said order made on the 24th of September 2014, included inter alia that the sum of $1,052,027.50 was to be deposited in an interest bearing account in the joint names of the parties Attorneys-at-Law…*
>
> *6. The said sum of $1,052,027.50 represents the sums being part proceeds of my [sic] half of the matrimonial home that Mr. Griffiths purchased from Mrs. Griffiths.*
>
> *7. That said sums were ordered to be placed in a joint account because Attorney-at-Law Ms. Verleta Green expressed apprehension about handing over all the purchase money to the Applicant's Attorneys in the event that any money was to be recovered from the Applicant for her client.*

[13] Ms. Biggs submitted that in respect of paragraph 7 of the order of Brooks J, made on the 13th of June 2011, there was no intention for the sums from the sale to be put up pending the outcome of the other matters. If it was so intended, then it could not be that only one party would be required to put up a sum as security for any outcome that might result from the proceedings. She emphasized that the issues of maintenance, the property and the business were all separate. She

asked the Court to release all the funds because it is the Respondent's money pursuant to the proceeds of sale of the property and especially because the Petitioner has failed to pay twenty-five (25) months maintenance and there is no indication of when he will be able to pay that amount. She noted that the order of Straw J did not say pending the outcome of the matter; it merely ordered that the sums be placed into a joint account.

Petitioner's Response

[14] Counsel for the Petitioner, Mrs. Green submitted that paragraph 7 of Brook J's order speaks for itself i.e. the property shall be sold and the net proceeds of sale paid into an interest bearing account – in the names of Verleta Green and Raphael Codlin & Co. pending the outcome of the hearing. She said that the hearing was as to the parties' interest in the property viz. the business and the matrimonial home. She submitted that at the hearing before Brooks J, the issue of Manchester Real Foods Ltd's financial status and its financial obligations were before the Court. She made reference to the Certificate of Title showing five (5) mortgages; and letter dated the 15th of May 2009 to the business from the Bank of Nova Scotia. Reference was also made to letter addressed to Mr. and Mrs. Griffiths dated the 11th of January 2010 listing the liabilities of the business and the balance due as of the 11th of January 2010.

[15] Mrs. Green submitted that the business was indebted and that is the reason why the funds from the sale of the property, whether it was Mr. Griffiths purchasing Mrs. Griffiths' half share or the whole property being placed on the open market, were to await the hearing and determination of the issues between the parties.

[16] She further stated that the Petitioner admits owing money for maintenance and has not deliberately refrained from paying but no longer has the resources to pay. He has paid off the mortgages on the property and there are still some liabilities including statutory obligations outstanding.

[17] Further, at paragraph 8 of the Petitioner's Affidavit (filed on the 10th of October 2016) the following was stated:

> *8. The reason for the balance purchase price being held in escrow is that in the event that it is found at the hearing that there are liabilities of the business for which both the Respondent and I are liable then the funds will be available to assist in clearing the liabilities.*

[18] The Petitioner asks the Court not to release all the money in the account but to give the Respondent/Applicant a portion and leave some to offset her liabilities should it be found that she also has a responsibility and is liable to pay off some of the debts of the business. Mrs. Green proposed that the sum of Four Hundred Thousand ($400,000.00) could be released to the Respondent.

Analysis

[19] The primary issue for this Court to resolve is whether paragraph 6 of the order of Straw J (made on the 24th of September 2014) varied the paragraph 7 of the order of Brooks J (made on the 13th of June 2011); in particular whether the net proceeds of sale (which now stands at $1,052,027.50) should remain in the joint account pending the outcome of the hearing or whether they can be released to the Respondent in full, at this time.

[20] The parties are for the most part ad idem with regards the reason that the said sum was placed in the joint account, i.e. to provide security in the event that the Respondent is determined to be liable either to the Petitioner or to satisfy business debts.

[21] Having ordered the matrimonial home to be sold, it is to be noted that order of Brooks J necessarily provided for two (2) potential outcomes namely, (1) what would obtain if the property was sold to a third party or (2) if the Petitioner exercised his option to purchase. Since the latter obtained, it is useful to consider paragraph 11 of the order of Brooks J which states:

> *11. If the Petitioner chooses to exercise the said option he shall sign the sale agreement and pay the usual deposit to the Respondent's attorneys at law within ten days of the agreement for sale being delivered to him for signing.*

While there is no express mention of what should be done with the proceeds of the sale after the deposit is paid to the Respondent's Attorney, it is reasonable to conclude that it would have been unnecessary to include same in the order, particularly as this typically provided for in the Agreement for Sale, which the Petitioner would be required to sign and thereafter abide by the agreed terms.

[22] It is curious that in their oral submissions neither Ms. Biggs nor Mrs. Green made mention to the Agreement for Sale which was exhibited as "PGG-2" to the Affidavit of the Respondent in Support of Notice of Application for Court Orders filed on the 11th of September 2014. Particularly since under the heading "How Payable" it was agreed as follows:

> 1. *A deposit of $337,500.00 is payable by the purchaser on the signing hereof*
>
> 2. ***The balance of $3,037,500.00*** *and proportion of stamp duty* ***payable by the purchaser shall be paid to Raphael Codlin & Co.*** *at 64 Duke Street, Kingston, Attorneys-at-Law for the vendor.* (emphasis added)

[23] It is noted that at least two (2) Notices of Application for Court Orders came before Straw J on the 24th of September 2014, this included the aforementioned one filed on the 11th of September 2014 and an earlier one filed on the 7th of September 2009.

[24] As previously mentioned Straw J made several orders on this occasion. These are set out in paragraph [11] herein. An adjourned hearing was set for the 8th of December 2014 for the determination of some of the orders sought in both Applications; and consent orders were made in relation to the business. This Court is primarily concerned with the orders granted at paragraphs 5-7:

> 5. *The sum of One Million Dollars which is part proceeds of the purchase price of Lot 38 Straun Castle is to be paid over to Raphael Codlin and Co. on or before September 25, 2014.*

> 6. *The remaining balance of $1,052,027.50 is to be deposited in an interest bearing account in the joint names of both Attorneys Raphael Codlin and Verleta Green on or before the 3rd of October 2014.*
>
> 7. *Any interest earned on the money deposited in any interest bearing account whether jointly or otherwise is for the benefit of Mrs. Griffiths.*

[25] It is clear that Straw J would have had the benefit of considering both the Agreement for Sale as well as the previous order of Brooks J when making the abovementioned orders. In fact, the orders made appear to have regard to and strike a balance between both. I am of the view that the order of Straw J at paragraphs 5 -7 (above) in effect varied the order of Brooks J, by allowing some of the net proceeds of the sale to be paid to the Respondent. It is also clear that the possibility of prejudice to the Respondent was duly considered, hence the order at paragraph 7 that the Respondent was to have the benefit of any interest earned on the money placed in the joint account.

[26] As previously mentioned, Ms. Biggs submitted that unlike Brooks J's order, Straw J's order does not specify that sums are to be held "pending the outcome of the hearing." She further submitted that –

i. When the matter was before Straw J, it was counsel for the Petitioner, Mrs. Green who brought attention to paragraph 7 of Brooks J's order which resulted in the order at paragraph 6 being made;

ii. Upon a close consideration of the said order by Brooks J, it is clear that what was intended was for sums to be paid into a joint account if the property was sold to a third party. This is supported by the following order(s) which stated that the Petitioner was to pay to the Respondent's Attorneys sums pursuant to the sale (i.e. the deposit), if he decided to exercise his option to purchase;

iii. The Petitioner has had the full benefit of his interest in the matrimonial home while Respondent is yet to receive the balance of sums pursuant to her interest and further the Petitioner is twenty-five (25) months in arrears with regards the maintenance payments;

iv. There was no intention for the sums from the sale to be put up pending the outcome of the other matters as Mrs. Green has contended. Alternatively, if it was so intended then it certainly could not be that only one party would be required to put up sums as security for any outcome that may proceed/result; and

v. All the issues are separate (i.e. maintenance, house/property and business) and should be so treated.

[27] In spite of Ms. Biggs submission, I find that it can be reasonably inferred that the words “pending the outcome of the hearing” are implied in Straw J’s order at paragraph 6. This is the only logical interpretation. I am fortified in the view I have taken by Ms. Biggs’ own submission that it was after paragraph 7 of Brooks J’s order was raised by Mrs. Green that the order at paragraph 6 was made.

[28] With regards to Ms. Biggs’ submission at set out at iv. (above), while it is somewhat unusual, there is nothing to suggest that an application was ever made by the Respondent for the Petitioner to provide a similar security.

[29] Finally, it would be incongruous for Ms. Biggs to assert that the issues of maintenance, property and business are all to be treated separately and then seek to rely on the fact that the Petitioner is in arrears with regards the maintenance payments owed to the Respondent as a basis on which the sums should be released in full. While the Court sympathises with the position the Respondent has been placed in, i.e. being kept out of sums owing to her, it is

observed that the order of Straw J at paragraph 7 entitling her to the interest earned, seeks to provide for this inconvenience.

[30] As an aside, it should be noted that section 22 of the **Matrimonial Causes Act** provides:-

> *22. When a petition for dissolution or nullity of marriage has been presented, proceedings under section 20 or section 23(2) may, subject to and in accordance with the rules of court, be commenced at any time after the presentation of the petition:*
>
> *Provided that no order under any of the sections referred to in this section (other than an interim order for the payment of money under section 20) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.*

Disposal

[31] It is hereby ordered as follows:

1. The order being sought at paragraph 3 of the Further Amended Notice of Application for Court Orders filed on the 27th of May 2016 is refused;

2. Pursuant to CPR rule 42.7, the parties may agree to vary the terms of paragraph 6 of the order of Straw J (made on the 24th of September 2014) by way of a consent order being made with respect to the release of all or part of the sum of $1,052,027.50 to the Respondent's Attorneys-at-Law. (If a consent order is made it must comply with CPR rule 42.7(5));

3. No order as to costs; and

4. The hearing to determine the orders being sought at paragraphs 1 and 2 of the Further Amended Notice of Application for Court Orders filed on the 27th of May 2016 are adjourned to a date to be fixed by the Registrar.