

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 HOLDEN AT GEORGE TOWN

3 Cause No: FAM 24/2010  
4  
5

6 BETWEEN:

7 MYRON GUSHLAK

8  
9 PETITIONER

10  
11 AND:

12 DEBBIE LYNN GUSHLAK

13  
14 RESPONDENT/APPLICANT  
15  
16

17 Appearances:

18 Mr. James Kennedy of Samson and  
19 McGrath for the Petitioner/Applicant

20 Mr. Anthony Akiwumi of Stuarts for  
21 the Respondent  
22

23 Before:

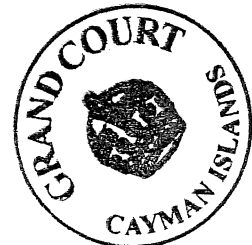
The Hon. Mr. Justice Charles Quin

24 Heard:

28<sup>th</sup> and 29<sup>th</sup> October 2010  
25  
26

27 RULING

28 Introduction  
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30



31 1. The Court has heard from counsel on behalf of the Respondent/Applicant in  
32 support of her application that she be granted leave to appeal against my Ruling  
33 dated the 25<sup>th</sup> October 2010 and against the Order dated the 28<sup>th</sup> October 2010,  
34 which, *inter alia*, allowed for the sale by auction of the matrimonial home by the  
35 Petitioner.  
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- 1           2. In addition, the Respondent seeks an Order that my Ruling and Order be stayed  
2           until the outcome of her appeal to the Court of Appeal.  
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- 4           3. In summary, the Respondent contends that the Court's Ruling to vary the  
5           injunction of the 7<sup>th</sup> October 2010 to allow the sale of Casa Coyaba is contrary to  
6           the expressed purpose of s.20(d) of the Matrimonial Causes Law (2005 Revision)  
7           namely to preserve and or protect the matrimonial estate prior to a final  
8           determination by the Court of the matrimonial assets.  
9
- 10          4. The Respondent submits that the Court went beyond its jurisdiction in mandating  
11          the manner in which the sale of Casa Coyaba should be undertaken and further,  
12          the Court did not have the jurisdiction to make the Orders that it did and, in so  
13          doing, erred in law.  
14
- 15          5. The Respondent further submits that the Court paid inadequate attention to the  
16          expert opinion of Charterland and relied, instead, upon the "unproven  
17          experience" of Mrs. Sheena Conolly – thereby ignoring the Respondent's  
18          contention, based on Charterland's valuation, that the sale would go ahead at a  
19          gross undervalue, thereby prejudicing her, the Respondent, and the matrimonial  
20          estate.  
21
- 22          6. The Respondent argues that, as an Appellant, she has a real prospect of success  
23          on appeal, and further, that on the balance of convenience, the Court should grant  
24          leave to Appeal and order a stay of the sale by auction of Casa Coyaba, failing  
25          which there is a real and substantial risk that the Appeal would be rendered  
26          nugatory if the stay were not granted, and the sale allowed to proceed.

1 7. The Respondent submits that if leave to appeal and a stay are not granted,  
2 considerable costs, delay and expense will result, which will further deplete the  
3 matrimonial property to the prejudice of both parties.

4

5 8. Finally, it is the Respondent's contention that if the Court denied her leave to  
6 appeal and the consequential stay, that any appeal would be rendered nugatory  
7 because there is a strong probability that Casa Coyaba could be sold in the 3<sup>rd</sup>  
8 November 2010 at the public auction.

9

10 9. The Respondent relies on the Cayman Islands judgment of Kerr J.A. sitting as a  
11 single judge of appeal in *Imbar Maritima S.A. and Five Others v. Republic of*  
12 *Gabon* [1988-89] CILR 286 in which he applied *Wilson v. Church* (No.2) (1879)  
13 12 Ch. D. 454 and re-stated the classic statement of Megarry J. in *Erinford*  
14 *Properties Ltd. v. Cheshire CCC* (1974) Ch. 261,

15

16 *"It is the duty of the court in ordinary cases to make such an order for*  
17 *staying proceedings under the judgment appealed from, as will prevent the*  
18 *appeal, is successful, from being nugatory."*  
19

20

## 21 **The Petitioner's Position**

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23 10. The Petitioner submits that there was no misunderstanding of law or of fact in the  
24 Court's Ruling of the 25<sup>th</sup> October.

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1 11. The Petitioner submits that the Court did not overreach the ambit of s.20(d) of  
2 the Matrimonial Causes Law, and further submits that the Court protected the  
3 matrimonial estate by refusing to interfere with the sale of the property.

4

5 12. The Petitioner contends that to allow the Respondent her appeal and a stay,  
6 would inevitably bring about the cancelling of the auction at a very late stage,  
7 with prejudicial consequences to the matrimonial estate and to both parties.

8

9 13. The Petitioner submits that the Court in its Ruling on the 25<sup>th</sup> October 2010 was  
10 not sanctioning a sale for US\$8,500,000.00 for Casa Coyaba but merely allowing  
11 Sotheby's and Concierge to try to obtain a sale, and a sale at a good price.

12

13 14. The Petitioner maintains that the Court did not ignore Charterland's valuation but  
14 merely accepted the evidence of the Petitioner and Mrs. Conolly that Sotheby's  
15 and Concierge were attempting to sell Casa Coyaba at the very best possible  
16 price.

17

18 15. Accordingly, the Petitioner contends that the Ruling of this Court does not  
19 disclose any misunderstanding as to the facts, nor any misunderstanding on the  
20 law.

21

22 16. The Petitioner maintains that the Respondent is protected by the continuation of  
23 the worldwide injunction in the sum of US\$80,000,000.00, Furthermore the  
24 proceeds of any sale of Casa Coyaba will also be subject to the injunction.

25

1 17. The Petitioner also contends that there is no real prospect of success for the  
2 Respondent's appeal against the Ruling of the 25<sup>th</sup> October 2010.

3  
4 18. The Petitioner maintains that should this Court grant the Respondent's  
5 application for leave to appeal and order a stay, it will effectively deny the  
6 Petitioner the fruits of his litigation and also render any appeal that the Petitioner  
7 might have against the proposed grant of leave and stay, nugatory.

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9 **Summary of Analysis and Conclusion**

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11 19. The Court has exercised its discretion in allowing the sale of Casa Coyaba to  
12 proceed, provided there is at least one pre-auction bid of over US\$8,500,000.00.

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14 20. The Court in coming to its decision was acutely aware that one of its roles, in  
15 light of the injunction, was to try and protect and maintain the matrimonial assets  
16 so that they are not depleted, thereby causing prejudice to both parties.

17  
18 21. Having been provided with detailed evidence by both parties, it was the Court's  
19 decision that, in view of the extensive efforts made by Mrs. Sheena Conolly,  
20 Sotheby's and Concierge, on a balance of convenience, it was better to allow the  
21 auction of Casa Coyaba to continue.

22  
23 22. The Court followed Henderson J. in *Scotia Bank (Cayman Islands) Ltd. v.*  
24 *Rankine* and his dicta that, "the best evidence of the value of real estate is the  
25 reaction of the marketplace." Accordingly, the Court exercised its discretion to

1 allow the sale to proceed, provided that if there were no pre-auction bid above  
2 US\$8,500,000.00, then the Petitioner was directed to cancel the auction.

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4 23. It should also be remembered that leading counsel on behalf of the Petitioner  
5 properly conceded that it is open to the Respondent, at a later stage, to argue for  
6 an adjustment on the proper market value of the house if it was found to be  
7 considerably more than what the public auction realised. With that concession,  
8 the argument on the value of Casa Coyaba remains alive so that the Respondent  
9 can call evidence and make whatever submissions on the value she wishes at a  
10 later stage. Accordingly, the Court finds that the matrimonial estate is still  
11 preserved.

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13 24. It is accepted that two principal matters that the Court will have to regard on  
14 applications for leave to appeal, are whether the Appellant has a real prospect of  
15 success on Appeal, and also the balance of convenience. Indeed, there is  
16 authority in the Grand Court in case of *CVC/Opportunity Equity Partners*  
17 *Limited v. Demarco Almeida* 2001 CILR Note 20 where Sanderson J. found that:

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19 *“Leave to appeal from an interlocutory order will be refused, even when the*  
20 *appellant has a realistic prospect of success, if (a) the point raised by the*  
21 *appeal is not sufficiently significant to justify the resulting costs; (b) if the*  
22 *significance of the point is outweighed by the procedural consequences, e.g.*  
23 *the loss of an existing trial date; or (c) it will be more convenient to*  
24 *determine the point at or after the trial. (Practice Direction (Court of*  
25 *Appeal: Leave to Appeal & Skeleton Arguments),[1999] 1 W.L.R. 2,*  
26 *applied).”*  
27

28 25. On the other hand, to grant a stay or an injunction of the sale, as counsel for the  
29 Respondent argued, would effectively render the Court’s Ruling dated the 25<sup>th</sup>

1           October 2010 and the Order of the 28<sup>th</sup> October 2010 completely redundant and  
2           of no effect whatsoever.

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4           26. The principles upon which the Grand Court relied in *Telesystem International*  
5           *Wireless Incorporated and T.I.W. DO Brasil Limitada v. CVC/Opportunity*  
6           *Equity Partners Limited and Three Others* 2001 CILR Note 21 (“*Telesystem*”)  
7           were set out by Sanderson J. in which he applied the test of Lord Woolf in *Swain*  
8           *v. Hillman* [2001] 1 All E. R. 91 which states,

9  
10                           *“The general test of whether leave to appeal should be granted is: Does the*  
11                           *appeal have a real (i.e. realistic, not fanciful) prospect of success?”*  
12

13           27. In *Telesystem* Sanderson J. went on to state the following principles;

- 14                           i. *“In an appeal on a point of law (including on the ground that a*  
15                           *finding of the lower court is unsupported by evidence), leave*  
16                           *should not be granted unless the court considers there is a real*  
17                           *prospect that the Court of Appeal will come to a different*  
18                           *conclusion that will materially affect the outcome of the case.”*  
19  
20                           ii. *“In appeal on questions of fact, leave will be appropriate if the*  
21                           *lower court has drawn an untenable inference from primary*  
22                           *facts or should have drawn a materially different inference...”*  
23  
24                           iii. *“Leave will nevertheless rarely be given for an appeal based on*  
25                           *the judge’s evaluation of oral evidence and requiring an*  
26                           *examination of the detail of his factual investigation.”*  
27  
28                           iv. *“Leave will also rarely be granted to appeal on the basis of the*  
29                           *court’s wrongful exercise of its discretion, unless the case raises*  
30                           *a point of general principle requiring the opinion of the*  
31                           *appellate court.”*  
32

33           28. s.18(3) of the Court of Appeal Law reads:

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35                           *“No stay of proceedings shall be granted upon judgment appealed ...save*  
36                           *upon good cause shown to the court or to the Grand Court.”*  
37

1 29. The Court's attention has also been drawn to the Court of Appeal decision in  
2 *Insurco International Limited v. Voluntary Purchasing Group Incorporated*  
3 *and Ferti-Lome Distributors* (1994-95) C.I.L.R. 402 where the Court of Appeal  
4 laid down four circumstances where the appellate court would allow an appeal on  
5 an interlocutory injunction as follows:

- 6
- 7 i. Decision based on misunderstanding of fact or law
  - 8 ii. Decision based on factual inference proved wrong by new  
9 evidence
  - 10 iii. Subsequent change of circumstances
  - 11 iv. Decision so aberrant no reasonable judge could have made it.
- 12

13 These principles were taken from the classic judgment of Lord Diplock in the  
14 House of Lords case of *Hadmore Prds. Ltd. v. Hamilton (2)* [1982] 1 All E. R.

15

16 30. I also refer to the House of Lords decision of *Piglowska v. Piglowska* (1992) 2  
17 FLR 763 which proved the principle of Asquith LJ in *Bellenden v. Satterthwaite*  
18 [1948] 1 All E. R.:

19

20 *"It is of course not enough for the wife to establish that this court might, or*  
21 *would, have come to a different order. We are concerned with a judicial*  
22 *discretion, and it is of the essence of such a discretion that on the same*  
23 *evidence two different minds might reach widely different decision without*  
24 *either being appealable. It is only where the decision exceeds the generous*  
25 *ambit within which reasonable disagreement is possible, and is, in fact,*  
26 *plainly wrong, that an appellant body is entitled to interfere."*  
27

28 31. It is always a slightly difficult and somewhat unnatural task for a judge to try and  
29 objectively examine his own Ruling for the purposes of deciding whether to grant

1 leave to appeal and a stay. However, I have, in as objective a manner as possible,  
2 carefully reviewed my Ruling of the 25<sup>th</sup> October 2010 and cannot state that it is  
3 a decision so aberrant that no reasonable judge could have made it. To put it  
4 another way, I cannot see how I have been “plainly wrong” in coming to my  
5 decision to allow the public auction of Casa Coyaba to continue.

6  
7 32. Moving on to the question of a stay, I cite the case of *The Annot Lyle* (1886)  
8 11P. 114. where the court stated:

9  
10 *“The Court will not grant a stay of execution unless satisfied that there are*  
11 *good reasons. The rationale for this is simple. The Court does not “make a*  
12 *practice of depriving a successful litigant of the fruits of his litigation, and*  
13 *locking up funds to which prima facie he is entitled.”*  
14

15 To allow a stay would effectively make my Ruling of the 25<sup>th</sup> October 2010  
16 redundant, and further, it would ensure that any appeal brought by the Petitioner  
17 against the stay and leave to appeal would be nugatory.

18  
19 33. Although in this case there was no oral evidence, the court was left with  
20 evaluating detailed affidavit evidence filed on behalf of both parties. The Court’s  
21 decision, as set out in its Ruling of the 25<sup>th</sup> October 2010, involved an  
22 examination and an analysis of the affidavit evidence of the parties and the  
23 exhibits. Given all the circumstances of the case as presented on the 21<sup>st</sup> October  
24 2010, and given the advanced stage of the auction procedure, it is the Court’s  
25 firm view that the matrimonial assets are better protected by allowing the sale to  
26 proceed, than by calling a halt to the auction procedure at this very late stage. If  
27 the auction sale of Casa Coyaba is successful, the sale proceeds would fall within

1 the injunction ceiling and be used to offset debt and preserve the value of the  
2 matrimonial assets.

3

4 34. The Court exercised its discretion only after hearing counsel at length and a  
5 thorough review of the evidence before it. The Court finds it difficult to see that  
6 the Respondent's Appeal would have any real prospect of persuading the Court  
7 of Appeal to come to a different conclusion on the evidence and facts before this  
8 Court.

9

10 35. This Court cannot find any matter of public interest that should trouble the Court  
11 of Appeal, neither is there any point of general principle requiring the opinion of  
12 the Appellate Court on the circumstances of this case.

13

14 36. For the aforesaid reasons I reject the Respondent's application for leave to  
15 appeal. I also reject the Respondent's application for leave to appeal and a stay  
16 on the grounds that the Respondent does not have a real prospect of success, and  
17 further, on the balance of convenience.

18

19 37. Should counsel wish to address me on the question of the costs of this application  
20 I will hear them that at a later stage.

21

22

23 **Dated this the 29<sup>th</sup> October 2010**

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26

  
**Quin J.**  
**Judge of the Grand Court**