Gfm Vs. Jam

Gfm Vs. Jam

SooperKanoon Citation : sooperkanoon.com/1150726

Court : New Zealand Court of Appeal

Decided On : Feb-28-2014

Judge : Randerson, Stevens &Amp; Wild

Appeal No. : CA566 of 2012

Appellant : Gfm

Respondent : Jam

Advocate for Pet/Ap. : M J McCartney QC for Appellant M W Vickerman for Respondent. Davies Law, Auckland for Appellant. Cairns Slane, Auckland for Respondent.

Judgement :

(Given by Wild J)

[1] By application filed on 17 February the appellant seeks a stay of execution of the judgment this Court delivered on 17 December. She applies pursuant to r 30 of the Supreme Court Rules 2004, seeking a stay pending determination of her application for leave to appeal to the Supreme Court and, if leave is granted, until determination of her appeal.

[2] The appellant supported her application with affidavits sworn on 14 and 21 February, the latter in reply to an affidavit in opposition sworn by the respondent on 18 February. Ms McCartney QC advised the Court she wished to be heard on

the application.

[3] This proceeding involves a dispute between the parties over their relationship property, in particular the former family home.

[4] The parties separated in October 2004, some nine and a half years ago. The youngest of their three children is now 17 years of age, and in his last year at school.

[5] The appellant wife continues to live in the former family home, as she has done since the parties separated. The children live there with her, although one at least not all the time.

[6] In its judgment of 4 November 2010 the Family Court vested the former family home in the wife at its agreed separation date value of $1.55 million. (JAM v GFM FC Auckland FAM-2006-004-2610, 4 November 2010.) In his judgment appealed to this Court, Woodhouse J reversed the Family Court. (JAM v GFM [2012] NZHC 290, [2012] NZFLR 469.) He directed that the wife have the opportunity to buy out the husband's interest in the former family home at a value agreed between the parties, failing which the home was to be sold and the net proceeds divided equally.

[7] The judgment of this Court which the wife seeks to appeal to the Supreme Court substantially upheld the judgment of Woodhouse J. (GFM v JAM [2013] NZCA 660.)

[8] The nub of the wife's application for leave to appeal to the Supreme Court is that the judgment of the Family Court should be restored. The application is a 10 page document which details approximately 20 grounds of appeal (it is difficult to enumerate them, but they occupy about eight pages of the application). It is fair to say that the wife seeks to challenge in the Supreme Court almost every aspect of this Court's judgment.

[9] Ms McCartney submitted that the principles applicable to a stay application under r 30 of the Supreme Court Rules are the same as the well established principles applying when a stay is sought under r 12 of the Court of Appeal (Civil)

Rules 2005. She relied on the statement of those principles in McGechan on Procedure at CR12.01(1) and (2).

[10] We agree, but with one important qualification. Where, as here, the Supreme Court has not granted leave to appeal, an additional consideration is the likelihood of the applicant being able to satisfy the criteria for leave set out in s 13 of the Supreme Court Act 2003. Section 13(1) provides that the Supreme Court must not give leave unless satisfied it is necessary in the interests of justice for the Court to hear the proposed appeal. And s 13(2) provides:

(2) It is necessary in the interests of justice for the Supreme Court to

hear and determine a proposed appeal if”

(a) the appeal involves a matter of general or public importance;

or

(b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or

(c) the appeal involves a matter of general commercial significance.

[11] We do not consider the wife's proposed appeal meets the s 13 criteria. As our judgment reflects, we considered this case involved the application of the relevant provisions of the Property (Relationships) Act 1976 and the case law on them to the parties' circumstances. The case does not involve a matter of general or public importance. Our view is the same in respect of the possibility of a substantial miscarriage of justice unless the appeal is heard. Like Woodhouse J in the High Court, we viewed the judgment of the Family Court as substantially unjust to the husband. The "matter of general commercial significance" criterion is inapplicable here. This is not a commercial case, let alone one that could have general commercial significance.

[12] In our view a balancing of the competing rights of the appellant wife and the respondent husband falls decisively in favour of the latter, and in favour of execution of this Court's judgment, and the sale of the former family home without

further delay. We identify four main considerations. First, refusing a stay will undoubtedly render nugatory the appellant wife's aim of restoring the Family Court's judgment and thus retaining the former family home as her own property. But, against that, is the assessment both of the High Court and this Court that the Family Court judgment was in error. Supporting the view of the two senior courts that the former family home should be valued at hearing date (and not at the separation date value taken by the Family Court) is the judgment of the Supreme Court itself in Burgess V Beaven. (Burgess v Beaven [2012] NZSC 71, [2013] 1 NZLR 129 at [25].)

[13] We do not regard the points of law raised by the notice of appeal as material to the outcome of the case. For example, regardless of whether May V May (May v May (1982) 1 NZFLR 165 (CA).)or Austin, Nichols and Co Inc V Stichting Lodestar (Austin, Nichols and Co Inc v Stichting Lodestar [2007] NZSC 103, [2008] 2 NZLR 141.) is the correct approach on appeal, error on the part of the Family Court was clearly established. Similarly with the point about s 18C of the Property (Relationships) Act. An analysis of the facts showed there was no warrant for the husband to be found responsible for post-separation losses, irrespective of the legal test to be applied. In these circumstances, we do not consider the appellant has strong prospects of obtaining leave to appeal.

[14] Secondly, Ms McCartney submitted the appellant wife would be able to buy out the respondent's interest in the former family home if she shared in the relationship property acquired by the respondent husband post-separation. Our reasons for concluding that the appellant wife has no realistic prospect of succeeding in the Supreme Court with that part of her case are set out in [120]”[133] of our judgment. Bar some unforeseen development, we conclude there is no viable prospect the appellant wife will be able to acquire the former family home. We accept Mr Vickerman's submission that a sale of the home is inevitable, even if the appellant's contentions are upheld.

[15] As matters stand, if the house is sold as directed, then Ms McCartney accepts that the appellant will receive a sum in the order of $1 million after the adjustments in her favour. In that event, the appellant wife seeks to re-house herself in central

Auckland, preferably in the area where the former family home is situated. She asserts she will not have the money to do that if the former family home is sold. The respondent husband disputes that, calculating that the appellant wife will receive approximately $1.4 million. But the more important point is that both parties must "cut their cloth" to their post-separation circumstances.

[16] Thirdly, we reiterate that nine and a half years have passed since the parties separated. During all that time the appellant wife has lived in the former family home. Woodhouse J dismissed the respondent husband's appeal against the Family Court's refusal to fix an occupation rent in his favour. He did not cross-appeal to this Court. Although the respondent husband is presently living in an apartment owned by his new partner, he calculates that he has paid approximately $230,000 in rent to house himself since the parties separated. There is much force in his submission that he should now be able to enjoy his share of the net proceeds of the sale of the former family home. The time for the "clean break" implicit in the Property (Relationships) Act is nigh, indeed we think it is well past.

[17] Fourthly, there is the prospect that the Auckland property market may not continue rising, and that the parties may lose money if the former matrimonial home is sold in a year or so's time, as opposed to now. At the hearing we explored with counsel the practicalities of making any stay conditional on the appellant wife undertaking to cover any loss from delayed sale sustained by the respondent husband and/or paying interest in the interim on the respondent husband's share of the home as ultimately determined. Counsel for both parties saw difficulties because there is no agreed current market valuation of the home.

[18] It is for all those reasons that we dismiss the appellant wife's application for a stay, even pending the Supreme Court's determination of the leave application.

[19] The appellant wife is to pay the respondent husband's costs as for a standard application on a band A basis with any usual disbursements.