



Neutral Citation Number: [2020] EWHC 2159 (TCC)

Case No: HT-2018-000281

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

The Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: Friday 7<sup>th</sup> August 2020

Before :

**MR ROGER TER HAAR QC**  
**Sitting as a Deputy High Court Judge**

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Between:

(1) MR CHRIS HART  
(2) MRS KERRY HART

**Claimants**

- and -

(1) MR RICHARD LARGE  
(2) MICHELMORES LLP  
(2) HARRISON SUTTON PARTNERSHIP

**Defendant**

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Jason Evans-Tovey (instructed by direct access) for the Claimants  
Simon Wilton (instructed by Kennedys LLP) for the Defendants  
Hearing date: 23 July 2020  
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**APPROVED JUDGMENT**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 7 August 2020 at 10:30 am.**

**Mr Roger ter Haar QC :**

1. In this action, following trial I circulated a judgment dealing with the substantive issues in the action. That judgment was to be handed down on the 24<sup>th</sup> April 2020 but following a request for some aspects to be changed to allow for a degree of anonymity I deferred the hand down of the judgment. The judgment was handed down under the Covid-19 Protocol on the 22<sup>nd</sup> May 2020.
2. In that judgment I awarded damages of £374,000 in respect of diminution of the value of the property which was the subject of the litigation and £15,000 by way of general damages.
3. On the 7<sup>th</sup> May 2020 I heard argument about the issues of interest, costs and permission to appeal (amongst other issues). A separate judgment dealing with these consequential issues was handed down on the same day as the principal judgment.
4. In that second judgment I awarded interest of £143,124.16; that the First Defendant (“Mr Large”) should pay the Claimants (“the Harts”) 85% of their costs; and that Mr. Large should pay £67,500 as an interim payment in respect of the Harts’ costs.
5. I also heard an application for permission to appeal on three grounds. I refused permission to appeal on two of those three grounds, but granted permission in respect of the third ground which relates to the recoverable measure of loss.
6. Mr Large applied to the Court of Appeal for permission to appeal on the other two grounds also. On the 7<sup>th</sup> July 2020 Coulson L.J. refused the further permission sought.
7. The appeal has been listed to float between the 8<sup>th</sup> and 9<sup>th</sup> December 2020.
8. On the 7<sup>th</sup> May 2020 Mr Large made an application to the Court for a stay of execution. I decided that the application should be the subject of a formal application to be made by the 25<sup>th</sup> June 2020. In the event the application was made on the 23<sup>rd</sup> June 2020.
9. The reason for the application is that the limit on Mr Large’s professional indemnity policy was £250,000, including any liability which Mr Large might be under to the Harts for costs.
10. The sum of £250,000 has been paid to the Harts. The amount in respect of which the stay was originally sought was £282,141.16. However, by the time that Mr. Wilton opened the application before me, the stay sought had been modified so as to be a stay in respect of the judgment sum and interim award of costs subject to a caveat that Mr. Large should pay £70,000 to the Harts within 14 days. I explain further below how that change came about.
11. The application was heard remotely by a telephone conference call because of the continuing health emergency. I would like to pay tribute once again to the efficiency of the parties in making this possible, particularly given that the Harts are representing themselves without the benefit of solicitors, instructing Mr. Evans-Tovey who now appears for them through the direct access scheme.

The Principles to be applied

12. In his skeleton argument, Mr. Wilton summarised the applicable principles as follows:

“8. The Court has a discretionary power to stay execution. There is an inherent power to do so – see *Bibby v Partap* [1996] 1 WLR 931 at 934 - recognised by section 49(2) of the Senior Courts Act 1981. There are also various places in the CPR where this inherent power is further recognised, or a specific power to stay is articulated:”

- a. there is the general case management power to stay the whole or part of any enforcement or execution on a judgment in CPR 3.1(2)(f), although in the light of the opening wording of CPR 3.1(2) it does not apply where other provisions in the CPR are specifically applicable (eg CPR 40.8A and CPR 83.7): see *Michael Wilson & Partners Ltd v Sinclair (No 2)* [2017] EWCA Civ 55, [2017] 1 WLR 3069;
- b. CPR 40.8A provides that a party against whom a judgment has been given may apply to the court for a stay of execution on the ground of matters which have occurred since the judgment or order;
- c. CPR 52.16 provides that unless the appeal court or the lower court orders otherwise an appeal does not operate as a stay of any order of the lower court - which plainly implies a power (the court’s inherent power, as explained in *Bibby* and *Ellis v Scott (Practice Note)* [1964] 1 WLR 976) expressly to impose such a stay;
- d. CPR 83.7 provides that a judgment debtor under a judgment for the payment of money may apply for a stay, including on the basis of the applicant’s inability to pay, and if the court is satisfied there are special circumstances which render it inexpedient to enforce the judgment or that the applicant is unable to pay then it may stay execution absolutely or for a defined period and subject to conditions, that being a distinct power separate from that implicit in CPR 52.16: *Ellis v Scott*.

“9. Out of an abundance of caution Mr Large has cited each of these sources of jurisdiction when making his application although it is the inherent power to stay, exercisable in respect of a case under appeal as recognised by CPR 52.16, upon which he particularly relies.

“10. The leading case on the court’s discretion to direct a stay pending an appeal is *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 where at [22] Clarke LJ said that whether to order a stay depended upon all the circumstances of the case but the essential question was “...whether there is a risk of injustice to one or both parties if it grants or refuses a stay”. Pertinent considerations are then:

- a. if a stay is refused, what are the risks of an appeal being stifled?
- b. if a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment?
- c. if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover any monies from the respondent?

“11. In *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474 the Court of Appeal also stated (at [12] and [13]) that while the general rule is that a stay will not be granted:

- a. the court has an unfettered discretion;
- b. no authority can lay down rules for its exercise;
- c. the proper approach is to make an order which best accords with the interests of justice
- d. the court has to balance the alternatives to decide which is less likely to cause injustice; and,
- e. where the justice of letting the general rule take effect is in doubt, the answer may well depend on the perceived strength of the appeal.

“12. The risk of an appeal being stifled is of course the paradigm reason why an application for a stay of execution pending an appeal is made. In such a case the court will of course need to be satisfied that there really is a risk as claimed, and it is not enough for an applicant to demonstrate that his own means are insufficient both to pay the judgment sum and fund an appeal as the court may also consider the applicant’s ability to raise funds elsewhere: *Contract Facilities Ltd v Rees* [2003] EWCA Civ 465 at [10]. However, where the applicant can demonstrate that his means and his ability to raise funds are such that an appeal really will be stifled, that will ordinarily be a very weighty consideration in favour of granting a stay, as was recognised by the Court of Appeal, in *Ackerman v*

*Ackerman* [2012] EWCA Civ 768 (stay granted as otherwise the appeal would be stifled).”

13. For the Harts, Mr. Evans-Tovey does not challenge those principles, but emphasises the following points derived from the decision of the Court of Appeal in *Mahtani v Sippy* [2013] EWCA Civ 1820:
- (1) The starting point is that an appeal does not operate as a stay of orders of the lower court (CPR 52.16);
  - (2) A stay is the exception rather than the rule. See *Mahtani* at [14];
  - (3) “*the general approach of the courts is that the court must first of all consider whether or not there are solid grounds for seeking a stay.*” See *Mahtani* at [13];
  - (4) As to solid grounds, the fact that there is permission to appeal is not solid grounds. Instead, “.... *the “solid grounds” which an applicant must put forward are normally “some form of irremediable harm if no stay is granted”*”. See *Mahtani* at [14] & [15];
  - (5) If the appellant puts forward “*solid grounds*” for seeking a stay, the court must then consider all the circumstances of the case. See *Mahtani* at [14];
  - (6) The essential question to be answered in the light of all the circumstances is whether there is a risk of injustice to one or other or both parties if the court grants or refuses a stay. *Hammond Suddards* [22].

Mr. Evans-Tovey also emphasised the applicable burden and standard of proof (skeleton paras 9, 10 and 11).

#### The Stay Application

14. As I have said, the application as originally filed sought a stay of execution in respect of all sums payable in excess of the sum of £250,000 which has already been paid.
15. The Harts have scrutinised with very great care and persistence the declarations made by Mr. Large as to his assets. This has resulted in ever greater information becoming available.
16. In the event, on the day before the hearing before me, Mr. Large filed a witness statement dated the 22<sup>nd</sup> July 2020 which updated his assets. The effect of that evidence, taken with evidence previously given, was that the amount of capital available to him is £123,317.
17. Mr. Large estimates that the costs which he has yet to incur in respect of the pending appeal are £52,500. There is also £13,000 in work in progress on the appeal for which Mr. Large is liable.
18. On that basis, Mr. Large offered the caveat expressed above that the stay should be subject to the payment of £70,000 by him to the Harts within 14 days. He further offered an undertaking that the amount of £52,500 which would effectively be retained by him would be used only for the costs of the appeal.

19. The ground upon which a stay was sought was that if a stay were not to be granted the appeal would be stifled.

The Response to the Application

20. The application was resisted. Mr Evans-Tovey made his submissions by reference to three issues:
- (1) whether the appeal would be stifled if a stay were to be granted;
  - (2) if so, whether the amount to be paid within 14 days should be more than £70,000; and
  - (3) the terms of any undertaking as to amounts to be retained by Mr. Large in respect of the costs of the pending appeal.

Would a stay stifle the appeal?

21. It is the Harts' starting point that they should not be required to await the appeal to receive the fruits of their hard-won success in this case.
22. I accept that starting point, and accept that I should only grant a stay if satisfied that a stay would stifle the appeal: even if I am so satisfied I have a residual discretion which I must exercise as to whether or not to grant the stay.
23. In considering these issues, I bear in mind that I have decided that there is a sufficiently arguable point of law justifying permission to appeal. I do not categorise that as strong or weak, but I record that I had no doubt in coming to the conclusion as to the appropriate measure of loss, although I recognised when giving permission to appeal that a higher court might well differ from me on what I viewed as being a pure point of law on the facts which I had found.
24. The appeal raises a point of law which has been fully explained in the skeleton argument already submitted to the Court of Appeal on Mr. Large's behalf, and a bundle of documents has already been prepared. Thus the work going forward to the hearing of what will be a relatively short appeal is somewhat limited unless in some way the Harts enlarge the scope of the preparatory work, for example by making an application for security for costs or seeking a freezing order. I have seen no reason to suppose that they will, and Mr. Evans-Tovey made it clear that the Harts were not suggesting any course that might significantly increase the costs. On the other hand, I have seen from my involvement in this case at the interlocutory stages, at trial and after trial, that the Harts have a propensity for thoroughness which tends to increase costs.
25. Before me, a number of ways in which the appeal might be conducted were canvassed:
- (1) Could Mr Large conduct the appeal hearing in person? Of course this is a possibility, but it is an undesirable possibility. The issue of law, whilst relatively narrow and easily definable by a lawyer specialising in this area of the law, is not one which is likely to be fully and easily understood by a non-lawyer. In my

view, it would be very unsatisfactory for the Court of Appeal not to have the benefit of argument from suitably experienced counsel.

- (2) Could Mr. Large retain counsel on a CFA? This is a possibility, but I accept Mr. Wilton's submission that there are potential difficulties including whether counsel could be found who would be willing to act without an uplift (which would not be recoverable by Mr. Large from the Harts if he wins his appeal).
  - (3) Could Mr. Large obtain pro bono assistance? This is possible, but the court cannot assume that such assistance will be available.
  - (4) Could Mr. Large obtain funding from third parties? Mr Large has attempted to persuade his professional indemnity insurers and the RICS to assist him, but to no avail.
  - (5) Could Mr. Large obtain assistance from his wife? The answer to this is that in large measure he has: the monies which have recently become available have been made available by reason of Mrs. Large's co-operation.
26. Whilst the appeal could still go ahead without Mr. Large having the benefit of counsel, and in that sense a stay will not stifle the appeal, what justice requires is that an effective and properly argued appeal should not be stifled.
  27. For the above reasons, I conclude that it is in the interests of justice that Mr. large should have the benefit of counsel at the appeal.
  28. Does he also need the assistance of solicitors? As recorded above, Mr. Evans-Tovey has been instructed on a direct access basis on behalf of the Harts. I see no reason why Mr. Large should not also be expected to proceed on the same basis, particularly given the principles set out above which show that the grant of a stay is the exception, from which it follows that if a stay is to be granted it should be restricted to the minimum required as a matter of justice.
  29. What is the amount which should be retained by Mr. Large in order to be able to fund the use of counsel? I bear in mind that if counsel is engaged on a direct access basis, the amount of work which counsel is required to do is likely to be greater than if a solicitor is also retained.
  30. In my judgment, it is in the interests of justice that Mr. Large should be allowed to retain £20,000 plus VAT (£24,000) in order to fund the appeal: That figure is based upon the likely fees based on my experience which directly instructed counsel will charge.
  31. I also need to allow for the sum of £13,000 which has yet to be paid by Mr. Large.
  32. Thus the amount to be retained is £37,000.

What sum should be paid now?

33. Whilst, if a stay is not granted, the Harts could proceed to take any of a wide range of steps to enforce the judgment, Mr. Evans-Tovey made it clear that at this stage what the Harts wish is that such available monies as there are should be paid now.

34. The proposal made by Mr. Wilton on behalf of Mr. Large reflects this approach – namely that such sums as are readily available should be paid within 14 days, subject to the retention of monies to fund the appeal.
35. I have concluded above that justice requires that £37,000 should be kept by Mr. Large to fund the appeal and to pay his outstanding legal fees.
36. As to the amount which is available, Mr. Wilton opened the case to me on the basis that the available capital is £122,000. The proposal was that £52,000 should be retained to fund the appeal and the balance of £70,000 should be paid within 14 days.
37. Whilst there has been a suggestion by the Harts that Mr. Large has not been open about his assets and that he has taken or may have taken steps to arrange his affairs so as to keep some part of his assets safe from enforcement.
38. This is a serious allegation, and in my judgment is not justified by the evidence.
39. However, it is the case that a full picture of his assets had not emerged even by the day before the hearing before me, but Mr. Large then filed a witness statement setting out the figures.
40. The need for a correcting witness statement arose out of transactions between Mr. Large and his wife. Put shortly, the Larges had agreed between themselves in what proportions they should own the property in which they live. The background to this agreement goes back some years to when each of them used assets which they had accumulated in each case from a previous marriage to purchase a series of matrimonial homes. Eventually this arrangement was formalised in relation to the jointly owned properties more recently owned by the Larges and so that when they purchased the house in which they now live Mr. Large's share was 48.34% and Mrs Large's 51.66%.
41. On considering the position as a result of these agreements, monies were recognised as being due from Mrs Large to Mr. Large. As a result of this more monies were available to Mr. Large to pay the Harts than had previously been thought: this it was that led to the offer to pay £70,000 within 14 days.
42. Mr Evans-Tovey and the Harts had very little notice of this, and Mr. Evans-Tovey challenged the figure of what was payable by Mrs Large to Mr Large.
43. In order to see if agreement could be reached, I asked counsel to confer. In the event there was a measure of disagreement. Mr. Evans-Tovey put the Harts' submissions into writing, and Mr. Wilton then helpfully annotated that document with comments on behalf of Mr. Large.
44. The difference between the parties turns upon whether allowance should have been made in considering what sum is due from Mrs Large to Mr Large for expenses of renovating and furnishing the matrimonial home. Mr. Evans-Tovey argues that a sum of £39,000 should be brought into account.
45. I agree with Mr. Wilton's submission that this is wrong. As Mr. Wilton submitted, this money has been spent and is no longer available.



46. Accordingly I conclude that the amount available is £123,317 as submitted by Mr. Wilton.
47. From this should be deducted the figure of £37,000, so that the amount to be paid within 14 days will be £86,317.

#### Undertaking

48. Whilst there was some dispute about the precise terms of the undertaking, the principle is clear: it is a term of the stay that the sum of £37,000 will be used by Mr. Large solely for the purpose of funding the appeal and paying his solicitors the £13,000 for work in progress.

#### Exercise of discretion

49. In making the order for a stay on the terms discussed above I am conscious that the practical effect of my order is that the monies retained will be unlikely to be available at the end of the appeal to satisfy my judgment if the appeal fails.
50. That powerful factor is, in my judgment, outweighed by the requirement of justice that Mr. Large should have the benefit of counsel at the appeal.
51. It is also relevant that, whilst £37,000 is not a minimal sum, it is a relatively low proportion of the amount which I awarded and of the amount outstanding.

#### Outstanding matters

52. I invite counsel to confer and to agree the terms of an order if possible, including as to the proper treatment of VAT.
53. I invite submissions on behalf of both parties as to the costs of this application by 5 p.m. on Wednesday the 5<sup>th</sup> August and reply submissions by 5 p.m. on Friday the 7<sup>th</sup> August 2020.