BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 34 of 2020

BETWEEN:

ASHTON SHON CADDLE **Appellant**

AND

ROGEOLLE LEE-ANN MORRIS **Respondent**

Before: The Hon. Sir Patterson Cheltenham, KA, Chief Justice, The Hon. Francis Belle and The Hon. Margaret A. Reifer, Justices of Appeal

Dates of Hearing **2020: December 12, 17**

Date of Decision **2021: March 30**

Mrs. Duana Peterson and Ms. Desirée Brown for the Appellant

Ms. Lyngeolle Morris for the Respondent

DECISION

REIFER JA:

INTRODUCTION

[1] Relocation cases, whether temporary or permanent relocation, are some of the most difficult cases to adjudicate in the Family Court. The court is statutorily mandated, inter alia, to make the welfare of the child its first and paramount consideration, but the wishes of the parents are usually most evident in such

cases. There is, and can never be, any winning party. Such is the case in the matter before us.

[2] Before this Court was an urgent Application, filed on 11 December 2020, for the stay of the order of **Chase J**, delivered on 11 December 2020, pending the urgent hearing of the appeal. This order addressed the temporary relocation, custody, care and control, maintenance and access arrangements after the conduct of a trial, for a minor child born 25 January 2019. After the delivery of the oral judgment, (with the promise of the written judgment to follow) the Appellant (then Respondent) sought a stay of the court's order pending appeal. This stay was refused by the trial judge. By the orders sought on appeal, the Appellant is seeking a reversal of the substantive order, in short, prohibiting the removal of the minor child from the jurisdiction, the vesting of interim care and control in the Appellant and the payment of maintenance by the Respondent.

[3] The factual basis of the application for the stay was the Appellant's assertion of the Respondent's intended travel with the minor child on Sunday 13 December 2020. Much argument has ensued as to whether this was in fact the case. For the purposes of the resolution of the application presently before this Court we have noted this dispute of fact, but do not consider it germane

to the present determination as the urgency of the Application is nonetheless clear.

[4] The matter heard by the Family Division of the High Court, was an application under the **Minors Act, Cap. 215**, as the parties were neither married nor part of a union other than marriage.

[5] It was first heard as a matter of urgency by this Court on Saturday 12 December 2020, when certain preliminary orders were made and the substantive application set for hearing on 17 December 2020.

[6] On Thursday 17 December 2020 this Court, after hearing the parties, dismissed the application for a stay with reasons to follow. These are those reasons.

THE BACKGROUND

[7] This matter, culminating in the trial judge's order of 11 December 2020, had its genesis long before that time. While the application pursuant to which the appealed order was made was filed on 5 November 2020, there is a relevant and relatively undisputed history, both factual and procedural, predating the recent application before this Court.

[8] For these purposes, we refer to the Respondent's affidavit filed on 15 December 2020. The factual content here referenced has not been disputed. The Respondent, the mother of the minor, is a young medical doctor with

aspirations of pursuing specialist training in cardiology. These aspirations predated COVID and it is not unrealistic to infer that they may have been some years in the making. Undisputed is the fact that the Respondent acted on them more than a year and a half ago in August 2019 when she travelled to Canada with the minor child (then age 7 months) to pursue a two (2) week Observership Programme in the field of cardiology with the University Health Network, University of Toronto at the Toronto General Hospital. In fact, at paragraph [13] of this affidavit, the Respondent deposes unchallenged, that the Appellant was aware in August 2019 of her plans to return to Canada the following year with the minor child to pursue her professional training. In August 2019, the Appellant provided the requisite letter of consent to facilitate the minor's travel to Canada with the Respondent.

[9] It is unclear from the record exactly when the relationship between the Appellant and the Respondent ended and to a large extent it is irrelevant to the matter before us. The Respondent in her affidavit of 15 December 2020 deposed that they ceased living together in January 2020. The Appellant having stated in his affidavit of 14 December 2020 that the minor was 22 months old and that he resided with her for the first half of her life, it is safe to conclude, from his affidavit evidence, that the minor was just shy of one-year old when the parties separated. It is not evident or relevant at this

stage what caused the breakup, but the sequel of that break-up is a clearly acrimonious relationship between the two; and, consequentially, poor and strained communication not in the interest of their co-parenting responsibilities.

[10] What is also relevant background, which later discussion shows that the trial judge considered for several reasons, is the fact that the minor is a special needs child with developmental delays (hypotonia or "floppy infant syndrome") and vision impairment. The Respondent demonstrated an intent to obtain specialist medical testing and treatment for the minor as an important adjunct to her professional plans, a level of treatment not presently available in this jurisdiction. At paragraph [36] of the Respondent's Affidavit of 15 December 2020 in answer to paragraph [12] of the Appellant's Affidavit, she states:

> "36. During the High Court Proceedings, I gave full and frank disclosure of the plans for the minor once settled in Canada, including provisions for quarantine, accommodation, day care and medical facilities. For instance, I identified that the minor would undergo an assessment at the Holland Bloor View Rehabilitation Centre which is affiliated with the University of Toronto (where I will be attached during my studies) where she would then be given a referral for all physicians and therapies based on the said assessment. I believe that given the limited resources here in Barbados as it relates to addressing children with neurodevelopmental delays, I would be able to explore these options in a metropolitan country such as Canada, especially at this very critical stage in her life. This view was even

> recommended by the multidisciplinary team that manages my daughter's care in Barbados."

[11] She expanded on this further in paragraphs [37] and [38] of the said affidavit.

[12] Counsel for the Respondent (Applicant therein) undertook a procedural and evidential mis-step when she attempted to put before the court below certain expert medical reports relative to the minor as an attachment to her written submissions. Counsel for the Appellant (Respondent therein) took issue with this and the trial judge declined, on our understanding, to admit them into evidence or to give them any weight in her determination of this matter.

[13] The Respondent deposes that she was notified in January 2020 of her acceptance into the Fellowship Programme with a proposed start date of July 2020. She deposed further that the Appellant was duly informed. Proceedings were commenced by the Respondent (Applicant therein) in February 2020 and the Appellant consented to the Respondent relocating to Canada for two (2) years, provided his written consent as well as approving, through his attorney, a comprehensive Consent Order relative to the custody and maintenance of the minor child. The full text of this Consent Order dated 14 February 2020 is set out *in extenso* below:

"It is HEREBY ORDERED BY CONSENT THAT

1. The Respondent/Father hand over Barbados Passport No. R322963 and Barbados Minor's Identification Card Registration No. 190125-0082 in the name of the minor child ELLA-ROSE SHONI NICHELLE CADDLE to the Applicant/Mother.
2. The Respondent/Father provide written consent for the said ELLA-ROSE SHONI NICHELLE CADDLE to travel to Canada with the Applicant/Mother for a period of two (2) years with the date of travel to be confirmed by the Applicant/Mother and to such other countries as are reasonably required in accordance with the itinerary.
3. The Respondent/Father have access to the said ELIA-ROSE SHONI NICHELLE CADDLE on Friday the 14th day of February 2020 from 2:00 pm to 7:00 pm.
4. The Applicant/Mother facilitate access to the said ELLA-ROSE SHONI NICHELLE CADDLE by the Respondent/Father by all means of communication possible, including but not limited to Skype, videoconferencing and social media and by periodic visits to the Applicant/Mother's residence or such other mutually appointed place for such access, which includes a period of time in which the Respondent/Father can have access for up to eight (8) hours. Further, The Respondent/Father to have reasonable access to the minor child in the event that the said minor child returns to Barbados.
5. The Respondent/Father pay the Applicant/Mother the sum of three hundred dollars (BDS$300.00) per month for the maintenance and upkeep of the minor child payable on the 30th day of each and every month and commencing on the 28th day of February 2020 plus one-half of all educational, medical, dental and ophthalmic expenses incurred by the Applicant/Mother in respect of the said minor child upon the production to him of copies of the relevant bills, receipts and/or invoices until further order.
6. There be liberty to apply.
7. The matter is adjourned to the 7th day of May 2020."

[14] The Appellant, a commissioned officer of the Barbados Defence Force, left Barbados immediately after consenting in February 2020 to the minor's relocation by July 2020. He deposed that he travelled to Jamaica on national duty. The Respondent deposes that the July relocation date was delayed as a result of delays in the issuance of her work permit from the Canadian authorities. On his return to Barbados in July 2020, the Appellant filed an Affidavit on 30 July 2020 signaling that "he preferred that the minor child remain in Barbados with him in light of the COVID-19 pandemic": paragraph [18] of the Respondent's Affidavit of 15 December 2020. At paragraph [12] of his affidavit of 14 December 2020, the Appellant deposed, *inter alia*,

> "The severe impact of the COVID-19 pandemic on Canada was also a fundamental change in circumstance that was not in my contemplation when the original consent was given."

[15] The trial judge, as evidenced in the record, invited the parties to discuss and resolve this complication which they failed to do between July and November 2020. Both sides appear to suggest lack of cooperation by the other. The Respondent's Application of November 2020 was apparently precipitated by the receipt of her work status approval by the Canadian authorities and the Appellant's now immovable position that the minor should not travel outside

the jurisdiction. The Affidavit of the Appellant of 14 December 2020 confirms that he was so informed by WhatsApp on 2 November 2020.

THE TRIAL JUDGE'S ORDER

[16] The application filed 5 November 2020 was heard between November and up to 8 December 2020. The trial judge delivered her oral decision on 11 December 2020, with the promise of a comprehensive written decision as soon as possible.

[17] It is significant that, despite the failure of the parties to agree, the respective recitals of the content of the oral decision and the trial judge's oral comments on her refusal to stay the order, displayed no material dispute of fact in this regard. For these purposes we reference the Appellant's affidavit filed 14 December 2020. This content is taken from paragraph [10] of the said Affidavit as follows:

> "… The Court observed that both parties have shown love and commitment to the minor child from birth in respect of her medical history and development. She said that in those circumstances issue of custody would always remain joint between parties. She said that the issues for COVID-19 were real and not overstated and that Toronto has been hard hit and was in a lock down but life goes on and quarantine process will be managed by the Respondent. She said that the Respondent has analyzed her situation carefully. She said that as a graduate student the Respondent still yearned to be a mother and to care for her child. She further said that the Respondent's desire to enter her graduate program factored in future medical care and treatment of child. The Court said that she considered this in best interest of minor child. The Court said that the child was close to

the Respondent and still breastfed and relied on the physical emotional support of her mother. The Court said that I also provided that physical, psychological and emotional support for the minor child. She said that there was no doubt that I love the child and was a good father. The Court said that with my limited financial resources, I intended to love and cherish the minor child. She said that my bond with the minor child was developing but was not sufficiently strong as the Respondent's and she felt that the Respondent would have time to spend with the child irrespective of her work duties and education. She said that the parties needed to mend their fences and improve our communication skills. She said that in light of the developed country in which this child has been raised and metropolitan country will be taken to, she said that the child should be permitted to leave the island with the Respondent to reside in Canada with arrangements for access for me to see the child by SKYPE, videoconferencing or social media, for at least twelve hours if the child returns to Barbados or if I go to Canada to visit the child and that I have to provide the Respondent with 48 hours' notice of his visit Canada. After these remarks, the Court then made the following Order:

"1. Permission be granted for the relocation of the minor child out of the jurisdiction of Barbados to Canada to reside with the Respondent for a period of two (2) to four (4) years such travel to take place as soon as possible.

2. That primary care and control of the said child be granted to the Applicant/Mother with liberal access to the Respondent/Father.

3. That joint custody of the minor child remain vested in the Applicant/Mother and the Respondent/Father.

4. That the Respondent/Father pay the Applicant mother monthly maintenance of $400.00 per month for the maintenance and upkeep of the minor child payable on the 30th day of each and every month plus one-half of all educational, medical, dental and ophthalmic expenses incurred on behalf of the said minor child. The said expenses are to be discussed and agreed between the Applicant/Mother and the Respondent/Father before being incurred and the

Respondent/Father receiving adequate notice of no less than 21 days of them being incurred. The Applicant/Mother is to provide to the Respondent/Father the monthly expense for each and every month on or before the 30th day of each month to provide for proper notification and budgeting by the Respondent/Father and she is to produce all relevant bills, receipts and/or invoices on or before the said 30th day of each and every month.

a. That the Applicant/ Mother continue to facilitate access to the said minor child by the Respondent/Father by all means of communication possible, including but not limited to SKYPE, Videoconferencing, Social Media and by periodic visits to a neutral place by agreement or such other place appointed for such access, which includes a period of time in which the Respondent/Father can have access for a period of no less than twelve (12) hours. The Respondent/Father shall provide to the Applicant/Mother at least 48 hours' notice of his intention to travel to Canada to visit and spend time with the minor child at a mutually appointed place in Canada or at his hotel or place of accommodation during the said visits.

5. The Respondent/Father to have liberal access to the minor in the event that the said minor returns to Barbados with him providing 48 hours' notice to the Applicant/Mother of his intention to have access to the minor child such time to be no less than twelve (12) hours.
6. Liberty to Apply."

[18] Paragraph 11 of the Appellant's affidavit, to the extent relevant, spoke to the trial judge's refusal of the stay. For these purposes I refer to the Respondent's paragraph [34] of the Respondent's unchallenged affidavit of 15 December 2020, which states as follows:

> "34. Once the parties had returned to the Courtroom, the Honourable Madam Justice Chase then gave her decision. I

resumed taking notes as she read her decision. She stated that there was a risk of injustice if the Stay was granted. She then made reference to a case to substantiate her position. Based on my notes, she stated the following:

a. The application for the Stay is refused;

b. The best interest and welfare of the child as paramount must be considered;

c. The minor child is aged 22 months and is female;

d. The Applicant/Mother is the primary caregiver and she made arrangements to complete her graduate studies in Canada. Although Canada has an outbreak of Covid-19 and is under lockdown, no country is spared as there is a global pandemic affecting the world including Barbados;

e. The mother has provided satisfactory arrangements for quarantine and daycare including assistance from the minor's maternal Great-Aunt and the minor's maternal grandmother in Canada;

f. The Canadian health facilities will be available to the minor and the minor will be eligible for medical care such as through the Ontario Health Insurance Plan (OHIP);

g. With the Mother as caregiver, the interest of the child will be best served in which said care should continue and remain with the nurturer so as not to break the bond of mother and child at this time in the interest of the child's development."

[19] It was gleaned from the affidavit of the Appellant that the case cited by the trial judge was **Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] All ER (D) 258 [Hammond Suddard]**.

THE APPELLATE FUNCTION AND PROCESS

[20] It is timely at this juncture to remind ourselves of the well-rehearsed principles attendant on this Court in the hearing of an application or appeal, such as in the case before us. Filed in this Court is an appeal, but the more immediate determination is an application for a stay of the trial judge's order in the court below, the trial judge having heard such an application and refused it. For the very obvious reasons evident in the factual matrix outlined above, time is and has been of the essence.

[21] In the recent case of **Rodrigues Architects Limited v New Building Society Limited [2018] CCJ 09 (AJ) [the Rodrigues Case]**, in an appeal from the Court of Appeal of Guyana cited by counsel for the Respondent, our apex Court restated these very important principles. Their Honours chose for those purposes to adopt the words of the Court of Appeal of Trinidad and Tobago in the case of **Attorney General of Trinidad and Tobago v Miguel Regis Civil Appeal No. 79 of 2011** (delivered 13 June 2011), at paragraph [11] when it succinctly stated these principles in the following way:

> "The appellate court will generally only interfere if it can be shown that the trial judge was plainly wrong. Thus, we may say that unless it can be demonstrated for example that the trial judge disregarded or ignored or failed to take sufficient account of relevant considerations or regarded and took into account irrelevant considerations or that the decision is so unreasonable or against the weight of the evidence or cannot be supported having regard to the evidence or that the judge omitted to apply

> or misapplied some relevant legal principle or that the decision is otherwise fundamentally wrong, the Court of Appeal will not generally interfere with the exercise of a court's discretion."

[22] Without a doubt, this extract encapsulates the guiding principles culled from the English authorities and accepted in this jurisdiction, and in the region generally, as the law on this issue. Their Honours, similarly adopted the oft-cited dicta of **Lord Woolf** in **AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507** as follows:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

THE SUBMISSIONS

[23] The primary argument of the Appellant in support of this Court's grant of a stay, is that the refusal of the stay would result in grave injustice and irreparable harm to him as a litigant as it would render any appeal by him against the removal of the minor child nugatory. In short, the minor child would already have been removed from the jurisdiction before the appeal could be heard and the issue of recognition and enforcement of any order of the courts of Barbados would be an issue. He further submitted that the refusal of the stay would not be in the best interest of the minor and could result in irreparable harm to her welfare and wellbeing, as it relates to her health, the

right of access and the development of a relationship with him and other pertinent (but unspecified) considerations. He pointed to alleged evidence of the Respondent's negative attitude towards him and its impact on his access to the minor, the challenging nature of their communication, the dangers of COVID-19 in Ontario and its comparators in Barbados and, *inter alia*, the strength of his appeal.

[24] In contrast, the Respondent predictably submitted that it is in the best interest of the child to accompany her on her temporary relocation, citing the *status quo*, tender age, gender, the special needs and developmental challenges of the minor and the fact that she is still breastfeeding. She submitted that separation from her may be traumatic to the minor and impact her physical, social and emotional development. Additionally, a separation of the minor from her mother would have an impact on her ability to access health care benefits in Canada and the child care fee subsidy available to the Respondent in Canada if the minor accompanies her as a dependent. Her earnings in Toronto would in her opinion continue to ensure that the financial needs of the minor are met.

[25] On the issue of COVID-19, the Respondent deposed that, as a health professional, she is acutely aware of the various health protocols, practices and recommendations, both local and international, as she is trained in the

area of Internal Medicine of which infectious diseases is a sub-specialty. She saw the lockdown in Toronto as a positive rather than a negative when she stated at paragraph [48] of her Affidavit of 15 December 2020:

> "48. The coronavirus is not an endemic but a global pandemic. The lockdown measures in Canada means that there will be less movement of persons in Toronto and as such, this would be an advantage while travelling with the minor."

[26] The Respondent expressed the view that the real motivation of the Appellant is the acrimonious relationship between the parties and not concern for the best interests of the minor.

DISCUSSION AND ANALYSIS

The Applicable Law

[27] The law as it relates to the principles attendant on whether to grant or deny a stay of execution, namely, the balance of convenience and the prospect of success of the appeal are most frequently expressed in circumstances concerning money judgments, as was the case in the earlier referenced **Rodrigues Case**. These broad principles discussed below are, however, with some minor modification, equally applicable to any application for a stay.

[28] Authority for the exercise of this jurisdiction can be found in statute **sections 53(2) (b) (iii)** "an interim order to prevent prejudice to the claims of any party pending appeal" and **61**, *inter alia,* of the **Supreme Court of Judicature Act, Cap. 117A [Cap. 117A]**, and in several provisions of the

Supreme Court (Civil Procedure) Rules, 2008 [CPR], more particularly, **CPR 60** and **62**. It is notable also that **sections 37** to **46** of **Cap. 117A** preserve the equitable jurisdiction of the High Court and Court of Appeal and that an application for a stay of execution invokes the equitable jurisdiction of the Court.

[29] The unfettered discretion of the Court of Appeal to grant a stay of execution is undisputed by all.

[30] The relevant considerations in determining whether to grant or refuse a stay constitute a balancing of the risk of prejudice to one or other or both of the parties (a balance of justice or convenience test) and a determination of whether the appeal has a genuine prospect of success (see **CPR 62.1(2)**). This is the ratio of the *locus classicus* on this issue, **Linotype-Hell Finance Ltd v Baker [1992] 4 All ER 887**, applied by this Court in **IDM Direct Marketing Corporation v The Attorney General et al Civil Appeal No. 4 of 1998** (delivered 16 November 1998). (See also **Wilson v Church (No. 2) (1879) 12 Ch.D. 454**).

[31] It is noted that in the **Rodrigues Case**, their Honours found that **Roy JA** in the Guyana Court of Appeal fundamentally erred when he did not pronounce on the merits of the substantive appeal, but themselves observed that there was a reasonable prospect of recovery in the event that the appeal was

successful. "If he did find that there was a reasonable prospect of recovery he should not have granted a stay of execution": paragraph [15].

[32] The case referenced by the trial judge, **Hammond Suddard** is another English authority also considered as a *locus classicus* in this area of law and applied in **Commissioner of HM Revenue and Customs v BMW AG [2008] EWCA Civ 1028**, **Gator Assets Ltd v NAK Naftogaz Ukrainiy [2007] EWCA Civ 988** and **Combi (Singapore) Pte v Sriram and Another [1997] EWCA Civ 2164** and regionally in **BCB Holdings Limited**, **Belize Bank Limited v The Attorney General of Belize Claim No. 743 of 2009**, **Urban Development Corporation v Jacitar (JA) Limited [2017] JMCA Civ 1**. **Hammond Suddard** provides a more modern formulation of the test, and once again, is more suited to a determination concerning money or commercial judgments but, notwithstanding this, on a general basis and application, the test is a balancing of the risks and the making of a determination in the interest of justice.

[33] These cases were all discussed by this Court in the recent decision of Civil Appeal **Tatem v Tatem Civil Appeal No. 13 of 2019** (delivered 25 September 2019) and **National Housing Corporation v Cameron Wood et al Civil Appeal No. 19 of 2019** (delivered 3 December 2019).

[34] The clear principle emerging from all these cases is that the applicant for the stay has the onus of satisfying the court that, having regard to the particular circumstances of the case and the risk of injustice, a stay should be imposed. (See **paragraph [19]** of the **Rodrigues Case**). Stated differently, the general rule is that there should be no stay or that a stay is not granted as of course.

[35] In the case of **Hammond Suddard**, the United Kingdom Court of Appeal, stated that a court, assuming that the appellant/applicant has shown that he/she has an appeal with a genuine prospect of success, must ask itself these three questions: If a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, 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 able to recover any monies paid from the Respondent?

[36] In some of the cases cited, the terms used are "compelling circumstances" or "exceptional circumstances", or "special circumstances", before a court should exercise its discretion by depriving a litigant of the normal fruits of a judgment in their favour. In **In the Marriage of JA and CQ Kelly (1980) 6 FamLR 741**, a decision of the Family Court of Australia cited by counsel for the Appellant, **Fogarty J** summarized the legal position as follows:

> "… But in the exercise of that discretion one has to bear in mind that the rule is that there shall be no stay. The language used suggests that there must be some exceptional circumstances shown to take the case out of the general rule, and I think that is the proper construction of the rule. If no facts are shown on which the Court can base its discretion then apart from consent there will be no stay. The facts must justify the stay."

[37] We have no doubt that these are special or exceptional circumstances or compelling circumstances, but that in itself does not answer the test of the balance of convenience or risk of injustice. What must overlay any determination of the risk of injustice, is an assessment of what is in the best interests of the minor child. Any determination involving minor children must have as its first and paramount consideration the welfare or best interests of the minor. This is an imperative of the **Minors Act, Cap. 215** at **sections 7** and **8**, reflected in the **Family Law Act, Cap. 214** at **section 43** and the **Maintenance Act, Cap. 216** at **section 20(2)**.

[38] This Court does not consider itself hampered by the unavailability of the trial judge's written decision at the point of determination. Given the immediacy of this matter, despite counsel for the Appellant's assertion in her written submissions of 15 December 2020 that there are varying interpretations as to the reasons of the learned trial judge for refusing the application, a review of the affidavit evidence and written and oral submissions, shows no dispute of fact as to what occurred and what was said by the trial judge. When challenged

by the Court, counsel for the Appellant demonstrated no dispute of fact, merely conflicting opinions as to how the trial judge should have discharged her responsibilities on the factual circumstances presented. In our opinion, there is both an adequate synopsis of the trial and the reasoning of the refusal of the stay to sustain this Court's review of this matter.

[39] It is noted that, in the interest of justice, **CPR 62.1(2)** empowers the Court to depart from the documentary requirements in the hearing of an application or appeal.

Where does the risk of injustice or balance of convenience lie?

[40] The Respondent is the primary caregiver of a 22-month old child with special needs, who is still breastfeeding. The Respondent has made a reasonable life decision to further her education and career that will benefit both her and the minor child. Stated differently, the interests of mother and child are compatible; they do not appear in any way to collide. It is clear from the trial judge's oral comments, that the Respondent satisfied her that she could pursue her career and satisfy her role as primary caregiver to the minor child. It was a *bona fide* decision made before the breakdown of the relationship and clearly not made maliciously as a result of that breakup. We accept that there is no demonstrated intention by the Respondent to exclude the Appellant from the child's life, but that the parties must work hard at repairing their relationship

and communication skills to better facilitate their co-parenting responsibilities.

[41] It is without doubt that the Court gave consideration to the effect on the minor of separation from her non-custodial parent, the Appellant, and gave due regard at all times to the welfare of the child as the first and paramount consideration as shown in the extracts above and quite obviously concluded, after taking a break to give further consideration to the application for a stay, where the balance of justice and convenience lay.

Would a refusal of a stay render the appeal nugatory?

[42] We are not of this view.

[43] First and foremost, the trial judge's order for relocation is only temporary; the Respondent's legal status in Canada is only that of a work permit; approval clearly dependent on a court order from this jurisdiction. Mother and child remain under the jurisdiction of the Barbadian Courts with any change in that legal status dependent, certainly from the demonstrated position of the Canadian immigration authorities, on a return to the Barbadian Courts for suitable amendment to the existing order. The Respondent has not, to date, demonstrated any disregard for the authority of the Barbadian Courts and has through her attorney signalled her respect. Certainly, it is not in the interest of the Respondent to increase her legal woes by being contemptuous of the

authority and jurisdiction of the Barbadian Courts. While note is taken of the argument of counsel of the Appellant with respect to recognition and enforceability of a judgment of a foreign court supported by reference to the case of **Pro Swing Inc v Elta Golf Inc 2006 SCC 52**, this consideration is not in our opinion sufficiently "exceptional" or "compelling" to justify a stay in the particular circumstances of this case, particularly in the context of the best interests of the minor.

[44] The refusal of the stay does not make the appeal nugatory. All live issues are still subject to the jurisdiction of the Barbadian Courts, in particular, the trial court having continued conduct of the matter, even the substantial issue of the care and control of the minor child. There is always liberty to apply in matters involving the welfare of minor children, in recognition of the fluidity of these matters.

CONCLUSION

[45] The ordering of reports and investigation by the Family Services Division and Child Care Board is not a statutory imperative. It was a matter for the discretion of the trial judge should she consider it necessary to enable the court to dispose of the issues at hand. Clearly, the trial judge saw no benefits in delaying the determination of this matter to obtain such a report, if indeed

there was a need for such a report. We can find no error in the trial judge's exercise of her discretion in this regard.

[46] The Appellant has failed to show that the trial judge incorrectly applied the law. The trial judge applied the correct legal principle in the determination of the relocation application (the best interests principle as the first and paramount consideration) as well as in the determination to deny a stay of her order. In the exercise of her discretion in both circumstances, she was not shown to have considered evidence which she should not have considered or failed to consider evidence that should have been considered.

DISPOSAL

[47] This Court is of the considered view that the balance of justice lies in upholding the trial judge's refusal of the stay and so orders. The application is accordingly dismissed.

Chief Justice

Justice of Appeal **Justice of Appeal**