JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 2/2015

APPLICATION NO 8/2015

BETWEEN	**FERRNAH JOHNSON-BROWN (Executor of purported last Will and Testament of Leonard Lloyd Brown, Deceased and Beneficiary named therein)**	**APPLICANT**
AND	**MARJORIE McCLURE (By her Personal Representative Joan Williams)**	**RESPONDENT**

Leroy Equiano instructed by the Kingston Legal Aid Clinic for the applicant

Mrs Helene Coley-Nicholson for the respondent

10, 17 March and 30 April 2015

IN CHAMBERS

PHILLIPS JA

[1] This is an application by Ferrnah Johnson-Brown (the applicant), for a stay of execution of the judgment of Rattray J delivered on 5 December 2014 and for an injunction to restrain Marjorie McClure, who is represented herein by Joan Williams ('the respondent') and her servants and/or agents from dealing with certain property the subject of the judgment.

Background

[2] The facts of the matter can be stated very briefly, and have been gleaned from the reasons from the judgment of Rattray J as the record of appeal has not yet been filed and I have therefore not had sight of the documents filed in the court below and the notes of evidence of the hearing before Rattray J.

[3] Marjorie McClure (now deceased, and the claimant in the court below) and the late Leonard Brown (whose estate was the defendant in the court below), shared a common law relationship which commenced in or about 1976. They lived together as husband and wife, for many years, but were never married to each other. During this relationship Ms McClure purchased two properties: one at 18 Throne Circle, Queen Hill, Kingston 19 in the parish of Saint Andrew (Throne Circle property) in 1977, and the other at Lot 7 Forest Hills in the parish of Saint Andrew (Forest Hills property), in 1979, and endorsed both their names on the respective Certificate of Title for each property as joint tenants. It was her evidence th at all the funds for the purchase of the properties came from her save for $12,000.00 which was contributed by Mr Brown to assist in the discharge of the mortgage in respect of the Throne Circle property.

[4] A break down in the relationship between the parties occurred in the 1980's and in December 1984 Ms McClure applied to the Supreme Court for an order declaring her lawful interest in both properties. On 1 October 1987 the parties entered into a consent order that would transfer Ms McClure's interest in the Throne Circle property solely to Mr Brown and transfer Mr Brown's interest in the Forest Hills property solely to Ms McClure.

[5] At the time of the consent order construction at the Throne Circle property, which Ms McClure stated had commenced in 1981, was incomplete. In fact, it was Ms McClure's evidence that throughout much of their relationship Mr Brown depended on her and her business ventures for his income. Initially, she had operated a supermarket and a garment store in the Red Hills area in Jamaica, and subsequently she had worked as a nurse in the United States of America, whereas, for most of that period, Mr Brown had not been gainfully employed.

[6] Subsequent to the consent order, and before the parties had taken any steps to carry out the terms of the order, Ms McClure indicated that Mr Brown was interested in resuming their relationship. He was sorry, she said, for the breakdown of the same, and the parties agreed to resume living together as man and wife, and to share the two properties as joint tenants. It is clear that neither party took any steps to transfer their respective interests in the properties in accordance with the consent order of the court.

[7] There was proof of the resumption of the relationship as evidenced by the following:

1. Ms McClure's significant financial contributions to the completion of the Throne Circle property as evidenced by the various receipts and a notebook exhibited to her affidavit filed in the proceedings filed before Rattray J. Ms McClure's evidence that she had used her own money to complete the construction of the house which was a five bedroom two storey house, which the parties lived in together, and it was her understanding that they owned the property as joint tenants, which she thought was his understanding also.

2. In 1992 Ms McClure applied for and received legal guardianship of Mr Brown's twin daughters Ana and Nereida in the Family

Court of the State of New York where both girls lived with her and would accompany her on visits to Jamaica where they would stay at the Throne Circle property.

3. In December 1993 both Ms McClure and Mr Brown attended the offices of the Victoria Mutual Building Society and collected the duplicate Certificate of Title for the Forest Hills property.

4. Ms McClure placed Mr Brown's name on her National Commercial Bank Gold Club account in or about 1999.

5. Mr Brown's mother lived with Ms McClure in the United States of America during the 1990's. Upon the death of Mr Brown's mother, Ms McClure assumed most of the funeral costs attendant therewith, and the funeral programme referred to her and Mr Brown as "son and daughter".

6. In 2004, Ms McClure with Mr Brown's consent contracted Hawkeye Electronic Security Limited to provide security for the Throne Circle property.

[8] Neither party tried to give effect to the consent order until 2005 when Mr Brown through his attorney-at-law, Mr S Earl O Hamilton, wrote a letter to Ms McClure asking her to honour the consent order.

[9] Mr Brown died on 26 January 2006. After Mr Brown's death Ms McClure discovered that he had been married to the applicant since 7 May 2004, and that the applicant was claiming ownership of both the Throne Circle and Forest Hills properties. Mr Brown's will named the applicant as the executor of his estate and he devised both the Throne Circle and the Forest Hills properties to her absolutely.

[10] Ms McClure on 14 June 2006, filed a fixed date claim form, 2006 HCV 2103, against the applicant asking for, *inter alia*, a declaration that she was the lawful owner

of the Throne Circle property. The trial lasted four days from 26 to 29 May 2008. An oral judgment was given by Rattray J on 5 December 2014 and the written judgment on 9 December 2014.

[11] Rattray J accepted the submission of counsel for the applicant, that the consent order in 1987 effectively severed the joint tenancy between the parties in respect of the Throne Circle property. He also accepted that by virtue of the said order sole ownership of the Throne Circle property passed to Mr Brown and the sole ownership of the Forest Hills property to Ms McClure.

[12] Having found that the joint tenancy was severed, Rattray J relied on the principle of proprietary estoppel to declare that Ms McClure was the lawful owner of the Throne Circle property. He stated that proprietary estoppel occurs:

> "...where one party is encouraged by another to spend money improving the property of that other, to their detriment, on the representation or encouragement of the owner, that that other party will acquire rights in or over the said property. In such a circumstance, it would be unconscionable for the owner to be permitted to insist on his legal rights..." (paragraph 22)

[13] Rattray J held further that it was trite law, in respect of which no authority was needed, that an order of the court once made must be obeyed, and that "[t]he stability and integrity of the judicial system is underpinned by the knowledge that judgments and Orders of the Court must be complied with and are final, subject to the avenues of appeal available to the parties: A Consent Order in effect is a contract that has received the stamp of finality of the Court". He however stated that the relevant point for

consideration was whether Mr Brown had made representations to Ms McClure as she claimed causing her to act to her detriment?

[14] Rattray J found and accepted as truthful Ms McClure's assertion that Mr Brown had made representations to her as a result of which they made an agreement which she acted on in good faith. She resumed their relationship, and completed the construction of Throne Circle. She took care of Mr Brown's daughters, and in 1992, applied for and was granted legal guardianship of his twin daughters in the Family Court of the State of New York where they were born, and they lived with her in the United States of America and travelled with her to Jamaica when she came on visits to the island and stayed with her at the Throne Circle property, as mentioned previously. Mr Brown represented to her that he wished their relationship to continue and that she should forget about the court order. Rattray J found that Ms McClure had relied on these representations to her financial and other detriment and that the applicant could not "seek to shield herself behind the Consent Order of the Court". He found that this matter was "precisely the type of matter that the application of the doctrine of proprietary estoppel is ideally suited for." He therefore found that Ms McClure had acquired all rights over the Throne Circle property and denied that Mr Brown had any rights to the said property. Mr Brown was therefore barred from devising that property to the applicant in his will.

[15] Rattray J ordered:

> "1. A Declaration is granted that the said Marjorie McClure is the lawful owner of all that parcel of land comprised in

Certificate of Title registered at Volume 1117 Folio 879 of the Register Book of Titles otherwise referred to as 18 Throne Circle, Queen Hill, Kingston 19 in the parish of Saint Andrew.

2. A Permanent Injunction is granted restraining the Defendant, Ferrnah Deloris Brown by herself or her servant and agents or otherwise howsoever, from trespassing on the said property or any property of the Claimant or from threatening, harassing or besetting the Claimant at her said property or any property of the Claimant at any time.

3. There be a stay of execution of the judgment for a period of six weeks from the date hereof.

4. Access to the premises at 19 [sic] Throne Circle is granted to the Claimant between 4 to 6 p.m. on December 5, 2014. Further access to the Claimant on giving the Defendant, through her Attorney-at-Law, at least 2 days notice of her intention to further inspect the said property.

5. Costs to the Claimant to be taxed if not agreed."

[16] On 13 January 2015 the applicant filed notice and grounds of appeal challenging Rattray J's decision and findings of facts. The grounds of appeal essentially claimed that the learned trial judge had erred because:

(i) The contributions made by Ms McClure for the development of the Throne Circle property after the consent order could not extinguish Mr Brown's sole proprietorship of the property or his equitable interest in the same;

(ii) The representations of Mr Brown could not permit the property to be treated by the parties a joint property as Mr Brown's words could not amount to a reversion of their positions to joint tenants as existed before the consent order, or a disentitlement of Mr Brown's rights to the property. Additionally, there was no certainty in the representations so as to create a trust, so that Mr Brown would have held the property in trust for Ms McClure; there

was also further uncertainty as the consent order related to two properties, and the equitable interest in both properties would have to be, and had not been, defined; and in any event Ms McClure's interest in the property would be limited to 50% of the same or such percentage which would be appropriate and consistent with her expenditure;

(iii) The finding that the joint tenancy had been recreated after the consent order required the four unities to exist and they did not; it required strong and compelling evidence to change property rights; the consent order remained in place until a further order by the courts, which required a fresh action to do so; additionally as the letter of 5 April 2005, had severed the joint tenancy, the principle of *jus accrescendi* was not applicable;

(iv) The delay in the delivery of the judgment rendered the same unsafe, particularly in circumstances in which: (i) the issues were not overly complex,(ii) the oral and the written judgment were given six years and seven months after the last day of the trial; (iii) the learned trial judge gave no reasons for the gross delay in the delivery of the judgment; (iv) the learned trial judge was likely to have made mistakes in the factual evidence, as the judgment had been delivered so long after the facts had been adduced into evidence.

The applicant also complained that the delay in the delivery of the judgment left the parties in a state of uncertainty, which was difficult bearing in mind that the applicant resided at the property. Further, the delay also deferred settlement of the estate of Mr Brown.

[17] On 16 January 2015 the applicant filed a notice of application seeking the following orders:

"1. That execution of the judgment of the Honourable Mr. Justice Andrew Rattray delivered on the 5th December,

2014 be stayed pending the hearing and determination of the appeal filed on 13th January, 2015.

2. That the respondent **MARJORIE McCLURE (by her personal representative Joan Williams)** and her servants and/or agents be restrained from transferring, charging, encumbering or otherwise dealing with or disposing of all that parcel of land comprised in the Certificate of Title registered at Volume 1117 Folio 879 of the Register Book of Titles otherwise referred to as 18 Throne Circle, Queen Hill, Kingston 19 in the parish of Saint Andrew until the trial of this action or until further order of this Honourable Court."

[18] The grounds of the application are *inter alia* (a) that the appellant has a real prospect of succeeding on appeal; (b) that she currently occupies the property and has spent sums to repair and maintain the same; (c) that the property had been devised to her in the will of Mr Brown, her late husband, and she was fearful that without an injunction, the respondent would transfer and or dispose of the property which would cause her irreparable financial harm; (d) that she was prepared to give an undertaking to pay any damages consequent on the grant of the injunction; (e) that it would be in the interest of justice and save time and expenses if the stay of execution of the judgment was granted, and would also be in keeping with the overriding objective.

Submissions

[19] Mr Leroy Equiano, counsel for the applicant, relied on authorities such as **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 and **Capital Solutions Ltd v Terryon Walsh and the**

Administrator General of Jamaica and Karlene Bisnott [2010] JMCA App 4 to support his submission that execution of the judgment should be stayed because the applicant's appeal has a good prospect of success and there is a greater risk of injustice to the applicant if the judgment was not stayed than there is to the respondent's estate if it were stayed.

[20] In relation to the prospects of success of the appeal, counsel for the applicant submitted that Rattray J failed to address Mr Brown's equitable interest in the property and no reasons were advanced as to how proprietary estoppel could operate to totally extinguish Mr Brown's said equitable interest. Counsel further contended that Rattray J had also failed to consider the effect of Mr Brown's instruction to his attorney-at-law Mr Hamilton to give effect to the consent order. He maintained that there was not sufficient evidence to support the learned judge's findings.

[21] Counsel for the applicant also submitted that there was a greater risk of injustice to the applicant if the stay was not granted because the applicant has lived at the Throne Circle property since 14 May 2004 and she therefore faced a risk of being displaced, and of depletion in Mr Brown's estate if the stay was refused. On the other hand, counsel asserted, Ms McClure, who is now deceased, had an address in the U.S.A., as does the respondent, and so would not suffer any inconvenience if the stay was granted.

[22] Mrs Helene Coley Nicholson, counsel for the respondent, also relied on **Hammond Suddard** to submit that the applicant's appeal lacks a good chance of

success because the grounds upon which the appeal were filed are wholly unmeritorious. She submitted that the various actions of both Ms McClure and Mr Brown subsequent to the consent order meant that the four unities in respect of a joint tenancy, namely possession, interest, title and time were present which would have confirmed the recreation of a joint tenancy. The creation of this joint tenancy was also demonstrated by the fact that considerable sums were expended on the construction of the Throne Circle property with Mr Brown's consent after the consent order. The fact that in 2004, the respondent with Mr Brown's consent contracted Hawkeye to provide security at the Throne Circle property showed counsel argued, that Ms McClure was in possession of the property. Thus, counsel concluded that Ms McClure would be entitled to the sole ownership of the Throne Circle property, either through the principle of proprietary estoppel as the learned judge had found, or through the principle of *jus accrescendi*, being the sole surviving joint tenant. In either situation, counsel argued, Mr Brown would have had no interest in the property.

[23] Counsel further contended that the risk of injustice to the applicant was non-existent for the following reasons:

1. The respondent has no intention of dealing with or disposing of the property until the court has determined the appeal.

2. It is also untrue that the applicant lived at the Throne Circle property since May 2004.

3. A further stay of the proceedings would aggravate the injustice suffered by the respondent who already has had to wait nearly seven years to obtain judgment in the matter.

4. An undertaking could be given not to deal with the property in any way until the appeal is determined.

Discussion

[24] A single judge of the Court of Appeal has the power to "stay the execution of any judgment or order against which an appeal has been made, pending the determination of the appeal" (Court of Appeal Rule 2.11(1)(b)).

[25] The principles governing the exercise of a judge's discretion to stay the execution of a judgment have been examined in several authorities. In **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887, per Staughton LJ, it was held that:

> "...if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution". (page 888)

[26] The test advanced in **Linotype-Hell** was approved by the Court of Appeal in **Flowers Foliage and Plants of Jamaica Ltd and Others v Jamaica Citizens Bank Limited** (1997) 34 JLR 447 where Rattray P at page 453 said:

> "The principle stated by Staughton LJ is more in accord with an acceptable concept of equity and justice, a relevant ingredient for the exercise of judicial discretion once it is established that there are these triable issues which would be denied the judicial scrutiny absent in a summary judgment."

[27] However the more acceptable consideration has been stated in **Hammond Suddard** which was relied on by both counsel for the applicant and the respondent. In

Hammond Suddard the court applied a more modern approach to the test and stipulated that in any application for a stay of execution of the judgment the applicant had to produce

> "cogent evidence that there was a real risk of injustice if enforcement is allowed to take place pending appeal... [and] that there is [no] significant risk of the appeal being stifled if a stay is refused." [page 2065]

[28] The modern interpretation advanced in **Hammond Suddard** has been cited with approval in **Milford Trading Company Limited v Garth Pearce** SCCA No 31/2009 delivered 28 May 2009, **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2010] JMCA App 25 and **Caribbean Cement Company Ltd v Freight Management Limited** [2013] JMCA App 29.

[29] In **Milford Trading Company Limited** Harris JA at paragraph 10 said:

> "On an application for a stay of execution, a court, in the pursuit of its discretion, is required to engage itself in a balancing exercise. As to whether the court will grant a stay is dependent on all the circumstances of the case. The critical question however, is whether there is risk of injustice to either party or both parties in the granting or the refusal of the stay."

[30] In **Jamalco (Clarendon Alumina Works) v Lunette Dennie** McIntosh JA (Ag) (as she then was) went even further to state that:

> "...The interests of justice require another consideration namely, whether the applicant has some prospect of succeeding in the appeal. That consideration is directly linked to the interests of justice because ...if the appeal had no prospect of success, it would not be in the interests of

justice to deprive the respondent of the fruits of the judgment." (paragraph [45])

[31] Lawrence-Beswick JA (Ag) in **Caribbean Cement Company Ltd v Freight Management Limited** summarized all these cases to show that:

> "...in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:
>
> (a) The applicant's prospect of success in the pending appeal.
>
> (b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.
>
> (c) The financial hardship to be suffered by the applicant if the judgment is enforced." (paragraph [16])

[32] When read together these authorities show that a judge's exercise of discretion in the grant or refusal of a stay of execution of the judgment depends on the following:

1. The applicant's prospect of success in the pending appeal.

2. The real risk of injustice to one or both parties if the judgment is enforced pending the appeal.

Prospect of Success

[33] There remain a number of unanswered questions following a reading of Rattray J's judgment as follows:

1. Was it reasonable for Rattray J to conclude that the joint tenancy had been severed?

2. Whether the agreement to reconcile after the consent order created a tenancy in common or a joint tenancy, and in the latter case could it be said that all the four unities were present after the consent order was made and once the parties reconciled?

3. The issue of whether once the joint tenancy had been severed the parties could only hold the property as tenants in common, there being no automatic reversion subsequently to holding the property as joint tenants.

4. Whether or not Mr Brown had an equitable share in the property.

5. Could proprietary estoppel operate to totally extinguish Mr Brown's equitable interest, if he had such an interest in the Throne Circle property?

6. The effect of Mr Brown advising his attorney, Mr Hamilton to write to Ms McClure, which he did, seeking to give effect to the consent order.

7. The issue of whether a court order, once made, can be ignored and discharged by conduct recognized by arrangement between the parties.

8. The effect of the inordinate delay in the delivery of the judgment in excess of six years and seven months.

[34] I am mindful of the fact that this matter is currently before the Court of Appeal, and that I should therefore be constrained not to give details in respect of my opinion on the merits of the appeal. However, I am aware that the applicant is challenging several findings of fact of the learned trial judge and it is settled law that the appellate court is hesitant to interfere with the findings of fact of a judge sitting alone as he had the opportunity to observe the witnesses and hear all the evidence, which opportunity

this court does not have, and so for this court to intervene, it will be a matter for the applicant to endeavour to show that the learned judge has gone wrong in law, has misapplied the law to the facts or has taken irrelevant matters into consideration.

[35] That notwithstanding, the presence of the above unanswered questions means that there are issues that require the benefit of judicial determination which will have an impact on the success of the applicant's appeal. The issues require in my view, clarification by the court, and I would therefore find in the circumstances that the grounds of appeal appear to have some chance of success, and are worthy of debate before the court.

Risk of Injustice

[36] It is necessary also to address the question of the risk of injustice to either party, and in my view, there is a greater risk of injustice to the applicant than to the respondent's estate if the stay of execution of the judgment is refused. The applicant, in her affidavit in support of the application for the stay of execution of the judgment, claims that she has lived at the property since May 2004 until present, is 62 years old, retired and of ill-health. Ms McClure in her affidavit sworn 8 June 2006, at paragraph 14, said that she owned four houses in the United States of America, three of which gave her rental income and at paragraph 1 of the same affidavit she listed the Forest Hills property as her true place of abode. Consequently, the respondent's estate has the benefit of numerous properties while the applicant only appears to have in the main, the benefit of the Throne Circle property.

[37] I acknowledge the request being made to balance the injustice suffered by the respondent by having to wait six years and seven months for a judgment. However, similar acknowledgment must be given to the applicant who has also endured the same injustice by virtue of the delay.

[38] Acknowledgment is given to counsel for the respondent's offer of an undertaking not to deal with the property without a court order, and I have taken that situation into consideration, but that statement was not a direct written undertaking from the respondent and so I hesitate to place full reliance on the same. In fact, the applicant is asking the court in addition to the stay of execution of the judgment to grant an injunction until trial. That is within the power of the single judge (Court of Appeal Rule 2.11(1)(c)), and I am satisfied, as stated previously, that there are serious issues to be tried. Based on the comments which I have already made in relation to the risk of injustice, the balance of convenience would lie with the applicant as she is residing at the property, coupled with the fact that the respondent has not indicated an intention to reside there, and indeed the estate has other properties in the United States of America, where the respondent resides, available to her.

[39] Additionally, the respondent has stated through her counsel that she does not have any intention to part or deal with the property before the determination of the appeal. It therefore seems in the interests of justice, that the applicant should be permitted to stay in the Throne Circle property until the determination of the appeal. I would however recommend an early hearing of the appeal, and given the particular

wording of the injunction prayed for, and given Ms McClure's substantial contribution to the development of the property and the judge's finding as to her entitlement, I would permit the respondent access to the property intermittently with reasonable notice to the applicant, in order to ensure that no waste occurs there. The injunction would also be made until the determination of the appeal or until further order of the court, for if the applicant does not pursue the appeal with dispatch the order can be reviewed. I would also make no order as to costs.

Conclusion

[40] The absence of clarity in respect of certain serious issues which require judicial determination has increased the applicant's prospect of success on appeal. There is a greater risk of injustice to the applicant than there is to the respondent's estate if a stay of execution of the judgment is not granted. Consequently, I make the following orders:

1. There shall be a stay of execution of the judgment of Rattray J pending the outcome of the appeal or until further order.
2. That **MARJORIE McCLURE (by her personal representative Joan Williams)** and her servants and/or agents be restrained from transferring, charging, encumbering or otherwise dealing with or disposing of all that parcel of land comprised in the Certificate of Title registered at Volume 1117 Folio 879 of the Register Book of Titles otherwise referred to as 18 Throne Circle, Queen Hill, Kingston 19 in the parish of Saint Andrew until

the determination of this appeal or until further order of this Honourable Court.

3. The respondent is permitted to gain access to the Throne Circle property intermittently, until the determination of the appeal or until further order of the court, with reasonable notice to the applicant.
4. There shall be no order as to costs.