JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00012

APPLICATION NO COA2019APP00061

BETWEEN	**EFFIE MIGNOTT**	**APPLICANT**
AND	**NEHEMIAH ROSE**	**1ST RESPONDENT**
AND	**YVETTE ROSE**	**2ND RESPONDENT**

Miss Janet Mignott for the applicant

Carlton Williams instructed by Williams, McKoy & Palmer for the respondents

14, 21 June and 5 July 2019

IN CHAMBERS

MORRISON P

[1] This is an application for a stay of execution pending appeal of a judgment given by Y Brown J (Ag) ('the judge') on 27 December 2018.

[2] Before the judge, the respondents sought an order for specific performance of an agreement for the sale of property known as Lot 8, part of Clarendon Park, Toll Gate in the parish of Clarendon ('the property') against the applicant. The property is registered at Volume 1290 Folio 729 of the Register Book of Titles.

[3] The respondents' case was to the following effect[1]. The applicant and her late husband had agreed to sell them the property in or around 1994, initially for the price of $1,000,000.00. But this sum was subsequently increased by agreement between the parties to $2,500,000.00, payable over a period of 15 years, on condition that the respondents, as purchasers in possession, pay the yearly sum of $12,000.00 to the applicant and her late husband. Pursuant to this agreement, on 13 November 1994, the respondents paid the sum of $300,000.00 to the applicant, who issued a receipt therefor. The respondents then took possession of the property on Christmas Day 1994. On 27 February 2009, the respondents paid a further sum of $500,000.00 to the applicant, who attributed $120,000.00 of this amount to lease payments for the period 15 November 1999-14 November 2008 and $180,000.00 to a payment on account of the sale of the property. The respondents also relied on the receipt issued by the applicant in respect of the payment of $500,000.00. The respondents remained in exclusive and uninterrupted possession of the property from 1994. And, on the strength of the promises and assurances by the applicant and her late husband that the property would be sold to them at the agreed price of $2,500,000.00, they had expended considerable sums of money to their detriment on the construction of a dwelling house on the property.

[4] The applicant's defence[2] was a denial that any concluded agreement for sale of the property had ever been arrived at. The applicant averred that, by a lease agreement

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[1] See amended particulars of claim filed 15 December 2017
[2] See amended defence and counterclaim filed 14 March 2018

dated 16 November 1994, the applicant had in fact leased the property to the respondents at an annual rental of $12,000.00 for 15 years. The figure of $1,000,000.00 referred to by the respondents represented the price at which the applicant had offered to sell the property to the respondents, but they had rejected the offer on the ground that they could not afford to buy at that price. The applicant denied payment to her by the respondents of the sum of $300,000.00. She averred that the receipt dated 13 November 1994 relied on by the respondents was, in effect, a sham, as it had been issued to the respondents to facilitate their obtaining financing for the proposed sale of the property to them, but that no money had in fact passed between them. The respondents were often in arrears of rent under the lease agreement. The receipt for $500,000.00 in 2009 incorporated $120,000.00 for arrears of rent owed by the respondents for 10 years, as well as $380,000.00 suggested by the applicant to the respondents as a down payment for purchase of the property at the new price of $2,500,000.00. However, the respondents again declined to accept this offer – as well as two subsequent offers made by the applicant – and remained in arrears of rent right up to May 2015, by which date the total amount owed by the respondents to the applicant on account of arrears of rental and taxes was $372,000.00. The respondents were at all times in possession of the property as lessees and not as purchasers and the applicant had at no time encouraged or acquiesced in the improvement of the property without ownership of same.

[5] The applicant accordingly counterclaimed for the said amount of $372,000.000. The applicant also counterclaimed for an order for recovery of possession of the property

from the respondents, on the basis that, despite they having been served with notice to quit on 23 May 2015, they had failed to do so.

[6] The judge found for the respondents and granted the order for specific performance of the agreement to sell the property to them. The judge directed that the applicant should transfer the property to the respondents upon payment by them of all outstanding sums due to the applicant in respect of the sale price of $2,500,000.00 and arrears of payments for use and occupation of the property. In the event that the applicant should neglect fail to take all necessary steps to enter into an agreement to sell and complete the sale of the property to the respondents within 90 days of the signing of the agreement for sale, the registrar of the Supreme Court was empowered to do all things required to achieve same.

[7] Regrettably, there is no written record of the judge's reasons for her judgment. However, in the amended notice of appeal filed on 25 April 2019, the applicant very helpfully provides the following outline of the judge's reasons:

> "1. The [Applicant's] credibility was not strong.
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> 2. The [Applicant] encouraged the Respondents to build their house and acquiesced in its construction and took no steps for over 15 years to stop their building of the house and that the serving if [sic] the Notice to Quit by the Appellant around 2015 came too late.
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> 3. The Lease Agreement did not meet the formalities required and that there was no nexus between the signing page and the other parts of the document.
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> 4. The Lease Agreement was not acceptable to the Court because it was undated and unstamped and it had white out

on it, the explanation for which regarding its use by the [Applicant's] church brother was not acceptable to the Court.

5. The Sale Agreement was not reliable and that the only documents acceptable to the Court were the receipts for the payment of money accepted into evidence.

6. The [Applicant] was aware that the house was being constructed by the Respondents and she went with the 2nd Respondent Mrs. Rose to buy building materials, contrary to what the [Applicant] said.

7. There is overwhelming evidence that the [Applicant] agreed to sell the property to the Respondents."

[8] The applicant now challenges the judge's decision on the following grounds:

"The learned Judge erred notwithstanding finding that the Agreement for sale was not reliable declared a sale on receipts which in the evidence of the Respondents was purported to have been pursuant to the Agreement and an Amendment of the Agreement.

The learned Judge erred in that even if receipt dated February 22, 2009 is accepted as the basis of the Appellant's agreement to sell the land in the absence of agreement to accept rental in lieu of interest, rental agreed prior to the purported agreement for sale was the basis for payment to the Appellant for use and occupation of the land.

The learned Judge erred in ignoring the Lease before the Court and to have any or sufficient regard for the fact that it constituted the nature of the document executed by the parties in lieu of an Agreement for Sale as alleged by the Respondents and which agreement was found to be unreliable by the learned Judge.

The learned Judge erred in that in accepting that the alleged Agreement for Sale purported to be stolen by the Appellant was unreliable entertained the Respondents claim in the Court of Equity as an alternative to plead the Respondents [sic] entitlement to an interest in the Appellant's Land.

> The learned Judge erred in finding that it was sufficient for the Respondents to establish entitlement to an interest in the Appellant's land on the basis that the Appellant encouraged the Respondents to build their house and acquiesced in its construction and took no steps for over 15 years to stop their building of the house and that the serving if [sic] the Notice to Quit by the Appellant around 2015 came too late notwithstanding that in the absence of an Agreement for Sale the Respondents were the tenants of the Appellant."

[9] The applicant seeks a stay of execution of the judgment pending appeal. The grounds of her application are as follows[3]:

> "1. The Appellant applies to a single Judge in Chambers pursuant to Rules 2.10 and 2.11 and will rely upon Rule 2.14 and 2.15 of the Court of Appeal Rules, for an Order to stay the execution of the judgment in the Supreme Court action pending the determination of this Appeal.
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> 2. The stay is necessary to preserve the status quo and the Applicant's interest therein pending the determination of the Appeal.
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> 3. That if the stay is not granted, the Appeal will be rendered nugatory as there would be no use in proceeding to challenge a Judgment which the Appellant is mandated to pay whilst challenging it.
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> 4. If the Judgment of Miss Justice Y Brown (Ag) is carried into effect and the Appellant pays the costs, it is not likely that the costs will be repaid.
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> 5. The Appellant is more than ninety two (92) years and she is a United States citizen.
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> 6. The Appellant has a real prospect of successfully appealing the orders made by the learned judge.

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[3] See further amended application for stay of execution pending appeal filed on 19 June 2019

> 7. That whilst the Appellant will suffer irreparable harm, prejudice and loss if the stay of execution is refused, the Respondent will suffer none should he execution of this Judgment be stayed pending the Appeal of this matter.
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> 8. That the interest and administration of justice will not be compromised by the stay of the Judgment pending the determination of the Appeal.
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> 9. It is in the interest of justice that a stay of execution be granted."

[10] The application was initially supported by a single affidavit sworn to by the applicant herself and filed on 11 March 2019. In that affidavit, the applicant states simply that she has been advised by her attorney-at-law that she has good grounds of appeal and that those grounds are as set out in the grounds of appeal filed on her behalf.

[11] In an affidavit filed on 4 June 2019, the second named respondent, Mrs Yvette Rose, opposes the grant of a stay of execution of the judgment. Mrs Rose points to the respondents' fear that the property is under threat of sale by a mortgagee under powers of sale contained in three outstanding mortgages. She states that, if the property were sold, "I would have lost my house and the fruit of the judgement of this Honourable Court". Further, that the applicant "has no reasonable ground whatsoever to appeal the decision … and is merely using the process of appeal as a means of delay, in order to facilitate the sale of the premises to satisfy her outstanding indebtedness".

[12] Mrs Rose's affidavit was met by two supplemental affidavits from the applicant filed on 10 June and 20 June 2019 respectively. The burden of these affidavits was to demonstrate that two of the three mortgages referred to by Mrs Rose have been

discharged and that the third, albeit not yet formally discharged, has also been repaid in full.

[13] And finally, in a brief fourth affidavit, also filed on 20 June 2019, the applicant largely repeats what she says in her first, which is that she has been advised by her attorney-at-law that she has good grounds of appeal and that those grounds are as set out in the grounds of appeal filed on her behalf.

[14] In further response to Mrs Rose's concerns about the threat of sale by a mortgagee under powers of sale contained in three outstanding mortgages on the property, Miss Janet Mignott, who appeared for the applicant on this application, was able to assure me that she is now in possession of the Duplicate Certificate of Title to the property and that she is actively pursuing the formal discharge of the third mortgage. I can therefore say at once that, based on the applicant's supplemental affidavit and Miss Mignott's assurances, I am fully satisfied that there is not now any imminent threat of a sale of the property by the mortgagee under the powers of sale in the three mortgages.

[15] So the question is whether the applicant is otherwise entitled to a stay of execution of the judge's judgment. Both sides accept that, as rule 2.14 of the Court of Appeal Rules 2002 makes clear, except so far as the court below or a single judge of this court or the court itself may direct, an appeal does not operate as a stay of execution.

[16] It is also common ground that, in order for a successful litigant to be deprived of the fruits of the judgment of the court below, the applicant for a stay must first show that he or she has an appeal with some prospect of success. As Clarke LJ observed in

Hammond Suddard Solicitors v Agrichem International Holdings Ltd[4], "the evidence in support of an application for a stay needs to be full, frank and clear". Once an appeal with some prospect of success has been shown, it will be a matter for the court to decide, as a matter of discretion, where the greater risk of injustice will lie if a stay is or is not granted[5]. As I observed in **Channus Block and Marl Quarry Ltd v Curlon Orlando Lawrence**[6], to which Mr Williams for the respondents referred me, this is "essentially a balancing exercise, in which the courts seek to recognise the right of a successful claimant to collect his judgment, while at the same time giving effect to the important consideration that an appellant with some prospect of success on appeal should not have his appeal rendered nugatory by the refusal of a stay".

[17] In a wide-ranging submission, Miss Mignott contends that the applicant has an appeal with a reasonable prospect of success. In this regard, she submits that the two receipts upon which the judge so heavily relied "showed certain challenges". She points out that (i) they were unstamped; (ii) they were in fact supplemental to an agreement for sale which the judge rejected as being "unreliable"; (iii) if in fact the 1994 agreement to which the respondents refer is found to be unreliable, then it must mean that their attempt to rely on such an agreement was a show of unclean hands, which should therefore disentitle them to the equitable relief they seek; and (iv) one of the receipts bore the signature of the applicant alone, when she in fact owned the property jointly

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[4] [2001] EWCA Civ 2065, per Clarke LJ at para. 13
[5] Ibid, at para. 22
[6] [2013] JMCA App 16, at para. [10]

with her late husband. Miss Mignott also submits that the judge erred in rejecting the lease document upon which the applicant relied. And finally, she submits that the judge was wrong to apply the principle of proprietary estoppel to this case, since it was not shown that the respondents had satisfied the criteria for the grant of such equitable relief.

[18] As regards the discretionary matters for my consideration, Miss Mignott points out that the respondents are already in occupation of the property, so a stay will cause them no prejudice. The applicant on the other hand will suffer irreparable harm if a stay is not granted and the property is transferred to the respondents before the appeal can be heard.

[19] In opposing the grant of a stay, Mr Williams submitted that there was an abundance of evidence which justified the judge's conclusions. In any event, the judge, who had the advantage of seeing and hearing the evidence as it unfolded before her, found that the applicant was not a credible witness and this court would be unlikely to disturb the judge's finding in this regard. Further, the evidence provided by the applicant in support of the application did not satisfy the criterion of being "full, frank and clear". In all the circumstances, the applicant has failed to show that she has an appeal with a reasonable prospect of success.

[20] From the summary of applicant's claim and the respondents' defence in the court below, I think that the issues before the judge gave rise to at least the following questions of fact. First, whether the parties had arrived at a concluded agreement for sale in respect of the property. Second, if the answer to the first question was yes, what was the agreed

price? Third, what were the terms of payment? Fourth, did the applicant and her late husband, whether by way of explicit assurances or tacit acquiescence, encourage the respondents in the belief that the property would ultimately be conveyed to them? And fifth, if the answer to the fourth question is yes, did the respondents alter their position, whether by the expenditure of money or otherwise, to their detriment?

[21] It is clear from the outline of the judge's decision set out at paragraph [7] above, in particular her very first finding that "[t]he [applicant's] credibility was not strong", that she preferred the account of the facts given by the respondents over that given by the applicant. This finding provided the basis for the judge's answers to all five questions set out in the foregoing paragraph.

[22] In my respectful view, the judge's conclusions on the first and third questions, that is, whether there was an agreement for sale and, if so, on what terms, were plainly supported by the two receipts signed by the applicant which were placed before her. The first receipt was in respect of a payment of $300,000.00 by the respondents on 15 November 1994, and the second was the receipt for $500,000.00 paid by the respondents on 27 February 2009. The first receipt stated clearly that the payment was a "deposit on Lot 8, Clarendon Park Meadows", while the second spoke to payment of rental arrears of $120,000.00 and a payment "on a/c sale of Lot 9" of $380,000.00. Both receipts supported the respondents' oral evidence that the applicant had agreed to sell the property, while the second also confirmed their evidence that the agreement was that the purchase price was to be payable over a period of 15 years.

[23] Despite Miss Mignott's rather faint attempt to suggest that the reference to "Lot 9" in the second receipt created an element of uncertainty, it is clear from the applicant's own case at trial that this must have been a mistaken reference to Lot 8, which is the property in issue in this case. Nor does anything turn, in my view, on the fact that both receipts bore the signature of the applicant only, there being no question from the whole tenor of the applicant's case at trial that her dealings with the respondents were carried out on behalf of her late husband and herself.

[24] It is well established that an appellate court will not lightly disturb a trial judge's findings of fact. In order to do so, as Lord Hodge observed in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**[7], "[t]he court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions". In this case, as it seems to me, despite Miss Mignott's valiant efforts, no basis has been shown to suggest that the judge's preference for the respondents' credibility over that of the applicant was sufficiently misplaced so as to warrant this court's interference with her findings.

[25] But the agreement alleged by the respondents in this case was, of course, an agreement for the sale of land, in respect of which the general rule is that no action can be brought "unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorised"[8]. In this case, the judge found that the

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[7] [2014] UKPC 21, para. 12
[8] Section 4 of the Statute of Frauds

agreement for sale upon which the respondents relied was "not reliable". However, despite the judge's description of the receipts as, "the only documents acceptable to the Court", it is not entirely clear whether she therefore considered them to be a sufficient memorandum in writing for the purpose of the Statute of Frauds.

[26] But the respondents explicitly relied on the doctrines of part performance and proprietary estoppel.[9] Both Miss Mignott and Mr Williams referred me to the decision of this court in **Annie Lopez v Glen Brown and Dawkins Brown**[10], in which both doctrines were discussed. In my judgment in that case, with regard to the question of part performance, I referred[11] to the statement in Gray & Gray's Elements of Land Law[12] that "[t]he doctrine of part performance render[s] a contract enforceable, even in the absence of a written memorandum, where the claimant ha[s] done acts which, on a balance of probability, [are] referable to and explicable only in terms of the existence of a contract in relation to land".

[27] And, on the question of proprietary estoppel, I referred[13] to the oft-cited case of **Ramsden v Dyson**[14], in which Lord Kingsdown said the following[15]:

> "If a man, under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing under an expectation, created or encouraged by the landlord,

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[9] See Amended Particulars of Claim, para. [15]
[10] [2015] JMCA Civ 6
[11] At para. [60]
[12] 5th edn, 2009, para. 8.1.40
[13] At para. [65]
[14] (1866) LR 1 HL 129
[15] At page 170

> that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

[28] In this case, the judge found as a fact that the applicant (i) "encouraged the Respondents to build their house and acquiesced in its construction and took no steps for over 15 years to stop their building of the house"; and (ii) was aware that "the house was being constructed by the Respondents and she went with the 2nd Respondent Mrs. Rose to buy building materials". In these circumstances, it seems to me that the judge was plainly entitled to find for the respondents on the basis of both part performance and proprietary estoppel. I am therefore of the view that the applicant does not have an appeal with a reasonable prospect of success against the resultant order for specific performance and that on that basis alone the application for a stay must be refused.

[29] On the question of costs, Mr Williams asked for an order for costs in the respondents' favour and Miss Mignott did not feel able to resist such an order. Accordingly, my order is that the applicant should pay the respondents' costs of the application, such costs to be taxed if not sooner agreed.