[2025] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2021CV00055

BETWEEN	**DEAN TENNANT**	**APPELLANT**
AND	**BARRINGTON HEMANS**	**RESPONDENT**

Hugh Wildman instructed by Hugh Wildman & Company for the appellant

Ms Vanessa C Wallace instructed by JNW Taylor & Associates for the respondent

26, 27 November 2024 and 25 July 2025

Contract – Oral Agreement for sale of land – Breach of contract – Claim for specific performance – Defence of laches – Whether the claim is statute-barred by virtue of the Limitation of Actions Act, section 36

F WILLIAMS JA

[1] I have read the draft judgment of Laing JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

SIMMONS JA

[2] I, too, have read the draft judgment of Laing JA (Ag) and agree with his reasoning and conclusion.

LAING JA (AG)

[3] This is an appeal against the judgment of A Thomas J ('the learned judge'), delivered on 28 May 2021, in which she made the following orders:

"1. The [Respondent] is granted specific performance as follows:

(i) The [Respondent] is entitled to repossession of the property registered at volume 1264 folio 46 of the Registered [sic] Book of Titles forthwith.

(ii) The sale of the property registered at volume 1264 folio 46 of the Registered [sic] Book of Titles to include the transfer of the title to Mr. Hemans is to be completed within 180 days of today, May 28th, 2021.

(iii) The attorney-at-law for the [Respondent] is to have carriage of sale

(iv) The Registrar of the Supreme Court is hereby empowered to sign any document to give effect to orders (i) and (ii) where any party fails or refuses to do so.

2. The [Respondent] is awarded damages in the sum of $3,400,000.00.

3. Interest is awarded at the rate of 6% per annum, to be calculated on each annual sum.

4. Cost[s] to the [Respondent] to be agreed or taxed."

[4] The essence of the appellant's complaint is that the learned judge erred in finding that there was an agreement for sale of the property because the contract between himself and the respondent was a tenancy agreement, the terms of which provided that the appellant would lease the property registered at Volume 1264 Folio 46 of the Register Book of Titles ('the property') to the respondent. The respondent would take possession of the property pursuant to the terms of the lease agreement.

[5] This court also considered an application by the appellant to adduce fresh evidence.

The background - proceedings in the court below

A. The respondent's case in the court below

[6] The respondent, Barrington Hemans, was the claimant in the action in the Supreme Court. He asserted that between 2000 and 2001, he lent £16,500.00 in cash to the appellant, who was the father of his sister's three children. In 2002, he entered into an oral agreement with the appellant for the sale of the property at an agreed price of £75,000.00, the equivalent of which was $5,500,000.00. It was further agreed that the money loaned to the appellant would be converted to a part-payment towards the purchase price of the property. At the time the agreement was made both parties resided in England.

[7] The respondent asserted that between 2001 and 2002, he paid the sale price in full and was put in possession of the property, which was an apartment located at Oaklands Apartments in Saint Andrew, in about April 2002. After completing the payment, in 2002, while on a visit to Jamaica, both he and the appellant visited the offices of the appellant's attorney-at-law, Mr Robin Smith (now deceased) ('Mr Smith'), for the purpose of effecting the transfer of the title to the property to the respondent. The appellant claimed that both parties signed the transfer in the presence of Mr Smith's secretary, Mrs Enid Veronica Burgher ('Mrs Burgher'). The respondent paid a retainer of $20,000.00 to effect the transfer and got a receipt. The respondent thereafter returned to England while the appellant remained in Jamaica.

[8] A few months passed and, having not received any update on the transfer, the respondent said that he sought the assistance of United Kingdom ('UK')-based attorneys, Stennett and Stennett, to contact Mr Smith. It was then discovered that Mr Smith had died sometime in September 2002, and the instrument of transfer could not be located. The respondent was assured, however, by the appellant that he need not worry because the apartment was already his. The respondent stated that he continued to be in effective possession of the property between April 2002 and September 2015 through family

members, friends and by leasing the property. During this time, neither he nor his tenants were interfered with by the appellant.

[9] The respondent claimed that in late September 2015, the appellant indicated that he wanted to reclaim the property and return the $5,500,000.00 the respondent had paid to him. On 27 September 2015, the appellant took possession of the premises by giving the respondent's tenant notice to vacate and putting a new tenant in possession. As a result of this breach, the respondent lodged a caveat against the title to the property and filed a claim form and particulars of claim on 4 January 2016 against the appellant in the Supreme Court for specific performance of the agreement and for damages in respect of rent the appellant has been collecting since repossessing the property in 2015.

B. The evidence of Ms Burgher in the court below

[10] Mrs Burgher's testimony was that she was employed to Robin Smith, attorney-at-law, as a legal secretary. Mr Smith died on 29 September 2002. She recalled that some time in 2002, the appellant and the respondent attended the offices of Mr Smith in relation to a transaction involving the sale of an apartment at Oaklands Apartments (which the learned judge accepted was the property). She said that the appellant related to her what he wanted to have done, and she informed Mr Smith, who gave her instructions. Pursuant to those instructions, she prepared an agreement for the sale of the property. She stated that the agreement was signed by the appellant and the respondent and was witnessed by her. She also stated that the respondent paid $20,000.00 for a retainer, and she gave him a receipt.

[11] Ms Burgher testified that the agreement was sent to the stamp office and was assessed but was not stamped.

C. The case of the appellant in the court below

[12] The appellant, in his defence, denied that he entered into an oral agreement to sell the property. He alleged that the respondent suggested that he would lease the property, pay the appellant and sublet it. The respondent's children's mother would then

collect the rent from that sublease to support the children in Jamaica and the appellant would, in turn, be paid in England the equivalent of the rent. This, he alleged, was to provide a more convenient method for the respondent to support his children rather than having to send money to Jamaica on a regular basis. He further stated that the agreement was also that the respondent would pay the maintenance fees for the property. It was on this basis, the respondent was given possession of the property, fully furnished with the appellant's furniture.

The application to adduce fresh evidence

[13] On 10 June 2021, the appellant filed a notice of appeal in this court appealing the judgment in the court below ('the notice of appeal'). While the hearing of the notice of appeal was pending, on 3 April 2024, the appellant filed a notice of application for court orders to adduce fresh evidence on the hearing of the appeal.

[14] Prior to the consideration of the substantive appeal, we addressed the application to adduce fresh evidence. The fresh evidence sought to be adduced before this court was in the form of a witness statement of Ms Veleta Pryce, Assistant General Manager of Tax Administration of Jamaica ('TAJ') outlining the stamp duty and transfer tax process as well as the request from the Counter-Terrorism and Organized Crime Investigation Branch ('C-TOC') and the findings of TAJ that:

> "*The Revenue Administration Information System (RAIS) was thoroughly interrogated and no records were found relative to assessment of duties for apartment 304, Block C, Oakland Apartment, situated at 111 ½ Constant Spring Road, Kingston and registered at Volume 1264 Folio 46 of to [sic] the transfer of titles.*"

[15] On 26 November 2023, we refused the application to adduce fresh evidence. The purpose of adducing the witness statement of Ms Pryce was to establish that there were no records at the Stamp Duty and Transfer Tax Division of the TAJ to show that an assessment of duties was done in relation to the property as a part of the process to facilitate the transfer of its registered title.

[16] The application was supported by the affidavit of the appellant. He asserted in his affidavit that the evidence contained in Ms Pryce's witness statement was not known to him or his attorney-at-law at the trial. He averred that this evidence came to light due to the collaborative investigation by C-TOC and TAJ after the trial. He further asserted that the document goes to the heart of the issue at trial, which was whether there existed a sale agreement for the property, and would have a significant bearing on the findings of the learned judge.

[17] The respondent strongly opposed the application. He contended that the document would not adversely impact the decision made by the learned judge as the document contains material errors as to the address of the property. It was also his contention that the document could have been reasonably procured with due diligence and could have been available for the trial. In the circumstances, it was submitted that the appellant did not satisfy the criteria for permission to adduce fresh evidence to be granted.

[18] In treating with the fresh evidence application, this court considered the principles laid down in the well-known case of **Ladd v Marshall** [1954] 1 WLR 1489. **Ladd v Marshall** has established that the court will exercise its discretion to receive fresh evidence only if the following conditions are satisfied:

1. the evidence the applicant seeks to adduce was not available and could not have been obtained with reasonable due diligence at the trial;

2. the evidence is such that, if given, it would probably have had an important influence on the outcome of the particular case, though it need not be decisive; and

3. the evidence must be such as is presumably to be believed or apparently credible.

[19] We concluded, having considered the submissions of both counsel, that the evidence did not satisfy the three limbs of the test in **Ladd v Marshall**. The information contained in Ms Pryce's witness statement could have been procured prior to the trial. Additionally, the statement referred to interrogation of the Revenue Administration Information System ('RAIS') which Ms Pryce indicated was introduced in 2016, and that previously an executed document related to a property transaction, which was submitted under the cover of a stamping requisition would be lodged and registered under the Stamp Office Information System ('SOIS'). The witness statement of Ms Pryce did not indicate whether the SOIS was also interrogated, and she did not positively assert that the absence from the RAIS of records relating to the property meant that no documents relating to that property had been submitted to the TAJ.

[20] In these circumstances, her witness statement could not conclusively establish that no assessment was undertaken in respect of the property, and consequently her evidence could not support the position of the appellant that no agreement for sale was signed by him at Mr Smith's office. Accordingly, we concluded that the witness statement had no evidential value and did not satisfy this important condition for the grant of the application for fresh evidence to be received.

The appeal

[21] By the notice of appeal, the appellant challenged the learned judge's decision on the following grounds:

> "a. The learned trial judge failed to appreciate that based on her findings in favour of the Respondent/Claimant, she ought to have denied the Respondent/Claimant specific performance on the basis that the Respondent/Claimant was guilty of laches which would have precluded him from any such equitable remedy.
>
> It is submitted that the failure of the Respondent/Claimant to take any steps to transfer the property in his name having purportedly executed this agreement with the Appellant/Defendant between

2001 and 2002, and did not take any action until 2015, is consistent with the doctrine of laches as the Respondent/Claimant would have acted unreasonably and would have caused the Appellant/Defendant to be in ownership of the property for a protracted period of time to his detriment.

b. The learned trial judge failed to appreciate that the failure of the Respondent/Claimant to take any steps to transfer the property in his name between 2001/2002 to 2015 until when the Appellant/Defendant indicated to him that he was about to sell the apartment to a third party, constitutes a breach of section 36 of the **Limitation of Actions Act** which effectively bars him from any equitable remedy.

c. The learned trial judge failed to appreciate that by the Respondent/Claimant's action to register a caveat on the Appellant/Defendant's property in 2015, having being [sic] told by the Appellant/Defendant that the Appellant/Defendant intended to sell the property, is indicative of the Respondent/Claimant's admission that the Appellant/Defendant is the true owner of the property.

d. The learned trial judge failed to appreciate that the Respondent/Claimant is not entitled to specific performance or any other remedy because of the Respondent/Claimant's inequitable conduct which has caused the Appellant/Defendant to act to his detriment and believe that he is the owner of the property.

e. The learned trial judge erred in law in making findings which are unreasonable having regard to the evidence, which clearly shows that the Appellant/Defendant allowed the Respondent/Claimant to remain in occupation pursuant to a tenancy agreement and not pursuant to a sales agreement, hence the reason for the Appellant/Defendant not taking any steps to claim ownership until 2015, when the Appellant/Defendant informed the Respondent/Claimant he was going to sell the property to a third party.

f. The learned trial judge erred in law in finding that the purpose of the visit to Mr. Robin Smith's office was to

execute a sale agreement and transfer without the Respondent/Claimant being able to produce any evidence of that sales agreement and transfer.

It is submitted that the burden of proof was on the Respondent/Claimant to produce evidence of the sale agreement and transfer which would have been in existence from 2002 to his knowledge and the knowledge of his witness Ms. Burgher, who would have been in possession of the sale agreement and transfer up to the time of the death of Mr. Robin Smith and thereafter. This burden was not discharged by the Respondent/Claimant.

g. The learned trial judge erred in law in failing to appreciate that the mere fact that the Respondent/Claimant having found out about the death of Mr. Robin Smith in 2002 and did nothing to have the property transferred in his name, is indicative of his acceptance of the Appellant/Defendant being the true owner of the property.

h. The learned trial judge failed to appreciate that unlike in the present case, the facts in **Steadman v Steadman** on which the learned trial judge placed much reliance in finding the existence of a [sic] oral contract, are clearly distinguishable, as in **Steadman v Steadman**, there was no dispute that the wife and husband had entered into an oral agreement about the family property and when the husband sought to enforce that oral agreement, the wife reneged.

It is submitted that in the instant case, there was a clear dispute as to whether there was in fact any oral agreement between the Respondent/Claimant and the Appellant/Defendant for the sale of the property, as the Appellant/Defendant maintains that for the entire time the arrangement was in placed [sic] it was a tenancy agreement and not for a sale of the property agreement.

It is further submitted that the fact that the Respondent/Claimant remained in occupation through his tenant for a protracted period for some thirteen (13) to fourteen (14) years after the purported

> execution of the sales agreement and transfer at Mr. Robin Smith's office, clearly demonstrates that he accepted that the arrangement was consistent with a tenancy agreement." (Emphasis as in the original)

[22] These grounds of appeal, inappropriately, also contain a portion of the appellant's submissions. However, these grounds can conveniently be summarised, and the appeal can be resolved by considering the following two issues:

1. Whether there were sufficient acts of part performance referable to an oral agreement for the sale of the property; and

2. Whether there are any bars to the respondent obtaining the remedy of specific performance, in particular:

    a. Laches, and

    b. The Limitation of Actions Act.

Acts of part performance referable to an oral agreement for the sale of the property

The appellant's submissions

[23] The fulcrum of the appellant's position was that the oral agreement between the parties was an agreement for the rental of the property and not for its sale. Counsel for the appellant, Mr Wildman, submitted that the evidence supported this position.

[24] Mr Wildman also submitted that it is settled law, as evidenced in cases such as **Steadman v Steadman** [1974] 2 All ER 977, that a purchaser of land under an oral contractual agreement for sale is permitted to rely on that contract to establish his claim to the property, provided that he can demonstrate that the contract existed as a matter of law and that there was evidence of part performance on his part. Where these conditions are satisfied, equity will grant specific performance to the purchaser against the vendor who refuses to complete a contract.

[25] Applying these principles to the present case, he argued that for the respondent to assert his beneficial interest to the property, he must show sufficient acts of part performance consistent with an oral agreement for sale. Counsel submitted, however, that there was no evidence on which the learned judge could properly have found there were sufficient acts of part performance in keeping with the principle in **Steadman v Steadman**. He argued that the burden of proof rested on the respondent to establish sufficient acts of part performance, which he had failed to discharge. In supporting his submission, counsel pointed to the evidence of the respondent going to Mr Smith's office to execute a written agreement when an alleged oral agreement was already in place, and the fact that between 2002 and 2015, no steps were taken to perfect the alleged oral agreement. Counsel further submitted that without the evidence surrounding the events that took place at Mr Smith's office, there would be no additional evidence to support the existence of an oral agreement for the sale of the property or acts of part performance related thereto.

[26] It was also Mr Wildman's contention that the mere fact that the respondent was in possession of the property did not discharge his burden of proving acts of part performance, since on the evidence it was also possible to find that the respondent was in possession by virtue of a tenancy agreement. This, he submitted, demonstrated that the evidence of a contract for sale before the court was equivocal, unlike in the case of **Steadman v Steadman,** where there was no dispute as to the nature of the oral agreement. For this reason, he submitted that the burden of establishing part performance has not been discharged by the respondent, and, therefore, the findings of the learned judge were not supported by the evidence. Further, he contended that the learned judge misunderstood/misinterpreted the evidence on this issue as to who bore the burden of proof to establish the existence of a contract.

[27] Counsel raised a challenge to the learned judge's reliance on the evidence of Mrs Burgher to support her finding that there was a contract between the parties. He submitted that no credibility ought to have been attached to her evidence as Mrs Burgher

had failed to adequately identify the appellant, whom it was alleged had signed the written contract for sale in her presence. In addition to this, counsel argued that her evidence that the executors took over management of the estate of Mr Smith, including the law office, contradicted that of the respondent, who claimed that he was unaware of any successor being appointed to manage the operations of Mr Smith's office.

[28] On the foundation of these submissions, Mr Wildman contended that a finding by the learned judge that there was an oral contract for sale was erroneous.

The respondent's submissions

[29] In response, it was advanced by Ms Wallace, on behalf of the respondent, that there was no issue of a trust before the court, but simply one of a breach of an oral contract between the parties.

[30] Ms Wallace further submitted that based on the evidence before the learned judge, she was entitled to conclude that there were sufficient acts of part performance indicative of the existence of an oral agreement for the sale of the property. Counsel emphasised that for acts to qualify as conclusive evidence of part performance, they must be unequivocal and clearly referable to the existence of the alleged contract. In support of this submission, she relied on the cases of **Elizabeth Maddison v John Alderson** (1883) 8 App Cas 467 ('**Maddison v Alderson**') and **Britain v Rossiter** (1879) 11 QBD 123.

[31] It was argued that the learned judge identified and relied upon several elements of the evidence to conclude that there were sufficient acts of part performance consistent with an agreement for sale. These included the respondent's payment of the full purchase price, his immediate possession of the property subsequent to the agreement and his continued and active possession from 2002-2015 when the appellant recovered possession. Additionally, there was before the learned judge, the respondent's acts of ownership, namely the payment of the relevant taxes, execution of extensive repairs, leasing of the property and collection of income for himself. Counsel also highlighted that

by the appellant's own admission, the respondent made the maintenance payments between 2004-2015 and undertook all the plumbing, electrical works and repairs.

[32] Counsel asked this court to note that the learned judge considered the evidence of Mrs Burgher, who corroborated the evidence of the respondent that the parties visited the office of Mr Smith to formalise the agreement and effect the transfer. She addressed the arguments of the appellant surrounding the credibility of Mrs Burgher but asserted that she had no personal interest in the matter and had no motive to fabricate evidence in favour of the respondent, as both parties were clients of Mr Smith. Counsel highlighted that the learned judge considered her apparent neutrality and found her to be a credible and convincing witness.

[33] Counsel contrasted this with the appellant's case, which she argued was marked by several factual misrepresentations. It was particularly notable, she argued, that although the appellant by his evidence indicated that he rented the property to the respondent, he was unable to speak to any action for the recovery of rent which he claimed was owed to him. Furthermore, there was no attempt by the appellant to recover his furniture that was in the property, which he alleged was leased to the respondent. Counsel further highlighted what she said was a material contradiction in the appellant's evidence, namely, the appellant's assertion that he entrusted the respondent with the keys to the property as his agent, which contradicted his initial assertion that the respondent was his tenant.

[34] Ms Wallace also took issue with the appellant's denial of ever meeting Mrs Burgher, arguing that he never disputed the fact that Mrs Burgher held the position of Mr Smith's secretary at the time. Counsel submitted that this discrepancy was considered by the learned judge, and she found that the appellant was not a credible witness in all the circumstances. Therefore, in light of the totality of the evidence, counsel argued that the assertion of an agreement for a tenancy could not be sustained and that the respondent, with the appellant's knowledge, engaged in actions consistent with ownership of the property.

[35] In conclusion, counsel contended that the appellant had failed to identify any legal errors, whether in fact or law, that the learned judge made in coming to her decision that required the overturning of her decision by this court. Counsel contended that the learned judge, after considering all the evidence and arguments, came to her decision on a well-reasoned analysis of the facts of the case and the law. Counsel also argued that the appellant failed to reference any new issues that were not considered by the learned judge but instead reiterated arguments that were already litigated and ventilated in the lower courts. In light of this, she submitted that the findings of fact of the learned judge ought not to be overturned. Reference was made to the case of **Terrence O'Gillvie v R** [2022] JMCA Crim 56, in underlining an appellate court's reluctance to overturn a lower court's findings on primary facts.

Analysis

[36] The Statute of Frauds (1677) ('the statute'), section 4 provides:

> "No action shall be brought whereby to charge … the defendant … upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them … unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The statute was received into the law of Jamaica and continues to be applicable (see section 41 of the Interpretation Act). The Civil Procedure Rules ('CPR') do not use the term "action" and, in the context of the statute, an action is to be interpreted to mean a "claim". In **Maddison v Alderson,** it was said that the Statute of Frauds "does not avoid parol contracts but only bars the legal remedies by which they might otherwise have been enforced".

[37] A useful starting point of this analysis is an examination of the law as enunciated in the case of **Steadman v Steadman**, which both counsel accepted as accurately reflecting the applicable law. In **Steadman v Steadman,** the parties were a couple

whose marriage had been dissolved, and the wife was seeking a declaration, under section 17 of the Married Women's Property Act 1882 (UK), that their former matrimonial home was jointly owned, and that it be sold. The husband was in arrears of maintenance, and, before the hearing, they made an oral agreement to settle the claim for maintenance and for the division of the matrimonial home. The husband asserted that this agreement provided that the wife would transfer her interest in the house to him for £1,500.00, the maintenance order for the wife would be discharged, the child's maintenance order would continue, and the arrears would be remitted, except for £100.00. The Magistrates made orders in accordance with this agreement.

[38] The husband paid the £100.00 and his solicitor prepared and sent the deed of transfer to the wife, who later refused to sign it. The wife restored the proceedings and argued that the oral agreement did not include the matrimonial home and did not include any agreement for the husband to become the sole owner thereof. She asserted that the oral agreement was unenforceable under section 40(1) of the Law of Property Act 1925 (UK), which requires contracts for the disposition of land to be in writing. The husband claimed the wife had compromised her claim by her oral agreement, which was enforceable due to part performance under section 40(2).

[39] The husband was successful before the Court of Appeal and, on the appeal by the wife to the House of Lords, by a majority (4:1), it dismissed the wife's appeal and held that the oral agreement between the parties was enforceable due to sufficient acts of part performance, despite the lack of a written contract as required by section 40(1) of the Law of Property Act 1925. The majority (Lords Reid, Simon, Dilhorne, and Salmon) agreed that the oral agreement made on 2 March 1972, was a single, indivisible contract. They held that acts of part performance must be assessed in context. If the acts pointed, on a balance of probabilities, to the existence of a contract and are consistent with the alleged agreement, they suffice. It was held that in the circumstances, the payment of £100.00 and the preparation of and sending the deed of transfer to the wife, in conjunction with the announcement of the oral agreement to the magistrates, were

sufficient acts of part performance of the oral agreement. It was confirmed that payment of money can, in appropriate circumstances, constitute part performance, thereby rejecting the older, stricter view that it never could. Importantly, it was determined that the acts of part performance need not be exclusively referable to the land-related term of the agreement, it is enough that they point to the existence of some contract consistent with the one alleged.

[40] The central issue in many cases, as it is in the instant appeal, is whether the acts of part performance are sufficiently referable to the relevant contract. This will be a fact that will fall for the determination of the trial judge, and there may be instances where there will be reasonable disagreement between judges as to whether the acts of part performance have satisfied the required threshold. For purposes of illustration, it is interesting to note that in **Steadman v Steadman,** Lord Morris of Borth-y-Gest, based on his distillation of the facts, was of the opinion that none of the husband's acts, taken individually or together, met the strict standard of part performance.

[41] In this regard, it is necessary to conduct the analysis in this appeal while being guided by the principle that an appellate court will not disturb a finding of fact of a judge at first instance unless it is shown to be plainly wrong. In the case of **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 at para. [7], Brooks JA (as he then was) reviewed the leading authorities and confirmed the position of this court in reviewing decisions of the lower court. His analysis is worth reproducing as follows:

> "[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in **Beacon Insurance Company Limited v**

Maharaj Bookstore Limited [2014] UKPC 21. The Board stated, in part, at paragraph 12:

> '...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole**. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions**. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo KokBeng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.'" (Emphasis as supplied by Brooks JA)

[42] It is also well settled that this court should be even more cautious to interfere where the tribunal, whose decision is being reviewed, reached its conclusion after having had the benefit of seeing and hearing first-hand, witnesses who gave conflicting testimony.

[43] The learned judge demonstrated that she appreciated that although the respondent asserted that there was a written agreement, which he could not produce, he was seeking to prove the terms of the oral agreement for the sale of the property that had been reduced to writing. However, the learned judge noted that the respondent was

nevertheless relying on the conduct of the parties, including their visit to Mr Smith's office and the preparation of the written agreement for sale as evidence of the existence of an oral agreement. She preferred the evidence of the respondent and accepted that they did attend the office and signed a sale agreement. The learned judge also found that the evidence of Mrs Burgher corroborated the respondent's evidence in this regard.

[44] The learned judge quite accurately identified the principles to be extracted from **Steadman and Steadman** and, at para. [83], noted the following:

> "[83] In light of the foregoing, I am obliged to examine the surrounding circumstances in order to determine the nature of the contractual relationship that was created between the parties, that is whether there were acts of part performance referable to a tenancy or a contract for the sale of land, Having considered the totality of the evidence I find that the evidence of part performance presented on the Claimant's case is consistent with his averment that he entered into an oral agreement with the Defendant for the purchase of the furnished apartment . I find that there was no serious contradiction on the Claimant's case as it relates to the material particulars. However, I find some serious contradictions on the Defendants case which, contrary to the position taken by Mr. Wildman, are inconsistent with the existence of a tenancy agreement between the Claimant and the Defendant. I find the version of events presented by the Claimant to be more credible than that of the Defendant. The reasons for this conclusion are hereby noted in the ensuing discussion of the evidence."

[45] I do not find it necessary to reproduce in detail the learned judge's analysis of the evidence, but I will identify some key points. She found that the act of going into possession was sufficient to amount to part performance and accepted the respondent as a credible witness as regards his evidence of the reason he was put into possession, that is, pursuant to an oral agreement for the sale of the property.

[46] This was a case in which each party advanced a different version of the agreement that had been reached between them. In the absence of written terms, it was a contest of credibility. The learned judge conducted a detailed analysis of all the facts on which the parties joined issue. The payment of money is a factor which may prove to be a sufficient act of part performance of the oral agreement for a sale of property. In relation to the payment by the respondent of £5,500.00 ($357,500.00) in 2001, which was admitted by the appellant, the learned judge found that it was referable to an agreement for the sale of the property. She reasoned that it defied common logic and was incredulous that the respondent would have paid what approximated to one year's rent in advance, for rental. This finding by the learned judge was important in that she concluded that the possession by the respondent of the property was explicable based on the existence of an agreement for sale and not one for a lease, as asserted by the appellant.

[47] In this case, there is no reasonable basis on which it can be asserted that the findings of the learned judge are not supported by the evidence. The learned judge carefully assessed the evidence and, on critical issues where there was a dispute of fact, she preferred the evidence of the respondent, as she was entitled to do. I find that there is no basis to interfere with the learned judge's decision that the acts of part performance relied on in this case were sufficient to enable the respondent to overcome the absence of a written contract for the sale of the property.

The defence of laches

The appellant's submissions

[48] It was also counsel's submission that the respondent was barred from asserting any equitable right to the property by the equitable defence of laches. He argued that the respondent having failed to take any steps to consummate the alleged oral contract for over 13 years and the property remaining in the hands of the appellant, it would be unconscionable after such a long period for him to assert his alleged beneficial right to the property.

[49] Counsel submitted that the applicability of the defence of laches to this particular case would not be affected by the nature of the respondent's claim as a beneficiary under a trust, which is what counsel characterised the nature of the respondent's claim to be. He asserted that support for this submission may be found in the case of **Patel and others v Shah and others** [2005] EWCA Civ 157, where the court accepted that the defence of laches applied to the beneficiaries under the trust and could disentitle them from any interest if the delay was unconscionable. Reference was also made to the Privy Council case of **The Lindsay Petroleum Company v Prosper Armstrong Hurd, Abram Farewell and John Kemp** (1874) LR 5 PC 221 ('**The Lindsay Petroleum Company**'), which counsel submitted supported his arguments because the Board held that laches applied as a defensive equitable principle.

The respondent's submissions

[50] On this issue, Ms Wallace submitted that the defence was not applicable. She argued that the respondent, at all times, since the creation of the agreement in 2002, asserted his ownership over the property. She also submitted that the transaction between the parties was not a strict business transaction but an informal one between persons with a familial relationship. Due to this, she posited that it could be inferred that the respondent relied on the assurances from the appellant that there was no urgency in effecting the transfer immediately, as he was already in possession and benefitting from rental income. Furthermore, she argued that in 2002, there was no interference on the part of the appellant to merit the intervention of the respondent until in 2015, when the appellant repossessed the property. In that same year, the respondent lodged a caveat on the title and litigated the matter. Therefore, she submitted that the respondent did not stand by and allow the appellant to repossess and reclaim the property he had purchased and to defeat his interest as owner.

Analysis

[51] In **The Lindsay Petroleum Company**, at pages 239 to 240, Lord Selbourne made the following and oft-repeated statement of the principle of laches:

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

The statement highlights that the two essential elements of the defence of laches are delay, in the sense that the claim was made after an unreasonably long period after the cause of action arose, and prejudice to the defendant who is deploying the principle in aid of his position.

[52] This court in **Leo Hogg v Neville Evans** [2024] JMCA App 22 ('**Hogg**') recently considered the application of the principles of laches in a case in which a defendant to a claim for specific performance was asserting that, because of the delay by the claimant in seeking the remedy, he had a solid defence of laches. At para. [17] Brooks P made the following observation:

> "[17] These submissions, similarly, cannot be accepted. Claims for breaches of contract for land are subject to the general principle that time is not of the essence in such a contract unless the parties so stipulate, either initially or during the contract (see **Raineri v Miles and Anor** [1980] 2 All ER 145). The other principle that renders these submissions untenable is that, for laches, time does not run against a person who is in possession of the land, which is the subject of the claim for the equitable remedy. Where possession has been granted to a purchaser 'the court will strain its power to enforce a complete performance' (see **Parker v Taswell** (1858) De G & J 559, 571; 44 ER 1106 and **Leiba v Thompson** (1994) 31 JLR 183, 189D-E)." (Emphasis as in the original)

[53] As was the case in **Hogg**, there was no dispute as to the fact of the respondent's possession of the property. There is also no disputing that the appellant reasserted his possession of the property in or about September 2015.

[54] The learned judge did not attach much weight to the respondent's delay in seeking to enforce the sale agreement, which she opined was a result of the "special circumstances" of the death of Mr Smith, who was acting for both parties and them not being aware of anyone taking over the operations of his practice. The learned judge also accepted the evidence of the respondent that the appellant told him he need not worry as the apartment was already his and the learned judge was of the view that it was comprehensible that the respondent would not be perturbed about these circumstances as he was indeed in possession of the property and was obtaining the benefit of the rental income.

[55] The learned judge was entitled to accept the evidence, which she did, as accounting for the delay in the respondent bringing the claim, including the reassurance provided by the appellant. Accordingly, there was ample support for the learned judge's conclusion on the evidence that the defence of laches could not avail the appellant.

The Limitation of Actions Act

The appellant's submissions

[56] Mr Wildman argued that if the transaction was an agreement for the sale of the property, it would be caught by section 36 of the Limitation of Actions Act. He submitted that the defence of laches is distinct from a defence founded on the statute of limitations and the appellant could avail himself of both defences. In that regard, he posited that the respondent, having failed to assert his beneficial interest within the six-year limitation period specified by section 36 of the Limitation of Actions Act, his interest would be defeated. He noted also that pursuant to section 34 of that Act, it would apply to an action by a beneficiary under a trust. He submitted that the combined effect of both sections 34 and 36 of the Limitation of Actions Act would disentitle the respondent from

asserting any alleged beneficial claim, and it is only where an allegation of fraud is made out that the statute would not apply, and fraud was not being relied on in this case.

The respondent's submissions

[57] On the limitation ground, counsel's position is similar to that expressed under the defence of laches. She submitted that in 2002, it was not necessary to bring an action against the appellant. There was no breach at that time, and the respondent was still in active possession and deriving all the benefits from the property. She further argued that in 2002, after the death of Mr Smith, the respondent was also assured by the appellant that the property belonged to him, which made it unnecessary for a suit to be initiated at that time. She contended that the limitation period ought to run, instead, from 2015, when the appellant sought to repossess the property, rather than from 2002. On that basis, the respondent would have acted and initiated a claim within the six-year limitation period. Accordingly, she submitted that it was inequitable for the appellant to rely on the fact that legal action was not taken in 2002, and he ought to be estopped from doing so. She submitted that 2015 was the appropriate time to take such action and for that reason, the limitation defence would not apply to the instant case.

Analysis

[58] The appellant has asserted that the transaction between himself and the respondent has been caught by the provisions of section 36 of the Limitations of Actions Act, which is in the following terms:

> "36. No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any action or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent :…."

[59] Section 36 does not relate to a claim in respect of specific performance of a contract for the sale of land. In **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7 ('**Brown v JNBS**'), Phillips JA examined the adoption of the UK limitations statute in Jamaica and confirmed in para. [40] that:

> "[40] … actions based on contract and tort (the latter falling within the category of 'actions on the case') are barred by section III, subsections (1) and (2) respectively of the 1623 statute after six years (see **Muir v Morris** (1979) 16 JLR 398, 399 per Rowe JA)." (Emphasis as in the original)

[60] In the instant case, the learned judge accepted that the appellant indicated to the respondent in 2015 that he no longer wished to sell the property to him. Accordingly, time only began to run from the time such communication was made to the respondent, and the respondent's claim was filed on 4 January 2016. In such circumstances, the Limitation of Actions Act could not have availed the appellant, in respect of the respondent's claim for breach of contract, because on the evidence accepted by the learned judge, six years had not elapsed since the cause of action arose. Accordingly, the issue of whether specific performance can be granted after a statutory period of limitation has passed does not fall for this court's consideration.

[61] On these facts as found by the learned judge, she was correct in holding that the Limitation of Actions Act did not bar the respondent's claim or the remedy of specific performance, which was granted to the respondent. There was no issue raised by the appellant regarding the jurisdiction of the court to have awarded damages in addition to the relief of specific performance, as the learned judge correctly appreciated.

Section 36 of the Stamp Duty Act

[62] In his oral submissions, Mr Wildman also sought to rely on section 36 of the Stamp Duty Act, which is in the following terms:

> "36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof."

[63] Counsel argued that the purported agreement did not satisfy the requirements of this section, which subjects an agreement of such a nature to the applicable stamp duty and transfer tax. Therefore, he submitted that the learned judge ought not to have relied on the existence of such an agreement.

[64] Importantly, in this case, although the learned judge found that an agreement for sale was signed by the appellant and the respondent, that document was not produced to the court, and an important issue as framed by the learned judge was "[w]hether the [a]bsence of a written agreement [d]efeats the claim". Consequently, section 36 of the Stamp Duty Act was inapplicable.

Conclusion

[65] The appellant has not demonstrated any error in the process adopted by the learned judge in making the findings of fact that she did, or in the orders that she made. In my opinion, there is no basis to interfere with the decision, and the appeal fails.

[66] For the reasons contained herein, I would propose that the court make the following orders.

1. The appeal is dismissed.

2. Costs of the appeal are awarded to the respondent to be taxed if not agreed.

F WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. Costs of the appeal are awarded to the respondent to be taxed, if not agreed.