

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 227/2017 and 51/2018

**BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE PUSEY JA (AG)**

BETWEEN	JOYCE WHITE	APPLICANT
AND	DISCOVERY BAY BEACH CLUB LTD	RESPONDENT

Hugh Wildman instructed by Hugh Wildman and Company for the applicant

**Christopher Dunkley and Miss Carissa Bryan instructed by Phillipson Partners
for the respondent**

28, 31 May and 1 June 2018

BROOKS JA

[1] Ms Joyce White has applied for an extension of time in which to file a notice and grounds of appeal against the judgment of Laing J. On 20 November 2017, Laing J gave summary judgment to Discovery Bay Beach Club Limited (the company) against Ms White. He ordered, among other things, that Ms White should vacate, by 20 January 2018, the company's premises, which she occupied.

[2] Ms White is aggrieved by that ruling and wishes to have it set aside. She was not represented by counsel at the hearing before Laing J, and the date for filing a notice of appeal passed without that step having been taken. She has since acquired the services of counsel and she filed the present application on 18 December 2017; two weeks after the notice of appeal should have been filed.

[3] She did not give up possession as ordered by the court and, while she waited for a date for the hearing of this application, she was evicted therefrom by the bailiff of the Parish Court. The bailiff acted pursuant to a writ of possession that was issued by the Registrar of the Supreme Court.

[4] In support of her application Ms White asks for fresh evidence to be adduced.

[5] The main issue to be decided in the application to extend time, is whether Ms White's proposed appeal has a real prospect of success. Before assessing that issue, however, an outline of the relevant facts which led to Laing J's decision will be set out.

The background facts

[6] The company's premises is beachfront property in the parish of Saint Ann. It asserted that Ms White was a tenant of the premises by virtue of a lease for a period of two years. The lease commenced, the company asserted, on 1 April 2014.

[7] It claimed that in January 2016 it gave notice to Ms White that it required her to quit the premises when the lease expired on 31 March 2016. She did not vacate the premises as required. The company filed a claim in the Parish Court for Saint Ann

seeking recovery of possession and mesne profits from Ms White, for her occupation after the expiry of the lease.

[8] The claim was transferred to the Supreme Court and Ms White filed a defence thereto. In her defence, she asserted, among other things, that:

- a. she was an honorary member of the company;
- b. she had been, as such, placed in possession of the premises since 2006;
- c. this was done by the then president of the company, Mr Schnoor;
- d. she was responsible for the maintenance and upkeep of the premises;
- e. she expended money to improve the premises and make it habitable;
- f. she has continued to maintain the property;
- g. although she did sign a lease, that lease was invalid as the persons who purported to sign on behalf of the company were not authorised to act on behalf of the company;
- h. she has been paying the utility bills for the premises;

- i. she denies the authority of the persons who purport to act on behalf of the company in initiating and maintaining the claim against her.

[9] That defence having been filed, the company applied for summary judgment. Whereas there was an affidavit of Mr Peter Junor filed in support of the company's application for summary judgment, Ms White did not file an affidavit in opposition to the application.

[10] Mr Junor contended that Ms White was a tenant by virtue of the lease agreement. He went on to state that the company had, at general meetings held on 29 August 2015 and 29 April 2016, respectively, agreed that Ms White's lease should not be renewed and that a claim should be filed to recover possession of the premises from her.

[11] Insofar as Ms White claimed to be an honorary member of the company by virtue of Mr Schnoor's action, Mr Junor asserted that she could not properly have been granted that status as the process required to award honorary membership was not followed. Secondly, he said that no member, whether honorary or not, could obtain an entitlement to control company property to the exclusion of the company.

[12] Laing J granted the summary judgment on the same day that it came on before him.

The applicable principles

[13] The criteria for assessing applications such as Ms White's, were clearly set out in **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported) Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999. Panton JA (as he then was) pointed out, at page 20 of that judgment, that this court in exercising its discretion concerning an application for extension of time within which to file a notice of appeal, will consider:

- “(i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) whether there is an arguable case for an appeal and;
- (iv) the degree of prejudice to the other parties if time is extended.”

Panton JA also made it clear that the absence of a good reason for the delay is not necessarily fatal to the application. He said, also at page 20 of the judgment:

“Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done.”

The criteria set out by Panton JA have been accepted as still being relevant to applications made in this court, despite the subsequent promulgation of the Court of Appeal Rules 2002. Among the cases, which cite the criteria with approval, is **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23.

[14] Ms White's application will be assessed against those criteria.

The analysis

a. The length of the delay

[15] It cannot be said, in the circumstances of Ms White being without legal representation at the hearing, although her defence had been settled by counsel, that the delay was egregious. It will not be held against her.

b. The reasons for the delay

[16] It may be inferred from Ms White's affidavit in support of her application, that she was unaware of her entitlement to appeal and the time constraint set upon that process. This also will not be held against her.

c. Whether there is an arguable appeal

[17] Mr Wildman argued strenuously that Ms White had a real prospect of success in an appeal against the judgment of Laing J. The substance of Mr Wildman's submissions was that Ms White had acquired an equitable interest in the property by virtue of her expenditure thereon. He argued that the principle of proprietary estoppel applied. Learned counsel submitted that the company, having put Ms White into possession, and acquiesced in her expending money in refurbishing the premises and paying the property taxes, without any word of protest or caution, was estopped from recovering possession from her. The learned judge would therefore, on an appeal, be found to be wrong to have granted summary judgment.

[18] Mr Wildman's submissions fail on a number of fronts. The first is that that was not the defence that was placed before the court below. Ms White filed no evidence for Laing J to consider and he therefore, could only consider the defence that she had filed.

[19] The defence, which, as noted above, was settled by counsel (not Mr Wildman), stated that Ms White had been put into possession and cared for the premises on behalf of the company. She said at paragraph 3 of the defence:

"In response to paragraph 3 of the Particulars of Claim the Defendant says that she is an honorary member of the Claimant, having been invited to become a member of the club by the former president Mr Raymond Schnoor in or around 2006 and who put the Defendant in possession of the property as a member of the Club and at which time it was agreed that the [Defendant] would be responsible for the maintenance and upkeep of the property **on behalf of the Claimant**. The Defendant expended monies to improve the property and to make it habitable as at the time it was derelict and has continued to maintain the property since taking possession in 2006." (Emphasis supplied)

[20] There was no indication in that defence that she was placed in a position in which her actions would be inimical to the company's interest. Mr Schnoor's statement does not include an assertion which would raise an equity on behalf of Ms White.

[21] The second difficulty with Mr Wildman's submission is that there is no indication or evidence of any promise, whether expressed or implied, being made to Ms White. Neither is there any pleading or evidence that she relied to her detriment on any promise or implied position that would raise an equity on her behalf. The principle of proprietary estoppel cannot assist Ms White, based on those pleadings. She said that

she paid utilities but that would not avail her because it was payment for her usage. Her assertion of payment was to deny the company's assertion that she had not paid for those services. The cases of **Inwards and Others v Baker** [1965] 2 QB 29, **E R Ives Investment Ltd v High** [1967] 2 QB 379 and **Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd; Old and Campbell Ltd v Liverpool Victoria Friendly Society** [1982] 1 QB 133, do not assist Mr Wildman's submissions. In all of those cases there was a promise, whether expressed or necessarily implied, which required the promisee to act to his detriment, which he did. In those circumstances the court found that it would be unconscionable for the promisor to renege on his promise.

[22] The third difficulty with learned counsel's submissions is that Ms White entered into a lease agreement with the company. She presumably paid rental based on the agreement. This is inferred, because the company has not sued her for rental. It has only complained that she had not paid rental since March 2016, and it sued her for mesne profits for April and May 2016. Her lease ended at the end of March 2016. She would be estopped from denying her landlord's title, and in this case, entitlement to the reversion. In Halsbury's Laws of England, third edition, volume 23, the learned editors demonstrate that a tenant is estopped from denying his landlord's title. They state, in part, at paragraph 988:

"A tenant is absolutely estopped from denying the title of the landlord by whom he was let into possession, whether or not he has notice of any defect in title. **Even if the tenant was not let into possession by the person claiming to be his landlord, the tenant is estopped from denying the landlord's title if he has recognised that title by attornment, or if he has paid rent,** unless he can show

that the payment was due to misrepresentation or mistake and that a third person is in fact entitled." (Emphasis supplied)

[23] That lease has come to an end and she has no entitlement thereunder to continue in possession of the premises.

[24] The fourth difficulty with Mr Wildman's submissions is that even Ms White's assertion that the company did not authorise instituting the action against her is without evidential support. Mr Junor's affidavit is uncontradicted evidence to the contrary. He deposed at paragraph 6 that the company's meeting authorised the action against her. He said:

"That the said Special Resolution vests me with authority as the officer who executed the lease agreement, and Mr. Jeremy McConnell to represent the Claimant in the Courts."

He further said, at paragraph 8, that the company resolved to retake the premises from Ms White. He said:

"At the Annual General Meeting of the Claimant Company held on August 29, 2015, it was unanimously decided that the Defendant's lease of the Company's property would not be renewed at the end of the lease period, and so by letter dated January 13, 2016, the Defendant was given notice of the Claimant's intention not to renew the lease as at April 1, 2016, thereby terminating the Defendant's tenancy."

[25] Further to that point, it must be noted that Mr Aston Rowe's statement, admitted by way of fresh evidence, that he does not know of any meetings of the company

having been convened, is not conclusive of anything. It does not assist Ms White's case or contradict Mr Junor's assertions in his affidavit.

[26] Finally, Mr Wildman's submission, that Ms White is, on the pleadings, an honorary member and, by virtue of her ownership of other property in the subdivision, an ordinary member, is flawed. The company's articles of association do not support this submission.

[27] In his affidavit evidence, Mr Junor pointed out the flaw concerning the claim to honorary membership. He said at paragraphs 14, 15 and 18:

- “14. What I will say is that not even full, let alone an honorary, membership of the Claimant could convey entitlement to control over the Claimant's property, which has been held as a collective enterprise for over fifty years.
15. In any event, admission to honorary membership is governed by the Claimant's Articles of Association.
16. ...
17. ...
18. That on a clear reading of Article 11, the power to let an honorary member lies solely with the Committee of the Claimant and not any President of the Claimant.”

His assertions are supported by a reading of article 11 of the articles of association, which states:

“The Committee shall have the power to elect any distinguished visitor to the Island or in special circumstances any other person an Honorary Member either for life or such period as the Committee may think fit. An Honorary Member shall not be liable to pay any entrance fee or subscription

but shall be entitled to all the same rights and privileges as an ordinary member."

[28] The claim to entitlement by virtue of being an ordinary member of the company is also flawed. This also assesses the issue of fresh evidence sought to be admitted. Even if a person is an ordinary member, there is no entitlement to company property, the company is a separate legal entity. Article 6 of the articles of association states that it is upon dissolution of the company that ordinary members become entitled to claim a share of the company's assets. It states:

"6. Every ordinary member but no other class of member shall be entitled to claim a share of the assets of the Club upon its dissolution."

[29] Based on all the various flaws in Ms White's position, there would be no real prospect of her succeeding on appeal. The application should fail.

[30] The fact that Ms White has been evicted from the premises is not necessarily fatal to her application. Whereas, this court could not order her re-instatement, if she were granted an extension of time and were successful on appeal, she could seek an order for re-instatement from the court below, or claim damages for having been wrongly evicted. As it is, those matters need not be considered further.

[31] Nor is it necessary, in the circumstances to deal with the issue of prejudice to the company if time were extended. The claim for damages is to continue in the Supreme Court.

[32] Before concluding this judgment, it should be said that the fresh evidence did not satisfy the criteria for admission, as set out in **Ladd v Marshall** [1954] 3 All ER 745. This is because the material was available or discoverable at the time of the hearing before Laing J (a point made by Mr Dunkley for the company). The material was, nonetheless, considered because Ms White was not represented by counsel at the time that the application came on before Laing J. Ms White was therefore allowed some relief from the effect of the principles set out in **Ladd v Marshall**.

Conclusion

[33] Ms White has no likelihood of success in seeking to set aside the judgment of Laing J. The application for extension of time within which to file a notice of appeal should be refused with costs to the company.

SINCLAIR-HAYNES JA

[34] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

PUSEY JA (AG)

[35] I have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The application for extension of time within which to file a notice of appeal is refused.
2. The application to admit fresh evidence is granted.
3. Costs to the respondent to be taxed if not agreed. The costs of the application for fresh evidence are not included.