**[2021] JMCA Civ 22**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 52/2016**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE STRAW JA**
**THE HON MRS JUSTICE V HARRIS JA**

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| **BETWEEN** | **WINSTON BROWN** | **1ST APPELLANT** |
| **AND** | **ANNETTE MAUD-MARIE BROWN** | **2ND APPELLANT** |
| **AND** | **CARLTON DAYE** | **RESPONDENT** |

**Anwar Wright instructed by Wright Legal for the appellants**

**Robert Moore for the respondent**

**8, 9 February and 22 April 2021**

**F WILLIAMS JA**

[1] I have read in draft the judgment of my sister V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

**STRAW JA**

[2] I too have read the draft judgment of my sister V Harris JA and agree with her reasoning and conclusion.

**V HARRIS JA**

[3] The outcome of this matter clearly demonstrates the alarming capability of delay to transform, what would otherwise have been a meritorious appeal, into a purely academic exercise.

[4] Mr Winston Brown and Mrs Annette Maud-Marie Brown ("the appellants") have sought, by way of an appeal, to challenge the decision of D McIntosh J ("the learned judge"), given on 21 December 2011, in the following terms:

> "1. That ALL THAT parcel of land part of Huntley in the parish of SAINT ANN and registered at Volume 1381 Folio 84 of the Register Book of Titles be sold and the sum of One Million Two Hundred Thousand ($1,200,000.00) and costs incidental thereto be deducted from the proceeds so as to satisfy the debt owing by the Defendants to the Claimant.
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> 2. Messrs Don Juan Enterprises of Main Street Discovery Bay in the parish of Saint Ann be appointed as Valuators herein and a valuation of the said property be done within thirty (30) days of the date of the Order.
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> 3. The cost of and incidental to the valuation and any costs incidental thereto of the said property be a charge on the proceeds of sale.
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> 4. The sale of the said property to be by way of private treaty.
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> 5. The Registrar be appointed and empowered to take all necessary accounts and inquiries and to sign all documents necessary to effect a transfer of the said property to the Purchaser or otherwise howsoever to facilitate the sale of the said property.
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> 6. The Claimant's Attorneys-at-Law be accorded carriage of sale of the said property in any event.

7. Costs to the Claimant.

8. Orders to be prepared by the Claimant's Attorney and served as soon as possible and before the property is valued."

[5] On 17 May 2016 the appellants filed a notice of appeal relying on the following grounds:

"i. The learned judge had no jurisdiction and/or fell into error when he granted judgment for the Respondent/Claimant as the claim was improperly commenced by Fixed Date Claim Form and in breach of rules 8.1(3), (4) and (8) [sic] of the Civil Procedure Rules 2002 in consequence of which the Claim was defective are invalid.

ii. The Respondent's/Claimant's pleadings and evidence disclosed no factual, legal or equitable basis which could have justified the remedy of an order for sale of the Appellants'/Defendant's property registered at Volume 1381 Folio 84 of the Register Book of Titles to satisfy an alleged contract debt. In granting judgment to the Respondent/Claimant the learned Judge therefore either had no jurisdiction or made an error of law.

iii. The learned Judge erred in law in granting judgment to the Respondent/Claimant when neither the alleged debt due from the Appellant/Defendant nor the existence of a charge had been proved to be valid.

iv. The learned trial Judge erred in law when he delivered judgment in the proceedings without affording the Appellants/Defendants the opportunity to present evidence, cross-examine the respondent, adduce evidence on their own behalf or address the court on the evidence or law in consequence of which the proceedings leading up to the judgment were procedurally unfair."

[6] Having been met with those grounds of appeal, Mr Carlton Daye ("the respondent"), on 8 December 2017, filed an application seeking leave to adduce fresh evidence and an extension of time within which to file that application, or in the alternative, that the application for fresh evidence, as filed, be permitted to stand. This application also sought the dismissal of the appeal on the basis that the appellants had no real prospect of succeeding on the appeal.

[7] The purpose of the application to adduce fresh evidence was to allow the respondent to place before this court, an affidavit from his previous attorneys-at-law, which described certain events that had taken place in this matter, subsequent to the orders that were made by the learned judge. On 17 June 2019, the application for fresh evidence came on for hearing but was adjourned for consideration before the court hearing the substantive appeal.

[8] As ordered, when the appeal came on for hearing, the respondent's application to adduce fresh evidence was considered. Having heard extensive arguments from both parties, we permitted the fresh evidence to be adduced but refused the application to dismiss the appeal. Having heard the substantive appeal, the court promised to give its decision at a later date. This is the fulfilment of that promise.

**Background**

[9] In order to be able to fully comprehend the dispute between the parties in the court below, and to properly analyse what I believe to be the single issue of importance that has arisen on this appeal, a summary of the background facts is necessary.

[10] The 1st appellant is a contractor and resides in Trysee, Brown's Town in the parish of Saint Ann. The 2nd appellant is his wife. They were the joint owners of a parcel of land located at Huntley in the parish of Saint Ann which was registered at Volume 1381 Folio 84 of the Register Book of Titles ("the property"). The respondent is a social worker and resides in Lillyfield District, Bamboo, in the parish of Saint Ann. In or around March 2009, the 1st appellant borrowed $1,000,000.00 from the respondent. He agreed to repay the principal sum plus an additional $200,000.00 as interest. The proceeds of the loan were to be utilised by the 1st appellant to carry out construction work on a parish council road at Cockpit, Brown's Town in the parish of Saint Ann.

[11] It was agreed that the 1st appellant would repay the loan within four months of disbursement. It was expected that the loan would have been liquidated from funds that the 1st appellant was to receive from the Constituency Development Fund. However, the 1st appellant repaid only $50,000.00 of the amount owed, and failed to make any further payments towards extinguishing the debt.

[12] After the many requests by the respondent of the 1st appellant to repay the outstanding balance bore no positive outcome, the appellants agreed in writing to execute a personal mortgage ("the charge") in favour of the respondent, over half an acre of the property (which measured in excess of five acres). This written agreement also specified the terms for the repayment of the debt. The 2nd appellant did not borrow any money from the respondent but was made a party to the agreement because she jointly owned the property with her husband. The charge, up to the time that the matter was heard by the learned judge, was not endorsed on the certificate of title. However, there was an

existing mortgage in favour of Eunice Veronica Gordon-Reid for the sum of $2,000,000.00 plus interest that was registered on the property. It would seem that Mrs Gordon-Reid was not notified of the court proceedings.

[13] The 1st appellant did not honour his obligations under the agreement and the respondent filed a fixed date claim form ("FDCF") in the Supreme Court on 20 September 2010 primarily seeking an order that the property be sold and the sum of $1,200,000.00 and incidental costs be deducted from the proceeds so as to satisfy the debt that was owed to him.

[14] On 17 March 2011 the FDCF came on for hearing but was adjourned. The minute of order disclosed no reason for the adjournment. On 21 September 2011, the matter was once again adjourned, this time at the request of the appellants who indicated that they had retained an attorney-at-law to represent them. The matter was adjourned again on 7 November 2011. No reason was stated for the adjournment. When the matter next came on for hearing on 24 November 2011, the minute of order reflected that it was part-heard and that the appellants were unrepresented at that hearing. It was then set down to be continued on 13 December 2011. There was no record from the court below to indicate what transpired on that day. However, the 1st appellant, at paragraph 8 of his affidavit in support of the application for extension of time dated 30 July 2014, deposed that he attended court on 13 December 2011 but the matter did not go on as the learned judge was on circuit court duties. The 1st appellant also stated that he was told that he would be advised of the next date for the continuation of the matter. It would seem, however, that the 1st appellant was not notified accordingly, because on 21 December

2011, when the learned judge made the orders delineated at paragraph [1] above, neither appellant was present nor were they represented at that hearing.

[15] The appellants were served with the orders that were made by the learned judge in or around February 2012. They took no steps, then, to lodge an appeal. However, on 30 July 2014, almost two and half years later, the appellants filed a notice of application for permission to appeal out of time with supporting affidavits. In the supporting affidavits, the 1st appellant on behalf of both appellants, in an effort to persuade the court to grant the application after such a lengthy delay, provided the explanation for their tardiness, as well as, the alleged merits of the proposed appeal and the prejudice that they faced.

[16] The 1st appellant deposed that in the written loan agreement, it was agreed that an unidentified half an acre of the property would be subject to a personal mortgage in the respondent's favour as security for the loan amount, and not the entire property. The 1st appellant also stated that he was not present when the learned judge made the orders on 21 December 2011 because he had not been informed of the date on which the matter was to continue, and it was not until he had been served with the orders of the court in February 2012 that he became aware that the matter had been concluded in his absence, which was by no means intentional and/or deliberate.

[17] The appellants further urged that since the orders were made in their absence, they were denied the opportunity to challenge a number of issues including the sale of their entire property, contrary to the agreement between the parties, and the validity of

the claim itself. The appellants also lamented that the property was sold at a gross undervalue. The appellants also advanced that the main reason for their failure to pursue an appeal, after becoming aware of the court's decision, was due to their impecuniosity. Their application was successful and this court granted the appellants permission to appeal on 9 May 2016. The notice of appeal was then filed on 17 May 2016.

[18] By the time that the appellant's application for permission to appeal out of time was granted and the notice of appeal filed, the property had long been sold (around 8 August 2014, shortly after the application for extension of time was filed). As is customary, a new certificate of title has been issued in the name of the new owners who are now in possession of the property. On 10 November 2014, the appellants were sent the net proceeds of the sale in the amount of $7,518,058.00, which they refused to accept, and subsequently returned to the respondent's then attorneys-at-law under cover of letter dated 13 November 2014. Those sums have since been placed in an escrow account.

[19] It is worth mentioning, so that the proceedings in this court are intelligible, that on 25 June 2015, almost a year before the appellants were granted permission to appeal by this court, they also filed a claim in the Supreme Court against the respondent, the current owners of the property (Morris Hill and Kelvin George Hill) and the court appointed valuator (Don Juan Enterprises Ltd), seeking essentially, that the sale of their property be set aside and damages for fraud and negligence. That matter is still pending. It would be fair to comment that significant occurrences have taken place in this matter since the learned judge rendered his decision in December 2011.

**Submissions**

[20] The attorneys-at-law for the appellants and respondent made extensive submissions on the respective grounds of appeal. However, in light of my view on the proposed outcome of this matter, I see no need to replicate them. However, I wish to thank learned counsel for the respective parties for their very helpful submissions.

**Issue**

[21] Notwithstanding the grounds of appeal and the submissions of counsel, I am of the view, that the single question to be determined, in light of the events that have taken place since the decision of the court below, is whether there are any remaining disputes between the parties for this court to resolve.

**Discussion and analysis**

[22] Without delving into any details concerning the merits of this appeal, I simply wish to observe, that the grounds as raised, in my view, were worthy of exploration and resolution by this court. Nevertheless, even before the appellants were granted permission to appeal out of time on 9 May 2016, there had already been major developments that would have, in any event, created an insurmountable legal conundrum for them on the appeal.

[23] I now turn to, what I consider to be, the gravamen of this appeal. As indicated earlier, when the appeal came on for hearing, the property had already been sold by virtue of the orders made by the learned judge. Assuming, without deciding, that the court came to the conclusion that the learned judge was palpably wrong when he granted

the orders to sell the property, the usual result of such a decision would be to allow the appeal and set aside those orders. That outcome would have the intended effect of settling the issue in controversy between the parties and restoring the appellants to the status quo they enjoyed, in respect to the property, prior to its sale.

[24] However, as the circumstances now stand, it is quite evident that even if the appellants were to succeed on the appeal, they would gain nothing at all from their success. I say so because any order that is made by this court setting aside the decision of the court below would be of no practical value and have absolutely no effect upon the position between the parties. Such an order, certainly could not restore ownership of the property to the appellants (which is the outcome they desire), in light of the fact that, *prima facie*, the property has been transferred to *bona fide* purchasers for value without notice who are now its registered owners. Their title, by virtue of section 70 of the Registration of Titles Act, can only be defeated by fraud. Therefore, at the time that the appeal was considered, the property, which is the subject matter of the dispute, was beyond the reach of the court.

[25] Regrettably, the inordinate delay and its attendant consequences, have overtaken the appeal. It is my considered view that these proceedings are now entirely academic. I am cognizant of the explanation provided by appellants for the delay in pursing the appeal (their impecuniosity). However, it would have been prudent for them, if the appeal were to be of any value, on becoming aware of the decision of the court below, to have taken steps to prevent its execution and preserve the subject matter of the dispute.

[26] I find support for the conclusion I have arrived at from the decision of the House of Lords in **Ainsbury v Millington** [1987] 1 WLR 379. In that case, there had been a dispute between the parties as to a council house tenancy, but by time the matter came before the House, the tenancy had ceased to exist. The House found that the appeal was academic. Lord Bridge of Harwich, who delivered the judgment of the court, considered and applied the principles enunciated by Viscount Simon LC in **Sun Life Assurance Co. of Canada v Jervis** [1944] A.C. 111, at pages 113-114, where he said:

> "1 do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the house undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties... I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue".

[27] Similarly, in the decision of the **Attorney General of Jamaica v The Commissioner of Police and Machel Smith** [2020] JMCA Civ 67, Edwards JA in considering whether there still remained an issue joined between the parties in that case, posited at paragraph [36] of the judgment that the court ought to bear in mind that it was no part of its function to make academic orders. The learned appellate judge also observed (having considered the cases of **R v Ministry of Agriculture and Fisheries and Food ex parte Live Sheep Traders Ltd** (QBD judgment delivered 12 April 1995) [1995] COD 297 and **R (John Smeaton on behalf of Society for the Protection of**

**Unborn Children) v The Secretary of State for Health et al** [2002] EWHC 886 (Admin)), that "the courts, including the Administrative Court, exists [sic] to resolve real problems and not disputes of merely academic significance".

[28] The responsibility of this court is to resolve real disputes between litigants. It would, therefore, in my view, be an improper exercise of the court's authority to engage in making decisions that are merely academic in nature. In the case at bar, the subsisting legal rights of the appellants, as well as, the issues between the parties that were to be determined by this court on the appeal, evaporated with the sale and transfer of the property.

[29] I find the words of Viscount Salmon LC in **Sun Life Assurance Co. of Canada** to be apt and worth repeating, in the circumstances. It is my considered view, based on the principles that emanate from the cited authorities, that any decision given in this appeal, "would merely be expressing [the court's view] on a legal conundrum, which the appellants hope to get decided in their favour without in anyway affecting the position between the parties… I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue".

[30] It is accepted that this court retains a discretion to hear an appeal where there was no longer an issue joined between the parties. However, this is a discretion that should be exercised sparingly, and only in circumstances, where there was a good reason, in the wider public interest to do so (see **R v Secretary of State for the Home Dept,**

**ex parte Salem** [1999] 2 All ER 42 at page 47), or where, for example, "litigation is required to be continued for the sole purpose of resolving an issue as to costs when all the other matters in dispute have been settled" (per Lord Bridge of Harwich in **Ainsbury v Millington** at page 381 of the judgment).

[31] Before concluding, I wish to observe that the appellants are seeking damages for fraud and negligence in the claim that is still pending in the court below. It would seem to me that that matter has the potential to give them the outcome that they wish to achieve. If they are able to defeat the current title by establishing fraud, that would put them on the path to accomplishing what they truly desire. If the issue of fraud fails and the present title cannot be defeated, the appellants' claim in relation to negligence, includes allegations of the undervaluing of the property by the court-appointed valuator. If it is proven that the property was worth more than what it was valued, and subsequently sold for, the appellants would be able to recover damages. Therefore, I am inclined to the view, given all the circumstances, that the claim in the court below, is the appropriate route that the appellants should pursue, since this court ought not to, and will not, act in vain.

[32] In conclusion, this appeal raised no issue of public importance or any legal ambiguity that required clarification in the interest of the public. The issues were generally factual and pursued in a bid to protect the appellants' personal interests. As a result, there being no "matter in actual controversy" between the parties, which this court could "undertake to decide as a living issue", it is proposed that the appeal should be dismissed, with costs of the appeal to the respondent to be taxed, if not agreed. It is also proposed

that the order as to costs should stand unless either party files and serves written submissions proposing a different order within 14 days of the delivery of this judgment.

**F WILLIAMS JA**

**ORDER**

1. Appeal dismissed.

2. Costs of the appeal to the respondent to be taxed, if not agreed. The order as to costs shall stand unless either party files and serves written submissions proposing a different order within 14 days of the date of this order.