JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 91/2011

APPLICATION NO 154/2011

BETWEEN	**CARMEN FARRELL**	**APPLICANT/1ST APPELLANT**
AND	**DESMOND FARRELL**	**2ND APPELLANT**
AND	**WADE FARRELL**	**3RD APPELLANT**
AND	**CURTIS FARRELL**	**4TH APPELLANT**
AND	**CARL FARRELL**	**5TH APPELLANT**
AND	**LASCELLE REID**	**1ST RESPONDENT**
AND	**INTERNATIONAL AIRLINK LIMITED**	**2ND RESPONDENT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**3RD RESPONDENT**

Miss Arlean Beckford instructed by Arlean D M Beckford and Company for the applicant/appellants

Mrs Sandra Minott-Phillips and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the 3rd respondent

5 June and 16 July 2012

IN CHAMBERS

PHILLIPS JA

[1] The application before me (No 154/2011), filed by Carmen Farrell, ("the applicant") on 29 July 2011 initially sought the following orders:-

"(1) That execution of the Judgment by the Honourable Miss justice Mangatal on the 17th day of June, 2011 be stayed until determination of the appeal.

(2) A permanent injunction restraining the Defendant either itself, or by its servants and/or agents or any of them or otherwise howsoever, from selling, disposing of, transferring, charging diminishing the value of, parting with possession of, or in any way howsoever, dealing with any of Claimants properties

(3) Such further or other relief this Honourable Court may deem just."

[2] On 17 June 2011, Mangatal J ordered as follows:

"1. Judgment for the 3rd Defendant against the Claimants, with costs to be taxed if not agreed.

2. Judgment for the Claimants against the 1st defendant and the 2nd Defendant.

3. The Power of Attorney dated 19th January, 2007 and recorded at the Island Record Office Liber New Series 418 Folio 205 is null and void on the grounds of forgery and fraud on the part of the 1st Defendant.

4. The Claimants are estopped by their conduct, deed and representation from denying the authenticity of the Power of Attorney as against the 3rd Defendant.

5. The Claimants' claim for damages against the 1st and 2nd Defendants for fraud fails.

6. The Claimants' claim for damages against the 2nd Defendant for breach of warranty of authority fails."

[3] The grounds of the application (No 154/2011) were:

> "1. The Applicants believe they have an appeal which has some prospects of success.
>
> 2. The likelihood of recovering any properties disposed of by the 3rd Defendant where the appeal succeeds is highly improbable.
>
> 3. That it is in keeping with the overriding objectives of the Civil Procedure Rules."

[4] The application was supported by an affidavit sworn to on 29 July 2011 in which the applicant indicated that she was authorized to swear the affidavit on behalf of the other appellants who were her children. Her concern was that a direct consequence of the judgment of Mangatal J was that all the appellants were now liable to pay the 3rd respondent US$ 600,000.00 together with interest and costs. She further deposed that the 2nd respondent had obtained a loan from the 3rd respondent and had used her certificate of title to secure the loan pursuant to a power of attorney, which the court had found to be fraudulent. She set out other documents which had also been used to secure the loan, but of significance was the first legal mortgage over lot 121, a residential complex at Jamaica Beach in Saint Mary comprised in Volume 1319 Folio 810 which certificate was registered in the appellants' name, and the mortgage was registered and stamped to cover US$600,000.00 with interest, which mortgage had been executed by the 1st respondent by way of the said fraudulent power of attorney. There was also a guarantee by one Howard Levy stamped to cover US$ 600,000.00.

[5] The applicant stated in her affidavit that she did not owe any debt to the 3rd respondent and as Howard Levy had also guaranteed the debt he should be held

liable for the payment of the same along with any losses she had suffered. The applicant's real anxiety was due to the fact that as the 3rd respondent held the certificate of title it could dispose of the property and settle the loan from the proceeds of sale without taking into consideration that Howard Levy was a guarantor. She claimed that she had an appeal with good prospects of success; that the likelihood of recovering any properties disposed of by the 3rd respondent was improbable; and that without the stay of execution she stood to be ruined financially. She gave the "usual undertaking as to damages in respect of the orders herein".

[6] At the commencement of the above application, the applicant indicated that she was not pursuing the request for a permanent injunction as stated in paragraph [1] herein, or for that matter any injunction at all.

The facts in outline

[7] Based on how this application unfolded I will try to summarise the facts as briefly as possible.

<u>The case for the applicant</u>

The applicant's position is that she, along with the other appellants, were the registered owners of lots 120 and 121, Jamaica Beach, Saint Mary. The applicant had already borrowed J$20,000,000.00 on the security of the property at lot 120 from the 3rd respondent for commercial development. She had decided that although she needed funds to further develop lot 121 she did not wish to obtain those funds through a bank or other recognised financial institution but through private loan financing.

Pursuant to this plan she engaged the services of the 1st respondent who was a mortgage broker, to arrange the alternate source of funds. She informed the 1st respondent that she required US$ 400,000.00 to complete the project, she gave him the certificate of title in respect of lot 121, and he obtained some of the funds for her. There were two amounts of US$ 100,000.00 and US$130,000.00 which she received in cash, and then she was given a cheque in the amount of J$ 16, 640,710.00 which was drawn on the 2nd respondent's account but which was not cashed on the instructions of the 1st respondent. She assumed that the first two tranches which she had received had come from the 2nd respondent. She never received the remaining amount. The first time, she said, that she was aware that the sums she had obtained had been sourced from the 3rd respondent, was at a meeting held at their offices, which she thought was convened to discuss the arrears in respect of the loan which was secured by a mortgage on the certificate of title for lot 120. At that meeting she was informed that there was a mortgage endorsed on the certificate of title for lot 121 also to the 3rd respondent, which had been executed by the 1st respondent, signed pursuant to a power of attorney which permitted him to do so, and which power of attorney had been "signed" by herself and her children and witnessed by a justice of the peace. It was her evidence that when informed in the meeting of this perfidy of the 1st respondent, she "broke down and cried uncontrollably". Subsequent to this, despite several efforts made to locate the 1st respondent she had been unable to do so. The applicant maintained that the power of attorney which had been registered at the Island Records Office was null and void, as it had not been signed by her or her

sons; that the instruments of mortgage and guarantee were also invalid having been signed by the 1st respondent pursuant to a power of attorney which was invalid.

The case for the 3rd respondent

[8] The 3rd respondent's position on all of this is that it had disbursed funds to the appellants in the amount of J$20,000,000.00 which funds were secured by way of a mortgage which was duly registered on the certificate of title for lot 120. The instruments of mortgage and guarantee securing the loan were signed by the applicant and her sons. The 3rd respondent then loaned US$1,600,000.00 plus interest to the 2nd respondent for the purpose of providing working capital and purchasing a Beech 1900 Airliner aircraft, disbursed by way of two loans for US$600,000.00 and US$1,000,000.00, respectively. The first loan was secured by a first legal mortgage on the certificate of title in respect of lot 121, registered in the names of the applicant and her sons. The instrument of mortgage (mortgage by way of guarantee) was signed by the borrower, the 2nd respondent, and the 1st respondent on behalf of the appellants, the guarantors, by virtue of the power of attorney. The instrument of guarantee was signed by the 1st respondent (on behalf of the guarantors, the appellants) also by virtue of the power of attorney. The 3rd respondent relied on the fact that the power of attorney bore the signatures of the appellants witnessed by a justice of the peace, and was stamped and registered at the office of titles and the Island Record Office.

[9] It was the contention of the 3rd respondent that it also had no reason to suspect the authenticity of the power of attorney as the appellants were customers in good

standing and had signed letters, dated 20 and 22 February 2007, indicating their awareness of the transaction and agreement for the use of the property as security for the same. The power of attorney, the 3rd respondent insisted, authorized the acts undertaken by the 1st respondent, and the other instrument of guarantee was executed by Mr Howard Levy, the principal of the 2nd respondent, who had also signed a promissory note.

[10] On the 3rd respondent's case, the 2nd respondent defaulted with payments under the loan facilities extended to it by the 3rd respondent, and notices of default were sent to the 2nd respondent and the appellants.

[11] The applicant was initially invited to a meeting with the 3rd respondent on 18 August 2008, to discuss the status of her indebtedness in respect of the monies borrowed in relation to lot 120, but while at the meeting, as a guarantee in respect of the loan which was secured by the certificate for title for lot 121, that loan, which was then in default, was also raised. The 3rd respondent maintained that in the meeting, the applicant acknowledged that she had given the 1st respondent permission to use lot 121 to secure a loan for the 2nd respondent. Indeed, the applicant never said at the meeting that lot 121 was not to have been mortgaged as security for a loan to the 2nd respondent.

[12] Of even more importance however, on the 3rd respondent's case, was that a meeting had been held subsequently, on 22 August 2008, at the request of the applicant, at the offices of the 3rd respondent, to discuss the debt owed by the 2nd

respondent, at which both the applicant and Mr Levy were present. Subsequent thereto, the applicant and Mr Levy confirmed the meeting of 22 August 2011, and by way of letter dated 27 August 2008, directed "To whom it may concern", made a proposal to the 3rd respondent for settlement of the 2nd respondent's indebtedness, which unfortunately did not find favour with the 3rd respondent.

[13] The 3rd respondent therefore posited that as the applicant had placed the certificate for title in the hands of the 1st respondent to secure a loan of money, the certificate of title had been used for the purpose for which she had intended. Additionally, the applicant had made no effort to protect the title for lot 121 from registration of a legal mortgage in favour of the 3rd respondent, or otherwise, as she had failed to lodge a caveat against the title, prohibiting any further dealings with the property. It was therefore the 3rd respondent's position that as a result of the actions of the applicant, the 3rd respondent had acted to its detriment, by loaning funds to the 2nd respondent.

The letters

[14] There were four letters which were of some significance in the case and on which counsel of the applicant placed much weight in her submissions before me. I will also try to deal with them succinctly. These were:

(1) A letter from the 3rd respondent dated 23 February 2007, addressed to the directors of the 2nd respondent indicating that it had approved credit facilities to the 2nd respondent for the sums stated therein on the terms and conditions set out

in the letter. One of the conditions in respect of the subject loan, was the provision of authorization from the owners of the property (the residential complex at Jamaica Beach, St Mary, registered at Volume 1319 Folio 810) to pledge the asset in support of the loan.

(2) A letter dated 20 February 2007, from the 1st respondent, and signed by him, addressed to the Manager of the 3rd respondent, at its Bay West branch in Montego Bay, for the attention of Mr Boothe, stating:

> "This letter is to verify that I, Lascelle Reid have no financial gain or interest in receiving funds from the transaction with International Air Link and National Commercial Bank now or in the future thereof."

There was also a postscript which read thus:

> "P.S. Please Note The Registered owners To Certificate of Title Registered Volume 1319 Folio 810 under The Registration of Titles Act are aware of this Trans"

The postscript was signed by the 1st respondent and dated 20 February 2007.

(3) A letter dated 22 February 2007 addressed to the Corporate Banking Division of the 3rd respondent at the said address in Montego Bay and headed thus:

"TO WHOM IT MAY CONCERN"

On the first page it read:

> "This letter serves to verify that We, Carl Farrell, Desmond Farrell, Carmen Farrell, Wade Farrell, and Curtis Farrrell have no financial gain now or in the future from International AirLink's transaction with National Commercial Bank.
>
> We are also aware and in agreement to US$600,000.00 (Six Hundred Thousand United States Dollars) being charged to the property, under Power of Attorney granted to Mr. Lascelle Reid for the property registered, Vol. 1319 Folio 810, at the Register Book of Titles under the Registration of Titles Act.
>
> After the loan is paid in full, this title should be discharged free and clear."

On the second page of the above letter (paragraph [14] (3)) there were five signatures, stated to be those of the appellants, set out in the order in which the parties were referred to in the letter on page one, and all the signatures were witnessed by someone stated to be a Justice of the Peace for the parish of Saint James (whose signature was illegible).

(4) A letter dated "Aug.27/08" from the applicant signed by her and bearing the address 24 Littleborough CRT., Scarborough, ON, Canada, which stated:

> "Re: To Whom it May Concern,
>
> This letter is to confirm the meeting that I, Carmen Farell and Mr Leve from International Air Link limited had with Mr Percell. We have made a proposal to bring to N.C.B hoping that they will accept our proposal. Upon the 10th day of September/2008, we will start paying $12,000 U.S.D with some changes in the Loan Conditions. Within a six year time frame, International Air Link Limited and I, Carmen Farrell agrees [sic] to pay $12,000 U.S.D on the 10th day of every month. Hoping for a speedy reply, thank you for our co-operation."

Findings of the trial judge

[15] The learned trial judge identified seven issues in the case. She analysed and comprehensively dealt with each and every issue. Once again, I will, bearing in mind the stage of the proceedings, and the very narrow issue I have to decide, set out her findings very succinctly and hope I do no disservice to her very thorough reasons for judgment.

Issue 1 - Whether the 1st respondent was guilty of fraud because of, amongst other matters, forging or causing to be forged, the appellants' signature on the power of attorney?

The learned judge found that the power of attorney and the letter of 22 February 2007 were not executed by the applicant and her sons. The power of attorney was therefore a forgery. The 1st respondent was guilty of fraud.

Issue 2 - Was there ratification by the applicant and her sons of the 1st respondent's actions?

The learned judge found that the letter of 27 August 2008 by the applicant did not amount to ratification, "because the act of forgery is a void act and cannot be ratified. Further, where someone forges another's signature they are not professing to be the agent of the person or persons whose signature is forged. Therefore the agency principles such as ratification cannot apply to forgery".

Issue 3 - Are the appellants estopped by deed, representation or conduct from denying the authenticity of the power of attorney, particularly since the 3rd respondent contention is that they relied on the same to their detriment?

The learned judge found that the letter of 27 August from the applicant did induce the 3rd respondent to believe that the power of attorney was validly executed.

Issue 4 - Was the 2nd respondent guilty of fraud?

The learned judge found that there was no or no sufficient evidence to conclude that the 2nd respondent had caused or permitted lot 121 to be used as a security for the loan to it.

Issue 5 - If the 1st respondent is guilty of forgery and fraud what if any effect does that have on the mortgage of the 3rd respondent?

The learned judge found that the appellants were not entitled to a declaration that the mortgage registered on lot 121 in favour of the 3rd respondent was null and void and

had no legal effect, nor were they entitled to a direction to the registrar of titles to have the endorsement cancelled, as pursuant to the Torrens System and our law of land registration , title to the land is obtained by registration, and to impeach the same on the basis of fraud, it must be actual fraud by the person whose title is being impeached.

Issue 6 - Whether the 3rd respondent was guilty of negligence?

The learned judge found that the appellants had failed to prove their case in negligence or any breach of a duty of care against the 3rd respondent. She found firstly that there was no common law duty of care owed by the 3rd respondent to the appellants. On a balance of probabilities there was no special relationship of trust and confidence between the 3rd respondent and the appellants. In the context of undue influence it was not the responsibility of the bank to advise against unwise or disadvantageous projects, the sole responsibility of a bank was not to take unfair advantage of its relationship with its customer. She also found that the 3rd respondent had acted in accordance with standard banking practices.

Issue 7 - Was the 3rd respondent guilty of any breach of fiduciary duty?

The learned judge found that the appellants had not proven that they were in a fiduciary relationship with the 3rd respondent. The relationship of banker/ customer, mortgagee/ mortgagor, guarantee/guarantor did not without more establish a fiduciary relationship.

The learned judge also indicated that in any event, the applicant had received sums from the 1st respondent, which had been borrowed by the 2nd respondent from the 3rd respondent, and which, on the applicant's own evidence, had not been fully repaid. Having given the certificate of title in respect of lot 121 to the 1st respondent, the learned judge found that the 3rd respondent would have been entitled to an equitable mortgage in respect of lot 121. Wherever the funds had been borrowed from they had to be repaid. The appellants had received some benefit and it could be said that they had obtained unjust enrichment, if they had received the monies, and the benefit without any obligation for restitution. Finally the learned judge found that there was no evidence to show that the appellants had suffered damages as a result of the fraud of the 1st respondent, no quantum had been proved, and equally there had been no proof of damages in respect of the claim for breach of warranty of authority against the 2nd respondent.

The appeal

[16] The applicant filed notice of appeal on 28 July 2011, asking for the judgment of Mangatal J to be set aside, or, in the alternative, that an order be made that the indebtedness to the 3rd respondent be settled jointly by the named guarantors; and that damages with interest be awarded and assessed in favour of the appellants, together with costs of the appeal. She relied on seven grounds of appeal. In essence the grounds raised the following issues:

(i) that the learned judge had not properly considered the fact and the effect of joint guarantors of the loan made to the

2nd respondent, viz the applicant and her sons and Howard Levy;

(ii) that the learned judge had failed to consider that the 3rd respondent had not taken sufficient steps to protect itself and the transaction, in that prior to accepting the letter of 22 February 2007, the 3rd respondent had failed to ascertain if the grantors of the alleged power of attorney were still alive as they were their customers, and particularly bearing in mind that they were all resident abroad;

(iii) that the learned judge failed to ensure that the applicant obtained independent legal advice prior to writing the letter of 27 August 2007 and/or to ascertain if the applicant was in a position to pay US$12,000.00 monthly to repay the said loan; and

(iv) that the learned judge failed to accept that the doctrine of estoppel was of no effect in this case, as the doctrine could not bind parties in respect of an illegal transaction; yet the learned judge struck out evidence in the applicant's witness statement which would have had relevance to the matters

to which the learned judge gave consideration in arriving at her finding on estoppel.

The submissions on the application

On behalf of the applicant

[17] Counsel referred to the Court of Appeal Rules (CAR) and the powers of the single judge of appeal, with particular regard to the stay of execution of any judgment pending appeal, although she submitted that a court also had an inherent jurisdiction to stay proceedings while an appeal was being pursued. Counsel relied on the principles enunciated by Staughton LJ in **Linotype - Hell Finance Limited v Baker** [1992] 4 All ER 887, where he set out the two-fold test in granting a stay namely that an applicant must show that he has some prospect of success of his appeal and that without a stay he would be ruined. Counsel indicated that this test has been endorsed by this court in several cases and submitted that the applicant had satisfied the test in the instant case.

[18] Counsel contended that on any perusal of the challenge to the findings of fact and law, and also the grounds of appeal, all set out in the notice of appeal, it would be evident that the appellant had a good case on appeal. She focused on the letters previously referred to herein, to show firstly that whereas the letter set out at paragraph [14](1) from the 3rd respondent requested authorization from the owners of the subject property, the letter at paragraph [14](2) allegedly supplying that authorization predated the letter requesting it; with regard to the letter at paragraph

[14](3) all the signatures were written on the second page of the letter and there was no evidence that any efforts had been taken to ensure their authenticity; finally the letter at paragraph [14](4) ought not to have been used by the 3rd respondent unless the 3rd respondent could show that the applicant had been given independent legal advice. Counsel argued that there were many matters which ought to have raised a "red flag" for the 3rd respondent; instead it either ignored or turned a "blind eye" to the same which could only be described as negligence. On this basis counsel argued that the 3rd respondent ought not to get the benefit of any protection of the law including the provisions of the Registration of Titles Act, (ROTA), which latter protection she recognized as a substantial hurdle which the 3rd respondent had to overcome, but indicated, relying on the Canadian case of **Rabi v Rosu**, 2006 Can LII 36623 (ON SC), that where in the circumstances the indications were clear that the transactions were flawed, as in this case, where the 3rd respondent was relying on a fraudulent power of attorney, then the 3rd respondent ought to be estopped from being able to rely on the ROTA.

[19] Counsel submitted that the justice of the case and the applicability of the overriding objective would require that a stay of the execution of the judgment be granted, particularly since there was no prejudice to the 3rd respondent if a stay was granted, but to the contrary if the stay was not granted, the applicant would be severely prejudiced, as she stood to lose her home and to suffer serious financial losses and would be ruined. The harm to the applicant, in those circumstances, it was submitted would therefore be unquantifiable. Counsel relied on the principles set out in

Rahul Singh et al v Kingston Telecom Ltd and Anor SCCA No 48/2006 Application Nos 72 & 80/2006 delivered 5 December 2006 and **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 in support of these submissions.

On behalf of the 3rd respondent

[20] Counsel took a preliminary point that the application for the stay of execution of the judgment of Mangatal J ought to be refused as there had been no counterclaim on behalf of the 3rd respondent, and therefore no money judgment or order for any sums to be paid, or any action taken, had been granted by the learned judge, on any claim made by the 3rd respondent. Counsel submitted that the 3rd respondent did not derive its ability to exercise the power of sale of the mortgaged property by virtue of any order of the court. Additionally, as the application for an injunction had been withdrawn there remained nothing executory in the judgment of Mangatal J which could be the subject of a stay of execution. Counsel relied on the dictum of Morrison JA in **Norman Washington Manley Bowen v Shahine Robinson et al** [2010] JMCA App 27 to support this submission.

[21] Counsel submitted that there was no merit in any of the grounds of appeal. The instruments of guarantee made it clear that the guarantors were jointly and severally liable, and thus the fact that Howard Levy was one of the guarantors could not affect the 3rd respondent's endeavours, or priority in the processes it pursued in order to collect the amount owing on the debt. The learned judge, she argued, had canvassed

thoroughly the steps taken by the 3rd respondent in granting the loan and in obtaining the security therefor, and had concluded that the 3rd respondent had followed standard banking practices, and that there was no negligence on its part. There had also not been any pleading or evidence of any special relationship between the applicant and the 3rd respondent such that any particular duty of care was owed to her. The 3rd respondent did not owe the applicant a duty as a guarantor to ensure that she obtained independent legal advice.

[22] Counsel submitted further that the applicant had not pleaded that the 3rd respondent had acted fraudulently in the transaction and thus could not defeat the indefeasibility of title afforded the respondent pursuant to section 71 of the ROTA. The 3rd respondent was an innocent third party and entitled, counsel argued, to the full protection of the statute.

[23] Counsel maintained that the learned trial judge was correct in striking out the portions of the witness statement that she did, as there was no pleading of fraud to support the evidence adduced therein. It was also clear on the evidence that the certificate of title for lot 121 was given to the 1st respondent as security for a mortgage as the learned judge so found. Counsel reiterated that as there were no prospects of success on appeal and no basis for a stay, the application should be refused.

<u>The applicant in reply</u>

[24] Counsel was persuaded by the cogent arguments of counsel for the 3rd respondent relative to the preliminary point taken and indicated that, having reviewed

the decision of Morrison JA in the **Norman Washington Manley Bowen** case, withdrew the request in her application, for stay of execution of the judgment, as counsel accepted that the judgment of Mangatal J was declaratory in nature and therefore posited that her earlier submissions should relate and be limited to, an application for stay of execution in respect of costs only.

The 3rd respondent's reply

[25] Counsel submitted that such an application is rarely allowed, and the real issue before me would be whether the applicant can credibly assert that she would be in jeopardy of having the costs repaid once the costs had been paid to the 3rd respondent.

Discussion and Analysis

[26] Pursuant to rule 2.11(1) (b) of the CAR, a single judge of appeal may make orders:

> "for a stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal."

Rule 2.14 (a) of the CAR reads as follows:

> "Except so far as the court below or the court or a single judge may otherwise direct-
>
> (a) An appeal does not operate as a stay of execution or of proceedings under the decision of the court below; …."

[27] It is clear that the rules permit a single judge of appeal to grant a stay of execution, of a judgment, as well as any order, against which an appeal has been filed. As indicated, counsel for the applicant withdrew her application for stay of the execution of the judgment of Mangatal J, on the basis of the decision of Morrison JA in the **Norman Washington Manley Bowen** case, which in my view was correct. In delivering his judgment Morrison, JA referred to two leading texts on Declaratory judgments and Declaratory Orders, to wit, by Zamir & Woolf and Mr P. W. Young QC respectively, which stated that whereas in an executory judgment the court determines the rights of the parties and then orders the parties to act in a certain way, either to pay money or to refrain from interfering with a party's rights, which can be enforced by the court by levying on a person's goods or by imprisoning him for contempt of court, a declaratory order declares the parties' rights but does not contain an order which can be enforced. Indeed in the latter text at para 2408, Mr Young , in confirming that the declaratory relief embraced no sanction stated: "The effect of the court's order is not to create rights but merely to indicate what they have always been… because of this, if an appeal is lodged against a declaratory order conceptually there can be no stay of proceedings". The order made by Mangatal J against the applicant in favour of the 3rd respondent, was in essence declaratory in nature, a stay of execution of which was therefore inapplicable.

[28] In **Lorraine Marie Issa v John David Stannard** SCCA No 51/1983, **Vehicles and Supplies limited and Another v The Minister of Foreign Affairs, Trade and Industry** (1989) 26 JLR 390 (CA) and **Jamaica Flour Mills Limited v West Indies**

Alliance Insurance Company Limited and Others (1997) 34 JLR 244) when interpreting rule 6 of the Jamaica (Procedure in Appeals to Privy Council) Order in Council, 1962, in particular, the words "Where the judgment appealed from requires the appellant to pay money or to do any act…" it was held cumulatively that those words were only intended to apply to what may be termed the substantive order or orders of the court, that is to say the orders embodying the determination of the issues raised in the appeal to the court, and that an order for costs was not one which required "the appellant to pay money or do any act", and so the provisions dealing with a stay of execution in relation to the payment of costs, would not apply. In my judgment, however, the inclusion of the word "order" in rule 2.11 of the CAR must mean that even though the application before me no longer involved a stay of execution of the judgment per se, nonetheless, the wording of the rule, as it includes a stay of execution of an "order," must on any literal interpretation include an order for the payment of costs simpliciter.

[29] What is clear however is that on any application, once dealing with a stay of execution of the judgment or order, whichever tier of the court the principles are the same. Downer JA in **Jamaica Flour Mills Limited** made it clear, "The modern approach as reflected in rules of procedure generally therefore is to balance the right to enforce a judgment at the first or second tier against the prospects of success of the appellant if there is a good arguable appeal. This approach was followed by **Linotype** - **Hell Finance Ltd v Baker** [1992] 4 All ER 887 by Staughton LJ in appeals to the Court of Appeal. This Court has frequently followed that course and imposed appropriate

terms." However, Downer JA did indicate with reference to other cases dealing with appeals to the House of Lords that it is extremely rare to grant stays of execution pending appeals to the House of Lords, and in respect of costs, grants are made only in circumstances where undertakings are given by attorneys for the refund of the costs if the other party is successful on appeal.

[30] In **Keary Developments Ltd v Tarmac Construction Ltd and Another** [1995] 3 All ER 534, Peter Gibson LJ referring to the judgment of Bingham LJ in **Kloeckner & Co AG v Gatoil Overseas Inc** [190] CA Transcript 250, indicated that, "the system of justice which prevails in this country is founded on the premise that the interests of justice are ordinarily best served if successful litigants recoup the costs of their litigation, or the bulk of those costs, and unsuccessful litigants pay them". In fact it was stated by Aldous LJ in **Perotti v Watson and others** [2001] EWCA Civ 506, that cost orders are not considered "the fruits of the judgment" but recompense for costs to be paid or which have already been paid, and without special circumstances should be enforced.

[31] In relation to the question of the stay of execution generally, in **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited & Another** [2011] JMCA App 1, Harris JA, in dealing with the requirements that the applicant had to show to succeed on an application for stay, viz some prospects of success, or that one would be ruined, stated however, that "since **Linotype-Hell Finance Limited v Baker**, the courts have adopted a quite liberal approach, in that, they seek to impose the interests of justice as an essential factor in ordering or refusing a stay", and she

referred to the dicta of Clarke LJ in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd**. Clarke LJ went on to say that the court should look at the risk of injustice to one or the other of the parties on the grant or refusal of a stay, and to whether any irremediable harm could result to one or other of the parties. He pointed out that " the evidence in support of the application needs to be full frank and clear…", the evidence should also be sufficient to disclose whether there was any significant risk of the appeal being stifled unless the stay is granted, or refused. The court is obliged therefore to examine all the circumstances of each case to ascertain where the risk of injustice lies.

[32] Additionally, in **Kingsley Thomas v Collin Innis** SCCA No 99/2005 Application No 162/2005 delivered 14 February 2006, K Harrison JA indicated that whether one would be able to recover the judgment sum and costs, once paid, if successful on appeal, was another matter to be considered in the circumstances of the case, but he endorsed that the essential factor was the risk of injustice.

[33] In this court, there have been several cases where we have viewed the interests of justice as an overriding consideration, (See **Reliant Enterprise Communications Limited and Anor v Infochannel Limited** SCCA No 99/2009 Application Nos 144 & 181/2009, delivered 2 December 2009 and **Cable and Wireless Jamaica Limited v Digicel Jamaica limited** SCCA No 148/2009, Application No 196/2009 delivered 16 December 2009).

[34] The real questions for my deliberation therefore are - is there an arguable appeal, with some prospects of success; will the applicant suffer ruin or will the appeal be stifled if the stay is not granted; what are the chances of having these costs refunded if the appeal is successful, and is there a significant risk of injustice if the applicant was forced to comply with the order for costs? I am of the view however that at this stage of the proceedings I should not give my view on the merit of the different positions taken by the parties before the court, as ultimately it is the Court of Appeal which will have to decide the issues between them (**Sewing Machines Rentals Limited v Wilson & Another** [1976] 1 WLR 37).

[35] On an overview of the grounds of appeal and the submissions before me therefore I make the following comments. The instruments of guarantee were not placed before me, however if as submitted by counsel for the 3rd respondent, they were in the usual format stating that the guarantors of the loan were jointly and severally liable, I am unable to see the significance and/or cogency of the ground of appeal and submission that the court failed to properly consider the effect of the joint guarantors on the loan. If the guarantee is several or joint and several, judgment against one does not operate as a bar to an action against the other. I am also unable to understand clearly the complaint that the 3rd respondent ought to have ensured that the applicant obtained independent legal advice, particularly before she wrote the letter of August 27 2007. The learned judge addressed this aspect of the case under issues 6 and 7 (paragraph [15] herein). She found that there was no special relationship of trust and confidence between the 3rd respondent and the appellants, and that was

essentially a question of fact based on the evidence before her, as the banker/customer relationship does not fall into one of the presumed relationships which generates that necessary influence of ascendancy or dependency which can lend itself to abuse. And, in any case, there was no claim in this case that the party in ascendance (presumably the 3rd respondent) had exploited any influence one could have said existed over the vulnerable party, (allegedly the appellants) and then taken some unfair advantage (**National Commercial Bank (Jamaica) Ltd v Hew and Another** (2003) 63 WIR 183).

[36] The submission however that based on its negligence the 3rd respondent ought not to be able to obtain the protection of the ROTA appears fundamentally flawed to me. The doctrine of indefeasibility of title under the Torrens system of registration of title applicable in Jamaica is well known. For any challenge to the registered proprietor to be successful there must be actual fraud on the part of the said registered proprietor, negligence alone will not suffice. As indicated, counsel for the applicant relied on the case, of **Rabi v Rosu**, which refers to the Land Titles Act in Ontario, Canada, and the application of the principles of " immediate or deferred indefeasibility" which is not a concept accepted under our law, as I understand it (see **Frazer v Walker** [1967] 1 All ER 649 and **Assets Company Ltd v Mere Roihi et al** [1905] AC 176).

[37] With regard to the last main issue identified by me in the grounds of appeal, the finding of estoppel by the learned trial judge is based on the facts before her with regard to that important meeting which took place at the offices of the 3rd respondent

on 22 August 2008. She did not accept the evidence of the applicant in respect of the purpose and intent of the letter, a matter entirely for her jury mind. The striking out of the portions of the witness statement is always a matter within the exercise of the discretion of the trial judge reviewable by this court in a limited way under established principles.

[38] Of even greater significance to me however, on this application, is the fact that there was no evidence whatsoever before me with regard to the amount of costs payable from the court below, the ability of the applicant whether assisted by the other appellants or not to satisfy them, and whether the particular payment of those costs would result in financial ruin. In order for me therefore to exercise my discretion whether or not to grant a stay, there must be some basis on which I could do so. There was no indication that if the stay was not granted payment of the costs would stifle the applicant's ability to proceed with the appeal. There was no evidence that the sums in respect of costs were exorbitant, and that all avenues for additional or alternate sources of financing were not available to her. There is also no allegation that if the costs awarded against the applicant were paid to the 3rd respondent there was no possibility of these sums being refunded to her.

[39] In light of all of the above, I would say that no acceptable arguments have been put forward to show any arguable appeal with some prospects of success. Additionally, it cannot be said that the applicant would be ruined if the costs were paid, or that if paid would not be refunded if successful on appeal, or that if the costs were paid the appeal would be stifled.

Conclusion

[40] The application for a stay of execution of the costs pending appeal is refused with costs to the 3rd respondent to be taxed if not agreed.