JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

APPLICATION NO COA2021APP00035

BETWEEN	**ENRICO POWELL**	**1ST APPLICANT**
AND	**SEAN ALLISTAIR POWELL**	**2ND APPLICANT**
AND	**ALEXANDER DRYSDALE**	**1ST RESPONDENT**
AND	**WINSTON CLARKE**	**2ND RESPONDENT**

Miss Sue-Ann Williams instructed by Lightbourne & Hamilton for the applicants

Kevin Williams and David Ellis instructed by Grant Stewart Phillips & Co for the respondents

19 and 20 April 2021

MCDONALD-BISHOP JA

[1] This is an application brought by Messrs Enrico Powell and Sean Allistair Powell ('the applicants') for permission to appeal orders made by Henry-McKenzie J ('the learned judge') in the Supreme Court on 12 February 2021, and for stay of execution of the said orders as well as orders made by Barnaby J in the Supreme Court on 7 April 2021. Barnaby J had refused the applicants' application for stay of execution of the orders of Henry-McKenzie J.

[2] It is to be noted that the amended notice of application for court orders for permission to appeal and stay of execution sets out the parties as: Alexander Drysdale

and Winston Clarke, claimants; Herman Farquharson and Enrich Gilmore Alexander Green, defendants; and Enrico Powell and Sean Allistair Powell, also as defendants. However, the applicants in this application are Enrico Powell and Sean Allistair Powell, and the respondents are Alexander Drysdale and Winston Clarke ('the respondents'). Herman Farquharson and Enrich Gilmore Alexander Green are deceased.

[3] It is not quite clear from the papers filed in this court whether there was an order removing Messrs Farquharson and Green from the record as defendants, or whether there was an order substituting the applicants. However, for the purposes of the court's treatment of the application, the names of the deceased persons are removed as parties to this application. Thus, the actual respondents to the application are Alexander Drysdale (1st respondent) and Winston Clarke (2nd respondent).

[4] The applicants are brothers, and sons of one, Phillip Powell, who is now deceased. They have been appointed the personal representatives of the estate of Phillip Powell for the purpose of the proceedings in the Supreme Court, pursuant to part 21.7(1) of the Civil Procedure Rules, 2002 ('the CPR').

Background

[5] By an agreement for sale dated 15 July 1982, Mr Phillip Powell agreed to sell, and the respondents agreed to purchase, a portion (44,885 square feet) of land located at 19 Norbrook Drive, Kingston 8 in the parish of St. Andrew, and registered at Volume 806 Folio 1 of the Register Book of Titles.

[6] On 12 May 1984, prior to the completion of the sale, Mr Powell died testate. Consequently, the portion of the property forming the subject of the agreement for sale was not transferred to the respondents.

[7] On 8 October 1984, probate was granted to Herman Farquharson and Enrich Gilmore Alexander Green, who were the named executors to the estate. In 1994, the respondents commenced a claim in the Supreme Court (Suit No CL 1994/D 130) against

the two executors ('the claim'). The claim is not part of the record of these proceedings, but it is presumed from the orders made in the Supreme Court that it was brought by the respondents to enforce the agreement for sale.

[8] The executors died at different times in 2005, prior to the claim coming on for trial. As a result, an order was made on 4 February 2008 in the Supreme Court, naming the applicants as the personal representatives of the estate.

[9] On 25 and 27 January 2010, the claim came on for trial before Sykes J (as he then was) when, by and with the consent of the parties, he made certain orders in these terms (('the consent order'):

> "1. There be Specific Performance of the Agreement for Sale dated the 15th day of July 1982 between the [respondents] and Phillip Powell, deceased, in respect of all that parcel of land comprising approximately 44,885 square feet located at 19 Norbrook Drive, Kingston 8 in the Parish of St. Andrew being part of the land comprised in Certificate of Title registered at Volume 806 Folio 1 of the Register Book of Titles and being the subject of this claim.
>
> 2. The [applicants] shall within 3 months of the date hereof, file an application to obtain Letters of Administration in the Estate of Phillip Powell deceased and pay the Transfer Tax on death in respect of the aforesaid premises. The [applicants] shall pursue the securing of the grant of Letters of Administration with all due diligence and quickly comply with all requisitions of the Registrar of the Supreme Court in order to obtain the Letters of Administration within 12 months of the date hereof.
>
> 3. The [applicants] shall within 3 months of obtaining Letters of Administration and payment of the relevant tax on death, execute such instruments of transfer and application for subdivision approval as may be required to vest title for the land the subject of the claim hereof in the names of the [respondents] or their nominee.
>
> 4. The [applicants] further agree that the remaining portion of land comprised in Certificate of Title registered at Volume 806 Folio 1 of the Register Book of Titles, containing by estimation 13,324 square feet with dwelling thereon, shall be included

and be a part of the strata development proposed to be constructed on the said land. To this end, the [applicants] shall participate with the [respondents] in making all necessary applications for obtaining modification of the restrictive covenants and approval for the proposed development of the premises to permit a strata development thereon. It is agreed that the [respondents] will solely be responsible for the costs of said applications and approvals and that the [applicants] will not be obliged to contribute thereto. At such time as the aforesaid approvals have been obtained, the [applicants] shall transfer to the [respondents] and or their nominee the remaining portion of land comprised in Certificate of Title registered at Volume 806 Folio 1 of the Register Book of Titles, containing by estimation 13,324 square feet with dwelling thereon in consideration of the sum of $30 million dollars Jamaican Currency. The said sum shall be payable by the [respondents] or their nominee by way of the transfer to each of the [applicants] and or their nominees, of a two (2) bedroom apartment comprising approximately 1,200 square feet each, completed with all internal and external finishes and fixtures in the same manner as the other units being constructed for sale in the proposed development to be erected by the [respondents] or their nominee on the premises, such transfer of the said apartments to occur within 60 months of the date hereof. The parties agree that the [applicants] shall be entitled to continue collecting rental from their tenant in respect of the dwelling on the said premises until such time as the aforesaid approvals have been obtained and the dwelling is required to be vacated for the purpose of commencing construction of the proposed development. At such time that the transfer of the said land with dwelling shall occur, the sum of J$30million dollars shall be secured by way of a charge on the premises, such charge to be subordinate to mortgages for credit facilities as may be secured to implement the proposed development and the charges referred to in paragraphs 2 and 7 hereof. The parties acknowledge that notwithstanding the foregoing, the [applicants] shall be entitled in the alternative to such increased sum as may become due pursuant to Clause 6 hereof in the event that the development is not constructed as contemplated hereby.

5. The Registrar of the Supreme Court is authorized to execute all relevant transfers and applications referred to in

paragraphs 3 and 4 hereof should the [applicants] fail to execute the same within the times specified.

6. In the event that the [respondents] or their nominee have not completed construction of the proposed development within 60 months of the date hereof or have previously determined to sell the premises together with the plans for the incomplete proposed development, the [applicants] shall be entitled to participate in the sale by including the 13,324 square feet with dwelling thereon in such sale and the [applicants] shall be paid such proportionate part of the market value then obtaining for the premises, by the [respondents], or their nominees or the purchaser of the premises.

7. The [applicants] shall bear the transfer tax, stamp duty and registration fees attendant on effecting the transfer referred to in paragraph 4 hereof. Each party shall bear their respective attorneys costs in respect of the said transfers.

8. Each party shall bear their own attorneys' costs herein.

9. The [respondents]' Attorney at Law to prepare, file and serve the Orders made herein."

[10] Despite the consent order, the transfer of the property to the respondents did not take place and the proposed development of the property did not occur. It was not until 30 December 2019 that the applicants obtained a Grant of Administration *De Bonis Non* with the Will Annexed in relation to the estate of the deceased, Mr Phillip Powell. Up to then, the respondents did not take steps, within the 60 months of the date of the consent order (which was the time fixed for the completion of the development), to make use of order 5 of the consent order. Order 5 authorized the registrar of the Supreme Court ('the registrar') to execute all relevant transfers and applications referred to in paras. 3 and 4 of the consent order should the applicants fail to execute the same within the times specified.

[11] By letter dated 29 August 2018, the respondents' attorneys-at-law sought to rely on order 5 of the consent order by submitting to the registrar an instrument of transfer for her execution.

[12] On 7 February 2019, the registrar executed the instrument of transfer. That action of the registrar was promptly challenged by the applicants, whose attorneys-at-law wrote to the registrar, by letter dated 1 March 2019, expressing their view that her execution of the instrument of transfer was based on a misunderstanding or misinterpretation of the consent order. It was expressed by the applicants that after expiration of the 60 months subsequent to the date of the consent order, the parties were bound to proceed under order 6 of the consent order, which imposes no obligation on the applicants to transfer their interest in the property to the respondents, but, instead, gives them the entitlement to participate in any sale of the property by including their interest. Order 6 also stipulates that the applicants are to be paid "such proportionate part of the market value then obtaining for the premises, by the [respondents], or their nominees or the purchaser of the premises".

[13] On 17 December 2019, the respondents filed a notice of application for court orders seeking, among other things, the determination by the court of the question whether the respondents' submission of the instrument of transfer to the registrar and the registrar's execution of the transfer were in accordance with the consent order. That application was supported by the affidavit of Alexander Drysdale.

[14] On 19 January 2021, the respondents filed an amended notice of application for court orders seeking additional orders to include an order, in the alternative, that the property be sold by private treaty with the respondents' attorneys-at-law having carriage of sale.

[15] On 26 January 2021, the applicants filed a notice of application for court orders along with supporting affidavit of Herbert A Hamilton, seeking the following orders:

> "1. A declaration/determination that the Registrar's execution of the Instrument of Transfer on behalf of the [applicants] on or about the 7th February 2019 was wrong, illegal or misinformed and not in accordance with the Order of the Honourable Mr Justice Sykes issued on the 27th day of January 2010 [the consent order]. This is so because the

conditions precedent imposed under paragraph 4 of the Order for a valid transfer of the [applicants'] portion of the property were not complied with by the [respondents], and paragraph 5 of the Order makes it clear that the Registrar has no authority to execute a Transfer under paragraph 6 of the Order.

2. The Instrument of Transfer executed by the Registrar on or about the 7th February 2019 is null and void.

3. The [applicants] as Personal representatives and beneficiaries be given first option to purchase the [respondents'] interest in the property within 120 days of the date of this Order.

4. The property be sold subject to the grant of the option in accordance with the terms of paragraph 6 of the Consent Order.

5. Costs of this Application shall be to the [applicants] to be agreed or taxed.

6. Liberty to apply.

7. Such further and other relief and/or orders as this court shall think fit in the circumstances of this case/application."

[16] On 27 January 2021, Henry-McKenzie J heard and considered both applications together and subsequently made 17 orders. There is no need to rehearse all 17 orders for present purposes and so I have distilled only those orders that I believe are germane to this application under consideration. The relevant orders are as follows:

1. "Instrument of Transfer executed by the registrar of the Supreme Court on 29 August 2018, is hereby set aside *(Order 1)*.

2. It is hereby ordered by consent that the property registered at Volume 806 Folio 1 of the Register Book of Titles be sold by private treaty *(Order 3)*.

3. The [applicants] shall have the first option to purchase the [respondents'] interest in the property within 90 days of the date of this order *(Order 5)*.

4. The [respondents'] Attorneys-at-Law shall have carriage of sale *(Order 6)*.

5. The [applicants] shall within 30 days of the order herein deliver up to [the respondents' Attorneys-at-Law] the Certificate of Title replacing Volume 806 Folio 1 of the Register Book of Titles *(Order 7)*.

6. The [applicants] or any of them or any other person referenced in para. 3 of this order shall deliver up possession of the said property to the [respondents] Attorneys-at-Law within 90 days of the date of the order herein or such longer period as expressly agreed in writing by the [respondents] Attorneys-at-Law to facilitate the sale and transfer of the property pursuant to this order *(Order 9)*.

7. Fees/charges charged by the valuator shall be deducted from the net proceeds of the sale of the property rateably to the parties' respective ownership *(Order 10)*.

8. The real estate fee payable to any real estate broker/dealer with whom the property is listed for sale pursuant to paragraph 4 of this Order shall be paid from the net proceeds of sale of the property rateably to the parties' respective ownership *(Order 12)*.

9. If after the expiration of a period of 30 calendar days after a document or instrument relative to the sale of the property has

been submitted to the [applicants] for execution the [applicants] shall fail to, neglect to, or refuse to sign any document or instrument submitted to them regarding the sale of the property and each and all of them the registrar of the Supreme Court shall be empowered to sign each and all such document on the [applicant's] behalf *(Order 13)*.

10. [Applicants'] application for leave to appeal is refused *(Order 17)*."

[17] On 1 March 2021, the applicants filed in the Supreme Court, a notice of application for court orders to stay proceedings. Barnaby J heard this application on 7 April 2021, and refused it with costs to the respondents to be agreed or taxed.

The application for permission to appeal and stay of execution

[18] On 25 February 2021, the applicants filed in this court, a notice of application for court orders for permission to appeal the orders of Henry-McKenzie J made on 12 February 2021. That application was supported by affidavits of Herbert A Hamilton and Enrico Lorenzo Powell.

[19] On 12 April 2021, the applicants filed an amended notice of application for court orders for permission to appeal along with a supplemental affidavit of Enrico Lorenzo Powell, seeking the following orders:

"(i) An order granting permission to appeal the orders of the Honourable Mrs Justice Henry McKenzie which were made on 12 February 2021.

(ii) That the Notice of Appeal is to be filed within fourteen (14) days of the date of the grant of permission requested, in accordance with Rule 1.11(1)(b) of the Court of Appeal Rules.

(iii) That there be a stay of proceedings in the Supreme Court of Judicature of Jamaica and a stay of the enforcement of the Orders of the –

(a) Honourable Mrs Justice Henry McKenzie which were made on the 12th day of February 2021

(b) Honourable Ms Carole Barnaby made on 7 April, 2021 pending the outcome of the [applicants'] Application for Permission to Appeal and the outcome of the Appeal if permission to appeal is granted.

(iv) The costs of [the] Application to the [Applicants].

(v) Such further and other relief and/or orders as [the] Honourable Court deems just."

[20] The applicants are seeking the orders applied for in this court on several grounds, which, according to their counsel, also include the proposed grounds of appeal. It is, therefore, necessary to rehearse these grounds in full in an effort to better appreciate the appeal that the applicants intended to pursue. Those grounds are set out in these terms:

"(a) The Learned Judge, Honourable Mrs Justice Henry McKenzie erred, when on the 12th February 2021 ordered, inter alia- sale of all the land situate at 19 Norbrook Drive, Kingston 8 registered at Volume 806 Folio 1, that the [respondents] have carriage of sale, and delivery up to them of the Certificate of Title and possession of the said land, in order to facilitate its sale. The Order ignored/disregarded the separate specific proprietary rights/ interests of the [applicants] in the aforesaid land, role/ responsibility as Executors of the Estate and that the [respondents] interests in the property is moot because they have not since the execution of the agreement for sale (1982) — that is approximately 42 years - complied with the condition integral to its completion, that is obtaining subdivision approval. The Learned Judge refused leave to appeal her decision(s). This application is made pursuant to the Court of Appeal Rules 1.8(1) & (3) and Rule 2.14 of the Court of Appeal Rules.

(b) The Applicant has a real chance of success on appeal.

(c) The Learned Judge erred in ordering the sale of the land referenced in Ground 1 because this constituted a variation of the Consent Order of the Honourable Mr Justice Sykes issued

on the 27th January 2010 (the Order) when there was no such application or affidavit evidence in support before the Court. Further the [respondents] Amended Notice of application for Court Orders dated January 19, 2021 is unsupported by Affidavit evidence and does not, satisfy the mandatory requirements of Section 55.2 of the CPR.

(d) That the Learned Judge further erred in granting an Order for the [respondents] to be given possession of the entire property in breach of the terms of para 4 of the Consent order dated January 27, 2010 which stipulates, inter alia, that 'the Defendant shall be entitled to continue collecting rental from their tenants in respect of the dwelling on the said premises until such time as the aforesaid approvals have been obtained and the dwelling is required to be vacated for the purpose of commencing construction of the proposed development' (lines 26-31). The learned Judge also ignored the fact that the [respondents] formally abandoned their plans for the proposed development of the property set out in para 4 of the Order (supra) since they admittedly had no funds to do so, and by letter dated July 15, 2015 also stated explicitly that they would now be proceeding under para 6 of the Order (supra). There is, with respect, absolutely no basis on which the Order made requiring [applicants] to deliver up possession of their property can be justified.

(e) Further, Rule 55.2 of the CPR sets out the mandatory requirements to be included in an application to obtain an Order for the sale of land. The [respondents] had no such application before the Court and, in consequence, the Order for sale is invalid.

(f) Any claim/interest acquired by the [respondents] under the Agreement for sale is defeated/extinguished on the grounds of 'Laches'.

(g) The appeal is necessary to enable the Applicants/ Defendants to protect their rights and interest (legally, equitably and beneficially under the Estate) in the property and as per the terms of the Order of 27th day of January, 2010 to which the parties are still bound.

(h) It is in the interest of justice to make this order.

(i) There is a real risk that the [applicants] will suffer an injustice if a stay of execution of the orders is not granted pending the Application for Leave to Appeal and the Appeal itself if leave is granted."

[21] Paragraph 14 of the affidavit of Enrico Lorenzo Powell in support of the application for permission to appeal, also set out some proposed grounds of appeal, which counsel for the applicants indicate should be considered in conjunction with those set out in the notice of application. That affidavit states that the applicants have a real chance of succeeding on appeal because the learned judge erred in the following respects:

"(a) Failing to give due consideration to the Orders of the Honourable Mr. Justice Sykes made on the 27th day of January, 2010, which identified the respective entitlement(s) in the subject property, and conditions precedent to any transfers taking place regarding the relevant and apportioned section(s) in the said lands.

(b) Granting an order for the [respondents] to have possession of the entire property for purposes of facilitating the sale of the entire property without regards to the terms of the Consent Order of January 27, 2010; particularly in respect to their right to possession and consideration/compensation.

(c) Purportedly in varying the terms of the Consent Order made by the Honourable Mr. Justice Sykes made on the 27th day of January, 2010, when there was no such Application before the Court or any Affidavit evidence in support of such an application.

(d) Failing to remind herself of the mandatory requirement of Rule 55.2 of the CPR before an order for the sale of land can be made."

[22] On 13 April 2021, the respondents filed an affidavit of Alexander Drysdale in opposition to the applicants' application for permission to appeal and for stay of execution. The application was hotly contested.

The issues

[23] The issues that have been distilled for consideration from the proposed grounds and the supporting submissions of counsel, are these:

(1) Whether the order of the learned judge that the property be sold, disregarded the terms of the consent order with respect to the applicants' separate specific proprietary rights and interest in the property, and the applicants' right to possession as executors of the estate (para. 14(a) of the affidavit of Enrico Lorenzo Powell, and para. 6(a) of the amended notice of application).

(2) Whether the order of the learned judge for the respondents to have possession of the entire property for the purposes of facilitating the sale and transfer of the property, disregarded the terms of the consent order with respect to the applicants' right to possession, consideration and compensation (para. 14(b) of the affidavit of Enrico Lorenzo Powell, and para. 6(a) and (d) of the amended notice of application).

(3) Whether the orders of the learned judge for the property to be sold constitutes a variation of the consent order (para. 14(c) of the affidavit of Enrico Lorenzo Powell, and para. 6(c) of the amended notice of application).

(4) Whether the learned judge was required to take into consideration rule 55.2 of the CPR before making the order for the property to be sold (para. 14(d) of the affidavit of Enrico Lorenzo Powell, and para. 6(e) of the amended notice of application).

(5) Whether any claim or interest acquired by the claimants under the agreement for sale is defeated or extinguished due to laches. (para. 6(f) of the amended notice of application).

[24] These grounds must be assessed to determine whether an appeal will have a real chance of success on any of them. This is in keeping with the requirements of the law. The court has had regard to the applicable law as laid down in the Court of Appeal Rules ('CAR') (rule 1.8(7)) and as extracted from case law, which is now regarded as almost trite and need not be rehearsed at this time.

Issue (1)

Whether the order of the learned judge disregarded the terms of the consent order with respect to the applicants' separate specific proprietary rights and interest in the property

[25] The applicants contended that the orders of the learned judge disregarded the terms of the consent order with respect to their separate specific proprietary rights and interest in the property.

[26] The respondents, however, submitted that nothing in the learned judge's orders treated with a transfer of the applicants' interest in the property. They maintained that the learned judge clearly recognized that the applicants have a separate share and interest in the property from the respondents and that it was only the respondents' interest that they were to purchase by exercising the option to purchase.

[27] The respondents also submitted that neither the order for delivery up of the certificate of title, delivery up of possession of the property to facilitate the sale and transfer, nor the direction that carriage of sale is to be with the respondents' attorneys-at-law, disturbed and or affected the parties' respective interests and entitlements in the property.

[28] Having considered the submissions on both sides, I agree with the submissions of the respondents on this issue. I find that the orders of the learned judge that the property be sold and that carriage of sale be given to the respondents' attorneys-at-law do not disregard the terms of the consent order with respect to the applicants' separate specific interest in the property, and their right to possession as executors of the estate.

I have come to this conclusion on an objective consideration of all the terms of the order; and from start to finish, it discloses that the separate interests have been recognised.

[29] As counsel for the respondents submitted, the orders of the learned judge recognised that the net proceeds would be divisible among the applicants and the respondents in terms of their respective interests and entitlements in the property, if the option to purchase is not exercised and the property is sold as a whole. This was made clear, specifically, in the orders dealing with the payment of the valuator fees and the real estate brokerage fee, where the learned judge specified that these fees shall be paid from the net proceeds of the sale pro-rated to the parties' respective ownership (orders 10 and 12 of the orders of Henry-McKenzie J). This is a clear recognition by the learned judge of the separate specific proprietary rights and interest of the parties in the property.

[30] I find that it would be hard pressed for the applicants to convince the court on appeal that this argument has merit. In my view, this proposed ground of appeal does not have a real chance of success on appeal.

Issue (2)

Whether the order of the learned judge disregarded the terms of the consent order with respect to the applicants' right to possession, consideration and compensation

[31] The applicants submitted that the order of the learned judge for the respondents to have possession of the entire property, for the purposes of facilitating the sale and transfer of the property, disregarded the terms of the consent order with respect to their right to possession, consideration and compensation.

[32] The respondents submitted, in response, that the learned judge's direction regarding possession of the property is to ensure that on the sale of the property, vacant possession can be given to the purchasers. They noted that it is clear from order

4 of the consent order that there are tenants in occupation of the property and that if the property is to be sold and vacant possession be given to the purchasers of it, the tenants would need to vacate, and possession be given to the attorneys-at-law with carriage of sale so that legal and actual physical possession can be given to the new owners at the completion of the sale. The respondents submitted, however, that this position would be rendered unnecessary, once the applicants exercise the option to purchase and, in fact, purchase the respondents' share in the property. There would then be no need for possession of the property to be delivered up to the attorneys-at-law for the respondents.

[33] Again, I cannot but accept the submissions of the respondents. The applicants had applied for, and were granted, first option to purchase the respondents' share in the property, therefore, as long as they exercise this option, there can be no disturbance of their right to possession. If the applicants do not exercise the option to purchase, then, the terms of the consent order do contemplate that vacant possession would have to be given to the respondents' attorneys-at-law for the property to be sold to the third party purchaser. That was the course of action consented to by the parties and judicially endorsed by Sykes J in the consent judgment.

[34] Based on what has been put before us, I cannot see how this court could agree with the applicants' contention that the order made for the respondents to have possession of the entire property, for the purposes of facilitating the sale and transfer of it, disregarded the applicants' interest in the property or runs counter to the terms of the consent order. The learned judge had made the order to facilitate the sale and transfer of the property in the event that the applicants do not exercise their option to purchase.

[35] Indeed, if there is any ambiguity in this aspect of the order, or anything that could lead to hardship on the applicants with respect to delivery up of possession, they could approach the court under the 'liberty to apply' provision for clarification or variation of that order. There is nothing in the order that would warrant disturbance by

this court in light of the applicants' entitlement to avail themselves of the 'liberty to apply' provision. There is no discernible basis on which this court would disturb that order on appeal.

[36] As it relates to the applicant's rights to compensation, order 6, pursuant to which the order was applied for by the parties and made by Henry-McKenzie J, sets up compensation for the applicants upon sale of the property in keeping with their interest.

[37] So again, this court would be hard pressed, on an appeal by the applicants, to conclude that the order made by the learned judge that possession be delivered up to the respondents' attorneys-at-law to facilitate the sale of the property has disregarded the consent order or runs counter to the applicants' interest in the property. I find that on this issue, the applicants have no real prospect of success on appeal.

Issue (3)

Whether the orders of the learned judge for the property to be sold constitutes a variation of the consent order

[38] The view submitted by the applicants (which would be correct) is that order 6 of the consent order gives them an entitlement to participate in any sale of the property by including their interest as part of the sale, but it does not impose an obligation on them to sell their interest in the property if they chose not to participate in the sale. The applicants submitted that the learned judge's order for the entire property to be sold is, therefore, a variation of the consent order and there was no application before her for variation or the setting aside the consent order nor was there any evidence on affidavit to support a variation.

(a) Whether there was an application before the learned judge to vary or set aside the consent order

[39] There was no application before the learned judge from either party expressly seeking an order that the consent order be varied or set aside. When the terms of the applications are considered, however, it is indisputable that both sides asked the

learned judge to grant an order for sale of the property, pursuant to order 6 of the consent order. The applications were made to give effect to order 6 because, in the view of the parties, specific performance was no longer possible.

[40] Therefore, the respondents' submissions that the learned judge did not vary the consent order and that the consent order remains intact, are accepted as sound and irrefutable. It is clear that both parties had acted under the provisions of order 6 for the sale of the property and that the learned judge, as counsel for the respondents put it, would have merely acquiesced to those requests and made an order that the property be sold.

[41] There is another argument advanced by the applicants, within this context, that must be disposed of at this juncture and that relates to the status of the respondents' application before the learned judge. In this regard, counsel for the applicants submitted that the respondents did not have a proper application before the learned judge because no grounds on which the application was being made were set out in the amended notice of application and the application was not supported by an affidavit.

[42] In my opinion, there is no merit in this argument because of the contents of the notice of application itself. The notice explicitly states that the grounds on which it was based were as set out in the affidavit of Alexander Drysdale sworn to on 17 December 2019, which was filed at the time of the original application. Furthermore, the applicants, through their counsel, responded to that same application and affidavit, without objection. In my view, any irregularity (even if there were such an irregularity) would have been waived by the action of the applicants in responding unconditionally to that application and the affidavits. So for that reason, the applicants would not stand on good ground with this argument to say that there was no proper application before the court by the respondents.

[43] I also accept the argument advanced on behalf of the respondents that the amended application was not filed as a new application because there was no

withdrawal of the original application. This means that the amended application would have taken effect from the date the original application was filed with all supporting material. All supporting documents that were filed with the original affidavit would have remained relevant. The respondents' application was, therefore, properly before the court for the court to have regard to it.

[44] Therefore, for the foregoing reasons, I conclude that the applicants cannot succeed on this argument that the learned judge erred in taking account of the respondents' application for the property to be sold.

(b) Whether the learned judge was wrong to have made the order by consent

[45] An additional complaint of the applicants is that the learned judge was wrong to have made the order by consent. Again, one cannot foresee what benefit would accrue to the applicants if they were to proceed to an appeal on this ground. When one considers what was before the learned judge, it is clear that both sides had applied for an order for sale of the property. An examination of the respondents' amended notice of application for court orders shows that they requested an order at para. 5 that:

> "In the alternative to paragraph 1 hereof, and **pursuant to paragraph 6 of the Order dated 27th January [2010],** the **Court do direct that the property registered at Volume 806 Folio 1 be sold by private treaty** with the respondent's Attorneys-at-Law having carriage of sale…" (Emphasis added)

[46] One notes that this application sought an order that "the property" be sold. It did not say part be sold or that the part over which the respondents are exercising the right to possession or ownership should be sold. It is the same application to which the applicants would have responded.

[47] When one looks at para. 3 of the applicant's application filed on 26 January 2021 in response to the respondent's application, it is observed that they were seeking

an order that they be given first option to purchase the respondents' interest in the property. Further, at para. 4 of their application, the applicants requested an order that:

> "**The property be sold** subject to the grant of the option **in accordance with the terms of paragraph 6 of the Consent Order**." (Emphasis added)

[48] It is, therefore, unmistakable that both sides sought to invoke order 6 of the consent order in their applications before Henry-McKenzie J. The order clearly states that if the conditions were not satisfied for the development to continue or if construction were not completed, within the times specified, then the property should be sold, and the applicants are entitled to include their portion in that sale. The order needs no interpretation; it is a very clear and prudent alternative to the specific performance provision of the order.

[49] Furthermore, an examination of a letter dated 16 April 2019, from the applicants' attorneys-at-law to the respondents' attorneys-at-law (exhibit "AD-5"), reveals that the applicants have indicated (through their attorneys-at-law) that they are prepared to negotiate the purchase of the respondents' interests in the property or participate in the sale of its entirety, whichever option is mutually acceptable by the parties. It is, therefore, quite curious, indeed, that the applicants are seeking to appeal the learned judge's order on the basis that they did not consent to the entire property being sold.

[50] I would conclude on this issue that based on the interpretation of order 6, which does not impose any obligation on the applicants to sell their interests but rather an entitlement to do so, if they so desire, the order of Henry-McKenzie J expressed to be 'by consent' is not likely to be found by this court to be erroneous. It is clear that she was of the view, and rightly so, that both parties wished for the entire property to be sold. That was the natural interpretation of what was contained in not only the respondents' application but also the applicants'. Accordingly, the use of the words 'by consent' is not such as to cause this court to disturb the order of the learned judge for sale of the property.

[51] I conclude that the learned judge's order for the property to be sold would not have been a variation of the consent order, but, instead, would have been giving effect to order 6. The fact that she had gone on to make consequential orders does not detract from the obvious fact that the application of the parties was for the property to be sold. The learned judge, in the exercise of her concurrent jurisdiction in law and equity, had a right to give appropriate directions to enhance the efficacy of the orders of the court. The absence of an application by the applicants for consequential orders is noted. Indeed, it is rather curious as to how the applicants expected the property to be sold without the necessary orders being made by the court for execution of the sale.

[52] In my view, the applicants would face a serious challenge in seeking to convince this court, if the matter were to proceed to a hearing of the proposed appeal, that the wording of their application imparts their intention that only a portion of the property was to be sold. It is not at all likely that this court would find that the parties had not consented to an order for sale of the property in accordance with order 6 of the consent order.

[53] This proposed ground of appeal that the order for the property to be sold constitutes a variation of the consent order and that there was no consent as expressed in the order of Henry-McKenzie J, cannot stand as meritorious for the purposes of granting permission to appeal.

Issue (4)

Whether the learned judge was required to take into consideration rule 55.2 of the CPR

[54] The applicants submitted that the learned judge failed to consider that the respondents did not comply with the mandatory provisions of rule 55 of the CPR and

that there was no application or affidavit before the learned judge, which would allow her to make an order for sale of the property.

[55] The respondents' response is that from a literal reading of the primary or substantive legislation, the court is not mandated to apply the provisions of part 55 of the CPR every time an order for sale of land is made. They cite the provisions of rule 17.1(1)(c)(v) of the CPR as an example. Counsel on their behalf argued that the orders for sale that should be subject to and governed by the rules in part 55 of the CPR are those orders for sale made "on the application of the person prosecuting a judgment or order for the payment of money" and that part 55 of the CPR is, therefore, an enforcement mechanism to realise the proceeds or fruits of a money judgment. The respondents also rely on sections 28A and 28B of the Judicature (Supreme Court) Act in support of this submission.

[56] The respondents further argued that the applications before the learned judge were seeking to carry into effect and obtain directions on the consent order that the property could be sold and were not applications made pursuant to part 55 of the CPR.

[57] I accept the respondents' arguments that part 55 of the CPR was not invoked by either party and was not relevant to the applications, which were before the learned judge. Having had regard to the provisions of part 55 of the CPR, and sections 28A and 28B of the Judicature (Supreme Court) Act, I conclude that the learned judge had no obligation to consider rule 55.2 of the CPR, in the light of the applications, which were before her and the provisions of the consent order. She could have made the order for sale on either application and part 55 did not fall for consideration in order for her to do so. In fact, the applicants themselves did not pursue their application for sale of the property under part 55 and so would not have complied with the requirements of the Rules that they are seeking to invoke.

[58] It would be an insurmountable hurdle for the applicants to convince this court, if the matter were to proceed to appeal, that the learned judge had erred by failing to

remind herself of the mandatory requirements under part 55 of the CPR, which was never engaged in the proceedings. This proposed ground lacks merit, and therefore, has no chance of success.

Issue (5)

Whether any claim or interest of the respondents under the agreement for sale is defeated or extinguished due to laches

[59] This issue arose from the proposed ground of appeal detailed at para. 6 (f) of the applicants' application for leave to appeal. It is noted, however, that this was not set out as a proposed ground of appeal at para. 14 of the affidavit of Enrico Lorenzo Powell and there was no argument from counsel for the applicants in support of it. I have, nevertheless, considered this ground for completeness.

[60] The court heard counsel for the respondents in response to this ground and noted their submissions, which, again, I cannot help but accept that laches is a defence to an equitable action, and it does not bar the enforcement of a judgment already obtained. In any event, this argument was never raised in the court below because both parties proceeded on the assumption that they could apply for order 6 of the consent order to be invoked.

[61] Accordingly, the applicants cannot successfully raise laches to defeat the enforcement of the consent order and to nullify the order of the learned judge that the property be sold. This proposed ground of appeal averring laches, therefore, is without a real chance of success.

Conclusion

[62] Having examined all the issues raised by the applicants on this application, it is found that there is no basis on which the court could properly grant permission to appeal, as the proposed grounds have disclosed no real chance of success. Accordingly, that application must be refused.

[63] Given the findings on the application for permission to appeal, it flows naturally that there is no basis to grant a stay of execution either of the orders of Henry-McKenzie J or Barnaby J. It must be said, however, in relation to the order of Barnaby J, that her order is not amenable to a stay of execution, except for the costs order. What she did was to refuse the application for a stay of execution of the order of Henry-McKenzie J. In effect, there is nothing in her order that could be stayed which would benefit the applicants as it relates to the order of Henry-McKenzie J. However, for completeness, it is necessary to state, for the record, that the application for stay of execution of that order also fails.

[64] In the premises, the application for permission to appeal and for stay of execution is refused.

The issue of costs

[65] On the issue of costs, it is noted that the respondents have succeeded on the application. In keeping with the general rule that costs follow the event, they should be awarded costs. Counsel for the applicants had, however, indicated, from the very start of these proceedings, that the application for permission to appeal was without notice and, as such, was not served on the respondents. This issue is raised because the position of the applicants' counsel as to service of the application for permission to appeal would affect the question of the respondents' entitlement to costs.

[66] Having heard the submissions of counsel for both sides on the matter, I cannot accept the applicants' position that costs should not follow the event. While permission to appeal may have been sought without notice, the application for stay of execution required service to be effected, which was done. Moreover, the respondents were not only served with that notice, but were also served with the application for permission to appeal which was annexed to the affidavit of Enrico Powell that was served on the respondents. Therefore, for all intents and purposes, the respondents were served with all documents pertinent to these proceedings. In those circumstances, the respondents, were, entitled and, indeed, obliged, to respond to everything served on them, including

the application for permission to appeal, if they so desired. They responded and filed copious submissions, which the court can say have been quite helpful.

[67] The respondents have incurred costs in responding to the application for permission to appeal. On this basis, they ought not to be deprived of the costs of the application; costs should be awarded to them to be agreed or taxed.

FOSTER-PUSEY JA

[68] I agree.

DUNBAR-GREEN JA (AG)

[69] I agree.

MCDONALD-BISHOP JA

ORDER

1. The applicants' amended notice of application for permission to appeal and for stay of execution of the orders of Henry-McKenzie J made on 12 February 2021, and of Barnaby J made on 7 April 2021, is refused.

2. Costs of the application to the respondents to be agreed or taxed.