JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA 2019 APP 00052

BETWEEN	**SHARON TIMOLL**	**1ST APPLICANT**
AND	**MARGARET TIMOLL**	**2ND APPLICANT**
AND	**JOSHUA TIMOLL**	**3RD APPLICANT**
AND	**LESTER WATTS**	**1ST RESPONDENT**
AND	**TIMOTHY WATTS**	**2ND RESPONDENT**

Ms Janice Behari on behalf of the applicants

Mrs Joan Thomas instructed by Joan Thomas and Company for the respondents

27 February and 13 March 2019

IN CHAMBERS

BROOKS JA

[1] This is an application by Ms Sharon Timoll, Ms Margaret Timoll and Mr Joshua Timoll (the applicants) for a stay of execution pending the outcome of their appeal against a decision of the learned Parish Court Judge for the parish of Saint Catherine. The learned Parish Court Judge, on 29 January 2019, gave judgment for Messrs Lester Watts and Timothy Watts (the respondents), and ordered the applicants to immediately vacate the premises, for which the respondents, in their claim, sought possession.

[2] The respondents had purchased the premises in 2016 and, after giving notice to the applicants to vacate the property, filed a plaint in 2018 for recovery of possession from them. The applicants contested the plaint on the basis of the Limitation of Actions Act. They asserted that they were successors in title to their father, Clifton Timoll, who was once one of the joint registered proprietors for the premises. They further claimed that Mr Clifton Timoll had acquired sole title to the premises by virtue of a possessory title. The applicants contended that Mr Clifton Timoll had dispossessed the other joint tenants and that the applicants had lived with him at the premises for over 40 years. They claimed that they were entitled to benefit from Mr Clifton Timoll's possessory title.

[3] Mr Clifton Timoll was originally jointly registered as proprietor for the premises along with Rupert Timoll, Daphne King, John Owen Timoll and Novlette Timoll, previously known as Novlette Williams. Rupert Timoll and John Timoll predeceased Clifton Timoll, who died in 2016. All these deaths were noted on the certificate of title. Thereafter, the surviving joint tenants, Daphne King and Novlette Timoll, sold the premises to the respondents.

[4] The issue before the learned Parish Court Judge was therefore a mixture of fact and law. It turned on whether Mr Clifton Timoll had in fact dispossessed his co-owners as the applicants had asserted. The learned Parish Court Judge apparently found that he had not. Consequently, she found that the respondents had a good basis to support their registered title and that the applicants had no basis to resist the claim for possession.

[5] The applicants have filed an appeal against the learned Parish Court Judge's decision. They wish, however, to be allowed to remain living at the premises until the resolution of the appeal.

[6] Ms Behari, for the applicants, contended that the applicants have a meritorious appeal. According to learned counsel, the learned Parish Court Judge erred in her understanding of the relevant law concerning the acquisition of a possessory title by one joint tenant from his co-owners. Ms Behari contended that the learned Parish Court Judge misunderstood the law concerning the rights of a purchaser of registered property for value.

[7] Learned counsel asserted that irremediable harm would be caused to the applicants if a stay of the learned Parish Court Judge's order were not imposed. She pointed out that they live with their respective families, including children, at the premises and asserted that there is a real risk that injustice would result if a stay of execution were not granted. The respondents, she said, would suffer no such prejudice.

[8] Ms Behari submitted that there was ample evidence to support the claim for a possessory title. She said that there was no evidence that any of the other joint tenants had exercised any control over the premises. Learned counsel submitted that there was no need for any evidence of confrontation, hostility or even ouster from the property, in order to establish a possessory title. She relied for support of her submissions on **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37, **Recreational Holdings (Jamaica) Limited v Carl Lazarus and Another** [2014] JMCA Civ 34, the

Privy Council decision in the latter case (**Recreational Holdings 1 (Jamaica) Limited v Lazarus** [2016] UKPC 22) and **Heather Rodney and Another v Audrey Dawn Pringle and Another** [2016] JMCA App 9.

[9] Mrs Thomas, for the respondents, on the other hand, asserted that the proposed appeal has no real prospect of success. She contended that the evidence before the learned Parish Court Judge militated against a finding that Mr Clifton Timoll had excluded his co-owners. Learned counsel submitted that the evidence was that Mr Clifton Timoll occupied the premises with the consent of his co-owners. She argued that that occupation was by way of a family arrangement. Learned counsel submitted that Mr Clifton Timoll was a licensee, and the applicants, his children, are but licensees.

[10] Significantly, learned counsel, pointed out that one of the applicants, Mr Joshua Timoll, admitted in evidence, before the learned Parish Court Judge, that in 2015, Mr Clifton Timoll and his co-owners, Ms Daphne King and Ms Novlette Timoll, filed a joint claim for recovery of possession against him, Mr Joshua Timoll. The importance of that evidence, Mrs Thomas submitted, is that it indicates an acknowledgement by Mr Clifton Timoll of the title of his then co-owners. She argued that time would only have started running against the co-owners, if it started at all, when Mr Clifton Timoll died on 14 January 2016, or possibly when the respondents acquired title to the premises.

[11] Learned counsel also pointed to the fact that the respondents have incurred expense to purchase the premises (the certificate of title reveals a purchase price of $20,000,000.00), to pay the property taxes for them and to dump material on them, in

order to cure a drainage problem. The respondents, she submitted, should therefore, have the benefit of the premises. The prejudice to the respondents, she argued, would be greater if the stay were granted, than the prejudice would be to the applicants if the stay were refused. Mrs Thomas relied, in part, on **Goomti Ramnarace v Harrypersad Lutchman** [2001] UKPC 25; [2001] WLR 1651, in support of her submissions.

[12] In response, Ms Behari submitted that the evidence before the learned Parish Court Judge about the 2015 claim was that Mr Clifton Timoll was gravely ill at the time that it was before the court, and had had nothing to do with the filing of the claim. In fact, she said, Mr Joshua Timoll's evidence was that his father was unaware of the proceedings. Learned counsel admitted, however, that the claim had been filed by counsel on behalf of the then co-owners.

Analysis

[13] Learned counsel have correctly identified the two main principles that govern the court's consideration of applications to stay execution of court orders pending the outcome of an appeal. They are:

1. The merits of the proposed appeal; and

2. The risk of injustice or irremediable harm to one side or the other depending on whether the stay is granted or not.

[14] These principles have been approved by this court based on the interpretation of the judgments of two landmark cases. The first is the judgment of Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited** [1997] EWCA 2164. Phillips LJ stated the correct approach in this way:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. **If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.** Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. **This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered.** But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice...." (Emphasis supplied)

[15] The second case is **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065. In that case Clarke LJ opined, at paragraph [22], that:

> "...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, **but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay.** In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?" (Emphasis supplied)

Both those cases have been approved by a number of cases in this court (see, for example **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1).

[16] The substantive law, relating to the merits of the instant case, may be gleaned from the important case, emanating from this jurisdiction, **Myra Wills v Elma Roselina Wills** [2003] UKPC 84. Their Lordships made it clear in that case, that:

a. a joint owner of real property may obtain a possessory title to defeat the title of his co-owners;

b. it is the intention of the person in possession which is to be considered in deciding whether a possessory title has been established; and

c. the court must look at the facts and circumstances of each case to decide the issue "whether what has been done in relation to the land constitutes possession [to the prejudice of the co-owners]" (paragraph 20).

[17] The Privy Council, in **Wills v Wills**, also indicated that consent was an important factor in cases such as these. The Board, at paragraph 17, approved the following statement by Lord Millett in **Ramnarace v Lutchman** [2001] 1 WLR 1651, in which Lord Millett said, at paragraph 10:

> "Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. **Possession is not normally adverse if it is**

> **enjoyed by a lawful title, or with the consent of the true owner**." (Emphasis supplied)

Their Lordships made it clear that they understood that the term "adverse possession" was not used in that extract, in a technical sense, but rather in reference to a possessory title.

[18] In applying those principles to the present case, it must first be noted that the outcome of the appeal is likely to depend heavily on the evidence that was placed before the learned Parish Court Judge, and her findings of fact, having heard and seen the witnesses. It is true that certain statements, said to have been made by the learned Parish Court Judge, do seem to run afoul of the principles of law relating to the acquisition of possessory titles in the case of joint tenants. The learned Parish Court Judge is reported to have said, in the course of her oral judgment:

> "…if a finding of adverse possession were to be made in favour of the said Clifton Timoll, being a paper title owner of the said property, it would mean that he was in adverse possession of the property against himself" (ground of appeal (iii)); and
>
> "an order for adverse possession could not properly be made against bona fide purchasers for value of the property" (ground of appeal (v)).

[19] Those statements would indicate that the learned Parish Court Judge would not have correctly appreciated the relevant law and that an appeal would have a real prospect of success. It is important to bear in mind, however, that in the absence of the learned Parish Court Judge's reasons for judgment, the context in which the statements were made, assuming an accurate reporting, may give a different impression.

[20] An important factor, nonetheless, is the evidence that a joint claim was filed by the then joint tenants to recover possession from Mr Joshua Timoll. The strong implication of that action, as Mrs Thomas argued, is that Mr Clifton Timoll, in acting in concert with his co-owners, recognised their title to the property along with his. There is, however, another implication. It is that even if Mr Clifton Timoll was not aware of the claim against Mr Joshua Timoll (and the filing of the claim by counsel suggests otherwise), it does indicate that even during Mr Clifton Timoll's lifetime, his co-owners were taking steps to assert their rights of title. These are strong indicators that militate against a finding that Mr Clifton Timoll had secured a possessory title against his co-owners.

[21] On the other hand, it is not known what evidence was adduced by the applicants to support their claim that Mr Clifton Timoll secured a possessory title against his co-owners. One snippet of evidence said to have been given at the trial is that Mr John Timoll, during his lifetime would visit the premises from time to time, but did not stay there.

[22] The critical issue to be decided is whether there was credible evidence before the learned Parish Court Judge that Mr Clifton Timoll occupied the premises without the consent of his co-owners. The impugned comments of the learned Parish Court Judge would also be a basis on which a prospective appeal would have a real prospect of success.

[23] Having considered the prospects of success, it is also necessary to assess the issue of the likely hardship to each side, if a stay were granted, or, conversely be refused, should therefore be closely considered.

[24] There is no doubt that refusing the application for a stay would result in great hardship to the applicants. They state that they have been living at the premises for upwards of 40 years and their respective children also live there. It is clearly a multigenerational family home. It also seems that they have not been paying anything for their accommodation there. Apparently, they do not even pay the property taxes for the premises.

[25] On the other hand, the respondents have the benefit of a judgment of the court below. They have incurred the expense of purchasing and upgrading the premises and they have not been able to reap the full reward of their efforts and expenditure.

[26] The prejudice to each side, depending on whether the stay is granted or refused, seem equal. Some other factor should be considered to determine the matter. If the respondents were to receive some compensation for the applicants' use and occupation of the premises, that would be a means of bringing some mitigation to the position of the parties.

[27] In the event that the appeal was successful, the likelihood is that the respondents would be able to reimburse the applicants. If it were unsuccessful, at least, the respondents would not be completely out of pocket.

Summary and conclusion

[28] In applying the principles set out in the **Combi (Singapore) Pte Limited** and **Hammond Suddard Solicitors**, it may be said that the prospects of success of the applicants' prospective appeal will depend on the evidence that was placed before the learned Parish Court Judge and her view of that evidence. The prejudice to each side therefore takes on more significance. A way of minimising that prejudice for each side would be appropriate. The stay, therefore, may be granted on terms, which should give each party some mitigation of the prejudice that the court's order will cause.

[29] The parties were given an advance indication of the thinking of the court and were asked to agree, if they could, on a monthly figure that the applicants would pay to the respondents for their use and occupation of the premises pending the outcome of the appeal. They, happily, were able to do so. A figure of $20,000.00 per month has been agreed.

[30] The orders of the court are therefore as follows:

1. The application for stay of execution is granted pending the determination of the appeal.
2. The stay of execution is granted on the following terms:
    a. the applicants shall pay to the respondents the sum of $20,000.00 monthly commencing in March 2019;
    b. the sum shall be paid on or before the first day of each month except for the month of March 2019,

when it shall be paid on or before the 15th day of the month;

c. the sums shall be paid to the attorney-at-law for the respondents;

d. the applicants shall not cause or permit any other person to occupy the premises, other than the current occupants;

e. the applicants shall maintain the premises in at least the condition that they are currently in, fair wear and tear excepted;

f. should the applicants fail to make any of the payments on or before the fifth day after which it is due, or commit any breach of any other of these terms of the stay of execution, this order for stay of execution shall lapse and the respondents shall be at liberty to apply for a warrant of possession against the applicants;

g. this order shall not be treated as creating a tenancy arrangement between the parties.

3. Costs are to be costs in the appeal.

4. Liberty to apply.