

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P  
THE HON MRS JUSTICE SINCLAIR-HAYNES JA  
THE HON MR JUSTICE D FRASER JA**

**APPLICATION NO COA2023APP00236**

**BETWEEN ANTHONY BROWN APPLICANT  
AND DADRIE NICHOL RESPONDENT**

**Ms Sarah-Elizabeth Dixon and Ms Abigail Heslop instructed by Cardinal Law for the applicant**

**Ms Michelle Smith instructed by Lewis, Smith, Williams & Co for the respondent**

**11 and 20 December 2023**

**Civil practice and procedure — Claim for declaration of ownership of real property— Claim proceeded in the absence of the respondent or his legal representative – Judgment in favour of the claimant – Application for extension of time within which to file notice of appeal – Application severely delayed – No good explanation for delay – Issue whether claimant’s claim was statute barred – Whether extension of time should be granted – Whether stay of execution should be granted – Limitation of Actions Act sections 3 and 30**

**BROOKS P**

[1] This is an application for an extension of time in which to file a notice of appeal. The applicant, Mr Anthony Brown, is the respondent to a claim that Ms Dadrie Nichol filed in the Supreme Court. In May 2021, Ms Nichol secured a judgment that an apartment, for which she and Mr Brown are the joint registered proprietors, is jointly owned by them. J Pusey J, who heard the matter in that court, also made orders that,

among other things, the apartment should be sold, and the proceeds of the sale divided equally between Mr Brown and Ms Nichol.

[2] Mr Brown wishes to appeal that decision, and, on 19 October 2023, he filed the present application. He has also applied for a stay of execution of the learned judge's order.

[3] Ms Nichol opposes his application. She contends that not only is Mr Brown's application woefully late, but he does not have a good explanation for the delay and his proposed appeal has no real prospect of success.

### **The background to the application**

[4] Mr Brown deposes that he was living in Canada when Ms Nichol filed the claim in the Supreme Court and that he was never served with the fixed date claim form. He subsequently heard about the claim and retained an attorney-at-law to represent him, but the attorney-at-law did not appear in court when the order was made. Mr Brown asserts that he was not aware that the judgment was handed down but was informed that a notice to quit had been posted on the door of the apartment in September 2023.

[5] He contends that he and Ms Nichol were living together in the apartment, but she vacated the apartment in January 2008 and has not returned to it since that time. Since then, he says, he has solely paid the mortgage loan instalments, strata fees, property taxes and maintenance expenses. He further contends that he has been in continuous open and exclusive possession of the apartment from January 2008 to 2018, when he moved to Canada, and thereafter had open undisturbed and exclusive control of it as two separate people occupied it at different times, with his permission, until his return to the island in September 2023.

[6] Ms Nichol, in resisting the application, agrees that she left the apartment in 2008 and has never returned since then, but that she was forced to leave because of Mr Brown's physical abuse. She says that she never relinquished her interest in the apartment and that Mr Brown was aware of this. She says that in the intervening

period, Mr Brown had offered to purchase her interest but failed to take the required steps to get the transaction done.

### **The analysis of the application**

[7] Applications for the extension of time within which an appeal may be filed, may be granted if the applicant satisfies the standard set by this court, as explained in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 (**Leymon Strachan**). By that standard, Mr Brown, to succeed, must satisfy this court that:

- (i) the delay is not inordinate;
- (ii) there are good reasons for the delay;
- (iii) there is an arguable case for the appeal;
- (iv) if the application is allowed, the degree of prejudice to the other parties is not oppressive; and
- (v) it would be in the interests of justice to grant the application.

[8] The application will be assessed against those requirements.

#### The length of the delay

[9] Mr Brown's delay of almost two and a half years is inordinate. There needs little more to be said in this regard. However, the court does not usually decide an application for extension on this basis alone. The reason for the delay is usually also considered together with the length of the delay.

#### The reason for the delay

[10] Mr Brown's reasons are also without merit. He says that although he was not served with the fixed date claim form, he was made aware that Ms Nichol's claim was to be heard in the Supreme Court on 12 April 2021. He says that he retained an

attorney-at-law to represent him but, although he paid a retainer, the attorney-at-law did not represent him. He was unaware of the situation because he could get no information from the attorney-at-law. Being in Canada, and unable to travel because of health reasons, he could not ascertain the status of the matter.

[11] He seeks to blame various attorneys-at-law for not representing him properly or at all. One attorney-at-law, he asserts, without his instructions, wrote to Ms Nichol's attorney-at-law offering to settle her claim. He says that he was never advised of his rights.

[12] It was when he had been cleared to travel, he says, that he came to Jamaica, and, for the first time saw the various court documents that had been left at the apartment. He then retained his present attorneys-at-law.

[13] His affidavit in support of his application falls woefully short of indicating any diligence on his part in responding to Ms Nichol's claim. Even if this court accepts his assertion that he could find no responsible legal representation to attend to the case while he was in Canada, this court recognises that his doctors cleared him for travel in December 2022, yet he did not come to the island to attend to the court matter until 24 September 2023. It appears that he was content to ignore the matter until the notice to quit was posted on the door of the apartment in early September 2023.

[14] He fails to satisfy this requirement as well.

[15] Despite Mr Brown's failure to provide a good reason for his delay, these failures will not be treated as dispositive of his application. Precedent for this approach may be found in para. [42] of **Dale Austin v The Public Service Commission and Another** [2016] JMCA Civ 46. The next step is to consider whether his proposed appeal is arguable.

Whether the proposed appeal is arguable

[16] Mr Brown's earlier deficiencies are, however, more than compensated for by the merits of his proposed appeal. It appears, from the affidavit evidence that the parties have placed before this court, that there is a strong basis for finding that Ms Nichol had no proper claim for an interest in the apartment, having lost it by the operation of sections 3 and 30 of the Limitation of Actions Act.

[17] Ms Nichol, in an email to Mr Brown dated 9 December 2010 indicated that she no longer resided at the apartment and desired that her name be removed from the mortgage and the title. In an affidavit that she filed in this court on 30 November 2023, she admitted that she left the apartment in 2008 and has not returned since. She did not challenge Mr Brown's evidence that she left the apartment in January 2008.

[18] She did not file the action in the Supreme Court until 10 June 2020, which is over 12 years after vacating the apartment. Section 3 of the Limitation of Actions Act provides that a person cannot bring an action to recover real property after the expiry of 12 years from the date that the right to recover it, accrued. Section 30 goes further to state that on the expiration of the 12 years, that person's title to the real property is extinguished.

[19] Although he has not specifically so stated in his proposed grounds of appeal, Mr Brown seeks to advance his limitation defence. In his affidavit evidence and through learned counsel's submissions on his behalf, he argues that since Ms Nichol left the apartment, he has been in factual possession and intended to possess the apartment.

[20] The House of Lords in **JA Pye (Oxford) Ltd and Another v Graham and Another** [2003] 1 AC 419 ('**Pye**') and the Privy Council in **Wills v Wills** [2003] UKPC 84; (2003) 64 WIR 176 have settled the relevant law. Their Lordships established that, to displace the title of the holder of the paper title, a person in possession only needed to establish that, for the requisite period, they were in factual exclusive possession of the land in question to the exclusion of the holder of the paper title — that is, "a

sufficient degree of physical custody and control”, using the land as an owner would — and that that factual possession was coupled with an intention to possess to the exclusion of all others.

[21] Mr Brown insists that he had factual possession and intended to possess the apartment to the exclusion of all others, save the persons that he permitted to occupy the apartment and therefore had acquired adverse possession of the entire interest in the apartment.

[22] The court notes that Ms Nichol and Mr Brown were engaged in settlement discussions during this period, however, those negotiations may not be sufficient to halt time from running for the purposes of the Limitation of Actions Act. The House of Lords in **Pye** ruled that where the possessor expresses a willingness to pay to occupy, that does not displace the intention to possess (see para. 46).

[23] On that reasoning, Mr Brown therefore has an arguable appeal.

#### The degree of prejudice to the other party

[24] There is no irremediable prejudice to Ms Nichol. She has not been in possession of the apartment and, at worst, any proceeds of sale to which she is entitled, by the order of the court below, will be delayed.

#### The decision that justice requires

[25] The decision that justice requires is to grant the application. Mr Brown should be allowed to file and argue his appeal.

#### **The application for a stay of execution**

[26] As there is merit in the proposed appeal, a stay of execution of the orders of the learned judge in the court below will cause the least injustice in these circumstances.

## **Conclusion**

[27] Despite his egregious conduct and attitude toward the court at this level and in the court below, Mr Brown seems to have a good arguable case for an appeal, based on the evidence that has been placed before this court. Considering that evidence, the application for an extension of time to file an appeal as well as a stay of execution of the judgment, should be granted.

## **Costs**

[28] Since, based on the assessment of Mr Brown's conduct, the application is to cure his default, costs should go to Ms Nichol (see rule 65.8 of the Civil Procedure Rules, which this court, by rule 1.18 of the Court of Appeal Rules has adopted).

## **SINCLAIR-HAYNES JA**

[29] I have read the draft judgment of Brooks P and I agree.

## **D FRASER JA**

[30] I too have read the draft judgment of Brooks and agree.

## **BROOKS P**

## **ORDER**

1. The application for an extension of time in which to file a notice of appeal is granted. The applicant shall file and serve his notice and grounds of appeal on or before 12 January 2024.
2. There shall be a stay of execution of the order of J Pusey J, made on 11 May 2021, pending the outcome of the appeal.
3. Costs of this application to the respondent to be agreed or taxed.