JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2020CV00036

APPLICATION NO COA2020APP00083

BETWEEN	**GEORGINA COOKE HOLLAND**	**APPLICANT**
AND	**RICHMOND FARMS LIMITED**	**1ST RESPONDENT**
AND	**MARK BROOKS**	**2ND RESPONDENT**

Dr Lloyd Barnett and Weiden Daley instructed by Hart Muirhead Fatta for the applicant

Maurice Manning QC, Ms Sherry-Ann McGregor and Ms Allyandra Thompson instructed by Nunes, Scholefield, DeLeon & Co for the respondents

16 June and 2 July 2020

IN CHAMBERS (BY TELECONFERENCE)

STRAW JA

[1] On 27 May 2020, the applicant ("Mrs Holland") filed an application for a stay of execution pending the hearing of her appeal. The precise orders sought are as follows:

> "(1) Save for the order contained in paragraphs 5 and 6 of the Orders therein, a Stay of Execution of the Judgment of the Honourable Mrs Justice Henry-McKenzie delivered on 15th May 2020, pending the determination of the appeal herein.
>
> (2) Costs of this application be costs in the appeal.

> (3) Such further order(s) as to the Honourable Court seems just."

[2] On 5 June 2020, my sister Foster-Pusey JA made the following orders:

> "1. Except as outlined in paragraph 2 below, save for the orders contained in paragraphs 5 and 6 of the orders therein, a stay of execution of the judgment of the Honourable Mrs. Justice Henry McKenzie delivered on 15 May 2020 is granted until 16 June 2020 at 2:00 pm pending the inter partes hearing scheduled for said date and time or until otherwise determined by this court.
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> 2. The interim injunction granted on 12 March 2015 and further extended by the Honourable Mrs. Justice Henry McKenzie on 15 May 2020 is hereby extended until the inter partes hearing scheduled for 16 June 2020 at 2:00 pm or until otherwise determined by this court.
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> 3. The inter partes hearing is scheduled for 16 June 2020 at 2:00 pm.
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> 4. Costs of this application be determined at the inter partes hearing.
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> 5. The applicant shall file and serve this order on the respondent."

[3] On 16 June 2020, after hearing oral submissions on behalf of the parties, I reserved my decision and made an order further extending the orders of Foster-Pusey JA contained in paragraphs 1 and 2, with respect to the stay of execution and the interim injunction, until the delivery of my judgment.

The judgment in respect of which the stay of execution is being sought

[4] The judgment of Henry-McKenzie J, referred to in the application, was delivered on 15 May 2020 in the following terms:

> "1. Summary Judgment is entered in favour of the 1st Claimant on its claim for the sum of One Hundred and Five Thousand United States Dollars (US$105,000.00), together with interest thereon at the rate of six percent (6%) per annum from October 26, 2012 to May 15, 2020 [.]
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> 2. Summary Judgment is entered in favour of the 2nd Claimant on his claim for the sum of Fifty-Four Thousand United States Dollars (US$54,000.00), together with interest thereon at the rate of six percent (6%) per annum from October 26, 2012 to May 15, 2020.
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> 3. Costs to the 1st and 2nd claimants, to be taxed if not agreed.
>
> 4. Interim injunction granted on March 12, 2015 is further extended until further orders of this court, or the Court of Appeal.
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> 5. Leave to appeal is granted.
>
> 6. Stay of enforcement of summary judgment is granted for twenty-eight days from the date hereof.
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> 7. Claimants' Attorneys-at-Law are to prepare, file and serve orders herein."

[5] Counsel for Mrs Holland, Dr Barnett, clarified that despite the wording of the order being sought, a stay was not being sought in respect of the interim injunction contained in paragraph 4 of the order of Henry-McKenzie J. What was actually being sought was a stay of the order at paragraphs 1, 2 and 3.

Brief summary

[6] On 2 May 2013, the respondents filed a claim against Mrs Holland seeking to recover monies based upon eight separate demand loans made by the 1st respondent company ("Richmond Farms") and the 2nd respondent ("Mr Brooks") to Mrs Holland between June 2004 and February 2007. For context, it is to be noted that Mr Brooks is

a director and majority shareholder of Richmond Farms and that Mr Brooks and Mrs Holland were romantically involved for a number of years. The respondents' case was that these loans were made by virtue of contractual arrangements and that Mrs Holland repeatedly acknowledged her indebtedness. Supporting documents were provided in respect of these assertions.

[7] Mrs Holland filed a defence in which she denied receiving loans from the respondents. However, she acknowledged signing the documents and receiving the monies which she contended were contributions from Mr Brooks (directly or indirectly through Richmond Farms) to fund her legal expenses in respect of her divorce battle and litigation for financial relief in England. Additionally, Mrs Holland sought to raise a number of defences in support of her contention that she should not be called upon to repay the monies. These included averments of (i) undue influence, (ii) no intention to create legal relations, (iii) breaches of the Moneylending Act, Stamp Duty Act and Bank of Jamaica Act, and (iv) the claim being statute barred by virtue of the Limitation of Actions Act.

[8] By way of a notice of application for court orders, filed on 4 March 2015, the respondents successfully invoked what has been denoted as a "valuable opportunity" provided by part 15 of the Civil Procedure Rules ("CPR") for the court to summarily determine whether they were entitled to the relief sought, without having a trial. In granting summary judgment, Henry-McKenzie J ultimately concluded that Mrs Holland had no real prospect of successfully defending the claim.

[9] Ms Holland has sought to appeal the decision of the learned judge. To this end, on 26 May 2020, she filed a notice of appeal containing 12 grounds of appeal which challenge both the findings of fact and the findings of law of the learned judge.

The grounds of appeal

[10] It is necessary to have regard to the grounds of appeal, which are as follows:

> "(a) The Learned Judge erred in fact and/or law in holding that the affidavit evidence before the Court demonstrates that the Appellant has no a [sic] reasonable prospects of succesfully [sic] defending the claim at trial.
>
> (b) The Learned Judge erred as a matter of fact and law in finding that the alleged 'Demand Loan' documents were not required by law to be stamped because she found they are not promissory notes, despite each of those documents being in any event (if not promissory notes, which is not admitted) subject to payment of and being stamped with stamp duty as an agreement or instrument under the provisions of the Stamp Duty Act including but not limited to sections 2, 43, 81 and the schedule to the Stamp Duty Act.
>
> (c) The Learned Judge erred in admitting into evidence the alleged "Demand Loan" documents for their enforcement in breach of sections 36 and 50 of the Stamp Duty Act, or as other instrument in breach of sections 43 of the Stamp Duty Act.
>
> (d) The Learned Judge erred in fact/and law…
>
> (e) Having delivered judgment on 15th May 2020 the Learned Judge on 18th May 2020 required the parties by counsel to attend a hearing by telephone [sic] on 20th May 2020 to address the matter of interest on the summary judgment already delivered where the Learned Judge wrongly awarded interest at 6% per annum from 26th October 2012 to 15th May 2020. This was irregular since no fair opportunity was given to the Appellant to consider the evidence on the issue.

(f) Despite having specifically found (paragraph 37) that the (inadmissible) documents indicate the sums that were borrowed on each occasion, how the interest rate applicable to the loan is determined, the Learned Judge failed to apply the said interest rate (if admissible), the Respondents having failed to provide any evidence of that specific and the only permissible contractual interest rate and instead applied a national average interest rate of 6% per annum which is a national average interest rate computed by the Bank of Jamaica in respect of 'Foreign Currency Weighted Time Deposit Interest Rate'. The Learned Judge did so despite giving summary judgment in a foreign currency, and the statutory interest rate on foreign currency judgment debts being 3% per annum.

(g) Further the interest rate of 6% per annum is far in excess of any interest rates quoted by the Bank of Jamaica (provided by counsel for the Respondents) possibly (but not admitted) resembling the rate payable on a savings account, which in any event is also inapplicable.

(h) The Learned Judge did not have any or any adequate regard to the fact that several of her findings of fact could not properly be made, and several of the issues raised could not be properly assessed [sic], without full disclosure of documents, inspection of documents, a trial, and cross-examination of witnesses.

(i) The Learned Judge erred as a matter of fact and law in finding that the Respondents had met the requirements for the grant of a perpetual post-judgment freezing order, and further erred in granting the application made orally on 15th May 2020 without notice after delivery of judgment.

(j) The Learned Judge did not have any or any adequate regard to the fact that the freezing order granted on 12th March 2015 was on an ex parte application, and that its subsequent extensions were not pursuant to any inter partes hearing and were all expressly without prejudice to the Appellant's position that the ex parte freezing order was wrongly granted and the Appellant has a subsistiing [sic] application filed 2nd April 2015 to set aside the ex parte freezing [order] granted on 12th March 2015.

(k) In awarding costs to the Respondents the learned Judge incorrectly exercised her discretion, and wrongly failed to hear the parties on costs.

(l) The Learned Judge failed to have any adequate or any regard to the overriding objective of dealing with cases justly."

[11] The 24 sub-issues under ground (d) are quite extensive and essentially challenge the factual findings of the learned judge, as well as her application of the law. The essence of these challenges were referred to by Dr Barnett, so for the sake of conciseness, and bearing in mind that this is not the hearing of the appeal, they were not set out.

Principles relevant to a stay of execution

[12] Rule 2.11(1)(b) Court of Appeal Rules ("CAR") provides –

"2.11 (1) A single judge may make orders –

(a) …

(b) for a stay of execution on any judgment or order against which an appeal has been made pending the determination of the appeal;"

[13] It is convenient to adopt McDonald-Bishop JA's concise statement of the principles relating to a stay of execution in **ADS Global Limited v Fly Jamaica Airways Limited** [2020] JMCA App 12, at paragraphs [23] and [24]:

"[23] The law governing a stay of execution of a judgment is well-settled and, by now, fast becoming trite. There is, therefore, no need for any detailed exposition on the applicable law. It suffices to say that the liberal approach laid down by Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and another** [1997] EWCA 2164, has been consistently adopted and applied by this

> court. See, for instance, **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30. The proper approach, according to Phillips LJ in Combi is for the court to make the order which best accords with the interests of justice, once the court is satisfied that there may be some merit in the appeal.
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> [24] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, including, the well-known authority of **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065, stated that the threshold question on these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Once that is so, the court is to consider whether, as a matter of discretion, the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice, if the stay is not granted or refused."

[14] My task is therefore two-fold. Firstly, I will consider what Morrison P calls "the threshold question", that is, whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Then secondly, I will go on to consider whether the case is one fit for the grant of a stay, that is to say, whether there is a real risk of injustice if the stay is not granted. I note also that this two-fold test was referred to by Phillips JA in **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30, which was relied on by Dr Barnett.

Whether the material provided by Mrs Holland discloses an appeal with some prospect of success

Submissions on behalf of the applicant

[15] Dr Barnett submitted that Mrs Holland has a reasonable prospect of succeeding on appeal as her grounds of appeal are all "arguable, substantial and have merit". His primary contention was that the learned judge erred when she made findings which

could not be decided "on paper" without having the benefit of "full evidence". In support of this point, he referred to the learned judge's finding on Mrs Holland's intellectual capacity and emotional condition, which was "not appropriate".

[16] Further, it was submitted that it was impossible for the learned judge to find that Mrs Holland was not subject to undue influence. Dr Barnett argued that this could only be determined by way of *viva voce* evidence at a trial. Similarly, there was an evidential dispute as to Mrs Holland's acknowledgement of the debts which required a trial.

[17] Additionally, Dr Barnett referred to the defences raised in respect of the unenforceability of the instruments which he contended were promissory notes. It was submitted that the learned judge's reliance on these promissory notes/documents evidencing the debt could not be justified due to the lack of intention to create legal relations and the breaches of the Moneylending Act, Stamp Duty Act and Bank of Jamaica Act.

[18] He also reiterated the arguments made before the learned judge, namely that the provisions for Mrs Holland to repay on demand were impractical as Mr Brooks knew she could not repay the monies and that this arrangement was merely for accounting purposes. He emphasised that Mrs Holland and Mr Brooks were in a romantic relationship and that it was Mr Brooks who insisted that Mrs Holland pursue the litigation in England.

Submissions on behalf of the respondent

[19] Queen's Counsel, Mr Manning contended that although Mrs Holland has raised copious points of fact and law in her grounds of appeal, these can be distilled and have been answered in the respondents' submissions in opposition to the appeal. He characterised the numerous issues raised by Mrs Holland as following the pattern of her attempt to "shroud some simple loans in opaque legal arguments" and accordingly it is improbable that her appeal will succeed as it is without merit.

[20] Despite the several legal arguments advanced, including the breach of a number of statutes which would apply to deny the liability attached to Mrs Holland, it was submitted that it was not suggested by her that she did not receive the amount of US $159,000.00 that she was sued for which are the subject of paragraphs 1 and 2 of the order of the learned judge.

[21] Mr Manning pointed out that although a limitation defence (pursuant to the Limitation of Actions Act) was relied on before the learned judge, this did not form part of Mrs Holland's grounds of appeal. It was clear that what was before the learned judge were letters written by Mrs Holland, long after taking the loans, acknowledging that she had taken the loans. There was evidence of her acknowledgement of liability on which the learned judge was entitled to rely.

[22] As it relates to the Money Lending Act, reference was also made to paragraph [65] of the learned judge's judgment wherein it was demonstrated that she was not struggling with conflicting evidence, rather there was no evidence that the respondents

were in the business of lending foreign currency, as such she found that the transactions fell within the exemptions under section 13(1)(h) of the said Act.

[23] On the point of undue influence, it was submitted that the operation of the principle was simply inapplicable. When the learned judge considered the benefit and disadvantage of the arrangement, it was clear that Mrs Holland received financial assistance which resulted in an award (by the English High Court) of a property in the United Kingdom (known as Batts Hill) which she in turn sold to her son for the sum of £790,000.00, yet her loans remain unpaid. The learned judge was correct in finding that there was no manifest disadvantage to Mrs Holland who was not contesting that she received monies from the respondents.

Discussion and analysis

[24] In considering the "threshold question", that is, whether the material provided by the parties discloses at this stage an appeal with some prospect of success, I am mindful that both the learned judge's findings of law and fact are being challenged. Henry-McKenzie J made critical findings based on what she had before her, that is the pleadings (statement of case), affidavit evidence and the supporting documentary evidence which were exhibited. It seems to me, to borrow the words of Morrison P, that "this court will be hard put to disturb those findings on appeal" (see **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2013] JMCA App 16, paragraph [11]).

[25] The learned judge found that Mrs Holland failed to show that she had a real prospect of successfully defending the claim and entered summary judgment in favour of the respondents. In her reasoned and thorough judgment, the learned judge correctly set out the principles relevant to the grant of summary judgment (at paragraphs [26] to [32]) and aptly stated what she had to consider at paragraph [33], which is reproduced for context:

> "[33] In the instant case, at first glance, one would think the court is only required to deal with the simple issue of recovery of monies allegedly loaned under demand loan agreements, and to assess whether in fact the parties had intended to create a legally binding contract, despite their romantic relationship and whether the monies were received as a gift. However, it is obvious that this case took a turn to include several other legal issues. The defendant raised defences under numerous statutory legislations, namely the Limitation of Actions Act, the Money Lending Act, the Bank of Jamaica Act and the Stamp Duty Act. She also raised the defence of undue influence. Under each of these legal issues, numerous sub-issues have arisen for consideration. In determining whether these issues can be decided without the need for trial, I will look at each contention individually."

[26] Beginning with the issue of whether there was an intention to create legal relations, the learned judge pointed out, it was common ground that Mrs Holland and Mr Brooks were in a romantic relationship when the disputed sums were given to her. Mr Brooks was able to support the contention that there was an understanding that, despite this relationship, the monies advanced to Mrs Holland were in fact loans. This was evidenced by (i) the purported demand loan agreements, executed by the parties, indicating the amount borrowed on each occasion, the applicable interest rate and that the loan was payable on demand, and (ii) various acknowledgements of the loans by

Mrs Holland herself. The latter took the form of correspondence by email and letter to Mr Brooks, as well as to his mother. The learned judge chronicled the said correspondence at paragraphs [39] of her judgment:

> '[39] Reference must also be made to a number of correspondence between [Mr Brooks] and [Mrs Holland], where [Mrs Holland] admitted that she owed monies to [Richmond Farms and Mr Brooks] and accepted having an obligation to repay the monies. In an email dated March 30, 2011 to [Mr Brooks], [Mrs Holland] wrote:
>
> > 'In reply to your recent email regarding the loans which I took out with you in order to pay for the court proceedings during my divorce; I will very shortly be putting Upton on the market with Coldwell banker at a much reduced figure & once a sale has gone through I will be in contact'
>
> Also, of note is [Mrs Holland's] correspondence to the [Mr Brooks'] mother, where acknowledgment of [Mrs Holland's] indebtedness to [Mr Brooks] and an obligation to repay him were evident. In the letter dated July 2, 2009 to [Mr Brooks'] mother, [Mrs Holland] wrote:
>
> > 'I owe Mark money that was used to fight the court case in London, so I'm in the process of selling my parents' home to repay my debt as soon as I can.'
>
> Further, in a letter dated May 4, 2009 to [Mr Brooks], [Mrs Holland] had this to say:
>
> > 'Don't worry to contact me again unless it is via email to organise all this or repay my loan.'"

[27] The learned judge noted that Mrs Holland did not deny the authenticity of the purported loan agreements but explained that the purpose of these documents was to provided documentary proof in the cost deliberations in the financial relief proceeding in respect of her divorce. The learned judge went on to state:

> "I must however take into account the fact that sums were also advanced to her by [Richmond Farms and Mr Brooks] after the financial relief proceedings came to an end. It is agreed between the parties that the proceedings ended in July 2006 and that monies were advanced thereafter. I have noted that the parties followed the same course of drafting and signing demand loan agreements for sums advanced after the financial relief proceedings came to an end. Given [Mrs Holland's] explanation for the loan agreements, what then is the rationale behind similar loan agreements being adopted for the monies given after the financial relief proceedings? [Mrs Holland] has provided no explanation for this. Worthy of note as well, are the documents relied on by [Richmond Farms and Mr Brooks] evidencing the repayment of some of the demand loans by the defendant in 2007. [Mrs Holland's] explanation is that she paid these sums to the [Mr Brooks] out of an appreciation for his assistance and not because there was any debt owed to him. This explanation however, defies logic and is lacking in substance."

[28] In respect of the correspondence, the learned judge again noted that Mrs Holland did not deny authoring these emails and letters. Taking all of this into account, she found that "[t]he facts therefore support a conclusion that the monies [were] given to [Mrs Holland] as loans with the intention to create legal relations between the parties and not advanced as a gift, out of love, affection and consideration for the financial struggles the defendant was going through at the time. [Mrs Holland's] argument that the monies were given to her as gifts is untenable in the face of her acknowledgment of the debts, the repayment of some of the loans with interest and the contemporaneous documents exhibited, which serve to undermine her case. The factual underpinnings of this defence is as such that time should not be spent exploring them further at a trial".

[29] Bearing in mind what was before the learned judge, that is, the statements of case and affidavit evidence with exhibits, she demonstrated her consideration of these

and assessed the strength of the parties' case. In **ED & F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472, at paragraph 10, it was stated in relation to summary judgment applications (as well as applications for setting aside default judgment),"[i]t is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in **Swain v Hillman** [2001] 1 All ER 91 at 95…However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable". It was entirely open to the learned judge to find as she did, that there was no triable issue in respect of the parties' intention to create legal relations.

[30] Turning now to the defences raised pursuant to the Money Lending Act and the Bank of Jamaica Act, the learned judge found that Mrs Holland's contentions were unsustainable as there was no evidence that the respondents were in the business of lending foreign currency. She found the transactions fell within a statutory exemption pursuant to sections 13(1)(h) and (i) of the Money Lending Act. Further, the learned judge had regard to the Money Lending (Prescribed Rates of Interest) Order which prescribed 25% per annum and found that the loan agreements stipulated an interest rate that was in line with the United States dollar savings interest rate for the Bank of

Nova Scotia and the National Commercial Bank. She then had regard to the Bank of Jamaica's Schedule of Commercial Banks Foreign Currency Weighted Time Deposit Interest Rates which was submitted before her for the required period, which showed an average rate of 6% per annum. She found that this was below the 25% threshold and thus in line with the acceptable interest rates and that it could not be said that the interest rate charged was excessive.

[31] With regard to the whether the documents evincing the loans were promissory notes which required stamping and could not be admitted in evidence pursuant to section 36 of the Stamp Duty Act, the learned judge found that they were not promissory notes. Based on her assessment, all the formalities of a contract were satisfied (that is, offer, acceptance, consideration and intention to create legal relations) and there was no stamping required. Further, she found that in any event (if she was wrong in her finding that the documents were not promissory notes), they could still be relied on for purposes other than enforcement. She found authority for this in a decision of this court, **Garth Dyche v Juliet Richards and anor** [2014] JMCA Civ 23, at paragraph [58]. I am unable to see how the learned judge could be faulted in coming to this conclusion, particularly since it bears repeating that there is no dispute that Mrs Holland received the funds from the respondents.

[32] Though not referred to by the learned judge nor any counsel in their submissions the learned judge's approach to the determination of the above issues

bears some similarity to that of the Privy Council in **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12 in which the Board put it quite clearly:

> "21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b)."

[33] Finally, the learned judge treated with undue influence at paragraphs [66] to [72] of her judgment, wherein she found that this defence was "at best fanciful". In her assessment, she acknowledged that the relationship between the parties could have fostered an environment where Mr Brooks could have wielded influence over Mrs Holland that is capable of giving rise to undue influence. However, she went on (correctly in my view) to state that in considering undue influence the focus should not only be on the existence of the relationship capable of giving rise to the influence, but more so on the misuse and abuse of the influence. The aim of this equitable doctrine being to save vulnerable individuals from being victimised or entering into manifestly disadvantageous transactions where the influencer will obtain an unfair advantage from a vulnerable individual.

[34] In respect of Dr Barnett's complaint about the learned judge's finding at paragraph [70] that Mrs Holland "was an individual who was endowed with sufficient intelligence and the mental capacity to be able to make her own decisions and conduct her own affairs and to understand exactly what she was doing, there is no evidence to the contrary". This must be viewed against the learned judge's review of two cases in which the parties who were susceptible to undue influence as they were barely literate and lacked the mental capacity to make rational important decisions (**Samuels v Gordon Stewart and others**, (unreported), Supreme Court, Jamaica, Claim No 2001/S-081, judgment delivered 23 December 2004 and **Watts v Watts and another** [2013] JMCC Comm 15). In my view, the learned judge was entitled to find as she did. She had before her a number of affidavits, some of which exhibited correspondence which Mrs Holland did not deny authoring. From these letters and emails, the learned judge would have been well placed to find that Mrs Holland was literate, or as she put it "endowed with sufficient intelligence".

[35] Also, the learned judge would have been apprised of the undisputed facts that after Mrs Holland received the loans (between 2004 and 2007) she had the presence of mind/mental capacity to make decisions/order her affairs in relation to her real property; namely to (i) engage a realtor (Coldwell Banker) to sell the Upton property,(based on her email sent 30 March 2011) and dispose of its furniture, (based on an email sent 4 July 2011) and (ii) sell her Batts Hill property to her son and his wife (David Anthony Holland and Fenella Kennedy-Holland), the transfer being registered on 8 May 2013.

[36] Additionally, it would have been for Mrs Holland who has been capable of instructing her attorneys and receiving legal advice, to put sufficient evidence before the learned judge in respect of any challenges that would have affected her mental capacity or reasoning ability as the claimant (Mr Samuels) did in **Samuels v Gordon Stewart**. In that case, Sykes J (Ag) (as he then was), when considering undue influence in respect of the summary judgment application before him, noted at paragraph [21] that "Mr Samuels is an unlettered man. By his own admission he is not well educated. He says he can hardly read. From his visits to chambers he is a patois speaker. His affidavit was put in Standard English by his lawyers…" Further, Sykes J found (at paragraph [28]) that it was the "combined evidence of low education and a transaction that [appeared] to very unfavourable to [him]…" that gave rise to "more than the skeleton of a successful plea of undue influence".

[37] It is to be noted that the learned judge considered the evidence of both parties in relation to the stress that Mrs Holland was experiencing at the time relevant to her involvement in the financial relief court hearings in the United Kingdom. She concluded as follows at paragraph [71] of the judgment:

> "[71] …There is no evidence she was victimized. The fact that she collapsed in court and had a stroke and was going through stress and anxiety in the financial relief proceedings, did not make her vulnerable and open to victimization by the claimants."

[38] Even if the learned judge could be faulted in making her finding about Mrs Holland's literacy/intelligence and mental capacity, the plea of undue influence would be quite hopeless where she could not show that the transaction was unfavourable to her.

It is worth mentioning that in **Sagicor v Taylor-Wright** the Board stated, at paragraph [31], that "even if a main plank in the pleaded claim was susceptible to a challenge (forgery) which could only be resolved at trial, **nonetheless the defendant's response to it was one which, if true, simply demonstrated the claimant's entitlement to the relief sought by the claim. It was therefore a case in which a trial would have amounted to no more than a serious waste of time and expense for the parties, where the defendant's case disclosed no real prospect of her successfully resisting the Bank's claim** and where the grant of summary judgment was the appropriate relief for the judge to grant the Bank, on the hearing of the parties' cross-applications" (emphasis added). I find that statement in respect of forgery equally apt to Mrs Holland's challenge in respect of undue influence.

[39] Having considered the learned judge's treatment of the issues raised before her, it seems to me that Mrs Holland has no real prospect of succeeding on the appeal. However, in the event that I have been too generous in my assessment of the respondents' case, I will proceed to consider the risk of injustice.

Whether there is a real risk of injustice if the stay is not granted

Submissions on behalf of the applicant

[40] Dr Barnett submitted that in resolving this question, it should be borne in mind that Mrs Holland is "completely vulnerable". He submitted that the risk of injustice was greater to her as the respondents were protected by the injunction (which was granted on 12 March 2015 and further extended; it restrains Mrs Holland from removing assets/money/goods from the jurisdiction up to the value of US$250,000.00). Counsel

submitted that Mrs Holland, on the other hand, would suffer irremediable harm if the stay of execution is not granted as she would be exposed to all means of executing judgments, including but not limited to committal and losing her only home located at Upton in the parish of Saint Ann, being evicted with her family as well as the benefits she has under a mortgage over lands located at Chester Castle, in the parishes of Westmoreland and Hanover.

[41] Counsel contends that in the event that she is successful on appeal, it would be an "empty judgment" as she would have lost her home at Upton which was inherited by her and her brother.

Submissions on behalf of the respondent

[42] Mr Manning acknowledged that there are competing issues; on the one hand the respondents possess something of value in the hard-fought summary judgment in a simple claim for recovery of debt which has been overcomplicated by Mrs Holland. On the other hand, Mrs Holland contends that the enforcement of the judgment by the respondents would cause her to lose her only home at Upton, which she owns in equal shares with her brother.

[43] When weighing the issues, it was submitted that the following points should be considered:

> "(i) The loans that are the subject matter of this claim were made to the Applicant more than a decade ago, the demand for recovery of them was made in 2012 and the claim commenced in 2013. The judgment in this matter has been a long time coming, and given that the Applicant has never

disputed receiving the monies in question, she has had a long time to prepare for an unfavorable outcome in the proceedings.

(ii) The loans that are the subject of the action and appeal were made by the Respondents to the Applicant on almost identical terms to the ones that she acknowledged and repaid up to December 2007 while still romantically involved with the 2nd Respondent.

(iii) A loan by any other name is a loan. Whether, as the Applicant has done, synonyms such as 'soft loans' or 'not loans of a commercial nature' are adopted to describe the loans or belated attempts are made to label them as 'gifts', the loans in this matter are sums that the Applicant ought to repay without further delay.

(iv) It lies ill in the mouth of the Applicant to now deny her indebtedness when she repeatedly acknowledged the debt and made unfulfilled promises to repay them over the years.

(v) The Applicant has put forward no evidence to show that she will face financial ruin if she is required to settle the judgment debt. The Applicant is not without substantial assets and means.

(vi) The Applicant has not asserted that there is a risk that the Respondents will be unable to repay the judgment sum if, after settling the judgment debt, she then succeeds on the appeal. In fact, the Applicant repeatedly averred in her Affidavits to the 2nd Respondent's wealth.

(vii) The very home that the Applicant is now asking this Honourable Court to consider inviolable was advertised for sale by her to repay the loans that she is now at pains to deny that she owes.

(viii) The Applicant invested the loan equity she acquired from the Respondents into the pursuit of financial relief proceedings in the UK, and enjoyed an immediate and substantial return on her investment when the financial relief proceedings ended with the award to her of property, including one known as Batts Hill that was worth £790,000. Although the Applicant had promised to sell that property to

pay the debt, when she eventually sold it, no portion of the net proceeds of sale was paid to the Respondents, and no account has been set out in any of her affidavits to say what use was made of the income generated from that sale.

(ix) The Applicant exercised powers of sale as a mortgagee and disposed of a property in Jamaica for a price of US$150,000 while the parties were engaged in mediation in an effort to settle the claim, but never paid a single cent of the net proceeds of sale to the Respondents.

(x) The Applicant's ownership of more than 393 acres of land in Chester Castle in the parishes of Westmoreland and Hanover is thinly masked as her having an interest solely as a mortgagee. Under this thin veil is an insubstantial mortgage in the amount of $800,000, which is owed by the Applicant's long-deceased father. That the Applicant is the true owner of this property is also revealed in the judgment of the UK Court in the financial relief proceedings.

(xi) The fact that the balances in the bank accounts that the Applicant identified in her Affidavit in the Court below have remained unchanged, yet she has managed to survive, suggests that the Applicant has a source of income or means that have not been disclosed to this Honourable Court.

(xii) Upton House has not been the Applicant's only home during the proceedings in the Supreme Court, because she resided in the United States as a green card holder at times. However, the Applicant has never disclosed who the owner of the home she occupied in the United States was, or the income tax returns she filed in that country.

(xiii) As no date has yet been scheduled for the hearing of the appeal, the Respondents face an (as yet) indeterminable delay in recovering the fruits of their judgment."

[44] It was further submitted that the judgment debt owed by the Mrs Holland stands at approximately US$232,140.00, being the principal amount of US$159,000.00, plus interest (amounting to approximately US$73,140.00 for interest). Mrs Holland is also

liable to pay costs in an amount that is yet to be determined. Counsel also stated that it bears noting that interest continues to accrue on this debt.

[45] In all the circumstances, it was submitted that the application ought to be refused. However, if I am minded to grant a stay to prevent Mrs Holland's home from being sold, that stay should be on condition that either the entire judgment debt or a substantial portion of it be paid into a foreign currency interest-bearing account, pending the appeal. The case of **United General Insurance Company v Marilyn Hamilton** [2018] JMCA App 5 was relied on in support.

Discussion and analysis

[46] I am minded to agree with the submissions of Mr Manning that the risk of injustice is greater to the respondents in all the circumstances. I have come to this view for the following reasons:

(i) Firstly, the respondents who have a judgment in their favour will now have to incur the additional cost of an appeal and continue to be deprived of the fruits of their judgment.

(ii) Secondly, Mrs Holland's appeal will not be rendered nugatory as the monies can be recovered. Mrs Holland herself has contended, in her affidavit, that the respondent, Mr Brooks, is "very wealthy" which naturally minimises the possibility that the monies cannot be repaid in the event that she is successful on appeal.

(iii) The appeal is unlikely to be stifled if the stay is not granted, as the applicant has stated (in her affidavit in support of the application) that she is fortunate to be in the position that her attorneys have not billed for legal services.

(iv) There is affidavit evidence from Mrs Holland that she remarried and has a residential address in the USA with her husband. As submitted by Mr Manning, she has managed to exist and survive in spite of her inability to access certain funds or sell certain real estate due to the injunction.

(v) Mrs Holland herself has stated in her correspondence to Mr Brooks from as far back as 2009 that she has been trying to sell the Upton property to repay the loan as soon as possible and even stated in her email dated 4 July 2011 that the furnishings have been removed. I do consider therefore that any hardship expressed in relation to the loss of the Upton property is somewhat exaggerated.

[47] It seems to me that I should put no restraint upon the respondents at this time in deciding how best to have access to the fruits of their judgment. The application for stay of execution will therefore be refused.

[48] The orders therefore are:

1. The notice of application for court orders for a stay of execution pending appeal, filed on 27 May 2020, is refused.

2. The interim injunction granted on 12 March 2015 and further extended by Foster-Pusey JA on 5 June 2020 is to remain pending the determination of the appeal or further order of this court.

3. Costs of this application to the respondents to be agreed or taxed.