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 COA2023APP00228

BETWEEN	**LEO HOGG**	**APPLICANT**
AND	**NEVILLE EVANS**	**RESPONDENT**

Oraine Nelson for the applicant

Ms Renee Freemantle instructed by Michael B P Erskine & Company for the respondent

12 December 2023 and 7 June 2024

Civil procedure – Application for leave to appeal and stay of execution – Refusal of application for extension of time to file a defence - Sale of land agreement - Specific performance – Laches – Whether plea of fraud sufficient to support a claim of a defence

BROOKS P

[1] This is a consideration of Mr Leo Hogg's application for permission to appeal, and a stay of execution of, a judgment of M Jackson J (Ag) ('the learned judge') handed down on 28 September 2023 in favour of Mr Neville Evans. The learned judge also refused Mr Hogg's application for permission to appeal, hence his present application.

Background

[2] The factual background to the litigation is that the parties entered into an agreement on 30 August 1991 in which Mr Hogg agreed to sell to Mr Evans four acres of land ('the property') in the parish of Westmoreland for the price of US$44,000.00. By

2012, the sale had not been completed but the parties have vastly diverse accounts as to the reasons for that failure and what had occurred during the interval. On 10 October 2012, Mr Evans filed a claim in the Supreme Court requesting orders for, among other things, specific performance and damages, against Mr Hogg.

[3] In December 2012, Mr Hogg filed an acknowledgment of service of the claim form. He did so without the benefit of counsel and, thereafter, failed to file a defence. Nothing else happened in respect of the litigation until 1 April 2019, when Mr Evans filed a notice of application for court orders along the lines of the orders sought in his 2012 claim form. On 21 March 2023, Mr Hogg applied for an extension of time within which to file a defence to the claim.

[4] It is to be noted that, after having been served with the claim form, Mr Hogg, in 2013, complained to the General Legal Council ('the GLC') about the conduct of the attorney-at-law, who had carriage of the sale of the property, Mr Michael Erskine. When Mr Evans' notice of application for court orders first came before the court, it was adjourned pending the outcome of the proceedings before the GLC. Apart from the initial delay, that outcome has not affected the litigation.

[5] The essence of the two respective cases that the parties advanced are:

a. Mr Evans wanted specific performance, in that he had paid all but US$5,000.00 of the purchase price to Mr Hogg (he had receipts signed by Mr Hogg between 1991 and 1992 to support the assertion), was in possession of the property, and had also paid the transfer tax and stamp duty that the agreement for sale attracted, but Mr Hogg, not only refused to transfer the property to him but was trying to sell it to someone else;

b. Mr Hogg:

    i. vehemently denied that Mr Evans had paid anything except the initial deposit;

ii. contended that Mr Evans had given up possession of the property;

iii. asserted that he had only signed one of the receipts that Mr Evans had produced and even that one (which he had signed in 2008) was fraudulent, in that most of its contents were untrue and were not on the receipt when he signed it; and

iv. said that his delay in filing a defence was caused by his inability to find an attorney-at-law who was willing to take his case.

[6] The two applications came on for hearing before the learned judge on 24 March 2023. She allowed time for both parties to file further documents, completed the hearing on 24 April 2023, and reserved her decision, which she delivered on 28 September 2023, as mentioned above.

The findings in the court below

[7] The learned judge refused Mr Hogg's application for an extension of time within which to file a defence but granted Mr Evans' application for an order for specific performance, damages and costs. She found:

a. Mr Hogg's application for an extension of time, within which to file his defence, being more than 10 years delayed, was not made promptly;

b. he did not have a reasonable explanation for the delay;

c. he did not have an arguable defence in that:

i. his evidence that Mr Evans had breached the contract was questionable;

ii. he had not cleared the tall hurdle erected by his signature ostensibly appearing on the various receipts;

iii. his assertions of fraud had not been so laid out to amount to an arguable defence;

iv. the contention that his signatures, on all but one of the receipts, were forgeries, was neither corroborated nor supported by any independent evidence;

v. his assertion that he signed one receipt, bereft of basic information, including the date, was incredible and he is bound by its contents;

vi. it was not sufficient to just cry forgery, especially with the lapse of over 30 years;

vii. neither the defence of laches nor a limitation of actions defence was available to him; and

d. Mr Evans would be more prejudiced by the grant of an extension of time to file a defence than Mr Hogg would be by a refusal.

The application for permission to appeal

[8] Mr Hogg's application for permission to appeal is based on numerous proposed grounds of appeal which essentially assert that the learned judge erred in finding that he did not:

a. provide a good reason for his failure to file a defence in time; or

b. disclose a probability of successfully mounting a defence to the claim;

c. bear greater prejudice if the application for an extension of time was refused;

and that she failed to give effect to the overriding objective.

The approach to applications for permission to appeal

[9] This court's approach to applications for permission to appeal is now well documented. The applicant, to succeed, must demonstrate that the learned judge in the court below was plainly wrong in the exercise of her discretion in the matter (see para. [20] of **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). The court is not to set aside the learned judge's decision merely because it would have exercised the discretion differently.

[10] In conducting its assessment of the learned judge's approach, the court must consider the way the learned judge should have approached her task. The approach that she should have used in considering Mr Hogg's application for an extension of time within which to file his defence is also well known. The principles guiding that approach were carefully set out by Panton JA, as he then was, in **Leymon Strachan v The Gleaner Company Limited and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered on 6 December 1999 (on page 20). The principles, in brief, adapted for these purposes, are:

a. the length of delay;
b. the reason for the delay;
c. the merits of the proposed defence;
d. the prejudice to the respondent; and
e. the overall justice of a decision on the application.

[11] The learned judge used that approach to Mr Hogg's application and the following analysis will examine his present complaints along those lines. As this is not a hearing of the appeal, no detailed analysis is required. Mr Hogg must show that his proposed appeal has a real chance of success (rule 1.8(7) of the Court of Appeal Rules, 2002 ('the CAR')).

The analysis

The length of the delay

[12] To say that Mr Hogg's delay (between December 2012 and March 2023) is egregious is an understatement. It is an untenable disregard for the court and its

processes. It is unprecedented. It could only be forgiven by an excellent reason together with a highly meritorious case. The delay in the borderline case of **Anthony Brown v Dadrie Nichol** [2023] JMCA App 40, along these lines (almost two and a half years), pales in comparison to Mr Hogg's delay. It is noted, however, that Mr Evans' failure to prosecute his case allowed it to languish for so long. Nonetheless, Mr Hogg cannot excuse his delay by pointing to Mr Evan's failure.

The reason for the delay

[13] Mr Nelson, appearing for Mr Hogg in this application, argued that the learned judge was wrong in finding that Mr Hogg should have filed a defence, even without the benefit of counsel. He submitted that this was a technical area and a failure to properly set out the defence would have risked Mr Hogg's defence being struck out or allowing Mr Evans to succeed on an application for summary judgment.

[14] These submissions cannot be accepted. The learned judge was correct in rejecting Mr Hogg's explanations in this regard. Mr Hogg's response to the claim could not properly be to do nothing. He showed that he could pursue matters in which he was interested when he pursued a complaint to the GLC against the attorney-at-law, Mr Erskine.

The merits of the proposed defence

[15] Mr Nelson outlined a raft of items on which, he submitted, Mr Hogg would be entitled to succeed on appeal. The most significant of which are:

a. a limitation of actions defence;
b. laches; and
c. fraud/forgery/misrepresentation.

A limitation of actions defence and laches

[16] Learned counsel submitted that the time limit for filing actions for claims of breach of contract is six years and therefore Mr Evans' claim was subject to that legislation and could not proceed. On the issue of laches, Mr Nelson submitted that in seeking the remedy of specific performance, Mr Evans was seeking an equitable remedy. That remedy, he

submitted, was no longer available to Mr Evans because of his delay in seeking the remedy. Mr Nelson submitted that Mr Hogg would, therefore, have a solid defence of laches to the claim for specific performance.

[17] These submissions, similarly, cannot be accepted. Claims for breaches of contract for land are subject to the general principle that time is not of the essence in such a contract unless the parties so stipulate, either initially or during the contract (see **Raineri v Miles and Anor** [1980] 2 All ER 145). The other principle that renders these submissions untenable is that, for laches, time does not run against a person who is in possession of the land, which is the subject of the claim for the equitable remedy. Where possession has been granted to a purchaser "the court will strain its power to enforce a complete performance" (see **Parker v Taswell** (1858) De G & J 559, 571; 44 ER 1106 and **Leiba v Thompson** (1994) 31 JLR 183, 189D-E).

[18] There was a dispute as to fact concerning Mr Evans' possession of the property. Both parties assert that Mr Evans went into possession after the payment of the deposit. Whereas Mr Hogg does not deny giving possession to Mr Evans, he asserts that Mr Evans relinquished possession when his tenant, who was doing farming thereon, left the property. Mr Evans accepts that the tenant left the property but neither party asserts that possession was given back to Mr Hogg. Mr Hogg's attempt to exercise dominion over the property, by commissioning a survey thereof, was challenged by Mr Evans' representative. The learned judge cannot be faulted as having found that Mr Evans was still in possession to displace a defence of laches.

Fraud/forgery/misrepresentation

[19] Mr Nelson contended that the learned judge erred in finding that Mr Hogg had not properly outlined a case of fraud in his proposed defence and that Mr Hogg was bound by his signature on the various receipts. He argued that the learned judge took upon herself the task of being an expert in handwriting, in finding that he had signed the receipts, when she properly ought to have ordered expert evidence to be procured to assist the court on that issue in a trial.

[20] Learned counsel also submitted that the learned judge erred in her consideration of the principle of *non est factum* (it is not his deed) in dealing with the receipt that Mr Hogg admitted signing, but asserted that only the figure of US$8,000.00 was on the receipt when he signed it. Mr Nelson contended that the learned judge did not give sufficient or any regard to the fact that Mr Hogg's assertion amounted to an exception to the principle that would ordinarily bind Mr Hogg to the contents of the receipt.

[21] Ms Freemantle, for Mr Evans, countered by submitting that assertions of fraud must not only be specifically pleaded but must be strictly proved. She submitted that the learned judge was correct in finding that Mr Hogg had not done enough to meet those standards. All he had done, learned counsel submitted, was to put forward his own "say-so" without any support of his contentions from any expert. The duty to provide the expert evidence, she argued, did not lie with the learned judge, but with Mr Hogg, who was making those assertions. She said the evidence against Mr Hogg was overwhelming.

[22] The documentary evidence before the learned judge mostly comprised:

a. the stamped agreement for sale;
b. letters that Mr Hogg produced to show his entitlement to sell the property;
c. a copy of the caveat that Mr Evans lodged against the registered title for a part of the property;
d. a receipt showing that Mr Evans had paid for a survey of the property; and
e. five receipts showing payment of funds toward the purchase price.

[23] The agreement for sale required Mr Evans to pay, after the initial deposit, the sum of US$38,000.00 within 90 days of signing and then the balance on completion. It also stipulated that Mr Hogg would deliver possession to Mr Evans upon "completion of payment of one half of the Purchase money". It appears that the parties departed from the latter provision since it is agreed that Mr Evans went into possession after the

payment of the deposit. Therefore, no emphasis can be placed on Mr Evans having possession of the property, to prove payment of the purchase price.

[24] Mr Nelson submitted that it was only just prior to the last day of the hearing before the learned judge that Mr Evans produced the three receipts that Mr Hogg denied having signed. Learned counsel submitted that Mr Hogg did not have sufficient time to get expert evidence to challenge those documents and the learned judge ought to have given directions for expert evidence to have been secured.

[25] The submission by Mr Nelson is flawed. First, although Mr Evans did not produce these receipts in the case until they were attached to his affidavit that was filed on 31 March 2023, it was not the first time they were being brought to Mr Hogg's attention (they were exhibited in the related proceedings before the GLC). Additionally, if Mr Hogg needed time to have additional time to have the documents examined he should have asked for it. He did not do so. It was not for the learned judge to have ordered an expert examination of the documents when it was Mr Hogg's duty to provide proof of his assertions of fraud and forgery.

[26] In **Albert Smith v Hazel Steer** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2008, judgment delivered 8 May 2009, H Harris JA pointed out in para. 20 of the judgment that "[a] general allegation of fraud is insufficient to establish fraud". The House of Lords, in **John Wallingford v Mutual Society and the Official Liquidator** [1874-1880] All ER Rep Ext 1386 at page 1391 stated the general rule on fraud, that "[w]ith regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice".

[27] Although it is indeed arguable that Mr Hogg did sufficiently particularise his assertions of forgery, fraud and misrepresentation, he should have supported his assertions with evidence. The learned judge was only able to adjudicate on the evidence

that had been placed before her and there was sufficient for her to have found that Mr Hogg was the author of the impugned receipts. She was entitled to rely on the documentary evidence despite Mr Hogg's denials. Her approach did not amount to conducting a mini-trial (see **ED & F Man Liquid Products Ltd v Patel and Anor** [2003] EWCA Civ 472; [2003] All ER(D) 75 at para. 10).

[28] On the issue concerning the principle of *non est factum*, the learned judge rejected the contention that Mr Hogg could deny the import of his signature on the receipt for US$8,000.00. She found that in the absence of any evidence (apart from Mr Hogg's say-so), she was left with only the receipt and she was entitled to rely on its contents.

[29] The receipt is dated 27 February 1992 and stated that Mr Hogg acknowledged receipt of the sum of US$8,000.00 as a "[f]urther Deposit on Purchase of land situated at West Cliff in the Parish of Westmoreland Vendor Leo Hogg Purchaser Neville Evans". At the foot of the receipt appears: "BAL $5,000 on completion of title".

[30] In his affidavit, Mr Hogg asserted that the only thing written on the receipt when he signed it was US$8,000.00 in the lower left corner. He said that he got an explanation as to why he was being asked to sign the document and even though he had not received any money, he accepted the explanation and signed.

[31] The learned judge cannot be faulted for holding Mr Hogg bound to the contents of the document. He knew he was signing a receipt in respect of the sale of the property. It was not void. In **Howatson v Webb** [1907] 1 Ch 537, a man signed a document in respect of land for which he was the nominal owner. The equitable owner asked him to sign saying that they were deeds transferring the land. They were, however, mortgage documents (which at common law involved a transfer of the title to the mortgagee), whereby he became indebted to a third person using the land as security for the debt. He had been misled about the true nature of the documents, but he accepted the representation that had been made to him. He was sued on the debt by a transferee of the mortgagee. He relied on the defence of *non est factum*.

[32] The court found that the defence could not succeed. He was held to be liable for the debt because he intended to sign documents relating to the transfer of the land. The documents that he intended to sign were not of a different character from those he signed. Warrington J, after referring to several cases and having distilled the principles therefrom, said, in part on page 549:

> "[The document signed] purported to be a transfer of the property, and it was a transfer of the property. If the plea of non est factum is to succeed, the deed must be wholly, and not partly, void."

[33] Applying the principle to this case, Mr Hogg acknowledged that he was signing a receipt in respect of the purchase price for the property. He cannot deny the document after so many years. In other circumstances, including a denial of the document in close proximity to the time of the signing, the document could, possibly, be considered voidable on the grounds of fraud, but it is not void (see pages 545 and 547 of **Howatson v Webb**). The learned judge was also entitled to find that the other receipts are consistent with the contents of the receipt that Mr Hogg seeks to avoid. The receipts are as follows:

a. Dated 30 August 1991 – the deposit of $25,000.00 (said to represent US$2,100.00)
b. Dated 2 October 1991 - $150,000.00 (being US$9.375.00 at the agreed rate of exchange of $16.00:US$1.00)
c. Dated 3 December 1991 – US15,000.00 (bearing a note that the balance remaining is US$14,000.00)
d. Dated 13 January 1992 – US$7,700.00 (signed by the attorney-at-law with carriage of sale)

[34] Those receipts total US$34,175.00. The additional payment of US$8,000.00, mentioned in the impugned receipt would be consistent (though not mathematically exact) with the balance of $5,000.00 (this is United States dollars according to Mr Evans' affidavit) said, on the receipt, to be due on the purchase price.

[35] It is noted that Mr Leyton Jackson, Mr Evans' agent who made all the payments reflected in the receipts, did not give any evidence concerning the payments or about Mr Hogg signing the documents. Neither did Mr Michael Erskine, the attorney-at-law with carriage of the sale, who received the sum of US$7,700.00 mentioned above, give evidence concerning the payment he received on behalf of Mr Hogg. The absence of this evidence does not adversely affect the learned judge's decision. She had sufficient evidence to arrive at the decision that she made. Mr Hogg therefore has not demonstrated that the learned judge erred in the exercise of her discretion.

The prejudice to the respondent

[36] Mr Evans, has been unable to proceed with securing his title. Although the matter of specific performance will not be straightforward, given that only a part of the property is registered and Mr Hogg is not the registered proprietor of that portion, Mr Evans should be allowed to start the process of securing his title. He should not be further delayed.

The overall justice of a decision on the application

[37] Given the delay in this matter, the just outcome would be to allow the learned judge's orders to be executed. The learned judge's decision is just in the circumstances and in keeping with the overriding objective.

The application for a stay of execution

[38] Mr Hogg has asked for an order whereby the execution of the learned judge's orders would be stayed until the hearing of the appeal. If there is no grant of permission to appeal, there can be no stay of execution. The various issues of prejudice to the respective parties and the justice of the case would, therefore, not arise.

Summary and conclusion

[39] Mr Hogg has not satisfied this court that his proposed appeal has a real chance of success to entitle him to permission to appeal. He was 10 years beyond the time in which he should have filed his defence, he did not have a good reason for his failure to file a defence, and he does not have a clear case demonstrating that he had a real chance of

success on appeal. Consequently, his application for leave to appeal and his application for a stay of execution of the learned judge's orders should be refused, with costs to Mr Evans. I would so order.

SINCLAIR-HAYNES JA (DISSENTING)

Leave to appeal

[40] I adopt the facts as outlined by my brother Brooks P above. However, for the following reasons I am unable to agree with his reasoning and conclusion.

[41] Rules 1.8(1) and (2) of the of the Court of Appeal Rules (2002) ('CAR') conjunctively stipulate that permission to appeal must first be made to the lower court where said permission can be sought at either level. Permission to apply must, however, be made within 14 days of the order which is being sought to be appealed being made. Leave was sought and refused in the lower court. The application was filed on the 5 October 2023 and the deadline was the 12 October 2023. The application for leave was therefore made within the time prescribed.

[42] Rule 1.8 (7) of the CAR, states that, "[t]he general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[43] In **Evanscourt Estate Company Limited and Others v National Commercial Bank Jamaica Limited and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008 ('**Evanscourt**'), at page 9, it was adumbrated that this general rule can be displaced where "exceptional circumstances" exists. These include, the "public interest".

[44] There is no argument (rightfully so) that this case falls outside the general rule, so the applicant must prove that the case has a "realistic" and not a "fanciful" prospect of success as noted in the oft cited case of **Swain v Hillman** [2001] 1 All ER 91. A test that has been adopted and applied in this court in varied matters including the aforementioned

Evanscourt (see page 10) and **Paulette Bailey et al v Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 103 /2004 judgment delivered 25 May 2005.

[45] The factors which a court is to consider in determining whether to grant an extension of time to file a defence can be gleaned from the authority of **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica Motion No 12/1999, judgment delivered 6 December 1999. Although, that case dealt with the issue of granting an extension of time to seek leave to appeal, the factors stated therein are of general application. Those factors are:

I. the length of the delay;

II. the reason for the delay;

III. whether there is an arguable case; and

IV. the degree of prejudice to the other party if time is extended.

[46] The authorities have established that lack of good reason and/or the length of time, before the filing of an application for extension of time, being unduly long do not necessarily lead to a refusal of an application for an extension of time. The court should have regard to the overriding principle of justice being done and the sufficiency of the material placed before it to enable it to exercise its discretion.

[47] These factors have been utilised by this court in several appeals involving an extension of time to file a defence including the cases of **Fiesta Jamaica Ltd v National Water Commission** [2010] JMCA Civ 4 (in which the case of **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Ors** (All England Official Transcripts (1997-2008) (delivered 18 January 2000) was applied) and **The Attorney General of Jamaica, Western Regional Health Authority v Rashaka**

Brooks Jnr (A Minor) By Rashaka Brooks Snr (His father and next friend) [2013] JMCA Civ 16.

[48] It is pellucid that all these factors were considered by M Jackson J (Ag). She rightly considered them conjunctively having regard to the overriding objective. Each factor will be dealt with *seriatim*. Regarding the issue of delay, in **The Attorney General of Jamaica, Western Regional Health Authority v Rashaka Brooks Jnr et al**, this court has made it clear that six months' delay in filing an application for extension of time to file a defence is egregious. In relation to the reasons for delay, such a reason must be "plausible" –see para. 19 in the written judgment of **Fiesta**. M Jackson J (Ag), rightly noted in her written judgment that it was apparent that the applicant had regard to the legal processes having filed an acknowledgment of service and even filing a complaint at the General Legal Council. Thus, he could have filed something in response to the claim. She was mindful that he was not an attorney-at-law and noted his deposed efforts to obtain legal representation. Therefore, albeit it is a reason that is valid, it is not fully plausible.

[49] In relation to the merits of the proposed defence, it is pellucid that the argument of laches lacks merit. However, this cannot be said regarding the signature and the issue of fraud. From para. [72] through to [76] of her written judgment, it appeared that M Jackson J (Ag) conducted a mini trial of the matter at the application for extension of time stage. I cannot agree that this appeal has "no real prospect of success" – see para. [31] of **Fiesta**. It cannot be stated that there is a "fanciful prospect of success" either since in the affidavit evidence and the draft defence the signatures on most, except one of the receipts, are disputed. I also recognise that some of these receipts were not mentioned or attached to the claim filed. Giving effect to justice in this case, this issue ought to be fully explored and ventilated at a trial. That is the forum for expert evidence (and contending views) and not at this preliminary stage.

[50] I am mindful of the delay in this matter and, therefore, propose that it be factored in the award of costs in the application to the respondent. Looking at the case as a whole,

however it would not be in the interests of justice (see page 2 of **Thamboo Ratnam v Thamboo Cumarasamy and Another** [1964] UKPC 50) if the possibility of fraud which has been plainly raised in the affidavit evidence is not properly ventilated. Although, it is argued that the quite detailed draft defence is inadequate, what is integral is deposed evidence in the affidavit, as re-iterated in the recent case of **Barrington Green et al v Christopher Williams et al -** see paras. [16] and [17].

[51] There was adequate material upon which M Jackson J (Ag) could and did exercise her discretion, albeit wrongly so, in determining whether or not to grant an extension of time to file a defence. M Jackson J (Ag), as noted above, stated that there were conflicting evidence and this conflict ought properly to have been ventilated at a trial and credence given to the need to grant the extension having regard to all the circumstances of the case. M Jackson J (Ag), went beyond identifying "some facts or material to make even an iota of difference by challenging the appellant['s] claim" and a "preliminary view" – see paras. [78] and [81] of **Barrington Green et al v Christopher Williams et al,** into conducting a mini trial. I appreciate the delay in this matter and thus recommend that an early date, be canvassed for the appeal.

Stay of Execution

[52] The test to be applied in determining whether to grant a stay generally was re-iterated at paras. [15] – [18] in the case of **Greg Tinglin et al v Claudette Clarke** [2020] JMCA App 24. That is:

> "[15] The resolution of the single question of whether the stay should be granted depends, of course, on the application of the relevant law that governs such applications to the circumstances of the case. The law in this is well settled. There is, therefore, no need for any detailed exposition on all the relevant authorities treating with the issue. It suffices to say that the approach is for the court to make the order, which best accords with the interest of justice, once it is satisfied that there may be some merit in the appeal (see **Combi (Singapore) Pts Limited v Ramnath Siram and Another** [1997] EWCA 2164).

[16] In a later case, **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA civ 2065 Clarke LJ stated the applicable principles in these terms:

> '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?"
>
> [17] In **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3, Morrison JA (as he then was), having had regard to previous authorities, stated that the threshold question to these applications is whether the material provided by the parties discloses at this stage an appeal with some prospect of success. Once that is, the court is to consider whether, as a matter of discretion, the case is one 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.'
>
> [18] Therefore, the two primary questions to be considered are:
>
> i. whether the appeal has some prospect of success; and
> ii. where lies the greater risk of injustice if the court grants or refuses the application?
>
> …"

[53] I have already found that the proposed appeal has a real chance of success and that justice requires that an extension be granted. On the said basis I would propose the granting of a stay of execution of the orders made by M Jackson J (Ag), having regard to the fact that if the matter proceeds the appeal could possibly be rendered otiose because the property would have been wrongly transferred to the respondent. In the converse, if the present status quo is maintained, the respondent is in possession of the property and has been so for a while so he presently and will continue to enure some benefit. The

respondent has unfortunately been waiting for a period of time but the interests of justice balances on maintaining the current status quo until the appeal is determined.

Conclusion

[54] In the premises, I would propose that leave to appeal ought to be granted and that costs be costs to the respondent in the application of leave to appeal in light of the delay caused by the applicant in the substantive matter. Further, that the substantive matter before the Supreme Court (including the orders made by M Jackson J (ag) on 28 September 2023) should be stayed pending the hearing of this appeal.

D FRASER JA

[55] I have read in draft the judgments of the learned President and my sister Sinclair-Haynes JA. I agree with the reasoning and conclusion of the President and have nothing further to add.

BROOKS P

ORDER

By majority (Sinclair-Haynes JA dissenting)

1. The application for leave to appeal and for a stay of execution is refused.
2. Costs to the respondent to be agreed or taxed.