

whether conditions imposed likely to result in injustice - whether judge wrongly exercised his discretion.
Application for leave to appeal, extension of time, stay of proceedings
Leave to appeal granted, Order of Court below unconditional
leave to defend granted. JAMAICA

Case referred to:

Martinez v. Kenn (1929) 1 KB 645
Zinn v. Beattie (1937) A.C. 473

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL MOTION NO. 15/93

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN LILIA NEUMAN DEFENDANT/APPLICANT
AND DELROYE SALMON PLAINTIFF/RESPONDENT

Maurice Frankson and Miss Georgia Gibson
for applicant

Enos Grant for respondent

December 15, 1993 and March 9, 1994

WOLFE, J.A.:

By Notice of Motion the defendant/applicant moved this Court for an order that:

1. The Defendant may be granted leave to appeal from the Order of the Hon. Mr. Justice Smith in the Supreme Court of Judicature of Jamaica on the 15th day of June, 1993.
2. All subsequent proceedings in Suit No. C.L. S222 of 1991 be stayed pending hearing of this appeal if leave so to do is granted.
3. The applicant be granted leave to appeal notwithstanding that the time limited by the rules for so doing has expired.
4. That costs of this application be costs in the cause.

On the 15th December, 1993, at the conclusion of the arguments we allowed the appeal and ordered as follows:

- "1. Leave to appeal granted.
2. Order of Court below set aside. Unconditional leave to defend granted.

"3. Costs of the application to be costs in the cause."

By an agreement for sale dated December 15, 1987, the plaintiff/respondent agreed to sell and the defendant/applicant agreed to purchase all that parcel of land situated at Coral Gardens being the lot numbered 653 on the plan of Coral Gardens and being the land comprised in Certificate of Title registered at Volume 843 Folio 5. The purchase price was agreed at \$2,000,000 apportioned as follows:

Land for	\$1,000,000.00
Business Assets for	\$1,000,000.00

The terms of payment were as follows:

"\$200,000.00 on the signing of the agreement, a further \$200,000.00 within ten weeks of the signing thereof. The balance to be held on an open first mortgage carried by the vendor for five years with interest thereon at 12½% per annum computed from the date of possession."

Difficulties arose between the applicant and the respondent and as a consequence the respondent commenced legal proceedings on the 26th day of August, 1991, seeking to recover possession of the property, the subject matter of the agreement. The applicant, having entered appearance on the 23rd day of October, 1991, failed to file a defence resulting in a Summons for Summary Judgment being issued.

On July 15, 1993, at the hearing of the Summons for Summary Judgment, Smith J. ordered, inter alia:

"That conditional leave to defend be granted on the terms that the sum of \$1.5 million plus interest at 12.5% thereon from the 31st December, 1987 be paid into court on or before the 15th September, 1993."

It is from this order that the applicant now seeks leave to appeal.

Unfortunately, this Court has not had the benefit of reasons for the decision of the learned judge. Mr. Grant for the respondent quite rightly submitted that for the applicant to succeed on this application she must show that the judge wrongfully exercised

his discretion and that where the defence is shadowy or where the facts are such that summary judgment could be given the judge may in his discretion order that the full amount be paid into court.

However, the judge having failed to disclose his reasons for the exercise of his discretion we are of the view that this Court is entitled to examine the affidavits and the pleadings to see if the order made by the judge can be considered a proper exercise of his discretion. If it can be shown that the exercise of the discretion would result in injustice, this Court would be entitled to set it aside. See Maxwell v. Keun [1928] 1 K.B. 645 and Evans v. Bartlam [1937] A.C. 473.

The affidavit in support of the motion disclosed, inter alia:

1. That the applicant was a citizen of the United States of America.
2. That the respondent is an Attorney-at-law practising in Jamaica.
3. That on or about the 28th day of October, 1987 both parties commenced negotiations for the sale of premises 14 Churchill Place, Coral Gardens in the parish of St. James.
4. That the applicant intimated to the respondent that she desired to have independent legal representation in the transaction and that the respondent persuaded her that it was unnecessary and that she should trust him.
5. That she entered in possession of the said premises, the agreement having been reduced into writing on the 15th day of December 1987, she having made a deposit of J\$200,000.00 and US\$55,000.00.
6. That a mortgage document for an indebtedness of \$1,600,000.00 was signed by the applicant and returned to the respondent to be duly stamped and registered with the understanding that the applicant's name would be endorsed on the Certificate of Title.
7. That by the 4th day of April, 1989 the balance of the purchase money was paid to the respondent as set out in the applicant's affidavit:

21. 1. 88 J\$ 50,000.00 cheque		
2. 88		US\$100,000.00 cash
16. 9. 88 J\$ 15,000.00	"	US\$ 75,000.00 "
14.11. 88 J\$ 30,000.00	"	US\$ 25,000.00 "
12. 1. 89 J\$ 50,000.00	"	
23. 1. 89 J\$100,000.00	"	
04. 4. 89 J\$ 5,000.00	"	US\$ 20,000.00 "
<u>J\$250,000.00</u>	"	<u>US\$220,000.00</u> "

8. That the respondent failed to issue the applicant with receipts and it was only after continued protests that the respondent confirmed the applicant's ownership of the property by two memoranda dated December 31, 1987 and February 25, 1988 and signed by the respondent. The contents of the memoranda are set out below for their effect:

December 31, 1987

"This certifies that Ms. LILIA NEUMAN of Toronto, Canada is the registered owner of that land (with buildings thereon) at 14 Churchill Place, Coral Gardens, White Sand Beach P.O., Montego Bay being the lot numbered 653 part of Coral Gardens aforesaid comprised in Certificate of Title registered at Volume 843 Folio 5 of the Register Book of Titles and became entitled to possession thereof on the 31st day of December, 1987.

Sgd. D.A. Salmon"

February 25th, 1988

RE: PREMISES - CORAL GARDENS, formerly part of IRONSHORE ESTATES, SAINT JAMES - Lot No. 653 - Registered at Volume 843 Folio 5

This serves to confirm that MS. LILIA NEUMAN is now the owner of the above-mentioned premises and as such is entitled to POSSESSION of the said premises to receive RENTS and PROFITS therefrom and are liable for all outgoings as from the 31st day of December, 1987.

Sgd. D.A. Salmon."

In addition to the aforementioned allegations, the applicant has expended large sums of money to refurbish the premises thereby improving considerably the value of the holding.

It is fair to say that most of these allegations have been denied by the respondent in affidavits filed by him. These allegations, however, raise serious questions of fact to be resolved in

a trial. The nature of the allegations demand that the applicant ought to have her day in court. The applicant has averred that she "ought not to be shut out of court by being put on onerous terms to pay money into court as a condition precedent to obtaining leave to defend."

To require the applicant to pay \$1,600,000 plus interest at 12.5% per annum from December 31, 1987 into court as a condition precedent to her being allowed to defend the action could very well have the effect of driving her away from the judgment seat in circumstances where there are serious issues of fact to be tried. Once the condition could have that effect then the order is likely to result in injustice, consequently it cannot be said that the learned judge has properly exercised his discretion.

We are of the view that the condition imposed by the learned judge is likely to result in injustice to the applicant and should not, therefore, be allowed to stand.