IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 1735 OF 2006

BETWEEN	**TREFINA VERONICA NUNES-ASIEDU**	**CLAIMANT**
AND	**ADMINISTRATOR-GENERAL FOR JAMAICA (Administrator of the estate of Herman Lawrence Anderson)**	**DEFENDANT**

Mrs. Pamela Benka-Coker Q.C. and Ms. Stephanie McLean instructed by J.Messado and Co. for the Claimant/Applicant.

Mrs. Denise Kitson, instructed by Perkins Grant Stewart Phillips and Co. for the Defendant/ Respondent.

Heard : 29th and 31st July 2008 and 30th September 2008

Mangatal J:

1. The application before me is for a stay of execution of the Judgment of Mr. Justice McIntosh delivered on the 17th September, 2007, pending the hearing and determination of an Appeal filed herein.

2. Alternatively, the Applicant seeks an injunction restraining the Defendant from selling or in any way dealing with land part of 11 1/2 Sea View Avenue in the Parish of Saint Andrew, being the property registered at Volume 1409 Folio 1439 of the Register Book of Titles, "the subject land" (Counsel advised that the Notice of Application for Court Orders filed January 18 2008 bears the wrong Volume and Folio

Number) until the hearing and determination of the Appeal herein.

3. The ground upon which the Application is stated to be made is that the Applicant has filed an Appeal with regard to the decision of the learned Judge in Chambers, and the Appeal will be nugatory unless the Order is granted.

4. The application is supported by the Affidavit of Trefina Veronica Nunes-Asiedu "Ms. Asiedu" sworn to on 17/10/ 07. The application has been opposed by the Administrator General and in that regard an Affidavit of Lona Millicent Brown, the Administrator- General of Jamaica sworn to on the 31st March 2008 has been filed .

5. Mrs. Benka –Coker Q.C., Counsel for Ms. Asiedu has submitted that it is just to grant the stay because

(a) if the appeal were to succeed the outcome would be stifled, and the Appeal would be rendered nugatory if the Administrator General were permitted to sell the land the subject of the Appeal herein.

(b) Damages would not be an adequate remedy.

(c) The Appeal has real prospects of success.

6. She also submits that if the Court considers injunctive relief more appropriate than a stay, then Ms. Asiedu's case meets the requirements set out in the leading case of **American *Cyanamid* v. Ethicon [1975]** 1 All E.R. 504 and that that would be the relevant test on this application. She states that the case shows that the Appeal has a real prospect of success, that

damages would not be an adequate remedy, and that the balance of convenience favours the grant of the injunction when all the circumstances are considered.

7. It seems logical to first determine whether the appropriate application is for a stay of execution of the Judgment of McIntosh J. or for an injunction pending determination of the Appeal.

8. In order to so decide I have to examine the nature of this case and of the Judgment handed down by my brother McIntosh J. on the 17th September 2007.

9. I note that the Civil Procedure Rules 2002 do not provide any guidance as to the principles upon which a stay of execution should be granted in relation to a Judgment such as the present one, i.e. a Judgment which does not involve the payment of money or orders for possession. The Court of Appeal Rules 2002 have also not changed the position which obtained prior to these Rules, which was that save where the Court so orders, an appeal does not operate as a stay of execution or of proceedings under the decision of the court below.

9a. Essentially, the Claim by Ms. Asiedu was for the specific performance of an Agreement for Sale of the subject land dated 14th December 2005 entered into between the Administrator General as (Administrator for the Estate of Herman L. Anderson, deceased) as vendor and Ms. Asiedu as purchaser. Ms. Asiedu did not as an alternative to specific performance claim damages but she has claimed further or other relief.

10. On the 17th September 2007 McIntosh J. handed down judgment as follows:

On a balance of probabilities, the Purchaser's claim is dismissed with costs to the vendor to be agreed or taxed.

This Court declares that:

1. *The Purchaser Trefina Nunes-Asiedu was in breach of an essential condition pertaining to the payment of the balance of the purchase money under agreement for sale dated the 14th day of December, 2005.*
2. *The agreement for sale between the parties dated the 14th day of December, 2005 was validly rescinded by the Administrator General, who is discharged from further performance of the said contract.*
3. *The Legal Fees attendant to forfeiture to be retained by the vendor.*
4. *That costs of this action be the Administrator General's, to be agreed or taxed.*

11. Mrs. Kitson, on behalf of the Administrator General submitted that there is no act ordered by the judgment which is capable of being stayed. She relied upon the case of **Otto v. Lindford** (1881) 18 Ch. D. 394 and a short dictum of Jessel M.R. at page 395. I agree with Queen's Counsel Mrs. Benka-Coker that in fact the short statement by Jesel M.R. had more to do with the issue of jurisdiction as between the court below and the Court of Appeal. In addition, in the same case Cotton L.J. stated (page 395) "I have no doubt that, though an action is dismissed, the Court below can,

pending an appeal, stay the doing anything under the order of dismissal."

12. I find the dictum somewhat confusing and indeed, so too that in **Wilson v. Church** (1879) 11 Ch. D. at 578. What I did find useful was the case of **Erinford Properties v. Cheshire County Council** [1974] 2 All E.R. 448, where Megarry J. (as he then was), considered and explained to some extent the decision in **Wilson v. Church** and **Otto v. Lindford** and he went to some pains to explain the differences between dicta in some of the cases as opposed to the actual decisions made. At the end of the day, Megarry J. did not follow the dicta of Jessel M.R. and Cotton L.J. in **Otto v. Linford**. In **Erinford** , the question was whether the court below could or should grant an injunction pending appeal when it had refused an interlocutory injunction. The headnote is an accurate summary of the main points of the case and states:

Where a Judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against the dismissal; it is not necessary for an applicant to apply to the Court of Appeal.

There is no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision from being rendered nugatory should that court reverse the judge's decision.

Dicta of Jessel M.R. and Cotton L.J. in Otto v. Linford....not followed.

Polmi v. Gray (1879) 12 Ch. D. 438 and Orion Property Trust Ltd. v. Du Care Count Ltd.[1962] 3 All E.R. 466 applied.

13. In the course of his judgment, Megarry J. made it clear that in his opinion in arriving at the appropriate principles, it made no difference whether the matter dismissed by the court below was of an interlocutory nature or involved a final order or judgment. Hence, I have freely considered these principles and their applicability to the case before me where a final judgment was delivered by McIntosh J.

14. At,page 448 Megarry J. states:

At least at first sight, the dicta support the view that a judge who dismissed an action has no jurisdiction to grant an injunction restraining the successful Defendants from parting with the subject matter of the action pending an appeal. The decisions on the other hand, support the opposite principle. In the words of Pennycuick J. in the ***Orion*** *case [1962] 3 All E.R. at 471,....the effect of the principle is that 'the court of first instance has jurisdiction to make an order preserving the subject- matter of the action in the appeal , even though the action has wholly failed.' Such a principle plainly seems to be consonant with the undoubted jurisdiction of a judge who has made an order to grant a stay of execution of that order pending an appeal, a jurisdiction which is the subject of rules of court.*(my emphasis).

15. At page 454 Megarry J.'s reasoning continues:

.....where the application is for an injunction pending an appeal, the question is whether the judgment that has

been given is one on which the successful party ought to be free to act despite the pendency of an appeal.....

Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal. Except where there is a good reason to the contrary....I would apply the convenience of the procedure for the one to the other.

16. In the case before him, Megarry J. found that damages did not appear to be a suitable alternative to an injunction pending appeal.

17. In my judgment, it is correct and convenient to approach the present case as an application for an injunction pending appeal to restrain disposal of the subject land, as opposed to a stay of execution of the Judgment of McIntosh J. This is because Ms. Asiedu's claim has been dismissed and the result which it is sought to be achieved, i.e. that the Administrator General be prevented from reaping the fruits of its success pending the appeal, can best be effected by way of injunctive relief.

18. The authorities appear to suggest that the same approach as taken in the **American Cyanamid** case should be taken. Firstly, it is for the Appellant Ms. Asiedu to demonstrate that the Appeal has a real prospect of success.

The Court will then have to look at the question of the relative adequacy of damages as a remedy for either side

as a first limb of its consideration as to where the balance of convenience lies.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the question of the general balance of convenience arises.

19. The concept of a real prospect of success denotes that the court must look to see whether there is a real as opposed to a fanciful prospect of success. In **Swain v. Hillman** [2001] 1 All E.R. 91, the useful observation is made that prospect of success is not the same as likelihood of success.

20. In the instant case, Ms. Asiedu's Attorneys have filed a number of grounds of Appeal, including that the Judge erred in his finding, (which the grounds attack as representing a finding both of fact and of law), that at the time when the Administrator –General rescinded the contract she was in a position to complete and was entitled to rescind the contract and that the purchaser failed to respond during the period of the notice. Ms. Asiedu asserts that the Learned Judge failed to properly consider whether, at the time the vendor purported to rescind the contract, the vendor the Administrator General was herself ready willing and able to complete the contract in accordance with the express provisions of the contract. Amongst the grounds are "that the Learned Judge failed to interpret the express clause in the Contract which deals with completion , which was the duty of only the Court to do, and wrongly relied on expert evidence adduced, which evidence was not relevant to a

proper interpretation of the express written agreement between the parties;

The Learned Judge failed to consider whether at the time that the Vendor purported to rescind, the period of the Notice had expired, ... and whether the time given in the Notice to complete the contract was reasonable in the circumstances".

21. Mrs. Kitson, cited a number of authorities as to the law, including authorities cited to McIntosh J., in her attempt to demonstrate that there is no realistic prospect of Ms. Asiedu succeeding in the appeal. I have looked at the matter, closely, and, at the end of the day, I think that the case involves some important points of law and of conveyancing practice. In her Affidavit in support of the application Ms. Asiedu swears to the fact that at the material time the Administrator General was not registered on the Registered Title on transmission, and further, that at the material time there was a caveat on the title, and thus, the argument runs, the Administrator General was not ready and willing to complete. I am of the view that this is an Appeal with real prospects of success in terms of Ms. Asiedu making out a case that the Administrator General breached the Contract for Sale. I am not called upon to delve into the merits of the prospects of success of the case in the same way that one would analyze the case when conducting a trial. I understand the exercise to be properly conducted by investigating the matter in a more limited way. It is also not necessary or appropriate to determine whether there is a real likelihood of success, as opposed to a real prospect of success.

22. However, this case/application raises interesting issues in another way. I note that the main thrust of Ms. Asiedu's case is that at the time when the Administrator General purported to rescind the contract, the Administrator General was not in a position of readiness, willingness, and ableness to complete. In paragraph 3 of her Affidavit Ms. Asiedu states "I at all times remained ready willing and able to complete the sale. However on or about 8th May, 2006 I received a letter from the Defendants indicating that the sale was cancelled." However, nowhere in the Grounds of Appeal is there a direct challenge to the learned Judge's finding at pages 3 and 4 of the judgment as follows:

(page 3)*On the 8th day of May, 2006 the purchaser sent the vendor a letter of undertaking from Mayberry Investments Limited which indicated their willingness to pay $15,300,000.00 to the vendor subject to their interest being registered on the title. This amount would be less than the $ 15, 854,495.00 required for completion.*

.....

(page 4)*....On the other hand, the purchaser was never in a position to complete and to this day has not shown that she is in a position to do so.* (my emphasis).

23. The nearest that it could remotely be argued that Ms. Asiedu comes to raising an issue about the Judge's findings in relation to her own readiness is in ground (iv) of the Grounds of Appeal. However, such a meaning would not be the natural meaning of the words used in the ground, and would at best be a strained one. The ground states " The Learned Trial Judge erred in law when he failed properly to consider the material issue of

whether at the time the vendor purported to rescind the contract, she was herself ready willing and able to complete the contract according to the express provisions of the contract. Nowhere in his judgment does he address this very important issue, which goes to the very root of the consideration of the Vendor's alleged right to rescind the contract."(my emphasis) In my view, the reference to " she ...herself" in ground (iv) is clearly a reference to the vendor, the Administrator General, and not to Ms. Asiedu. In other words, in this ground the challenge is directed at the Judge's allegedly faulty consideration of the Administrator General's readiness to complete, and is not a ground challenging directly, or otherwise, the Judge's clear finding that Ms. Asiedu was never in a position to complete and that she had not demonstrated this up to the time of trial. In any event, it is clear from the judgment that the learned judge did consider in express terms the readiness, willingness and ability of the Administrator General, as well as Ms. Asiedu, to complete. The lack of challenge to the above findings regarding Ms. Asiedu herself may well be because Ms. Asiedu's case placed emphasis, and continues to place emphasis, on the readiness of the vendor, the Administrator-General to complete as the real issue before the court. At page 3 McIntosh J. stated:

It is agreed that the real issue for the court is "whether at the time that the Administrator General purported to rescind the sales contract with Nunes-Asiedu, she was entitled to do so".

24. In my judgment, the authorities are quite clear that a purchaser seeking specific performance of an Agreement

for Sale of Land must be able to show on a factual basis his or her readiness and willingness to perform their essential obligations at the time when the proposed relief is to be granted. See **Spry** on **Equitable Remedies** , 6th Edition, pages 217-221. Being ready willing and able to complete with regards to payment of the balance purchase price is one such essential obligation. In **Rightside Properties Limited v. Gray** [1974] 2 All E.R. 1169, the purchasers had originally filed Suit claiming specific performance of an agreement for sale of land, and alternatively, for damages. Eventually, however, the purchasers accepted a letter from the Defendant –vendor as repudiation of the contract and did not press the claim for specific performance. In the course of his judgment Walton J. at page 1183 indicated that had the purchaser persisted with the claim for specific performance, it is only at material times that the purchaser must be demonstrated to be ready with his finances. Walton J. indicated that one such time must be the time when completion ought to have taken place. Walton J. also stated:

Had Rightside claimed specific performance, I think the trial would have been another material time and Rightside might have had to show their financial ability to complete at that date.

25. In so far as there is no clearly delineated challenge set out in the Grounds of Appeal to McIntosh J.'s finding that the purchaser had not been shown to be ready, willing and able to complete, indeed, right up to the trial date, it therefore seems to me that even if Ms. Asiedu can succeed in proving that the Administrator General was in

breach of contract, repudiatory or otherwise, she does not have real prospects of succeeding in her claim to the equitable remedy of specific performance. It may therefore be said that Ms. Asiedu has no real prospects of succeeding in her Appeal since the only express claim is a claim for specific performance. However, since the Court has power to award damages in lieu of specific performance, alternatively one can approach the issue as a question of the adequacy of damages.

26. On the question of the adequacy of damages as a remedy, I accept Mrs. Benka-Coker Q.C.'s submission that in relation to land, ordinarily damages are not regarded as an adequate remedy. She referred to **Spry** on **Equitable Remedies**, 5th Edition, pages 59-74.

At page 61 it is stated:

Whether remedies at law are adequate is determined on the same principles, whether realty or personality, such as a chattel, is involved. But land is property that has a fixed location and a special value, and ordinarily at least damages are not to be regarded as an adequate substitute for the right either to acquire or dispose of an interest in it. Even indeed if the purchaser intends to purchase the land in question merely in order to be able to sell it later at a profit, damages will not be regarded as an adequate remedy for him.

27. In **Alberto Fernando Rose v. Patrick Wilkinson Chung et al** (1978) 16 J.L.R. 141, Mrs. Justice Allen declared the Court's jurisdiction, which is not in dispute in this case, to award damages in lieu of or in addition to specific performance in relation to a contract for sale of land. I agree with Mrs. Benka-Coker that an important

consideration in that case, and which influenced the Court's decision to award damages as opposed to specific performance, was that third parties had acquired the legal interest in the land. The **Rose v. Chung** case is not authority for the proposition that in contracts for the sale of land damages are an adequate remedy. In **O. Hemans and T. Hemans v. St Andrew Developers** (1993) 30 J.L.R. 290, Harrison J. (Ag)(as he then was) did decline to grant an interlocutory injunction to restrain disposal of a piece of land in a claim for specific performance on the basis, amongst others, that he considered damages an adequate remedy. However, in that case, the Claimant had made an ex parte interim application in respect of which the learned Judge found that there had been material non-disclosure, and in addition it was found that the applicant had been guilty of delay. His Lordship expressly stated equity aids the vigilant and not the indolent. In any event, I am of the respectful opinion that the decision in **Hemans** does not change the general proposition, the existence and rationale for which I accept, that damages are not generally an adequate remedy when one is dealing with land. I note that in **OPM Property Services Ltd. v Venne** [2003] E.W.H.C. 427, it is stated at paragraph 47 of the judgment that in England it is well-established that in relation to contracts for the sale of land, the court does not normally refuse to grant specific performance on the basis that damages are an adequate remedy. It was pointed out that the practice may be different in Canada and New Zealand. My own understanding of the position in Jamaica is that the same practice as obtains in England, is also applied here, i.e.

that damages are not normally considered an adequate remedy in relation to sale of land transactions. However, for the reasons which I have stated above, notably that Ms. Asiedu has not in her grounds of Appeal challenged the learned Judge's finding that she was not ready, willing and able to complete, Ms. Asiedu, even if she were to be successful, would be left to her remedy at law, being damages. In the circumstances of this case, damages would therefore be an adequate remedy for Ms. Asiedu. At page 64 of **Spry**, 5th Edition, the learned author makes the point that whether damages constitute an adequate remedy is a question of fact in each particular case.

28. I cannot trace seeing any evidence as to the Administrator General's evidence as to her ability to pay damages. However, I am prepared to hold that the Administrator General, being a creature of Statute would be in a position to pay damages should Ms. Asiedu succeed in her Appeal and it turns out that the injunction should not have been refused.

29. As regards the question of adequacy of damages for the Administrator General representing the estate, as vendor it would seem that in view of the right of a purchaser to specific performance, the vendor of an interest in land has a similar right also-see the discussion at page 62 of **Spry,** 5th Edition. However, in this case, I am of the view that damages would be an adequate remedy for Ms. Asiedu, and I am inclined to think that damages would be an adequate remedy for the vendor in this case. However, in the circumstances of this case, I find that the evidence of Ms. Asiedu in paragraph 8 of her Affidavit does not

satisfy me of Ms. Asiedu's ability to pay damages in the event that the Appeal is lost and it is proved that the injunction ought not to be granted.

30. For these reasons, i.e. that this Appeal does not have real prospects of success, or alternatively, that damages are an appropriate remedy for Ms. Asiedu in the circumstances of this case and the Administrator General would be in a position to pay them, or that damages would be an appropriate remedy for the Administrator General but that I am not satisfied on a balance of probabilities that Ms. Asiedu would be financially able to pay them, I find that the circumstances favour the refusal of an injunction pending the Appeal.

31. Further, if it is that the appropriate issue is to consider the grant of a stay of execution rather than the grant of an injunction pending appeal, it seems to me that the law has really evolved to such an extent that the tests for these two remedies are in essence more similar than they used to be. Just as it is far too stringent a test to have to show that, in a money judgment, if the damages and costs are paid there is no reasonable probability of getting them back if the appeal succeeds, (see **Linotype -Hell Finance Ltd. v. Baker**[1992] 4 All E.R. 887), it is not necessary for a defendant to say, that without a stay of execution he will be ruined, though of course if he can prove a real risk of such ruination that would be a powerful consideration redounding to his benefit. The modern practice is really an exercise in risk assessment of relative injustice once the applicant can show that he or she has a real prospect of succeeding on Appeal, against the backdrop that a successful litigant is not

lightly to be deprived of the fruits of his success. To the extent that the inquiry involves an analysis of relative risks, it is similar to the court's consideration of the balance of convenience in relation to interlocutory injunctions, once it is established that there is a serious issue to be tried or that there is a real prospect of success(page 510 e-f of **American Cynamid**).

32. Provided that the Applicant can demonstrate this real prospect of success, then the court considering the application for a stay of execution, must then weigh up the relative risks of injustice that may be occasioned to each party, depending on which way the Court decides the matter.

33. I have found useful guidance in the English decision **Hammond Suddard Solicitors v. Agrichem International Holdings Limited** [2002] EWCA Civ. 2065, where Clarke L.J. at paragraph 22 put forward his views as to the manner in which the court should exercise its discretion:

Whether the court should exercise its discretion to grant a stay will depend upon all of the circumstances of the case, but the essential question is whether there is a risk of injustice to one or both parties if it grants or refuses a stay. In particular if a stay is refused, what are the risks of an 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?

34. In my judgment, based on the nature of this case, the judgment, and the grounds of appeal, in particular the lack of challenge to the finding of Ms. Asiedu's state of unreadiness to complete, I am not of the view that if a stay is refused the appeal will be stifled. As to the question of the consequences for the respondent if a stay is granted and the appeal fails, there has really been no evidence from the Administrator General as to any difficulty in enforcing the judgment, except to say that there will be hardship on the beneficiaries of the deceased's estate, and for the Administrator in terms of her inability to sell the property now and to wind up the estate. I am of the view that a stay of execution, if that is the appropriate relief, should be refused. It seems to me that the relative risk of injustice is higher for the estate, its beneficiaries and the Administrator General, than for Ms. Asiedu.

35. As I have said earlier in this Judgment , I am of the view that the appropriate application to be considered is that of an injunction pending appeal. In my judgment the Judgment is one on which the successful party, the Administrator General ought to be able to act freely despite the pendency of an Appeal.

The Re-Issued Notice of Application dated 18th January 2008 is dismissed, with costs to the Administrator General to be taxed if not agreed.