IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007HCV02564

BETWEEN	**A1 LIMITED**	**CLAIMANT**
A N D	**MARY GRACE ABRAHAMS**	**DEFENDANT**

And

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00531

BETWEEN	**MARY GRACE ABRAHAMS**	**CLAIMANT**
AND	**A1 LIMITED**	**DEFENDANT**

Application for stay of execution pending appeal – Application for removal of caveat - Application to strike out claim – Whether issue estoppel or res judicata – Judge reached age of retirement prior to delivery of judgment- Whether real prospect of success on appeal- Stare decisis - Whether Supreme Court bound by decision of court of appeal- Whether real risk of injustice if stay refused.

Samoya Young instructed by Clough Long & Co. for A1 Limited.

Andre Sheckleford instructed by Hart Muirhead & Fatta for Mary Grace Abrahams

Heard: **20th December 2018 and 25th January, 2019**

IN CHAMBERS

CORAM: BATTS J

[1] There are multiple applications in separate suits before me. The applications are:

[a] In Claim 2007HCV02564: An application, filed on the 25th April 2016, for a Declaration that leave to appeal was granted on the date judgment was delivered and, for a Stay of Execution pending appeal.

[b] In Claim No. 2017CD0053: The final hearing date of the Fixed Date Claim for removal of Caveat and an application to strike out the claim and/or to have it stayed pending the determination of the appeal in Claim 2007HCV02564.

[2] The facts and circumstances leading up to these applications are not in dispute. Mary Grace Abrahams (hereinafter referred to as Mary) entered into an agreement dated 27th March 2007 with A1 Limited (hereinafter referred to as A1). Mary, in that agreement, agreed to sell to A1 a parcel of land registered at Volume 1156 Folio 9747 of the Register Book of Titles (hereinafter referred to as the land). Time was, expressly stated to be, of the essence in relation to condition 4 of the agreement. Upon A1 being late, in relation to condition 4 time lines, Mary terminated the agreement and forfeited a part of the deposit.

[3] A1 then commenced Claim No. 2007HCV02564 (hereinafter referred to as the 2007 claim) against Mary seeking specific performance of the agreement. Mary, in that claim, successfully applied for and obtained summary judgment. The judge, who heard the application and wrote the judgment, was the Honourable Mr. Justice Raymond King. The application before Justice King was heard on the 2nd day of October 2012 and judgment was reserved. However, between that date and the date it was delivered, Justice King reached the retirement age of 70 years. His written judgment was therefore delivered by Ms. Justice Nicole Simmons on the 16th March 2016. There was no minute of order made, or at any

rate none is to be found on file, at the time judgment `was delivered. A1 contends that Simmons J granted them leave to appeal. The appeal was filed on the 25th April 2016. An Amended Notice and Grounds of Appeal was filed on the 4th May 2016.

[4] A1 applied, by notice of application filed on the 25th day of April 2016, for a declaration that leaves to appeal was granted and for a stay of execution of the order of King J pending appeal. That application was listed on the 9th June 2016, 22nd June 2016 and 22nd September 2016. On the last date it was adjourned, for a date to be fixed by the Registrar, apparently due to the absence of A1's representative.

[5] The matter remained dormant until Mary, by Fixed Date Claim No. 2017CD00531 (hereinafter referred to as the 2017 Claim) filed on the 31st October 2017, applied for an Order to remove caveat # 1471506 dated 11th May 2007 and lodged on the title to the land. The caveat relates to the same land and the same agreement which was the subject of the 2007 Claim. A1, by notice of application filed on the 5th October, 2018, applied to strike out the 2017 Claim as being an abuse of process. Alternatively, A1 seeks to have the 2017 claim stayed pending the hearing of its appeal in the 2007 claim.

[6] Upon the 2017 Claim, and the application to strike it out, coming on for hearing, I directed that the applications in the 2007 Claim be also listed for hearing before me at the same time. It seemed to me to be the only way to do justice in this long outstanding, and unnecessarily delayed, matter.

[7] In the result, and but for one rather surprising turn of events which I discuss below, the issues were not difficult to resolve. I will treat with the matters on the assumption that Justice Simmons gave leave to appeal. There was affidavit evidence suggesting she had, see paragraph 6 of the affidavit of Joseph Issa dated 21st April 2016, and there is no evidence in rebuttal. There was no Formal Order, nor was there a Minute of an Order when judgment was delivered. I canvassed Justice Simmons on or about the 20th December 2018 who, not

surprisingly, had no recollection. On that same day the cabinet, which would have had the relevant notebook, was locked. Her secretary was on departmental leave and the key to the cabinet could not be located. I indicated all this to the parties as well as my intention to hear the matters on the assumption that leave had been granted. Neither side demurred.

[8] I am grateful to the parties for the submissions made and authorities cited. Having given the matters careful consideration my conclusions will be shortly stated.

[9] In relation to the 2017 Claim I agree with A1 that it must be struck out. That claim, being for removal of a caveat lodged to support an interest by virtue of the disputed agreement, involves the same matters in dispute in the 2007 claim. In order to decide whether to remove the caveat the court will necessarily either have to decide whether A1 Is entitled to specific performance or, whether the 2007 Claim finally resolved the issue in Mary's favour. In either event it involves the court relitigating an earlier claim between the same parties in respect of the same issues. *Res judicata* and/or issue estoppel clearly arises and, for present purposes, it matters not which it is, see generally: ***Fletcher G Company Ltd. v Billy Craig Investments Ltd. et al [2012] JMSC Civil 128 (unreported judgment of McDonald Bishop J dated 24 September 2012).*** I therefore Order that the 2017 Claim be dismissed.

[10] The situation, in respect of the applications in the 2007 claim, seems equally clear. A1, as I indicated earlier, applied for a stay of execution pending appeal. Mr. Sheckleford, for Mary, argued firstly that the court had no jurisdiction to grant a stay because there was nothing to stay. He relied primarily on the decision, of the Court of Appeal, in ***Dennis Atkinson v Development Bank of Jamaica SCCA 90/2015, [2015] JMCA* App 40**, ***(unreported judgment of Phillips JA delivered 20th October, 2015).*** I respectfully disagree because the cases are distinguishable. Justice King's judgment, when read with the typographical error in Para 18 corrected, granted summary judgment. It had the effect of striking out

and/or dismissing A1's claim. That is an order of the court. The court has an inherent jurisdiction to stay its own Orders, see generally ***Bibby and another v Partap and another*** **(1996) 48 WIR 371(P.C.)** and ***BCB Holdings Ltd v A-G of Belize*** **(2011) 78 WIR 41**. The authorities, to whom Mr. Sheckleford referred, all relate to declaratory relief. Declarations are not orders which are enforceable. They are binding pronouncements but compel no activity, and therefore, in that sense are not enforceable. There is nothing, or rather no order, to stay. For that reason a stay of execution cannot be had in relation to declaratory relief, see ***Robert Rainford v His Excellency the Most Honourable Sir Patrick Allen et al Application No. 106/2014 [2014] JMCA App.26 (unreported judgment of McIntosh JA delivered on the 12th April 2014).*** I see nothing incongruous, or problematic, with a court staying an order which dismisses a claim. The stay will have the effect of keeping the action alive.

[11] Mr. Sheckleford is on firmer ground with respect to the merits of A1's application for a stay. Save, for one unfortunate development, I would have dismissed that application. This is because there really is not much merit in the intended appeal. In this application, for a stay of execution pending an appeal, the question is twofold, viz: what is the appellant's prospect of success on appeal and whether there is a real risk of injustice to either or both parties if the judgment is enforced , as per Phillips JA in ***Ferrnah Johnson-Brown (Executor of purported last Will and testament of Leonard Lloyd Brown ,deceased) v Marjorie Mclure (by her personal representative Joan Williams) [2015] JMCA 19 (unreported judgment delivered 30th April 2015).***

[12] The written agreement for the sale of land provided, in Special Condition 4, as follows:

> *"1) The purchasers shall on or before 21 days after the date of this Agreement cause to be delivered to the Vendors Attorneys-at-law either*
>
> *i. a letter of undertaking from a reputable licensed financial*

institution, in a form acceptable to the vendors Attorney-at-Law, as to the payment to the Vendor's attorney-at-law of the balance sale price and costs of this sale as set out in this agreement upon completion,

or;

ii. payment in full of the balance Sale price and costs of this sale as set out in this Agreement.

2) Time shall be of the essence of this special Condition 4."

[13] There is no dispute that the tender, of the letter of undertaking, was outside the 21 days stipulated by Special Condition 4. The grounds of appeal in that regard (Grounds V, XI, XII, and XV of the Amended Notice and Grounds of Appeal) allege that the contract was ambiguous. Reference is made to the "How Payable" Clause (c) and to the Completion Clause of the agreement. It is contended that the former provides for the entire balance of the sale price being payable on Completion and, the latter, for Completion in 30 days. A1's counsel posits that, since there is 30 days for completion on one hand and 21 days in Clause (4) on the other hand, there is an ambiguity such as to render the purported termination ineffective. I am not called upon to decide the point, it suffices that, the prospect of its success, is very low.

[14] This is because completion occurs where there is an exchange of payment for either title or a registrable transfer. The contract describes that in the Completion Clause as "payment in full." Clause 4 is dealing with the time period for tendering of an undertaking to pay and/or of payment. There is nothing inconsistent with a requirement that payment be tendered prior to completion. One rationale for this may be to give the vendor time, before delivery of title and/or registrable transfer, to verify and confirm that the undertaking is good or that the cheque is valid. Whatever the rationale however, a tender of payment on the one hand, and

completion of a contract on the other, are distinct activities. The latter necessarily includes the former. The former may occur without the latter. What is clear is that the time, by which payment was to be tendered, was of the essence of the contract. It is also clear that tender of payment and/or the undertaking to pay was late.

[15] The Honourable Mr. Justice King had been a practitioner of many years prior to his elevation to the bench. He was very experienced in such matters. He stated at paragraph 17 of his judgment:

> *"The court takes further guidance from the advice of the Privy Council delivered by Lord Hoffman in the case of* ***Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514 at 521.*** *In that case time was of the essence in respect of the final payment which was made 10 minutes late, Lord Hoffman advised that certainty was needed in business. Accordingly, the contract terms would be strictly enforced and the contract rescinded and the deposit lost....."*

[16] Justice King had before him, but did not refer to, exhibit NP 4 to the affidavit of Novar Patrick McDonald dated the 2nd May 2011. It is a file note, written by Mr McDonald and dated 3rd May 2007 , which reads,

> *"Spoke with Clayton Morgan. He asked why the vendor wanted to do this. I said I had received instructions from her hence the letter rescinding. He said he thought she would have charged interest instead, but he had warned Joey that time was passing.*
>
> *CM: was this the vendors final position? The L/V from the bank was just days away, though he did not yet have it himself.*
>
> *I said the vendor had indicated she did not want to keep the Agreement on foot and I had discussed it thoroughly with her and she was bent on rescinding. However, obviously Joey could talk to her and see what could happen, but I had no instructions.*

> *CM: accepted that the vendor was entitled to rescind. He will speak to Joey and tell him the ball is in his court."*

It is a note of the conversation between the lawyers at the time of rescission. Justice King, in his judgment, referred to a letter dated 3rd May 2007 rescinding the agreement. There is, as far as I am aware, no required format for a notice to say a contract is terminated. Grounds I and II of the Amended Notice and Grounds of Appeal, which challenged the findings as to the appropriateness of rescission, are therefore most unlikely to succeed.

[17] Grounds (III) and (IV) allege that the deposit of US$75,000 was part deposit and part "Part performance." However there was no application before the Judge for relief from forfeiture. I fail to see how this could be successfully raised on appeal.

[18] Grounds VI and VII criticise the judge for relying on affidavits filed on the 10th May 2011, "without permitting the Claimant to answer the named affidavits." Ground VIII challenges reliance on the affidavits because the affidavits,

> "*were filed on behalf of the Defendant, were filed by the Defendant's attorneys at law who are not and ought not to be the Defendant's witnesses."*

[19] To take Ground VIII first, that really is an absurd proposition. In many matters, particularly those involving conveyancing the real witness of fact is the attorney having conduct of the transaction. As regards the grounds, concerning the opportunity to respond to the affidavit, the record does not support the complaint. The application and affidavits were filed on the 2nd May 2011. It first came on for hearing on the 5th May, 2011 before the Hon. Miss Justice Beckford and was adjourned to the 12th December 2011 at 10 a.m. for 3 hours. There were other applications filed including one by A1 on the 19th May 2011 to have the application for Summary Judgment struck out. On the 12th May 2011 Mary, by Notice, withdrew her application for court orders which had been filed on the 20th May 2011. This appears to have been done to enable an application for security

for costs against A1 Ltd. On the 27th May 2011 the Honourable Mr. Justice Patrick Brooks, in an Order which was perfected, listed the application for Summary Judgment for hearing on the 12th December, 2011. By order made on the 14th May 2012 the Hon. Mr. Justice Hibbert ordered security for costs and listed the application for Summary Judgment for the 2nd October, 2012. On the 2nd day of October 2012 the Honourable Mr. Justice King heard the application for Summary Judgment. He reserved judgment. On that date also, by consent, he varied the Order for Security for Costs. It is therefore clear that A1 had almost a year in which to file affidavits in response to the two affidavits of which complaint is made. Justice King could hardly be faulted for refusing an application in October 2012 for time to respond to affidavits filed in May 2011. Furthermore, the relevant facts are not in dispute.

[20] Justice King's judgment, on the Summary Judgment application, was not delivered until the 16th March 2016. By then he had reached and passed the age of retirement. His judgment was delivered by the Hon. Ms. Justice Nicole Simmons. This is the way in which our courts, in my experience both as practitioner and as a judge, have dealt with such matters. It is a practice hitherto thought to be consistent with the words of the Constitution,

> *"Section 100*
>
> > *(1) Subject to the provisions of subsection (4) to (7) inclusive of this section, a Judge of the Supreme Court shall hold office until he attains the age of seventy years.*
> >
> > *Provided that he may at any time resign his office*
> >
> > *(2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the Office of Judge of the Supreme Court may, with the permission of the Governor General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or*

to do any other thing in relation to proceedings that were commenced before him before he attained that age.

(3) Nothing done by a Judge of the Supreme Court shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office.

(4) A Judge of the Supreme Court may be removed from office only for inability to discharge the function of this office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of sub-section (5) of this section.

(5)
(6) .....
(7) .....
(8) .....
(9) .....
(10) .....

[21] It would seem that the framers of the Constitution were indicating that once the age of retirement is reached a judge could no longer perform active duties such as commence or continue a trial, or deliver judgment unless the permission of the Governor General was first had and obtained. However nothing he did, in the way of his role as a judge, could be set aside" only" because he had passed the age of retirement. This, one would have thought, allows a judge to complete judgment on a case he heard prior to reaching the age of retirement. Subsection 3 of Section 100 is designed to prevent the injustice and inconvenience of decisions being overturned on the ground only that the judge had reached the age of retirement. Or so one may be pardoned for thinking.

[22] The Court of Appeal of Jamaica has decided otherwise. Ms. Young, appearing for A1, urged upon me a decision of that court which provides a valid ground to challenge Justice King's decision of 16th March 2016. She submitted that Justice King's decision is null and void and has to be set aside and the matter heard de novo. This in consequence of the decision, of the Jamaican Court of

Appeal, in ***Paul Chen Young, et al v Eagle Merchant Bank Jamaica Limited [2018] JMCA App 7 (unreported judgment delivered 20th April 2018).***

[23] In that case the Court of Appeal considered the validity of its own previous decision. A decision delivered by a differently constituted panel after the three judges, who heard the appeal and wrote the judgments, had all retired. The provisions of the Constitution, in relation to Judges of Appeal and the effects of retirement, are identical to those relevant to the Supreme Court. The Lord President, stated,

> *"58. It follows that, in light of my late conversion to Mr. Braham's position on the import of Section 106 (3), I find it more difficult to accept Mr. Hylton's submission that Section 106 (3) is in fact no more than a codification of the de facto doctrine. In my view, as I have already indicated, the phrase "a Judge of the Court of Appeal" in Section 106(3) can only be read as a reference to "a Judge of Appeal properly so called in the context of Section 106 (1) and (2) and not to a de facto judge in the sense in which that phrase has come to be understood."*

[24] One would have thought, and I posit this most respectfully, that the protection of conduct on the ground "only" that the age was exceeded (section 106(3)) is only relevant or necessary if no permission has been granted by the Governor General pursuant to Section 106 (2). The phrase "A Judge of the Court of Appeal," in Section 106(3) could not therefore mean, as the Court of Appeal has decided, a judge to whom permission had been granted in accordance with Section 106(1) and (2). In effect the Court of Appeal's decision has written out of the Constitution, or significantly reduced the import of , subsection 106 (3). The Court of Appeal was impressed by the fact that the Judges had retired and their vacancies filled. However this is almost always the consequence of reaching the age of retirement. One wonders therefore, if a judge wrote his judgment on Saturday the 31st July but reached the age of retirement on Sunday the 1st August, whether another judge could validly deliver it on his behalf on Monday the 2nd August. If he can it means that the Court of Appeal's decision turns on

the fact that the judges had retired and their vacancies filled. Evidence as to when the judgments were written, as against when delivered, might therefore be relevant.

[25] The Court of Appeal was not insensitive to the consequence of its decision ,see Para 82 per Morrison P, and Para 154 per Phillips JA. The Court arrived at this construction of the Constitution notwithstanding that it is to be given a broad and purposive interpretation and its terms are to be construed in accordance with the times, because a Constitution is a living instrument, see ***Re Fisher*** **[1980] AC 319.** Phillips JA acknowledged this approach to constitutional interpretation at paragraph 101 of her judgment. The Court of Appeal relied principally on cases which considered statutes, common law principles and constitutional issues which were not identical. The court apparently saw no distinction, between the writing of a judgment and its delivery, for the purpose of Section 106. I am therefore wrong in thinking that a judgment, written after the age of retirement and delivered by another judge, cannot be set aside by reason 'only' of the fact that the judge who wrote it reached the age of retirement .

[26] Mr Sheckleford, urged me to disregard the decision of the Court of Appeal when considering A1"s application for a stay in the 2007 Claim. This because the written submissions, filed by Miss Young which referenced the Court of Appeal's decision, were filed in the 2017 Claim and were in response to his application for judgment on the Fixed Date Claim. That approach is of course untenable. The applications, in the 2007 Claim and in the 2017 Claim, were both heard together. I cannot ignore a judgment, which directly addresses an issue I have to decide. In any event A1, in its Notice of Application filed in the 2017 claim, asked that the Court "treats with the applications filed in the 2007 claim."

[27] Mr. Sheckleford also submitted that this issue of jurisdiction, did not form a part of the Grounds of Appeal filed in the 2007 Claim and therefore, cannot be relied upon in A1"s application for a Stay of Execution pending appeal. As I pointed out to Mr. Sheckleford, it could hardly have been a ground, since until the decision of

the Court of Appeal in 2018; it was the accepted practice to have a retired judge's judgment delivered by a sitting judge. It has therefore only now become a possible ground of appeal. Grounds of appeal can, and often are, amended by the Court of Appeal. Can I, consistently with the law justice and truth, ignore the existence of this jurisdictional point and shut the door to A1 being allowed to pursue it in the Court of Appeal. I do not think I can nor should I.

[28] It is not open to me, a judge of first instance, to depart from a considered decision of the Court of Appeal. There must be certainty in the law. *Stare decisis* has its consequences. The common law is built on precedent and the binding nature of decisions of higher courts, see ***Young v Bristol Aeroplane Company Ltd. [1944] KB 718,*** reaffirmed by the House of Lords in ***Davis v Johnson [1979] AC 264.*** None of the exceptions, viz: (a) the existence of two conflicting decisions, (b) a decision which conflicts with a prior decision of the highest court or (c) a decision given per incuriam, applies in the case before me. The Court of Appeal of England in ***DN (Rwanda) v The Secretary of State for the Home Department [2018] 3 All ER 772*** recently, whilst reaffirming these principles, opened the door to departure from precedent if a decision is plainly wrong and affects the liberty of the subject. Arden JA at paragraph 42 of her judgment, with which her colleagues agreed, also stated,

> *"Lord Hailsham also made the point that it was always open to the Court of Appeal to say in its judgment if it thought that the House of Lords should look again at one of its own decisions."*

I respectfully commend that approach in this instance.

[29] In the final analysis therefore, A1 has a ground of appeal which has a real prospect of success, that is, that the judgment of King J is to be set aside as it was delivered after he had reached the age of retirement. There is no evidence that permission was granted by the Governor General who can, on the advice of the Prime Minister, give such permission .If a stay is refused the claim will stand dismissed and the appellant, possibly and irreparably, prejudiced .I will therefore

order a stay of execution as preyed. However, as the appeal is otherwise unmeritorious and as the jurisdictional issue was only raised for the first time in the hearing before me, I make no order for costs on the application for a stay in the 2007 Claim.

[30] In the result my Orders are as follows:

1. Claim No. 2017 CD 00531 is struck out as being an abuse of process.

2. Stay of Execution pending appeal granted with respect to the judgment and Order of the Honourable Mr. Justice King in suit 2007HCV02564

3. Costs of the application with respect to Claim No. 2017 CD00531.and costs thrown away to A1 Limited.

4. No order for Costs on the application for a stay in 2007HCV 02564.

David Batts
Puisne Judge