



[2014] JMSC Civ. 220

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2012 HCV 00954

BETWEEN GLADSTONE ALLEN CLAIMANT

AND DONALD ALLEN DEFENDANT

Mr. Michael D. Thomas for the claimant

Ms. Jacqueline Cummings instructed by Archer, Cummings and Company for the defendant

Heard: April 01 &10, June 25, July 03 &10, and December 19, 2014

Property Dispute - Claim for declaration of beneficial interest in estate property – Claim for sale of estate property – Application for injunctive relief

HARRIS J

IN CHAMBERS

The Claim

[1] The claimant by way of an amended fixed date claim form is seeking the following orders:

- (i) A declaration that the Claimant is beneficially entitled to one half interest in the premises being part of the estate of Ethel Viola Coley formerly Ethel

Viola Allen and situate at lot number 1034 Irvine Drive, Ironshore, Montego Bay in the parish of St. James.

- (ii) A Declaration that by preventing the Claimant from occupying any part of the abovesaid premises the Defendant acted unlawfully
- (iii) That the Defendant account to the Claimant for all rental collected by him in relation to any part(s) of the abovesaid premises
- (iv) That the Defendant compensate the Claimant for rental paid by the Claimant as a result of him being precluded from occupying the abovesaid premises from June 2009 to the completion of the sale of the property at \$30,000.00 per month less any rental received by the Claimant during the aforesaid period.
- (v) An order that the property be sold and the net proceeds of sale shared equally or in any proportion as the Court may order, between the parties.
- (vi) An order that the market value of the said property be determined by a reputable valuer agreed between the parties or in the absence of an agreement by the parties a valuer appointed by the Court and that the cost of the valuation be borne by both parties in equal share.
- (vii) An order that in the event any of the parties refuse to sign any document relevant to the transfer of the said property, the Registrar of the Supreme Court be empowered to execute such on the party's behalf.
- (viii) In the event that the Defendant fails or refuses to deliver up the Duplicate Certificate of Title for the said property or to facilitate its delivery up by any Financial Institution now holding the same to the Claimant's Attorney having carriage of sale, the Registrar of Titles be empowered to cancel said Duplicate Certificate of Title and issue a new Certificate of Title in the name of the Purchaser and upon completion pursuant to the Order of Sale obtained herein

- (ix) An order that the Claimant's Attorney-at-Law have Carriage of Sale
- (x) An injunction restraining the Defendant, whether by himself or servant and/or agents from transferring or otherwise dealing with the said property in any way prejudicial to the interest of the Claimant.
- (xi) Such further or other relief as the Honourable Court deems just.

[2] On April 10, 2014, at the conclusion of the hearing of the matter, the parties were directed to file and serve written submissions on or before May 16, 2014. On June 25, 2014 the matter was set down for oral submissions.

[3] On May 16, 2014 when the claimant filed his written closing submissions he advanced that the defendant was in breach of contract or in the alternative in breach of a contractual licence based upon the agreement between the parties that the claimant could occupy the property with his wife on his return to permanently reside in Jamaica.

[4] On July 03, 2014 when Ms Cummings responded to the written and oral submissions made by Mr. Thompson on June 25, 2014 she submitted that it was never pleaded by the claimant that the defendant was being sued for a breach of either a contract or contractual licence. She further stated that the defendant did not meet this claim in either his pleadings or evidence. She also put forward that the claimant was bound by his pleadings. The matter was then adjourned to July 10, 2014 for Ms. Cummings to complete her submissions.

[5] I have no doubt that it was these submissions that were made on behalf of the defendant which prompted the claimant to file an application on July 04, 2014 seeking the court's permission to amend his statement of case as follows:

1. The Claimant be permitted to further amend the Fixed Date Claim Form by adding the following:-

- (i) An Order that by refusing the Claimant to occupy the downstairs bedroom and bathroom of the subject premises on his return to Jamaica, the Defendant was in breach of an agreement made with the claimant in 2008

and for which the Claimant gave valuable consideration or in the ALTERNATIVE;

- (ii) An order that by refusing to allow the Claimant to occupy the downstairs bed-room and bathroom of the subject premises on his return to Jamaica the Defendant being an occupier of the subject premises was in breach of a contractual licence granted to the Claimant when he revoked the said licence for which the Claimant gave valuable consideration.

[6] The application to amend was short-served when the matter continued on July 10, 2014. The claimant was permitted to file written submissions on the application by July 17, 2014 and the defendant's response in writing was to be done by July 24, 2014. While the claimant's written submission was filed in time, the defendant's response was not received by the Court until October 22, 2014.

Background

[7] The parties are brothers and the only children of Ethel Coley nee Allen who died intestate in 1999 leaving a property that is situated at 1034 Irvine Drive, Ironshore in the parish of St. James (the property). The claimant resided in the United States of America while the defendant lived in Canada.

[8] As far back as 2005, the claimant gave his consent for his brother the defendant to file for Letters of Administration (LA) in their mother's estate. Unfortunately, to date, that application is still pending in this Court and her estate is yet to be administered. This delay is to be attributed to the non-payment of the stamp duty which amounts to over \$600,000.00. It may well be that the inordinate delay in the administration of the parties' mother's estate has largely contributed to the commencement of this claim.

The Evidence

[9] Much of the evidence given by the parties is agreed. Very few areas of conflict have arisen. The parties for sometime had what appeared to be an amiable relationship and shared a common understanding concerning the use of the property. They would stay there during the periods they vacationed in Jamaica.

[10] What emerged from the evidence is that the defendant was appointed by this Court to manage his mother's affairs when she became incapable of doing so for herself. This authority ceased when she died. However, it seems clear, that the defendant has been in possession/occupation of the property for some time.

[11] In 2005 the claimant gave his consent for his brother to apply for LA in their mother's estate. Although this matter has been lingering before this court for an inordinate period of time (almost ten years) as a result of the non-payment of the stamp duty, the claimant stated that he was not aware that this amount was outstanding but went on to say that he was willing to assist with defraying this cost.

[12] Sometime in January 2008 the parties agreed that when they returned to reside permanently in Jamaica in 2009 they would carry out repairs to the house, sell it and divide the proceeds equally between them. I would expect that the sale and division of the proceeds derived from it would have taken place after administration.

[13] As is common in matters of this kind, the cordial relationship that the brothers shared was about to change. This occurred when the claimant upon his return to the United States called his brother and told him that he and his wife intended to return to reside permanently in Jamaica and that they would occupy the house or a part of it until it was sold.

[14] It is agreed evidence that the defendant initially consented to this arrangement. However, the defendant told the Court that he subsequently informed the claimant, before he left for Jamaica, that he could not live in the house. The reason he gave was that the house was a one family residence and it was not convenient for two families to share it, as there was only one kitchen and living area. The claimant however, the defendant said, was welcome to stay there during his vacations. As it turned out the real reason for this change in his position was that the parties' wives, it seemed, were not getting along.

[15] Naturally this did not go down well with the claimant who felt that his brother was unreasonably excluding him from occupying the property that belonged to their mother

and to which they were both entitled to share equally. The defendant did not deny this in cross examination.

[16] Before this position was indicated to the claimant, he had been sending money by wire transfers to the defendant to offset legal fees that he had been told were due for the administration of the estate. However, this stopped when he was told that he could not take up residence at the property with his wife. The claimant gave evidence that he sent the defendant US\$1,750.00 in total. The defendant initially denied that he received this amount but he retracted from this stance when he was confronted with the documentary evidence.

[17] The property has been rented to various tenants over the years by the defendant. It might be useful at this point to indicate that the claimant was successful in obtaining an order from this Court which compelled the defendant to pay over to him fifty per cent (50%) of any rental income that the defendant received from the property. The Court was made to understand that the defendant has in the past complied with this order.

[18] The defendant gave evidence that the income earned from the rental of the property has been used to maintain the property and pay the property taxes. He also said that his brother has never assisted him with the maintenance and payment of the property taxes. This aspect of the evidence is agreed between the parties.

The Application to amend

[19] The claimant has applied, very late in the day (during closing submissions) to amend his statement of case (see paragraph 5 above).

The Law

[20] Rule 20 of the Civil Procedure Rules (CPR) makes provision for amendments to statements of case. Given the time that the amendment in question is being sought the permission of the court is required. Rule 20.4 (2) of the CPR provides that after case management has taken place statements of case can only be amended with the court's permission.

[21] When an application of this nature is being sought, the court is being requested to exercise its discretion based on the overriding objective. In the seventh edition of **A Practical Approach to Civil Procedure**, the learned author Stuart Sime at paragraph 13.3 had this to say:

Generally disposing of a case justly will mean that the amendments should be allowed to enable the real matters in controversy between the parties to be determined...There is a public interest in allowing a party to deploy its real case provided it is relevant and has a real prospect of success...

[22] Mr. Thomas has relied on the authority of **Charlesworth v. Relay Roads Ltd** [2000] 1 WLR 230 to support his application. In that case it was held that the court had the jurisdiction to amend pleadings between judgment and the drawing up of the order, even if it involved a new argument being put forward and further evidence being adduced.

[23] In the **Charlesworth case** Neuberger J stated the applicable principles that were to be considered when an application to amend pleadings was being sought. These are:

- (i) Whether granting the amendment will be prejudicial to the other side
- (ii) Whether there would be no injustice caused to the other side
- (iii) Whether the other side would be taken by surprise
- (iv) How great a change is made in the issues by the proposed amendments

Submissions

[24] Mr. Thomas on behalf of the claimant has submitted that in the claimant's affidavit and oral evidence it was stated that the parties had an agreement that the claimant would occupy the bedroom and bathroom downstairs and that this agreement was later revoked by the defendant. The defendant also gave evidence of this when he was cross-examined.

[25] He further advanced that the claimant was not seeking to adduce any new evidence if the application to amend was granted and so the defendant could not put forward that he would be taken by surprise or be prejudiced by the application since the evidence remains fundamentally unchanged. He also submitted that the amendments served a useful purpose and the claimant had a real prospect of success.

[26] Ms Cummings on behalf of the defendant has vigorously opposed the application. She has relied on the case of **Alton Brown v. Jamaica Herald et al** C.L. 2000/B248 and B250. I should point out at once that this case was decided before 2006 when rule 20.4 (2) of the CPR provided as follows:

The court may not give permission to amend a statement of case after the first case management conference unless the party wishing to make the amendment can satisfy the court that the amendment is necessary because of some change in the circumstances which became known after the date of that case management conference.

[27] However, rule 20.4 (2) was amended on the 18th September 2006 and now it simply reads:

Statements of case may only be amended after a case management conference with the permission of the court.

[28] I therefore agree with Mr. Thomas that the principles enunciated in the **Alton Brown case** are no longer applicable. However, Miss Cummings has further submitted that the defendant would be severely prejudiced if the amendments to the claimant's statement of case were granted as this would change the claim to one of breach of an agreement or contractual licence which are entirely separate and completely new claims against him.

[29] She has also put forward that the evidence given by the parties and the initial submissions did not raise these legal principles and the defendant did not meet the claims now being put forward in his affidavit and/or oral evidence.

[30] Finally, Miss Cummings submitted that if the amendments are allowed then the defendant should be given the opportunity to re-open his case and be allowed to give further evidence in defence of these claims.

Analysis and Disposal

[31] It is now well settled that litigants are bound by their pleadings. A claimant's statement of case, allows a defendant to know the claim that is to be met. The defendant in turn is given the opportunity to defend the claim also by way of pleadings. This principle however, does not abrogate the powers of the Court to amend statements of case even very late in proceedings provided that this is done to enable the Court to justly dispose of the matter.

[32] I am inclined to agree with Ms Cummings that the issues of breach of contract or in the alternative breach of a contractual licence did not arise on the claimant's pleadings and as such the defendant did not meet this claim.

[33] Having examined the evidence, I have found that there is in fact no issue that the parties had engaged in a discussion where it was initially agreed that the claimant would occupy the property with his wife when they took up permanent residence in Jamaica. It is also not in issue that the defendant later communicated the withdrawal of his consent to this arrangement to the claimant.

[34] The claimant had said initially in cross-examination that he was not aware that the defendant did not want him to reside at the property. However, he later admitted that his brother had in fact told him so before he (the claimant) returned to Jamaica.

[35] The real issue for determination, in my opinion, is whether at the time that the parties made this agreement was there an intention between them to enter into binding legal relations.

[36] The basic features of a contract, which may be expressed or implied, in writing or made orally, are an offer and an acceptance, an intention between the parties to enter into binding legal relations which must be supported by valuable consideration. A

contractual licence, which is distinct from a bare licence, arises from the permission to use or occupy land and it is derived from an expressed or implied contract. It is founded on valuable consideration moving from the licensee.

[37] Having carefully considered the evidence in this matter, as well as, the submissions made by learned counsel for the claimant and defendant, I have found that even if the defendant would not suffer any prejudice, injustice or be taken by surprise should the claimant's statement of case be amended, the claimant's application is nonetheless denied on the basis that, I am of the view, that the claim does not have a real prospect of success even if the amendments asked for are granted.

[38] I say so because at the time when the parties agreed that the claimant would occupy the house with his wife on their return to Jamaica, the evidence does not disclose, expressly or impliedly, that there was an intention between them to enter into binding legal relations which was supported by valuable consideration. I find that this agreement was merely an informal arrangement between two brothers. The evidence therefore has not established the existence of a legally binding contract/agreement or a contractual licence.

[39] The result of this decision is that the claim for compensation for a breach of the agreement to occupy the property, as well as, the alternative claim for breach of a contractual licence fails.

The Substantive Claim

[40] Turning now to the substantive claim I believe that the best place to start is to address the *locus standi* of both the claimant and the defendant in regard to the property in question which forms a part of their deceased mother's estate.

[41] While the defendant, with the claimant's consent, has applied for a Grant of LA in their mother's estate since 2005, this matter is still pending after almost ten years. Neither party has attempted to pay the stamp duty that is outstanding so that the application can progress. It is duly noted that the claimant gave evidence that he is

willing to do so. Perhaps the delay or hesitancy on his part is directly linked to his non-occupancy of the property.

The Law

[42] The **Intestate (Estate and Property Charges) Act** gives the parties to this claim equal rights to the estate of their mother. However, for the parties to stake claims as owners of the property in question, LA must be granted to her personal representative and the assets of the estate distributed between them.

[43] In the case of **Commissioner of Stamp Duties (Queensland) v Livingston** [1964] 3 All ER 692 it was held that the beneficiary under a will or on intestacy has no legal or equitable proprietary interest in the unadministered assets of a deceased's estate.

[44] This principle was cited with approval in a number of cases from this Court, as well as, the Court of Appeal. In the case of **Kathleen Morrison, Andrew Morrison and Joy Morrison v. Herma Lemond** [1989] 26 JLR 43 it was decided that the respondent in that case, who claimed to be a beneficiary under an unprobated will, did not have an equitable estate that was certain, much less a legal estate.

[45] It was held, that she was at best an inchoate equitable owner and that it was only after probate had been granted of the will in question, would her inchoate estate or interest in the land become certain. In any event, it would remain an equitable estate or interest until an assent was given by the executors.

[46] Mangatal J in the case of **Winston O'Brian Smith and Pleasurephonics Ltd v Constantine Scott, Crosswell Scott, Veronica Robinson and Joyce Gibson** [2012] JMSC Civ 152 stated:

That until a grant of administration has been made and the estate distributed, the beneficiaries have no such claims as would entitle them to stake claims as owners of the estate's assets. A beneficiary under a will or intestacy has no legal or equitable proprietary interest in the unadministered assets of the deceased's estate...

Further the true status of a beneficiary under a will or on intestacy is that he has a chose in action to have the deceased's estate properly administered. (Emphasis supplied)

Analysis and Disposal

[47] Applying these principles to the case at bar, it would seem to me that the substantive claim is bound to fail as the Court has no basis in law or equity to make the declarations and orders being sought by the claimant.

[48] The property in question remains an unadministered asset in the parties' mother's estate and until a grant of administration is made to her personal representative, neither the claimant nor his brother the defendant has any legal or equitable proprietary right to her property. They do not possess 'an equitable estate that is certain, much less a legal estate.' Their interest in the property would at best be as 'inchoate equitable owners'. It is only after a grant of LA and the distribution of the estate have taken place can the parties 'stake claims as owners of the estate's assets.'

[49] For the reasons cited above, I am of the view that the Court cannot make an order declaring that the claimant is beneficially entitled to one half interest in the property. The court, in these circumstances, cannot order that the property is to be sold and the net proceeds of the sale are to be shared between the parties. The estate must be administered and distributed before this can be done. The court cannot aid the claimant to circumvent the administration of his mother's estate bearing in mind that the Crown has a right to its revenue.

[50] No argument or legal authorities have been presented to show on what premise the claimant, given his inchoate equitable interest, would have a right to occupy the property which would entitle him to the injunctive relief and the compensation he has sought if excluded.

[51] In the case of **Doris Lightbody and Anthony Lightbody v Howard Lightbody and Everton McDonald** 2005 HCV 2305 delivered January 27, 2006, a decision of Sykes J, the claimants had applied for and obtained an ex parte injunction. The property

which was the subject of the claim was registered to William Lightbody who had died intestate. There was no evidence that letters of administration had been granted in respect to his estate. It was held that a beneficiary on intestacy does not have any legal or equitable interest that is 'capable of attracting legal protection.'

[52] The claimant's true status therefore as a beneficiary on intestacy is that he has a chose in action to have the estate of his mother properly administered. He has chosen not to exercise this right and has embarked on a claim which in my view was misconceived from the outset.

[53] I would have thought that since the application for LA has not progressed for almost ten years, and given the allegations that have been made by the claimant about the manner in which the defendant has treated with him as a residuary legatee that this claim would have been brought in another division of this Court. It is the administration of the estate that requires keen attention so that the dispute that has arisen between the parties, who are brothers, can be put to rest.

Orders

[54] Judgment for the defendant.

[55] Each party to bear their own costs.