



[2021] JMCC Comm 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00237

| | | |
|----------------|------------------------------|-------------------------|
| BETWEEN | IAN LEVY | FIRST CLAIMANT |
| | CECELIA LEVY | SECOND CLAIMANT |
| AND | JULIE ATHERTON | FIRST DEFENDANT |
| | RICHARD ATHERTON | SECOND DEFENDANT |
| | REFRESHING IDEAS LLC. | THIRD DEFENDANT |

Application for sale of land – Whether basis to refuse application- Hardship-Non disclosure of existing creditors – Whether jurisdiction to order sale and jurisdiction to make charging order separate and distinct- Whether Order to be suspended.

John Graham QC, and Peta-Gay Manderson instructed by John G. Graham & Co. for Claimants and for Mr Gregory Mayne an interested party.

Caroline Hay QC, Kimberly McDowell and Zurie Johnson for 1st and 2nd Defendants instructed by Caroline Hay & Co.

Mrs. E. Ewart an Interested Party representing herself.

Heard: 9th and 15th April, 2021.

In Chambers, by ZOOM

Cor: Batts J.

[1] On the 15th April 2021 I made the following orders:

“IT IS HEREBY ORDERED THAT:

1. *All that parcel of land being part of Constant Spring Estate called Norbury Villas and being the lots more fully described in, and being the property registered at, Volume 1248 Folio 479 of the Register Book of Titles (hereinafter referred to as the said property) shall be sold.*
2. *The Claimant’s attorneys at law John G Graham & Company shall have carriage of the sale.*
3. *The said property is to be sold by private treaty after being listed for sale with, and in accordance with advice to be rendered in writing by D C Tavares & Finson Realty Limited which firm shall also act as auctioneers should the need arise.*
4. *In the event D.C. Tavares & Finson Realty Limited is unable and/or unwilling to undertake the above assignment same shall be communicated to the Defendant’s attorneys at law by the Claimant’s attorneys at law and the said assignment given to a licensed real estate valuer appraiser and auctioneer agreed upon between the parties or, if there is a failure to agree, selected by the Registrar of the Supreme Court, from a list or lists provided to the Registrar by either or both parties to this action within 7 days of the failure to agree. The said lists are to be accompanied by the consent in writing to act of each of the said licensed real estate valuer appraiser and auctioneers on the list.*
5. *Subject to any further or other order of this court and, unless there is a sale by private treaty within 12 months of the date this order comes into effect, the property shall be sold by public auction.*
6. *Subject to any further or other order of this court the reserve price, being the minimum price at which the said property is to be sold whether by private treaty or otherwise, shall be US\$1.1 million dollars.*

7. *The proceeds of sale of the said property shall be applied in the following manner:*
 - a. *To pay all costs and expenses incurred, inclusive of professional fees, to effect the sale*
 - b. *To discharge any amount due for property tax, rates or dues connected to the said property including, but not limited to, any amount due to the National Water Commission.*
 - c. *To discharge liabilities due to any creditors secured by a registered interest in the said property*
 - d. *To discharge liabilities due to any unsecured and/or equitable or other creditors whose interest rank in priority to the interest of the Claimants.*
8. *Subject to any further or other order of this court the priority of unsecured creditors shall be determined on the basis that the first in time to register a notice of their interest and/or a charge on the title to the said property shall have priority over the later in time; liberty is granted to any or all such creditors to apply to this court within 90 days of the date of this order to have priorities determined.*
9. *In the event a person or entity is unable or unwilling to accept payment in accordance with paragraph 7 (c) and (d) the amount required to discharge the said liability and/or liabilities shall be paid into court and, upon service of notice of payment into court, the said liability and/ or liabilities shall be deemed to be discharged.*
10. *Upon completion of the sale, and the discharge of liabilities in accordance with paragraph 7 (a) to (d), the Claimants shall file and serve a statement of account and, unless an objection is filed within 14 days, the Registrar of the Supreme Court shall certify the amount due to the Claimant as contained in the said statement of account.*
11. *The Claimants shall upon the issue of the Registrar's Certificate be entitled to retain the amount due to them and shall pay the balance (if any) to the attorneys at law on the record for the First*

and Second Defendants or if the attorneys decline to accept same shall be paid into court. A notice of payment into court shall then be served on the First and Second Defendants.

12. *In the event an objection is filed, pursuant to Order 10, the Registrar of the Supreme Court shall as soon as practicable list the matter before a Judge of this Court.*
13. *The First and/or Second Defendants and/or any person or persons in possession of the Duplicate Certificate of Title for the said land are hereby ordered to deliver same to John G. Graham & Company in order to facilitate the carrying out of this order for sale.*
14. *In the event there is a failure to deliver up the Certificate of Title within 14 days of the service of this Order, on the person or persons in possession thereof, the Registrar of Titles shall be at liberty to:*
 - a) *Dispense with the production of the said Duplicate Certificate of Title in order to register the relevant instrument of Transfer.*
 - b) *Cancel the said Certificate of Title registered at Volume 1248 Folio 479 and issue a new certificate of title in the name of the purchaser(s) of the said land.*
15. *In the event the First and/or the Second Defendant or either or both of them fails, neglects and/or otherwise refuses to sign any document required to give effect to this order for sale within 7 days of being requested to do so, as to proof of which request a letter written to their attorneys at law on the record shall suffice, the Registrar of the Supreme Court shall be entitled to execute the said document.*
16. *This Order is suspended until, and shall take effect on, the 31st day of May 2021 unless the Defendants on or before the said 31st day of May 2021 discharge the judgment debt interests and costs*

in this matter in which event this order for sale shall be discharged.

17. *Costs to the Claimants to be taxed if not agreed*

18. *Liberty to Apply generally.*

19. *This Order is to be prepared, filed and, served by the attorneys at law for the Claimants on the 1st and 2nd Defendants and on all persons who, to the knowledge of the Claimants or their attorneys at law have or claim to have a legal or equitable interest in the said property.”*

I promised then to put my reasons in writing at a later date. This judgment is the fulfilment of that promise.

[2] This application reflects the climax to litigation which commenced in the year 2017. It is a Re-Issued Notice of Application for the sale of land which was filed on the 8th July 2019. It was first listed for hearing on the 16th July 2019.

[3] When it came on for hearing before me, in addition to the parties to the litigation, there were two interested parties present. They were Mr Donovan Mayne and Mrs. E. Ewart. A third person, who had made it known to the parties that he claims an interest, was absent. This is Mr. Vincent Chen who sent a message indicating that he was attending an Anglican Synod and was unable to attend. Mr. Chen had made no application to intervene nor had he sent a legal representative. I therefore decided to proceed.

[4] Queen’s Counsel, for the 1st and 2nd Defendants, indicated that her clients wished an adjournment. She said a proposal to settle had been made but that no response was received. Her clients were also awaiting word from a financial institution and needed a little more time to get the necessary financing. The process, of securing financing, had been interrupted by the pandemic and the fact that her clients had to be out of the island for extended periods for reasons related to their son’s illness. The application to adjourn was vigorously opposed for reasons with which I

agreed. In the first place financing can be pursued whether or not an order for sale is made. It is always possible to stay an order for sale. Secondly, this is an old matter and the application has been pending for 2 years. An aspect of this matter had already been to the Court of Appeal and Mr. Graham QC quoted the opening words of the judgment of that court,

“The attempts by Mrs Julie Atherton and Mr Richard Atherton (the Atherton’s) to avoid repaying Mr Ian Levy and Mrs Cecelia Levy (the Levy’s), money that the Atherton’s and their company borrowed from the Levy’s, are unworthy of the efforts that counsel on both sides, the court below and this court, have been obliged to invest in the resulting litigation”,
per Brooks P., **Atherton v Levy [2017] JMCA Civ 62 (unreported judgment 3rd December 2020).**

It would, he submitted, be ridiculing the administration of justice if after all that an adjournment was granted for the purpose of allowing the Defendants to seek financing. I refused the application for an adjournment.

[5] In the circumstances of this matter I invited the Defendants’ counsel to address me first. She was to indicate why an Order for Sale ought not to be made. Mrs. Hay Queen’s Counsel had prepared speaking notes which she kindly provided. Essentially they relied upon allegations of a failure to make full disclosure and of hardship.

[6] In so far as the failure to disclose was concerned the complaint was that the Defendants did not contemplate the presence of interested parties Mayne and Ewart. Ms. Ewart, it was said, had taken no step in relation to the judgment she had against the Defendants for 11 years. She had a provisional charging order that had never been made final. With respect to Mr. Gregory Mayne his matter is pending before the Court of Appeal. In their affidavit, of the 18th April 2018 at paragraph 7, the Claimants purport to list the names of interested parties

but do not list Mr. Gregory Mayne. Mr. Mayne, it was submitted, had at all material times been represented by Mr. John Graham QC and therefore the failure to disclose was not accidental. It was not sufficient to exhibit titles which indicated a registered interest as the cases suggested that merely exhibiting documents, without bringing matters to the court's attention, will not suffice. The duty to disclose was breached at the time the provisional order was made on an ex parte application. ***Venus Investments Limited v Wayne Ann Holdings Limited [2015] JMSC App 24*** was relied on as an authority in support. The pending appeal, with respect to Mr. Mayne's judgment, ought to have been disclosed. Mr. Vincent Chen's interest is another matter which had not been known. All this non-disclosure means the Defendants should be given time to consider the matter. The Defendants, asserted Queen's Counsel, were now exposed to an uncertain debt. The Court should also decline the relief to protect its process from abuse.

[7] The other basis, on which the order for sale is resisted, are circumstances of hardship. The Defendants' son has a terminal illness. His prognosis is unknown. The details of it are contained in an affidavit filed on the 6th April 2021 at Paragraphs 16 – 19. Their son was treated overseas. He received an offer from "The Make a Wish Foundation" of his own football playfield. It is to be installed at their home which is the property the subject of this application. The organization making the offer is a charity which grants wishes to terminally ill patients. It is submitted that an order for sale would either prevent him getting the gift or severely curtail his ability to enjoy it.

[8] In his submissions Mr. Graham QC, for the Claimants, stated that the Defendants were represented by other counsel at the inter partes hearing of the application to make the charging order final. A stay of execution, pending determination of Mr. Mayne's appeal, was then applied for and assurances given about insurance of the property. The matter of insurance is still not settled but the final charging order was made by consent. There can be no credible suggestion that the Defendants

were ignorant of that interest. As regards Ms. Ewart's interest, arrangements were made with the Defendants so again, there could be no surprise.

[9] Mr Graham QC submitted further that, in any event, this application for sale was not made pursuant to the Civil Procedure Rules (2002) (hereinafter referred to as the CPR). It was unconnected to the charging orders earlier made. Section 28A of the Judicature Supreme Court Act gives a statutory power to sell whether or not there is a charging order in place. Part 48 (11) of the CPR deals with charging orders prior to sale. However, Part 55 of the CPR deals with the sale of land by an order of the court. The property can be ordered to be sold without first being charged. The fact that the Claimants had also obtained a charging order does not make them worse off for having done so. It was submitted that at the time, this application for sale was filed, the Claimants had not yet obtained a charging order. Mr. Graham QC relied on ***Ken Sales v Levy (2008) UKPC 6*** to support his submission. In that case, he said, the profound point was that the CPR had a provision for charging orders with no legislation to underpin it. Section 28 (d) of the Supreme Court Act was thereafter inserted to give a statutory foundation for making a charging order. However, there had always been jurisdiction for a judgment creditor to apply to sell real estate to satisfy a judgment. It would however have to be on an inter partes application.

[10] On the question of hardship Mr. Graham QC conceded that the circumstances were regrettable and quite touching. However, those facts have little bearing on the duty of the court in this matter. The playfield had not yet been delivered. It could therefore be located anywhere that is suitable preferably somewhere to which the child has access. In other words, there is no direct correlation between the order for sale and the child being unable to accept the gift.

[11] Finally, Queen's Counsel indicated that his client is really only interested in being paid money owed. If there are indeed preliminary discussions with a financial institution to settle the debt the order for sale can be made and stayed for some days to allow an opportunity for that process to occur. His client has however been

out of pocket for a considerable time and has been exposed to expense. It is just and right that an Order for Sale is now made ***Girvan Williams v Omatoso CLW239/1996*** was relied on. A stay of no more than 30 days was suggested.

[12] In her reply Mrs. Hay QC agreed that the court's power to order a sale appeared to be independent of the provisions relating to charging orders.

[13] Having reserved, to consider my decision, I found favour with the submissions of Mr. Graham. There is no legal impediment to the sale proceeding. It is clear that the interested parties' interests had been made known to the Defendants long before the commencement of this hearing. Whether or not it was disclosed, at the stage of the provisional application for a charging order, would not be a basis to refuse the order for sale. This is because the interested parties were present and represented and themselves had no objection to this application for a sale. Mr. Graham's further point, that this inter partes application for an order for sale is independent of the orders obtained for charging the property, was conceded by Mrs. Hay QC. I am inclined to agree that the jurisdictions are separate. It is however an unwise person who would seek to sell land without first having it charged and/or caveated. This is because without a charge registered on the title a landowner could sell or charge his interest after having received notice of a pending application to sell. Nevertheless, the effect of Mr. Graham's legal submission is that, as the application for sale is inter partes no duty of disclosure as on ex parte application arises.

[14] Finally, on the question of hardship, the circumstances are not such as to justify a refusal of an order for sale. The illness of the Defendant's child is of course quite unfortunate. Their care for and attention to him very admirable. The court certainly hopes he is on the way to recovery and will recover. It is also hoped that he will be able to take advantage of, and enjoy, the gift of a football playfield. Whereas, he would most enjoy it at the home at which he has lived, and to which he is accustomed, an order for sale will not preclude his enjoying it elsewhere. An order which provides for sufficient time will enable his parents to locate some suitable

alternative venue. Football is a team sport and therefore it may even be all the more appreciated if located at a site which allows for the enjoyment of others.

[15] In all the circumstances, therefore I determined that an Order for Sale, with necessary safeguards, should be made but suspended to allow for alternate arrangements, in respect of the gift and/or for financing, to be made. The Make a Wish Foundation will, I am sure, facilitate any consequential delay in the provision of instructions to them.

These therefore are my reasons for making the orders stated at paragraph 1 of this judgment.

David Batts
Puisne Judge