



[2022] JMSC Civ. 09

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2018 HCV 00603**

BETWEEN CARLTON W.S. MURRAY CLAIMANT

AND PROPRIETORS' STRATA DEFENDANT
CORPORATION PLAN NO. 272

IN OPEN COURT

Ms Tamiko Smith instructed by Ramsay Smith for and on behalf of the Claimant.

Mr Mikhail Williams instructed by Taylor, Deacon and James for and on behalf of the Defendant.

Heard: June 24, 2020 and July 9, 2021, January 28, 2022

Bill of costs- Disputed Attorney's fees - Whether Attorney's bill of costs was excessive and inequitable - Whether the Court has jurisdiction to refer the Bill of Costs to the Registrar of the Supreme Court for Taxation - Whether Defendant can charge Claimant maintenance for property in their possession by Order of the Court.

SONIA BERTRAM LINTON, J

THE APPLICATION

[1] Mr. Murray by way of Amended Fixed Date Claim Form filed on June 13, 2019 is seeking remedy against Proprietors' Strata Corporation Plan No. 272. The Claimant is seeking the following Orders:

1. *"An Order that this claim be consolidated with Consolidated Claims No. 2006 HCV 00554 and 2008 HCV 00128 for the purposes of determining the issues herein.*
2. *An Order for an Account to be made in relation to the sale of Strata lot 105 comprised in Certificate of Title registered at Volume 1179 Folio 185 of the Register Book of Titles pursuant to Judgment entered on the 29th of January, 2009 by the Defendants.*
3. *An Order that the Defendants account for the excess sum of \$2,439,535.20 paid to the 1st Defendant above and beyond the Judgment award made on the 29th of January, 2009.*
4. *An Order that interest at a rate of 6% per annum be applied on the balance proceeds of sale for which the Claimant is entitled calculated from date the sale was completed.*
5. *An Order that the 2nd Defendant hand over the balance proceeds of sale for which the Claimant is entitled to.*
6. *Costs*
7. *Interest*
8. *Such further or other relief as the Honourable Court deems just.*
9. *Liberty to apply"*

[2] The Grounds on which the Applicant seeks the orders are as follows:

1. *That on the 29th of January, 2009 the 1st Defendant obtained Judgment in their favour against Virginia Murray in the Consolidated Claims No. 2006 HCV 00554 and 2008 HCV 00128 in the sum of \$2,999,420.20 being outstanding maintenance claimed for together with costs.*
2. *The 2nd Defendant as Counsel for the 1st Defendant successfully enforced the Judgment by way of an Order for Sale made on the 14th of April, 2010.*
3. *The Vendor's Statement of Account prepared by the 2nd Defendant sets out a sum of \$5,438,995.40 as "Amount paid on outstanding Maintenance to PSP 272 Penthouse No.2 Oxford Manor Apts. In accordance to Court Order for possession dated March 2011." That this sum exceeds the Judgment sum awarded by \$2,439,535.20.*
4. *That to date the 2nd Defendant has failed to provide a statement of account for this overpayment.*
5. *Further, to date the 2nd Defendant has failed to pay over the balance proceeds of sale that the Claimant is entitled to.*
6. *The Orders are being sought in accordance with Part 41 of the Civil Procedure Rules, 2002 as amended (hereinafter referred to as CPR).*
7. *The Consolidated Claims are set for Taxation on the 11th of July, 2019 and the 2nd Defendant's Bill of Costs will likely extinguish the balance proceeds of sale for which the Claimant is entitled...*

- [3] By consent, paragraph one of the Amended Fixed Date Claim Form was abandoned on November 11, 2019.

THE EVIDENCE

- [4] The evidence on behalf of the Claimant was contained in the Supplemental Affidavit of Carlton W.S Murray in Support of the Amended Fixed Date Claim Form filed on June 13, 2019.
- [5] Mr. Carlton Murray is the son of Virginia Murray, a former registered proprietor for strata lot 105 comprised in Certificate of Title registered at Volume 1179 Folio 185 of the Register Book of Titles. He says this property forms part of the Proprietor Strata Corporation Plan No. 272. Mr. Murray stated that he has locus standi to bring the claim on behalf of Mrs. Virginia Murray by Power of Attorney registered under Liber Series 779 and Folio 27. Therefore, he could speak to the issues based on his personal knowledge to the best of his information and belief.
- [6] The Claimant said Mrs. Murray fell behind in her maintenance payments and on the 10th of February 2006 the First Defendant brought a claim against her for outstanding maintenance in the sum of \$1,004,402.80. Subsequently, another claim was filed against Mrs. Murray in 2008 for outstanding maintenance in the sum of \$2,999,420.20. On January 29, 2009 judgment was entered against Mrs Murray in the sum of \$2,999,420.20 being the outstanding maintenance together with costs.
- [7] On November 18, 2009 the First Defendant filed a Notice of Application for Court Orders to sell the property and on the 14th of April 2010 the order for sale of the property was granted. The First Defendant then made a request for issue of a writ of possession against Mrs. Murray which was executed on or about the 23rd March 2011. Subsequently, the strata lot 105 was sold in or about August 2016 for the sum of \$16,000,000.00 and the Statement of Account revealed that the

Attorney's fee was 4%. The Statement of Accounts further revealed that the sum of \$5,438,955.40 was paid over to the First Defendant for the outstanding maintenance said to be based on the Court Order dated March 2011. However, Mr. Murray claims this is an overpayment of \$2,439,535.20 which is almost twice the judgment sum for which he said there was no explanation in the Statement of Account.

[8] On November 11, 2019 the Court ordered the First Defendant to file and serve Affidavit in Response to the Amended Fixed Date Claim Form and Supplemental Affidavit of Carlton Murray by January 31, 2020. The Court also ordered that no Affidavits were to be filed after March 13, 2020 except with leave of the Court.

[9] However, the Court records indicate, that the First Defendant did not file the Affidavit in Response. In fact, the only Affidavit that was done by the Defendant was filed on June 23, 2020. Furthermore, this Affidavit of Mr. Williams, Attorney-at-Law for the Defendant was in support of the Amended Notice of Application for Court Orders seeking to obtain additional orders. His affidavit supported the application to obtain the sum of \$500,000.00 held by the Defendant to be used as security for costs in the event the court makes an order for costs in favour of the Defendant. The Defendant did not comply with the Order of the Court.

THE SUBMISSIONS

Counsel for the Claimant

[10] Counsel made oral arguments which were buttressed by written submissions all of which the Court has considered. The Court ordered the parties to file their Skeleton Arguments and List of Authorities by May 29, 2020. The record indicates that Claimant did so on June 23, 2020.

[11] Ms. Smith began her oral submissions by referring to paragraph 2 of the Order made by Mr. Justice Gayle on April 14, 2010 and account for the charge of

\$5,438,955.40. She also asked the Court to take note that there was no explanation for the two (2) valuation fees which was attributed to Mrs. Virginia Murray. Counsel also referred to paragraphs 15, 21 and 22 of the Supplemental Affidavit of Carlton W.S Murray in Support of the Amended Fixed Date Claim Form filed on June 13, 2019. She highlighted these sections to emphasize that the Claimant along with his mother had been plagued with substantial health issues. The paragraphs are reproduced below:

“15. That neither my mother nor I, am aware of any Order made March 2011 in the Consolidated Claims awarding Judgment sum of \$5,438,955.40 to the 1st Defendant. That by my calculation of this sum is an overpayment of \$2,439,535.20.

...

*21. That my mother Virginia Murray has had a host of health challenges including colon cancer. Attached hereto and marked “**CW 13a**” and “**CW 13b**” for identity are documents from Einstein Cancer Centre Montgomery dated July 2, 2015.*

*22. that while I am doing all I can to assist my mother, I too have been plagued by health challenges including a spinal nerve injury and a heart attack. Attached hereto and marked “**CW 14a**”, “**CW 14b**”, “**CW 14c**”, “**CW14d**”, “**CW 14e**”and “**CW 14f**”.*

[12] Ms. Smith then referred to the Defendant’s Bill of Costs and submitted to the court that it did not contain any billable items. Furthermore, she stated that even if the Defendant were to argue that they were entitled to maintenance charges up to the date of possession, they failed to indicate when they in fact obtained that possession. They also failed to state what, if anything, prevented them from obtaining such possession from the date the recovery of possession was granted to March 2011. There was also no explanation for the interest rate and sums

charged even though the Defendant billed for maintenance with interest of 20% per annum for outstanding maintenance owed over thirty days.

[13] Counsel submitted that the issues for the Court to determine are;

- a. Whether the Defendant has an obligation to act in good faith when exercising an Order for Sale and whether it had done so in all the circumstances?
- b. Whether the Defendant has an obligation to account for duplicated and/or excessive charges and fees?
- c. Whether the Defendant was entitled to continue imposing maintenance charges against the subject property and was, in the circumstances of this case, entitled to deduct these charges?

[14] To resolve these issues Ms. Smith relied on **section 5A of the Registration of (Strata Titles) Act** which she says provides that the entitlement to maintenance charges must be set out in writing and accompanied by a statement of account outlining the **“period for which the contribution is owed”**. She also stated that the Court granted the order for sale on March 4, 2011 yet the property was not sold until on or about August 2016 and no reason was provided for the delay. In addition, the Defendant did not inform Mrs. Virginia Murray about the sale or the balance proceeds from the sale notwithstanding the fact that their Attorney received court papers and correspondence from the Claimant and Mrs. Virginia Murray.

[15] On September 7, 2016 the Defendant filed a Bill of Costs for the sum of \$4,511,142.39. However, it was not served on the Claimant. Nonetheless, after it came to his attention he filed Points of Dispute on May 7, 2019 to contest the sum. On this point Ms. Smith emphasized that the Attorney’s fees were 4% which was at the highest end of the scale which is normally 3%. She said this was grossly exorbitant suggests that the intent must have been to diminish as much

as possible the balance that was to be payable to Mrs. Virginia Murray. Counsel stated that it was not equitable under the circumstances considering the Claimant's illness of which the Defendant was made aware. Further, the proceeds of the sale were retained by the law firm for over two (2) years, from August 2016 to 2019 with no explanation. She relied on **section 5 C of the Registration of (Strata Titles) Act** which provides that the money ought to have been held in escrow. She used this section of the Act to justify that the lawyer's actions of keeping the money for that period was not just or equitable.

[16] She submitted that there was no indication as to how the Defendant arrived at the sum of \$5,438,995.40 as the outstanding maintenance charges against Proprietor Strata Plan 272 Penthouse No. 2 Oxford Manor Apts. She grounded this argument on the basis that the judgement sum awarded by the court in January 29, 2009 was \$2,999,420.20 with no interest. Therefore, the additional \$2,439,575.20 for maintenance is above and beyond the judgment debt. As a result, the Defendant retained this sum without reasonable or justifiable cause. Furthermore, the Defendant failed to state when they obtained possession. All of which was used to the Defendant's advantage so they were able to benefit and diminish the balance payable to Mrs. Virginia Murray.

[17] Counsel concluded her submissions by asking the Court to make an Order for the Defendant to account for the excessive charges on the sale and to repay them together with the sum of \$2,976,117.95 at 6% interest from August 16, 2016 to the date of judgment with costs to be assessed.

Counsel for the Defendant

[18] Mr. Williams opened the Defendant's case with reference to **Part 41 (2) (1) of the Civil Procedure Rules** which provides that:

“Where a claim or counterclaim is made for an account or requires the taking of an account, an application for directions relating to the taking of the account must be made at the case management conference or first hearing.”

- [19] He then addressed the maintenance by stating that the charge of maintenance is a statutory charge which runs with the land in the water rates or property taxes. He also emphasized that it is a condition precedent that has to be satisfied in order to seal the property. Therefore, the position in respect of the \$2,976,117.95 is that the Defendant was entitled to charge it up to the point of sale.
- [20] Mr Williams submitted that the account ought to be done by the Registrar. He also stated that if the Proprietor’s Strata Corporation Plan was not entitled to recover the maintenances charges then the Court is to determine the amount due to the owner.
- [21] It is important to note that on November 11th 2019 the Court ordered the parties to file and exchange their Skeleton Arguments and List of Authorities by May 29th 2020. The Defendant has not complied with this Order.

ISSUES

- i. Whether maintenance should still be attached to the property registered at Volume 1179 Folio 185 at the expense of the Claimant or should the Court Orders of January 29, 2009 be strictly enforced.*
- ii. Whether the Defendant is obligated to account for the charges and fees outlined in the Bill of Cost to the Claimant for the transaction of the sale of the property registered at Volume 1179 Folio 185.*

THE LAW, DISCUSSION AND ANALYSIS

Issue I - Whether maintenance should still be attached to the property registered at Volume 1179 Folio 185 at the expense of the Claimant or should the Court Orders of January 29, 2009 be strictly enforced.

[22] **Section 5A of the Registration (Strata Titles) Act** gives a Proprietor Strata Plan the authority to exercise power of sale to recover arrears of maintenance that have been outstanding for more than thirty (30) days. It also outlines the procedure that ought to be followed before the commission issues a certificate a grant of the power of sale. Section 5A provides:

5A.-(1) Where for a period exceeding thirty days a proprietor fails, neglects or refuses to pay to the corporation, all or any part of the contribution levied pursuant to section 5(2)(b), the corporation shall act in the manner specified in subsection (2).

(2) For the purposes of subsection (1), the corporation shall notify in writing the proprietor concerned and his agent, if any, and the mortgagee of the strata lot, if any-

(a) of the outstanding amount of the contribution owing by the proprietor and the period for which the contribution is owed, outlined in a related statement of accounts;

(b) of the amount of interest accruing on the contribution and the period for which interest is payable, outlined in a related statement of accounts; (C) that the proprietor is required, within thirty days from the date of the service of the notice, to pay the outstanding contribution and the amount of interest, if any, accruing thereon;

(d) that if the outstanding contribution and interest accrued thereon are not paid within the period specified under paragraph (c) or make suitable arrangements to pay that amount, the corporation may sell the strata lot by public auction or by private treaty in accordance with section 5C(4);

[23] Upon the authority of section 5 A of the Act the Defendant could lawfully exercise its power of sale over any of the strata property once the proprietor was in arrears for at least 30 days. However, before the Defendant exercises the power of sale, they must prepare a Notice Letter and a Statement of Account.

The Notice Letter must state the period of arrears and the Statement of Accounts clearly identify the expenses charged both of which must be reconciled. The Defendant would then have to serve both documents on the proprietor before they could file their application with the commission to be granted the certificate to exercise their power of sale.

[24] In instant case the Defendant followed the procedure outlined in the Act and met the requirements for the issuance of the certificate of the power of sale. Subsequently, the Defendant requested an issue of a writ of possession against Mrs. Murray which was executed on or about the 23rd of March 2011 and they sold it for \$16,000,000.00 in or about August 2016.

[25] **Section 5E of the Registration of (Strata Titles) Act** provides:

(1) Where a corporation has exercised its power of sale under section 5(2), any money received in respect of the sale shall be apportioned in the following order-

(a) firstly to pay any costs associated with and incidental to the sale of the strata lot; then

(b) to pay all amounts owing to the corporation; and then

(c) in the absence of a mortgage on the strata lot, to pay the balance to the proprietor.

(2) The corporation shall forthwith upon the exercise of the power of sale, furnish a statement of accounts of the sale, to the proprietor and mortgagee, if any.

(3) Where there is a mortgage on the strata lot, the mortgagee shall be paid the amount owed upon the mortgage, and the balance, if any, shall be given to the proprietor.

(4) In the event that a proprietor cannot be located subsequent to the exercise of a power of sale, the money received in respect

of the property shall be deposited in an interest bearing account in a bank or other financial institution licensed to accept deposits, in the name of the Corporation, in trust for the proprietor.

- [26] Section 5E of the Act is applicable because it provides guidance on how the Defendant should utilize the proceeds of sale after exercising its power of sale. It gives the Defendant the authority to pay any incidental costs to the sale, take what was owed to them and if there was no mortgage to be paid, they should hand over the balance if there is any to the proprietor, Mrs Virginia Murray. Moreover, the **Registration of (Strata Titles) Act** also provides that following the sale, a Statement of Accounts must be given to the proprietor. Therefore, the Defendant ought to furnish the Claimant with a Statement of Account in which they will account for the Judgment Sum of \$2,999,420.20 with no interest that was awarded on January 29, 2009 and explicitly outline the reason for the additional maintenance charges of \$2,439,575.20 since the judgment date.
- [27] The Act implies that the Defendant ought to have exercised their power of sale in good faith. The Order for Sale was made on the 14th of April 2010, yet the property was not sold until around August 2016 and there was no explanation for the delay. Moreover, the Defendant continued to charge maintenance fee in relation to the property registered at Volume 1179 Folio 185 even after they had possession of it and then added an additional cost of \$2,439,575.20 to the judgment debt of \$2,999,420.20 that was awarded on January 29, 2009. While the Act is silent on how the Defendant should treat with maintenance charges after having possession of the property, the general position in relation to maintenance is that it is paid so that proprietors within the strata can benefit from the enjoyment of the common areas and other services that are related to the upkeep of the strata such as gardening and painting etc.
- [28] The Defendant had the property in their possession for approximately 5 years before selling it for \$16,000,000.00. During this period the Claimant was not able

to occupy or enjoy or gain any benefit from the property registered at Volume 1179 Folio 185. The Defendant also charged the Claimant interest of 20% per annum of the outstanding maintenance without providing an explanation for why interest was due or what accounted for the rate that was applied. The Court believes that this charge of 20% per annum for outstanding maintenance owed over thirty days was inequitable. Therefore, the Claimant additional maintenance charges of \$2,439,575.20 since the judgment date was inequitable.

[29] Upon the authority of the Act, the Defendant was allowed to exercise its power of sale to recover the Claimant's arrears in maintenance fees. Therefore, if the Defendant's purpose for selling the property registered at Volume 1179 Folio 185 was to recover the maintenance money that was owed to them, there is no reason why they should receive more money than what was awarded in the judgment sum of January 29, 2009. That sum would have already accounted for what was owed to them at the time they executed their power of sale. As a result, this Court finds that the extra maintenance charge of \$2,439,575.20 that was paid over to the Defendant is indeed inequitable and excessive and is due and owing to the Claimant who was no longer in possession of the property.

Issue II- Whether the Defendant is obligated to account for the charges and fees outlined in the Bill of Cost to the Claimant for the transaction of the sale of the property registered at Volume 1179 Folio 185.

[30] The case of ***Murray, Karin v Clough Long and Company [2018] JMSC Civ 30*** establishes that a litigant should not be forced to accept a bill from a solicitor if he believes that it is unreasonable. He has a common law duty to challenge the bill that he is to pay in the ordinary jurisdiction of the court. The court can rely on its common law or ordinary jurisdiction as opposed to its inherent jurisdiction to refer a bill for taxation for the purpose of determining the excessive nature of the Bill of Costs. It also states that where the Bill of Costs is found to be excessive the overpayment belongs to the Claimant.

[31] *Murray (supra)* makes it clear that this Court has the jurisdiction to refer this Bill of Cost that was prepared by the Defendant to taxation for the purpose of determining whether there was indeed an overpayment not just in relation to the maintenance fee but the other services that were charged on the bill. Therefore, having found the Defendant's extra maintenance charge of \$2,439,575.20 to be inequitable and excessive this Court is of the view that the Defendant should account for all the other charges and fees outlined in the Bill of Cost that was issued to the Claimant in relation to the sale of the strata property registered at Volume 1179 Folio 185.

CONCLUSION

[32] Accordingly, the Court makes the following Orders:

1. The Defendant is to give a detailed account for the charges deducted from the proceeds of sale of the property registered at Volume 1179 Folio 185 located at Oxford Manor, 12-16 Oxford Road, Kingston 5 in the parish of St. Andrew on or before the 31st March 2022.
2. The amount in respect of any maintenance charge over and above the judgement and after possession of the property was given to the defendant of \$2,439,575.20, is to be repaid to the Claimant herein forthwith with interest of 20% from August 16, 2016, to the date of Judgment and 3% from the date of Judgement to the date of repayment.
3. Costs for the claim are awarded to the Claimant to be agreed or taxed.

Sonia Bertram-Linton
Puisne Judge