Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO C. L. 1994/V010

BETWEEN	EWON VASSELL	CLAIMANT
A N D	BERTRAM TENNANT	DEFENDANT

Mr. C. Dennis Morrison Q.C. for Claimant instructed by Mr. Carl Dowding of Messrs. Knight, Pickersgill and Dowding

Mr. Bertram Tennant in person

Motion to vary an order of the Court

CORAM: BROOKS, J.

HEARD 2nd AND 10TH JUNE, 2005

In 1996 Mr. Vassell secured against Mr. Bertram Tennant an order that Mr. Tennant "fulfil his contractual obligation to (Mr. Vassell) by virtue of an Agreement to sell pursuant to an option to purchase" a parcel of real estate to Mr. Vassell. The order was made on a Motion for Judgment brought by Mr. Vassell and Mr. Tennant was not represented at the hearing.

It turned out however that the order, though drawn up and perfected, could not be given effect because Mr. Tennant was not the sole owner of the property, but was one of five joint tenants. He was, and is therefore, by himself, unable to transfer the property or any part of it to Mr. Vassell.

A further provision of the order stipulated that "the Registrar of the Supreme Court be empowered to execute on behalf of (Mr. Tennant) the said Agreement for Sale, Instrument of Transfer and any other relevant documents necessary to effect the sale of the said land". This order was also stymied by the fact of the joint ownership, as the Registrar was not (nor could she be) empowered to sign on behalf of the other owners.

Mr. Vassell now returns to court, nine years later, to request the court's permission for him to proceed to assessment of damages against Mr. Tennant instead of pursuing the order for specific performance.

The questions to be decided are whether the court has the power to alter its order and if so whether these circumstances warrant the exercise of that power.

Mr. Morrison Q.C. on behalf of Mr. Vassell submitted that the power to grant the order sought, lay in the inherent jurisdiction of the court to supervise orders made by it and to give directions as to how they are to be carried out. He submitted that at present the order of the court has been made in vain, and that such a situation was untenable. He argued that the court should therefore correct it so as to allow Mr. Vassell to receive relief for his loss. No authorities were provided in support of the application.

Under What Circumstances May the Court Alter its Order?

The general rule is that once an order was drawn up, any mistakes had to be corrected by an appellate court. (See Bristol-Myers Squibb Company v. Baker Norton Pharmaceuticals Inc and Another - The Times April 27, 2001.) The following words of Bowen LJ in Glaiser v. Roll (1889) 59 LJ Ch 63 are also appropriate in these circumstances:

> "To seek to alter the judgment by asking that something may be embodied in it, the demand for which was not even thought of at the time, and was never brought to the attention of the Court, is really to ask us to make a different judgment from that which has already been perfected"

The court may only alter its orders under certain specific circumstances. Some of these are: the slip rule, the power to amend before the order is perfected and the power to make a supplemental order. As the first two are clearly not applicable to this matter I shall only review the last-mentioned one to determine if it is applicable.

Power to make a supplemental order

In a case that pre-dates the Civil Procedure Rules 2002 ('the CPR'), the court had held that although it had no jurisdiction to vary its orders, it was entitled to make a supplemental order directing additional relief. This however is allowable only where the supplemental order is grounded on facts that were not available at the time when the original order was made, and where it did not alter the original order. (See Re Scowby, Scowby v.

Scowby [1897] 1 Ch. 741 at p. 754.) The decision did not rely on any rule under the previous rules of the Supreme Court but is an expression of the inherent jurisdiction of the court to control its process.

Ford-Hunt v. Raghbir Singh [1973] 2 All E.R. 700 provides some guidance as to the approach to be taken. There the court had made an order for specific performance against a purchaser of land. The purchaser failed to comply with the order within the time specified. After completion and on the application of the vendor, the court made a supplemental order for an enquiry for damages to be made in respect of loss resulting from the delay.

The judge in that case contrasted those facts with those in the case of Munro v. Finlinson (1903) 116 LT Jo. 109. In the latter case (admittedly very briefly reported) an application for a supplemental order for an enquiry as to damages was refused. This was so because the facts upon which the later application was based were known to the plaintiff prior to the application for the initial order for specific performance, and there had been no application for damages at that time.

Both of the last mentioned cases involved vendors applying for specific performance. In Northern Counties Securities Ltd. v Jackson & Steeple Ltd. [1974] 2 All E.R. 625 the plaintiff company was a purchaser. It had secured an initial order against the defendant company for specific

performance of an agreement to transfer some of the latter's shares. It later applied for further orders seeking to enforce the initial order.

Walton J. in that case made two comments that are of assistance in the present exercise. The first is, (at p.629h - 630a):

> "Under the liberty to apply which is reserved in the order, the plaintiffs would then be entitled to apply for whatever, in changed circumstances, was the correct order for the court to make having regard to the overriding determination that the contract should be specifically enforced.... Moreover I do not think that the reservation is in any way essential to the plaintiffs' right to claim damages or an alternative order for transfer of what the company can in any event issue to them...together with damages..."

The learned judge described that comment as "quite elementary". The point of course, being that an award of damages may be made, in an appropriate case, as supplementary, even alternatively, to an initial order for specific performance.

In recounting the course of events subsequent to the first order in Northern Counties the judge also made the following comment (at p. 630c):

> " It had however, been discovered in the meantime (although I do not think that this would have come as a surprise to anybody versed in stock exchange practice) that the stock exchange required that the issue of shares should be made subject to the consent of the company in general meeting..." (Emphasis added)

I read the comment to mean that although the requirement, which made specific performance impossible, was imposed after the order therefor, it could have been ascertained beforehand that that requirement was one that would have been imposed. The judge was nevertheless still prepared to

make the supplemental orders that the plaintiff requested. It is true to say that the plaintiff did have other conditions in the initial order which would have reserved its position to secure further orders, but that does not affect the validity in law of the comments outlined above.

Taking all these principles into consideration, I find that the court does, in the circumstance of Mr. Vassell's case, have the discretion to make a supplemental order for an enquiry into damages.

Do these circumstances warrant the exercise of the court's discretion?

Can a distinction be drawn between the Northern Counties situation and that of Mr. Vassell? In the former, stock exchange requirements, which could have been ascertained beforehand, were subsequently imposed. The effect of the imposition was to defeat the intent of the order. In the latter, a rule of law, which ought to have been known to Mr. Vassell's advisors beforehand, was the stumbling block for the order.

One distinction may perhaps be drawn. Whereas it may be said that the application made on Mr. Vassell's behalf was made by the advisors presumed to have the necessary expertise (and knowledge), in Northern Counties, there is no evidence of that being the case. An application of the presumption would result in a situation similar to that in Munro v. Finlinson (supra) and the application would be refused.

If however that distinction were ignored for the moment, the issue for resolution would be whether the consideration of the overriding objective directs the granting of the application.

In this regard I have reviewed the "option to purchase" referred to in the order. It really proves to be a right of first refusal. It reads as follows:

> "PROVIDED that the Lessee shall not be in any respect in breach of any of the covenants hereinbefore on his part entered into during the term hereby created, the Lessor shall not sell or dispose of the said lands or any part thereof without first offering the same for sale to the Lessee by Notice in writing at the price of Two Million Five Hundred Thousand Dollars ($2,500,000.00) therefor and giving the Lessee one (1) calendar month to accept the said offer. AND if the Lessee shall by Notice in writing refuses (sic) the offer within the aforesaid period of one calendar month the Lessor shall renew the Lease for another year certain at the monthly rent of Fifteen Thousand Dollars ($15,000.00) so however that during the term hereby created the Lessor shall not sell or dispose of the said lands or any part thereof without first offering the same for sale to the lessee by Notice in writing setting out the purchase price which shall be increased by twenty percent (20%) of the price first offer therefore (sic) and giving the Lessees (sic) one calendar month to accept the said offer AND the lessee shall by notice in writing refuse the offer for a lesser price than that offered by the Lessee until three months after the refusal of the aforesaid offer by the Lessee."

Although the clause has some obvious errors that make its intent a little difficult to follow, what is clear is that the right of first refusal is granted to the lessee Mr. Vassell for one, or, at most two, years. Mr. Tennant's obligation is not to sell the property during that time without first offering it for sale to Mr. Vassell. Nine years later the property is still registered in the names of Mr. Tennant and his co-owners. What therefore is the breach for which damages are to be awarded?

Without seeking to overturn the original order, it is my view that Mr. Vassell, who is still living at the property in question, without evidencing a renewal of the lease, and more particularly the right of refusal, has not shown that he is entitled an exercise of the court's discretion, in his favour.

Conclusion

There must be some finality in litigation and litigants cannot be allowed unlimited 'bites at the cherry'.

Mr. Vassell having claimed the order that he received from this court, and having perfected it, is not entitled, without there being a supervening factor, to have that order varied or supplemented.

I find that Mr. Vassell's advisors ought to have known, at the time of applying for the initial order, of Mr. Tennant's inability to unilaterally transfer the property. I therefore find that there was no new supervening factor. I also find that the terms of the agreement in Mr. Vassell's situation do not allow for an exercise, in his favour, of the court's discretion.

Mr. Vassell's redress cannot be secured by an application such as this. I will not express any opinion as to whether he may properly seek it at the appellate level.

The application is refused.