[2012] JMSC Civ 136

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 02762

BETWEEN	DAVID WEST	1st CLAIMANT
AND	CHRISTOPHER WEST	2nd CLAIMANT
AND	DOUGLAS WEST	3rd CLAIMANT
AND	MARSHALEEN FORSYTHE (NEE HENRIQUES)	4th CLAIMANT
AND	JEROME SMITH	5th CLAIMANT
AND	RICHARD SMITH	6th CLAIMANT
AND	JAMES WYLLIE	1st DEFENDANT
AND	LORNA WYLLIE	2nd DEFENDANT
AND	RICHARD WINT	3rd DEFENDANT

A. Wood Q.C. and D. Gentles-Silvera instructed by A. Wong and M. Palmer of Livingston Alexander & Levy for the Claimants

O. Crosbie instructed by Owen Crosbie & Company for the Defendants

Heard: May 30, 31, June 1, 2, 2011 and October 4, 2012

Recovery of Possession –
Lease with Option to Purchase – Caveat –
Service of Notice to Warn Caveat –
Section 52 Interpretation Act

Lawrence-Beswick J

[1] The claimants, by amended fixed date claim form dated October 3, 2007 seek an order that the defendants deliver up possession of land to them. They also seek injunctions to restrain the defendants and to prohibit them from constructing any building on the property or from trespassing on the land. By Order dated January 21, 2010 the action was ordered to stand as if begun by ordinary Claim form.

The defendants in an amended counterclaim filed June 30, 2010 seek an Order for specific performance of the lease agreement made between the 1st and 2nd defendants and the late Mr. William Arscott. By Order dated June 17, 2010, the defendants were granted leave to join Ms. Sheila Smith as executrix as a defendant to the counterclaim, seeking relief of specific performance against the claimants and her, as executrix. They ask that the title of the property be delivered to the defendants' attorneys-at-law and that the claimants execute the transfer of the land to the 1st and 2nd defendants.

Background

[2] Mr. William Arscott owned about 24 acres of land, part of Spitzbergen, Manchester registered at volume 1260 folio 65 in the Register Book of Titles (the land). He died on March 6, 1994 and in his will dated July 18, 1988, he purported to devise his interest in the land to named persons in a specific manner.

[3] Probate was granted in Mr. Arscott's estate on June 23, 1999 and thereafter on September 8, 2005, the land was transferred to the six claimants ('the Wests') who were the persons named in his will. They are now the registered proprietors of the land. However, the two defendants, James and Lorna Wyllie ('the Wyllies') claim an interest in the land and are in possession. The Wests therefore filed suit for recovery of the land.

[4] Mr. Arscott had earlier, on March 1, 1988, leased the property to the Wyllies, with an option to purchase.

This option was not exercised before Mr. Arscott's death.

[5] On March 7, 1994, the day after Mr. Arscott died, Mr. James Wyllie and Ms. Lorna Wyllie went to Mr. Arscott's house and delivered to Mr. Vincent Thomas, his employee a cheque, payable to Mr. Arscott. On that day also, a notice of caveat was issued by the Registrar of Titles, purporting to notify William Arscott of the existence of a caveat forbidding any change in proprietorship or dealing with the land. That caveat was dated February 3, 1994.

[6] On April 5, 1994, the Wyllies wrote to Ms. Sheila Smith, executrix of the will, and the daughter of Mr. Arscott, indicating that they had an agreement with Mr. Arscott for lease and sale of the land. They wished to make a payment on the lease and wanted to be informed by her as to whom the payment should be made and where.

[7] Ms. Smith through her attorney-at-law, by letter dated June 15, 1994 returned the cheque of March 1994 to Ms. Lorna Wyllie, stating that she did not know the purpose for the payment and also that she thought the cheque could not be negotiated as it was in Mr. Arscott's name.

[8] Some two weeks later, on June 27, 1994, Mr. Owen Crosbie, attorney-at-law for the Wyllies, wrote that the cheque was for rental of the property and that there was a caveat on the property to protect the Wyllie's interest in respect of a lease and Sale Agreement of March 1, 1988.

[9] Mr. Crosbie also in that letter of June 27, 1994 asked of the attorneys-at-law as to whether they were willing to accept all arrears of rent and/or $300,000.00 inclusive of all costs as agreed in the lease and Sale Agreement.

[10] There was no response to this letter until January 25, 1995 when the attorneys-at-law wrote that they were applying for probate of Mr. Arscott's will and that they had no instructions concerning the property.
Ms. Smith's evidence is that she was not contacted by the Wyllies after 1995 and thought they were no longer interested in the land. Probate was granted on June 23, 1999.

On July 16, 2003, an application to warn the caveat was lodged with the Registrar of Titles and a Notice to the Caveator dated October 9, 2003 was issued by the Registrar of Titles and directed to James Wyllie c/o Owen S. Crosbie & Company, 64 Duke Street, Kingston.

[11] Meanwhile, Mr. Vincent Thomas, who had been an employee of the late Mr. Arscott and who was now Ms. Smith's caretaker visited the property on occasion. He observed that the farming activity which had earlier been pursued had ceased, and the property was not being maintained. There was no sign of possession by the Wyllies.

[12] On May 3, 2007, Mr. Thomas observed surveying equipment on the property. Mr. Wyllie who was present told him that it was the neighbour who was surveying.

[13] On May 4, 2007, Ms. Smith enquired at the Tax Office re property taxes concerning the land and was informed that an outstanding tax payment had been made in April 2007. She had not authorized anyone to make that payment. It was the Wyllies who had made the payment. Nonetheless, she herself paid the amount which she knew had been owed.

[14] On May 12, 2007, Ms. Smith visited the property. She observed very little farm product present and no cattle rearing but she saw marl and concrete deposits. It was then that she saw Mr. Richard Wint, the 3rd defendant,

who said he resided in the house there, which Ms. Smith described as being make-shift. She testifies that he was there with no permission from the Wests or herself.

On June 1, 2007, a notice dated May 18, 2007 to quit the property within one month was served on the Wyllies and Mr. Wint on behalf of the Wests. On July 11, 2007, the Wests sued the Wyllies and Mr. Wint for delivery of possession of the property.

[15] **Analysis**

The Will

Mr. Arscott's will dated 18th July 1988 states, *inter alia that:*

> *"...I give my six grandchildren namely, David West, Douglas West, Alrick West, Marshaleen Henriques, Jerome Smith, and Richard Smith, this property contains (sic) 24 acres more or less. It is now leased to one Mrs. Whily for five years with option to purchase for $300,000.00. If she purchases after clearing expenses (sic). The remaining balance must be equally divided among the children ..."*

It is these six (6) grandchildren who are the registered proprietors of the land against whom the Wyllies are claiming an interest.

[16] *The Caveat*

A person who claims interest in land which is not registered in his name can seek protection of that interest under the Registration of Titles Act (the Act). Section 139 provides:

> *"Any....person claiming any. . .interest in land under the operation of this Act...may lodge a caveat with the Registrar...forbidding the registration of any person as transferee or proprietor of.... such interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator....."*

[17] When a caveat is lodged concerning property, the Registrar of Titles' powers to deal with such property are restricted. He is required to notify the person who filed the caveat, the caveator, before certain dealings with the land.

Section140 of the Act provides:

> *"Upon the receipt of any caveat under this Act the Registrar shall notify the same to the person against whose application to be registered as proprietor, or ....to the proprietor against whose title to deal with the estate or interest such caveat has been lodged...."*

[18] Thereafter the proprietor may summon the caveator to attend Court to show cause why the caveat should not be removed. Meanwhile the Registrar may not register any dealings with the land. Section 142 of the Act provides:

> *"So long as any caveat shall remain in force prohibiting any..... dealing with the ....interest in respect to which such caveat may be lodged the Registrar shall not enter in the Register Book any change in the proprietorship....subsequent to the date on which such caveat was lodged....."*

[19] After the letter dated January 1995 from the attorneys-at-law for the Wests informing the Wyllies that they were applying for probate for the will of the late Mr. Arscott, the next relevant evidence is that it was some eight years later, in 2003 that the Wests applied to the Registrar of Titles to warn the caveat.

[20] The Act requires the Registrar to serve notice of a warning on the caveator and it provides for possible lapsing of the caveat after the service.

In this case therefore, it is important to determine if the notice warning the caveat were properly served on the caveator and if so, when the caveat might be taken to have lapsed.

[21] *Service of Notice of Warning of Caveat*

The issue of when service of the notice of warning was effected was addressed in **George Hylton v Georgia Pinnock (as executrix of the estate of Dorothy McIntosh, deceased)** *et ors*[1] where one of the critical issues to be determined was the date of service of the warning of a caveat.

There the Court emphasised that Section 140 of the Act discloses no provisions as to the method of service in Kingston of the notice of warning the caveat and that Section 139 did not assist in this regard.

[22] Section 139 provides:

> "No *caveat shall be received:*
>
> *(a) Unless some address or place within the city of Kingston shall be appointed therein as the place at which notice and proceedings relating to such caveat may be served;*
>
> *(b) ... A caveator may, however, give an additional address out of the said city at the foot of such caveat, in which case a registered letter shall be sent through the post office to such address on the same day as that on which any notice relating to such caveat is served in Kingston. Every notice relating to such caveat, and any proceedings in respect thereof if served at the address or place appointed as aforesaid, shall be deemed to be duly served."*

[1] SCCA 17 and 84/2010

[23] The effect of that section is that it is only where an additional address outside of Kingston is specified, that service is required to be by registered post.

The Court then considered if Section 52 of the Interpretation Act might assist in the interpretation as to the method of service of the notice in Kingston.

[24] The Interpretation Act provides:

> *"S.52. Where any Act authorizes or requires any document to be served by post...then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, preparing and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."*

[25] The Court highlighted that Section 52 of the Interpretation Act refers to service by post, whereas Section 140 of the Registration of Titles Act does not specify post as the method of service of the notice at the Kingston address.

It followed that Section 52 of the Interpretation Act does not assist in the interpretation of Section 140 of the Registration of Titles Act, because the Act does not specify primary method of service to be by post, and where the additional secondary service is in fact authorized to be by post, the Registration of Titles Act itself prescribes that that service must be by registered post.

[26] The Court in the **Hylton** case concluded that what was required by the Act was actual delivery to and receipt at the address provided, not necessarily that the notice reached the caveator.

The service of the notice of the warning was not to be based on an assumed delivery after the passage of a number of days.

[27] Harris JA opined:

> *"The notice must therefore be delivered to and be received at the address given in the caveat .... [it does not mean] notice actually communicated. It therefore need not be further proved when the notice actually reaches the caveator's attention...."*[2]

[28] In the **Hylton** case, the evidence had been unchallenged that the caveator had received notice on a particular date. Here, however, the evidence is that the notice was not delivered, but that the Registrar of Titles presumed that it had been delivered in the ordinary course of post.

[29] Section 140 of the Registration of Titles Act provides:

> *".....every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing...."*

[30] On October 9, 2003, the Registrar of Titles issued a notice directed to Mr. James Wyllie c/o Mr. Owen Crosbie that there was an application for the registration of a transfer of the land and that unless he received an Order from a Judge prohibiting him from so doing, he would proceed to register the transfer and the caveat would be deemed to have lapsed upon the expiration of 14 days from the service of the notice. This notice was sent by registered post on October 21, 2003 addressed to Mr. James Wyllie, c/o Owen S. Crosbie, 64 Duke Street, Kingston. There was no reference to Ms. Wyllie. The transfer by transmission had been lodged by the Registrar on October 7, 2003 noting the interest of the executors in the property before the notice warning the caveat was posted.

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[2] At paragraph 38

[31] The Registrar of Titles recorded the caveat as lapsed on November 19, 2003 almost four weeks after the posting of the notice. In my view that would have been well outside the time at which a letter posted on October 21 would be expected to be delivered in the ordinary course of post and indeed, outside the 14 day period required by law to pass after giving notice to the caveator before the caveat lapses if there is no Court Order. An important question would of course be whether the notification went to the correct person and correct address.

[32] The caveat lodged provided two addresses – 64 Duke Street and 3 Hotel Street, Mandeville - to which notices relating to the caveat may be sent. As it concerns service at Duke Street, the warning notice was returned undelivered, addressee unknown, in January 2004. By that time the Registrar had already registered a lapsing of the caveat.

[33] The letter containing the notice of the warning of the caveat was returned undelivered to the office of the Registrar of Titles some three months after it was posted. No doubt the framers of the law did not anticipate that notification that registered post had not been delivered within the Island could take approximately three months.

[34] As it concerns the Kingston address for service of the notice, the obligation on the Registrar was to serve the caveator at the given address. There is no requirement in the Act that the Registrar should await the acknowledgement of its service or indeed, even proof of its actual service.

[35] In my view the Registrar may well be considered to have waited a reasonable period of time, namely approximately four weeks after posting the notice of the warning, before registering the caveat as having lapsed. However, the reality was that the notice was not delivered and that means that the caveator must be taken to have been unaware of the warning of the caveat. Such a situation surely must have been within the

contemplation of the Court when the learned Judge of Appeal in the **Hylton** case said that what was important was that the caveator be given the opportunity to protect his interest.

[36] These caveators were not given that opportunity. The purported service on Mr. Wyllie at the Kingston address did not in fact occur. There was no service on Ms. Lorna Wyllie at the Kingston address. It is undisputed that there was no service on the Wyllies at the Mandeville address.
I must therefore conclude that the caveators were not properly served with notice that the caveat was being warned, and they therefore did not have the opportunity to seek to protect their purported interest.

[37] Service of the notice of the warning of the caveat was therefore not in accordance with the Registration of Titles Act because of a number of reasons, including failure to serve Ms. Wyllie. It is therefore not necessary for me to determine the effect of a notice being returned as undelivered, many months after having been posted, and after there have been dealings on the Title.

[38] What falls to me to resolve is the competing interest of caveators who were not notified of a warning of the caveat, and the interest of purported beneficiaries under the will of the registered proprietor. In so doing, I am considering issues which would have been determined if the caveators had been properly warned.

[39] *Registration of Transfer*
It was more than one and a half years after receiving the notification that the caveator was not known at the address to which the notice had been posted, that the Registrar registered the transfer of the property from the executors to the beneficiaries, the Wests, on September 8, 2005. Proper service of the warning of the caveat had not been effected on the Wyllies. Nonetheless, the transfer was endorsed on the Certificate of Title.

[40] *Indefeasibility of Title*

The Registration of Titles Act holds sacrosanct the endorsement on a registered title except where fraud is found. Section 70 provides:

> *"Notwithstanding the existence in any other person of any estate or interest...the proprietor of land or of any estate or interest in land...shall, except in case of fraud, hold the same as the same may be described... in the certificate of title...but absolutely free from all other incumbrances whatsoever..."*

[41] *Evidence of fraud*

There is no direct evidence of fraud, nor evidence from which fraud can be inferred on the part of the registered proprietors, or indeed on the part of anyone. The proprietors submitted documents to the Registrar of Titles in accordance with the law. Indeed several years passed between the death of the late Mr. Arscott and the registration of the names of his beneficiaries on the Certificate of Title.

The registered proprietors proceeded in accordance with the law and as it concerns the land, the subject of this suit, must therefore "h*old the same as the same may be described... in the certificate of title... absolutely free from all other incumbrances whatsoever..." (Section 70).*

[42] Any damage suffered by the Wyllies and Mr. Wint cannot be attributed to the actions or omissions of the Wests and therefore any relief/remedy that the Wyllies and Mr. Wint may have does not lie in the hand of the Wests.

[43] *Counterclaim*

The defendants filed a counterclaim for an Order for specific performance of a lease agreement made between the 1st and 2nd defendants and the late Mr. William Arscott.

Interest of Wyllies

It is not disputed that originally there was a lease between Mr. Arscott and James and Lorna Wyllie. The lease provided that the parties:

> *"Shall enter a contract to purchase the demised property for the sum of $300,000.00 exclusive of all cost (sic) (All costs must be paid by the Purchasers)."*

The proper time for so doing was either during the term of the lease or at the expiration of the term of five (5) years with an extended period of two years. The lease provided in part:

> *"That at the expiration of the term of the lease with an expended (sic) period of two (2) years or during the period of the lease the lessor and the lessees shall enter into a contract to purchase the demised property for the sum of THREE HUNDRED THOUSAND DOLLARS JAMAICAN ($300,000.00) exclusive of all cost (sic) (All cost must be paid by the purchasers).*

[44] Was the lease in force when the late Mr. Arscott died? Is it still in force?

There is evidence from which I infer that at the time of Mr. Arscott's death rental was overdue. Firstly, the attorney-at-law for the Wyllies enquired in a letter *inter alia,* as to whether arrears of rent would be accepted by the attorney-at-law for the Wests. Secondly, there is no evidence of rental having been paid. Thirdly, the executrix did not accept any monies for rental.

[45] The lease provides:

> "*That if the rent hereby reserved or any part thereof shall be in arrears for a space of thirty (30) days next after any of the days whereon the same ought to be paid... it shall be lawful for the lessor in the name of the whole to re-enter on the premises hereby leased and to be again repossesses (sic) and enjoy as in his former estate.*"

[46] I am satisfied on a balance of probabilities that prior to the death of Mr. Arscott, the Wyllies failed to pay the rental due thereby breaching the lease prior to the death of Mr. Arscott and in the circumstances he would have had a right to re-enter the premises pursuant to their failure to pay rental. Subsequent to his death, the executors would have had the right to re-enter on his behalf.

[47] In any event more than five years passed between the commencement of the lease and the death of Mr. Arscott. There is no evidence of any extension having been negotiated and the lease would have been terminated by the effliuxion of time. The fact that the lease spoke to a five year term and then followed the reference to two year extension means in my view, that the parties intended that there should be some renegotiation at the end of the five year period. Were it otherwise the parties would have simply contracted for a seven year period.

[48] The lease has come to an end and with it any interest which the Wyllies may have had.

Further, the agreement concerning the option to purchase was uncertain and unclear on fundamental important issues not least of which was the time and manner in which the option was to be exercised.

[49] It is settled that an option for the renewal of a lease must be exercised strictly within the time limited for the purpose, otherwise it will lapse[3]. The time for the exercise of the option was uncertain and therefore it was not possible to exercise it strictly.

[50] **The Order** that I make is:

> Judgment for the claimants on the amended claim and the counterclaim. As it concerns land at Spitzbergen, Manchester registered at volume 1260 folio 65:

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[3] Halsbury's Laws of England Vol. 8, 3rd edition 165.

1) The defendants are restrained and prohibited from constructing or continuing the construction of any building or structure on the land.

2) The defendants must deliver up possession of the land to the claimants within fourteen (14) days of today.

3) Costs to the claimants to be agreed or taxed.