[2016] JMSC Civ.63

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2005 HCV 01112

BETWEEN	**MERCEDES BLAKE**	**CLAIMANT**
AND	**ANDREW BLAKE**	**DEFENDANT**

IN CHAMBERS

Miss Carol Davis for the claimant/respondent.

Miss Marjorie Shaw instructed by Brown & Shaw for the defendant/applicant .

5th February and 15th April, 2016.

Matrimonial property – Occupation rent – Principles upon which award is made – No ouster – Defendant undertaking not to occupy jointly owned property – Whether occupant in receipt of rent – Impact of delayed sale.

EVAN BROWN, J

Introduction

[1] By Notice of Application for Court Orders filed on the 12th November, 2014, the defendant sought the following two orders, among others. Firstly, an order that the claimant pays to him one half mesne profit or rental for her occupation of 6 Lincoln Road, Passage Fort, St. Catherine; for the period commencing October 2005 and terminating at the date of the sale of the premises. Secondly, an order that the mesne profit or rental due to the defendant be deducted from the claimant's interest in the proceeds of sale of the said premises.

[2] The application came before me on the 5th February, 2016 and, having heard and considered the submissions of learned counsel for both sides I refused to grant the orders. My reasons for refusing to grant the orders appear below. However, before setting out my reasons, it is appropriate that a factual background be provided to give the matter a context.

Background

[3] The parties were married on the 21st October, 1986. In 1992 they became the owners of the subject property, holding it as joint tenants. That property became their matrimonial home. Their marriage broke down subsequently and they separated in 1998. Between 1998 and 2000 the claimant/respondent resided overseas and the defendant/applicant resided in the matrimonial home along with their two children. The claimant/respondent returned to the matrimonial home in 2001, the same year the defendant/applicant departed the island to study. The defendant/applicant returned to the island in or about January 2005.

[4] Prior to his return, their marriage was dissolved on 27th August 2004. Following the dissolution of their marriage, the claimant/respondent sought a declaration of their respective interest in the property by Fixed Date Claim Form (FDCF) filed on the 20th April, 2005.

[5] Pursuant to the FDCF, consent orders were made on the 16th March, 2006. Three of the several consent orders are relevant for present purposes. Firstly, the parties' respective interest in the property was declared to be 50% each. Secondly, the claimant/respondent was given the first option to purchase the defendant's share of the matrimonial home. The option was to be exercised within 60 days of receipt of the valuation ordered to be carried out. Thirdly, the defendant/applicant gave "an undertaking not to enter the matrimonial home whilst the claimant is in occupation thereof".

Submissions

[6] Miss Shaw, for the defendant/applicant, submitted that the claimant/respondent and or her agents and or her licensee assumed exclusive occupation of the house. To demonstrate this, counsel directed my attention to paragraphs 8, 11, 17-20 of the defendant/applicant's affidavit. In those paragraphs it was alleged that the defendant/applicant made all the mortgage payments from the time of acquisition in 1992 to when he departed the island in 2001 to study. Further, upon his return to the island he discovered that he was locked out of the family home and barred from entering pursuant to a Protection Order, granted in his absence. In spite of several efforts on his part, he was never again permitted to enter the family home.

[7] Another discovery he made was that, since or about 2004, the claimant/respondent had rented a room in the home to his nephew and occupation was also being shared by one Damian Barrett, the claimant/respondent's beau.

[8] Although there was an agreement in principle for the sale of the house, that sale never took place. Here I was directed to paragraphs 25, 28-34. The defendant/applicant asserted that it was his expectation that his interest in the property would have been speedily liquidated. He said they had some difficulty and suffered great delay in securing the perfected order as the judge proceeded on retirement shortly after the orders were made.

[9] In particular, the defendant/applicant alleged that the sale was not completed within the time frame ordered because of the conduct of the claimant/respondent as she refused: (a) "to take any steps towards the sale until the Order was perfected;" (b) "to advance the one-half cost of the valuation;" and (c) "to sign the Agreement for Sale on the basis of objection to the insertion of the typical interest clause or otherwise on the basis that she wanted to be reimbursed for the mortgage payments being made by her."

[10] Miss Shaw submitted that the court should have regard to the delays in liquidating the asset. My attention was again adverted to the defendant/ applicant's affidavit, paragraphs 47-48 and 50. It was there asserted that an order was made for the defendant/applicant to contribute to the discharge of one half of the mortgage paid by the claimant/respondent. That was ordered to be deducted from the proceeds of sale.

[11] In December 2009 the claimant/respondent was given an extension of three months from the date of account to exercise her option to purchase the property. Lastly, "an order was made for the payment of a lump sum out of the proceeds of sale, notwithstanding the facts".

[12] To ground the defendant/applicant's legal entitlement to the orders sought, Miss Shaw relied on ***Beverley Simpson v Anslyn Simpson*** Cl. No. E129/2000 delivered 28th November, 2008 (unreported). In that case Mangatal J held the occupying spouse liable to pay an occupation rent although there was no ouster. That is to say, the claimant/spouse had left the property voluntarily. The learned judge accepted, upon the authority of a summary of the law in ***Bromley's Family Law***, that it was unnecessary to establish exclusion from the premises.

[13] Miss Shaw also relied on ***Dennis v McDonald*** [1977] 1 W.L.R. 810, an authority also cited by Miss Davis. Specific reference was made to item two of the head note. I quote:

> *"That, although a tenant in common in sole occupation of premises was not liable to pay an occupation rent where the other tenant in common voluntarily chose not to exercise a right of occupation, if the non-occupying tenant had been excluded from the premises the court would order payment of an occupation rent if it was necessary to do justice between the parties; that it was unreasonable to expect the plaintiff to exercise her right of occupation as she had done before the breakdown of her relationship with the defendant and thus, she was, for practical purposes, excluded from occupation and prevented from enjoying her rights as a tenant in common and accordingly she was entitled to an occupation rent."*

[14] Miss Davis submitted that as both the defendant/applicant and the claimant/respondent are joint tenants, one cannot be liable to pay rent to the other. That proposition was based on the unities between joint tenants, particularly the unity of possession. The argument was, in the same way one joint tenant cannot get possession against another co-owner, one joint tenant cannot be liable to pay rent to the other. Counsel cited the learning in ***Commonwealth Caribbean Property Law*** 2nd ed. pp. 125-126, ***Bull v Bull*** [1955] 1 All E.R. 253,254, ***Jones v Jones*** [1977] 1 W.L.R. 438, 441, ***Dennis v McDonald***, *supra* and ***Aggie Forbes v Victor Bonnick*** (1968) 67.

[15] In ***Bull v Bull*** Lord Denning articulated the rights of equitable tenants in common until the property was sold, which, he said, mirrored those of the legal owners in common. Those rights amount to a bundle of possessory rights. The basic entitlement is a right to possession. Consequent on that basic right of each co-owner to possession, the one cannot evict the other from the property. If, however, one co-owner purports to dispossess the other, the latter would have a claim in trespass against the wrongdoer. Equally, a claim would lie for an accounting if one tenant in common sought to take more than his proper share in the property.

[16] ***Jones v Jones***, *supra*, was an appeal from a decision that one equitable tenant should pay rent to the other otherwise the property should be sold. It was held that one equitable tenant in common could not claim rent from another tenant in common even though he was in occupation of the whole property. At page 442 Lord Denning referred to what he said in ***Bull v Bull*** and made two exceptions. First, if there had been an ouster of one tenant in common by the other. Secondly, if there was a letting to a stranger.

[17] ***Bull v Bull*** was applied by the Jamaican Court of Appeal in ***Aggie Forbes v Victor Bonnick***, *supra*. In that case, the issue on appeal was whether the resident magistrate was correct in making an order for recovery of possession against one equitable tenant in common at the instance of the other. The Court of

Appeal accepted Lord Denning's declaration of the law in respect of equitable tenants in common; namely, until the house was sold each had a concurrent right to the enjoyment of possession with the other and neither could turn the other out.

Analysis

[18] The law in respect of co-owners, as laid down in the cases following ***Bull v Bull***, is encapsulated in ***Snell's Equity*** 31st ed. para. 18-28 under the heading, "Taking an account – co-tenants". Although ***Bull v Bull*** was not cited by the learned authors, ***Jacobs v Seward*** (1872), LR 5 HL 464, one of the cases referred to in the judgment of Lord Denning, was. I quote:

"Where land is held by several co-tenants they are all, as between themselves, entitled to possession of the whole. Hence there is no remedy in trespass against an occupying co-owner unless he has ousted or excluded the other or others. There is no exclusion if one merely stays away, allowing the other to occupy a house or take all the profits whether by way of rents, crops or minerals. Where one oust the other or others, he will be liable for an occupation rent. Where there is no ouster there is no such liability in the absence of any contract to pay rent or other assumption of liability. If one co-tenant was dissatisfied with the situation, his remedy was to apply to the court for an order compelling partition. From 1868 the court was empowered, in the alternative, to order a sale of the jointly-owned land."

[19] Regarding situations of joint occupation, as in the instant case, it was said that the party left in sole occupation may be liable to pay an occupation rent at the time of taking an account: ***Snell's Equity,*** *op.cit*. para. 18-30. Citing ***Dennis v McDonald***, *supra*, liability for the payment of an occupation rent was said to be grounded in an ouster by one party of the other, whether directly or constructively. The learned authors, however, went on to make three important points. Firstly, ouster was never the test in cases of taking an account while it

appears to have been in cases of trespass. The test was whether the house was open to the absent tenant. Secondly, in some cases the occupying party was made to pay an occupation rent without reference to the circumstances surrounding the departure from the premises of the co-owner. Thirdly, "a rent or payment of interest" may be levied instead of making an order for sale.

[20] The learned authors cited ***William M'Mahon and Wife v Burchell and Another*** (1846) 2 PH 127 (***M'Mahon v Burchell***) as authority for saying the test was whether the house was open to the absent tenant. In that case the plaintiffs sued the executors of his sister's, Anne, estate for the payment of certain legacies. In answer, the defendants insisted on a right to set-off the amount of the legacies against occupation rent for which they contended William was liable. Seven siblings, including William M'Mahon and Anne, were tenants in common of the house. It was admitted that William and three of his siblings occupied the house for many years but by William alone for most of that time. Anne never occupied the house. The defendants contended that by virtue of that occupation rent became due to Anne's estate.

[21] The case initially went before Vice Chancellor Wigram who referred it to the Master to take an account. The Master was also directed to inquire whether William was in occupation and if so whether he should be charged with any sum in respect of that occupation. The defendants took exceptions to the Master's report. The exceptions were heard by the Vice Chancellor. An appeal and cross-appeal came before the Lord Chancellor Cottenham.

[22] On behalf of William, it was submitted, inter alia, that the mere occupation of premises by one of several tenants in common would not make him liable for rent to the rest, unless there were either an ouster or a contract for payment. The Lord Chancellor rejected the proposition that the fact of the plaintiff's occupation as a tenant in common made him liable to his co-tenants. The Lord Chancellor went on to say there may be modes of occupation which would make the

occupying tenant in common liable for rent to his co-tenants. For example, there might have been an agreement for the occupying tenant to pay rent.

[23] It was decided there that the occupying co-tenant bore no rental liability in the absence of exclusion, contract or receipts in excess of his share. In short, bare occupation by one co-tenant carried no incidence of rental liability to the other co-owners. Cottenham LC said, "where there was neither contract nor exclusion, nor anything received, occupation by one tenant in common created no liability for rent to the other tenants in common".(See ***M'Mahon v Burchell*** 47 ER 944, 951)

[24] Without an exhaustive review of the cases, it appears to me that the basic proposition is this, where one co-owner goes into sole occupation of jointly owned property the bald fact of occupation does not make him liable to the other co-owners for an occupation rent: ***M'Mohan v Burchell***, *supra;* ***Jones v Jones***, *supra*. That proposition is grounded in the fact that co-owners are together seised of the entire estate and each is entitled to concurrently enjoy possession along with the others: ***Bull v Bull***, *supra*; ***Aggie Forbes v Victor Bonnick,*** *supra.*

[25] That basic, general proposition is subject to the qualifications which follow. Firstly, there is a prima facie entitlement to occupation rent by the spouse who left the matrimonial home following a breakdown of the marriage: ***In re Pavlou.*** However, if the co-owner who voluntarily left the property would be welcome back and would be in a position to enjoy occupation of the property, equity would not normally require an occupation rent of the occupying co-owner: ***In re Pavlou***.

[26] Secondly, some forms of occupation by a co-owner will make him liable to the other co-owners for an occupation rent for example, a contract making occupation subject to the payment of rent: ***M'Mohan v Burchell***, *supra.*

[27] Thirdly, an occupation rent is payable if the claiming co-owner was excluded from the property by way of an 'ouster': ***Jones v Jones***, *supra;* ***Dennis v McDonald***, *supra*. Actual or constructive exclusion of a co-owner is the typical case in which

an occupation rent has been charged: ***Brenda Joyce Byford v Butler*** [2003] EWHC 1276 (Ch) (***Byford v Butler***).

[28] Fourthly, an occupation rent is due from the occupying co-owner where he lets part of the property: ***Jones v Jones***, *supra*.

[29] Fifthly, a court of equity will order an enquiry and payment of an occupation rent in the absence of an ouster where it is necessary to do equity between the parties: ***In re Pavlou (a bankrupt)*** [1993] 1 WLR 1046, 1050 (***In re Pavlou***). Put another way, in declaring an occupation rent chargeable the court is "endeavouring to do broad justice or equity as between co-owners": ***Byford v Butler,*** *supra*. This is particularly so where an occupying spouse wishes to be credited for solely amortizing the mortgage debt on the property without being chargeable for his or her sole use of the property. (See, for example, ***Suttill v Graham*** [1977] 1 WLR 819.

[30] So then, a claim may be made against a co-owner in sole occupation, as in the case at bar, in the absence of his exclusion or ouster from the property. Although ouster from the subject property is the typical case, it appears that the overarching endeavour of the court in levying an occupation rent is to do justice between the co-owners.

[31] In fine, the award of an occupation rent is not an arbitrary judicial gesture. An occupation rent only becomes chargeable to adjust the balance between co-owners. Mere occupation has never been a sufficient basis to levy an occupation rent. The balance between co-owners may require adjustment as a result of the unlawful or inequitable actions of one or more co-owners.

[32] Since exclusion from the co-owned property is but one of the several possible transgressions by a co-owner, exclusion cannot be the indispensable conditionality to award an occupation rent. Hence, the co-owner who voluntarily gave up possession may also be eligible to make a claim for an occupation rent: ***Beverley Simpson v Anslyn Simpson***, *supra*. However, if the insufficiency of

bare occupation to ground occupation rent is to remain a valid proposition, a co-owner who voluntarily gave up occupation must establish that the equitable or legal balance has been disturbed. He does so by proving, for example, either the existence of a contract to pay rent or that the circumstances require an equitable accounting.

[33] In the case at bar, so far as may be gathered from the defendant/applicant's affidavit, the claim for mesne profit or rent sits on three bases: exclusion, third-party letting and inordinate delay in carrying out the sale of the property. It should be said before going on to further consider the matter that neither party was cross-examined. That is important as much distance remained between them on critical areas of fact. Therefore, I am quite reticent in attaching much weight to areas of conflict. Having said that, I turn my attention to the bases of the application in their respective order.

[34] The defendant/ applicant asserted that when he returned to the island he was locked out of the family home and further barred by a Protection Order from entering. The claimant/respondent denied that a Protection Order was in place and none was exhibited. She adverted to the defendant/applicant's undertaking not to return to the matrimonial and swore that it was in those circumstances that she came to occupy the matrimonial home with their children. Additionally, the defendant/applicant allegedly re-married on the 25th March, 2005.

[35] Against that background I conclude that the defendant/applicant was not excluded from the property. He gave up occupation voluntarily. It is incongruent to plead exclusion in circumstances where an undertaking is given not to enter the premises while the other co-owner is in occupation. Although the consent orders were not made until a year after the applicant's return to the island, juxtaposed with his remarriage three months later, the picture is painted of a joint owner who had no wish to resume occupation of the matrimonial home.

[36] Having given up occupation voluntarily in those circumstances, it could not be said that the applicant would be welcomed back into the matrimonial home. That, however, is not the end of the story. Even if he were to be welcomed back into the matrimonial home, was he in a position to enjoy occupation of the property? That question must be answered with a resounding no. Unless the matrimonial home were to be reduced to some sort of commune, it is difficult to image it being made a home, simultaneously, for the defendant/applicant's old and new families. The defendant/applicant was neither in a position to be welcomed back nor to enjoy occupation of the property: ***In re Pavlou,*** *supra.* There was therefore no ouster.

[37] I will now shift my attention to the allegation of third-party letting. In answer to that the claimant/respondent said the third party was the defendant/applicant's nephew who had been living at the property before her return to Jamaica in 2001. She described the allegation as an intentional falsehood. Without any documentary evidence to support the allegation of a tenancy, I cannot accept that there was one. ***Jones v Jones***, *supra,* would therefore not apply.

[38] I come now to the delay in sale of the subject property. It has not been demonstrated that the claimant/respondent has been the sole architect of the delay. In any event, delay in the sale of the property did not appear in any of the reported cases as a ground for the imposition of an occupation rent. Even so, it is unclear how delay could act as a trigger for an equitable accounting. As a matter of principle, it is in the adjustments of the accounts upon the sale of the property that an occupation rent becomes relevant. It is noted that accounting has already been ordered in respect of mortgage liability.

Conclusion

[39] All that was established was bare occupation. As has been shown, bare occupation by one co-owner carries no liability to pay an occupation rent to the other co-owners: ***M'Mahon v Burchell,*** *supra*. The defendant/applicant has no

entitlement to an occupation rent from the claimant/respondent where he relinquished occupation: ***Dennis v McDonald***, *supra*. Further, there was a failure to show that the claimant/respondent was in receipt of any rent from the property. Consequently, the defendant/applicant failed in his bid to show that the claimant/respondent was liable to pay an occupation rent.