



[2015] JMSC Civ. 112

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012 HCV00617

**IN THE MATTER of an Application by Raymond
Johnson**

AND

IN THE MATTER of a Claim under the Partition Act

AND

IN THE MATTER of an Application concerning all the parcel of land part of REIDS PEN now called WEST AINTREE, GREATER PORTMORE in the parish of SAINT CATHERINE being the lot numbered THREE HUNDRED AND TWENTY-TWO on the plan of part of Reids Pen now called West Aintree, Greater Portmore aforesaid deposited in the Office of Titles on the 26th day of July, 1994 of the shape and dimensions and butting as appears by the said plan and being all that parcel of land comprised in Certificate of Title registered at Volume 1280 Folio 757 of the Registrar Book of Titles.

BETWEEN RAYMOND LINCOLN OLIVER JOHNSON CLAIMANT

AND ANGELA EUNICE JOHNSON DEFENDANT

IN CHAMBERS

Miss Marjorie E. Shaw instructed by Brown and Shaw for the Claimant

Michael Williams for the Defendant

Heard on: March 19th 2015 and June 15th, 2015

**CIVIL PROCEDURE – PARTITION ACT SECTIONS 2 AND 3- DISPOSSESSION OF PROPERTY –
LIMITATION OF ACTIONS ACT SECTIONS 3, 4, AND 14 OF PROPERTY (RIGHTS OF SPOUSES)
ACT SECTIONS 2 AND 13.**

SHELLY-WILLIAMS, J (AG)

BACKGROUND

[1] The Claimant, **RAYMOND LINCOLN OLIVER JOHNSON**, is a Customer Service Representative, who lives in Kingston 17 in the Parish of Saint Andrew and is the former husband of the Defendant. The Defendant is a Housewife who resides at Lower Christiana P.O. in the Parish of Manchester. The Claimant and the Defendant are Jamaican Nationals.

[2] The parties herein were married to each other and are registered as the proprietor of premises known as lot numbered 322 part of REIDS PEN now called WEST AINTREE, GREATER PORTMORE in the parish of SAINT CATHERINE being the lot numbered THREE HUNDRED AND TWENTY-TWO on the plan of part of Reids Pen now called West Aintree, Greater Portmore aforesaid deposited in the Officer of Titles on the 26th day of July, 1994 of the shape and dimensions and butting as appears by the said plan and being all that parcel of land comprised in Certificate of Title registered at Volume 1280 Folio 757 of the Register Book of Titles, (“the property”). The parties were married in 1989 and the marriage between the parties was dissolved in 2003 the Defendant having filed for divorce in 1999. The property which is the subject of this application, has been rented from 2006 by the Defendant who benefits exclusively from the income obtained from the said rental.

THE FIXED DATE CLAIM FORM

[3] The Claimant seeks his entitlement in the said premises pursuant to the Partition Act.

The Claimant contends that:-

- a. He is entitled to the severance of the joint tenancy and one-half of the legal and/or beneficial interest in the property (also referred to in the filed documents as “the premises”)

The Claimant seeks the following Remedies, Directions and/or Order:-

- a. A Declaration that he is entitled to one half of the legal and/or beneficial interest in the premises registered at Volume 1280 Folio 757 of the Register Book of Titles;
- b. Further, an Order that the joint tenancy be severed;
- c. An Order that the premises be valued by a Valuator agreed upon by the parties herein and that the cost of the said valuation be shared between the parties herein.
- d. An Order that the premises registered at Volume 1280 Folio 757 of the Register Book of Titles be sold on the open market and that the net proceeds of sale be shared between the parties, in accordance with their respective interest;
- e. An Order that the Claimant's Attorney-at-Law do have conduct of the sale of the premises;
- f. An Order that the Defendant does account to the Claimant for all income collected from the premises registered at Volume 1280 Folio 757 of the Register Book of Titles
- g. An Order that the Registrar of the Supreme Court be empowered to sign any and all documents to effect a registrable Transfer if either of the parties is unable or unwilling to do so;
- h. Any further relief, directions and/or Orders as this Honourable Court deems just in the circumstances.

[4] The Defendant filed an affidavit in response on the 13th April 2013 and in it she is claiming the following orders:-

- a. A Declaration that Angella Brown acquired title by possession in all the interest in the property situated at Lot 322, 7 West Greater Portmore in the Parish of Saint Catherine and being all that parcel of land registered at Volume 1280 Folio 757 of the Register Book of Titles.
- b. A Declaration that Raymond Lincoln Oliver Johnson whose name appears on the Certificate of Title registered at Volume 1280 Folio 757 of the Register Book of

Titles as joint tenants with Angella Johnson is not entitled to share in the said property by reason of abandonment.

- c. A Declaration that the Defendant Angella Brown is legally and beneficially entitled to all the interest in the said property.
- d. Further or in the alternative, that the Defendant Angella Brown is entitled to a 95% legal interest in the property registered at Volume 1280 Folio 757 of the Register Book of Titles and the Claimant is entitled to a 5% interest therein.
- e. That a transfer of the property be effected in the name of Angella Brown as owner thereof.
- f. That the cost of an incidental to the transfer of the said property be borne by the Defendant.
- g. That the joint tenancy be severed.
- h. That the Registrar of the Supreme Court be empowered to sign any and all documents to effect a transfer of the property in the event that either party is unwilling or unable to do so.
- i. Costs
- j. Such further relief or orders as this Honourable Court deems just.

THE APPLICATION

[5] A Fixed Date Claim Form was filed on the 26th of March 2012 in which the Claimant is seeking the above mentioned orders. In support of the application the Claimant filed two affidavits on the 26th of January 2012 and the 28th of June 2013. In response, the Defendant filed two affidavits on the 13th of April 2013, the 16th of September 2013 and a supplemental affidavit filed on the 17th of March 2014.

[6] This claim is to be decided in relation to three legal issues. These are;-

- a. Whether the property can be considered to be Matrimonial Property and as such falls under The Property (Rights of Spouses) Act hereinafter referred to as

(PROSA). If this is so the property should then be divided equally between the parties.

- b. Whether time prescribed under the Limitations of Action Act 1881 has expired for the Claimant to file this application and as such the interest of the Claimant should be transferred to the Defendant.
- c. Whether the Claimant is allowed to make the claim under the Partition Act and if so whether he is entitled to a 50% interest in the property as claimed by him or 5 % as claimed by the Defendant.

Property (Rights of Spouses) Act (PROSA)

[7] The first issue is whether or not the Claimant can make a claim under PROSA? This Act defines a spouse to include Divorcees as such the Claimant would then fall under the category of persons entitled to make such a claim.

[8] The next issue is whether the property falls under property that is to be properly dealt with under this act. Section 2 of PROSA seeks to answer this question. Section 2 of PROSA states:-

“ family home means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with and land, building or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit.”

[9] In the affidavits of the Claimant he claims that this was the home he and the Defendant purchased together and they resided after the marriage. He then argues that the property would be considered the Matrimonial Home and as such falls under this act to be divided. The Defendant agrees and this matter is therefore resolved.

[10] Having crossed this hurdle the next question to be answered is when should such applications be made? Section 13 of PROSA states that;-

13(1) A spouse shall be entitled to apply to the court for a division of property-

- (a) On the grant of a decree of dissolution of a marriage or termination of cohabitation; or
- (b) On the grant of a decree of nullity of marriage; or
- (c) Where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- (d) Where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

(2) An application under subsection (1) (a),(b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.

(3) For the purposes of subsection (1) (a) and (b) and Section 14 the definition of 'spouse' shall include a former 'spouse'.

[11] In seeking to decide whether or not this claim is to be decided under this statute the judgment of **Allen v Mesquita** [2011] JMCA Civ 36 at paragraphs 13 and 14 was considered. In that decision Harris JA stated that;-

[13] Admittedly, the Act does not outline the factors to be taken into account when considering an extension of time. This, however, would not preclude the court from giving consideration to Mr. Manning's submissions, neither would the fact that there is some dispute as to the date on which the parties ceased cohabitation render the court incompetent to consider them. The respondent has acknowledged that the fixed date claim form is out of time. A party who seeks leave to bring an action in circumstances where leave is required, must satisfy the court that he is entitled to place himself under the umbrella of the court's jurisdiction.

[14] Thus, in seeking an extension of time to file his claim, an applicant must also seek leave to extend the time and place before the court reasons to be evaluated by the court to justify his right to do so. Such reasons should explain the delay in filing the claim.

[12] The parties were married in 1989 and they were divorced on the 10th of October 2003. The Claimant filed his claim nine (9) years after they were divorced. There was no application for an extension of time to file this claim. There was no good reason proffered by Claimant for the long delay in filing the application and as such this Claim is barred by means of Section 13 of PROSA. I find no proper basis for the court to exercise its discretion to extend the time for filing of the application.

DISPOSSESSION

[13] The applicable laws have been laid down in a number of cases, namely, **Wills v Wills**[2003] UKPC 84, **Paradise Beach Transportation Company v Cyril Price Robinson**[1968] A.C 1072 PC (**Paradise**), **J A Pye (Oxford) Ltd v Graham** [2003] 1 AC 419 HL (**Pye**), and **Freckleton v Freckleton** HCV 01694 of 2005. In **Freckleton**, Sykes J acknowledged the principle in **Powell v McFarlane** (1979) 38 P& CR 452 where Slade J stated that

‘the intention necessary that must exist is the party which is claiming to have dispossessed the registered owner.’

Lord Upjohn in the case of **Paradise** speaking on behalf of the Board made a number of conclusions.

‘The relevant statute is the Limitation of Actions Act of 1881, sections 3, 4 and 14 which was developed to rid the law of the doctrine of non-adverse possession. The basis is that the judges found it difficult to accept that a paper owner might lose his land by the simple fact of another person being in possession without any “hostile” act of the dispossessor. The law on dispossession is that the dispossessor must have the animus

possidendi coupled with possession and the dispossessor must use the land in such a manner as to make it clear that he was behaving like the owner and that use when examined must show that he ousted the paper owner. Anything less was insufficient to dislodge the paper owner's title.

'The effect of the Limitations of Actions Act 1881 is that one co-owner, whether joint tenants or tenants in common, could extinguish the title of the other. Under section 3 of the Act the question is whether the requisite number of years has elapsed from the time the right of entry of the paper owner accrued, regardless of the nature of the possession of the person claiming title by extinction of the paper owner's title. Section 3 of the Act places the time period for dispossession at twelve years.'

[14] The law is clearly stated by Lord Browne- Wilkinson in **Pye** which was accepted by Sykes J in **Freckleton** to be that there are two elements necessary for legal possession:

(1) 'a sufficient degree of physical custody and control (factual possession) and

(2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). What is crucial is to understand that, without the requisite intention, in law there can be no possession.'

[15] The Judicial Committee of the Privy Council in **Wills** at paragraph 19 stressed the importance of scrutinizing all the facts in any given case when it said:

***[19]** All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the Court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also*

rightly stated that the Court should not be ready to infer possession from relatively trivial acts.....”

[16] The burden is therefore on the person who is claiming that the title of the paper owner has been extinguished. That person has to establish that there was

(a) occupation or physical control of the land and

(b) an intention to possess. Intention to possess meaning the statement of mind which says that the dispossessor has it in mind to possess the property in question in his own name or on his own behalf to exclude the world at large including the paper title owner so far as this is possible.

As stated in **Freckleton** at paragraph 19.

“the legal position now is that a registered owner of land or indeed any other owner may now have his title extinguished by his lack of vigilance. If the registered owner wishes to prevent this happening he simply needs to heed the advice of Slade J in Powell, that is to say, do some “slight” acts either by himself or on his behalf so that it will negative the burgeoning “right” of the dispossessor. Whether that “slight” act will be sufficient depends on the facts of each case. There can be no catalogue of “slight” acts.”

[17] Mr. and Mrs. Johnson were married and subsequently after on or about the 26th day of July 1994 they acquired property as joint tenants. The deposit was acquired by means of a loan which both parties paid the installments. A loan was secured with Caribbean Housing Development Corporation to finance a mortgage on the property in both names. After the purchase of the property and shortly after the marriage Mr. Johnson worked in Guantanamo Bay and visited the island occasionally.

[18] The relationship of Mr. and Mrs. Johnson broke down sometime in 1999. According to Mrs. Johnson this was when Mr. Johnson moved out all his personal belongings. Mr. Johnson has also noted that they maintained regular communication and close interaction with each other until 1999.

[19] The evidence is that since 1999 Mr. Johnson has not lived at the property and Mrs. Johnson has retained possession of the property. In fact Mrs. Johnson gave affidavit evidence which I accept that she has also during that time lived at the premises with her children and extended family and has also rented the property. From the above it is clear that Mrs. Johnson has been in occupation of the property and has exercised control over it since 1999.

[20] However having looked at the evidence adduced by Mrs. Johnson in this case, it is not clear that she had the intention to possess the property in her own right and in her own name to the exclusion of her former husband or the world at large. The evidence is that she occasionally asked Mr. Johnson for contribution to pay for the mortgage for the property. She asked Mr. Johnston to source a loan from his mother who worked at the Palisadoes Credit Union to build a perimeter fence. She solicited funds from Mr Johnson to pay expenses in relation to the improvement and maintenance of the property.

[21] According to Mrs. Johnson she did not find it prudent to notify Mr. Johnson of any dealings with the property as she thought he had abandoned it. While this may be so, Mrs. Johnson has not sufficiently demonstrated that she has dispossess Mr. Johnson, nor that she had the intention to dispossess Mr. Johnson. This is evident as she continuously mentioned his failure to contribute to the property which implies that she acknowledges an obligation to maintain on his part and therefore a right in the property.

[22] The law is strikingly clear the dispossessor must have the intention to dispossess. On these bases the argument must fail that Mrs. Johnson has dispossessed Mr. Johnson of the property over the requisite period.

[23] This is then coupled with the affidavit evidence of the Claimant that he made contributions on the property up to 2003. The majority of the information in relation to the contribution of the Claimant is detailed in the second affidavit of the Claimant sworn on the 2nd of July 2013. The Claimant had stated in his affidavit that he made contributions in relation to the property. The Claimant exhibited receipts in support of his claims. These receipts included payments to Caribbean Housing Finance Corporation up to 2003 and National Housing Finance Corporation up to 2003. The mortgage for the property was with these two institutions.

[24] The fact that there were payments made by the Defendant up to 2003 to an institution that is responsible for the mortgage of the property shows that the Claimant had some association with the property and as such the 12 year period required to dispossess the Claimant had not expired when he would have filed the Fixed Date Claim Form on the 26th of January 2012.

PARTITION

[25] This application would then have to be considered under the Partition Act, namely sections 2 and 3 which gives the court the power to order a partition or to make an action for sale and distribution of the proceeds.

[26] Generally, division of property between spouses is governed by the Property (Rights of Spouses) Act. However, this application does not fall within the ambit of the Act because the application was made out of time and the Claimant had made no application for the extension of time or give reasons for the delay. Therefore the equitable principles will apply.

[27] The starting point in such cases as outlined in **Stack v Dowden**[2007] UKHL 17 is that where there is joint legal ownership this raises a strong presumption of joint beneficial ownership. In determining the parties' intentions, the court may consider a wide range of factors. Thus at paragraph 69 Baroness Hale in **Stack v Dowden** states:

In law, "context is everything" and each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or

constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.'

[28] The starting point is that it is for Mrs. Johnson to show that the common intention, when taking a conveyance of the house into their joint names or thereafter, was that they should hold the property otherwise than as beneficial joint tenants. Generally in situations where the parties were married and acquired property there is nothing to indicate that a contrary inference should be drawn other than equal shares in the property.

[29] In considering the factors mentioned by Baroness Hale in paragraph 69 of her opinion, the context of the acquisition of the property was that it is to be used as the family home. The purchase was done in the joint names because the parties were married at the time. I accept the affidavit evidence of Mrs. Johnson that the primary purpose of the acquisition was to provide a home for Mrs. Johnson and their new born baby since Mr. Johnson was frequently away at work. However, there are many factors indicated by Mrs. Johnson that can indicate that the parties did have a different intention subsequent to acquiring the property.

[30] Firstly, receipts provided by Mr. Johnson of payments to the Palisadoes Credit Union for the mortgage on the property do not go beyond January of 1995. This leaves another 17 years before the claim of Mr. Johnson and has not averted that he made payments on the outstanding loan. Secondly Mrs. Johnson has listed several expenses incurred by her as contribution towards substantial improvements of the property. Namely:

Landscaping	\$50,000.00
Top soil	\$10,000.00
Construction of drive way	\$25,000.00
Construction of verandah	\$150,000.00

Grilling	\$100,000.00
Re-modeling of bathroom	\$45,000.00
Installation of new cupboards	\$50,000.00
Cost to fix cracks in walls	\$20,000.00
Cost to fix roofing	\$10,000.00
Sealing roof	\$100,000.00
Repairs	\$333,800.00
Cupboards	\$360.00 (USD)

[31] According to the affidavit evidence of Mrs. Johnson, that I accept, she expended a total of \$893,800.00 JMD in addition to the \$360.00USD towards substantial improvement and maintenance of the property. In addition she indicated that she expended monies towards installation of security lighting outside the property, installation of ceramic tiles, paint work, and continuously fixing of cracks in the walls.

[32] On the other hand there is also some evidence of Mr. Johnson's contribution to the property. The parties indicated that they both contributed to the deposit amount although the portion is disputed by both parties. There is conflicting evidence over the payment of the mortgage installments. There is no documentary evidence to identify the source of any of the payments. On this basis the court will accept that both parties contributed.

[33] Mr. Johnson also adduced evidence of payments made to the Palisadoes Credit Union up until January 30, 1995 and receipts from hardware store for the purchase of material used in the improvements of the property. I note that these payments were 17 years prior to the date the claim was filed and 4 years prior to the separation of the parties. According to the evidence adduced by Mr. Johnson he contributed the majority of the loan payments from 1993 to 1995. He contributed \$15,272.00 and Mrs. Johnson \$6,830.00 for the two years period. In 1998 he also paid a cheque in the amount of \$1,500.00 towards the mortgage.

[34] However, the evidence of receipts for payments to the mortgage company Caribbean Housing Finance Corporation Ltd does not indicate who made the payments. The court cannot therefore conclude that those payments were only made by Mr. Johnson. I also note and accept the assertions made by Mrs. Johnson, that Mr. Johnson stole some of the receipts from the house when he left in 1999.

[35] There is evidence of money transfer receipts to Mrs. Johnson through Western Union up to 2001 and payments to Cable and Wireless Credit Union from 2006 to 2007. There is evidence of Mrs. Johnson that had to seek the assistance of the court for the Claimant to pay her maintenance for their daughter. The sum for this maintenance was \$7,000 per month. Due to the nature of the sums paid and the times that they were paid the court has accepted Mrs. Johnson's affidavit evidence that those payments were for the maintenance order made by the court for the child.

[36] The fact that the property was conveyed into joint names, that Mr. Johnson was jointly and severally liable under the mortgage, that he was occupying the property at the time of the acquisition and that he contributed to the mortgage lead me to the conclusion that it was intended by the parties that Mr. Johnson should have a beneficial interest in the property. However this common intention changed when Mr. Johnson moved out of the home in 1999. Mrs. Johnson has since then and before expended monies towards the improvement and maintenance of the home. Mr. Johnson was not living at the house and made little or no contributions.

[37] It is plain that Mr. Johnson's financial contributions were significantly less than Mrs. Johnson. Mrs. Johnson paid most of the mortgage over the years and made improvements to the property. Taking all the facts into consideration, all the facts that I have found above, in the circumstances, the court has decided that Mr. Johnson should have a 25% beneficial interest in the property.

CONCLUSION

The orders of the court after analysing all the affidavit evidence and the submissions are that;-

1. The Claimant did not make an application for extension of time for the claim to be brought under PROSA and as such the Claimant is barred by Section 13 of the said Act.
2. The Claimant has not been dispossessed of a portion of the property. The Claimant has proven that he made contributions towards the property up to 2003 and the present Claim was filed in 2012. The time for dispossession according to Section 14 the Limitation of Actions Act is 12 years and as such the Claimant has not been dispossessed.
3. The claim is for a declaration that the Claimant is entitled to 50% of the property. Based on the affidavit evidence and the documents in support I do not find that the Claimant is so entitled. The Claimant is declared to be entitled to 25% of the property.
4. That the joint tenancy be severed.
5. That the property be valued by a valuator to be agreed upon by the parties and the cost of the valuator be shared between the parties within 90 days of this order.
6. That the Defendant has first option to purchase the Claimant's 25% of the property within 90 days of the valuation report.
7. That the property be sold on the open market and the proceeds divided between the parties if Defendant do not purchase the Claimant's 25%.
8. That the Registrar of the Supreme Court be empowered to sign any and all documents to effect a transfer of the property in the event that either party is unwilling or unable to do so.
9. Each Party to bear their own cost.

