



[2010] JMSC Civil 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV O2548

BETWEEN AGATHA PETTIGREW

CLAIMANT

AND COLLEEN THERESA DANVERS CHANNER

DEFENDANT

Ms. Jamila Thomas instructed by Lilieth D. Lambie-Thomas & Company for Claimant.

Ms. Kayann Balli for Defendant.

IN CHAMBERS

HEARD: FEBRUARY 1 & 2, 2012

CORAM: ANDERSON, K. (J.)

[1] This matter has come before this Court by means of a Claim form which was filed by the Claimant on May 20, 2010. The essence of the Claim which has been particularized in the Particulars of Claim which was also filed on same date, is that the Defendant was at all times, the registered proprietor of a parcel of land as comprised in Certificate of Title Registered at Volume 1086, Folio 916 of the Register Book of Titles, with its civic address being at No. 9 Occala Way, Willowdene, Spanish Town P.O. in the parish of St. Catherine. The Claimant has alleged that in or about 2004, she was invited by the Defendant to improve upon the aforementioned property, for her own benefit. The Claimant contends that following upon that invitation, she made improvements to said property and as a result, thereafter moved to reside in same, since 2008. She has been living there ever since. It is further contended that since about March of 2009, the Defendant has been interfering with the Claimant's use and enjoyment of the said property, in an effort to force the Claimant to vacate the same. The Claimant therefore has sought against the Defendant, primarily, the following reliefs:-

- (i). A declaration that the Claimant has an interest in the property situated at 9 Occala Way, Willowdene, Spanish Town P.O. in the parish of St. Catherine;
- (ii) A declaration that the subject property is hold by the Defendant on trust for the Claimant and herself; and
- (iii)** (a) An order that the defendant transfers to the Claimant such portion of the property as will represent the Claimant's interest in the subject property; or in the alternative –
(b) An order that the Defendant pays to the Claimant such sum as would represent the value of the Claimant's interest in the subject property and;
- (iv) An injunction restraining the Defendant from doing any act to interfere with the Claimant's interest in the subject property and the Claimant's use and occupation of the property.

[2] The Defendant has filed a Defence to the Claim and in her Defence, has painted a completely different picture of the events leading up to the current state of affairs as between the parties and the subject property. It will not be necessary to recount the details thereof, but suffice it to state that the nature of the agreement between the parties is disputed, as also, the identities of the parties who reached such agreement and, the extent of the contribution, from a financial standpoint, of the Claimant, in terms of the subject property, following upon that agreement.

[3] The Claimant filed an Application for Court Orders on November 2, 2011, seeking an interim injunction, restraining the Defendant, her servants and/or agents from interfering with the Claimant's use and enjoyment of the portion of the subject property, as is occupied by the Claimant; and an interim injunction directing the defendant to reconnect the electricity supply to the portion of the subject property as is occupied by the Claimant. Thus, it is both prohibitory and mandatory injunctive relief being sought by the Claimant.

- [4] There are two grounds upon which the aforementioned Orders are sought by the Claimant, these being firstly, that the Defendant has disconnected and/or disrupted the supply of electricity to the portion of the subject property which is occupied by the Claimant; and that the Defendant has interfered with the Claimant's use and enjoyment of the portion of the subject property which is occupied by her.
- [5] What is apparent from the evidence as given by the Defendant in response to this Application and to the Affidavit evidence which has been filed and served by the Claimant in support thereof, is that the electricity supply to the portion of the premises which is currently occupied by the Claimant, was one which arose from an illegal electricity connection. This specific contention of the Defendant, as contained in her affidavit filed on January 26, 2012, has not at all been challenged by the Claimant and thus, this Court accepts the veracity thereof. That illegal electricity connection arose in a situation wherein, the Claimant began occupying this being an addition that was made to the subject – property following upon an oral agreement between various parties, the identities of whom are disputed; at a time when the addition was not yet completed and she did so occupy same at that time, without the defendant's consent, since it was agreed between the parties that the Claimant would not have moved in until the construction of that addition was complete. Once again, this is an allegation made by the Defendant in her Affidavit, which has not been disputed and accordingly I accept the veracity thereof.
- [6] The Defendant has also contended, in her affidavit evidence, that after having experienced problems with the light bills each month for the premises not being contributed to on time by the Claimant, as was agreed between the parties, should have been done, she had an electrician at her expense, re-wire the subject property (home) and it is since then that the Claimant has not had access to electricity supply to her portion of the home. If this was in fact done, then such meter would clearly be registered in the Claimant's name and the Claimant would

be responsible for the payment of those bills. In response to such request, the Defendant's counsel wrote to the Claimant's counsel specifying therein that the Defendant had plans to have the premises re-wired by certified electricians, but was not interested in having her clients share in the cost of having this done, "having regard to the inflated claims that have been made for amounts previously expended on the property."

Accordingly, in that letter, the Claimant's counsel advised that the letter requested, seeking the Defendant's approval of the installation of an electricity meter at the portion of the premises currently occupied by the Claimant, would not be forthcoming from her client (the Defendant) at that time. That letter from the Defendant's counsel to the Claimant's counsel, is dated February 16, 2011. The Defendant has contended in her affidavit evidence, that she has not been able to undertake the expense of re-wiring the portion of the premises occupied by the Claimant and this is why same has not been done. Interestingly enough though, at least insofar as this Court is concerned, is that no request was ever, it seems, made of the Defendant, that she re-wire the portion of the premises currently occupied by the Claimant. Clearly, if there does exist an illegal connection there, a meter will not be installed by the Jamaica Public Service Company Limited unless and until that, 'problem' has been rectified. The Jamaica Public Service Company will no doubt resolve any problem as to wiring, before installing the new meter as per any approval of same as may hereafter be given by her. This Court though, can make an Order requiring the Defendant to approve the installation of such new meter, but make such Order subject to certain conditions, such as that, the portion of the premises occupied by the Claimant at present, be checked as to the wiring thereof, by a certified electrician and that, if necessary, that portion of the premises be re-wired by such certified electrician and that the relevant authority certify the wiring thereof. All of these conditions should be undertaken at the sole expense of the Claimant.

- [7] If an Order such as that specified in paragraph 6 of this Judgment were to be made, it would best accord with the overall interests of justice, bearing in mind the hardship undoubtedly currently being experienced by the Claimant, arising from her not having electricity at the portion of the subject property which she currently occupies – this being hardship alleged by the Claimant in her affidavit evidence and which on this point, has not been directly challenged by the Defendant in her affidavit evidence, as a result of which, this Claimant accepts the veracity thereof. Bearing in mind that there is a Claim pending in relation to the subject property as aforementioned, such an Order would best ensure that nothing unduly detrimental happens or at least, continues to happen to either party, for as long as that Claim remains unresolved by this Court.
- [8] Although it is mandatory injunctive relief being sought by the Claimant, insofar as the reconnection of electricity supply to the portion of the subject property which is currently occupied by the Claimant is concerned, it is to be noted that as a matter of law, the Court, in deciding on whether or not to grant mandatory injunctive relief, should no longer simply apply the test as laid down in **Shepherd Homes v Sandham [1971] Ch. 340**, this being that the Court must be assured that the Claimant's Claim has a high degree of assurance of success, if it is to grant such an injunction (that is, mandatory). The House of Lords (as it then was), laid down in the case – **Films Rover International Ltd., and Cannon Film Sales Ltd. [1987] 1 W.L.R. 670**, that the, 'high degree of assurance' test does not have to be satisfied in all cases, and that the fundamental principle on applications for prohibitory and mandatory injunctions alike, is that, "The Court should take whichever course appears to carry the lower risk of injustice if it should turn out at trial to have been wrong." This approach has been followed in subsequent English case law. See: **Nottingham Building Society v Eurodynamics Systems plc. (1993) F.S.R. 48**; and **Zockou Group Ltd., v Mercury Communications Ltd., (1998) F.S.R. 354**. For these reasons, as stated by David Bean, in his text – **Injunctions, 10th edition (2010)**, at paragraph 3.49, arguments over whether injunctive relief

as sought, should be classified as prohibitive or mandatory, are barren. On this point, see page 680 in the Films Rover case.

- [9] Insofar as the Claimant's application for a prohibitive injunction is concerned, this being her application to restrain the Defendant from interfering with her quiet enjoyment of the portion of the subject property which she currently occupies, is concerned, the House of Lords in the Films Rover Case, has made it clear, that the 'box ticking' approach as has arisen out of the earlier House of Lords Judgment in the renowned case of American Cyanamid Company and Ethicon Ltd., is not an approach which ought to be followed by this Court, in deciding on whether or not injunctive relief ought to be granted. Thus, whilst the factors as laid down in the American Cyanamid case are still relevant, the Court cannot simply take into account one of these factors at a time, or in isolation of other factors. The factors as specified in the American Cyanamid Case, were as follows:- (i) Whether there is a serious question / issue to be tried ; (ii) Inadequacy of damages ; (iii) Balance of convenience .

Whilst these factors are still relevant, the primary factor to be considered by this Court in deciding on whether interlocutory/interim injunctive relief ought to be granted, is the risk of injustice to the respective parties, if the injunctive relief as sought, is or is not granted, as the case may be. What really matters in this regard is what the practical consequences of the injunction are likely to be and in that regard, where the greater risk of injustice will lie. This Court should do its best to ensure that whatever order it makes on the application for injunctive relief as is being sought, will do the least risk of injustice. This is the approach suggested by the **Privy Council in the case of N.C.B (Ja.) Ltd., and Olin (2009) 1 W.L.R. 1405**, as the approach which ought to be taken. Such is therefore the approach which I have taken, for the purposes of rendering this Judgment.

[10] In the circumstances, I am of the considered opinion that the Claimant ought to have quiet enjoyment of the portion of subject property which she currently occupies, but I am also of the view, that whilst the Defendant has not applied for such relief by means of an application for an injunction, nonetheless, the Claimant should be enjoined from interfering with the Defendant's quiet enjoyment of the property which she (the Defendant) currently occupies. This would be best for both parties and to my mind, best accord with the overall interests of justice.

[11] I must, of necessity, mention at this juncture, that the Claimant in her affidavit evidence in support of her application, gave that which can be described as no more than a bare undertaking as to damages. As a general rule, a bare undertaking as to damages is not enough and the giving of same greatly heightens the risk of injustice to the Defendant. An applicant for injunctive relief should ordinarily provide to the Court hearing that application, satisfactory evidence to satisfy the court of the ability of the party making the undertaking, to satisfy same. On this point, see an earlier Judgment of mine, in **Romario Mundle and Diana Hall and Owen Hall and Harold Hall – Claim No. 2011 HCV 04919** and also, **Locke v Bellindgon Ltd., (2002) 61 W.I.R. 69, at paragraphs 33-38 and 78-81**. This Court can however, in appropriate cases, waive the otherwise required undertaking as to damages. See Rule 17.4(2) of the Civil Procedure Rules on this point. It would, to my mind, be appropriate to so do, in the particular circumstances of this particular case, insofar as the Claimant herein is clearly of limited economic means and additionally, the likelihood of there being any, or any significant economic loss to the defendant arising from this Court granting orders in terms as suggested above, is either non-existent or minimal. A similar approach in this regard, was adopted by the Court in **Allen v Jambo Holdings Ltd. (1980) 1 W.L.R. 1252**.

[12] There remains just one other important issue to be addressed as part and parcel of this Judgment and it is this : - The Defendant contends that the construction of

the addition to her home was done to facilitate her mother, who is in fact the Claimant herein, because at that time, the Claimant was not comfortable in the premises which she was then occupying. The Defendant has stated that it was understood between the parties, that the Claimant would occupy the expanded section of the house, but the improvement work done on the property would be for the Defendant's sole benefit **upon the Claimant and the Claimant's husband's death.** In that context, it must be realized that firstly, the Claimant is still alive. Also, no evidence was placed before this Court, to suggest that the Claimant's husband is now deceased. In the circumstances and pursuant to the agreement between the parties, as alleged by the Defendant herself, it must follow as a matter of inexorable logic that the Claimant should be permitted to have quiet enjoyment of the portion of the subject property which she currently occupies and that she must be afforded the opportunity to have electricity exist in that portion of the said subject property. This would flow from the very same agreement which the Defendant has given evidence of and essentially, that agreement would have changed the nature of the Claimant's occupancy of the relevant portion of the subject property, from that of a, "tenant at will," to instead, that of a, "tenant for life." In the circumstances, it would be unjust to deprive the Claimant of the benefit of that which the Defendant had expressly agreed to in this regard – if her own evidence on this point is to be believed.

[13] In the circumstances, I am making the following Orders:-

- (i) **The Defendant shall, by or before February 10, 2012, provide to the Claimant's Attorneys-at-Law, a letter addressed to the Jamaica Public Service Company, requesting therein that Jamaica Public Service Co. Ltd., install a new meter for the portion of the subject property which is currently occupied by the Claimant and that such new meter when installed, be installed in the Claimant's name only.**

- (ii) It is also ordered that, if, as a condition of installation of such new electricity meter by Jamaica Public Service Co. Ltd., it is required by Jamaica Public Service Co., Ltd., that the portion of the subject property currently being occupied by the Claimant, be re-wired by a certified electrician and/or that any back-bills for electricity supply as may have been obtained arising from any illegal electricity connection as either may now exist, or may have existed as regards, the portion of the subject – property currently occupied by the Claimant, then the payments of any and all such expenses shall be borne exclusively by the Claimant.**
- (iii) It is ordered that the Claimant shall afford the Defendant, quiet enjoyment of the portion of the subject property which the Defendant currently occupies and also, that the Defendant shall afford the Claimant, quiet enjoyment of the portion of the subject property which the Claimant currently occupies.**
- (iv) The general requirement that the Claimant provide an undertaking as to damages is waived.**
- (v) The costs of and pertaining to the Claimant's Application, shall be costs in the Claim.**
- (vi) The Claimant shall file and serve this Order.**