



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV01983

BETWEEN	CARL BARROWS	CLAIMANT
AND	JACQUELINE BARROWS	1ST DEFENDANT
AND	REGISTRAR OF TITLES	2ND DEFENDANT

Interlocutory Injunction- Registration of Titles Act - Notice to Caveator expired- Whether injunction to be granted barring registration of transfer- whether damages an adequate remedy

Kimberly Dobson, Tamara Francis Riley-Dunn instructed by Kerene Stanley & Co. for the Claimant

Raphael Codlin & Karen Scott for the 1st Defendant

Taniesha Rowe-Coke instructed by the Director of State Proceedings for the 2nd Defendant.

Heard: 31st October, 2016 and 4th November 2016.

IN CHAMBERS

COR : BATTIS J.

[1] On the 4th November 2016 I gave my decision and made certain orders. I promised the parties that my reasons would be reduced to writing at a later date. This Judgment fulfils that promise.

[2] There were three matters before me. The first two were inter partes applications for injunctive orders. The other was an application, filed on the 23rd September 2016, for the Claim against the 2nd Defendant to be struck out. There was no objection by either the Claimant or the 1st Defendant to this latter application. I therefore ordered that the Claim against the 2nd Defendant, the Registrar of Titles, be struck out.

[3] The applications for injunctions were filed on the 25th August, 2016 and 1st September 2016 respectively. The application first in time was by the Claimant. The relevant orders applied for were:

- (1) “An Order preventing the 2nd Defendant from registering any dealing with property known as all that parcel of land part of Bella Vista in the parish of St. Andrew registered at Volume 1485 Folio 339 and formerly comprised in Volume 1057 Folio 626 until the determination of the claim.
- (2) An Interim Declaration that Caveat numbered 1981980 is not to be removed from Certificate of Title registered at volume 1485 Folio 339 of the Register Book of Titles, until the Claim is determined.”

The relief sought is expressed to be against the 2nd Defendant. It is I believe mutually understood that, the 2nd Defendant having been removed from the matter by consent, the relief claimed will continue as if claimed against the 1st Defendant.

[4] The Claimant’s application came on for hearing on the 26th day of August, 2016 before my sister Straw, J. On that date ex parte Orders barring registration of dealings were made until the inter partes hearing. That inter partes hearing was fixed for the 23rd September, 2016.

[5] The other application for injunctive relief was filed by the 1st Defendant on the 1st September 2016. The relevant Orders sought were:

- “(1) An Order that the Registrar of Titles immediately remove the caveat lodged by the Claimant against the Applicant’s

title registered at Volume 1485 Folio 339 of the Registrar Book of Titles and deliver to the Applicant all documents relating to the transfer of the property aforesaid with the name of the purchaser, Kimm Carol Daley, endorsed thereon.

- (2) An injunction restraining the Claimant, his servants agents or otherwise from lodging any further Caveat, against the Applicant's Title registered at Volume 1495 Folio 339 of the Registrar Book of Titles unless ordered to do so by the Honourable Court."

[6] This application was listed for hearing on the 2nd September 2016. On that date, it was adjourned to the same date and time as the other application. This was done in the expectation that both applications would be heard together.

[7] On the 23rd September 2016 Justice A. Lindo made the following orders:

- (1) Caveat numbered 19811980 registered against the Certificate of Titles Vol. 1485 Folio 339 be removed from the Registrar Book of Titles.
- (2) Inter partes hearing of Injunction granted on the 2nd day of September 2016 is adjourned to October 31 2016 at 2 p.m. for 1 hour.
- (3) 2nd Defendants application filed on the 23rd day of September to be heard on October 31, 2016."

[8] The applications for injunctive relief are the alter egos of each other. The Claimant seeks to prevent registration of any dealing with the land. The 1st Defendant seeks to remove any impediment to the registration of a pending transfer of the land. The circumstances in which these contending claims emerged may be shortly stated. In doing so, I am cognizant that at this interlocutory stage I am to make no factual findings where there is a dispute as to the facts. There is yet to be a trial and no observations I may make about the evidence are to impact the determination of facts which is to take place then.

Having made that clear the relevant facts may be gleaned from the affidavits filed : (a) Affidavit of Carl Barrows filed on the 25th August, 2016 (b) Affidavit of Jacqueline Barrows in response filed on the 4th September 2016 (c) Affidavit of Urgency by Jacqueline Barrows filed on the 1st September 2016 (d) Affidavit of Carl Barrows filed on the 21st September 2016 (e) Affidavit of Jacqueline Barrows in response filed on the 22nd September 2016 (f) Affidavit of Cheriese Walcott filed on the 23rd September 2016.

[9] The Claimant resides in the United States. The Defendant and the Claimant were once husband and wife. In the course of their marriage the property, the subject of this action, was purchased in their joint names. This is evidenced by a Certificate of Title registered at Volume 1057 Folio 626 of the Register Book of Titles on which is a transfer #444949 dated in February 1986. A house, which eventually became the matrimonial home, was built on the land. There is a dispute as to whether or not there was contribution by both parties to the purchase of land and to the construction of the house. The Defendant asserts that,

“The Claimant’s name was put on the registered title because of the request by my employers, Bank of Jamaica, to put the Claimant’s name on the registered title because we were then married and it is the bank’s policy, and it was so then, that a married woman who obtained loans from the bank to purchase property would and still is required to put the name of her husband on the registered title.”

[10] The parties eventually separated in or about the year 2000 and a decree absolute for divorce was granted on the 31st January, 2005. The Defendant applied some years later for a new title to the said land on which her name alone was to be placed. She asserts that she did this because of the time that had elapsed and because according to her the Claimant had no interest in the

property. A new title was obtained in the Defendants sole name and it is registered at Volume 1485 Folio 339 of the Register Book of Titles.

- [11] The Claimant found out about the issue of a new title and that the Defendant was taking steps to have the property sold. He therefore lodged a caveat 198198 against the new title and filed this claim on the 13th May 2016. The Defendant endeavoured to transfer the said title to Kimm Carol Daley an intended purchaser. Upon the said transfer being lodged for registration the Registrar of Titles issued a Notice to Caveator dated the 29th July 2016. That notice was sent on the 9th August 2016 and expired on the 23rd day of August 2016. As at the latter date the Claimant had not applied for or obtained an injunctive order.
- [12] On the 26th August 2016 the Claimant obtained ex parte an order of the court preventing the registration of any dealing with the land. That Order was served on the Registrar of Titles on the same day.
- [13] The parties have each filed written submissions. Oral submissions were also made before me. I am grateful to both counsel for their efforts. I will not however restate the submissions. Suffice it to say that having considered the authorities I decided, for reasons stated below, to grant the Claimant's application for injunctive relief.
- [14] It is common ground that the principles enunciated in ***American Cyanamid v Ethicon LTD [1975] 1 All ER 504*** and ***NCB v Olint [2009] JCPC 16***, are the ones applicable. It is therefore incumbent on me to first consider whether there is a serious issue for trial. If there is then the question of the adequacy of damages arises. If the scales in this regard are evenly balanced I then consider the balance of convenience or, in the more modern formulation, the justice of the case. In this connection all circumstances are to be examined.
- [15] The Claimant admits that he left the matrimonial home in or about the year 2001 when the parties separated. They divorced in 2005. He has never re-entered the house. He does not assert that he had any possessions there. Indeed, he

migrated in 2005 on his account. His case, if I understand his affidavits, rests on -

- a) contribution to construction and purchase
- b) his assisting with other household expenses and the educational expenses of the children
- c) that he never intended to abandon his interest
- d) An assertion that it was agreed between himself and the Defendant that she, would remain in the premises until she retired and, that he would not redeem his $\frac{1}{2}$ interest while she lived there.
- e) The Defendant in 2012 asked him to transfer this $\frac{1}{2}$ interest to her and he refused
- f) The property when purchased was registered in their joint names and it was a loan from his then employers, which facilitated that purchase.
- g) The application to register a possessory title which extinguished his $\frac{1}{2}$ interest was done without notice to him and without disclosing to the Registrar of Titles either their agreement or that he had not abandoned his interest in it. These omissions were deliberate and therefore fraudulent.
- h) That he is unaware of the current market value of the property and cannot say whether the sale price to the intended purchaser is a good one.
- i) A caveat was lodged prior to the transfer being lodged for registration and therefore the intended purchaser ought reasonably to have been aware of his claim.
- j) Damages would not be an adequate remedy because the Defendant resides in the United States and if the premises are sold and the proceeds dissipated he will be unable to recover any damages which may be awarded.

[16] It is the law that the validity of a claim to a possessory title, that is one based on the Limitation of Actions Act, is not determined by the intent of the owner of land.

Rather It is the intent of the person who claims a possessory title that is most relevant, that is, did the Claimant occupy as owner of all the land that is did she regard herself as such, see *Wills v Wills PCA No. 30 of 2002*.

The applicable principles are clear, however the evidence necessary to establish a case in one context, may markedly differ from the evidence required or sufficient in another context.

[17] It therefore cannot be said that the Claimant's case is unarguable or that he has no real prospect of success. He asserts that the Defendant remained in possession of the jointly owned property by mutual agreement. He says it was agreed that he would not redeem his $\frac{1}{2}$ interest while she remained there. If this is true it means the Defendant while in possession continued to recognise his half interest, she may not have had the intention to own the entirety of the property. The Claimant's assertion is not farfetched. In a context where he was migrating and the Defendant lived at the premises with their children, it is quite possible that they discussed and agreed to such a position. It will be a question of fact for a court at trial to determine whether there was such an agreement between the Claimant and the Defendant. It will also be a question of fact whether and what effect such an agreement had on the state of mind of the Defendant as it relates to her intention to possess as owner.

[18] There is also the allegation that he received no notice of the application to remove his name as a joint owner. He alleges that at all material times the Defendant knew his address in the United States. These allegations, if true, may also be significant. So too the failure to inform the Registrar of Titles of their mutual agreement, if such an agreement did in fact exist. A court at trial may find that the cancellation of the old title and registration of her sole interest in a new title was obtained by fraud.

[19] There being triable issues, the question arises whether damages are adequate as a remedy and whether it is just in all the circumstances to grant injunctive

relief. Neither party has placed supporting evidence before me of an ability to pay damages. The Claimant was content to assert :

“22. That I am a Realtor and Insurance Salesman and am gainfully employed and financially able to satisfy any undertaking which may be ordered by this Honourable Court.”

The Defendant gives even less information about her means but asserts that an injunction may lead to liability. This is because the intended purchaser may sue her for breach of contract. I am not satisfied that there is any merit in that concern. I accept Claimant’s counsel’s submission that in a sale of land damages are not generally awarded for a failure to make good title ***Bain v Fothergill (1874)LR 7 HL 158, Perreault v Fearon PO78/2002(unrpted Judgment delivered 24th November 2006 and, Ray v Druce [1985] 2 All E.R. 482.*** In any event, the presence of the caveat was notice to all the world. There is no suggestion that if the sale is lost another purchaser will be difficult to find; nor is it suggested that the value of the premises is diminishing.

[19] It seems to me that greater hardship is likely to be caused to the Claimant if the injunction is refused and he later succeeds at trial, than would be caused to the Defendant if the injunction is granted and she later succeeds. This is because if the sale goes ahead, unless an order of the Mareva type is granted, the Defendant will have access to and be able to utilise the entire net proceeds of sale. She states her address as the property being sold, which suggests that after the sale she will be going elsewhere. No evidence as to her future address has been provided. The Claimant if ultimately successful at trial may therefore have some difficulty recovering damages from her. On the other hand if the injunction is granted, and if the sale is in consequence aborted, the property will still be there and available to be sold. The Claimant resides abroad and therefore the Defendant may apply for security for costs.

In all the circumstances of this case therefore injunctive relief was granted.

[20] The Defendant's counsel has argued that the Claimant failed to make full disclosure at the ex parte stage and that in consequence the Order should be discharged without more. The alleged falsehoods or non-disclosures related to (a) the year the parties got married and (b) the failure to indicate that the 14 day notice, given in the warning to caveator, had expired prior to the filing of legal action. I had occasion recently to restate the duty of full and frank disclosure on an ex parte application see **Port Kaiser Oil Terminal SA v Rusal Alpart Jamaica (A Partnership) (2016) JMCC COMM CD 10(Unreported Judgment delivered 7th April 2016)**.

[21] In this case, the Claimant explains the misstatement of the date of marriage as a typographical error. This appears to be the case because his Particulars of Claim, filed on the 22nd August, 2016, clearly states that the land was purchased in or about 1986, became the matrimonial home and remained so until April 2001, when the Claimant moved out of the home. I accept that the assertion on affidavit that the parties got married in 2001 was an error. The failure to indicate that the period stated in the Registrars Notice had lapsed, is however troubling. The notice was attached to an Affidavit as exhibit CB3 and on it the date of service is clearly displayed. This may not have sufficed as it is incumbent on counsel to bring to the attention of a judge hearing a matter ex parte all facts which may impact the decision one way or another. There is however no rule of law preventing injunctive relief after the lapse of a caveat. In this case the Registrar had not registered the transaction up to the date of the application to court. That being so, I would not penalise the Claimant for not expressly pointing to the fact that the 14-day period had expired 3 days earlier. It seems to me that the court would have granted the same relief even if the fact had been indicated; see Section 140 of the Registration of Titles Act, which contemplates that in an appropriate case the court can extend the 14-day period.

[22] The Defendant urged this court to say that the new title once issued was indefeasible in the absence of fraud, and that, since fraud was not alleged or particularised, relief should be refused. I disagree because, as stated at

Paragraphs 15 and 18 above, the Claimant has made it sufficiently clear in his statement of case that fraud is alleged as well as the basis of the assertion.

[23] In the result, and for all the reasons stated above, I made the following Orders:

- (1) The Defendant is restrained whether by herself her servants and/or agents or otherwise howsoever from registering any dealing with the property known as all that parcel of land part of Bella Vista in the parish of St. Andrew registered at Volume 1485 Folio 339 of the Registrar Book of Titles and formerly comprised in Volume 1057 Folio 626 (hereinafter referred to as the said land) until the trial of this action or further order of the court.
- (2) Pursuant to Section 140 of the Registration of Titles Act, and upon the Claimant, giving the undertaking stated below, the Registrar of Titles is directed to delay registering any dealing with the said land until the trial of this action or further Order. The 14-day period of the Notice to caveator is extended accordingly.
- (3) The Claimant through his Counsel gives the usual undertaking as to damages.
- (4) Costs to the Claimant to be taxed or agreed.

David Batts
Puisne Judge