[2022] JMSC Civ. 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV01949

BETWEEN	**DAWKINS BROWN**	**1ST CLAIMANT**
AND	**GLEN BROWN**	**2ND CLAIMANT**
AND	**CLAUDETTE LOPEZ LEWIS (Representative for Annie Lopez, deceased)**	**DEFENDANT**

Liberty to apply- inherent in every order of the court whether or not it is included in the order- limits of the rule.

IN CHAMBERS

Kent Gammon instructed by Kent Gammon and Associates for the Applicant/Defendant

Craig Carter instructed by Althea McBean & Company for the Respondents/Claimants

Heard: June 1, 2022 and September 22, 2022

ORR, J (AG)

[1] Before me is an application by the Defendant for the following orders:

1. That the Defendant/Applicant be permitted to recover rent outstanding for the period 01st October 2007 to 31st December 2007 from the account no. 001-101-034-6143 in the joint names of Althea McBean and or Lancelot Cowan, Attorneys-at-Law at the RBTT Bank or any such account (s) held in the names of Althea McBean and or A. McBean & Company pursuant to

Order No. 1 of the Honourable Mr. Justice Pusey made on the 19th day of December 2007.

2. That the Defendant/Applicant be permitted to recover rent outstanding for the period 1st January 2008 to 1st May 2020 and continuing from account no.001-101-034-6143 in the joint names of Althea McBean and or Lancelot Cowan, Attorneys-at-Law at the RBTT Bank or any such account (s) held in the names of Althea McBean and or A. McBean & Company pursuant to Order No. 1 of the Honourable Mr. Justice Pusey made on the 19th day of December 2007.

[2] The application has come some seven years after the Court of Appeal upheld the decision of this court granting the claimants a proprietary interest in property owned by the former defendant, Annie Lopez now deceased. The application is to recover rent which the defendant says is due and owing by the claimants. This period encompasses a period after the claim had been filed but prior to the delivery of the court's judgment, and a further period after the delivery of the judgment to the present.

[3] The account referenced by the defendant in her notice of application for court orders, account no.001-101-034-6143, was created pursuant to an interim order of Pusey, J which required the claimants to "*pay the sum of $58,000.00 per month on the 1st working day of each month with effect from the 1st day of January 2008, into an interest bearing account in a licensed financial institution to be held in the names of both attorneys-at-law*." In addition, he ordered, inter alia that these funds be held until the determination of this claim or further order.

[4] This order was made on the defendant's application for the claimant's to pay her rent pending the determination of the claim by the court at trial. Pusey, J did not order that the claimants pay rent, rather that they pay a sum equal to the rent they were previously paying under a lease agreement with the defendant and before they claimed to have exercised the option to purchase.

[5] This account subsequently became the subject of the final order of the court when the claim was determined at trial. Indeed, once the claim was determined at trial there was no need for the claimants to make any further payments into the account. The final order of the court would have therefore replaced the interim order of Pusey, J.

[6] Mr. Gammon in his submissions has grounded his application under the principle of Liberty to Apply. He relies specifically on the decision of Morrison, JA (as he then was) in this claim (**Annie Lopez v Dawkins Brown & Anor)** where at paragraph [7] he said that "*while Campbell, J did not expressly reserve liberty to apply to the parties, it is well established that all orders of the court carry with them inherent liberty to apply to the court for assistance in working out the rights declared by the court in its judgment".* He made reference to Halsbury's Laws of England, 5th edn, Vol 12, para 1165 and the cases there cited.

[7] Counsel's submissions in summary were that because the Claimants failed to take the necessary steps to determine their lease, it therefore still subsists and the Claimants are liable to pay the defendant rental for the periods claimed.

[8] Mr. Carter, in opposing the application, argued that the court having determined that the Claimants had a proprietary interest in the property, the Claimants were not liable for the payment of rent. He relied on ***Cockwell & Another v Romford Sanitary Steam Laundry Limited*** *[1939] 4 All ER 370*. He submitted that the Claimants' equitable interest in the property arose on July 3, 2006, and as at that date by operation of law, the relationship between the parties as landlord and tenant no longer existed, as they became purchaser and vendor. He said that based on Campbell, J's decision the Defendant was not entitled to any sum other than the purchase price of $10,000,000.00 ordered by the court less any rents paid up to that time.

ANALYSIS

[9] The application is grounded under the principle of 'liberty to apply' which has been described as a judicial devise not dissimilar to the slip rule and is intended to supplement the main orders in form and convenience only so that the main orders may be carried out. Errors and omissions that do not affect the substance of the main orders may be corrected, but nothing must be done to vary or change the nature of the original order.

[10] Smith, JA (as he then was) in **Michael Causewell et al v Dwight Clacken et al** SCCA 129/2002 (February 18, 2004) in considering the scope of the court's jurisdiction to vary a consent order had pointed out that where, in the case of a final judgment or order, the necessity for a subsequent order was foreseen, it was usual to insert in the judgment or order, words expressly reserving liberty to any party to apply to the court for further directions. He went on to say that:

> *"The insertion of 'liberty to apply' does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly, on proof of change of circumstances."*

[11] Later, in ***Jebmed SRL v Capitalese SPA Owners of M/V Trading Fabrizia*** *[2017] JMCA Civ 45* the court *adopted* the reasoning of Somerville LJ, in ***Cristel v Cristel*** [1951] 2 All ER 574 where he said that:

> *"Prima facie, the words "liberty to apply" refer to working out the actual*
>
> *terms of the order"*

Denning LJ, in the same case, stated in his judgement:

> *"when there is no change of circumstances, I do not think the court can alter or vary the agreement of the parties under "liberty to apply". It can only do what is necessary to carry the agreement into effect."*

[12] Philips, JA as she then was **in *Capital Solutions Limited v Terryon Walsh and Others*** *[2010] JMCA App. 4* at Paragraph [65] suggested that in determining whether an application fell within the ambit of liberty to apply one should enquire:

(i) Whether the order of the court required any working out

(ii) If the answer to (i) is yes, did the working out of the order involve any matters on which it may have been necessary to obtain the decision of the court?

(iii) Are the matters which have been set out in the affidavits and the submissions and which are the subject of the application for liberty to apply variations to the order?

(iv) Are the said matters referred to above necessary to carry the order into effect?

[13] In considering the defendant's application, the starting point must therefore be the trial judge's decision, which subsumed the interim order of Pusey, J, and the critical question is whether the defendant's notice of application seeks to work out this order or vary the order.

[14] On May 22, 2009 Justice Lennox Campbell (as he then was) made the following orders:

> 1. *There be specific performance of the agreement to purchase property at Lot 2, 9 Panton Road, Stony Hill, St. Andrew between the Claimants and the Defendant for the sum of $10,000,000.00 less $540,000.00 allocated as rent towards the purchase price, such rent being for the period January to December 2004.*
>
> 2. *The Claimants are declared to have an equitable interest in the property at Lot 2, 9 Panton Road, St. Andrew by virtue of proprietary estoppel.*
>
> 3. *That if the parties fail or neglect to sign an agreement for sale and transfer then the Registrar of the Supreme Court shall be empowered to sign the agreement for sale, transfer and any document necessary to effect the sale of the property at Lot 2, 9 Panton Road, Stony Hill. St. Andrew.*
>
> 4. *All sums in the account 001-101-034-6143 in the names of Althea McBean and or Lancelot Cowan at the RBTT Bank Jamaica*

Limited, Duke and Tower Streets to be paid forthwith to Robertson Smith Ledgister & Co. on behalf of Annie Lopez.

5. *Stay of execution granted for 21 days*

6. *Costs to the Claimant to be agreed or taxed.*

[15] In doing so, he gave judgment for the Claimants on their claim wherein they sought "*a declaration as to their interest in premises situated at Lot 2 Panton Road, Stony Hill, specific performance, proprietary estoppel and an injunction restraining the Defendant from interfering with their occupation of the premises*" until their claim was resolved by the court.

[16] In their Particulars of Claim, the Claimants alleged that on or about January 1, 2004, they entered into a lease agreement with an option to purchase Lot 2 Panton Road, Stony Hill for $10,000,000.00 from the Defendant. In consideration of this agreement they paid the Defendant $540,000.00 during 2004, and $1,320,000.00 during 2005 and 2006 in monthly payments of $55,000.00.

[17] The Defendant, in response to this claim, denied that the Claimants were entitled to an interest in her property. She also denied that there was any agreement with the Claimants to purchase her property, as they had failed to exercise the option to purchase the property within the prescribed time as set out in the lease agreement.

[18] She also counterclaimed "*the sum of $110,000.00 this being two months' rent due and owing by the Claimants, at $55,000.00 per month, which unpaid monthly rent continues".*

[19] The Defendant appealed the trial judge's decision and on appeal, the Court of Appeal dismissed the trial judge's finding that there should be specific performance of the agreement. That court however upheld all the other findings of the trial judge.

[20] At the end of his judgment, Morrison JA (as he then was) pointed out that the parties had not made any submissions on paragraph 4 of Campbell J's order in relation to the funds held in an account in the joint names of then counsel.

[21] He made a further order inviting counsel to file submissions in relation to the trial judge's order that all sums in the account held in the joint names of then counsel were to be paid to the claimant's then Attorneys-at-Law on her behalf.

[22] After considering these submissions, Morrison, JA (as he then was) said that the Defendant would not be entitled to claim the increase of 7% as submitted by her counsel as she had not provided any evidence to justify this increase, he made no finding that she was entitled to any outstanding rent.

[23] He went on to say at paragraph [7] that:

> *"The defendant's more general contention is that the court should make an order that the funds standing to the credit of the RBTT account should be released to her. There can be no doubt that this result flows from Campbell, J's express order (see paragraph 4 of the formal judgment**). But it seems to me that this aspect of the matter may be more appropriately dealt with by either (and preferably) agreement between the parties, or, failing this, by an application to the Supreme Court, supported by affidavit evidence, to ascertain the precise amount due to the appellant under this head…"** (my emphasis)*

He concluded by ordering that:

> *"Failing agreement between the appellant and the respondents within 28 days of the date of this order, the disposition of the funds standing to the credit of the RBTT account is to be dealt with by way of an application by the appellant, supported by affidavit evidence, to a Judge of the Supreme Court."*

[24] To my mind, Campbell, J having ordered that the Defendant should receive all the money in the joint account held at RBTT, Morrison, JA (as he then was) further directed the parties to *"ascertain the precise amount due to the appellant under this head*." Where they were unable to arrive at any agreement, they were to then apply to this court under Liberty to Apply and have this court assist them in determining the amount to be paid out to the Defendant.

[25] In other words, this court was to assist the parties in working out how much money was payable to the defendant from the joint account and in so doing give effect to the trial judge's order. This court has no power to vary the order of the trial judge

unless there is evidence that circumstances existing when the order was made have now changed. There was no evidence of any change in the circumstances of either party.

[26] It is clear that the Defendant's application goes well beyond the scope of working out 'order 4' in Campbell, J's judgment. Firstly, the Defendant asks the court to find that she is entitled to recover rent. It is clear that neither court made any order in relation to the Defendant's counterclaim for arrears of rent. Indeed, although the trial judge found for the Claimants, he made no order for judgment for the Claimants on the Defendant's counterclaim.

[27] In trying to reconcile the Defendant's present application my curiosity led me to peruse the witness statement filed on behalf of Annie Lopez on May 19, 2008. Her brief witness statement is confined to 8 paragraphs. None of these paragraphs speak to her counterclaim for arrears of rent.

[28] I examined the trial judge's notes of evidence which are also on the file to ascertain whether the Defendant was permitted to amplify her witness statement at trial to give evidence in relation to her counterclaim. There is no evidence in relation to the Defendant's counterclaim for two months' arrears of rent and continuing. It would therefore seem that despite the inclusion of the counterclaim in her defence, and the several applications she made in relation to the payment of rent prior to the conclusion of the trial, Miss Annie Lopez abandoned her counterclaim at trial.

[29] There being no order by either court on the issue of outstanding rent, the Defendant could not now seek to raise the issue of any arrears of rent under liberty to apply.

[30] If the Defendant is of the view that the Claimants are liable to pay her rent, she could not seek to have this court make such a finding. This claim would be a new claim and independent proceedings would have to be commenced subject to the Limitation of Actions Act.

[31] Furthermore, her claim for rental extends to a period beyond the judgment of this court. She seeks to claim rental outstanding from January 1, 2008 to May 1, 2020 and continuing. Campbell J delivered his judgment on May 19, 2009. Pusey, J's order only contemplated payments up to when the claim was determined or further order.

[32] Furthermore, where the trial judge had indeed granted judgment in favour of the Defendant on her counterclaim, although she claimed rent and continuing, the trial judge would have been limited to awarding her arrears of rent up to the date of judgment. He could not have contemplated any sum that was not yet owing by the Claimants. She could not therefore seek to claim these sums which she alleges accrued after the judgment date, under liberty to apply.

[33] Her application is also misguided in that she seeks to recover monies in another account "held in the name of Althea McBean and or A. McBean & Company pursuant to Order no. 1 of the Honourable Mr. Justice Pusey made on the 19th day of December 2007." Order 4 of Campbell, J was specific. It spoke to the funds held in a joint account in the names of the parties then Attorneys-at-Law. The order also made specific reference to account number 001-101-034-6143.

[34] Most notably, although the defendant asks the court to make orders in relation to the payment of funds from account number 001-101-034-6143, she has failed to provide the court with a current balance on this account.

[35] In order to work out how much is to be paid to the Defendant, the current balance on the account is necessary, particularly because a previous payment in the sum of $348,000.00 was made to the defendant prior to the conclusion of the trial, on her application to the court.

[36] In her affidavit filed on May 14, 2019, Miss McBean has exhibited a statement in relation to this account as at January 1, 2015. There was a balance of $16,068.43. She has also stated in that affidavit that the balance on the account was depleted over time by the bank's service charges.

[37] In her further affidavit filed on June 17, 2022, Miss McBean's unchallenged evidence is that despite the Court of Appeal awarding the claimants 75% of their costs in both courts, these costs remain outstanding some several years later.

[38] In working out the sum that the Defendant is entitled to receive from account number 001-101-034-6143, some consideration would have had to be given to the costs she owes the claimants in light of the Court of Appeal's order awarding the Claimants 75% of their costs in that court and in the court below. Curiously, she did not raise this issue.

[39] A few minutes before this judgment was to be delivered, I received an affidavit filed by Mr. Kent Gammon indicating that he had received information from Sagicor Bank the former RBTT bank which held the funds in account number 001-101-034-6143 in the joint names of counsel for the claimant and the former counsel for the Defendant.

[40] He indicated further that the account had been closed as there were no funds in the account. He further prayed that the court would grant the orders sought by the defendant.

[41] The fact of the matter is that if there are no funds in account 001-101-034-6143 which was the subject of order no.4 made by Campbell, J (as he then was) and also the further order of the Court of Appeal, there is no basis for this court to work out any order under 'liberty to apply'.

[42] Order no. 4 made specific reference to a particular account at a specified bank. Where there are no funds in that account, this court cannot assist the parties in determining any sums that the defendant would be entitled to from that account. Neither can this court vary the order of the trial judge (of equal jurisdiction) to allow for the payment of monies from any other source other than account number 001-101-034-6143.

[43] To adopt the words of Stirling, L.J in ***Poisson & Woods v Robertson and Turvey*** *[1902] (86 L.T. 302)* as relied on by the court in ***Cristel v Cristel*** *[1951] 2 All ER ,574*:

> *"…such an application as the present cannot be made under the liberty to apply… The judgment contained a declaration as to the interests of the parties… with 'liberty to apply'…But the insertion of those words… does not enable the court to deal with other matters which do not arise in the course of working out the judgment."*

[44] In the result the Defendant's application under liberty to apply cannot succeed in this instance.

THE AGREEMENT FOR SALE

[45] Before disposing of this application, it would be remiss of me to not address what can only be described as the vexed issue of the Agreement for Sale which has not yet been executed by all parties to this claim in furtherance of the orders of the court.

[46] There have been no less than three orders directing the parties to execute the Agreement for Sale and complete the transfer of Lot 2, 9 Panton Road, Stony Hill to the Claimants.

[47] The most recent order was made by Wolfe Reece, J on October 31, 2019 where she ordered that the Claimants were to execute the Agreement for Sale within 10 days.

[48] Miss McBean's affidavit of May 5, 2020 outlines that the claimants executed the Agreement for Sale on November 5, 2019. She received the claimant's deposit cheque on November 11, 2019 and indicated by email to Mr. Gammon's office that she would deliver the Agreement and deposit cheque the following day. The Agreement and deposit payment were nevertheless returned to her by Mr. Gammon who she says indicated that time had run on November 8 ,2019 and that his client would not be accepting any Agreement for Sale and or deposit. This evidence was never challenged.

[49] The order made by Wolfe Reece, J was the third order directing the parties to take steps to effect the transfer to the Claimants. The Agreement for Sale was to be signed pursuant to an order of the court. The Defendant was ill advised as she had no authority to refuse to accept the signed Agreement and deposit cheque. A mere extension of time was needed to comply with the order and the parties could have simply consented to the extension.

[50] In light of Miss McBean's unchallenged evidence as to her several unsuccessful efforts over the years to procure an Agreement for Sale from the seven different Attorneys-at-Law who represented the Defendant, it was imperative that the Defendant's present counsel ensure that the Agreement for Sale was executed and stamped, even if it was received a day late.

[51] The court having determined that the Claimants are entitled to a proprietary interest in Lot 2, 9 Panton Road, Stony Hill St. Andrew, the transfer must take place, except where the claimants are unable to satisfy the balance of the purchase price.

[52] Accordingly, I will exercise my powers under CPR 26.2 to ensure that the parties comply with the order of Campbell, J of May 19, 2009.

[53] My orders are as follows:

1. The Defendant's further amended notice of application for court orders filed on April 22, 2020 is refused with costs to the Claimants to be taxed or agreed.

2. Such costs are to be paid within 14 days of being agreed or taxed.

3. Counsel for the Defendant is to prepare an Agreement for Sale and deliver same to counsel for the Claimants within seven days of the date of this order.

4. The Claimants are to sign and return the executed Agreement for Sale with the further deposit towards the purchase price within 7 days of receipt of the Agreement for Sale; such time to be extended to 14 days only where either of the Claimants are out of the jurisdiction or ill.

5. The Defendant's representative Claudette Lopez Lewis is to execute the Agreement for Sale within 7 days of receipt by her Attorneys-at-Law, such time to be extended to 14 days only where she is ill or out of the jurisdiction.

6. Where either party fails to execute the Agreement for Sale within the prescribed time outlined in this order, the Registrar of the Supreme Court is at liberty to sign the Agreement for Sale on behalf of the defaulting party.

7. Kent Gammon & Associates who has carriage of the Agreement for Sale is to lodge the Agreement for Sale at the Tax Office within 5 days of receipt of the executed agreement from Claudette Lopez Lewis.

8. Counsel for the Claimants is to be notified by email and provided with proof that the Agreement for Sale has been lodged within 3 days of the Agreement for Sale being lodged at the Tax Office.

9. Orders 3-9 herein are stayed for 14 days where any party affected by the order wishes to be heard.

10. Any such party is to file and serve written submissions within 14 days of this order.

11. The Defendant's Attorney-at-Law is to prepare file and serve this order.