



[2014] JMSC Civ. 184

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 02898

BETWEEN BASIL COMMOCK 1ST CLAIMANT/RESPONDENT
(Deceased and substituted by nephew
Fitzroy Phillips)

A N D SANDRA COMMOCK 2ND CLAIMANT/RESPONDENT

A N D CHAIRMAINE JOAN HEMMINGS 1ST DEFENDANT/APPLICANT
(As Executrix of Estate INEZ COMMOCK)

A N D CHAIRMAINE JOAN HEMMINGS 2ND DEFENDANT/APPLICANT

Mr. Keith Bishop for the claimants/respondents

Mr. Sylvester Hemmings for the defendants/applicants

Heard: 5th June, 2012, 14th June, 2012, 19th July, 2012, 17th October 2012, 10th January, 2013, 7th March, 2013, 9th May 2013, 13th November 2013, and 23rd June, 2014

Summary judgment – When appropriate – Allegations of fraud – Recovery of Possession of devised property – Real prospect of success – CPR Rules 1.1, 1.2, 15.2, and 15.6

BERTRAM-LINTON
MASTER-IN-CHAMBERS

Facts

[1] The Claimants filed an action against the defendant in both her capacity as Executrix and in her personal capacity. The claimants contend in their pleadings that the defendant meddled in the estate of Inez Commock by gathering the assets of the estate and causing her body to be interred, accessing and taking control of Inez

Commock's accounts and properties, which she obtained by fraud and misrepresentation by causing or writing Aston Commock's signature on a Will and transfer documents without his consent, permission or knowledge, since at the time she alleges Aston Commock was without mental capacity to make or execute these documents. Further, the 2nd defendant neglected to pay reasonable debts for nursing care provide by the 2nd Claimant for the last five years of Inez Commock's life. The defendant filed an Acknowledgement of Service and Defence and counterclaimed that she is the absolute owner of the property located at 3 Mozart Avenue by virtue of Inez Commock's will, under which the 2nd defendant is a beneficiary and that she is entitled to mesne profit from the 2nd Claimant for the occupation of the said property. In this application before us the Defendants applied to have the Claimants' statement of case struck out and summary judgment entered against the Claimants by the Court pursuant to Part 15 of the Civil Procedures Rules (hereinafter referred to as the Rules/CPR).

Issues:

1. Whether the case is one in which summary judgment ought to be entered?
2. Whether the Defendant is entitled to recover possession of the aforementioned property?
3. How the properties are to be divided amongst the parties to the claim?

The Relevant Legislation utilised:

1. Legislation dealing with the administration and transfer of property
2. Civil Procedure Rules 2002 of Jamaica hereinafter (referred to as the CPR)
3. Case Law
4. Textbooks of Noted Authors

The Law

[2] Summary judgment is defined as 'a procedure by which the court may decide a claim or particular issue without a trial', and is designed to provide a quick solution to cases and defences which are weak on the facts at any early stage of proceedings, ***Martinez v Elijo, SC of Belize No 97 of 2005, per Conteh J.*** It is available both to the Claimant and Defendant in the claim, thus either party can make the application. It

can also be given by the Court on its own initiative, in performance of an important case management function to stop weak cases from proceeding. It may also be used to obtain summary determination of one or more issues in contention, thereby reducing the complexity of any ultimate trial, **Professor Gilbert Kodilinye, Commonwealth Caribbean Civil Law**. Pursuant to Rule 15.6, Civil Procedure Rules the Court can on an application for summary judgment, make a number of orders including:

“(a) give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end;

(b) strike out or dismiss the claim in whole or in part;

(c) dismiss the application;

(d) make a conditional order; or

(e) make such other order as may seem fit.”

It is a decision on the merits which is final and the only recourse of the party against whom it has been granted is to appeal.

[3] Rule 15.2 of the CPR states that the court may give summary judgment on the claim or on a particular issue if it considers that –

“(a) the claimant has no real prospect of succeeding on the claim or the issue; or

(b) the defendant has no real prospect of successfully defending the claim or the issue.”

In **Swain v Hillman [2001] 1 ALL ER 91, CA**, Lord Woolf MR posited that *“the words no real prospect of succeeding did not need any amplification as they spoke for themselves; the words directed the court to see whether there was a realistic as opposed to fanciful prospect of success. This does not mean a ‘real and substantial’ prospect of success nor does it mean that summary judgment will only be granted if the claim or defence would be dismissed at trial.”* The learned authors of Blackstone’s Civil Practice of 2012 postulate that it is not required that the evidence be compelling, but simply enough evidence to give a real prospect of a contrary case.

[4] One readily perceives that the primary underpinning of the policy of summary judgment is the court's overriding objective to deal with cases justly and to give effect to this overriding objective when interpreting rules or exercise any powers under the rules, pursuant to rules 1.1 and 1.2 of the CPR. Dealing justly with a case includes –

- “(a) ...
- (b) *saving expense;*
- (c) *dealing with it in ways which take into consideration –*
 - (iii) *the complexity of the issues;*
- (d) *ensuring that it is dealt with expeditiously and fairly; and*
- (e) *allotting to it an appropriate share of the court's resources, which taking into account the need to allot resources to other cases.”*

Accordingly, summary judgment is indicative of the court's overriding objective to manage, direct and determine cases in an efficacious manner, thereby facilitating justice.

[5] In ***Lyle v Lyle*, SCJ 2005 HCV 02246 (unrep)** Sinclair-Haynes J emphasized that summary judgment is inappropriate where there are important disputes of fact and in order for the application to succeed the applicant must satisfy the court that:

1. All substantial facts relevant to the Claimant's case, which are reasonably capable of being before the Court, must be before the court;
2. Those facts must be undisputed or there must be no reasonable prospect of successful disputing them;
3. There must be no real prospect of oral evidence affecting the court's assessment of the facts.

[6] In ***Stewart v Samuels*, 2005 Civ App No. 2 unrep** the respondent sustained serious injuries while in the sea in the vicinity of a hotel owned by B Ltd (third appellant) allegedly caused by the negligent operation of a ski boat by R (the second appellant), an employee of B Ltd. Whilst in hospital the Respondent signed a 'Release' recognizing

the financial and medical assistance from the appellants and thereafter agreed to not pursue further compensation. He later filed a claim, seeking damages for negligence. The appellant applied for summary judgment seeking to rely on the 'Release'. Sykes J who did not find the definition of real prospect of success in **Swain v Hillman** particularly enlightening found that the threshold to satisfy the test of 'real prospect of success' was very, very low. He dismissed the application on the ground that the respondent was 'an obviously poor and uneducated person, in poor health because of his injuries, and dependent on the benevolence of B Ltd, had raised a strong arguable case of undue influence which, if established, would nullify the 'Release' and open up the possibility of establishing negligence.' On appeal, the Court of Appeal affirmed Sykes J's decision. Panton JA endorsed Otton LJ dictum in **Sinclair v Chief Constable of West Yorkshire 2000 ALL ER 2240** where the Lord Justice stated that:

"in order to defeat the application for summary judgment it is sufficient for the respondent to show "a prospect", i.e some chance of success. However, the prospect must be "real". The court must disregard prospects which are merely fanciful, imaginary, unreal or intrinsically unrealistic."

[7] One may extrapolate from the authorities that summary judgment is not only inappropriate where it is clear that the respondent will succeed at trial but it should also not be granted where there are very serious and intricate matters that can only be sufficiently canvassed and addressed at a trial with documentary evidence and cross examination of witnesses. Indeed, it is often realised that examination and cross examination of witnesses often change the complexion of a case. A claim may be fanciful where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based. Therefore, summary judgment should only be entered where, on the untested written evidence, and whatever further evidence may be found in the future, there is no real prospect of success, **Blackstone's Civil Practice and Procedure 2012**. It is noteworthy too that in **Eureka Medical Limited v Life of Jamaica Ltd 2005 HCV 1268 SCJ**, Mangatal J opined that summary judgment is designed to deal with cases that do not merit a trial and as such a mini trial into the issues may be conducted. A judge

ought not to necessarily examine the evidence and the legal issues in much depth but when faced with an application for summary judgment, determine on a prima facie evaluation of all the documents and evidence before him or her, any further realistic future evidence, whether there are a serious triable issues. If not, summary judgment should be granted.

Application to the facts

[8] In our case, the applicant has produced a copy of Inez Commock's will which complies with all the formalities required under section 6 of the Will's Act for the execution of a will. The applicant is appointed as one of the Trustees and Executors of the will under the Trustees Act, Settled Land Act and the Conveyance Act. It bequeaths to her the property located at 3 Mozart Avenue, including other personal estate of the testator and makes provisions for the second claimant. In respect of this property, pursuant to paragraph 6a and paragraph 5 of the Applicant and 2nd Claimant's affidavits, respectively, there is a discrepancy as to whether Mrs. Inez Commock assisted her husband to purchase the property or whether he purchased it alone. But what is clear however is that at some point they became joint tenants as the Claimant concedes at paragraph 5 of her affidavit that her father placed her step mother's name on the title. Sometime after, it is submitted that the property was transferred into Mrs. Commock name only. There is very compelling and cogent evidence from the Attorney-at-Law Mr. Patrick Bailey who witnessed the transfer of the property to Mrs. Commock and who attests that it was indeed a gift to the applicant's mother by her step-father.

[9] The Claimant however asserts that the transfer into the mother's name only is fraudulent as her father lacked the mental capacity to sign. In **Williams on Wills, 8th Edition, Volume 1, p. 56**, it is expressed that 'a gift obtained by undue influence or fraud is liable to be set aside upon proof of the undue influence or fraud.' To establish a case before the court at trial, she would have to bring some medical or psychiatric evidence to attest to the deteriorated state of her father's mental condition at the time the transfer was done; otherwise the Attorney's evidence is very compelling. She avers in paragraph 8 of the Particulars of Claim, that in recent years after an analysis of Aston Commock's purported signature on his last will and transfer documents, experts in

handwriting concluded that all relevant signature of Aston Commock was fraudulently endorsed or written on documents. **Blackstone's Civil Practice and Procedure** states that claims involving allegations of fraudulent or deceitful misconduct which are not capable of being substantiated by inference from the documentary evidence or written evidence are inappropriate for summary judgment. Conversely, where a challenge to a fraud claim has no real prospect of success, summary judgment may be appropriate.

[10] In, ***Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG*** [2007] EWCA Civ 1066, it was stated that it is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it had a real prospect of succeeding at trial. If it wished to rely on the likelihood that further evidence would be available at that stage, **it had to substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court (for emphasis)**. The court might then be able to see that there was some substance in the point and that the party in question was not simply playing for time in the hope that something would turn up. It was not sufficient, therefore, for a party simply to say that further evidence would or might be available, especially when that evidence was, or could be expected to be, already within its possession. In the instant matter, the 2nd Claimant at paragraph 8 of her Particulars of Claim has in a somewhat abstract manner opined that there is evidence from handwriting experts. The court however in general terms has been advised of the nature of the evidence, its possible source and how it would be relevant to the claim. This is in accordance with the decision in ***Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG*** [2007] EWCA Civ 1066.

[11] Having noted the above, it is perhaps pertinent to recognize that assuming for a moment that the transfer was fraudulent, Mr. and Mrs. Commock were initially joint tenants of the said property and under this arrangement of ownership of land, 'jus accrescendi', the right of survivorship applies. This means that, on the death of one joint tenant, his interest automatically accrues of the surviving joint tenant, so that he has nothing to transfer under his will or intestacy, as per Professor Kodilinye, 'Real

Property Law'. In the **Halsbury's Laws of England, Third Edition, Volume 15, p.23**, it is stated that property which a person is absolutely entitled to, which he has caused to be transferred to himself and any other person jointly ... the beneficial interest in the property, or some part of it, passes or accrues by survivorship on his death of the other person. These two authoritative statements reflect two implications for the 2nd Claimant's case. Foremost, she would not be entitled to any interest in the said property located at 3 Mozart Avenue by virtue of her dad's will, because when he died, even presuming that there was no transfer, all his interest in the property would have accrued to Mrs. Commock. Therefore, upon her dad's death, Mrs. Commock was solely entitled to the said premises. Secondly, since she was the last surviving joint tenant, it would then be distributed in accordance with her will, as long as the will is probated and it is determined that is genuine.

[12] From the aforementioned, it does not appear that the court would be satisfied that the requirements laid down by Mangatal J in **Lyle v Lyle** are fulfilled. Even if requirement one is satisfied, the substantial facts are not necessarily indisputable, if the relevant evidence is provided, there is a reasonable prospect of disputing them, and certainly in matters of this nature, oral evidence in the context of family divisions and acrimony, could very well affect an assessment of the facts. Further the 2nd Claimant's contentions do not appear merely fanciful, imaginary, unreal and/or intrinsically unrealistic, there is ostensibly a real, even though minute, prospect of success if the Claimant proves that the transfer and the will are indeed fraudulent, evidence of which has been already alluded to in her affidavit. This would comply with the ratio decidendi expressed by the English Court of Appeal in **Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG [2007] EWCA Civ 1066**. It would further be consistent with the view of the learned authors of **Blackstone's Civil Practice and Procedure 2012**, that claims involving allegations of fraudulent or deceitful misconduct which are not capable of being substantiated by inference from the documentary evidence or written evidence are inappropriate for summary judgment.

[13] The Claimant argues in her Particulars of Claim that Mr. Commock, whilst being senile was unduly influenced by his wife to prepare a will making her the principal

beneficiary. Here again she will have to provide compelling evidence of fraud. At paragraph 8, she refers to the handwriting experts. If this evidence is likely to be available, the case will be a complex one with a number of issues to be tried and determined. If she is able to offer compelling evidence of the will's fraudulence and it is accepted, then Mrs. Commock's estate would be governed by the Intestates' Estates and Property Charges Act, section 4.

[14] As it pertains to the property at 3 Mozart Avenue, the 2nd Claimant appears to be a licensee who ordinarily does not have an estate in the land which they occupy. In ***Street v Mountford*, [1985] 1AC 809** Lord Templeman stated that there were five circumstances which negative the creation of a tenancy. The golden rule is that the law does not impute intention to enter into legal relations where the circumstances and the conduct of the parties negative any intention of any kind ***Cobb v Lane* [1952] 1 ALL ER 1199**. One such scenario is where there is a family arrangement. In ***Edward v Brathwaite*** the claimant lived on a plot of land of which he claimed that his mother put him in possession as she wanted him to have the land. After his mother's death, his father who had letters of administration to the estate permitted him to continue living there. He made additions to the house, planted gardens and erected fences. After his father's death, his brother who was the heir at law gave the land to their sister who mortgaged it. It was held that the claimant entered into a family arrangement throughout the period of his occupation and was therefore a licensee. Lord Denning stated that if the circumstances and the conduct of the persons indicated that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held to be a licensee only. (***Errington v Errington and Woods*, [1952] 1 KB 290**.) Therefore under the Jamaican Court of Appeal decision in ***Knight v Pratt***, the 2nd defendant is only required to give reasonable time to quit to the 2nd claimant. Thereafter, the 2nd defendant may apply for an order for ejectment which could be obtained from the court. The 2nd claimant moved from her townhouse back into her step mother's home possibly contemplating that if she assisted Mrs. Commock during her illness, she would be entitled to the house or at least obtain some interest. She was living elsewhere before and there is no indication that the stepmother intended to give her an interest in the said house.

[15] The second defendant could also obtain mesne profit for use of the land by the 2nd Claimant. In ***Chin Lyn et al v Reynolds*, 2008 HCV 04348**, there was purportedly an agreement for sale of property and the claimants entered in possession and thereafter refused to give up possession, the Jamaican Court of Appeal upheld summary judgment and awarded mesne profit for the use of the land by the Claimant until possession was delivered to the defendant. However simultaneously, the Claimant could claim license by estoppels under the second class of the doctrine, which is a reasonable expectation of acquisition of a right. The Jamaican Court of Appeal case of ***Trenchfield v Leslieper*, 1994 Ja Civ. App No 200F 1994**, Patterson JA, enunciated that 'a persons may obtain an interest in land if he is led by the owner to believe that he will be granted such an interest, and as a result, he acts to his detriment. In ***Bennett v Pearson*, 2004 CLB 446**, Sykes J found that there was the possibility of an equity by way of estoppel arising in favour of the claimants and for that reason the claimants' case was not hopeless. He continued;

'I am not saying that success is guaranteed but neither can I say that failure is assured. My task at this stage is simply to determine whether the claimants' case is such that it has no real prospect of succeeding ...The summary judgment procedure is not a substitute for trial, it is designed to cast out the most hopeless of cases'.

[16] In relation to the matrimonial property of 6 Mozart Avenue, one has to check the title to see if Mr. and Mrs. Commock were joint tenants or tenants in common. If they were joint tenants and the entire estate passed to her on her husband's death, then it is to be distributed according to her will. If they were not joint tenants, the Property Rights of Spouses Act applies pursuant to section 6 subject to sections 7 and 10. However, since the validity of this will is seemingly challenged by the 2nd claimant and the reference by her to the available evidence of handwriting experts, it is a matter for the court to determine distribution. The Claimant has also claimed payment for nursing care of Inez Commock, these are issues which the court has to determine after a sufficient canvassing of all evidence both oral and written, which I submit cannot be respectfully done at the summary judgment stage. Summary judgment in essence deprives the party of a right to a trial and its ability to strengthen its case through

disclosure and other court procedures. Sykes J in **Stewart v Issa, SCCA No 16/2009, p.9** enunciated that the matters mentioned in Rule 1.1 has to be balanced against the fact that courts exists to resolve disputes and under the constitution a litigant has a right to approach the court to determine what is rights and obligations are, a litigant must not be lightly turned away. Nonetheless the court ought not to be a source of profligacy and waste. This case seems to be one which could be prolonged and encourage serious arguments particularly if the claimant is able to show the compelling evidence alluded to in her particulars of claim.

[17] The judge is required to exercise discretion; it is a power which anticipates the judge assessing the prospect of success of the relevant party based on the whole of the claim in the interest of justice. Can the Claimant's case be defined as hopeless, unmeritous, not involving any seriously triable matters and not fit for trial at all. Indeed, it appears prima facie that it will be an uphill task for the Claimant to succeed but it does not mean that there is entirely no real prospect of success (**Bennett v Pearson**, per Sykes J).

[18] In light of the evidence referred to by the 2 Claimant in her Particulars of Claim, particularly paragraph 8, if it is available at trial, it would certainly establish a real prospect of success, however minimal, in respect of 6 Mozart Avenue. Such evidence would establish whether or not the will in relation to the matrimonial property is invalid. Furthermore, because of the nature of the accusations of fraud, both wills ought to be probated pursuant to Rule 68.5 of the CPR. Such undertakings could significantly change the complexion of the defendant's case. In **Swain v Hillman**, Lord Woolf MR had this word of caution '*that useful though the power is ... it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial...*' The Claimant's case concerns a contested will and transfer. These matters are by their very nature technical, intricate and more often than not a lot of complex arguments arise. The matter of fraud is one of substance, not form, therefore the Claimant should be allowed to provide proof of these contentions at trial. It is the only arena in which such issues can be fully ventilated and the overriding objective of the CPR met. It is a heavy burden but if the evidence which

she alludes to is available, it may be cogent evidence to challenge the defendant's assertion. For this reason, cases involving complex issues of law and disputed facts are likely to be inappropriate for summary judgment (*Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1).

[19] As per Professor Kodilinye' if the point of law relied upon by either party raises difficult questions of law which calls for detailed arguments and mature consideration, summary judgment is inappropriate.

[20] In these circumstances then the court is of the view that there are issues which ought to form part of the totality of a trial and some which do not need to go to trial. The court therefore orders as follows:

- Recovery of possession in favour of the defendant in respect of 3 Mozart Avenue.
- All other matters are to proceed to Case Management Conference with a view to setting the matter on the trial list at an appropriate time.
- Case Management Conference is scheduled for March 2, 2015 at 10am.