

MEMORANDUM OF REASONS

INTRODUCTION

- [1] I denied the Applicant's application for default judgment on the grounds of his failure to join all the vendors to the contract for the sale of land, for which he is seeking specific performance.
- [2] My reasons for doing so are outlined below. However, a brief overview of the factual background that led to the application is necessary.

BACKGROUND

- [3] In August 2006, the Applicant agreed with the named Defendant (who is now deceased) and two others, Vivia Hyman and Joshua Johnson ('the vendors'), to purchase the Saint Matthew Lodge located in Port Antonio, in the parish of Portland, for an agreed price of Three Million Two Hundred Thousand Dollars (\$3,200,000.00). The vendors are all Trustees of the Lodge.
- [4] On 31 August 2006, the agreement for sale was executed by all four and on September 8, 2006, the Applicant paid a deposit of Five Hundred Thousand Dollars (\$500,000.00).
- [5] Among other things, the Agreement for Sale stipulated that the sale would be completed within 60 days and that upon payment of the outstanding balance, the title would be released to the claimant.
- [6] At the time of the agreement, the land on which the Lodge sits was unregistered. A registered title for the subject property was subsequently obtained. However, it is registered in the defendant's name.
- [7] After the agreement was signed, Mr Michael Lorne, counsel for the vendors, obtained a valuation report and found that the property's market value was twice the sale price specified in the sale agreement. Consequently, Mr Lorne wrote a

letter to the Applicant's Attorney-at-Law. He then advised that the vendors would be willing to accept and proceed with the sale based on the new valuation of Six Million Dollars (\$6,000,000.00).

[8] The Applicant refused to re-negotiate the sale price and appealed to the vendors to complete the transaction and transfer the subject property to him. The vendors failed to complete the transaction. The Applicant commenced this action solely against the deceased on February 25, 2014, by way of a Claim Form and Particulars of Claim.

[9] It must also be noted that although the applicant successfully applied for the substitution of the deceased as a party to the claim, no amendment has been made to the claim form or subsequent documents. This application, as is evident, was brought against the deceased without reflecting the current position that Mr Clive Fairweather is the personal representative of the deceased's estate. While this omission did not affect the final outcome of the matter, it was mentioned to emphasise that the court record must always reflect the current status of the pleadings.

THE APPLICATION FOR DEFAULT JUDGMENT

[10] The applicant filed an application for default judgment on December 13, 2018, after the deceased failed to file a defence.

[11] The orders were set as follows:

- a) *Specific Performance of the Agreement for Sale dated the 31st of August 2006 regarding **ALL THAT PARCEL** of land part of Lot being number 1 Church Street in the parish of Portland, being all the land comprised in Certificate of Title registered at Volume **1452** Folio 1 of the Registered Book of Titles ("the subject property");*
- b) *An Order that the defendant execute and deliver to the Claimant through the Claimant's Attorney-at-Law, an instrument of Transfer and all or such documents required*

for the said property to be transferred to the Claimant within six (6) weeks of the date hereof, failing which the Registrar of the Supreme Court be empowered to sign all such documents required for the transfer of the said property to the Claimant and generally to complete the said Agreement for Sale; and

c) An Order that the Defendant give possession of the subject property to the Claimant forthwith.

[12] In support of the Application, 19 grounds were advanced. In these proceedings, only the first four grounds need to be set out. These are as follows:

- 1. The Applicant entered into an agreement for sale with the Defendant on August 31, 2006, to purchase the subject property.*
- 2. That the Applicant fulfilled his obligations by paying the deposit, his share of costs of preparing the agreement for sale and further payments on account to the Defendant and his co-vendors*
- 3. The Applicant sent a notice making time of the essence to the Defendant on March 15, 2013, after numerous attempts to have the Vendors complete the sale.*
- 4. Instead of completing the agreement, the Defendant sought to renegotiate the purchase price.*

[13] By virtue of rule 12.5 of the Civil Procedure Rules, 2002 ('CPR'), a claimant is entitled to a default judgment against a defendant if the defendant fails to file a defence within 42 days of being served with the claim, and there is no pending application for an extension of time to file the defence. The law is well settled in this area.

[14] However, rule 12.9 of the CPR sets out the circumstances in which a default judgment may be entered against more than one defendant. Of particular importance to this application is rule 12.9(2)(b), which provides that:

12.9(2)

(b) if the claim cannot be dealt with separately from the claim against the other defendants –

i if the court may not enter judgment against that defendant; and

ii the court must deal with the application at the same time as it disposes of the claim against the other defendants.”

[15] From the brief facts, it is evident that there were four parties to the contract for the sale of the subject property: the three Trustees of the Lodge, who signed as vendors, and the Applicant, who signed as the purchaser. Furthermore, it is undisputed that the claimant's claim was instituted and served on only one of the trustees, the current defendant, who is now deceased. No explanation has been provided in any of the filed documents for omitting the other trustees from the claim. Likewise, no information was given to this court indicating that they had been notified of the proceedings. The application was made without giving notice to the remaining vendors (also Trustees of the Lodge). This is a land claim; proper notice is required.

[16] Because this is a claim by the purchaser to enforce a sale agreement, the claim must be against all the parties who signed as vendors. The court is concerned that only one of the three vendors has been joined to the claim and that the absence of the other two vendors has not been explained or accounted for.

[17] This concern regarding the failure to initiate proceedings against all the vendors, in light of the order now sought for default judgment, was communicated to counsel for the Applicant. The court made it clear that an application for default judgment would not be tenable in the circumstances. Based on the court's stance, counsel for the Applicant requested additional time to make further submissions.

[18] Counsel argued that, according to rule 8.4(1)(b) of the CPR, the general principle is that a claim will not fail simply because a person who should have been made a party was not included in the proceedings. He further contended that there is no

penalty for failing to add a party to the proceedings who ought to have been included.

- [19] Counsel further submitted that under rules 26.9(1) to (4) of the CPR, the court has the authority to rectify the matter where no penalty has been specified for failing to comply with a rule. In this case, he argued that the court could do so before granting a default judgment. In support, he cited the cases of **Jamaica Defence Force Co-operative Credit Union v Georgette Smith** [2019] JMCA Civ. 7 (paras [38] – [49]) and **Bupa Insurance Limited (trading as Bupa Global) v Roger Hunter** [2017] JMCA Civ. 3 (paras [58] – [60]). Counsel, in general, has asked this court to make an order, in the interest of justice, to set things right.
- [20] Regarding whether all vendors should be included as parties to the claim, counsel referred to paragraph 24 of a decision by the **Equal Opportunity Tribunal of the Republic of Trinidad and Tobago in Andreana Henry v Princess Entertainment Corporation Trinidad and Tobago Limited** (unreported), EOT No. 002/2016, delivered on September 25, 2019. The Tribunal noted that rule 19.3 of their CPR (which is similar to our rule 8.4(10)(b) of the CPR) “may apply where the wrong party is added or omitted, but there is a viable party remaining whose liability can be assessed in the case”.
- [21] In that case, Counsel argued that the rule was considered inapplicable because removing a party without substituting another would paralyse the litigation process. Regarding the case before this court, Counsel argued that it is distinguishable, as other vendors can be added to these proceedings without rendering the claim to fail. In this regard, he argued that, in the interest of justice and with the overriding objective, the Court should not rule that the claim must fail because of the failure to add the other parties.
- [22] It is clear from the sale agreement dated 31 August 2006 that the applicant entered into a contract for the sale of the subject property with three vendors: Dudley Harris (the sole named defendant, now deceased), Vivia Hyman, and

Joshua Johnson, who are the property's trustees. The deceased was, therefore, one of three persons with collective authority to give effect to the sale agreement.

[23] In National Commercial Bank Jamaica Limited v International Asset

Services Limited [2015] JMCA Civ. 7 at paragraph [39], Phillips JA opined that:

"[39]. ...the court must be careful to ensure that all parties concerned in a dispute before the court are before the court as that serves the ends of justice"

[24] Accordingly, in this court's opinion, any proceedings for specific performance should have been initiated against all three vendors from the outset. The other two vendors should have been served and summoned to appear before the court. It is difficult to see how an order for specific performance could be issued solely against one of the three vendors when he cannot perform the sale agreement alone. This is especially true when the vendor is not the sole owner of the property and is now deceased.

[25] I am reminded of the wise words that: "In the most primitive concepts of justice, one of the fundamental requisites for exercising judicial authority over the person or property of another is notice. The exceptions to this rule are indeed rare. See **Skarpinski v. Veterans of Foreign Wars**, 98 N.E.2d 858, 858, 859, (Ill. App. Ct 1951).

[26] Submissions were also advanced that the court has the discretion to set things right. However, having regard to the antecedent of the matter, before the issue of setting the claim right, as prayed, can be dealt with, the issue of service and/or notice to the other vendors is imperative. This court is therefore unmoved by the submissions as no basis has been outlined to the court for excluding the other parties to the sale agreement.

[27] Even if the rationale is that the deceased has become the registered legal proprietor of the property, the preamble to the sale agreement indicates he is merely one of the named trustees of the property. The trustees need to provide evidence of why it was registered solely in his name.

[28] Additionally, regarding how the claimant chose to commence his claim, rules 8.1(4)(b) and (c) of the CPR clearly state that a fixed date claim form must be used in claims for possession of land, and where the claimant seeks the court's decision on a question that is unlikely to involve a substantial dispute of fact. I believe the claimant's claim falls within these circumstances. Therefore, the court has concerns that the claimant chose to commence proceedings using a claim form rather than a fixed date claim form. The significance of this difference is demonstrated by rule 12.2(a) of the CPR, which states that a claimant cannot obtain a default judgment if the claim is a fixed date claim.

CONCLUSION

[29] In light of the concerns that have arisen, granting the application for default judgment in the absence of a defence being filed would have been inappropriate.

[30] Therefore, in the final disposition of the proceedings, it is hereby ordered that:

1. The Notice of Application for Court Orders filed on 13 December 2018 to determine the terms of the Default Judgment is refused.
2. Costs of the application to the Respondent to be taxed if not agreed.
3. Leave to appeal is refused.
4. The matter is fixed for a Case Management Conference on 9 October 2023 at 2:00 pm for 30 minutes.
5. The Claimant's Attorney-at-Law to prepare, file and serve this Order.