[2016] JMCC COMM 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2012CD00029

BETWEEN	**FIRST GLOBAL BANK LIMITED**	**CLAIMANT**
AND	**ROHAN ROSE**	**DEFENDANT**

IN CHAMBERS

Kevin Powell instructed by Hylton Powell for the claimant

Lisa Mae Gordon instructed by Malcolm Gordon for the defendant

Carol Davis for Karel Rose an interested party

June 9 and July 29, 2016

CIVIL PROCEDURE – ENFORCEMENT OF MONEY JUDGMENT – APPLICATION FOR PROVISIONAL ATTACHMENT OF DEBT ORDER AND PROVISIONAL CHARING ORDER TO BE MADE FINAL – APPLICATION TO DISCHARGE OR VARY PROVISIONAL CHARGING ORDER

SYKES J

Mrs Karel Rose

[1] Mrs Karel Rose is in great distress. She is in danger of losing her matrimonial home – a home she and her husband acquired in 2004. It is the home in which

she has raised the couple's daughter. Somehow her husband got himself into a USD$200,000.00 debt with his former employers, First Global Bank Limited, the claimant. The home in question is 9 Fairlane Avenue, Kingston 6.

[2] Mrs Rose is similar to the wife in **Eves v Eves** [1975] 1 WLR 1338. That wife undertook heavy manual work in order to make the house liveable. So too did Mrs Rose. Mrs Rose's consternation is therefore understandable.

[3] The bank brought an action to recover the debt. It was granted judgment. A provisional charging order was granted in respect of two parcels of land on November 10, 2014. One is 9 Fairlane Avenue and the other is Biscayne Beach, Bull Bay, St Thomas. The bank says that it was in negotiation with the Mr Rose but to no avail. It now seeks to recover its debt by getting a final charging order over both parcels of land and though it has not said so, then seek an order for sale. The final charging order is a necessary step towards sale.

[4] Based on the evidence there seems to be little prospect of Mr Rose paying off USD$200,000.00. He paid USD$10,000.00 but that was so long ago that the interest charges since then would quite likely have pushed the figure closer to the debt amount. The court should add that it is not aware of any bank in Jamaica which charges simple interest. Compound interest is the order of the day.

[5] Mrs Rose is objecting to the charging order being made final. She has applied to have the entire order discharged. If she fails in that she wants the matrimonial house and the furniture in that house exempt from the final charging order.

[6] The court will deal with the furniture first. Mrs Rose says that since 2009 her husband has not been in full time employment. She also says that more than 50% of the items in the matrimonial home belong to her. She says that since 2009 she has been the one making the mortgage payments. The furniture, appliances, paintings and prints and electronic items in the matrimonial home are jointly owned. In addition at the time of marriage each party had furniture and took them into the marriage.

[7] Clearly, the furniture that Mrs Rose brought into the matrimonial home cannot be the subject of any order of any kind. The provisional charging in this regard was simply too broad. It charged all 'the 'furniture, appliances, painting, prints and electronic property' at the matrimonial home. It does not appear that the bank is contesting her assertion that more than 50% of the items at the house belong to her. It would seem to this court that it is impossible to make this provisional charging order over all 'the 'furniture, appliances, painting, prints and electronic property' without some provision made for Mrs Rose to claim her property. The provisional charging order is varied to exclude 'the 'furniture, appliances, painting, prints and electronic property' belonging to Mrs Rose. The final charging order is granted but only in respect of 'the furniture, appliances, painting, prints and electronic property' that is the property of Mr Rose.

Real estate

A. *Biscayne Beach*

[8] In respect of the parcel of land known as Biscayne Beach, the evidence from Mrs Rose is that she has sold her interest in that property and as it presently stands this property is solely owned by Mr Rose. If that is so and no one else has any legal or equitable interest in that property then a final charging order is granted.

B. *Fairlane Avenue*

[9] In light of the submission of Miss Carol Davis, Mrs Rose's counsel, a bit of history is necessary. In **Irani Finance Ltd v Singh** [1971] Ch 89 Buckley J stated that the history of charges in favour of judgment creditors on land of judgment debtors goes back to the Judgments Act of 1838, section 13 which reads:

> *"a judgment already entered up or to be hereafter entered up against any person in any of Her Majesty's superior courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to*

which such person shall at the time of entering up such judgment, or at any time afterwards,

[10] However, the ability of judgment creditors to enforce judgments against land owned by judgment debtors first arose during the thirteenth year of the reign of Edward 1 (1271 – 1307) (Statute 13 Edw 1 c 18). Under this statute the judgment creditor was able to take only one half of the judgment debtor's estate. Since this was the feudal era, the judgment debtor was permitted to keep the other half so that he could meet his obligations under the particular tenure by which he held the land.

[11] The important thing to note about these two statutes is that the enforcement was only against land in which the judgment debtor had an interest.

[12] But what about jointly owned property, specifically, property held as a joint tenancy? The four unities of time, title, possession and interest. Each joint tenant it entitled to the whole but yet do not hold any party for themselves alone. Hence the expression, each hold everything but yet holds nothing. That is the case unless the joint tenancy is severed. Unless there is a declared bankruptcy, only acts of the joint tenants can sever the joint tenancy and make it a tenant in common. It has not been argued in this case that the Roses have severed the joint tenancy.

[13] The bank, through Mr Kevin Powell, says that Mrs Rose cannot resist the final charging order because there are cases which support the making of a final charging order. Mrs Rose says that the land is jointly owned that she and her husband are joint tenants and not tenants in common and therefore no charging order can be made.

[14] Miss Davis says that the joint tenancy has not been severed. A provisional charging order does not have the effect of severing the joint tenancy. Learned counsel submitted that unless a statute gives the power to other persons only the joint tenants themselves can sever the joint tenancy. She submitted further that no act of severance has taken place in this case. For this counsel relied on the

decision of judgment of McDonald-Bishop J (Ag) (now Justice of Appeal) in **Sheila Miller-Weston v Paul Miller and Leithia Yvonne Miller** Claim No 2002M094 (unreported) (delivered June 22, 2007). In that case the claimant successfully brought a claim and obtained judgment against the husband. The husband and wife held the property as joint tenants. The judgment debt remained unsatisfied. The claimant then took enforcement action. He sought the remarkable order that there was a severance of the joint tenancy by virtue of the execution of a document called 'Instrument of Transfer for Change of Tenancy.' He sought an equally ambitious order that the property be sold by private treaty and by public auction. The application was rejected, thankfully.

[15] What is crucial is the reasoning of her Ladyship. One of the extraordinary submissions made was that the husband's acknowledgment of the debt evidenced by a written document had the effect of severing the joint tenancy. McDonald-Bishop J relied on this passage from **Williams v Hensman** 70 ER 862, 867 (Vice Chancellor Page Wood):

> *A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund—losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of Wilson v. Bell and Jackson v Jackson .*

[16] This has been held to represent the law in Jamaica even today. In England the position has changed remarkably since 1925. None of those reforms in England has been effected in Jamaica.

[17] Her Ladyship went on to point out that there is no such thing in Jamaica as severance of a joint tenancy without the joint tenants themselves taking steps in accordance with the law to sever the joint tenancy except in cases of bankruptcy. This court expressly agrees with and adopts her Ladyship's conclusion that there is no such thing as a severance of joint tenancy by unilateral declaration unless that intention is (a) communicated by one joint tenant to the other and (b) there is conduct giving effect to the intention; or it is severed by operation of law as in bankruptcy proceedings.

[18] The essence of Miss Davis' submissions is this: the joint tenancy exists and the law is that the joint tenants own the whole and the part it is difficult to see how a charging order could be registered against the property since the effect of it would be to register a charge over the property of a person, that is to say the other joint tenant, who was not in any way concerned with the debt.

[19] Unfortunately for Miss Davis at least two judges of the Supreme Court have taken a different view. Batts J could hardly be clearer that these words his Lordship spoke in **First Global Bank Ltd v D'Oyen Williams and Tracey Ann Williams** [2015] JMSC Civ 11. His Lordship said at paragraph 17:

> *I do not agree that a charging order on jointly owned land where one joint owner is not a judgment debtor is barred by law. To so hold would be to say that one joint owner has no interest in the jointly owned land. On the contrary there is a unity of interest. It is that united interest which is charged and Part 48.6 of the CPR expressly authorises this. The purpose of the charging order is to give notice to all the world that if the joint tenants decide to treat with the premises there is a third party who has a judgment awaiting satisfaction with respect to one or other or both of the joint tenants.*

[20] His Lordship recognised that the joint tenant who had nothing to do with the debt might be hard done by if there was an order for sale. Hence in paragraph 18 there was this solution:

> *In the result therefore, I will make the Provisional Order Final (sic). I direct that if an application for an order for sale is to be made then the other joint owner is an interested party and must be served.*

[21] This was what was said in 2015. Four years earlier, in 2011, another judge, Mangatal J said much the same thing in **Air Jamaica Limited v Stuart's Travel Service Limited** Claim No 1998/A-018 (unreported) (delivered February 24, 2011). At paragraphs 28 – 31 her Ladyship held:

> *28. I also agree with Mr. Graham that a charging order in relation to land does not necessarily or inexorably lead to an application for an order for sale of land, which order is included in the definition of a writ of execution. A charging order is a separate proceeding and/or alternatively, it has its own utility, as a form of execution not covered under the definition of writ of execution. At page 11, Lord Lloyd of Berbick, who gave the lead judgment, referred to paragraphs of the Final Report of the Law Reform Committee on Limitation of Actions (1977) (Cmnd. 6923), which had during the arguments before the House been referred to by Lord Hoffman. Paragraph 14.14 states:*
>
> > *4.14 The authorities show that section 2(4) has caused difficulties in practice, because it has been apt to bar certain (though not all) forms of execution. We think that the law of limitation of actions ought not to interfere with the rules in relation to execution, which currently provide for a period for issue of a writ of execution of six years, which may be extended with the leave of the court. We think that provisions of this kind are the appropriate method of dealing with execution and that they could, if necessary, be extended to cover those methods of execution which, because they are*

not covered by the current rules, are subject to the 12-year period.

29. In my judgment there was therefore no need for Air Jamaica to have sought the Court's leave in order to issue the provisional charging order, or indeed, in order to apply to make the provisional 9 charging order final, on the basis that more than six years have elapsed since the judgment was entered.

30. I think therefore that the really crucial issue is whether the Court would be acting in vain if it were to issue a final charging order when a writ of execution will not be permitted to be issued after six years without the Court's leave in the absence of a satisfactory explanation for the delay, there being none proferred here.

31. I agree with Mr. Graham that a charging order does not necessarily lead to the issue of an order for the sale of land, and a charging order has a utility of its own. It has the effect of being notice to other parties with whom the owner of the land may want to have dealings that the recipient of the charging order has an interest which needs to be recognised or cleared off. In my judgment, it follows from this that the Court ought not to refuse to make a charging order final on the basis that over six years have passed since the judgment was entered. If at the end of the day, the Judgment Creditor then decides that it wants to apply for an order for the sale of land, then that is the stage at which the Court will have to consider whether there is or is not a proper basis for granting permission for a writ of execution in the form of an order for the sale of land to be issued out of time.

32. In my judgment it is appropriate in this case for the provisional charging order to be made final. Mrs. Champagnie had gone on to submit that in that event, she would wish to be heard on the issue of the calculation of the judgment.

[22] It is true to say that a charging order does not necessarily lead to an order for sale but there is no denying the fact that it is an essential step. The whole point of getting a charging is not just notice to the world but also to place one's self in pole position to sell the property should that become necessary.

[23] One of the distinguishing features of a joint tenancy and indeed its most vital characteristic is what is called jus accrescendi, that is, the right of survivorship. The death of one joint tenant before the death of the other automatically, by operation of law, extinguishes all rights of the first deceased joint tenant and the entire legal and equitable estate passes to the surviving joint tenant. In the words of Latham CJ of the High Court of Australia: *'If one joint tenant dies his interest is extinguished. He falls out, and the interest of the surviving joint tenant is correspondingly enlarged*' (**Wright v Gibbons** (1949) 78 CLR 313, 323). Consequently 'any will made by a joint tenant as to the interest, or share, in that joint tenancy will be ineffective, nor can the estate of the joint tenant who dies have any claim under the intestacy rules, should the joint tenant die without leaving a will' (*Ken Mackie, Elise Histed and John Page, Australian Land Law in Context, (OUP) (2012), 283).*

[24] What is the implication of all this if counsel for Mrs Rose is correct? It means that a charging order, provisional or otherwise does not and has no power to sever a joint tenancy. It means that if a provisional charging order or final charging order is granted over property held as a joint tenancy and there is only one joint tenant who is the judgment debtor and that joint tenant dies then it necessarily follows that the surviving joint tenant takes the whole and the charging order must necessarily fall away. All this seems quite logical. Regrettably as we shall see the common sense of Miss Davis' submission has been defeated by the law. It will be shown that the conclusions of Batts and Mangatal JJ are supported by long standing authority going all the way back to Littleton.

[25] This court must confess that it was inclined to agree with counsel for Mrs Rose but as ever that great Australian judge Dixon J in **Wright v Gibbons** had this to say at pages 330 - 331:

> *Logical as may seem the deduction that joint tenants have not interests which in contemplation of law are sufficiently distinct to assure mutually one to another, there are many considerations which show that, to say the least, the consequence cannot be*

called an unqualified truth. The fact is that the principle upon which the deduction is based must itself be very much qualified. It represents only one of two not altogether compatible aspects of joint tenancy, a form of ownership bearing many traces of the scholasticism of the times in which its principles were developed. "Albeit they are so seised" says Coke, (186a) ("scil. totum conjunctim, et nihil per se separatim") "yet to divers purposes each of them hath but a right to a moitie." For purposes of alienation each is conceived as entitled to dispose of an aliquot share. The alienation may be partial. One joint tenant for an estate in fee simple may grant a lease of his equal share and during the lease the jointure is suspended and there is a temporary severance and apparently it would not matter that the lease did not commence until after the death of the joint tenant granting it. A joint tenant may grant an estate for life in his share, though in that case it seems that it works a severance of the entire fee simple. If one joint tenant suffered a forfeiture it was not the whole estate but only his aliquot share that was forfeited. If one joint tenant proved to be an alien the Crown, on office found, took only his share. Execution on a judgment for debt against one joint tenant bound his aliquot share and continued to do so in the hands of the survivor if the execution debtor afterwards died. See Comyns, Digest, vol. 4, S.V. Estates, K.6 & 7. Each joint tenant could declare uses and they could declare different uses of their respective shares: Sanders Uses, Ch. II., s. 7, p. 218 (1589) 2 Co Rep 58a (76 ER 549) . In two places Richard Preston summed up the result: "Joint tenants are said to be seised per my et per tout. They are in under the same feudal contract or investiture. Hence livery of seisin from one to another is not sufficient. For all purposes of alienation, each is seised of, and has a power of alienation over that share only which is his aliquot part": Essay on Abstracts of Title, (1824), vol. 2, p. 62. "The real distinction is, joint tenants have the whole for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each has only a particular part"; On Estates, 2nd ed. (1820), vol. 1, p. 136. An alienation by one joint tenant to a stranger might be made by the appropriate means of assurance and in respect of the aliquot share of the alienor the stranger would come in with the remaining co-tenant or co-tenants as a tenant in common. (at p331)

[26] Here his Honour is saying that in a joint tenancy in some instances the conduct of one joint tenant can bind the other even if there is no severance and even if the joint tenant whose act led to the consequence in question has died and that act of the joint tenant does not necessarily sever the joint tenancy. In other words, counter intuitively, it is not always the case that the conduct of one joint tenant affects only him during his life time and when he dies the consequence of his action dies with him. Importantly, it is important to observe that the conduct that has had the effect on the surviving joint tenant when taken during the life time of the deceased joint tenant does not have the effect of severing the joint tenancy.

[27] In *A Digest of the Laws of England (4th ed) (editor Stewart Kyd) (1793) (Dublin: Luke White), page 73* there is this statement (citing Littleton):

> *So, if one joint-tenant does a thing which gives to another an estate, or right in the land, it binds the survivor; as if a joint-tenant in fee, or for life, makes a lease for 40 years. Lit s 289*
>
> *So, if he leases to commence in futuro, and dies before the commencement, Ibid*
>
> *So, if he leases for years the vesture or herbage of the land: for such lessee has a right to the land. Co L 186 b*
>
> *And the survivor shall not have the rent upon a lease for years, tho he has the reversion Co L 185 a.*
>
> ***So, if he acknowledges a statute, recognizance or judgment and execution be sued in his life-time; it binds his companion who survives*** *Co L 184 b* (Emphasis added)

[28] It would seem from this that even in respect of a joint tenancy some actions by one joint tenant do indeed by the surviving joint tenant even if the surviving joint tenant was not part of the conduct giving rise to the liability of the deceased joint tenant. Or put another way there does the conduct of one joint tenant may lead to other joint tenant being affected and that conduct does not necessarily lead to a severance of the joint tenancy.

[29] In *A Digest of the Laws of England Respecting Real Property, Vol 2, William Cruise, (4th ed) (1835) (London: Saunders and Benning, Law Book Sellers), 375 – 377,* there is this more accessible language;

> *53. In consequence of the right of survivorship among joint tenants, all charges made by a joint tenant on the estate determine by his death, and do not affect the survivor; it being a maxim of law, that jus accrescendi prefertur oneribus. [the right of survivorship is preferred over encumbrances]*
>
> *54. Thus, Littleton says, if there are two joint-tenants in fee, and one of them grants a rent-charge by deed, out of that which belongs to him; in this case, during the life of the grantor, the rent-charge is effectual: but, after his decease it is void; for he who hath the land by survivorship, shall hold it discharged; because he is in by survivorship, and claims under the original feoffment, and not by descent from his companion.*
>
> *55. **If one joint tenant acknowledges a recognizance or a statute, or suffers a judgment in an action of debt to be entered up against him and dies before execution had, it shall not be executed afterwards; but if execution be sued in the life of the cognizor, it shall bind the survivor. But Lord Coke observes, that, as well in the case of a rent-charge, as of a recognizance, statute, or judgment, if he who makes the charge survives, it is good for ever.*** (Emphasis added)
>
> *56. If one joint-tenant in fee-simple be indebted to the king and dies, no extent shall be made after his decease, upon the land in the hands of the survivor.*
>
> *57. There is one exception to this rule; for, if there are two joint-tenants in fee, and one of them makes a lease to a stranger for years, it will be good against the survivor, even though such lease does not commence until after the death of the joint-tenant who made it; because it is an immediate disposition of the land.*
>
> *58. ...*
>
> *59. In consequence of the intimate union of interest and possession which exists between joint-tenants, they are obliged to join in many*

acts. Thus, joint-tenants must formerly have all done homage and fealty together.

60. There are, however, many cases, in which they need not all join; and where the act of one will be considered as the act of all. Thus, the entry of one joint-tenant is deemed the entry of all; and the seisin and possession of one is the seisin and possession of all.

[30] These passages were confirmed by Sir William Blackstone in his commentaries on Littleton. It appears from this that a joint tenant suffering a judgment in an action for debt and being the subject of execution of the debt before the judgment debtor dies does not sever the joint tenancy. This view is confirmed by a reading of the very next chapter in William Cruise's text entitled *How a Joint Tenancy may be Severed and Destroyed*. Of all the methods mentioned being the subject of judgment debt is not one of them – at least the mere fact of being a judgment debtor and execution begins against the jointly held real estate does not bring about any automatic severance. The reason seems to be that being the subject of judgment debt does not destroy any of the three unities other than unity of time.

[31] Miss Davis cited the **Irani Finance** case and **Deborah Webb v Orville Web and Memeile Webb** Cause No 415 of 1982 and **Cowcatcher Collection Fund v Robert Hawkes and Belinda Hawkes** Causes 198 and 353 of 1996 (unreported) (delivered February 21, 1991) per Smellie CJ. It is no disrespect to counsel that these cases have been not examined in depth. The research has convinced this court that no useful purpose would be served by this because the passages cited above from the authoritative texts show that it was the common understanding from as early as the time of Littleton that one joint tenant's property could be properly used to satisfy a judgment debt despite the fact that the other joint tenant was not a judgment debtor and had nothing to do with the circumstances that led to his co-tenant becoming a judgment debtor. What has happened since those ancient times is that many statutes over time have regulated how the judgment creditor may go about enforcing his judgment. Also those case turned on the statutory provisions examined in those cases.

[32] It is indeed regrettable that Mrs Rose is now in the position that she is in but this court has to declare the law and apply it.

[33] Miss Gordon's submissions on behalf of Mr Gordon can be dealt with quickly. It is this court's view that there is nothing in the circumstances of the case which would deflect the provisional charging order being made final. Equally, there is no factual or legal consideration that would prevent the provisional attachment of debts order being made final.

[34] Miss Gordon's task was quite difficult. Mr Rose's affidavit alleges that the claimant has not acted in a manner that makes it possible for him to discharge his debts. He says that the bank has frustrated every effort he has made to sell properties to meet his liabilities. The bank is entitled to enforce its judgment.

[35] He also sought to say that there was misrepresentation on the part of the bank but the court was not persuaded of this. The material was simply not there to make this case. Mr Rose also sought to say that there was material non-disclosure on the part of the bank when it applied for the provisional charging order. The court is hard pressed to see what the material non-disclosure was.

Resolution

[36] The court has engaged in this rather lengthy history in order to show that it appears to be the case that the fact that one joint tenant becomes a judgment debtor is no bar to enforcement action in the form of a charging order being made against the property.

Orders

[37] The order of the court is as follows:

(1) Final charging order granted

(a) *in respect of property located at 9 Fairlane Avenue, Kingston 6 in the parish of Saint Andrew being lot numbered 19 and registered at volume 1383 folio*

409 of the Register Book of Titles and held in the joint names of Rohan Rose and Karel Rose;

(b) *in respect of property known as part of Biscayne Beach, Bull Bay in the parish Saint Andrew being lot numbered 20 and registered at volume 1051 folio 63 of the Register Book of Title and held in the names of Rohan Rose and Karel Rose;*

(c) *furniture, appliances, paintings, prints and electronic property located at 9 Fairlane Avenue, Kingston 6 in the parish of Saint Andrew that is the property of Rohan Rose held solely and jointly by Rohan Rose and Karel Rose*

(2) In respect of the Fairlane Avenue property in the event of an application for an order for sale, the interested party, Karel Rose, must be served.

(3) The provisional charging order is varied to exclude furniture, appliances, paintings, prints and electronic property that is owned solely by Karel Rose.

(4) Costs of application in the case of Rohan Rose to the claimant to be agreed or taxed.

(5) Sixty percent of costs of application in the case of Karel Rose to the claimant to be agreed or taxed.

(6) Leave to appeal granted.