[2025] JMSC Civ 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV00075

BETWEEN	DESMOND FOX	CLAIMANT
AND	GEORGE FOX	FIRST DEFENDANT
AND	CLIFTON FOX	SECOND DEFENDANT

IN OPEN COURT

Ms. Carol Davis for the Claimant

Mrs Debby-Ann Brown-Salmon instructed by Salmon & Swaby for the Defendants

Heard: September 30, October 1, 2, 3, 4, 2024 & May 13, 2025

Property Law - Land – Attorney transfers land out of the name of defendants while claim is sub judice – No disclosure of transfer to court or opposing counsel – No joinder of third parties to claim – No orders made against land in absence of owners of freehold - Supreme Court Act, S. 2 & 48.

WINT-BLAIR, J

The pre-trial application to amend the claim

[1] The land subject of this claim is situated at Mount Airy district in the parish of St. Andrew ("Mount Airy.") The claim was filed on January 8, 2021. The acknowledgement of service on behalf of both defendants was filed on April 22,

2021. The defendants, both of whom reside in New York, USA, indicated on their acknowledgement of service that their address for service was that of their attorney-at-law.

This claim proceeded through the usual channels of case management and pre-trial review. The trial date was set with the concurrence of counsel appearing in the matter, and the appearances have remained unchanged.

[2] On the morning of trial an application was brought by Ms Davis to amend the claim form. The affidavit of the claimant in support of the application stated that having conducted a title search some two weeks before the trial date, Ms Davis had discovered that since this claim was filed, the defendants had transferred the land.
Copies of both certificates of title were attached, marked DF1.

[3] The claimant averred that he occupies the said land and none of the transferees have attended upon the land since January 8, 2021. He did not become aware of this change in ownership until he saw the title and believes that the land was gifted in a deliberate attempt to defeat the claim. The land was never advertised for sale nor was he ever advised that the land was for sale.

[4] The claimant deposes that he cannot proceed now to request an order for sale of the land as the new owners are not before the court. In order to respond to this development, Ms Davis filed the application to amend the claim seeking an order that the claimant's one-third share of the land be valued and if he is successful in this claim, an order that the defendants pay the value of his one-third share to him.

[5] Ms Davis relied on the cases of Caricom Investments Limited and Others v NCB and others[1] and Jamaica Redevelopment Foundation Inc v Clive Banton and Sadie Banton[2].

[6] The application to amend was rather surprisingly most stridently resisted by Mrs Brown-Salmon. It was beyond dispute that an application to transfer the land subject of this claim had been signed by the defendants and lodged by Mrs Brown Salmon, counsel appearing in this trial for the defendants. The transfer was registered to Karen Fox and Kemeel Sandiford by way of gift on September 30, 2021 and a new certificate of title was issued.

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[1] [2020] JMCA Civ 15
[2] [2019] JMCA Civ 12

The land subject of this claim is now registered at Volume 1522 Folio 332 of the Register Book of Titles.

[7] In her oral submissions Mrs Brown Salmon admitted to being the attorney with carriage of the conveyance of the land which the claim is based. Counsel further admitted that endorsed on that certificate of title registered at Volume 1522 Folio 332 is transfer number 2324376 by way of gift, registered on September 30, 2021 to Karen N. Fox and Kemeel Sandiford, the children of the first defendant.

[8] There were no submissions in relation to prejudice if the trial commenced, neither was there an application for an adjournment to add Ms Fox and Ms Sandiford as parties to the claim as they are now the registered owners of the land.

[9] By way of chronology, the witness statement of the claimant was dated April 28, 2022 and filed the day after. The witness statements of the defendants were dated April 21, 2022 and filed on April 22, 2022.

[10] There was no mention in the defendants' witness statements or in any other document filed by them after the date of the transfer that the defendants no longer owned the land. Up to the date that the core bundle in this claim was filed by the claimant's attorney (September 20, 2024), the certificate of title before the court, was the original title issued on February 19, 2019.

[11] The defendants' list of documents filed on February 17, 2022, did not contain either the instrument of transfer or the new certificate of title. The defendants' listing questionnaire filed on June 3, 2022, did not address the issue of disclosure.

[12] In their pre-trial memorandum filed on May 27, 2022, the defendants state in paragraph [2] that:

> "The Defendants maintain that they are the legal owners of the property in question…"

[13] The only indication that there had been an actual transfer of the land in question was contained in the defendants' skeleton submissions filed on March 13, 2024. There was evidence, in the witness statement of George Fox at paragraph 19 which heralded that the land would have been transferred to his daughters though there was no actual averment speaking to the transfer itself which had long been registered. This is what he said:

> "I told him that It was only my brother and I and that we owned the property equally and if anyone was going to get anything, it would be my two children. I told him we cannot give him anything because it was going to my daughters." I also told him that I did not know if my brother Clifton would be considering giving him anything because he never claimed him as his son." He then asked me, if it is that he was not going to get anything then, and I told him that my brother would not give him anything. Desmond then said, OK, you are going to hear from my lawyer." [3]

[14] Despite the pre-trial review judge hearing this matter on June 15, 2022, the attention of the court was not adverted to the transfer registered on September 30, 2021, nor to that paragraph in the witness statement.

[15] There were no other hearing dates in this claim between the pre-trial review date and the date of trial. The defendants filed no supplemental list of documents.

Therefore, for all intents and purposes, the court up until the very morning of the trial had no clue that the land subject of the claim, had been transferred, and most unfortunate of all, that counsel appearing in the trial for the defendants was the attorney with carriage of the conveyance.

[16] The state of the court record was incapable of explanation by Mrs Brown-Salmon. It was her submission that the registered proprietors are the children of one of the defendants. While this is an admission in a submission, the court is prepared to accept it as fact as it

[3] Witness statement of George Fox at [19]-[21]

has not been set down in any court document. The application to amend the claim was not opposed after mature deliberation.

[17] It behoved the court to enquire of Mrs Brown-Salmon whether any orders had been made by the court as a result of the conveyance of the land to the daughters of George Fox, as upon examination of the court file, there were no such ascertainable orders. The response to that enquiry led the court to conclude that there had been no disclosure of the transfer of the land subject of the claim to any of the several judges who heard this matter in pre-trial proceedings, let alone to opposing counsel. There was also no disclosure of this material fact to this trial court before the application to amend the claim was raised by Ms Dacosta on the morning of trial.

[18] The court was put in the infelicitous position of having to point to the provisions of the Legal Profession Act, the Canons of Ethics of the legal profession, the duty of counsel as an officer of the court, as well as the ongoing duty of disclosure to Mrs Brown-Salmon.

[19] Nevertheless, the court went on to consider the merits of the application. In the Caricom case, the appeal concerned the right of a party to amend its statement of case in preparation for a retrial and the extent to which such amendments should be allowed. That case is distinguishable on the facts, however its principles are important to state. At paragraph [30] Brooks, JA (as he then was) writes:

> "a party should be at liberty to put forward its entire and best case. If it is entitled to succeed on that case then it would be an injustice to deny it that success. The fact that the other party loses the contest as a result of that amendment, is not, by itself, a wrong. It only means that that party has got its just deserts. This guidance, among others, to which the learned judge referred is contained in the judgment of Neuberger J, as he then was, in Charlesworth v Relay Roads Ltd (in liquidation) and others [1999] 4 All ER 397, at pages 401-2:
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> > "As is so often the case where a party applies to amend a pleading or to call evidence for which permission is needed, the justice of the case can be said to involve two competing factors. The first factor is that it is desirable that every point which a party reasonably wants to put forward in the proceedings is aired: a party prevented from advancing evidence and/or argument on a point (other than a hopeless one) will understandably feel that an injustice has been perpetrated on him, at least if he loses and has reason to believe that he may have won if he had been allowed to plead, call

> evidence on, and/or argue the point. Particularly where the other party can be compensated in costs for any damage suffered as a result of a late application being granted, there is obviously a powerful case to be made out that justice indicates that the amendment should be permitted."

[20] There were no orders sought by the defendants concerning the new proprietors of the land. The fact that Mrs Brown-Salmon did not apply to add the new owners of the land to the claim at any stage or even at the time of the hearing of this application, led this court to pause, as the owners of the land would be affected and/or prejudiced by any orders made yet they were not before the court.

[21] In Beep Beep Tyres, Batteries and Lubes Limited v DTR Automotive Corporation,[4] it was held that "the rules do not clearly outline the precise limits on a party's ability to amend, and neither do the rules set out any factors that may be relevant to a court in the exercise of its discretion to allow or disallow an amendment". The paramount consideration for the court is to ensure that, having balanced the scales, justice is dispensed between the parties. In so doing, all the circumstances of the case must be taken into account:

> "[53] Although a judge is imbued with wide discretion to determine whether to grant or refuse a proposed amendment, in the exercise of that discretion a judge must seek to achieve fairness and justice between parties. That end is achieved by taking account of all relevant factors in the particular case and, in so doing, having regard to the court's overriding objective. The factors for the court's guidance in its quest to dispense justice and to further the overriding objective of the court can also be derived from the relevant authorities. Some relevant factors for the judge's consideration are listed below. This list is, however, by no means exhaustive and is merely intended as a guide. [sic]
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> (i) the importance of the proposed amendment in resolving the real issue(s) in dispute between the parties; (ii) the nature of the proposed amendment, that is, whether it gives rise to entirely new and distinct issues or whether it is an expansion on issues that were already pleaded or otherwise foreshadowed; (iii) the stage of the proceedings at the time the application to amend is made. If the application to amend is made at a late stage, for example close to the trial date with the result that there may be an adjournment or if the application is made after trial has commenced, it should be considered with greater scrutiny; (iv) whether there was delay in making the application to amend, the extent of the delay and the reasons

[4] [2022] JMCA App 18

> for the delay; (v) the prejudice to the respective parties to the claim, consequent on the decision to grant or refuse the proposed amendment; (vi) whether any prejudice to the parties may be appropriately compensated by an order for costs; (vii) the arguability of the proposed amendment; (viii) the potential effect of the proposed amendment on the public interest in the efficient administration of justice; (ix) the reason(s) advanced by the applicant for seeking an amendment; and (x) the importance of having
> finality in litigation."

[22] In all the circumstances of this case, the justice of the situation required that the amendment to be made. There was no application for an adjournment, to join the new owners of the land and no submissions as to how the trial of the claim would prejudice them, as none had been advanced. This is a peculiar set of circumstances and it would have been useful to have material upon which to consider the issue of prejudice. An amendment to the claim would not lead to a new cause of action. It was deemed necessary in determining the real issues in controversy between the parties. The certificate of title and instrument of transfer speak for themselves.

[23] In all the circumstances, this application fell into the category of those requiring the permission of the court, which was not withheld, given the context within which the application was made. The application to amend the claim was granted in order to do justice between the parties and in furtherance of the overriding objective.

The Pleadings

[24] The claimant formerly amended his particulars of claim, requiring no permission from the court to do so. The order granting substituted service on the defendants by registered post and courier was made by Lawrence-Grainger, J(Ag), (as she then was) on March 10, 2021.

[25] The defence filed on May 27, 2021, was the subject of a requisition stating that it was filed out of time. The power to allow a party to amend its statement of case is set out at rule 20.4 of the Civil Procedure Rules (CPR). The case management conference ("CMC") took place on February 3, 2022, before Master S. Orr (as she then was). What was prescience in the orders on the part of the learned Master, was order number seven, which stated that any applications to be made by either side were to be filed and served by May

13, 2022 and heard at the pre-trial review on June 15, 2022 at 11:00 am for one hour. Any affidavits in response were to be filed and served by June 3, 2022. There were no applications from either side.

[26] Order number seven may be construed as a signal to counsel for the defendants by the learned Master that there ought to have been an application to extend time to file the defence, which was filed out of time. Though the claim has been amended, there is no amended defence before the court as a consequence.

[27] There was no application by the defendants to extend time for the filing of the defence as had been foreshadowed in the orders of Master Orr, neither did the claimant complain about the absence of any such application at trial. Each case

has to be decided on its own facts. Despite the several issues outlined, the court proceeded with the trial.

Issues

1. Whether the court can make the orders sought as the current landowners are not before the court.
2. What remedy can be granted.

Discussion

[28] In the case of Hyacinth Gordon v Sidney Gordon[5] Brooks, JA (as he then was) on appeal from a decision under PROSA said:

> [20] "It is a basic tenet of our common law that a person could not be deprived of his interest in property without having been given an opportunity to be heard in respect of any such deprivation. A court that is made aware of a person's interest in property should, therefore, make no order concerning that property, unless that person is given an opportunity to appear and make representation in that regard."(Emphasis added.)
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> [21] The learned judge, although accepting that this property was not wholly owned by either Mr Gordon or Mrs Gordon or both, was therefore in

[5] [2015] JMCA Civ 39

> error in declaring that Mr Gordon had an interest in it, not having the other interested parties before the court.
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> > [22]… Even if Mr Gordon could have established that the other interested parties had so conducted themselves that he would be entitled to secure an interest as against them, it would have been necessary for them to have been present to answer his allegations. There have been cases where relief has been granted even when the property is owned by one spouse along with others. In those cases the other parties were joined." (Emphasis added.)

[29] This case first of all concerns registered land, a fact not in issue. Second, there was certain conduct in relation to the conveyance of that registered land to the children of George Fox while the matter was sub judice. This conduct was such, that it ought to entitle the claimant to benefit. There was no specific averment related to the existence of a trust in his pleadings. However, the claim was brought in equity which means it was open to the court to see whether a trust could have been inferred or implied based on all the circumstances.

[30] The difficulty is that, the law is clear. Property owners and those with an interest in land must be before the court. In these circumstances, this court is not entitled, to make any order as regards the claimant's interest in the land at Mount Airy. The court accepts that there are other persons who now own the land and those persons have not made parties to the action.

[31] In light of all the circumstances in this case, the court cannot on the authority of Hyacinth Gordon proceed to determine whether the claimant has an interest in the land by virtue of his contribution to the construction, management and upkeep of the land and so on in the absence of the parties who own the land.

[32] By way of an appropriate remedy, the general principle is that what is affixed to the land, as was in this case, a concrete structure, becomes part of the land. Williams J in Greaves v Barnett,[6] expressed the principle this way:

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[6] (1978) 31 WIR 88 at page 91 j

> "[t]he general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land would follow the ownership of the land on which the building is constructed."

[33] The claimant alleges that he built a two-room apartment in 2006, George Fox alleges that he began repairs on the old board house that was on the land. Clifton

Fox said that it was the defendants who did the repairs, however he admitted that the brothers had given the claimant permission to build on the land at Mount Airy. Both defendants also admitted that the building they later constructed was an extension of that building built by the claimant.

[34] I accept that there was a two-room apartment on the land built by the claimant. In respect of expenditure for that structure, the agreed receipts in evidence total $111,500 and were said to represent purchases made by the claimant between 2008 and 2009 for the construction.

[35] The sum of $111,500 will be refunded to the claimant. It is the only order made in all the circumstances as the orders sought in the amended claim cannot be granted based on the foregoing statement of the law.

[36] Orders

1. Judgment for the Claimant.
2. The defendants are hereby ordered to repay the sum of $111,500.00 to the Claimant.
3. Costs to the Claimant to be taxed if not agreed.

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Wint-Blair J