



[2021] JMSC Civ 178

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021 CV 00795

BETWEEN

SIMONE GRANT

CLAIMANT/APPLICANT

AND

DENISE FORREST

DEFENDANT/RESPONDENT

IN CHAMBERS

VIA VIDEO CONFERENCING

Ms. Annaliesa Lindsay instructed by Lindsay Law Chambers for the Claimant/Applicant

Mrs. Tamara Francis Riley Dunn instructed by Nelson Brown Guy and Francis for the Defendant/ Respondent

Heard: September 28, 2021 and October 13, 2021

Application for Interim Injunction – Factors to be considered in granting Interim Injunction—Serious issues to be tried-Whether damages are an adequate remedy – American Cyanamid test

LAWRENCE-GRAINGER, J (AG.)

[1] On the 13th October 2021, I delivered an Oral Judgment where on the inter partes hearing of an Application for an Interim Injunction, I discharged the Interim Injunction and ordered that costs be awarded to the Respondent to be agreed or taxed. These are the written reasons for my decision.

- [2] This is an application by Simone Grant (the Claimant) for an interim injunction to restrain Denise Forrest, the defendant, her servants and/or agents from selling transferring or otherwise dealing with or disposing of property situated at Townhouse #4, Knightsbridge Manor, 41 Kings House Avenue, Kingston 6, in the parish of St. Andrew, registered at Volume 1392 Folio 154 of the Register Book of Titles.
- [3] The Defendant and the husband of the Claimant held the disputed premises as joint tenants and on the death of the claimant's husband on the 17th January 2020, the defendant begun the process of selling the premises. The Claimant averred that her lawyers received a telephone call from a prospective purchaser and she was then prompted to initiate proceedings by way of a Fixed Date Claim Form on March 3, 2021 and by a Notice of Application for Interim Injunction filed on the 27th July 2021.
- [4] An Interim Injunction was granted on the 16th August 2021 until the 28th September 2021 when the matter was fixed for Inter partes hearing. That was what was before this Court.
- [5] The issue before the Court was whether the injunction should be discharged or extended until the determination of the substantive claim as laid out in the Fixed Date Claim Form. In coming to a decision on the issue, the Court examined the pleadings to see the circumstances that lead to the application.

THE CLAIMANT'S CASE

- [6] The Claimant stated that she begun a common law relationship with Michael Forrest, the Defendant's brother, about the year 2000 and she moved into the disputed premises on the 1st August 2007 with him "which was purchased for the purpose of us to reside in as our family home."
- [7] Though the term "family home" was used, in the course of the hearing Counsel on behalf of the Claimant conceded that the premises didn't meet the definition of family home as set out in the Property Rights of Spouses Act (PROSA).

- [8]** The Claimant says that she provided One million dollars towards the purchase of the home; Five Hundred Thousand Dollars (\$500,000) directly and another Five Hundred Thousand Dollars (\$500,000) by way of a loan which was repaid by herself and Mr. Forrest. That further they purchased furniture and decorated the home together.
- [9]** However, Mr Forrest became ill in October 2019 and passed on the 17th January 2020. They got married a day before he died, on the 16th January 2020.
- [10]** Mr. Forrest had also given instructions to the Defendant to have his Last Will and Testament prepared. In that Will, dated December 27, 2019 (before the marriage) he bequeathed to the Claimant 50% interest in the said disputed premises and the Claimant therefore believed that her husband treated the property as one of tenancy in common. The Defendant was also one of the Executors.
- [11]** The Claimant alleges that the joint tenancy was converted given the communications between her husband and the defendant as well as the actions of both of them on which she acted.
- [12]** The Defendant she said assured her that “my family home was mine” though the revelation before that response was that she stood to inherit only 50% of the property. She said the Defendant had also assured her that after the execution of the Will that the home was left to her. After the reading of the Will however, the Defendant told her that she was going to sell the property.
- [13]** She does not say when but that she later became aware of a loan from the National Commercial Bank (NCB) for which the home stood as security and the loan proceeds were paid out to the Defendant but the loan payments were made with her husband’s and her money from a joint account. That further the defendant agreed that if she continued to make payments towards the loan she would transfer the property to her. She attached five receipts. Three of them were paid in by a Roger Johnson but no explanation was offered as to who he is. Her name doesn’t appear on any of the receipts.

[14] The Claimant also referred to another loan that the Defendant had benefitted from which again was repaid by herself and Mr. Forrest and said the Defendant was amenable to transferring the property to her because she benefitted from these loans which were repaid by herself and her husband and they were never reimbursed. There was also a third and further debt of 2 million dollars that the defendant owed them for an investment done in Negril.

THE DEFENDANT'S CASE

[15] As for the Defendant, she states that though she cannot dispute when the Claimant and her brother begun their relationship, in the year 2000 her brother was engaged to someone else and they got married on 7th April 2001 and divorced on 8TH May 2009.

[16] The disputed premises was acquired by her brother and herself as an investment property but they agreed subsequently that he could reside there until he acquired somewhere to live. The property was transferred to them on the 8th December 2005 as Joint tenants.

[17] She was the one who paid the deposit of \$2million dollars and the balance purchase price was financed through a mortgage obtained by her brother and her.

[18] She agreed that her brother asked her to assist him with his Will whilst he was a patient in the hospital and that pursuant to instructions from his attorney at law, she spoke to him and drafted a Will.

[19] That "I further understand that since the property is jointly owned by my brother and I and he predeceased me that there is no separate share owned by him at the time of his death"

[20] The Defendant says the Executors of her brother's Will met with the Claimant after his death and went through his finances to include his debts. That when the Will was read, she told the Claimant that the premises now belonged to her. She denied that she assured the Claimant that the property was hers.

- [21] She stated further that she and her brother took out several loans and she is now left to pay them and that she needs to liquidate the property to reduce the debt and she has also assumed responsibility for her brothers last child.
- [22] With respect to the loan from NCB, the Defendant says that the loan was for her brother and not her. She attached a letter from the NCB. The letter was dated June 17, 2020 and addressed to the defendant and Mr Forrest. It informed them that the loan was in arrears in the sum of almost \$388,000.00 and needed to be regularized. She said she made no arrangement with the Claimant for her to repay the loan.
- [23] In referring to the loan with FCIBC, she says that was paid out by an insurance policy. She borrowed no money from Sagicor Bank and she doesn't owe the Claimant or her brother any monies for an investment in Negril.
- [24] She also indicated that she made no agreement to sever the joint tenancy and her brother never asked her to. She expected her brother to recover and for them to review the Will. She had attempted to probate the Will but it was challenged because the Claimant's marriage to her brother operated as an automatic revocation of the Will. Her brother died leaving not only the Claimant but four (4) children, one (1) of whom is a minor.
- [25] She wishes to sell the property to help with the debts and to care for the minor.

THE LAW

- [26] The decision as to whether to grant an interim injunction is informed by the oft cited **American Cyanamid v Ethicon [1975] 1 All ER 504**, endorsed in several decisions from our courts to include **The National Commercial Bank Jamaica Ltd v Olint Corp. Limited, Privy Council Appeal No. 61 of 2008 and delivered on the 28th April 2009**. The principles are as follows:
- i. The Court must first consider whether there is a serious question to be tried. This means that the claim must not be frivolous or vexatious. This is

different from the requirement to establish a prima facie case. The Claimant should have a real prospect of succeeding in her claim for a permanent injunction at trial. If there is no serious question to be tried, then the injunction should be refused.

- ii. If there is a serious question to be tried the next question is whether damages would be an adequate remedy for the Claimant's whatever losses she may suffer pending the trial of the substantive matter. Also, one must consider whether the defendant is in a position to pay them. If damages are an adequate remedy, then an injunction should not be granted as then there is no basis for interfering with the Defendant's freedom of action by granting an injunction.
- iii. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. The court must be satisfied that the comparative mischief, hardship or the inconvenience which is likely to be caused to the applicant by refusing the injunction will be greater than that which is likely to be caused to the opposite party by granting it.
- iv. Hence, it is the duty of the court to consider the convenience of the plaintiff as against the convenience of the defendant. If the court thinks that by refusing the injunctions, greater or more inconvenience will be caused to the plaintiff, it will grant the interim injunction. Moreover, if the court finds that greater inconvenience will be caused to the defendant, it will refuse the relief.

IS THERE A SERIOUS ISSUE TO BE TRIED?

[27] From the pleadings there are two main questions in dispute. Those are:

- a. Was there a severance of the joint tenancy?

- b. Did the claimant have a proprietary and/ or an equitable interest in the property?

ISSUE 1: Was there a severance of the joint tenancy?

- [28] It is also recognised that the substantive claim has still not been tried and so this court should avoid taking an interim view on the outcome of the case. For that reason, no comprehensive analysis of issues that are material to the determination of the Fixed Date Claim Form should be done. However, that doesn't mean that the Court is just to accept what is thrown at it without some sort of basic analysis, even at this interlocutory stage.
- [29] The Claimant asserted that before they were married her husband gave instructions to the Defendant to have his Last Will and Testament prepared and in that Will he left for her his 50% interest in the disputed premises and so she argued her husband treated the property as one of tenancy in common.
- [30] In support of this position she highlighted that the Defendant was also one of the Executors and knew of the content of the Will and especially the fact of this gift. She further alleged that the joint tenancy was converted given the communications between her husband and the defendant.
- [31] In **Williams v Hensman, (1861) 70 ER 862**, the court outlined three methods of severing a joint tenancy - (i) by alienation by one of the joint tenants of his share in the property; (ii) by mutual agreement between the joint tenants and (iii) by a course of dealing between the joint tenants.
- [32] This formulation has been accepted by our Court of Appeal in cases such as **Sunshine Dorothy Thomas, Winsome Blossom Thompson (Executrices of the estate of Leonard Adolphus Brown, deceased) & Owen Brown v Beverley Davis [2015] JMCA Civ 22** and **Carol Lawrence & Others v Andrea Mahfood [2010] JMCA Civ 38**,

- [33] The authorities also establish that it is the person who is asserting that there is a severance who must prove it. In this case it's the duty of the Claimant.
- [34] In **Megarry and Wade – The Law of Real Property (8th edition) page 497 the following was stated:** “The right of survivorship does not mean that a joint tenant cannot dispose of his interest in the land independently. He has full power of alienation inter vivos, though if, for example, he conveys his interest, he destroys the joint tenancy by severance and turns his interest into a tenancy in common, but he must act in his lifetime, for a joint tenancy cannot be severed by Will.”
- [35] In **Bertram Cooper v Linford Coleman, McDonald Bishop J (ag) (as she then was) opined the following at paragraph 23:** “Under the Common Law, a mere declaration of an intention to sever without the agreement of the other joint tenant was not effective to sever a legal joint tenancy. As Lord Hardwicke, LC said: “If no agreement then there must be an actual alienation to make it amount to a severance. The declaration of one of the parties that it be severed, is not sufficient, unless it amounts to an actual agreement.”
- [36] The Learned Judge opined that falling short of an act of alienation or a similar unilateral act affecting the beneficial interest so as to preclude the operation of the right of survivorship, a unilateral act or declaration of intention, without more, even if communicated, is not enough to sever the joint tenancy within the principles of **Williams v Hensman.**
- [37] At the hearing the Claimant agreed that a Joint Tenancy cannot be successfully severed by Will. However, that was the only substantial evidence that the Claimant brought to show that the deceased alienated his interest. Everything else was just the Claimant's mere assertions of what the now deceased would have said to her. That would not be sufficient to ground an alienation, even if communicated to the Defendant and even if the Defendant was aware of the proposed gift.
- [38] Additionally, both sides agreed that the Will was invalid as it was executed before the Claimant's marriage to Mr. Forrest and the Claimant cannot rely on it.

[39] The other two rules both require some mutuality and a common intention to sever between the joint tenants. There was no evidence expressed or implied where the court could find that there was a mutual agreement to sever the joint tenancy. The court does not accept the fact of the Defendant's knowledge of the content of the Will as evidence that she agreed with the wishes of her brother. The fact that the Respondent knew about the wishes of her brother would not equate to her acquiescing or agreeing with them. The court does not believe that would be a reasonable inference especially in light of the circumstances where he was hospitalized and died shortly thereafter.

[40] The Court therefore believed, even at this interlocutory stage, that there was no severance of the joint tenancy which would exclude the operation of the Defendant's right of survivorship on her brother's death.

[41] Therefore, it found that this was not a serious issue to be tried.

Issue 2: Did the Claimant have a proprietary and/ or an equitable interest in the property?

[42] The Claimant says that she provided One million dollars towards the purchase of the home; Five Hundred Thousand Dollars (\$500,000) directly and another Five Hundred Thousand Dollars (\$500,000) by way of a loan which was repaid by herself and Mr. Forrest. That further they purchased furniture and decorated the home together. She however has provided no evidence to buttress or substantiate these assertions. The only receipts she presented were those payments made after the death of her husband which she says were made pursuant to an agreement with the Defendant.

- [43] Did the Defendant acquiesce in the Claimant expending her monies on the property and acting to her detriment and is now estopped from enforcing her strict legal rights?
- [44] The only communications revealed by the pleadings between the Defendant and her brother were his instructions to the Defendant to prepare this Will. The assertions of any promise made by the Defendant for the property to be transferred to the Claimant as well as the Claimant's contention that the Defendant asked her to make loan repayments in exchange for this transfer were denied.
- [45] Additionally, she alleged that she acted upon the actions of both of them and says she made payments on an NCB loan in reliance on certain promises made by the defendant for her to get the premises.
- [46] However, given the letter from NCB relied on by the Defendant, even if there were such promises (and the Court does not accept that there were) the Claimant did not carry out her obligations under it.
- [47] Furthermore, the Claimant would just be a beneficiary of the estate of her husband and has no legal or equitable proprietary interest in the unadministered assets of the deceased's estate. For that proposition see **Winston O'Brian Smith & Ors v Constantine Scott & Ors [2012] JMSC Civ 152**.
- [48] The fact that the Claimant was in possession does not entitle her to enforce her right to possession against the Defendant who is not a mere stranger or trespasser but a legitimate title holder.
- [49] The Court also saw it important to note that though the applicant resided at the disputed premises, she accepted that the disputed premises was not the family home as defined by the Property Rights of Spouses Act, as it was not wholly owned by either or both of the spouses.
- [50] The Court therefore believed that this also was not a serious issue to be tried.

[51] Out of an abundance of caution, in case it was wrong, it went on to consider the next question.

Is damages an adequate remedy?

[52] When considering the adequacy of the remedy of damages available for either party the Court adopts the following approach. Firstly, the Court considers whether, if the Claimant were to succeed at trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained by the refusal to grant the injunction. If damages would be an adequate remedy and the Defendant is in a financial position to pay them, then the injunction should be refused, regardless of how strong the Claimant's claim may appear to be at that stage.

[53] Secondly, if damages would not provide an adequate remedy for the Claimant in the event of him succeeding at the trial, then the Court should consider whether, if the defendant were to succeed at trial the loss he suffered as a result of having been restrained by the injunction would be adequately compensated by the Claimant's undertaking as to damages.

[54] The Claimant has relied on several unsubstantiated allegations. She has provided proof that she made payments on a loan- that's monetized. The disputed premises was not the family home. Given the law of survivorship and the courts finding that the defendant is now the sole legal owner, damages would be adequate.

[55] The Court believed that if the Claimant were to succeed at trial in establishing her right to a permanent injunction she would be adequately compensated by an award of damages for the loss she would have sustained by the refusal to grant the injunction.

[56] If the court is wrong on that, the third condition for granting an interim injunction is the balance of the convenience which must be in favor of the applicant. In other words, the court must be satisfied that the comparative mischief, hardship or the inconvenience which is likely to be caused to the applicant by refusing the

injunction will be greater than that which is likely to be caused to the opposite party by granting it.

[57] Hence, it is the duty of the court to consider the convenience of the Claimant as against the convenience of the Defendant. If the court thinks that by refusing the injunction, greater or more inconvenience will be caused to the Claimant, it will grant the interim injunction. Moreover, if the court finds that greater inconvenience will be caused to the Defendant, it will refuse the relief.

[58] In the instant case, more harm will be caused to the Defendant as against the Claimant if the injunction were extended. The Claimant has not provided any documentary proof of her contributions except some payments made after the death of her husband. That has to be balanced against the Defendant who was the registered title holder, registered as a joint tenant with the deceased and the usual consequences of that after one joint tenant passes. Additionally, the Defendant has given evidence of the debts of her brother's estate which need to be addressed. The balance is in favour of the Defendant and for the refusal of the application.

ORDER

1. Interim Injunction granted on the 16th August 2021 is discharged.
2. Cost to the respondent to be taxed if not agreed
3. Leave to appeal is granted.
4. Applicant's attorney at law to prepare file and serve Order.