



[2020] JMSC Civ 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017 HCV 01914

BETWEEN	VINCENT GUTHRIE	CLAIMANT/RESPONDENT
AND	DORRETTA MAY GUTHRIE	DEFENDANT/APPLICANT

IN CHAMBERS

Ms. Lisamae Gordon and Ms. Raynah Spence instructed by Malcolm Gordon, Attorneys-at-Law for the Defendant/Applicant.

Ms. Tavia Dunn and Ms. Debra Dowding instructed by Nunes, Scholefield, DeLeon & Co., Attorneys-at-Law for the Claimant/Respondent.

16th June and 3rd July 2020

Civil Procedure - CPR 26.3 - Application to Strike out Fixed Date Claim Form - whether there was failure to comply with a rule or practice direction - whether current claim is a re-litigation of an earlier claim and therefore an abuse of court process - whether the absence of facts in the earlier claim is likely to obstruct the just disposal of current proceedings.

Whether judgment on earlier claim is declaratory or executory - procedure for enforcing declaratory judgment - whether limitation period at CPR 46.2(1)(a) is applicable.

C. BARNABY, J (AG)

INTRODUCTION

[1] The now Ms. Guthrie and Mr. Guthrie, the Applicant and the Respondent respectively, were once married to each other. Whilst they were estranged, Mr. Guthrie

made an application to this court in Claim No. 2009 HCV 3430 (“the 2009 claim”), for the division of property and other remedies under section 14 of the **Property (Rights of Spouses) Act**. On 22nd July 2011 R. Anderson, J delivered judgment in that claim. The parties’ percentage interest in several properties and directions on the process for their realisation were ordered. Among the properties was Pitkelleny, in which each party was declared entitled to a fifty percent (50%) interest. The property was then registered at Volume 134 Folio 933 of the Register Book of Titles.

[2] It is the Respondent’s claim, which the Applicant does not deny, that a new certificate of title was issued for the said Pitkelleny property on 7th July 2014, in the names of the Applicant and two children of the marriage. It is one of the Respondent’s complaints on his Fixed Date Claim Form filed on the 14th June 2017 (“the current claim”), that the Applicant has acquired his declared interest in Pitkelleny. He pursues a number of declaratory reliefs in that regard; and an order that the Applicant pays forthwith his share of the appraised value of that property, less the sums he would owe to her on account that other properties which are the subject of the 2009 claim are in his sole name.

[3] By Notice of Application for Court Orders filed on the 26th February 2018, the Applicant asks this court, in exercise of the powers reserved to it by CPR 26.3(1)(a) and (b), to strike out the Respondent’s current claim.

[4] The Application was heard on the 16th June 2020 and a decision reserved to today’s date.

ISSUES

[5] The following four issues are determinative of the application:

- i. Does the Respondent’s claim constitute an abuse of the process of the court?

- ii. Can enforcement proceedings for breach of the orders on the 2009 claim be initiated by Fixed Date Claim Form?
- iii. Is the absence of the history of facts in the 2009 claim likely to obstruct the just disposal of the current claim?
- iv. Has the limitation period for enforcing the orders of R. Anderson, J on the 2009 claim expired?

[6] A number of authorities were helpfully referenced by Counsel during the course of submissions but I find that it is only necessary to cite a few in disposing of the application.

APPLICABLE LAW AND ANALYSIS

Does the Respondent's current claim constitute an abuse of the process of the court?

[6] The parties are in agreement that it would be an abuse of the process of the court for the Respondent to attempt a re-litigation of matters which were previously determined by R. Anderson, J in the 2009 claim. However, issue has been joined on whether the current claim so qualifies.

[7] It is the Applicant's contention that the issues which the Respondent is asking this court to decide are matters which were previously determined by the court in the 2009 claim. In consequence, she requests that the current claim be struck out.

[8] CPR 26.3(1)(b) states:

26.3 (1) *In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –*
(a)...

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c)...

[9] The Applicant relies on the oft cited case of **Hunter v Chief Constable of West Midlands and another**.¹ The court held that the claimant had engaged in an abuse of the court's process by initiating a collateral attack on a criminal conviction by way of a civil action. The facts are dissimilar to those which arise on the instant application but the general observations of Lord Diplock on the court's inherent jurisdiction to prevent abuse of its processes is instructive. He stated,

[There is an] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; ...²

[10] In assessing the merit of the Applicant's argument relative to re-litigation, an examination of the current claim and the 2009 claim must be undertaken. Ahead of doing so however, I believe it necessary to determine the nature of the judgment in the 2009 claim.

Nature of the judgment of R. Anderson, J

[11] It was the submission of Ms. Dunn for the Respondent that the judgment in the 2009 claim is declaratory, suffering the fate of judgments of that kind - it cannot be enforced by execution if disobeyed. It was further argued that as a result, the Respondent

¹ [1981] 3 All ER 727

² *Ibid.* 729

was compelled to initiate the current claim to enforce that part of the judgment which he claims the Applicant has breached.

[12] Reliance was placed on the dicta of Morrison, JA (as he then was), who had the occasion in **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams**³ to make the distinction between declaratory and executory judgments. On the application for a stay of the judgment on an election petition, Morrison, JA said this:

[10] It will immediately be seen that the judgment is in substance declaratory, rather than executory, by which I mean that although it does make a pronouncement with regard to the 1st defendant's status as a member of the House of Representatives, it does not purport to order the 1st defendant to act in a particular way, such as to pay damages or to refrain from interfering with the claimant's rights, either of which would be enforceable by execution if disobeyed. The distinction between the two types of judgment is well expressed by Zamir & Woolf as follows (in 'The Declaratory Judgment', 2nd edn. para. 1.02):

"A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive, judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain

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any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position.”

[13] I have also found the following extract from **Halsbury’s** on judgments and orders in civil proceedings useful. It states,

Many judgments and orders given or made in civil proceedings do not require to be enforced because the judgment or order itself is all that the party obtaining it requires. Thus, a judgment which determines status does not call for specific enforcement because it is declaratory of the status of the particular person or thing adjudicated upon, and renders it such as it is declared... Such a judgment does not order recovery or payment of money, delivery or transfer of property, or any specific act or abstinence which may be subject to any of the various methods of enforcement... A declaratory judgment is complete in itself, since the relief is the declaration.⁴

[14] The 2009 claim concerned the division of property and other remedies under section 14 of the **Property (Rights of Spouses) Act**. The court’s decision on the parties’ entitlement to several properties was sought, and in delivering his judgment on the 22nd July 2011 R. Anderson, J made the orders which appear below.

1. *The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property at Hopewell and registered at Volume 1313 Folio 776 of the Register Book of Titles.*

⁴ Halsbury’s Laws of England Volume 12A (2015), para 1268

2. *The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the properties at Sheffield and registered at Volume 1214 Folios 792 and 793 of the Register Book of Titles.*
3. *The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property at Pitkelleny and registered at Volume 134 Folio 933 of the Register Book of Titles.*
4. *The Claimant and the Defendant are each entitled to a fifty per cent (50%) interest in the property located at Lot 93, Nonpariel Land Settlement, Negril in the Parish of Westmoreland.*
5. *All the properties are to be valued by a valuator agreed by the parties and if no such agreement is arrived at within thirty (30) days of the date of this Order, the Registrar of the Supreme Court shall appoint such a valuator; provided that the parties may by agreement in writing entered into within the time set for appointment of a valuator, use valuations of the properties, previously obtained and jointly paid for by them.*
6. *Upon the properties being valued and valuation reports provided to the attorneys at law for each party, each party shall have the option to purchase the interest of the other party, provided however, that the Claimant shall have the first option in respect of properties at Order (1) and (2) and the Defendant shall have the first option in respect of properties at Orders (3) and (4), such options are to be exercised within one hundred and twenty (120) days of the delivery of the valuations to the parties' attorneys as aforesaid.*
7. *In the event of the failure of any party to exercise his or her option within the time limited by Order (6) above, the other party shall have the right to purchase the interest of the person so failing.*
8. *In the event that the Defendant exercises her option to purchase the property at Order (3) above, she will pay the Claimant one million dollars in reimbursement of the sums borrowed for the construction of the home, such sum is to be added to the cost of the 50% of the valuation for which she would otherwise be liable.*
9. *Where neither party is able to purchase the property as set out herein, such property may be sold at public auction or by private treaty and the proceeds divided in the same proportions as the ownership interests declared.*
10. *The Registrar is authorized to sign any document to give effect to the Orders made herein.*
11. *The Defendant is not indebted to the Claimant in respect of any sums withdrawn from any of their jointly held accounts.*

12. *The Claimant's claim for payment of any other debts other than any dealt with in these orders is denied.*

13. *Two-thirds of the Defendant's costs are to be paid by the Claimant, such costs to be taxed if not agreed.*

14. *Liberty to Apply.*

[15] When the above orders of Justice Anderson are examined, the conclusion that those numbered (1) to (4) are purely declaratory is inescapable. They set out the percentage entitlement, or status if you will, of each party in relation to the properties which were the subject of that claim.

[16] The order numbered (5) then goes in aid of those which precede it, and prescribes the method for determining the value of the properties. Orders (6) to (9) direct the parties on how to proceed to realise their declared percentage interests. While those orders offer guidance to the parties, they do not, to borrow **Halsbury's** phraseology, "*order recovery or payment of money, delivery or transfer of property, or any specific act or abstinence **which may be subject to any of the various methods of enforcement.***"⁵

[17] The orders cannot be said to be of a coercive character, which leads me to agree with the Respondent's submission that the orders in the judgment of R. Anderson, J are in fact declaratory.

Enforcement of the declaratory orders

[18] The nature of the judgment in the 2009 claim was not specifically addressed by Counsel for the Applicant. It was the Applicant's submission that the Respondent should have approached the court to work out the orders of R. Anderson, J on the basis that he had the liberty to apply. It was said that the Respondent in initiating fresh proceedings has abused the process of the court. I do not find favour with this argument.

⁵ Emphasis mine.

[19] Morrison, JA (as he then was), in **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams**,⁶ before going on to quote a passage speaking to the unavailability of an order for stay of a declaration, where an appeal against it has been made, also said this of the enforceability of those orders.

[13] In the work 'Declaratory Orders', 2nd edn, Mr P. W. Young QC, an Australian author, makes the point (at para. 212), that "The enforceability of a declaratory order is the weak spot in its armour, as there is no sanction built into the declaratory relief".

[20] This then begs the question: How are declaratory orders to be enforced?

[21] A further and very useful extract from Zamir & Woolf offers invaluable assistance in answering this question. This extract was cited with approval by Mangatal, J (as she then was) in **RBTT Bank Jamaica Limited v Y.P. Seaton and Ors. and Y.P. Seaton v RBTT Bank Jamaica Limited**.⁷ The court was asked to consider an application to strike out a portion of a witness statement ahead of the commencement of trial. In the course of deciding that application, Justice Mangatal was required to consider the nature of declaratory relief and in doing so said this,

At page 3 of his Work, Zamir, examines the subject of mere declaratory relief from the angle of its effectiveness:

*... A declaration made by the court is not a mere opinion devoid of legal effect: the controversy between the parties is thereby determined and becomes res judicata. Hence, if the defendant subsequently acts contrary to the declaration, his act will be unlawful. **The plaintiff may then again resort to the court, this time for damages to compensate him for loss suffered or for***

⁶ Ibid. n.3

⁷ (JMSC, 10 November 2009 [19])

a decree to enforce his declared right. Apprehensive of such consequences, the defendant will usually yield to the declaratory judgment. Where, however, the plaintiff has good ground to fear that the declaration will not be strictly observed, he may in cases in which he is entitled to declaratory relief claim together with the declaration an award of damages, an order for specific performance, an injunction etc...

[Emphasis added]

[22] The Respondent on his Fixed Date Claim Form claims the following as his relief:

1. *A Declaration that the property known as Lot 24, part of Pitkelleney, West Cliff, Negril in the parish of Westmoreland, and more particularly registered at Volume 1481 Folio 375, is the same property which is the subject of the Order of the Supreme Court of the 22nd July 2011 in Claim No. 2009 HCV 3430.*
2. *A Declaration that the Defendant did not comply with the directions for the exercising of the first option to purchase Lot 24, part of Pitkelleney, West Cliff, Negril in the parish of Westmoreland.*
3. *A Declaration that the Defendant has not paid to the Claimant the sums due and owing in respect of her acquiring his interest in Lot 24, part of Pitkelleney, West Cliff, Negril in the parish of Westmoreland.*
4. *A Declaration that the Defendant has not paid the prescribed sum of One Million Dollars (\$1,000,000.00) for reimbursement of the sums borrowed for the construction.*
5. *A Declaration that the Claimant is entitled to be paid the sum of Eight Million Eight Hundred and Twenty-Five Thousand Dollars (\$8,825,000.00) by the Claimant for his interest in Pitkelleney and the construction costs.*
6. *An Order that the Defendant shall forthwith pay, or cause to be paid, to the Claimant the aforementioned sum together with interest from the 7th July, 2014.*
7. *Court Fees of \$2,000.00 and Attorney's Fixed Costs on issue of \$10,000.00.*
8. *Such further and other Reliefs as this Honourable Court deems just.*

[23] When the orders on Justice Anderson's judgment are looked at against the relief now being sought in the current claim, it is clear that the latter is limited to the Pitkelleny property, which was then registered at Volume 134 Folio 933 of the Register Book of Titles.

[24] In the Respondent's affidavit filed in support of his claim, he avers that subsequent to Justice Anderson's order, the Applicant transferred the Pitkelleny property to herself and two children of their marriage. The Applicant in her reply to the Respondent's evidence does not deny that the Pitkelleny property was transferred as averred by the Respondent. It is her evidence that they agreed that she would keep that property and the Respondent would retain the others which were the subject of the court order.

[25] On account of the change in registration of the Pitkelleny property, which does not reflect the Respondent's previously declared fifty percent (50%) interest, the Respondent again approaches this court for relief. He first seeks a decree that the Pitkelleny property now registered at Volume 1481 Folio 375 of the Register Book of Titles is the Pitkelleny property which was the subject of Justice Anderson's orders. The second and third relief claimed by the Respondent are declarations that the Applicant did not comply with the court order for exercising the first option to purchase his share in Pitkelleny; and that she has acquired his share therein without paying him its value. Cumulatively, if these decrees are granted, they would evidence a breach of the orders in the 2009 claim.

[26] It was also one of Justice Anderson's orders that in the event the Applicant exercised her option to purchase the Pitkelleny property, she would pay one million dollars to the Respondent in reimbursement of sums borrowed for the construction of the home there. That sum was ordered to be in addition to the cost of fifty percent (50%) of the valuation for which the Applicant would otherwise be liable to the Respondent for acquiring his share in the property. The Respondent therefore seeks a declaration that the sum is now owed to him.

[27] In the absence of agreement between the parties, the properties which were the subject of the 2009 claim were valued by a court appointed valuator pursuant to the order

of R. Anderson, J. The Respondent is seeking a declaration that he is owed a sum which represents his share of the average appraised value of Pitkelleny plus the one million dollars ordered to be paid by the Applicant if she opted to purchase his declared share, less the amount he would owe to her for her interest in the other properties in his sole name.

[28] The Respondent then goes on to request an order that the Applicant pays the sums forthwith, together with interest from the 7th July 2014, the date on which the certificate of title relative to the Pitkelleny property was issued in the name of the Applicant and children of the marriage.

[29] There is no collateral attack on Justice Anderson's judgment. Other than seeking declarations which would establish the alleged disobedience of the orders in that claim and an order directing compensation for the Respondent's alleged loss of his share in Pitkelleny, the current claim does little more. It does not involve the re-litigation of issues which are the subject of the 2009 claim. Additionally, there is nothing on the claim which appears to be manifestly unfair to either party to the action, nor does it otherwise bring the administration of justice into disrepute.

[30] Having determined that the orders of R. Anderson J are declaratory, I am of the view that the Respondent is permitted to "*again*" approach the court for the purpose of enforcement, which conduct does not amount to an abuse of the process of the court.

Can enforcement proceedings for breach of the orders on the 2009 claim be initiated by Fixed Date Claim Form?

[31] Another ground on which the Applicant relies in seeking to strike out the current claim is that it is a claim for the payment of a debt and should have commenced by way of a Claim Form. No authority was provided for any of those contentions, both of which will now be addressed.

[32] A debt is generally understood to mean a sum of money due from one person to another. The obligation can arise in a number of ways including as of record, for example by way of a recognizance or judgment debt. As to its recovery, Lord Davey in **Ogdens Ltd v Weinberg** (1906) 95 LT 567 at 567, HL remarked that “...*nothing can be recovered in an action for debt except what is ascertained or can be ascertained.*”

[33] Pursuant to CPR 8.1(2), a claimant begins proceedings against a defendant in this court on the filing of a claim form. Paragraphs (3) and (4) go on to provide as follows:

CPR 8.1 (3) *A claim form must be in Form 1 **except** in the circumstances set out in paragraph (4).*

(4) *Form 2 (fixed date claim form) must be used –*

(a) in mortgage claims;

(b) in claims for possession of land;

(c) in hire purchase claims;

(d) where the claimant seeks the court’s decision on a question which is unlikely to involve a substantial dispute of fact;

(e) whenever its use is required by a rule or practice direction; and

(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion.

[Emphasis mine]

[34] CPR 8.3 provides that, “[a] claimant may use a single claim form to include all, or any, other claims which can be conveniently disposed of in the same proceedings.” In a claim for declaratory relief, the court is permitted by CPR 8.6 to make a binding declaration of right whether or not any consequential relief is or could be sought. The Respondent is therefore permitted to pursue declaratory and consequential reliefs in the same claim.

[35] The sum being claimed, if the declarations pursued by the Respondent are granted, is said to be calculated on the average appraised value of certain properties and

the fixed amount ordered to be paid by R. Anderson, J on the happening of a specified event. The sums are therefore capable of being ascertained.

[36] From the evidence presented in these proceedings, it does not appear to me that there are likely to be any substantial disputes as to fact in resolving the claim. Initiating the claim for enforcement by way of a Fixed Date Claim Form appears to have recommended itself.

Is the absence of the history of facts in the 2009 claim likely to obstruct the just disposal of the current claim?

[37] The Applicant argues that in the absence of the history of the facts she says is contained in the 2009 claim, the just disposal of the current claim is likely to be obstructed. The court is urged to exercise its power pursuant to CPR 26.3(1)(b) to strike out the claim on this basis.

[38] Although the current claim relates to the judgment of R. Anderson, J in the sense that enforcement of orders contained in it is now being pursued, that judgement and the orders thereon are capable of speaking for themselves. The claim is *res judicata* and is binding on the parties. What is in issue is the enforcement of that judgment, in particular, marking its alleged breach and enabling realisation of the parties' declared interest in the properties. This follows the issue of a certificate of title for the Pitkelleny property in the names of the Applicant and persons other than the Respondent, after the declaration of his fifty percent (50%) interest on the 22nd July 2009.

[39] The absence of the history of the facts contained in the judgment of Anderson, J is in my view, unlikely to obstruct the just disposal of the current claim.

Has the limitation period for enforcing the orders of R. Anderson, J on the 2009 claim expired?

[40] It was also the Applicant's submission that the period for enforcing the judgment on the 2009 claim or the debt arising thereon has expired. As a result, it was submitted that the Respondent would require the court's permission to proceed with enforcement. It was indicated in oral submissions that that the Applicant relies on the provisions of CPR 46.2(1)(a).

[41] Generally, Part 46 of the CPR makes provision for writs of execution. In particular, CPR 46.2(1) prescribes that no writ of execution may issue without the permission of the court where six (6) years have elapsed since the date of the judgment. The meaning of "writ of execution" is stated at CPR 46.1 thus,

In these Rules a "writ of execution" means any of the following –

- (a) an order for the seizure and sale of goods (form 18);*
- (b) a writ of possession (form 19);*
- (c) an order for the sale of land;*
- (d) a writ of delivery (whether it is –*
 - (i) an order for recovery of specified goods in form 20; or*
 - (ii) an order for the recovery of goods or their assessed value in form 21); and*
- (e) an order for confiscation of assets.*

[42] When one looks at the orders being sought by the Respondent on the current claim, it is obvious that no writ of execution within the meaning of CPR 46.1 is being sought. CPR 46.2(1)(a) on which the Applicant relies is therefore irrelevant to the proceedings. In any event, the Fixed Date Claim through which the Respondent seeks to enforce the orders of R. Anderson, J was filed within six years of that judgment and the breaches complained of.

[43] The Applicant's contention is without merit.

CONCLUSION

[44] Following the hearing of the Defendant/Applicant's Notice of Application for Court Orders filed on the 26th February 2018, it is ordered that:

1. The application to strike out the Respondent's claim is refused.
2. Costs of the application to the Respondent to be taxed if not agreed.
3. The First Hearing of the Fixed Date Claim Form is to proceed.
4. The Applicant's Attorneys-at-Law to prepare, file and serve the order herein.