



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006HCV01526

BETWEEN	FITZGERALD HOILETTE	CLAIMANT
AND	VALDA HOILETTE	DEFENDANT
AND	DAVION HOILETTE	1ST INTERESTED PARTY
AND	SIMEON DAVIS	2ND INTERESTED PARTY

Miss Catherine Minto instructed by Nunes Scholefiel DeLeon & Company for the claimant

Mr. Gordon Steer, Miss D. Dowding, and Mrs. J. Cooper-Batchelor instructed by Chambers, Bunny & Steer for the defendant

Mr. Gayle Nelson and Miss A. Chapman instructed by Gayle Nelson & Co. for the interested parties

Heard: January 24, February 17 and August 4, 2011

SIMMONS J (Ag.)

[1] This is an application by the defendant for the variation of a Consent Order made on the 7th November 2008.

The Claim

[2] By way of a Further Amended Fixed Date Claim Form dated June 20, 2007 the Claimant, Fitzgerald Hoilette, claimed inter alia against the defendant for a declaration that he is the legal and equitable owner of a fifty percent (50%) interest in the parties' matrimonial home at 76 Caribbean Park Estate, Tower Isle in the parish of Saint Mary, being all that parcel of land registered at Volume 944 Folio 28 of the Register Book of Titles. He also claimed for an accounting of all rent collected by the defendant and that fifty percent of that sum be paid to him.

[3] On the 7th November 2008 the parties consented to an order in the following terms:-

1. A declaration is hereby made that the Claimant is the legal and equitable owner of a fifty percent (50%) interest in the parties' matrimonial home at 76 Caribbean Park Estate, Tower Isle in the parish of Saint Mary, being all that parcel of land registered at Volume 944 Folio 28 of the Register Book of Titles.
2. That the property is to be valued by a reputable valuator to be agreed upon by the parties, and failing agreement to be appointed by the Court.
3. The Claimant be permitted to purchase the Defendant's share or interest in the said property.
4. That if the Claimant fails to purchase the Defendant's interest, the property is to be sold by public auction or private treaty.

5. An order is hereby made that the Registrar of the Supreme Court be empowered to execute all documents, necessary to effect a transfer, in the event that the Defendant fails or neglects to do so.
6. An order is hereby made that the Registrar of Titles be empowered to issue a new Certificate of Title in the name of the Claimant, Fitzgerald Hoilette, upon proof of payment of the relevant sale price and taxes.
7. That all costs incidental to the sale of the Defendant's interest in the said property or the sale of the property including but not limited to the payment of transfer tax, stamp duty, registration and attorney's fees to be borne by the Claimant and the Defendant equally.
8. The Defendant is to account to the Claimant for all rents collected with respect to the rental of the said property from January, 2002 to the date of the order, with supporting documentation.
9. That the Defendant be ordered to pay to the Claimant 50% of the rent collected during the said period within twenty one days of the date of this order, together with interest on the said amount at a commercial interest rate from January 1, 2002 to the date of judgment.

The terms of the agreement between the parties as set out in the consent order, were essentially the same reliefs sought by the claimant. Further orders were made which are not relevant to this application.

The application

[4] The defendant has applied to the court for a variation of paragraphs 8 and 9 of the consent order to read:-

"8. The defendant is to account to the claimant for all the rents collected along with the expenses incurred with respect to the renting of the said property from January 2002 to the date of the order, in order to arrive at the net rental owed to the claimant.

9. That the Defendant be ordered to pay to the Claimant 50 % of the rent collected from January 1, 2002 to the date of this judgment."

[5] The amendment to paragraph 8 seeks to vary the terms of the consent order to provide that the defendant account for the net rental as against "***all rents***" collected by her.

[6] With respect to the proposed variation of paragraph 9, the time frame for payment of the sums due and the requirement for the payment of interest have been removed.

Issues

[7] The issue to be determined is whether the Court has the jurisdiction to vary the consent order.

The affidavit evidence

[8] The defendant's evidence is that it was her understanding that the sum which was to be paid to the claimant after the accounting exercise

would represent one half of the net rental, that is, the amount due after the deduction of operating expenses. She also states that the requirement for interest to be paid on that sum is oppressive as she has no other source of income and needs the rent to survive.

[9] On January 20, 2011 a notice was filed by the claimant's attorneys in which it was indicated that they intend to rely on his affidavit sworn to on the 3rd day of May 2010. In that affidavit the claimant states that the defendant has accounted for the rent collected by her up to May 2009. He also states that she has only paid \$135,000.00 out of a total of \$2,867,950.00 which is due to him (exclusive of interest) as at November 2009. The claimant also states that the defendant has not paid one half of the rent due to him from December 2009.

Defendant's Submissions

[10] Mr. Steer submitted that the court has the jurisdiction to amend the order in the terms sought, as the proposed amendments would not affect the share that each party has in the property. He argued that the amendments are necessary to clarify the basis on which the accounting is to be undertaken and does not affect the substance of the order. It was also emphasized that the property in question was being run as a

commercial enterprise and as a result any money spent on improvements ought to be considered in the accounting exercise. Counsel also submitted that repairs had to be effected to the premises from time to time especially because the property was rented and that those expenses which were incurred by the defendant ought to be deducted from the total rent that was collected. In essence Mr. Steer submitted that the accounting ordered by the court should not be interpreted as referring to the gross amount of rent that was collected but must include sums that were spent on the maintenance of the property.

Claimant's submissions

[11] Miss Minto submitted that the Court has no jurisdiction to vary the terms of the consent order on the basis sought. She argued that defendant was in essence, asking the Court to re-open the matter. Counsel also pointed out that both parties had had the benefit of legal representation at the time when the consent order was made and that order was in identical terms of the Fixed Date Claim Form, which was filed and served on the defendant from May 2006. She also stressed the fact that the hearing was *inter partes* and any dispute arising out of the consent order ought properly to be the subject of an appeal.

[12] In particular, Counsel referred to the proposed changes in respect of the time in which the payment was to be made to the claimant and the interest rate applicable to that sum. She also referred to the variation of paragraph 8 which she said would result in a reduction of the sum due to the claimant. In addition Miss Minto pointed out that the expenses which the defendant seeks to deduct at this time are being presented to the claimant and by extension, the Court for the first time approximately three years after the order was made and at the time when committal proceedings had been instituted against the defendant. She submitted that the defendant's expenditure in respect of repairs can properly be taken into account when the property was sold and the sum credited to her. In this regard, Counsel referred to ***Leigh and another v. Dickeson*** [1884] 15 QBD 60, where it was held that a tenant in common who spends money on repairs has no right of action against his co-tenant for a contribution where no request was made. Reference was also made to ***In Re Pavlou (A Bankrupt)*** [1993] 1 WLR 1046 in support of this submission.

[13] Miss Minto argued that the orders sought by the defendant either amounted to a setting aside or variation of the consent order made on the 7th day of November 2008 and ought to be considered in light of the various provisions of the ***Civil Procedure Rules, 2002 (CPR)*** which deal with the

jurisdiction of the court in such matters. In this regard she referred to **Part 11.16** of the **CPR** (Ex parte or without notice orders), **Parts 11.17 and 11.18** (with notice orders which were made in the absence of the applicant/respondent), **Part 13** (default Judgments), **Part 28.6** (Judgment entered after striking out for non compliance or breach of the Rules) and **Parts 47.4; 48.10, 49.9** (Orders made in enforcement proceedings). She submitted that none of these provisions were applicable to the present case.

[14] Counsel also directed the court's attention to **Part 26.1 (7)** which provides as follows:

"A power of the Court under these Rules to make an Order includes a power to vary or revoke that order."

Miss Minto referred to **Civil Procedure 2006, Volume 1, Parts 3.1.9 and 40.9(1)** and submitted that Part 26.1 (7) of the CPR could only be relied on in very limited or restricted circumstances. She stated that Part 3.1.9 states that r. 3.1(7) of the English rules, which is identical to Part 26.7 of the CPR *"should not be construed as conferring a power allowing any court at any time 'simply to reverse itself if it happens to change its mind' (SCT Finance Ltd. v. Bolton [2002] EWCA Civ 56; [2003] 3 All E.R. 434, CA."* Counsel also submitted that in order to invoke the operation of Part 26.1(7) the applicant must satisfy the court that there has been a material change of

circumstances since the making of the order or that the judge who made the order was misled in some way in relation to the facts of the case. This according to counsel would require the applicant to present affidavit evidence to the court. In support of that submission she referred to ***Lloyd's Investment (Scandinavia Limited) v. Ager – Hanssen*** [2003] EWHC 1740. In that case, the defendant made an application to stay the further execution of a judgment obtained against him and for him to be permitted to defend the action. The application was made in circumstances where an earlier judgment in default of defence had been set aside on terms that the defendant pay into court the sum of £1.175m within 28 days. The time for compliance was extended and the defendant failed to comply with the terms of the order. Mr. Justice Patten stated that in order for the court to revoke or vary an earlier order the applicant must show that there has been a material change in circumstances or that the judge who made the order was misled as to the relevant facts. He went on to state that *“if all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which for*

whatever reason, he or his legal representatives chose not to employ". The learned Judge also expressed the view that he could not as a Judge exercising a parallel jurisdiction entertain an application which was in effect an appeal from an order made by another Judge.

This approach was confirmed by the court in **Collier v. Williams** [2006] 1 WLR 1945.

[15] With respect to the requirement that there be a change in circumstances, Counsel relied also on **Advent Capital Plc v. Ellinas Imports – Exports Ltd.** [2005] EWHC 1242. In that case the claimants were insurers of cargo and the defendants were the assured. The cargo was lost at sea. The contract of insurance was stated to be subject to the exclusive jurisdiction of the English courts. The defendants commenced an action in Cyprus. The claimant in turn, sought an anti suit injunction in the English courts. The defendants challenged the jurisdiction of the English Court to determine a claim for an anti suit injunction. The Judge concluded that a trial in London would not be any less convenient than one in Cyprus and granted the relief sought. Cyprus subsequently became a member of the European Union and as such subject to the Judgments Regulation. The applicants sought to set aside the injunction on the basis that it was contrary to the jurisdictional regime in the Regulation. The application was

refused. The court acknowledged the fact that it had the jurisdiction to revoke the order where there had been a material change of the circumstances which were relevant to the making of the said order. It was also stated that the inclusion of the words *liberty to apply* did not confer an additional basis on which the court could revoke an earlier order. The court stated that if the accession of Cyprus to the European Union had rendered the jurisdictional clause in the contract of insurance void and unenforceable the court would exercise its discretion to set aside the order.

[16] Counsel referred to the affidavit of the defendant and submitted that her difficulty in paying one half of the rent collected is not a change in circumstances as she knew her means when the consent order was being made.

[17] Miss Minto also argued that a consent order is of a specific nature and can only be set aside on appeal or by a fresh action on bases that would be sufficient to set aside a compromise between the parties. She submitted that the defendant has failed to present any basis on which a court could re-open the matter. It was argued that where it is being asserted that there has been a mistake it must be proved that it was a mutual mistake of the parties. She stated that the affidavit evidence

presented by the defendant has failed to disclose the existence of any of the bases that would warrant the court's intervention.

[18] Counsel relied on ***Halsburys Laws of England 4th ed. Volume 26 para 562*** in which it is stated that “*a judgment given or an order made by consent may be set aside in a fresh action brought for the purpose, on any ground which would invalidate a compromise not contained in a judgment or order*”. The passage also stated that a court may refuse to set aside a compromise where there has been delay by the applicant. Miss Minto cited the case of ***Marsden v. Marsden*** [1972] 2 All E R 1162 in which the court set aside a consent order. In that case, the application was made within three months of the making of the said order.

Applicant's response

[19] Mr. Steer submitted that ***Leigh and another v. Dickeson*** can be distinguished from the instant case on the basis that the subject property in that case was not the family home. Counsel also submitted that where the order did not specify whether it was the net or gross rental for which the defendant was to account, it should be implied that it referred to net rental.

Court's jurisdiction to vary a consent order

[20] The power of the court to vary or revoke an order is contained in **Rule 26.1 (7)** of the **CPR**. However, the general rule which was stated in **Marsden v. Marsden** is that a judge does not have the jurisdiction to change a final order after it has been perfected. In that case, the court assessed the timeliness of the application and was also influenced by the fact that the compromise was entered into by Counsel without the authority of the wife in respect of matters that were important to her and may cause her to suffer "*grave injustice*". In the present case there has been an unexplained time lapse of three years since the making of the consent order.

[21] In **Causwell & another v. Clacken & another** Supreme Court Civil Appeal no. 129/2002 (delivered February 18, 2004) Smith, J.A. stated that consent orders may only be varied to correct clerical errors, clarify the terms of the judgment or to facilitate the working out of the order. In that case the court also stated that a consent order has the same effect as one arrived at after a trial except that the parties cannot appeal without the leave of the court. The court made reference to **Tigner-Roache & Co. v. Spiro** [1982] 126 S.J. 525 as authority for the principle that where a consent order appears to incorporate the conclusion of negotiations

between the parties a court will not vary the said order by giving a party additional time to comply with its terms. In such matters the court must determine whether a true binding contract was created “...to which is superadded the command of the judge and which bears his imprimatur, or whether it is a mere order of the court to which the parties agreed or did not object”. In the latter case the court has the jurisdiction to extend or abridge the time within which a party is required to do an act. Smith, J.A. went on to state that where the order evidences a real contract the court will not as a general rule interfere with its terms.

[22] The order in this matter seals the compromise between the parties. Such an order according to Cooke, J.A. in ***Windsor Commercial Land Company Limited & others v. Century National Merchant Bank Trust Company Limited & another*** SCCA No. 114/05 delivered on the 5th June 2009 will not be “*interfered with or disturbed by a court on grounds other than those in which it would interfere with any other contract*”. These would include mistake, misrepresentation, duress and undue influence. The defendant has not argued that the circumstances of this case give rise to the consideration of this matter in relation to any of those grounds. I find therefore that there is no basis to interfere with the terms of the consent order on any of the said grounds.

[23] An examination of the consent order reveals that it does not contain any words which expressly reserve liberty to either party to apply to the court for further directions. In any event, according to Smith, J.A. in the **Causwell** case such a reservation does not give the court the jurisdiction to deal with matters that are not concerned with the working out of the judgment or order.

[24] The power of the court to vary the provisions of paragraphs 8 and 9 of the consent order is to be considered in light of the provisions of Part 26.1 (7) of the CPR and the interpretation given to it by the courts. Having examined the cases, it is clear that the courts in this jurisdiction have adopted the restricted circumstances in which an order may either be revoked or varied. In **Harley v. Harley** SCCA No. 72 of 2007 delivered on the 23rd March 2010, Harris, J.A. referred to the ratio decidendi in **Lloyd's Investment (Scandinavia Limited) v. Ager – Hanssen**. The learned Judge of Appeal stated:-

"It is patently clear that rule 26.1 (7) restricts the conditions under which a court may vary or revoke an order. The rule does not provide an open door permitting a court to reverse its decision merely because a party wishes the court so to do. A court therefore, will only revisit an order previously made if an applicant, seeking to revoke

that order, shows some change of circumstances or demonstrates that a judge who made an earlier order has been misled.”

[25] The evidence presented in an effort to prove a change in circumstances and so justify a variation of the order is that the defendant has no other source of income. There is no evidence to suggest that this was not the situation in November 2008 when the consent order was made. In this matter there is also no evidence which demonstrates that the judge who made the order was misled in any way.

[26] It is also not disputed, that the parties own the property in question as joint tenants. The evidence in this matter is that the defendant collected the rent due from the tenants from 2002 to November 2008 and that no part of those sums was paid to the claimant. As a joint owner the claimant was therefore deprived of the full benefit of the income derived from the rental of the premises. The requirement for the defendant to pay one half of the sum collected for rent for the relevant period and the interest component in paragraph 9 of the order seeks to remedy this situation.

[27] Paragraph 8 of the consent order provides for an accounting in respect of **“all rents collected”** from January 2002 to the 7th November 2008. The order does not make any provision for an accounting in relation

to expenditure. In addition, paragraph 9 of the said order requires the defendant to pay **"50% of the rent collected ..."** to the claimant. These words are clear and unambiguous. The defendant had the benefit of counsel and could not be said to have been in an inferior bargaining position. The variation as regards "net rental" if allowed would result in the claimant receiving a significantly reduced sum and in my view, would amount to a change in the substance of the agreement between the parties.

[28] The proposed amendment to paragraph 9 seeks to remove the requirement for the defendant to pay interest as well as the time within which the claimant is to be paid. The reason given for this request is that the terms of the order complained of are oppressive as the sum collected as rent is the defendant's sole source of income. These terms were agreed upon by the parties and there is no evidence which suggests that there has been a change in defendant's circumstances since the making of the consent order.

[29] The removal of the interest component would result in the reduction of the compensation agreed on by the parties and which was due to the claimant in respect of the period that he was deprived of his share of the rental income derived from the property. The effect of the proposed

variation would amount to a change in the substance of the agreement arrived at between the parties over three years ago.

[30] Having considered the submissions made by counsel, I find that there is no basis on which the court could properly exercise its power to vary the consent order.

The application is therefore refused.

Costs to the claimant against the defendant to be taxed if not agreed.