



[2017] JMSC Civ. 77

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV02415

BETWEEN	THELMA JACAS	CLAIMANT/ APPLICANT
AND	HOWARD JACAS	1st DEFENDANT/ RESPONDENT
AND	LORENZO JACAS	2nd DEFENDANT/ RESPONDENT
AND	SYLBERT JACAS	3rd DEFENDANT/ RESPONDENT
AND	GORDON JACAS	4th DEFENDANT/ RESPONDENT
AND	NEIL JACAS	5th DEFENDANT/ RESPONDENT

IN CHAMBERS

Ms. Margaret Macaulay and Ms. Eileen Felix for the Claimant/Applicant
The Defendants/Respondents appearing on behalf of themselves.

Heard: January 16, February 16, March 9, April 18 and May 19, 2017

Application for an Interim Injunction - Settled Land Act - Rights and Powers of Life Tenant and Remaindermen - Whether Remaindermen should be Denied Access - Whether there is a serious question to be tried - Damages as an Adequate Remedy - Balance of Convenience.

CORAM: STEPHANE JACKSON-HAISLEY J. (AG.)

FACTS

- [1] On the 19th May 2017, I delivered an oral judgment in this matter. I have now converted my reasons into writing. This matter concerns an application by a mother, the Claimant now the Applicant, Thelma Jacas against five of her sons Howard Jacas, the 1st Defendant, Lorenzo Jacas, the 2nd Defendant, Sylbert Jacas, the 3rd Defendant, Gordon Jacas, the 4th Defendant, and Neil Jacas, the 5th Defendant. The Defendants are now Respondents in this Application.
- [2] By way of an Ex Parte Notice of Application for Court Orders filed on June 10, 2016, the Applicant seeks orders inter alia to restrain all the Respondents from taking steps to enter, remain in or trespass on her home situated at 16½ Wickham Avenue, Kingston 8 in the parish of St Andrew. She also seeks an order to restrain them from taking any steps to watch, harass, interfere with or beset the household residents, invitees, servants and or agents who enter or occupy her home and an Order to restrain the Respondents from taking any furniture, paintings, art work and chattel presently in her home. She asks that these Orders remain in place until the determination of the Fixed Date Claim Form.
- [3] A Fixed Date Claim Form was filed on June 10, 2016 by which she seeks Declarations and Orders against all the Respondents with respect to the said property. Among the Declarations sought are, a Declaration that the Applicant owns the home known as 16½ Wickham Avenue as a life “interest” with the remainder on her demise to the Respondents and other children mentioned in the Will. Among the orders sought are orders that the Respondents be restrained from taking any steps to enter the home of the Applicant situated at the aforementioned address. On the said date the Applicant sought and obtained an interim injunction in the terms requested.

[4] There have been a plethora of affidavits filed by the parties which they relied on at this hearing of the application for the inter partes injunction. A recital of the allegations contained therein shows the basis upon which the Applicant grounds her application and the basis upon which the Respondents resist it.

[5] The Applicant in her affidavit indicates that under the Will of her late husband Silbert Juan Jacas o/c Sylbert Juan Jacas she received a life interest in the property whilst the Respondents are the beneficiaries. This Will dated September 8, 1997 was exhibited to her affidavit. Paragraph four of the Will is relevant to these proceedings and provides as follows:

“I GIVE AND DEVISE all my following real estate to my wife THELMA for her life and after her death to such of our eight surviving sons namely: HOWARD, GARFIELD, NEIL, IAN, LORANZO, SILBERT, BRYAN & GORDON as shall survive her share and share alike absolutely; (1) My dwelling house at 16½ Wickham’s avenue, Kingston 8, Saint Andrew...”

[6] According to the Applicant, this matter was preceded by a matter in the Family Court in which she was successful in obtaining interim protection orders under the Domestic Violence Act against the 1st, 2nd, 3rd and 4th Respondents, however these Orders were discharged on the 31st day of May 2016. On that said date she alleged that the 1st, 2nd and 4th Respondents came to her home and demanded entry but she denied them entry. She alleged that they argued with her in the most disrespectful manner and threatened to return the next day with a locksmith and in fact the 1st and 2nd Respondents did return and with the assistance of the locksmith attempted to gain access to her house.

[7] In her affidavit evidence, she refers to an incident in the precincts of this Court during which the Respondents behaved in a disrespectful manner towards her. As a result of this she expressed that she continues to be denied peaceful and quiet enjoyment and complained that she suffers from high blood pressure and the entire issue has caused her severe stress and she fears that there will be no end in sight, unless this Honourable Court grants the Orders sought.

- [8]** The 1st Respondent in response pointed out that he is one of the executors of his father's estate and that he has been trying to wind up the estate for a while now. Further, that the Applicant's interest is not yet registered and so the only persons authorised in law to collect monies owed to the estate would be the executors. He is of the view that the transfer of the property in question was fraudulent as it was done without the knowledge of the executors. He indicated that the premises situated at 16½ Wickham Avenue has always been the family home and this is where he stays when he visits Jamaica and he even has a bedroom with personal effects there.
- [9]** Further, that his mother stays at her residence in the United States of America most of the times and so is not in occupation of the premises for more than three quarters of the year. He said that he has always been on good terms with his mother and has never threatened, abused, mistreated or used any violent overtone towards her. He however admits having hired a locksmith to open the locks to the house. It is his view that, as he has a beneficial interest in the property under his father's Will, it is in his interest to visit the property from time to time to ensure that it is well maintained and to ensure that its value does not diminish. He is of the belief that his father's intention was to have the premises remain as the family home. He believes that his brother Bryan Jacas has influenced his mother to file the Claim herein and to make this application and so he is requesting that the application for the injunction be refused.
- [10]** The 2nd Respondent in his response expressed his belief that Bryan Jacas has an intimidating influence over his mother and that she is afraid of him and that this action has been brought based on Bryan's wishes. He believes that his father's Will and intention was not only to have his mother live comfortably at the family home until her death but also that any of his children could live there, if they so desired. He indicated that the house is a massive structure and for the most part the two top floors are unoccupied.

- [11] He pointed out that both the Applicant and Bryan are permanent residents of the United States of America and in fact reside there. He on the other had lived at the family house up until he was about 30 years of age and was compelled to stay away by the interim order from the Family Court. He spoke about returning to the house after the interim order was lifted but said that he was physically denied access. He indicated that he would abide by the decision of the Court in a claim for Recovery of Possession as he believes that the proper procedure would be to file such a Claim. He stressed that the accusations that he and his brothers are disrespectful are all false and fabricated in an attempt to deceive the Court. Further, that he has always been peaceful and respectful to the Applicant and has suffered hardship and inconvenience as a result of being kept out of the family home. He alleged that on his visits to the house he has never been disrespectful to his mother nor has he acted in any way to cause her to be fearful or to feel endangered. He is of the view that a decision by the Court that brings the family together would auger more favourably for a peaceful resolution.
- [12] The 3rd Respondent in response spoke about having provided his endless support in assisting his father to build the house from a small house with three bedrooms to a huge mansion containing twelve bedrooms. He indicated that on July 17, 2014 he was evicted from this home pursuant to an ex parte application and that his two children who are minors were left with no one responsible for their safety. He said his children are left alone when his mother and brother Bryan are in the United States. He asked the Court to disregard all Claims made against him and said that he would humbly accept the Court's decision.
- [13] The 4th Respondent responded that on June 5th 2016 he went with his brothers Howard and Lorenzo to the house escorted by two police officers and that Bryan came out in a rage and an altercation ensued resulting in Bryan pulling a machete. He pointed out that it is Bryan that had driven fear into his mother. He is of the view that the Applicant is acting maliciously in bringing the Claim and is wasting his and the Court's time and resources.

[14] The 5th Respondent responded that the relationship between himself and his mother deteriorated in about 2013 when Bryan transferred property to her behind the backs of the executors. As a Justice of the Peace, he indicated that he has tried on several occasions to mediate and to encourage his brothers to keep the peace but to no avail. On June 3, 2016 he denied being present when the locksmith arrived but said he arrived afterwards to broker the peace. Further, that he stayed in his car but did not go on the premises and has never threatened his mother and would never hurt her. He said that there is no need for a restraining order against him because he rarely visits except to give something to his niece or nephew. He admitted having visited the premises on June 7 but said he merely observed proceedings from another house close to the family house, as he had been restrained from going to the family home. He is also of the view that the allegations that he is aggressive, violent and abusive are untrue. He believes that the Applicant is not the author of her affidavit and that it is Bryan who has orchestrated this Claim. He is of the belief that this Claim is vexatious and that it is a waste of the Court's time and resources and prays that the matter be dismissed and the application for the injunction refused.

[15] All the affidavits filed were allowed to stand as evidence-in-chief. The Applicant was cross-examined by each of the Respondents. All the Respondents were cross-examined. During cross-examination all parties were largely consistent with their affidavits so I will not repeat the evidence given in cross-examination.

DISCUSSION

[16] I have given careful thought to all the allegations as outlined in the various affidavits filed, the submissions presented and the authorities cited, but I have no intention of reiterating them however, all parties can rest assured that I have considered them all in coming to my decision. The issues herein will be determined based on the undisputed facts as outlined and so there is no need for me to arrive at any findings of fact on the areas of discord. The undisputed facts include the fact that pursuant to the Will of Sylbert Jacas otherwise called Silbert

Jacas, the Applicant is the tenant for life in respect of the property in question and the Respondents are among the remaindermen.

[17] The seminal question is whether or not to grant this injunction pending the hearing of the substantive matter. An interim injunction is a temporary order made with the purpose of regulating the position of the parties to an action pending trial. It is not a final order. It does not stand on its own and it is dependent upon there being a substantive cause of action against the Respondent. The case **American Cyanamid Co. v Ethicon** [1975] AC 396 sets out the guidelines on how a court should exercise its discretion to grant an interim injunction. The underlying purpose of the guidelines is to enable the court to make an order that will do justice to the parties.

[18] The guidelines set out by Lord Diplock in the **American Cyanamid** case place paramountcy on whether or not there is a serious question to be tried. Other factors that the Court should consider are the adequacy of damages and the balance of convenience. These criteria are also set out in the case of **National Commercial Bank of Jamaica Ltd. v Olint Corporation Ltd.** [2009] 1 WLR 1405 where the Privy Council reaffirmed the principles outlined in the **American Cyanamid** and offered further useful guidance on the approach to interlocutory injunctions. At paragraph 16 of the judgment delivered by Lord Hoffman this is how it is expressed:

“It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a Respondent to do something or not to do something else, but such restrictions on the Respondent’s freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the Respondent’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the Respondent pending

trial and the cross-undertaking in damages would provide the Respondent with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.”

- [19] Similarly, in a case with which the parties are not unfamiliar, **Jacas, Howard (Executor estate Sylbert Juan Jacas, deceased) v Jacas, Bryan v Bryan, Jacas (Attorney of Thelma Jacas)** [2014] JMSC Civ. 190, Simmonds J. in analysing **the American Cynamid** case and the **National Commercial Bank v Olint Corporation Ltd.** (supra) case stated the approach to be taken at paragraphs 28 to 31 of the judgment:

“In order to ground a claim for an injunction the Applicant must first satisfy the court that there is a cause of action - Fourie v. Le Roux [2007] 1 W.L.R. 320. The substantive claim in this matter is for an account. [29] The principles which guide the court when considering whether or not to grant injunctive relief are to be found in the case of American Cyanamid v. Ethicon (supra). In that case, Lord Diplock stated that before granting an injunction the Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious issue to be tried. Where the court finds that there is in fact a serious issue to be tried, it must then be determined whether damages would be an adequate remedy. In the event that damages would not be an adequate remedy, it must be determined whether the Respondent would be adequately compensated under the Applicant’s undertaking as to damages. Where there is doubt as to the adequacy of damages and whether the Applicant’s undertaking would provide enough protection for the Respondent the court must then decide where the balance of convenience lies. These principles were approved and applied in National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd. [2009] 1 W.L.R. 1405..”

IS THERE A SERIOUS QUESTION TO BE TRIED?

- [20] In determining whether or not there is a serious question to be tried the Court is required to investigate the merits of the case albeit only to a limited extent. All that needs to be shown is that the Applicant’s cause of action has substance and reality. The substantive claim is one in which the Applicant seeks inter alia a Declaration that she is the owner of the premises at 16½ Wickham Avenue and as such is entitled, pursuant to the Settled Land Act, to sell, exchange or concur in making partition of the land. She also seeks final orders inter alia that she is entitled to the sole, undisturbed, unmolested, peaceful and quiet enjoyment and

possession of the family home. She also seeks restraining orders to prevent the Respondents, their servants and or agents from entering, trespassing, or remaining on the said premises or from watching, harassing or otherwise interfering with or besetting the household residents or their agents, servants or invited guests.

[21] According to the Applicant, the Will of her husband was probated from as far back as June 8, 2001 and the property was transferred to her for the term of her natural life and thereafter to her eight sons including the five Respondents. Although this fact was initially contested by the 1st Respondent, the Certificate of Title speaks for itself. It reflects that Thelma Jacas holds the property for the term of her natural life and thereafter to Howard Jacas, Garfield Jacas, Neil Jacas, Ian Jacas, Lorenzo Jacas, Silbert Jacas, Bryan Jacas and Gordon Jacas.

[22] At common law a tenant for life has many of the powers of dealing with land as would an estate owner except that any gain derived from the exercise of a power ought to be held on trust for the beneficiaries. Such rights are set out in ***Barnsley's Conveyancing Law and Practice 4th Ed. Pgs 277 et seq.***, where the learned author pointed out that the rights of a life tenant are personal to him and that he may assign his interest but he cannot assign his powers and that life tenants have rights equivalent to that of any tenant which include the following rights:

- i. To peacefully occupy the premises without interference;
- ii. To keep persons off the premises who they wish to;
- iii. To have exclusive possession;
- iv. To be in occupation;
- v. To enjoy the premises;
- vi. To protect against trespasser; and/or
- vii. To keep the premises in repair except from fair wear and tear.

[23] The powers of a tenant for life are also set out in the Settled Land Act. Such powers include the power to sell, lease, exchange (under limited circumstances),

mortgage, enter into contracts regarding the settled land and the power to execute any deed in relation to the land. The policy behind the Settled Land Act is to make land freely marketable despite the existence of a life interest.

- [24] The 1st Respondent claims that it would be his father's intention for them to be able to access the property. However, under section 57 of The Settled Land Act, it is clear that any such provision would be void. It provides as follows:

*"(1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition of settled land, or by a limitation, gift, or disposition of other real or any personal property, or **by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be denied to be void".**
(emphasis mine)*

- [25] Harrison J as he then was, expounded on this very provision in the unreported decision of **Harold Campbell (Executor Estate John McTernan deceased) v Claudette Robinson** Suit No. P 071 OF 1999, delivered on May 18, 2000, and found that the Plaintiff shall have the right to exercise her rights as a life tenant under the Settled Land Act and that any conditions under the settlement that restrict the rights given to such a life tenant are void, defeated and overridden by the Act.

- [26] Harrison J reiterated the position set out in the Settled Land Act, whilst placing reliance on the case **Donaldson et al v The Stamp Commissioner** (1945) 4 JLR 259 (CA), in arriving at a position with respect to the powers of a tenant for life vis a vis the remaindermen at page 7 of the judgment which he enunciated as follows:

"Donaldson et al v The Stamp Commissioner (1945) 4 JLR 259 (CA) is authority for the proposition that where the terms of a settlement are contained in a Will they are effective on the death of the testator and the

property comprised in the settlement is settled property at that moment of time. It is my considered view therefore, and I do hold that it would be the tenant for life who holds the power of sale once a settlement is created. This power of sale may override and defeat the intentions of the settlor and under such a settlement, it is the tenant for life who would have the powers of sale of the property. The proceeds of such sale becomes capital funds under the Settled Land Act and is held upon trust for the remaindermen”

- [27] Therefore, in keeping with the Settled Land Act, a tenant for life has the right to such property for life. The Applicant therefore has a right to enjoy the property until her death and any contrary intention to be deemed from the Will of the testator is void and cannot be acted upon by the beneficiaries in remainder.
- [28] The Act also places a duty on the Applicant in her capacity as life tenant, to inspect, maintain and repair, the property, having regard to the interests of all the parties entitled under the settlement, and she is deemed to be in the position and to have the duties and liabilities of a trustee for those parties, in this case being the Respondents. The tenant for life, although given an almost unfettered liberty to exercise the statutory powers, is a trustee for the beneficiaries. In the case **Re Marquis of Ailesbry's Settled Estates** [1892] 1 Ch 506 at 546 Bowen J pointed out that a trustee of a settlement must act honestly and must act as an upright, independent and righteous man would act in dealing with the affairs of others.
- [29] The Respondents however would not be without a remedy if the Applicant does anything inconsistent with her rights. As beneficiaries in remainder, the Respondents would be entitled under the Act, to bring an action, against the tenant for life and the estate of the tenant for life, after her death, for any damages caused to their interests by the Applicant.
- [30] This takes me to the question of the position of the 1st Respondent who is one of the executors. He claims to have a right to enter the premises to do certain things in furtherance of his duty as executor, however this right is really that of the Applicant under the provisions of the Act. The duties of an executor are also set out in the case of **Howard Jacas (Executor estate Sylbert Juan Jacas,**

deceased) v Bryan Jacas (*supra*), where Simmons J stated at paragraph 23 of the judgment:

“the duty of an executor is to administer the testator’s property and to carry into effect the terms of the will. In Re Stewart; Smith and another v Price and others 5 ITELR 622 at 630, Laurenson J in his examination of the role of an executor stated:-

An executor is the person appointed by a testator or testatrix to administer his or her property and carry out the provisions of the will. To this end the executor has certain specific statutory and common law duties and powers, namely to:

- 1. Bury the deceased;*
- 2. Make an inventory of assets;*
- 3. Pay all duties, testamentary expenses and debts;*
- 4. Pay legacies;*
- 5. Distribute the residue to the persons entitled; and*
- 6. Keep accounts.”*

[31] It does not appear that in order to carry out any of these duties the 1st Respondent has to gain access to the property. Thus, as executor he has no greater right to gain access to the property than the other Respondents, and as such any restriction placed on the 2nd, 3rd, 4th and 5th Respondents as it relates to the property in question will apply to the 1st Respondent.

[32] In all the circumstances, it is clear that there is a serious question to be tried.

WILL DAMAGES BE AN ADEQUATE REMEDY?

[33] Having found that there is a serious issue to be tried, the next step is to determine whether damages would be an adequate remedy. If damages would be adequate to compensate the Applicant, then it must be determined where the balance of convenience lies. These principles were approved and applied in **National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd.** case (*supra*). The injunction will be denied if damages will provide an adequate remedy.

- [34] The Applicant as life tenant would be entitled to exclusive possession and quiet enjoyment of the property during her lifetime. The loss of enjoyment of property is essentially non-pecuniary and can impinge on her quality of life.
- [35] Based on the display of emotions and the general conduct of the parties throughout the hearing of this matter it seems highly unlikely that there would be quiet enjoyment if the Applicant and the Respondents were forced to share the same space. The peaceful enjoyment the Applicant would stand to lose, may be irreplaceable especially in light of the Applicant's age.
- [36] Another area of difficulty would be the ability to assess damages where the loss of quiet enjoyment to the property is interfered with. It would be difficult to envision a sum that would adequately compensate the Applicant for the loss of exclusive possession and quiet enjoyment. To further complicate the matter, there is no indication from the Respondents that they would be in a financial position to compensate the Applicant for the potential loss if she is successful at trial.
- [37] In the circumstances, I find that Damages would not be an adequate remedy. Having made this determination that damages would not be an adequate remedy I must now determine whether the Respondents would be adequately compensated under the Applicant's undertaking as to damages.
- [38] The Applicant has given the usual undertaking as to damages and so in the event the Respondents succeed at trial they would be compensated under that undertaking.

BALANCE OF CONVENIENCE

- [39] Strictly speaking, I am not required to move on to this next step having found that damages would not be an adequate remedy. However, if I am found to be wrong in finding that damages would not be adequate to compensate the Applicant, then the question of where the balance of convenience lies would have to be determined.

[40] In determining where the balance of convenience lies I have to weigh the risk of doing an injustice to one side or the other. I take into account the fact that currently the Applicant is in possession of the property and this is effectively her home. The question as to whether she spends time overseas is not relevant to this determination. It is clear that the parties are unable to subsist peacefully in the same space and that was evident throughout the hearing of this matter with the frequent outbursts. There is no obvious injustice that would be occasioned by the Respondents if they are not allowed to access the property between now and the resolution of the matter. The injustice to the Applicant is more evident as she would lose her right to occupy this property exclusively and no doubt her right to peacefully enjoy it.

[41] Therefore, the application for an interlocutory injunction is granted in terms of the Notice of Application for Court Orders filed June 26, 2017 as amended to read as follows:

1. That the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, their agents, servants and/or otherwise be restrained from taking any steps to enter or remain in the premises known as 16½ Wickham Avenue, Kingston 8 in the parish of Saint Andrew comprised in Certificate of Title registered at Volume 1284 Folio 451 of the Registered Book of Titles until the determination of the Fixed Date Claim Form filed or until further and/or other order of the Court.
2. That the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, their agents, servants and/or otherwise be restrained from taking any steps to interfere with the quiet enjoyment of the Applicant, her invitees and household residents at her home known as 16½ Wickham Avenue, Kingston 8 in the parish of Saint Andrew comprised in Certificate of titles registered at Volume 1284 Folio 451 of the Registered Book of Titles until the determination of the Fixed Date Claim herein or until further and/or other order of the Court.

3. That the 1st, 2nd, 3rd, 4th and 5th Respondents by themselves, are to contact the Applicant's Counsel and submit a list of the items that belong to them at the premises that they require to be removed from the said 16½ Wickham Avenue, Kingston 8 in the parish of Saint Andrew, by the 30th June 2017 and arrangements are to be made for the said items to be delivered to them within two weeks thereafter.