



[2021] JMSC Civ. 91

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO SU2020 CV 04751

BETWEEN	CHESTER MORRISON	CLAIMANT
AND	ELIJAH MORRISON	1ST DEFENDANT
AND	ALVIRA COLLINS	2ND DEFENDANT

Mr Anthony Williams instructed by Usim Williams and Co Attorneys-at-law for the Claimant/Applicant.

Ms Kerry-Ann Wilson Attorney-at-law for the First and Second Defendants/First and Second Respondents.

HEARD: April 22, 2021 and April 29, 2021

Civil Procedure - Application for interim injunction and for disclosure, CPR 17 and CPR 28.6 and 28.7

CORAM: MOTT TULLOCH-REID J (AG)

BACKGROUND

[1] On December 4, 2020, the Claimant filed a claim against the First and Second Defendants seeking certain declarations with respect to property known as Morris Meadows in the parish of Saint Catherine which would result in the Claimant being named on the Duplicate Certificate of Title as the sole owner of the legal and beneficial interest. The Claim is supported by an Affidavit of the Claimant which sets out the history of how he is alleged to have acquired an interest in the property

[2] On January 28, 2021 the Claimant filed an application requesting disclosure of income derived from rental of the Morris Meadows property and another property which I will refer to as the Carless property. It also seeks disclosure of the bank accounts of the Defendants presumably to determine what sums they collected for rental on the property and for an injunction that the Defendants not deal with the Morris Meadows property until the determination of the claim.

I will make no orders as it relates to the Carless property as it is not the subject of the claim which has been made by the Claimant.

Disclosure

[3] Mr Williams' sole submission on the issue of disclosure is that the Defendants have collected rent and continue to collect rent and as such should give an account as to the rental income collected. The issue is also raised in ground (e) of the Claimant's application which states as follows:

"The Defendants at all material times collect and continue to collect rental income in respect of both subject properties of this suit and have not accounted to the Claimant for the rental income collected from the date of the first rental to the date of this application."

Ms Wilson argues that there need not be any further disclosure as the First Defendant, has in his affidavit, set out how much rental was collected per month and how the monthly rental was spent as per the Claimant's instructions. This is however with respect to the Carless property and not with respect to the Morris Meadows property which is the subject of the claim.

[4] I have perused the Fixed Date Claim Form and Affidavit in Support and I do not see where a claim has been made to recover monies from the Defendants for rental income received from the Morris Meadows property. At paragraph 7 of the Fixed Date Claim Form the Claimant merely asks the Court for an order.

“That the Defendants [shall] prepare and deliver to the Claimant’s Attorneys a statement of rental income earned from the date of rental up to the date of the hearing of this matter.”

In paragraph 24 of his Affidavit filed in Support of the Fixed Date Claim Form the Claimant depones as follows:

“Also, they have been collecting a rent of \$40,000.00 per month since 2019 and I have not received any rent nor have I been provided with any Rental Income Statement for this period from the Morris Meadows property.”

- [5] Strictly speaking the Claimant has not in either instance made a claim for the rental income to be paid over to him. He has merely said he has not received rent and wants to see the statement of rental income. Part 8.9A of the CPR provides that

“The Claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.”

Although it is not so plainly stated, I am of the view that the Claimant is intending to recover the rental income collected on the Morris Meadows property and this is why he has asked for an order in the Fixed Date Claim Form and the Application for the statements of the rental income to be disclosed to him. Out of an abundance of caution, the Claimant may wish to amend his Fixed Date Claim Form to ask specifically for the rental collected to be paid to him to avoid any doubt as to whether the sums claimed have been specifically pleaded.

- [6] I believe it would be useful to know how any rental income generated from the Morris Meadows property was dealt with. In the event the Claimant is successful

in his claim, the Court may need to have that information to make a determination as to any amounts which may be due to the Claimant as mesne profits.

[7] Part 28.6 of the CPR speaks to the issue of specific disclosure. Part 28.6(5) reads as follows:

“An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.”

Part 28.7(2) sets out the things the court must consider in making the order for specific disclosure keeping in mind that specific disclosure must be *necessary in order to dispose fairly of the claim or to save costs* (CPR 28.7(1)). CPR 28.7(2) reads as follows:

“It [the Court] must have regard to –

- (a) the likely benefits of specific disclosure;*
- (b) the likely cost of specific disclosure; and*
- (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.”*

[8] I am of the view that specific disclosure will be of benefit to the Court when dealing with the substantive claim. If the Defendants are found not to be the legal owners of the Morris Meadows property and were merely trustees holding the property on trust for the Claimant, then any monies they collected as rental income from the letting of the property on behalf of the Claimant may be ordered paid to the Claimant by the trial judge. It is to be noted that the Defendants have not given any evidence to suggest that they would suffer financial hardship in producing the information, documents and statements and this also played on my mind in coming to my decision.

Injunction

[9] The 5th order sought in the Claimant's application is that the First and Second Defendants and/or their agents "be restrained from transferring, selling, mortgaging, assigning, charging or otherwise taking any steps to deal and/or dispose of the [Morris Meadows property] until the determination of the suit". Part 17.4 speaks to interim orders including interim injunctions. Both parties rely on the case of **American Cyanamid Co v Ethicon Ltd [1975] AC 396** wherein Lord Diplock set out the issues that are to be considered by the Court when considering an application for injunctive relief. The conditions to be satisfied are:

- a. whether there is a serious issue to be tried
- b. whether damages would be an adequate remedy for the applicant
- c. whether the undertaking in damages is adequate protection for the respondent; and
- d. the balance of convenience.

I will take each condition in turn. I note that Ms Wilson on behalf of the Defendants in her submissions merely said the Claimant has not satisfied the grounds required in the **American Cyanamid Case** for an injunction to be granted. She has not indicated in what way the grounds have not been satisfied. She also argues that an injunction is an equitable remedy and since the Claimant has not come to equity with clean hands as is evident from his affidavit the injunction ought not be granted.

Serious issue to be tried

[10] The claim is one in which the Court must determine who is the legal owner of the Morris Meadows property. Was the money alleged paid by the Claimant to the Defendants a gift to assist them in purchasing the property for their own use and benefit or was the money to be used by them as trustees on the Claimant's behalf for the purchase of the house for the Claimant's use and benefit? It is not my duty at this stage to decide "*difficult questions of law which call for detailed arguments and mature consideration.*" Nor is it my responsibility at this stage to "*try to resolve*

conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend". Those are matters which the trial judge must resolve. My sole duty at this stage is to assess whether the claim, as presented by the Claimant is arguable with a real prospect of success. In my view the claim has merit. The Claimant says he sent several thousand United States Dollars to the First Defendant to facilitate the purchase of the Morris Meadows property which he identified as being ideal for his home. The Defendants on the other hand, say the property was their choice and upon making a request of the Claimant for assistance he gifted them the shortfall. Mr Williams argues that this could not possibly be so as it would not be likely that a man who was himself having financial problems stemming from a motor vehicle accident and a dissolution of his marriage would take several thousand United States dollars and gift it to the Defendants to purchase property which he would not own or benefit from. The Court, when all the evidence is fully before it, will make the determination as to whose evidence is more credible and is likely to succeed on a balance of probabilities.

Damages an adequate remedy for the Claimant

- [11] Mr Williams argues on behalf of the Claimant that damages are not an adequate remedy because since the property is registered in the name of the Defendants they can dispose of the property for monetary compensation at any time before the trial. I asked Mr Williams if damages would not be sufficient in paying for the value of the house and he answered in the negative and indicated that the Claimant had formed an attachment to the house that could not be quantified in the form of damages.
- [12] I am of the view that in the circumstances damages would not be an adequate remedy as what the Claimant is seeking to recover is the Morris Meadows property and not the monies spent to purchase it. I have not seen on the First Defendant's affidavit any evidence that he would be able to pay the damages if damages are in any event ordered against him. It certainly would be difficult to assess the quantum of damages that should be paid to a Claimant who suffers the loss of his

property which, although he has never lived in it, he has developed an attachment to.

Undertaking as to damages

[13] In assessing the balance of convenience the Court does not only consider whether damages would be an appropriate remedy for the Claimant if he is successful at the trial but also whether the Claimant's undertaking as to damages would be sufficient to compensate the Defendant for any loss he will suffer as a result of the injunction being imposed (see **American Cyanamid page 408** and Hanbury & Martin Modern Equity 20th edition para 28-031). I have not seen on the Claimant's affidavit or in the application filed any sign of his willingness to give an undertaking as to damages. He must however be so willing otherwise he could not reasonably have applied for injunctive relief.

[14] Lord Diplock at page 408 of the **American Cyanamid case** said

"...where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake."

In **Chong v Young 28 JLR 610** an interlocutory injunction restraining the defendants from dealing with property on the plaintiff's undertaking in damages was granted. The plaintiff did not give any evidence as to his ability to pay the damages and the defendants had not produced any evidence to indicate that the plaintiff was not able to pay. At the Court of Appeal, it was held that although there was no evidence as to the plaintiff's means, there was also no evidence of the damage the defendants would likely suffer as a result of the injunction being granted and as such the court was minded to preserve the status quo by granting the injunction.

[15] Similarly, in the case before me, neither the Claimant nor the Defendants have put forward any evidence as to whether he will undertake to pay damages (the Claimant) or whether they will be able to afford to pay damages (the Defendants). I am thereof of the view that in the circumstances, it is best to preserve the current status quo and protect against any dealing with the property until the claim has been determined. If the property is transferred, disposed of or offered for mortgage then it will affect the Claimant negatively and as such it is best to have things remain as they currently are until the issue of ownership has been determined.

Point of Note

[16] Although one of the orders sought by the Claimant in his application was an injunction, the parties did not present to me at the hearing copies of the authorities on which they intended to rely. I gave them the opportunity to do so but these were not presented to me until the afternoon of April 26, 2021. This led to a delay between the hearing the application and the delivery of the judgment. Injunctions are urgent applications which require an immediate decision. I am not of the view that in the circumstances of this case, not giving an immediate decision has prejudiced either party.

[17] I wish to point out that I found the case of **Tara Estates Limited v Milton Arthurs [2019] JMCA Civ 10** which Mr Williams relied on useful in coming to my decision. Mr Williams also relied on a copy of a text but I am not sure of the source because it was not noted on the document which was made available to me. Ms Wilson did not provide me with any authority except for mentioning the principles highlighted in the **American Cyanamid case**.

Conclusion

[18] My orders are as follows:

- (a) The First and Second Defendants are to file and serve an Affidavit which should exhibit a Statement of Rental Income in respect of property situate at Lot 115 Morris Meadows in the parish of Saint Catherine registered at Vol 1393 Folio 247 of the Register Book of

Titles (the “Morris Meadows property”) and must do so on or before June 30, 2021.

- (b) The First and Second Defendants are also to disclose in the Affidavit to be filed, the names, addresses and branches of their bankers, their bank account numbers and types of accounts in respect of rental income received from the rental of the Morris Meadows property and must do so on or before June 30, 2021
- (c) The First and Second Defendants are to disclose by way of Affidavit evidence, copies of all bank accounts, rent books and bank statements in respect of rental income received concerning the Morris Meadows property on or before June 30, 2021.
- (d) The First and Second Defendants are restrained, whether by themselves or their agents or otherwise howsoever, until the trial of this action or further order of the Court from transferring, selling, mortgaging, assigning, charging or otherwise taking steps to deal or dispose of the Morris Meadows property
- (e) The Claimant, through his counsel, gives the usual undertaking as to damages.
- (f) The parties are to attend mediation on or before July 30, 2021.
- (g) The first hearing of the Fixed Date Claim scheduled for June 14, 2021 at 10:00am is vacated.
- (h) Should mediation be unsuccessful the parties are to attend Case Management Conference on September 21, 2021 at 3:30pm for ½ hour.
- (i) All rental income collected as of the date of this Order by the First and Second Defendants jointly and/or severally is to be paid into an interest bearing escrow account held at Sagicor Bank, Hope Road Branch in the joint names of Usim Williams & Co, Attorneys-at-law and Kerry-Ann Wilson, Attorney-at-law, until the determination of the action or further order of the Court in relation to same
- (j) Costs are to be costs in the claim.

- (k) Liberty to apply
- (l) The Claimant's attorneys-at-law are to file and serve the Formal Order.