[2020] JMSC Civ 164

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2013HCV03890

BETWEEN	**VALDA CONSTANTIA SCOTT**	**CLAIMANT/RESPONDENT**
AND	**ENA SCOTT**	**DEFENDANT/APPLICANT**

IN CHAMBERS

Ms. Petrina Williams instructed by Zavia Mayne & Co. for the Defendant/Applicant

Mrs. Jennifer M. Hobson-Hector for the Claimant/Respondent

Heard: July 6 & July 29, 2020

DIVISION OF PROPERTY – VARIATION OF COURT ORDER – LIBERTY TO APPLY

WOLFE-REECE, J

INTRODUCTION

[1] The Applicant filed a Notice of Application supported by an affidavit on the December 21, 2018 seeking, inter alia, that there be a variation of orders made The Honourable Justice Mrs. G. Fraser on the November 4, 2014 relating to the division of property situated at Lot 5 Columbus Avenue, Spring Valley Estate,

Jamaica Beach in the parish of Saint Mary and registered at Volume 1227 Folio 434. The Respondent has filed no affidavits in response to the said application.

BACKGROUND

[2] The matter first came before the court on August 8, 2013 when, the Respondent Valda Constantia Scott filed a Fixed Date Claim Form seeking a declaration that she is entitled to fifty percent (50%) interest in the aforementioned property in keeping with orders previously made in this court by The Honourable Mr. Justice Panton (as he then was) on the February 6, 1996 in Suit E/482/1994 which arose between the Respondent and her ex-husband who is now deceased, Mr. Leopold Scott.

[3] Following the declaration made by Panton, J that both Valda Constantia Scott and Leopold Scott are beneficially entitled in equal shares to the captioned premises, the Honourable Mr. Justice Ellis on the March 30, 2000 ordered that Mr. Scott pay to Respondent the sum of $5,500,000.00 being the value of her half share in the property which was valued at $11,000.000.00.

[4] Following the Respondent's divorce from Leopold Scott, he got married the Applicant, Ms. Ena Scott. Leopold Scott died on the January 10, 2005 leaving a Will wherein he devised the entire property to Ena Scott. Miss Ena Scott subsequently obtained a Grant of Probate over the estate of Leopold Scott and had the property transferred to her name. All of this was done without the Respondent being compensated in keeping with the orders of Panton, J and Ellis, J respectively.

[5] It is against this background that the Respondent filed the current claim to have her interest enforced. During the course of the proceedings, the issue arose as to whether the Respondent had a beneficial entitlement to both buildings that were constructed on the land. Miss Valda Scott argued that Panton J confirmed by order

dated February 6, 1996 that she is beneficially entitled to 50% of the house built on the property at the time of the order. She however, claimed a greater interest to the second building, which she claimed to have constructed on the property subsequent to the making of the 1996 order. The Respondent further argued that at the time of Leopold Scott's death he was not residing at the premises. Rather, since the parties divorced she was in sole possession of the premises and was responsible for the construction of the second building.

[6] The matter was referred to mediation and when the matter came for hearing before G Fraser, J the parties came to an agreement which resulted in the Learned Judge ordering, amongst other things, the following:

> 6. *Terms of Division- With the excepted portion being the second building commenced by Leopold Scott and Valda Scott and completed by Valda Scott. The property registered in the book of Titles registered in the name of Ena Scott at Volume 1227 Folio 434 is to be shared equally between the parties.*
>
> 7. *The above division as is appropriate is to take into account the following:*
>
>   a. *Any income derived from the property by Valda Scott as from the 30th March, 2000 until present*
>
>   b. *Any cost of maintenance rates, taxes expended by Valda Scott.*
>
>   c. *Rates and taxes expended by Ena Scott.*
>
> 8. *In relation to the second construction estimate, Order # 6. The Defendant to give consideration to the Claimant proposal of Seventy Five percent (75%) to Claimant and Twenty Five percent (25%) to Defendant. Twenty Five percent (25%) share in favour of the Defendant or such as the parties agree. Such agreement to be within forty five (45) days of the date hereof.*
>
> *9. – 12…*
>
> 13. *In relation to Order # 8. Liberty to apply.*

APPLICANT'S SUBMISSIONS

[7] The Applicant is seeking that order number 8 as outlined above be varied and that the court make a final determination as to each party's share in the second construction on the said land. She is also seeking an injunction that the Respondent, whether personally or through her servant or agent, be restrained from registering any transfer and/or any dealing whatsoever with the land until the matter be resolved.

[8] Miss Ena Scott argued at paragraph 8 of her Further Affidavit filed on the February 12, 2020, that Miss Valda Scott has no beneficial interest in the second construction on the property in dispute. She argued that the second building was built solely by Leopold Scott with no contribution being made by the Valda Scott. The Applicant also submitted that though the property was constructed during the subsistence of the marriage between Mr. Scott and Respondent, given that the property is not the matrimonial home, the Respondent is not entitled to a share in same.

[9] She went on to state at paragraph 9 of the said affidavit that she is entitled to a majority share in the said property and therefore suggested that she was entitled to a 70% share in the property with Valda Scott being entitled to a 30% share.

[10] Learned Counsel for the Applicant relied on the case of **Dalfel Weir v Beverly Tree** [2016] JMCA App 6 in highlighting the point that the court has the inherent jurisdiction to amend or vary judicial orders in order to correct accidental slips or omissions so as to ensure that the judgement or order reflects the true intention of the court.

[11] Counsel also relied on the case **Sarah Brown v Alfred Chambers** [2011] JMCA App 16 in arguing that the court has the inherent jurisdiction to revisit previous orders under the "liberty to apply" jurisdiction. The Applicant submitted that the inclusion of the term "liberty to apply" at order # 13 therefore gives the Court the power to facilitate the working out of Order # 8.

LAW AND ANALYSIS

Does the Court have inherent jurisdiction to amend or vary order 8 of the perfected orders made by G. Fraser, J on November 4, 2014?

[12] The issue of whether the Court reserves the power to amend or vary a final order or judgment was discussed by the Court of Appeal in the case of **Dalfel Weir v Beverly Tree** [2016] JMCA App 6 wherein Morrison P (Ag.) examined and applied the cases of **American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others** [2014] JMCA App 16, **Hatton v Harris** [1892] AC 547 and **Sans Souci Limited v VRL Services Limited** [2012] UKPC 6 in coming to the conclusion that the Court has the power to correct or vary an order previously made by it in a bid to ensure that such order or judgment, as the case may be, is in conformity with the true intention of the court. His Lordship captured the essence of the principles to taken from the aforementioned cases at paragraph 17 of the judgment where he expressed as follows:

> *"These cases appear to suggest at least the following. This court has the power to correct errors in an order previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order. In order to determine what was the intention of the court which made the original order, the court must have regard to the language of the order, taken in its context and against the background of all the relevant circumstances, including (but not limited to) (i) the issues which the court which made the original order was called upon to resolve; and (ii) the court's reasons for making the original order. While ambiguity will often be the ground upon which the court is asked to amend or clarify its previous order (as in this case), the real issue for the court's consideration is whether there is anything to suggest that the actual language of the original order is open to question."*

[13] It cannot be overemphasised that while the Court holds the inherent jurisdiction to vary or otherwise amend its orders, such power will exercised sparingly by the court bearing in mind the need to preserve the sanctity and finality of its decisions. This point was emphasised in ***Bailey v Marinoff*** (1971) 125 CLR 529 which was applied in ***Dalfel Weir v Beverly Tree,*** supra and ***Sarah Brown v Alfred Chambers*** [2011] JMCA App 16. In ***Bailey v Marinoff*** Barwick C.J. expressed on page 530 as follows:

> *"Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance, in my opinion, beyond recall by that court. It would, in my opinion not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order dismissing the appeal having been perfected by the processes of the Court."*

[14] Gibbs J expressed similar sentiments on page 539 when he expressed in his dissenting judgment as follows:

> *"...it is a well-settled rule that once an order of a court has been passed and entered or otherwise perfected in a form which correctly expresses the intention with which it was made the court has no jurisdiction to alter it... The rule rests on the obvious principles that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing. However, the rule is not inflexible and there are a number of exceptions to it in addition to those that depend on statutory provisions such as the slip rule found in rules of court."*

[15] I find it necessary to provide a synopsis of the facts which led to the application in **Dalfel Weir v Beverly Tree, supra** in order to shed light of the instances in which the Court may be led to exercise its discretion to vary or alter an order so as to correct an accidental error or slip. The issue before the court concerned the ambiguity in the wording of an order the court. The applicant in that case was faced with losing his right of first purchase of certain property if the order of the court was

interpreted to mean that the purchaser had the first right to purchase the property within three months from the date of the order of the court as opposed to within three months from the date of the valuation of the property. Dr. Leighton Jackson who appeared for the applicant in that particular case argued that the issue before the court resulted from a typographical error in the drafting of the order where the word “hereof” ought to have been “thereof”. The order which was in question before the Court of Appeal is hereunder provided.

> *“(c) That the property comprised in Volume 899 Folio 23 of the Register Book of Titles together with the dwelling house situated thereon, be valued by a Valuator to be agreed by the parties and thereafter be sold with the Claimant having the first option to purchase same such option to be exercised within three months of the date hereof failing which the said premises to be sold by Private Treaty or Public Auction with the Valuation price to be the reserved price.”*

[16] The central focus of the Court in coming to its conclusion was to give effect to the intention of the court. At paragraph 68 of the judgment, Phillips JA concluded as follows:

> *“In my opinion, there is no need to refer in any detail to the other bases in respect of which the court could exercise its jurisdiction in order to preserve the clarity and functioning of its order, save to say that if a supplemental order was needed for the “working out” of the order pursuant to the implied liberty to apply jurisdiction, I would make the order as indicated above. Additionally, with regard to the interpretation of the order, I accept counsel’s submission that the valuation of the property could be considered a condition precedent to the sale of the same, and the exercise of the option, could therefore be considered a term of the order for sale”.*

[17] In applying the law to the facts of the current case, I find that there was no error or accidental slip in need of correction or amendment, the intention of the Learned Judge was very clear, she invited the Respondent to consider the Applicant’s proposal for the building in dispute to be apportioned with a 75% share to the Respondent and 25% share to the Applicant.

[18] Unfortunately, the parties were unable to agree on this amount and the Applicant is now approaching the Court for a variation of the order having been granted liberty to apply pursuant to order number 13.

To what extent can order number 8 be varied, the parties having been granted liberty to apply

[19] I must stress the point that the use of the term liberty to apply does not render the order any less final, rather it gives the parties the right to approach the court to make a decision on matters which may touch or concern the order but one should not fall prey to the folly of thinking that the term means 'liberty to apply to vary or amend'. This point was expressed by Somervell LJ in the case of ***Cristel v Cristel*** - [1951] 2 All ER 574 where the following was expressed:

> *Prima facie, "liberty to apply" is expressed very often—and, if it is not expressed, it will be implied—where the order that is drawn up requires working out and the working out involves matters on which it may be necessary to get the decision of the court. Prima facie, certainly, it does not entitle people to come and ask that the order itself shall be varied.*

[20] Halsbury Laws of England Volume 11, 5th edition paragraph 1602 explains the concept of liberty to apply when the learned authors encapsulated the legal principles relating to the area as follows:

> *"The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the*

> *order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur."*

[21] Given that the authorities have made it abundantly clear that a declaration of *'liberty to apply'* is not a mechanism to be used for the alteration of final orders which have been made by the court, it brings us back to the point of determining what was the intention of the Learned Judge in making the order and whether the wording of the order gives room for any flexibility in altering the apportionment and if yes, to what extent?

[22] In the case of ***Dalfel Weir v Beverly Tree*** Morrison P (Ag) pointed out at paragraph 14 of that it is the intention of the Court which must prevail. His Lordship expressed as follows:

> *"…Firstly, there is American Jewellery Company Limited and Others v Commercial Corporation Jamaica Limited and Others [2014] JMCA App 16. The applicants in that case sought an order from this court, "to clarify or correct" its own previous order. The ground of the application was that there was an inconsistency between the judgments delivered by the members of the court and its orders as drawn. In considering the matter, the court accepted (at paragraph [2]), applying its own previous decision in Brown v Chambers [2011] JMCA Civ 16, that "this court may, by virtue of its inherent jurisdiction to control its process, 'correct a clerical error, or an error arising from an accidental slip or omission … in its judgment or order'". The order sought was accordingly granted, on the basis of what the court took to be the clear intention of the court which had made the previous order. As I sought to explain in my judgment in that case (at paragraph [31]), with which Dukharan and Brooks JJA agreed****, "…where that intention is clear … it is that intention that must prevail".*** *[Emphasis mine]*

[23] Morrison P (Ag) also applied the dicta of Lord Sumption in the case of ***Sans Souci Ltd v VRL Services Ltd*** [2012] UKPC 6, Privy Council pointed out that judicial orders are akin to other legal instruments and therefore the proper approach in

interpreting such orders would be to take due consideration to the language used in the order and the circumstances under which such orders were made. Lord Sumption expressed at paragraphs 13-14 of the judgment as follows:

> *13 "… the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve.*
>
> *14. It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity."*

[24] The dicta of Lord Sumption is very applicable and relevant in determining the case at bar. When one analyses order number 8 of the orders made by G Fraser J on the 4th November, 2014 it is clear that the Learned Judge left room for the parties to have dialog on the apportionment of their respective interest in the property. It is my view that the general wording of the order is indicative that the learned judge did not intend to make a hard and fast order regarding the apportionment of the parties share in the second building. Rather, the wording of the order makes room for flexibility and slight variation in the proposed apportionment. In essence the Fraser J gave the parties the option to '*work out'* where their respect interest lie and in so doing she outlined what I consider to be a guide.

[25] While it is clear that the Learned Judge made room for parties to work out the arithmetic, it would be an affront to common sense for the parties to go off on a tangent in arriving at apportionment which is diametrically opposed to the entire set of orders which were made by the learned judge on November 4, 2014. I find

that order number 8 must be read with order number 6, which to my mind is a precursory order which led to the making of order number 8. Order number 6 specifically states as follows:

> *"Terms of Division* ***- With the excepted portion being the second building commenced by Leopold Scott and Valda Scott and completed by Valda Scott.*** *The property registered in the book of titles registered in the name of Ena Scott at Volume 1227 Folio 434 is to be shared equally between the parties." [Emphasis mine]*

[26] I find that the only logical interpretation to be taken from order number 6 is that Miss Valda Scott is entitled to a majority interest in the property. The Applicant is now seeking that the court makes an order which is the opposite of what was previously proposed. That goes beyond the scope of working out and steps into the realm of varying the order of the court, as seen earlier, such alteration is not permitted by a declaration of '*liberty to apply.'*

[27] The second issue that I have with Applicant's submissions in this regard is that it appears that Ms Ena Scott is using this application as a forum to lay down her case anew. Based on the authorities which have been previously cited, the purpose of an order giving liberty to apply is for the court to make a determination on matters which touch and concern the rights of the parties and such an application should not constitute a hearing of fresh evidence.

CONCLUSION

[28] I find no reason to deviate from the originally proposed apportionment. It having been concluded that Mr. Leopold Scott contributed to the construction of the second building prior to the divorce, I find that his estate is entitled to an interest in the property and I see no reason to deviate from the 25% which was previously proposed.

[29] In similar fashion, the Court having concluded that Miss Valda Scott completed the building, it is reasonable and only befitting that she be granted majority interest in the property and she is therefore awarded 75% of the value of the property.

DISPOSITION

1. Orders sought in the Applicant/Defendant's Notice of Application filed on December 21, 2018 are denied.

2. It is declared that the Respondent/Claimant is entitled to Seventy-five percent (75%) and the Applicant/Defendant is entitled to Twenty-Five percent (25%) interest in the second building erected on property described as Lot 5 Columbus Avenue, Spring Valley Estate, Jamaica Beach in the parish of Saint Mary and registered at Volume 1227 Folio 434.

3. That Allison Pitter & Co. by commissioned to provide and updated valuation of the property, which is to include the specific value of the second building be within twenty-eight (28) days of this Order.

4. The cost of the said updated valuation is to be borne by the parties equally.

5. That the Applicant/Defendant should notify the Respondent/Claimant's attorney-at-law that she intends to exercise the option to purchase the Respondent/Claimant's interest in the property within fourteen (14) days of the date of the receipt of the Valuation Report.

6. In the event that the Applicant/Defendant does not exercise her option, the property is to be sold on the open market and the proceeds distributed according to the shares of the parties.

7. Sale Agreement should be prepared and executed within fourteen (14) days of the Applicant/Defendant's notifying to the Respondent/Claimant.

8. That upon the failure of any of the parties to execute any of the documents relevant to effect a registrable transfer of the said property then the Registrar of the Supreme Court shall be empowered to sign on their behalf.

9. Each party to bear their own costs

10. The Applicant/Defendant's Attorney-at-law to prepare, file and serve the orders made herein.

………………………………

Hon. S. Wolfe-Reece, J