



[2024] JMSC Civ. 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV05139

BETWEEN	THE ADMINISTRATOR GENERAL OF JAMAICA (Administrator for the Estate of Japheth Heath, deceased)	CLAIMANT (On Counterclaim)
AND	MURIEL TAYLOR	DEFENDANT (On Counterclaim)

IN OPEN COURT

Dr. Mario Anderson instructed by Kingston Legal Aid Clinic on record for the Claimant

Mrs. Geraldine R. Bradford instructed by the Administrator General for Jamaica appearing for the Defendant

Heard: October 9th, 2023 and January 25th, 2024

Recovery of Possession — Letters of Administration — Claim for mesne profits.

T. HUTCHINSON SHELLY, J

BACKGROUND

[1] On the 9th of September, 1999, the death intestate of Japheth Heath was reported to the Administrator-General's Department. On the 11th of March 2004, the Letters of Administration were granted to the Administrator General for Jamaica. The deceased died possessed of property at 157 Kamika Avenue, Site A, Caymanas Gardens in the parish of Saint Catherine registered at Volume 1177 Folio 257 of the Register Book of Titles and endorsed with Transfer No. 815660 registered on the 17th of August 1994 to Japheth Heath otherwise called Thomas Jepheth Heath.

[2] Upon receipt of the Grant of Letters of Administration, the Administrator-General for Jamaica tried to enter into a rental agreement with Ms Taylor, the Defendant on the Counterclaim, as she was occupying the premises and was not reported as being a beneficiary. The Defendant was unsuccessful in their attempts to have an Agreement in place.

[3] Thereafter, the Department had a squatter notice served on the Claimant/Ancillary Defendant and subsequently, they approached the Saint Catherine Resident Magistrate's Court (now parish Court) for recovery of possession. The proceedings at the Parish Court was stayed as the Claimant filed this Fixed Date Claim Form in the Supreme Court on the 7th of December 2016 for the following orders:

- i. A determination of the interest of the parties in all parcel of land known as Lot 157 Kamika Avenue, Site A, Caymanas Gardens in the parish of Saint Catherine being land comprised in Certificate of Title registered at Volume 1177 Folio 257 in the Register Book of Titles.*
- ii. A declaration that the Defendant is entitled to 50% interest and the Claimant is entitled to a 50% interest in the property located at Lot 157 Kamika Avenue, Site A, Caymanas Gardens in the parish of Saint Catherine being land comprised in Certificate of Title registered at Volume 1177 Folio 257 in the Register Book of Titles.*
- iii. An Order that on determination of the respective interest of the Claimant and the Defendant in the said property that the property be valued by a mutually agreed valuation.*
 - (a) If the parties fail to agree within fourteen (14) days of being requested to do so, the Registrar of the Supreme Court is empowered to choose the valuator.*
 - (b) The costs of the valuator is to be borne by the Claimant and the Defendant in respective shares and that the said valuation be completed within 30 days of the Order being made.*
- iv. If either party neglects or refuses to comply within fourteen (14) days of a request being made, the Registrar of the Supreme Court is empowered to sign any documents necessary to give effect to the Orders made by the Court.*

- v. *That the Claimant be granted the right to elect to purchase the Defendant's interest in the property within 30 days of receipt of the valuation.*
- vi. *That the value to be applied shall be the market value stated in the valuation.*
- vii. *Upon the election of the Claimant to purchase the Defendant's interest in the property, the sale shall be completed within a period of 90 days from the execution of such agreement.*
- viii. *That in the event of the Claimant purchasing the Defendant's interest in the said property the Defendant sign all documents required to transfer the said property to the Claimant.*
- ix. *If either party is unable to or unwilling to purchase the other party's share within the allotted time the property is sold on the open market to a third party*
- x. *If either party neglects or refuses to comply with a request being made the Registrar of the Supreme Court is empowered to sign any and all document necessary to give effect to any and all Orders made by this Honourable Court.*
- xi. *That the Claimant's Attorney-at-Law be given Carriage of Sale.*
- xii. *That the costs of this claim be borne by the Defendant.*

[4] On the 14th of May 2019, the Fixed Date Claim Form and the Affidavit of Muriel Taylor in Support of the Fixed Date Claim Form dated September 9th, 2016 and filed on the 7th of December 2016 were struck out by the orders of the Honourable Justice Mrs. Simone Wolfe Reece.

[5] A counterclaim had been filed by the Administrator General on the 3rd of April, 2017 and an amended counterclaim on the 16th of January 2020 seeking the following relief:

- i. *Recovery of possession*
- ii. *Mesne profits or in the alternative occupational rent*
- iii. *Interest*
- iv. *Costs*

[6] On the 16th of December 2021, the Court granted the orders sought on the Amended Counterclaim and made orders as follows: –

1. *Recovery of Possession to the Administrator General for Jamaica of Lot 157 Block A Caymanas Gardens in the parish of Saint Catherine registered at Volume 1177 Folio 257 of the Register Book of Titles. The recovery process is to take place by June 30, 2022;*
2. *The consideration for Mesne Profits to be heard at Assessment; and*
3. *Costs is deferred and is to be dealt with at the Assessment.*

[7] Only orders Nos. 2 and 3 were pursued at the Assessment hearing on the 9th of October 2023 as Ms. Muriel Taylor vacated the premises around August 31, 2022.

[8] At the Assessment of Damages hearing, the evidence before the Court was largely provided by the account of Andrew O’Gilvie (an employee of the Administrator General for Jamaica) and a number of exhibits were admitted into evidence. Although the record shows that the Claimant is represented by Dr. Mario Anderson, Counsel did not attend and Mr. Colin Greenland who purported to hold on his behalf attended the hearing during cross-examination by the Defendant. Mr. Greenland sought to obtain an adjournment on the basis that Dr. Anderson was unable to attend and he had not been properly briefed in order to conduct the hearing. This application was refused as the matter had been the subject of at least two (2) previous adjournments on the same basis. It is noteworthy that apart from the Fixed Date Claim Form and the Affidavit in support on December 7th, 2016, which had been filed on the Defendant’s behalf by her previous attorney, no further documents were filed on behalf of the Defendant on the Counterclaim. At the end of the assessment hearing, the parties were granted permission to file additional submissions. Mr. Greenland, who was still present, was informed of this opportunity to address the Court on the matter based on the notes which had been taken by Ms. Taylor. Regrettably, there has been no compliance on the part of the Defendant.

THE EVIDENCE OF ANDREW O'GILVIE

- [9] Mr. Andrew O'Gilvie gave evidence that he is a Property Administrator, employed to the Administrator General for Jamaica. His core functions include the co-ordination of the management of estate properties, supervision of the activities of the property agents, maintenance of estate properties, taking formal possession of properties, property visits, ensuring that property taxes are paid, preparing rental agreements, collecting and remitting rent. He explained that on the 11th day of March 2004, the Administrator General for Jamaica obtained a Grant of Letters of Administration in the estate of Japheth Heath otherwise called Thomas Jepheth Heath who died possessed of a property located at Lot 157 Kamika Avenue, Block A, Caymanas Gardens in the parish of Saint Catherine. The Letters of Administration was tendered into evidence as Exhibit 1. Mr O'Gilvie has had conduct of the administration of the property for this estate from October 1, 2015 to present day.
- [10] Mr. O'Gilvie informed the Court that Muriel Taylor and her daughter had been in occupation of the property prior to the grant of Administration and remained in possession after same had been obtained by the Administrator General. He stated that Ms. Taylor is not a beneficiary of the Estate but refused to enter into a rental agreement with the Department and has never paid rent for the property.
- [11] The Property Report of Jennifer Grace was tendered into evidence as Exhibit 2. This report was prepared on behalf of the Administrator General for Jamaica as the author of the report is employed there as a Property Administrator. Ms. Grace visited the property of the deceased to make arrangements for formal possession. The report gave copious details of the property, however, in my view, the most germane detail is the condition of the property. According to her observation, the building is in fair condition but is in need of painting. She observed that two (2) rooms which were added before the death of the deceased are still unfinished. She noted that the roof leaks and blocks are permanently placed at the front step to stop the flow of water from getting inside the building whenever it rains. Her

inspection of the property confirmed that Ms. Muriel Taylor and her daughter are occupants of the premises. Mr. O’Gilvie testified that Ms. Taylor was never granted permission or given approval to occupy the property, make any alterations or do any repairs. In outlining the loss to the estate, he noted that Ms. Taylor’s occupation has hampered the Estate from receiving income to do general maintenance and for payment to beneficiaries.

[12] A Rental Statement was prepared for the subject property by Mr. O’ Gilvie. The report sets out the years for which rent is outstanding and is owed to the Estate of Japheth Heath as a result of the Ms. Taylor’s occupation of the property. The report illustrated the breakdown in terms of the likely rent which would have been obtained for the period 2005 to 2022. The annual loss to the estate was also detailed as follows:

RENTAL STATEMENT FOR THE YEARS 2005 - 2022
Property — Lot 157 Kamika Avenue, Block A
Part of Caymanas Gardens St. Catherine

ESTATE JAPHETH HEATH

<u>CALENDAR YEAR</u>	<u>MONTHLY RENTAL</u>	<u>GROSS RENTAL PER ANNUM</u>
2005	10,500.00	\$126,000.00
2006	11,000.00	\$132,000.00
2007	11,500.00	\$138,000.00
2008	12,000.00	\$144,000.00
2009	12,500.00	\$150,000.00
2010	13,000.00	\$156,000.00
2011	14,000.00	\$168,000.00
2012	15,000.00	\$180,000.00

2013	16,000.00	\$192,000.00
2014	17,000.00	\$204,000.00
2015	18,000.00	\$212,000.00
2016	19,000.00	\$228,000.00
2017	20,000.00	\$240,000.00
2018	21,000.00	\$252,000.00
2019	22,000.00	\$264,000.00
2020	23,000.00	\$276,000.00
2021	24,000.00	\$288,000.00
CALENDAR YEAR	MONTHLY RENTAL	GROSS RENTAL PER ANNUM
2022 (Jan. — August)	25,000.00	\$200,000.00
TOTAL		\$3,550,000.00

[13] The report outlined that the figures stated as monthly rental were in keeping with the Valuation Report prepared by D.C. Tavares & Finson Realty Ltd in June 2022 on the instructions of the Counter-Claimant. The Valuation Report was entered into evidence as Exhibit 5. It examined the market value and likely market rental of the property. The valuator noted that the property has good market appeal and would attract a favourable response for sale or rental if offered on the market. In terms of the state of repair, the following is noted:

“At the time of the inspection, the unit was occupied and appeared to be in a fair state of structural and decorative repair, exhibiting the need for roof repair as discoloration and “sagging” was observed in ceiling areas as a result of moisture penetration from the roof, ceiling joint cracks in areas, internal wall crack bedroom, unrendered external walls of one bedroom with the “unfinished” room having no flooring, unrendered ceiling and walls, window and door openings only and no fixtures or fittings.”

[14] It was also indicated that in order to arrive at an accurate figure for both values, two (2) approaches were adopted and these were delineated as follows:

1. The Income approach to property valuation is whereby the estimated or actual future cash benefits (rent) generated by an income property is capitalized to arrive at a present worth or current value.

2. The Sales Comparison Approach which is a process of analysing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. However, as no two properties are exactly alike, adjustments will have to be made with the subject property for differences with the comparables, such as time of sale, location, size or parcel of land and quality of land improvements.

[15] It was the opinion of the Valuator that based on factors examined, guided by the level of rental prices being realised for similar properties and applying what was considered suitable adjustments for the subject property, the subject property would fetch the following monthly rental rates:

January 2022 – June 2022 - \$25,000 per month

January 2021 – December 2021 - \$24,000 per month

January 2020 – December 2020 - \$23,000 per month

[16] The Expert also provided guidance on the likely rental which could have been collected for the period 2005 to 2019 as follows:

January 2019 - December 2019 - \$22,000 per month

January 2018 - December 2018 - \$21,000 per month

January 2017 - December 2017 - \$20,000 per month

January 2016 - December 2016 - \$19,000 per month

January 2015 - December 2015 - \$18,000 per month
January 2014 - December 2014 - \$17,000 per month
January 2013 - December 2013 - \$16,000 per month
January 2012 - December 2012 - \$15,000 per month
January 2011 - December 2011 - \$14,000 per month
January 2010 - December 2010 - \$13,000 per month
January 2009 - December 2009 - \$12,500 per month
January 2008 - December 2008 - \$12,000 per month
January 2007 - December 2007 - \$11,500 per month
January 2006 - December 2006 - \$11,000 per month
January 2005 - December 2005 - \$10,500 per month

[17] Mr. O’Gilvie was cross-examined and vehemently disagreed with the suggestion that he had neglected the property between 2016-2022. He was however unable to recall the date and time when it was communicated to Ms. Taylor that she could no longer stay at the premises. He disagreed that there had been no official document instructing Ms. Taylor to vacate the premises. Mr. O’Gilvie also refuted the suggestion that the property was only taken over by the Administrator-General’s Department in 2015.

[18] When pressed on whether the Defendant had made any repairs to the property, Mr. O’Gilvie was unable to state whether Ms. Taylor had spent money doing so as he had not seen any proof of same. When asked to describe the condition of the building, he indicated that it was in need of painting and repairs to the roof. He also pointed out that the roof was leaking, the doors required repairs and the general facility required painting. Mr. O’Gilvie also stated that because the property was in a bad condition, it was his opinion that it would not yield the highest market value or rent.

[19] It was suggested to him that the figures in the reports were inflated and he disagreed. He insisted that the sum of **Three Million Five Hundred and Fifty Thousand Dollars (\$3,550,000.00)** accurately reflected the lost income to the estate as it was commensurate with what was stated in the Expert's report and consistent with market value.

COUNTER-CLAIMANT'S SUBMISSIONS

[20] Ms. Bradford has asked the Court to award mesne profits to compensate the estate for the lost income attributed to the Defendant's unlawful occupation of the premises. She submitted that the basis for this award lies in the fact that mesne profit is damages awarded when a former tenant holds over and becomes a trespasser. She further submitted that in circumstances such as these where mesne profit is claimed, the individual entitled to possession of land may recover the damages which he has suffered as a result of being out of possession of the land or, the amount of money that he reasonably could have received for the use of the land.

[21] Ms. Bradford argued that it is settled law that a person becomes entitled to mesne profits when he has the right to obtain possession but another person whose occupation is unauthorized deprives him of that possession. Counsel asked the Court to find that this is the situation which existed in the instant claim as the Defendant had deprived the estate of lawful income.

[22] An extract from paragraph 1 of **Halsbury's Laws of England Volume 62 (2016)** on the subject of mesne profit was commended to the Court which states:

"The landlord may recover in a claim for mesne profits the damages which he has suffered through being out of possession of the land, or if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the value of the premises to the defendant for the period of the defendant's wrongful occupation. Mesne profits being a type of damages for trespass may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right to occupy the premises."

- [23] Ms. Bradford also relied on the case of **Swordheath Properties Limited v Tabet and others** [1979] 1 All ER 240 where a similar situation arose. Specific reference was made to the judgment of Megaw LJ where he elucidated that where a person remains as a trespasser on residential property the owner is entitled to damages for the trespass without bringing evidence that he could or would have let the property to someone else if the trespasser had not been there. The Court found that the measure of damages will be the value to the trespasser of the use of the property for the period during which he has trespassed, which in a normal case will be the ordinary letting value of the property.
- [24] The case of **Pauline Williams v Norman Willis and Estate of Sarah Willis** [2021] JMSC Civ 28 was also highlighted as providing guidance on how mesne profits is to be calculated, what ought to be the measure of damages and how the Court could arrive at a fair figure.
- [25] Ms. Bradford contended that nominal damages would be inappropriate in this instant claim as Expert evidence has proved the ordinary letting value and the Estate has been deprived of the use of the land for approximately twenty-two (22) years. Counsel highlighted what she described as aggravating features, namely the fact that despite having no claim to the property, Ms. Taylor initiated this claim and another and completely disregarded the orders of the Court by not vacating the property within the timeframe stipulated.

DISCUSSION/ANALYSIS

- [26] It has not been disputed by Ms. Taylor that she was in occupation for the period 2005 to 2022 as stated. The sole point of contention which arose between herself and the Claimant's witness was the month of her departure in 2022. On this issue, Mr. O'Gilvie insisted that this would have been in August 2022 based on the timing of his visits to the property. Ms. Taylor sought to assert that she had spent money on the property and was entitled to an interest in same but she failed to produce any document in support of this point. On the question of the likely rental, which was addressed in exhibits 4 and 5, her sole point of objection was the figure was

'too high' but no evidence to the contrary was produced by her to the Court. In my consideration of the matter, it is evident that from 2004/2005, the Estate would have been in a position to have the property sold or listed for rent in order to provide an income for the beneficiaries. This opportunity was thwarted however by the continued occupation of the property by the Defendant and her daughter who had no legitimate claim to it. The situation was compounded by the refusal of the Defendant to enter into a rental agreement. I find that the evidence proves that Ms. Taylor had indeed become a trespasser as she refused to vacate the property and when faced with a suit in the Parish Court for recovery of possession, she filed an action seeking a declaration that she was entitled to the property. I am satisfied that all of these actions were done with the purpose of depriving the Estate of the income which could have been realized from the rental of the subject property. In the circumstances, it is pellucid that the Claimants would be entitled to recover mesne profit as claimed.

[27] The question that would now arise for consideration is the sum in which the mesne profit claim would fall. Useful guidance on how this should be arrived at is found in the judgment of **Ministry of Defence v Ashman** (1993) 66 P.&C.R. 195 where Lord Hoffman said that:

“The amount of mesne profits for which a trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. This is so even if the landlord would not have let the property in question during the period of trespass.”

[28] On an assessment of the totality of the evidence proffered, specifically the Valuation Report, the Property Report and Statement of Rental Income, I find that the Counterclaimant had placed cogent evidence before the Court to show the mesne profit to the estate in the sum of **Three Million Five Hundred and Fifty Thousand Dollars (\$3,550,000.00)** being the rental which could have been obtained for the period January 2005 – August 2022. As such, on a balance of probabilities, I am satisfied that the Counter-Claimant is entitled to have mesne profits assessed in the aforementioned sum.

Costs

[29] Pursuant to Rule **64.6 (1)** of the CPR, the decision to award costs is discretionary. The general rule on costs is that the unsuccessful party is to pay the costs of the successful party. Counsel indicated that costs should be granted in the Counterclaimant's favour and has submitted that the pertinent issues to be determined are as follows:

- a. **Whether this is a fit and proper case for the Court to make an Order for Costs?**
- b. **What special circumstances or otherwise exist to allow a deviation from the general rule?**

[30] In respect of the first issue, Ms Bradford pointed out that this is a fit and proper case for a cost order as Ms Taylor initiated legal proceedings against the Administrator General Department by way of Fixed Date Claim Form in which she claimed an interest as a spouse in the property owned by Japheth Heath otherwise known as Thomas Jepheth Heath. Counsel submitted that after eight (8) Court attendances, the Claimant's case was struck out and on the hearing of the Amended Counterclaim, the Claimant was unsuccessful and an Order was made for her to quit and vacate the subject property.

[31] Ms Bradford referred the Court to the authority of **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and the University and Allied Workers Union** [2016] JMCA Civ 26 where Morrison P opined in paragraph 12 that the long-established principle is that costs should ordinarily follow the event. Counsel argued that this authority bolsters the Counter-Claimant's argument that this is a fit and proper case for a cost order, especially given that the Claimant has been unsuccessful at every stage of this claim.

[32] Ms Bradford further submitted that the situation is compounded by the fact that Ms. Taylor did not possess the requisite locus standi to bring the claim as she was not the spouse of the deceased and never obtained a declaration to that effect.

[33] Counsel asked the Court to note that even after Ms Taylor's case had been struck out, she filed Claim No. 2019CV01055 seeking an Order for a Declaration of Spouseship and an application had to be made for a stay to those proceedings as the Claimant had not settled her costs.

DISCUSSION

[34] On a review of the chronology of events, it is evident that the Counter-Defendant has engaged in litigious conduct in circumstances where her actions had no real prospect of success. In doing so, she occasioned further expense to the Estate by way of the costs associated with defending and prosecuting these claims. In the circumstances, the Counter-Claimant is justified in seeking an award for the costs expended and I am satisfied that there is no reason to depart from the general rule that "*costs follow the event.*"

CONCLUSION

[35] Having regard to the foregoing, I make the following orders:

1. Mesne profits are awarded to the Counter-Claimant in the sum of **Three Million Five Hundred and Fifty Thousand Dollars (\$3,550,000.00)**;
2. Costs awarded to the Claimant to be agreed or taxed;
3. No award is made in terms of interest; and
4. Counter-Claimant's Attorney-at-Law to prepare, file and serve the Judgment made.