

Nm/S

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E503/2002

IN CHAMBERS

BETWEEN	DEHRING BUNTING & GOLDING LIMITED	PLAINTIFF
AND	SHARON WILLIAMS	FIRST DEFENDANT
AND	BASIL WILLIAMS	SECOND DEFENDANT

Mr. John Vassell Q.C. and Ms. Julianne Mais instructed by
Dunn Cox for Plaintiff.

Heard Ex Parte : September 26th & 27th, 2002

BROOKS J.

The Plaintiff herein has presented two applications for the Court's consideration.

The first is an *ex parte* summons for leave to issue Writ of Summons and to serve notice thereof out of the jurisdiction upon the intended defendants and for substituted service. The second is an *ex parte* summons for an interim injunction.

Since some of the issues required for consideration in these applications overlapped they were heard concurrently.

The facts as gleaned from the affidavit evidence and a perusal of the court's file in respect of Suit No. CL1995/D007 are as follows:

- (1) The defendants are both Jamaican Citizens who now live outside of the jurisdiction of this Court. Their last known address was in the United States of America.
- (2) They are the registered proprietors of all that premises situated at Orange Bay in the parish of Hanover which premises are comprised in Certificate of Title registered at Volume 1243 Folio 267 of the Register Book of Titles (hereinafter called "the premises").
- (3) The First Defendant secured a loan from the Plaintiff in or about September 1993 in the sum of \$500,000.00. The Plaintiff alleges through the Affidavit of its Vice President Patricia Martin that the First Defendant secured the loan by way of a Promissory Note as well as by an agreement "that the said loan would be secured by a mortgage to the Plaintiff of (the premises)". A handwritten note from the First Defendant promising to forward the title for the premises to the Plaintiff "as soon as possible" was exhibited to the affidavit.

- (4) The First Defendant defaulted in honouring her obligations under the loan and the Plaintiff herein sued her for recovery of the loan by Writ of Summons in this Court in Suit C.L.1995/D007 (hereinafter called “the former suit”). The First Defendant was the sole defendant in the former suit. Both defendants had migrated from Jamaica before the former suit was filed.
- (5) The Plaintiff lodged caveat #879374 with the Registrar of Titles preventing dealings with the land without notice, and also, in 1996, secured a judgment against the First Defendant in the former suit. In the fullness of time the Plaintiff secured an Order *Nisi* for the sale of the premises, the judgment debt not having been paid.
- (6) The Order *Nisi* for the sale of the premises was not made absolute for a variety of reasons and it has languished for a period in excess of four years. Indeed it has still, as at the date of hearing of these summonses, not been made absolute.
- (7) The defendants have recently caused an instrument of transfer of their interest in the premises to be lodged with the Office of

Titles for registration and the Registrar of Titles has sent a notice to the Plaintiff warning it of the intended action.

- (8) Earlier on the very day of the commencement of the hearing of these applications the Plaintiff secured an order of this court in the former suit extending the time of the effect of the Order *Nisi* until the completion of the sale of the premises. This order, as it is understood, ought to effectively prevent any dealings with the property until the fulfillment of that event. Counsel for the Plaintiff has expressed reservation as to the efficacy of the system to achieve that end.
- (9) The Plaintiff now wishes to have itself declared as an equitable mortgagee of the premises based on the agreement between itself and the First Defendant concerning the premises and the title for same.

It is against this background that the Plaintiff brings the present application.

The application for leave to Issue Writ and for service out of the jurisdiction.

This application is made pursuant to Section 47 of the Judicature (Civil Procedure Code) Law (“the C.P.C.”). It is supported by an affidavit

addressing the various issues stipulated by that section which in the circumstances of the instant case are as follows:

- (1) The intended suit concerns, *inter alia*, land situated within the jurisdiction (satisfying section 45(a) of the C.P.C.).
- (2) The defendants who are Jamaican citizens are most probably in the United States of America, but their actual addresses are unknown at this time.

The Over-lapping Issue.

The question as to whether the Plaintiff has a “good cause of action” (to quote the words of Section 47 of the C.P.C.) or, a “good arguable case” as expanded by the learned authors of the Supreme Court Practice (1997) in reference to Order 11 r. 1 (11/1/6), or, a serious question to be tried, (which is the well established standard laid down in American Cyanamid v Ethicon [1975] 1 ALL ER 504 for considering the granting of interim injunctions, are sufficiently allied to enable joint consideration.

The concern of the court, about the necessity for the Plaintiff’s proposed action in the face of the relief being enforced in the former suit, was answered by Mr. Vassell, in substance, as follows:

- (a) The interest, now sought to be protected, is separate and apart from that of a judgment creditor. This proposed

action will enhance its position at the enquiry pursuant to the Order for Sale, and;

- (b) The equitable interest allows the enforcement of rights which pre-date the judgment in the former suit.

The second concern of the court, in respect of the entitlement of a joint tenant to unilaterally charge the land, was met with the submission by Mr. Vassell that:

- (a) One joint proprietor may mortgage the property. This right existed prior to the 1925 Law of Property Act in England. - Williams vs Hensman (1861) 1 J & H 546
- (b) The Court will treat the mortgage as affecting the beneficial interest of that joint proprietor. - Basma v Weeks and others (1950) A.C. 441
- (c) The principle applies to the mortgage of real property held jointly. - First National Securities Ltd. v Hegerty & Anor. [1984] 1 ALL ER 139 and Thomas Guaranty Ltd. v. Campbell & others [1984] 2 ALL ER 585.
- (d) Those principles are in fact applied in our own jurisdiction.

Leiba v. Thompson S.C.C.A. 82 of 1992 (now reported at
(1994) 31 J.L.R. 183)

Application for Interim Injunction

The application for the interim injunction is supported by an Affidavit of an Assistant Vice President of the Plaintiff company who depones to the facts of the case from the Plaintiff's viewpoint - some of which are contained in the summary of the facts hereinbefore set out.

The effect of the affidavit is to complain that the Plaintiff's claimed interest in the premises will be adversely affected if the defendants are allowed to dispose of their (the Defendant's) interest in the premises.

Findings

After reviewing the affidavits and hearing submissions, the court is satisfied that:-

- (1) The defendants are Jamaican Citizens.
- (2) The subject matter of the action falls within the ambit of Section 45 of the Judicature (Civil Procedure Code) Law.
- (3) The defendants are outside of the jurisdiction but their address is unknown though they are most probably located in the United States of America.

- (4) There is a serious question to be tried and there is a good arguable case in respect thereof.

Based on a review of the authorities it is accepted that there is authority to support the principle that a joint tenant may by his unilateral act in respect of his own share create a severance of the joint tenancy. A quote from the judgment of Sir W. Page Wood V.C. in *Williams v Hensman* (*supra*) is instructive:

“A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund-losing, of course, at the same time, his own right of survivorship. Secondly, a joint tenancy may be severed by mutual agreement. And in the third place, there may be a severance by any course of dealing sufficiently to intimate that the interests of all were mutually treated as constituting a tenancy in common.”

This passage was cited with approval by Wolfe J. (as he then was) in *Gamble v. Hankle* (1990) 27 JLR 115 in the context of our own Registration of Titles Act. In that case an *inter vivos* deed of gift by one of two joint tenants was held to be effectual

in severing the joint tenancy and preventing the operation of the *jus accrescendi* upon the death of that joint tenant.

The unilateral act of one joint-tenant must however, be an irrevocable act. (See in re Wilks Child v Bulmer (1891) 3 Ch. D. 59).

There is an act of the First Defendant in the instant case which may amount to a charging of the First Defendant's share in the premises. Whether the act constitutes an irrevocable act, and whether it is sufficient to bind the Second Defendant, are issues which are to be fully ventilated at a trial of the action, and not at this stage.

Despite the absence of writing from the Second Defendant to satisfy the requirements of Section 4 the Statute of Frauds 1677 Mr. Vassell has argued that the Second Defendant is a necessary party to the action as his beneficial interest in the premises may be affected by an order of the Court. Indeed it is accepted that he should at least have formal notice of the action and be afforded the opportunity to identify the nature of his beneficial interest.

(5) The subject matter has to do with an interest in premises and though the Plaintiff is ostensibly seeking (bearing in mind the former suit) an award of money, it may have to satisfy itself with the relief which is afforded it under the Registration of Titles Act, (provided that it is successful in this action). I therefore find that damages is not an adequate remedy in the circumstances.

(6) The defendants on the other hand are attempting to transfer the premises, and so, *prima facie* their interest at this stage is no longer a claim of an interest therein. I therefore find that the balance of convenience is in favour of the Plaintiff.

The Plaintiff is a well known public company and at this stage there is nothing to indicate any inability on its part to pay any damages which may be awarded against it if the defendants were successful at trial.

On the contrary the First Defendant has demonstrated, on the evidence available at this stage, at least a reluctance to meet her financial obligations.

The appropriate step to be taken in these circumstances is to prohibit the intended transfer by the defendants until arguments may be heard *inter partes*.

The Plaintiff through its attorneys at law has given the usual undertaking as to damages and therefore it is ordered as follows:

On the Summons for leave to issue Writ of Summons and to Serve Notice thereof out of the Jurisdiction upon the Intended Defendants and for Substituted Service:

1. That the Intended Plaintiff be granted leave to issue Writ of Summons in terms of the proposed Writ of Summons for service on the Intended Defendants out of the jurisdiction and to serve Notice thereof on the Intended defendants out of the jurisdiction.
2. That the Intended Plaintiff be allowed to dispense with personal service of the Notice of Writ of Summons upon the Intended defendants.
3. That the Intended Plaintiff be at liberty to effect substituted service of the Notice of Writ of Summons and all subsequent process by both of the following methods:
 - (a) by leaving the said documents at the property being all that parcel of land at Orange Bay in the parish of Hanover being lot numbered 43 on the plan of Orange Bay aforesaid and being the land comprised and described in the Certificate of Title

registered at Volume 1243 Folio 267 of the Register Book of Titles, and

- (b) By insertion of a Notice of these proceedings in the Jamaica Weekly Gleaner Newspaper North American Edition.
- 4. That the time for entry of Appearance to the Writ of Summons by the Intended defendants be limited to 42 days from the date of service of Notice of Writ of Summons upon them.
- 5. Costs of this application be costs in the cause.

On the Summons for Interim Injunction

- 1. The defendants and each of them whether by themselves, their servants, agents or otherwise, be restrained for a period of 35 days from taking any steps or any further steps whatsoever to transfer, dispose of or charge property being all that parcel of land situated at Orange Bay in the parish of Hanover being the lot numbered 43 on the Plan of Orange Bay aforesaid and being the land comprised and described in the Certificate of Title registered at Volume 1243 Folio 267 of the Register Book of Titles (hereinafter called “the Property”) or any part thereof to third parties.
- 2. The Registrar of Titles be restrained from registering any dealings with the Property for a period of 35 days from the date hereof.
- 3. The Plaintiff gives the usual undertaking as to damages.
- 4. Costs of this application be costs in the cause.