NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 105/08

BEFORE: THE HON. MR. JUSTICE SMITH, J. A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	**BARRINGTON DIXON**	**APPELLANT**
AND	**ANGELLA RUNTE**	**1ST RESPONDENT**
AND	**ANTHONY DEPAUL**	**2ND RESPONDENT**

Mrs. Georgia Gibson Henlin and Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co. for the Appellant

Mrs. Marjorie Shaw-Currie and Miss Deneve Barnett instructed by Brown & Shaw for the 1st Respondent

Mr. David Batts and Miss Teri-Ann Brown instructed by Livingston, Alexander & Levy for the 2nd Respondent

19, 20, 21 and 26 November 2008 and 17 July, 2009

SMITH, JA:

1. I have read in draft the judgment of Harrison, JA. I agree with his reasoning and conclusion. I wish however, to make a few comments in respect of the issue of joinder.

2. The appellant, Barrington Dixon, brought an action against the 1st respondent, Angella Runte, on the 16th October, 2007 in respect of an agreement for the sale of land located in Hanover. In his claim, he asserted that he was "a purchaser in possession of the land" and relied on documentary evidence including

memoranda in writing executed sometime in 1986, an undated agreement for sale and several receipts bearing dates between 1986 -1987. Among the relief sought were:

> "1. An Order that, on proof of the payment of the balance of the mortgage into Court, the Defendant specifically performs the agreement to sell all that parcel of land registered at Volume 1154 and Folio 270 of the Register Book of Titles
>
> 2. Alternatively a declaration that the Claimant is entitled to all that parcel of land contained in Certificate of Title registered at Volume 1154 and Folio 270 of the Register Book of Titles by virtue of adverse possession"

3. An acknowledgment of service was filed but no defence was filed within the period required by the Civil Procedure Rules (CPR) or within a further period agreed upon by the parties. When it appeared that no defence was forthcoming, the appellant applied for judgment in default of defence on March 7, 2008. Subsequently on the 25th March, the 1st respondent filed an application for an extension of time within which to file a defence.

4. On the 13th May 2008, the 2nd respondent, Mr Anthony Depaul, filed an application to be added as a defendant to the proceedings on the following grounds:

"(a) The Applicant is and was at all material times a beneficial owner of a one half interest in the property, the subject matter of this action.

(b) The Applicant's beneficial interest was protected by Caveat #97071 lodged on the 19th November 1984

(c) The said Caveat was notice to all the world and to the Claimant of the Applicant's interest in the said property

(d) The Claimant knew or ought reasonably to have known of the Applicant's legal and beneficial interest in the said premises and therefore any or any alleged investment subject to the Applicant's prior interest.

(e)...

(f)...

(g)...

(h) It is desirable that the Applicant be added as a party to this action so that the court can resolve all the matters in dispute in the proceedings

(i) There is an issue involving the Applicant which is connected to the matters in dispute in the proceedings and it is desirable to add the Applicant so that the court can resolve that issue. "

In his affidavit in support of the application, Mr Depaul deposed that:

> 3. "...The said land was purchased jointly by Angella Runte, Charles Runte and myself. Angella Runte and Charles Runte were entitled to a 50% share and I was entitled to the remaining 50%. I contributed 50% of the purchase price.
>
> 4. Contrary to the agreement aforesaid Charles and Angella Runte had the land transferred into their joint names

rather than into the name of a company we had intended to form.

I therefore had lodged on my behalf a Caveat which gave notice to all the world of my said interest...."

Exhibited to his affidavit was an agreement dated 10th March 1984 made between himself, Angella Runte and Charles Runte to which he refers in paragraph 4.

5. All three applications were heard together by Brooks J. who refused the application for default judgment, and granted the 1st respondent an extension of time until the 3rd of October to file her defence failing which judgment in default would be entered against her. He also ordered that the 2nd respondent should be added as a 2nd defendant and be required to serve his defence and any ancillary claim on or before 17th October 2008.

6. The appellant filed some seventeen grounds of appeal to the effect that the learned judge had erred in the exercise of his discretion in granting both the joinder of the party and the extension of time for filing the defence. In respect of the joinder of Mr. Depaul as a defendant, the appellant contended that the conditions stipulated in the relevant rule of the CPR had not been satisfied. The appellant's arguments, as I understand them, may be summarised thus:

(i) On a true construction of the agreement the 2nd respondent was to be allotted shares in a company that should have been but had not yet been formed. Therefore the respondent's claim is rightly for breach of contract and an entitlement to damages and not an interest in the property.

(ii) Lodging a caveat does not confer on the 2nd respondent an entitlement to an interest in the subject property.

(iii) Based on (i) and (ii) above, there is no matter in dispute in the proceedings or issue in dispute involving the 2nd respondent as his claim is un-established.

(iv) The claims are wholly unconnected on the facts and the issues integral to the resolution of each claim are different. The claims against the 1st respondent in respect of each defendant are different and independent claims. There is no direct connection between the appellant's claim for specific performance and the claim for breach of the agreement.

(v) In adding the respondent as defendant, the learned judge had deprived the respondent of relying on the defences of adverse possession, limitations of action and laches .

(vi) Further, the joinder would increase the length and cost of this litigation

7. Mr Batts for the 2nd respondent argued that the 2nd respondent has an arguable case that the 1st respondent holds 50% of the subject property on trust. The 2nd respondent's interest in land is equitable in that having acted unlawfully, fraudulently or dishonestly, the 1st respondent now holds the land as trustee. The caveat is notice to the world of the 2nd respondent's prior equitable interest. He submitted that based on these circumstances, the respondent's claim is relevant to the disposal of the proceedings between the appellant and the 1st

respondent particularly in light of the fact that the appellant is seeking the discretionary remedy of specific performance. The court will rarely order specific performance if to do so results in a breach of a trust or prejudice to a prior equitable interest. He further submitted that the court at this stage is not required to consider the merit of any defence against establishing an interest.

8. The instant proceedings are interlocutory in nature. At this stage, a court need not embark on a detailed examination of the substantive issues. In my view, it is only necessary to establish whether the application is, ex facie, one that is sustainable in light of the requirements of the relevant rule . In his application, the 2nd respondent relied on Rule 19.2(3) which states:

> "(3) The court may add a new party to proceedings without an application, if-
>
> (i) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (ii) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

9. It is , I think, beyond dispute that the 2nd respondent could not be joined on the basis of the requirement in 3(i) above , in that, adding the 2nd respondent may not resolve all the matters in dispute between the appellant and the 1st respondent. However, the 1st respondent has not denied or disputed the existence of the agreement referred to and exhibited by the 2nd respondent nor

has she denied that the respondent advanced the agreed sum towards the purchase of the property. In my view, this establishes that there is an issue between the 2nd respondent (new party) and the 1st respondent as to the ownership of the property. Further, the existence of the caveat, which still appears to be valid, would have been notice to the appellant of the 2nd respondent's interest.

10. A resolution of the issue of the ownership of the property is, in my view, integral to a resolution of the dispute between the appellant and the 1st respondent. It must be decided, what entitlement or interest, if any, the 2nd respondent has in the property. If the 2nd respondent has an equitable interest in the property, then it is unlikely that specific performance will be granted because the 1st respondent would have sold more than her interest in the property and would be entitled to transfer only 50% of the property. This would determine the matter in dispute between the appellant and the 1st respondent in so far as the relief of specific performance is concerned. Alternatively, if the 2nd respondent's proper claim is for breach of contract, the return of the sums advanced and damages would have to be satisfied from the balance of the monies owed by the appellant to the 1st respondent. In my view, this is sufficient basis for the joinder of the 2nd respondent. I agree with the learned judge's statement at page 3 of his judgment that "his claim is neither frivolous nor vexatious and deserves consideration at trial."

11. The question as to whether the claim ought properly to be for breach of contract or breach of trust ought to be left for the trial where the interest of the 2nd respondent will be determined. Of course, as contended by the 2nd respondent, a caveat is not an interest in land. It merely operates to prevent any dealing with the land in question without the consent of the caveator or the removal or withdrawal of the caveat. (See ***Half Moon Bay Limited v Crown Eagle Hotels Ltd*** Privy Council No. 31/2000 delivered 20th May 2002). It temporarily protects an unregistered interest in anticipation of legal proceedings. The caveator must make a claim with a view to establishing his interest. Thus, in order for the 2nd respondent's interest to be determined, he must file an ancillary claim in respect of a interest. The learned judge was therefore correct in adding the 2nd respondent as a defendant and granting permission for him to file an ancillary claim. However, in view of the fact that at the time of the hearing of the appeal, no ancillary claim had been filed by the 2nd respondent, the 2nd respondent should be required to file the claim to have his interest as indicated by the caveat determined. The question of how the matter will proceed is best dealt with at a case management conference.

12. It follows that the trial is the appropriate arena for the consideration of any defences. I should state however, that in view of the fact that a court will not add a party who advances a claim that is unsustainable, in rare circumstances, a court may in considering an interlocutory application of this nature take into account the defence of limitations. For instance, in this case,

were the claim solely grounded in contract, it would be necessary to consider whether the action is statute-barred. However, such an exercise is unnecessary in this case where the probability of an equitable claim exists.

13. I would therefore dismiss the appeal.

HARRISON, J.A.:

14. This is an appeal from a decision made on the 23rd of September, 2008 by Brooks J. in interlocutory applications whereby he ordered that:

> 1. Mr. Anthony Depaul shall be added as a second defendant to the claim;
>
> 2. Mr. Anthony Depaul shall file and serve his defence to the claim and any ancillary relief on or before 17th October 2008;
>
> 3. Mrs. Angella Runte shall file and serve on the claimant and Mr. Anthony Depaul on or before 3rd October 2008, her defence to the claim, failing which the claimant shall be entitled to enter default judgment against the said Mrs. Angella Runte.
>
> 4. The Claimant's application for leave to enter judgment in default of defence is refused;
>
> 5. Mrs. Angella Runte shall pay the claimant's costs of the application to file the defence out of time.
>
> 6. There shall be no order as to costs of the claimant's application for leave to enter default judgment;
>
> 7. The costs of Mr. Anthony DePaul's application shall be costs in the claim.

The Background

15. There is a parcel of land known as Point, in the parish of Hanover, registered at Volume 1154 Folio 27 of the Register Book of Titles. The said land was purchased jointly by Angella Runte (the first Respondent), her late husband Charles Runte and Anthony DePaul (the 2nd Respondent) around 1984 for the sum of US$42,000.00. It was purchased for the purpose of development. A written Agreement was entered into between the parties and is set out below:

> "This Agreement made and entered into this 10th day of March 1984 by and between CHARLES RUNTE AND ANGELLA RUNTE AND ANTHONY DePAUL.
>
> WITNESSETH
>
> WHEREAS it is the intention of the parties hereto to enter into an Agreement for the purchase and development of certain parcel of land located in the Country of Jamaica for the purpose of subsequent development thereof.
>
> NOW THEREFORE, in consideration of the mutual promises made herein and the parties hereto intending to be legally bound, hereby agree as follows:
>
> 1. The parties hereto shall enter into partnership for the purchase and development of all that parcel of land situate a (sic) Point in the parish of Hanover containing Nineteen (19) Acres, Nine perches and Two Tenths of a Perch of the shape and dimensions and butting as appears by the Plan thereof annexed and being part of the land comprised in the Certificate of Title registered at Volume 1154 Folio 27 of the Registered (sic) Book of Titles for the consideration of JAMAICAN ONE

HUNDRED AND THIRTY-FIVE THOUSAND ($135,000.00) DOLLARS. A copy of the Plot plan and scale of said parcel is attached hereto and marked as Exhibit "A".

2. The parties have made a capital contribution for the purchase of said parcel in the total amount of **FORTY TWO THOUSAND ($42,000.00) US DOLLARS** as follows:

(a) CHARLES RUNTE AND ANGELLE RUNTE – **TWENTY ONE THOUSAND DOLLARS ($21,000.00) U.S. DOLLARS**
(b) ANTHONY DePAUL - **TWENTY ONE THOUSAND $21,000.00) U.S. DOLLARS.**

3. It is the intention of the parties hereto to form a corporation in the Country of Jamaica and to issue capital shares of stock thereto.

4. The amount and par value of the aforesaid capital shares of stock shall be determined by the parties hereto and **CHARLES RUNTE AND ANGELLE RUNTE** SHALL BE ENTITLED TO RECEIVE ONE HALF (1/2) of the capital shares of stock and **ANTHONY DePAUL** shall receive the remaining one half (1/2) shares of capital stock.

5. It is acknowledged by the parties hereto that all capital contributions for the purchase and development of the aforesaid parcel of land shall be borne

> equally by the parties hereto, and any subsequent proceeds or profile shall be divided equally thereto.
>
> IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.
>
> WITNESSES: Sgd. Charles Runte
> Sgd. Angella Runte
> Sgd. Anthony DePaul."

16. It is alleged by the 2nd Respondent that contrary to the terms of the above Agreement, the first Respondent and her late husband had the land transferred into their joint names rather than into the name of a company which should have been formed. Transfer No. 429133, registered on July 23, 1984 was noted on the aforesaid Title.

17. The land was transferred to the 1st Respondent and her husband as joint tenants with the consideration being One Hundred and Thirty-Five Thousand Dollars ($135,000.00). The 2nd Respondent lodged caveat number 97071 dated November 14, 1984 in the Registrar of Titles Office, against the title for the land.

18. Sometime in the year 1986 an Agreement for the Sale of the aforesaid property (exhibited at page 60 of the Record of Appeal) was made between the Appellant, the first Respondent and her late husband Charles Runte. The purchase price for the property is stated as $500,000.00 but it seems that the price was varied to $440,000.00. A deposit of $200,000.00 was required on signing of the Agreement with the balance payable on completion which was

fixed for March 31, 1989. It was further agreed that the appellant would obtain vacant possession on completion. The special conditions provided inter alia, that the Agreement was subject to the purchaser obtaining a mortgage of $300,000.00 from the vendors.

19. There is an unexplained gap between 1986 and 2007. On October 16, 2007 the Appellant filed a Claim Form and Particulars of Claim in the Supreme Court seeking an order for Specific Performance of the Agreement for Sale. He contended in the alternative that he had acquired title to the said land by adverse possession as he had entered into possession in excess of twenty (20) years.

20. The 1st Respondent filed an acknowledgment of service of the Claim Form on December 13, 2007 but no Defence was filed. On the 7th March, 2008 the Appellant applied for judgment in default of defence but on the 25th March, 2008 the 1st Respondent applied for an extension of time within which to file her Defence. On the 13th May, 2008 the 2nd Respondent filed an Application to be added as a Defendant.

21. Brooks J. heard all three (3) applications and on September 23, 2008 he made the orders mentioned in paragraph 1 above.

22. The appellant filed seventeen (17) grounds of appeal. These grounds raised the following issues: (a) Whether the second respondent held an interest

in the land at Point; (b) whether it was proper to have joined the second respondent to the claim and; (c) whether the learned judge was correct in setting aside the default judgment against the 1st respondent.

The 2nd Respondent's Interest in the Land

Grounds 3(c), 3(d), 3(e), 3(f), 3(g)

23. The 2nd Respondent filed an application on the 13th May, 2008 to be joined as a Defendant in the Claim on the basis that:

a. He is a beneficial owner of a one-half interest in the property.

b. His beneficial interest was protected by Caveat Number 97071 lodged on November 19, 1984.

c. The Caveat was notice to all the world and to the Claimant of his interest in the said property.

d. The Claimant ought to have known of his legal and beneficial interest in the said premises and therefore, the sale to the Claimant is void or voidable.

e. It is desirable that he be added as a party to this action so that the Court can resolve all matters in dispute in the proceedings.

f. There is an issue involving him which is connected to the matters in the dispute in the proceedings and it is desirable to add the Applicant so that the Court can resolve the issue.

g. The Applicant desires to be joined in order to protect his interest.

The learned judge below found that the 2nd respondent:

(a) May have an equitable claim to an interest in the land,

(b) Having advanced monies toward the purchase of the land may lead to the Runtes' being deemed trustees for the 2nd respondent.

24. Mrs. Gibson-Henlin for the appellant submitted that the Agreement had specifically identified the 2nd Respondent's share in the investment not by reference to an interest in land, but by reference to shares in the capital stock of the company — one half (1/2) capital stock to the 2nd Respondent and the remainder to the 1st Respondent and her husband. She further submitted that it was the 2nd Respondent's case that the 1st Respondent and her husband had frustrated the purpose of their venture by their failure to form the company; to develop the land and/or to put the land in their joint names. In those circumstances, she submitted that there was never any intention that the land should be held in their joint names, and that it was clear that the 2nd Respondent's remedy would be for a breach of the agreement and not for an interest in the land.

25. Mr. Batts for the 2nd respondent submitted that since the 1st respondent and her late husband did not form the company that they had agreed to form, both would have held a 50% interest in the land in trust for the 2nd respondent. He further submitted it was trite law that the court will create a constructive or resulting trust where a party uses money belonging to another contrary to his instructions or agreement, and moreso where the misuse of funds is dishonest or

to the detriment of the other. The law he said, will in this way trace the money and imply or impute an interest in the subject matter acquired.

26. Mr. Batts referred to and relied on the case of **Banner Homes Group plc v Luff** [2000] 2 All ER 117. In that case the parties who came to an agreement had intended a joint venture to develop land but in breach of the understanding one party went and sought another partner and acquired the site in the name of a company. It was decided that the company held the property on a trust since it was inequitable to allow one party to treat as its own, property that had been acquired in furtherance of a pre-acquisition arrangement or understanding.

27. In my judgment, there is merit in the submissions of Mr. Batts. It is arguable that a fiduciary relationship could have been created between the parties to the agreement of March 10, 1984 once it is established that the payment by the 2nd respondent was made with a view to the parties carrying out a particular enterprise. The company was not formed and in an apparent breach of that agreement, the land in dispute was bought in the names of the 1st respondent and her husband. In these circumstances, it could be said that the appellant's purchase was subject to the 2nd respondent's prior interest which was held in trust on his behalf by the 1st respondent. The caveat that was lodged against the title by the 2nd respondent would therefore serve to indicate to all and sundry that he held an interest in the land.

28. It is further my judgment that it would not be necessary for the 2nd respondent to have had his interest declared before he lodged his caveat. The case of **Stoeckert v Geddes** SCCA 50/98 delivered March 1, 1999 relied on by Mrs. Gibson-Henlin is distinguishable from the instant case.

These grounds of appeal therefore fail.

The Joinder Issue

Grounds 3(g), 3(i) and 3(l)

The CPR 2002

29. Part 19.2(3) of the Civil Procedure Rules 2002 ("the CPR") make provision for the joinder of parties in circumstances where:

> (i) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (ii) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

30. Mrs. Gibson-Henlin submitted that the learned judge was wrong when he made the joinder order because the claims by the appellant and 2nd respondent are separate and independent claims and are wholly unconnected on the facts. The issues she said, which are integral to the resolution of each claim, are different. She submitted that in those circumstances, it was not desirable for the joinder to have been made under Part 19.2(3) of the CPR.

31. Mr. Batts submitted however, that the learned judge had applied the correct principles and had correctly exercised his discretion in the matter.

In making the order for joinder the learned judge said this:

> "I am not in agreement with counsel's submission. Depaul may well have an equitable claim to an interest in this land and in addition he claims that he was not made aware of the agreement with Mr. Dixon. Having advanced monies toward the purchase of the land may lead to the Runtes' being deemed trustees for Depaul...I am not prepared at this stage in the absence of authority, to say that the existence of the caveat was not a sufficient basis for Mr. De Paul to expect that his interest in the property, if any, was sufficiently protected. His claimed interest should quite properly be dealt with at the same time that Dr. Dixon's claim is tried as the one may well be dependent upon the other. To try them together would also avoid multiple claims".

32. I find no fault with the reasons given by the learned judge. What the court is concerned with is to do justice between the parties and to save time and costs. The learned judge was therefore correct in my view, to have allowed the joinder so as to have the issues of fact and law determined at the trial. There was really no need for him at this interlocutory stage to determine matters such as limitation defences, laches and/or waiver. It is further my view that the requirements of Order 19.2 (3) of the Civil Procedure Rules (2002) were clearly satisfied.

33. There is no merit in these grounds of appeal and they therefore fail.

Defence Issue

Grounds 3(m), 3(n). 3(o), 3(p), 3(q)

34. The 1st respondent had filed an acknowledgement of service of the Claim Form on December 13, 2007 but no defence was filed. On March 7, 2008 the appellant applied for judgment in default of a defence. On March 25, 2008 the 1st respondent sought leave pursuant to part 10.3 (9) of the CPR in order to extend the time within which to file the defence. Rule 10.3(9) provides as follows:

> The defendant may apply for an order extending the time for filing a defence.

35. Mrs. Gibson-Henlin submitted that the application was made in excess of two (2) months after the time within which she was required to file her defence under the Rules and after an extension of time that was granted by the Appellant had passed. She submitted that the effect of granting the application would be to deprive the Appellant of a judgment which had accrued, and would therefore be prejudicial to the Appellant.

36. It was also contended by Mrs. Gibson-Henlin that an extension of time ought not to have been granted unless there was (a) some good reason for the delay and; (b) that the 1st Respondent had a real prospect of successfully defending the claim.

37. In her affidavit in support of the application to extend time, the 1st respondent had deposed that there was delay on her part in making the

application but this was due mainly to challenges in locating the relevant documentation. She said that she had located some documents and was "in a better position to provide instructions to [her] Attorneys-at-law in respect of the matter".

38. The 1st respondent has also denied that she had given the appellant possession of the subject land and further denied that she had given any instructions for the sale to the appellant to be completed. She further contended that the appellant had defaulted on his agreement to purchase the property and was not entitled to re-instate it. She has also relied on the Statute of Limitation stating that Dr. Dixon was barred from succeeding in the claim by virtue of that Act, and which she intended to rely upon.

39. The learned judge had raised the question whether possession may well be critical in determining the issue of whether or not the appellant was actually placed in possession of the land. He opined that a hearing in Chambers was not the proper forum.

40. On the application of rule 10.3(9) of the CPR the learned judge had this to say:

> "Rule 10.3 (9) of the CPR provides that a defendant may apply for an order extending the time for filing a defence. No guidance is given in the rules for considering such applications, but the learned editors of Blackstone's Civil Practice 2005, when considering a similar restriction structure in respect of filing of a defence, opine that the application would be made to

> extend the time under the provision dealing with the court's general power to extend or abridge time".

In this jurisdiction, the court's general powers of management are set out in Part 26 of the CPR. Rule 26.1(2) (c) provides:

> (2) Except where these Rules provide otherwise, the court may –
>
> (b) ...
>
> (c) "extend or shorten the time for compliance with any rule, practice direction, order or direction of the court even if the application for an extension is made after the time for compliance has passed".

In concluding on this issue the learned judge said:

> "I have already opined that there are serious issues to be tried as raised by Mrs. Runte and she has a real prospect of successfully defending the claim. Mrs. Runte has given a good explanation for her failure to file the defence on time. Finally, her application was made on March 25, 2008, albeit after the expiry of a period of extension which Dr. Dixon's attorneys-at-law had granted, but not, I find, unforgivably long after acknowledging service".
>
> "I find that Mrs. Runte is entitled to have her day in court and that the matter should proceed to trial".

41. I can find no reason to differ with the learned judge for the reasons given for extending the time for the 1st respondent to file her defence. The grounds of appeal filed with respect to this issue therefore fail.

Conclusion

For my part, I would dismiss the appeal with costs to both the 1st and 2nd respondents.

DUKHARAN, J.A.:

I have read the draft judgments of both Smith and Harrison, JJA. I agree with their reasoning and conclusion. There is nothing further that I wish to add.

ORDER:

SMITH, J.A.:

The appeal is dismissed with costs to both the 1st and 2nd respondents to be agreed or taxed.