



[2013] JMSC Civ 61

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 08090

BETWEEN	JOSEL DRUMMOND	CLAIMANT/APPLICANT
A N D	FAVAL DALEY DRUMMOND	1ST DEFENDANT
A N D	PAULINE WOOLLEY	2ND DEFENDANT

IN CHAMBERS

Mr. Leonard Green, instructed by Chen, Green & Co. for the Claimant/Applicant

Mrs. Dionne Meyler–Reid for the Defendants

Heard: April 19, 2013

Application for interim injunction – Presumption of advancement – Whether presumption rebutted – Lack of bona fides of party seeking to have presumption rebutted – Exercise of discretion – Failure to fully disclose pertinent information

Anderson, K., J.

[1] In this claim, the claimant is, as has been related to the court by the claimant's attorney and as is discernible from the claimant's Fixed Date Claim Form and Affidavit of Urgency in support of Fixed Date Claim Form, which has been deposed to by the claimant, seeking a declaration from this court, that the claimant is entitled to one-half of the legal and beneficial interest in the relevant property, which is lot numbered 150 as comprised in the Certificate of Title

registered at Volume 1195 Folio 809 (hereinafter termed as 'the relevant land') and a declaration that the defendants hold one-half of the relevant land, which is located in the parish of Westmoreland, in trust for the claimant and an Order that the defendants transfer the claimant's interest to him pursuant to such declarations.

[2] The defendants are the joint registered owners of the relevant land and hold the same as joint tenants. This is not disputed. It is equally undisputed that some years prior to the institution by the claimant of his Fixed Date Claim Form, in fact, in December of 2007, there was a transfer by the claimant to the defendants, of his interest in the relevant land and that such transfer was done by deed of gift under the Registration of Titles Act of Jamaica. Clearly, as at the date of that transfer, the relationship between the parties to this claim was a much more pleasant, happy and overall, calmer one than it now is. As is not unusual though, that relationship appears to have subsequently soured and clearly now therefore, this Fixed Date Claim Form is one of the many ensuing consequences. Indeed, things have even reached the stage, as between the first defendant and the claimant, who are spouses, but no longer reside together, such that there was, on January 19, 2011, an Order made in the Westmoreland Family Court, by Magistrate Dionne Gallimore Rose, on the application of the first defendant. Interestingly enough, that was a consent Order, whereby the claimant undertook not to do violence against the first defendant, not to threaten, harass or molest the first defendant and not to behave in any manner likely to cause the first defendant, harm or ill-treatment. That Order has been directed by that court, to remain in effect for three (3) years. This is interesting to this Court, not only because it makes it clear that the claimant and the first defendant have clearly, for at least the last few years, not been enjoying a comfortable relationship with each other, but also because the claimant has never, in any evidence filed before this court in respect of either his application for injunction relief, nor in support of his Fixed Date Claim Form, deposed to there existing as between himself and the first defendant, a consent domestic violence order which restrains him from engaging in certain violent, intimidatory or harassing conduct in relation to the first defendant. On the other hand though, in his Affidavit evidence which

was deposed to on September 13, 2012 and filed on September 14, 2012, the claimant has specially stated that he is not a violent person. The failure to mention anything about the said consent Order in his Affidavit evidence, as also, his failure to mention other important details about his personal life, will be addressed by this Court, in this Judgment, below, as such failure will be relevant to the claimant's application which is before this court, for injunctive relief.

[3] The Affidavit evidence of the claimant as filed in support of his Fixed Date Claim Form on December 30, 2011, deposes to the claimant and the first defendant having married on October 5, 1996, in the United Kingdom, where they lived until around 2008, when they moved back to Jamaica. The second defendant is the daughter of the first defendant and thus, is also the claimant's step-daughter. The Certificate of Title for the relevant property, has been exhibited to that said Affidavit and reveals that on February 10, 1999, the relevant land was transferred to the claimant and first defendant as tenants – in common, for the sum of \$1,300,000.00 and thereafter, was transferred by way of gift, to all of the parties in this Fixed Date Claim Form matter, on November 17, 2003, as joint tenants. Thereafter, the relevant land was transferred, by way of gift, solely to the defendants and that transfer was effected on December 18, 2007. This last transfer was done in the defendants' favour, as joint tenants.

[4] That which has come before me for adjudication in respect of this claim, is an interlocutory application by the claimant in which he seeks injunctive relief. He is seeking an injunction to prevent the defendants from denying him access to the property and by virtue thereof, also to the house on the property which forms the subject-matter of this claim.

[5] The claimant has alleged, in his second Affidavit as filed on April 11, 2013, that he transferred his interest in the said property, exclusively to the defendants as joint tenants, solely for the purpose of protecting that which he has described in that Affidavit as being the, 'family home'. He further alleges in that Affidavit, that he did so based on advice that he received from his financial advisers, that if he did not do so, the – 'family home may be in danger' (para. 14). In his Affidavit in support of Fixed Date Claim

Form, which, solely for the purpose of ease of reference, this court will hereafter refer to in this Judgment as 'the claimant's first Affidavit', he deposed to he and the first defendant having, after they got married, decided to buy the relevant land parcel, in order to construct thereon, their family home. Although the time period when said decision was made is not precisely discernible from any of the claimant's Affidavit evidence, it appears as though, if indeed said decision was made (this bearing in mind that the same has been expressly disputed by the first defendant in her joint Affidavit with the second defendant), that such decision was made whilst the claimant and the defendant were still residing in England. The claimant and the defendant were married while they were both residing and employed in England. The claimant has further alleged in his first Affidavit, that sometime around 2002, fire destroyed his business place and all its contents, as a result of which he then began experiencing grave financial difficulties and as such, filed for bankruptcy in the United Kingdom. Interestingly enough, the claimant was not attached to either of his Affidavits filed to date in respect of either his claim or his interlocutory application for injunctive relief, any court record or documentary proof of that which he has deposed to in respect of his filing for bankruptcy. This is interesting, because the defendants are contending that the claimant did not in fact file for bankruptcy in England, until 2008, and have attached to their defence, a notice which appears to be addressed to the claimant herein and which has, recorded, on it, the numbers – '676 of 2008'. This court cannot resolve any factual issues as to when it was that the bankruptcy notice was filed by the claimant, nor as to what was/were the reason (s) behind such filing. What is not in dispute, however, is that the claimant did file for bankruptcy in England.

[6] The claimant has given no evidence of the extent of financial support (if any), which he provided, either for purchase of the relevant land parcel, or for the construction of the home which was eventually constructed on that land parcel. On the other hand, the defendants have provided detailed evidence to this court, inclusive of receipts, as regards large sums of money passed on to the claimant through the 1st defendant's Victoria Mutual Building Society account, which she claims, were sums of money used

to purchase the land parcel as well as to construct the house thereon and also evidence as to how those sums of money were acquired.

[7] It is not in dispute though, that at some point in time the claimant and the first defendant both had returned to Jamaica and then began living together in the relevant house (precisely when that state of affairs began and whether the claimant and the first defendant returned to Jamaica either at or around the same time, or even years, is expressly disputed between the parties).

[8] Following on this, what is not disputed, is that at some point in time after having lived together at the relevant house in Jamaica, the claimant was forcibly evicted therefrom by the defendants. This in fact has not been disputed by the defendants, either in their defence, or in their Affidavit in response to the claimant's notice of application for court orders.

[9] It is primarily as a consequence of that undisputed fact, that the claimant has sought, by virtue of his application for court orders, which was filed on September 14, 2012, an injunction restraining the defendants, their servants or agents or otherwise from entering or accessing the, 'family home' – which as mentioned above, was constructed on the relevant land parcel. It is an application which, when considered more precisely in the specific terms of the main relief sought thereby, is one seeking mandatory relief, or in other words, a mandatory injunction. It does not matter, in that regard, that in its terms as utilized in the application itself, it is referred to as a restraining order. In deciding on what the precise nature of the injunctive relief that is being sought by any applicant is, the court ought, of necessity, to consider substance, rather than form. Essentially, what the order as sought would require, if granted, is that the, defendants are mandated/required to permit the claimant entry and access to the relevant land parcel and thus, by necessary extension, to the home which is presently situated on that land parcel.

[10] It used to be the law that a court which applies United Kingdom jurisprudential principles, such as do all of Jamaica's Courts, was to always be far more reluctant to

grant a mandatory injunction than it would be to grant a comparable prohibitory injunction and that therefore, in cases wherein a mandatory injunction is applied for, it always had to be shown that the case was unusually strong and clear, in order for a court to grant a mandatory injunction. In that regard, see: **Shepherd Homes v Sandham** - [1971] All E.R. 340, esp. at p.351, per Megarry J. That dictum of Megarry J., was though, qualified by the words – ‘in a normal case’ (p. 351). Also at p. 349A, Megarry J. stated that, ‘*the subject is not one in which it is possible to draw firm lines or impose any rigid classification*’. This element of flexibility was seized on in **Films Rover International Ltd. v Cannon Film Sales Ltd.** [1987] 1 W.I.R. 670, per Hoffman J., who held that the fundamental principle on interim applications for prohibitory and mandatory injunctions alike, is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out at trial to have been ‘wrong’. The Court of Appeal of England approved of this approach in **Zockoll Group Ltd. v Mercury Communications Ltd.** [1998] F.S.R. 354. For purposes of Jamaica, the leading case on applications for either mandatory or prohibitory injunctive relief, is: **National Commercial Bank Jamaica Ltd. v Olint Corporation Ltd.** [2009] 1 W.L.R. 1405. In that case, again, the same legal approach was adopted; this being that, whether the application is one for prohibitory or mandatory injunctive relief, the court should take whichever course seems likely to cause the least irreparable prejudice to one party or another.

[11] Applying that legal principle now, to the case at hand, this court begins by noting that even though in this claim, the claimant has not sought any final remedy of injunctive relief, this does not mean that this court is thereby precluded from granting to the claimant, the interim injunctive relief which he has sought. See rule 17.1(4) of the Civil Procedure Rules (CPR) in regard.

[12] In assessing the risk of injustice, this court must, at this stage, consider on paper, the relative strengths of the respective parties’ statements of case. In doing so on paper, however, this court recognizes and accepts that any decision made by it now, in respect thereof, cannot possibly be binding, or even persuasive to the trial court. This is because, at trial, that court will have the benefit of seeing and listening to witnesses.

This court has not had that benefit. Instead, evidence to this court, for the purposes of the claimant's application for injunctive relief, has only been presented on paper, in the form of Affidavits, albeit that such constitute sworn documents. This court is aware though, that as such evidence only exists on paper and has not been tested or challenged by means of cross-examination, it is not for this court to, at this stage, ascertain, in respect of disputed evidence, who is telling the truth and who is not, nor even to ascertain what is the truth. All such ascertainties/assessments will have to be conducted at trial, by the trial judge. That trial is presently scheduled to take place on December 4, 2013, this being approximately seven-and-a-half months from the date when the claimant's application for injunctive relief was denied, during a hearing in Chambers. This judgment sets out the reasons for the denial of that application.

[13] In the case at hand, the claimant has expressly contended in his Affidavit evidence filed on April 11, 2013 (his second Affidavit) that the reason why he transferred the relevant property into the defendants' names, was in order that he could protect that property from his creditors. This was therefore what the law would describe as being a fraudulent intent. Even therefore, where his wife was a party to the fraud, as he has alleged to be the case, nonetheless, the law is that the presumption of advancement would nonetheless apply, such that, it will be presumed that the party who executed that transfer, in this case, the claimant (husband), in favour of the defendants (wife and step-daughter respectively), had intended such property to be a gift to them. That is the essence of that which is known as the presumption of advancement. See **Re: Eybyn's Trust** [1877] 6 Ch. D. 115, esp. at p. 118, per Malins, V.C., which dicta was cited with approval, by Ld. Upjohn in **Pettitt v Pettitt** [1970] A.C. 777, at p. 803. It was made clear also, in the **Eybyn's Trust** case (op. cit.), by Malins, V.C. also at p. 118, that the presumption of advancement is unaffected by the fact that the property was also placed in the name of another person. On this latter – mentioned point, see also: **Crabb v Crabb** [1834] 1 My. and K. 511. Furthermore, a presumption of advancement arises in respect of not only relationships such as husband and wife and father and child, but equally also, step-father and step-child. In that regard, see: **Re Paradise Motor Co. Ltd.** [1968] 1 W.L.R. 1125 (C.A.). As such, the presumption of

advancement would be applicable in respect of, in the claim at hand, the transfer in the joint names of the defendants only, of the claimant's legal interest in the relevant property.

[14] The presumption of advancement is, of course, a rebuttable presumption and particularly in more recent times, especially in cases as between husband and wife, courts have become far more willing to consider such presumption as having been rebutted. In that regard, see **Gissing v Gissing** [1971] A.C. 886 (H.L.) and **Pettitt v Pettitt** (op. cit.). Of course though, in ascertaining whether or not such presumption has been rebutted, it is important to note that property rights must always be ascertained by a court, as at the time of purchase or transfer, as distinct from the time when a dispute between the relevant parties occurs, as to ownership of said property and also, as distinct from the date when the marriage is either at an end, or generally unstable. Thus, as was stated in **Pettitt v Pettitt** (op. cit.) by Ld. Morris:

'The fact of a break – down of the marriage , is irrelevant in the determination of a question as to where ownership lay before the break – down: the break – down will then merely have caused the need for a decision, but will not, of itself, have altered whatever was the pre-existing position as to ownership.'

[15] In the case of **Gascoigne v Gascoigne** [1918] 1 K.B. 223, it was held that a party's fraudulent design *vis-a-vis* the relevant property, precluded him from being successful in rebutting the presumption of advancement. Thus, also in **Re Emery's Investment's Trusts** [1959] 1 ALL E.R. 577, where shares were put into the sole name of the wife in order to evade the revenue laws of a friendly foreign country, the wife was able to rely on the presumption of advancement and the husband was not permitted to set up his inequitable intention in order to rebut it. The Court of Appeal of England, agreed in **Tinker v Tinker** [1970] 1 ALL E.R. 540, that the cases of **Gascoigne v Gascoigne** (op. cit.) and **Re Emery's Investment's Trusts** (op. cit) were correctly decided. In **Tinker v Tinker** (op. cit.), the husband, on the purchase of the matrimonial home, had it conveyed into his wife's name, in order to avoid said home from being

taken by his creditors in case his business failed. In the **Tinker** case, it was determined as a fact, that Mr. Tinker had acted honestly, not fraudulently. That evidence of his intention was held as strengthening the presumption of advancement and accordingly, the husband had no claim to the house when the marriage broke up, this even though the wife had made no contribution to its purchase.

[16] Apart from all of the aforementioned as set out in some detail at paragraph 13 – 15 of his judgment, again it must be reiterated at this juncture, that the claimant has put forward no evidence up until now, as could even remotely serve to assist him in rebutting the presumption of advancement and permitting this court to hold that his share of the relevant property is held for him on either a resulting or constructive trust, by his wife and step-daughter. Certainly, there exists no evidence before this court, from the claimant, up until now that, that goes to show that the claimant contributed any money towards either the purchase of the relevant land parcel, or the construction of the relevant home on that land parcel. To the contrary, the claimant has placed before this court, in quite some detail, evidence of monies from her building society account at Victoria Mutual Building Society (V.M.B.S.) - this being it seems, a foreign currency account, which were used to construct the home on the relevant land parcel. In fact, the first defendant has deposed to having sold her home in England, which she had purchased from even before she had met the claimant, in order to purchase the land parcel and construct the home which was later constructed on same.

[17] It is now clearly the law though, that a constructive trust can arise even in situations where no money has been directly paid or contributed to either the purchase of property or the building of a home. See **Pettitt v Pettitt** (op. cit.) in that regard. Nonetheless, a constructive trust will not be taken by this court as having been established, in a case where the party seeking to have the same be established, has not led sufficient evidence so as to enable this court to properly consider such type of trust, or for that matter, any type of trust as would be in his favour, as having been established. Regrettably for the claimant, it is this court's view that at present, this is exactly the situation with the claimant's statement of case as presently exists.

[18] In any event though, not only at trial, but even now for the purposes of this interlocutory application seeking equitable relief in the form of an injunction, this court must consider whether the claimant has come before this court, as the well-established saying goes – ‘with clean hands.’ This court must consider this, because the granting of an injunction by this court is always discretionary and never a form of relief to which someone is entitled as of right, this even if his intended and expected case is overwhelmingly likely to yield a favourable result for him. Thus, an application for injunctive relief, which is made by a party who has not come before the court with honesty, is likely to fail. Equally too, it is likely to fail where the applicant has used deplorable means to pursue an objective. See **Armstrong v Sheppard and Short Ltd.** [1959] 2 Q.B. 384 and **Hubbard v Vosper** [1972] 2 Q.B. 84.

[19] In his first Affidavit as was filed in respect of this claim, this also being an Affidavit which is being relied on as regards the claimant’s application for interlocutory injunctive relief, the claimant did not disclose a number of fairly important details regarding himself, which would, when disclosed, likely cause any court to seriously question his credibility. Amongst the matters not disclosed initially by the claimant, are the following:

- i. He has been deported to Jamaica from the United States.
- ii. He was in prison in the United States for the period of 1991 to 1996.
- iii. He has used a false Jamaican passport and thereby obtained a false taxpayer’s registration number, a false Jamaican marriage certificate, a false certificate of business registration and even a false registered title. All of those false documents are in the false name for the claimant/applicant – James Lofters. Interestingly enough, the Jamaican marriage certificate shows that the married couple are supposedly ‘James Lofters’ and ‘Jackie Simon’ and in that marriage certificate, ‘James Lofters, is described as – ‘Bachelor’. That marriage, according to that which is on the marriage certificate which was brought to this court’s attention, by the defendants’ defence, as the same has been attached as one of several exhibits attached thereto, took place on June 10, 1993 at the Spanish Town Seventh Day Adventist Church, in St. Catherine, Jamaica. It is undisputed, however, that presently the claimant and the defendant are still married and that divorce proceedings are now underway at the

instance of the first defendant. Thus, it may very well be that the claimant has committed and may in fact still now, be committing the offence of bigamy.

[20] The information as to his having been incarcerated in prison in the United States, from 1991 – 1996, as well as regards his having thereafter been deported from that nation, to Jamaica, was only disclosed by the claimant after he had been duly served with the defendants’ defence. As such, the same was only disclosed in his second Affidavit, in which the claimant has sought to justify why it is that he has, amongst other things, used a false name in Jamaica, in various respects. All in all, this court finds the claimant’s conduct, even at this preliminary stage, deplorable and does not find such conduct of his, insofar as such conduct relates to the non-disclosure of such information in the early course of seeking this court’s exercise of its judicial discretion in his favour, to be such as should cause this court to exercise its discretion in a manner which is favourable to him.

[21] The failure to disclose is however, only to be considered as a secondary reason as to why this court did not grant to the claimant, the interim injunctive relief which he has sought. The primary reason is as regards the likely risk of substantial injustice to the defendants, if the claimant’s application for injunctive relief were to be granted, this bearing in mind, the relative strengths of the parties’ cases, which is in this court’s considered opinion, predominantly weighing, at least at present, in the defendants’ favour.

[22] In the circumstances, this court has denied the claimant’s application for interim injunctive relief, but nonetheless, on application for same as made by the claimant’s counsel, has granted leave to appeal.

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Hon. K. Anderson, J.