

JVPL/2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY
SUIT NO. E90/97

BETWEEN TEX ROLONDO INNERARITY PLAINTIFF
AND CAROL INNERARITY DEFENDANT

Mr. C.J Nicholson for the Plaintiff.

Miss D. Ferguson for the Defendant instructed by Ferguson, Campbell & Co.

Heard: June 20, July 12, 2002

HARRISON J.

The previous Orders

The matters before me concern applications for further directions and a summons for recovery of possession of property.

It was ordered by Reckord J on the 8th July, 1998:

- a) That the parties (husband and wife) are beneficially entitled to the properties mentioned below in equal shares namely:
 - 1. Lot 20 St. Jago Heights, Spanish Town in the Parish of St. Catherine.
 - 2. Lot 100 Upper Fort Hellshire, in the Parish of St. Catherine.
 - 3. Lot 5 Chancery Hall in the Parish of St. Andrew.
 - 4. Property part of San San in the Parish of Portland.

- b) That each property be valued.
- c) That each property be sold and that the net proceeds of sale be distributed equally between the parties.
- d) That the Plaintiff be given the right of first refusal to purchase the matrimonial home.

- e) That the defendant do account to the plaintiff for her one half share of the total mortgage payments made by the plaintiff.

The matrimonial home referred to above is Lot 20 St. Jago Heights, St. Catherine. It was further ordered by Reckord J that the Registrar of the Supreme Court was empowered to sign the relevant documents for and on behalf of the defendant/wife in respect of the sales.

Application for adjournment

Counsel for the defendant had applied for an adjournment of the summons for further directions on the 20th June 2002. She argued that she had needed time to plead particulars of fraud since the property Lot 20 St. Jago Heights was sold at an undervalue. I refused to grant the adjournment for the following reasons:

1. The summons was adjourned on the 19th December 2001 due to the absence of the defendant's Attorney at Law.
2. On the 8th April 2002 the summons was further adjourned on application of the defence with costs to the plaintiff.
3. On the 30th April 2002, the matter was adjourned with costs to the plaintiff in any event.
4. The matter was further adjourned to the 30th May 2002 but was not heard. It was thereafter re-listed for hearing on the 20th June 2002.

I was of the view therefore that the matters should proceed since the defendant had more than sufficient time up to the 20th June, to have filed and served the supplementary documents.

The Directions and Orders sought

Further directions were sought and a summons headed "THE DEFENDANT'S AMENDED SUMMONS FOR FURTHER DIRECTIONS" sought the following orders:

1. The plaintiff to give a full and proper account of the proceeds of sale of lot 100 Emerald Close Hellshire and Lot 20 St. Jago Heights, in the Parish of St. Catherine respectively.
2. The purchase of the property Lot 20 St. Jago Heights, in the parish of St. Catherine by the plaintiff be set aside on the grounds that the property was purchased at an undervalue.
3. The Registrar of Titles to revoke by virtue of section 158 of the Registration of Titles Act, the transfer made in favour of the plaintiff on the duplicate certificate of title registered at Volume 998 Folio 350. That a revaluation of the property to be done of the said property and sold at the true market value.
4. There be a stay of execution of the Orders made on the 8th July 1997, and 26th April 2000 and that there be no further execution until proper valuations and proper accountings are done of the properties already sold. The defendant to remain in occupation of property Lot 20 St. Jago Heights, until all such sales are completed and all monies properly accounted for.
5. The Order for C.D Alexander Realty Company to be valuers be set aside and that a reputable valuator be agreed upon by the parties to value the other properties to be sold.
6. The plaintiff compensate the defendant for the value of BMW motor vehicle registered at 9549 AR as at 1997 and such compensation be paid over to the defendant with interest no later than sixty (60) days from the date of the valuation. The Valuator is to be agreed on by the parties and there be such further order as this Honourable Court deem fit.
7. The Order that the defendant do account to the plaintiff for her one half share of the total mortgage repayments made by the plaintiff be set aside.

The plaintiff seeks an order pursuant to a summons filed on the 1st March 2002:

That the defendant her servants, agents, licensees, tenants and workmen vacate known as Lot 20 St. Jago Heights in the Parish of St. Catherine and that the plaintiff be given immediate possession of the said premises.

He also seeks further directions and is asking for an order:

That the net proceeds of sale in respect of premises Lot # 20 St. Jago Heights, and Lot 100 Upper Fort Hellshire in the Parish of St. Catherine be paid to the defendant by sending the cheques for the said net proceeds of sale to the Defendant's Attorney at Law who is on record from time to time and if there are no Attorneys at Law on the records that the net proceeds of sale be paid into the Supreme Court of Judicature of Jamaica for collection by the Defendant."

The application to adjourn the hearing into open court

Counsel for the defendant argued during her submissions that since fraud was a live issue the matter ought to be adjourned into open court and for it to be treated as if begun by Writ of Summons. Counsel had relied on Order 5 - Rule 2 of the United Kingdom Rules of the Supreme Court which states:

"2. Subject to any provision of an Act or of these rules, by virtue of which any proceedings are expressly required to be begun otherwise than by Writ the following proceedings must be begun by Writ that is to say

(a)

(b) in which a claim made by the plaintiff is based on an allegation of fraud."

In the instant case, the parties are seeking further directions arising from an order made on an Originating Summons. Now, in all matters relating to husband and wife as to title or possession of property, it is Section 16 of the Married Woman's Property Act which is applicable and such matters are commenced by way of an originating summons. It is my considered view therefore, that the summons before me can be heard in Chambers and there is no need to have the matter adjourned into open court. See the case of Wilbert Letford v Minnette Letford (1988) 25 JLR 433.

Sale of the Properties

Lots 20 St. Jago Heights and 100 Upper Fort Hellshire, were valued and sold respectively. Lot 20 was valued at \$6,000,000.00 with a forced sale value of \$4,200,000.00. The plaintiff having exercised his right of first refusal bought that property at the forced sale value. The transfer was registered on the 19th November 2001 at Volume 998 Folio 350 of the Register Book of Titles.

The defendant has no difficulty with the sale of Lot 100 Upper Fort Hellshire but she contends that Lot 20 St. Jago Heights was sold at an undervalue. It was argued:

1. That since this property was purchased by the plaintiff at the forced sale value it had resulted in her loss of potential "revenue" from the sale.
2. That since C.D Alexander Realty did not have access to the interior of the house at the time of valuation, the valuation arrived at was flawed.
3. That a recent valuation was done on the property and the report of Mc Ohanle Realty Services places the market value of that property at \$8,670,000.00 with a forced sale value of \$6,900,000.00.
4. That based on the defendant's knowledge of general prices and value of properties over the years of marriage, the said property would have valued ~~of~~ at least \$8,000,000.00 at the time of sale.

The plaintiff on the other hand contended that failure by the Realty Company to have inspected the interior of the house, was insufficient to attribute fraud to the plaintiff and furthermore, the defendant had failed to particularize any alleged fraudulent act. He further submitted that the current valuation could not accurately represent the value of the property when it was sold two years ago and the Court ought not to rely upon the defendant's own views with respect to her knowledge of property values.

The Issues

The main issues for consideration now, are whether the plaintiff's title for Lot 20 St. Jago Heights can be defeated in law and whether or not the sale of that property should be set aside.

Except where there is fraud, a registered title is indefeasible. Section 70 of the Registration of Titles Act provides inter alia:

“70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, **except in case of fraud**, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.” (emphasis supplied)

Several authorities have evolved over the years on this issue and they indicate that it is “actual fraud”, that is dishonesty of some sort and not what is called constructive or equitable fraud that will defeat the registered title. See Asset’s Co. Ltd v Mere Roihi [1905] AC 176; Willocks v Wilson 30 JLR 297; Robert Honiball v Alele 30 JLR 373.

The defendant has alleged and it was argued on her behalf that the property at Lot 20 St. Jago Heights was sold to the plaintiff at an under-value hence the sale ought to be defeated in law. It does seem that there are two aspects of undervaluation, viz:

1. A sale based on a flawed valuation, and
2. A sale below the market value.

Counsel for the defendant has submitted that the current valuation filed on behalf of the defendant supported the contention that the property was undervalued at the time of sale. The current market value is fixed at \$8,670,000.00 whereas the forced sale value is \$6,900,000.00. Counsel for the plaintiff submitted in response, that the present valuation cannot accurately say what the property was worth when it was sold two years earlier. I

do agree with him. **Derry v Peek** (1880) 37 Ch. Div has indicated that the Court must concern itself with the value of the house at the time of actual sale. In that case the plaintiff was induced to purchase shares on the premise that the company in question had certain authority which it did not in fact possess. The shares subsequently lost value because the public found out that the company did not possess the authority which in their prospectus they claimed to have. The House of Lords held inter alia, that the plaintiff should be reimbursed for the shares at the value that they possessed when they were allotted to him and not at their value at the time of suit.

Can the Court rely then upon the defendant's knowledge of the value of the properties? There is no evidence before me to say that she is an expert in this field so it is my considered view that her evidence cannot assist this Court. The defendant's Valuers could have at least given its opinion on a value at the time of sale.

Does the plaintiff's option to purchase at the forced sale value constitute evidence of fraud? He has not given a reasonable explanation why he exercised this option to purchase the property. It was submitted on his behalf that the defendant could not be found and that her Attorney at Law was not known at the time. By order of the Court he was given the right of first refusal to purchase and he opted to exercise that right. Certainly, he could have sought the assistance of the Court if he had a difficulty locating her before he proceeded to purchase at the lower value. Furthermore, the defendant did not consent to this method of sale. Mr. Mitchell submitted however, that although the transaction between the parties ought to be an arm's length one and that quite properly they should have used the current market value at the time of sale, it ought not to be concluded that fraud had been perpetrated by the plaintiff.

In **Stuart v Kingston** (1923) CLR 309 it has been held that fraud is to be decided on the facts of each case and no definition of fraud can be attempted because so various are its forms and methods.

The plaintiff in the instant case had chosen to purchase at the “forced sale value” recommended by the Valuator but he ought to have appreciated the implications that would arise. In the end the property was bought for almost Two Million Dollars (\$2,000,000.00) less than the market value arrived at by C.D Alexander Realty Company. It also meant that the defendant’s share was reduced by almost One Million Dollars (\$1,000,000.00). He must have realized that the defendant would have suffered a major loss. I do believe that the only inference which can reasonably be drawn from such conduct was that there was dishonesty on his part which amounts to fraud.

The case of **Honiball and Anor. v Alele** 30 JLR 373 comes to mind on the question of undervaluation. That case dealt with the undervaluing of property based upon an affidavit of value sworn to by the second appellant. There was no official valuation. The Privy Council held inter alia, that it was incumbent upon the appellants to have answered the issue of fraud by substantiating the accuracy of the affidavit of value which had induced the cancellation of title and the issue of a new title in the names of the appellants. It held further that on the evidence tendered on behalf of the respondent, the appellants’ valuation of the land was so ludicrously low as to be evidence of fraud, and as regards that evidence, the Court of Appeal drew the correct and only inference that could reasonably be drawn that the appellants had acted fraudulently.

The evidence also reveals that the defendant was further deprived of the opportunity to have her share increased in the value of the property because the Real Estate Agent had failed to make an assessment of the interior of the house. It is my view however, that this could amount to negligence on the part of the Real Estate Company. In the circumstances a claim for damages would seem to be an adequate remedy for such negligence. In light of my finding of fraud above, such action would not be necessary however.

The other orders sought.

Mr. Mitchell has no problem with the order being sought with regards to a stay of execution of the sale of the other properties until fresh valuations are done. Neither does

he have a problem if another Valuator is appointed in lieu of C.D Alexander Realty Co. Ltd.

There is no difficulty also on the part of the plaintiff with the order being sought by the defendant for a full and proper account of the proceeds of sale to be done in respect of the properties that were sold.

The defendant agrees that the order sought in respect of the BMW motor car is not one which the Court could deal with in her summons for further directions. I hold that this is a correct concession.

The final Order

The Court orders:

1. That the plaintiff gives a full and proper account of the proceeds of sale of Lot 100 Emerald Close Hellshire in the Parish of St. Catherine.
2. That an enquiry is to be held by the Registrar of the Supreme Court and a report submitted for approval by the Court.
3. That the purchase of the property Lot 20 St. Jago Heights in the Parish of St. Catherine be set aside.
4. That the Registrar of Titles by virtue of section 158 of the Registration of Titles Act revoke the transfer made in favour of the plaintiff on the duplicate certificate of title registered at Volume 998 Folio 350 of the Register Book of Titles.
5. That a revaluation of the property at Lot 20 St. Jago Heights be done and the property sold at the true market value.
6. That there be a stay of execution of the sale of the other properties at Lot 5 Chancery Hall, St. Andrew and property part of San San, Portland respectively, until another Valuator is appointed.
7. That a reputable valuator be appointed to value the properties at Lot 20 St. Jago Heights, St. Catherine; Lot 5 Chancery Hall, St. Andrew and property part of San San, Portland. The Valuator is to be agreed upon by the parties failing which the Registrar of the Supreme Court will appoint same.

8. That the cost of the valuation is to be borne between the parties equally.
9. That the sum of \$271,748.00 representing the proceeds of sale for the defendant's one half share in property Lot 100 Emerald Close Upper Fort Hellshire, St. Catherine be paid into court and be placed in an interest bearing account in the name of the defendant at the Bank of Nova Scotia, King Street, Kingston.
10. The summons for recovery of possession of Lot 20 St. Jago Heights, St. Catherine is dismissed.
11. Costs to the defendant to be taxed if not agreed.
12. Liberty to apply.