

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. E 106 OF 1999

BETWEEN STANLEY LYNCH CLAIMANT
AND RUTHLYN MITCHELL DEFENDANT

IN CHAMBERS

Roy Stewart instructed by H.G. Bartholomew and Company for
the claimant

Crislyn Beecher-Bravo instructed by Bennett and Beecher-
Bravo for the defendant

May 19 and September 18, 2008

CONSENT JUDGMENT - MEANING OF CONSENT -
VARIATION OF CONSENT JUDGMENT - RULE 42.10 OF
THE CIVIL PROCEDURE RULES - MEANING OF LIBERTY TO
APPLY

SYKES J.

1. This case began life as a writ of summons issued out of the Supreme Court Registry on March 22, 1999. The claimant sought a declaration that he was entitled to a 50% share of the property registered at volume 1230 folio 642 of the Register Book of Titles. The writ also sought consequential orders. These were the usual orders giving each party the first option of purchasing each other's interest within a stipulated time, failing which the property would be sold by private treaty or auction. There was also a claim for an account of the rent from the property alleged to have been collected by Miss Ruthlyn

Mitchell, the defendant. Finally, the last substantive remedy claimed was mesne profits.

2. The claim arose from dispute over property arising from a break down and separation of the Miss Mitchell and Mr. Lynch. They had cohabited for a period of time and during that time purchased the property that is the subject of this suit.

3. The matter concluded on October 10, 2002, when the parties, represented by counsel, in open court, consented to the following judgment:

- i. The plaintiff is hereby declared to be entitled to a 50% share in the property registered at volume 1230 folio 642 of the Register Book of Titles.
- ii. The defendant be at liberty to purchase the plaintiff's share of the said property within 120 days of the date of this Order (sic) of this Honourable Court (sic).
- iii. The property be valued by a mutually agreed valuator.
- iv. If the defendant fails to obey the Order (sic) at (ii) above, the property be sold by private treaty or public auction. The costs incurred in such sale and the mortgage (if any) be deducted from the sale price and the balance divided equally between the parties.
- v. If any of the parties fail to execute any document(s) necessary for the carrying out of (ii), (iii), (iv) above the Registrar of this Honourable Court shall execute such documents(s) on behalf of the party failing to obey the order.

vi. There shall be liberty to apply.

4. It is to be observed that this final judgment contained no reference to mesne profits or rental income. This judgment was signed by the legal representatives of both parties. Indeed the minute of order reads "Order in terms of consent judgment filed 10/10/2002."

5. Miss Mitchell did not exercise her right of first purchase which meant that the property was to be sold either by private treaty or public auction. The property was sold in 2007. Although the sale has taken place the claimant has either refused or is unable to account for the 50% of the proceeds due to the defendant. It is not clear what the sale price was because the claimant has not provided that evidence. Despite this, Miss Mitchell believes that the property was sold for approximately \$3m dollars some time in 2007.

6. This matter is now back before the court under the liberty-to-apply provision of the judgment entered on October 10, 2002. Miss Mitchell filed a notice of application for court orders asking that the claimant, through his attorneys, account for the 50% share of the proceeds of sale due to her. She has also asked for payment to be made within ten days of the order being made, less half of costs incurred in respect of the sale and less half costs incurred in discharging the mortgage on the property. She has also asked for, as an alternative remedy, interest on her share of the proceeds of sale at such a rate to be determined by the court to compensate the defendant for the fall in value of her share of the net proceeds from the time of completion of the sale to the date of payment of the sum due to her.

7. What is the response to all this by the claimant? He files an affidavit seeking an accounting to him of his share of rental collected by the defendant. In other words, one of the remedies he sought in the writ of summons way back in 1999 which was settled by consent in 2002 is being brought back from the dead. Even Lazarus would have been surprised at this resurrection attempt.

8. Mr. Stewart makes the submission that the consent judgment of the court should simply be varied to include a paragraph to deal with the rent claim. There is no affidavit evidence explaining the omission. He simply says that it was left out and that the court, at this stage should, to quote him, "exercise its discretion and deal with rent at this time since it was not dealt with as part of the order."

9. For her part, Mrs. Beecher-Bravo resorted to the proposition that the claim fell to be treated as a matrimonial matter and that I am to apply the principle stated by Balcombe J. in *Tommey v Tommey* [1982] 3 All ER 385 which was that consent orders embodying financial arrangements of divorced parties derived their force from the order itself and not from the parties agreement and could only be set aside on the same grounds as non-consensual matrimonial orders. I must say that I have to decline Mrs. Beecher-Bravo's invitation because the parties were not married. Counsel tentatively suggested that the five-year rule relating to common law spouses should apply here. Again, I decline. That rule is a statutory innovation and is applied in the specific circumstances of the particular statute wherever that rule is found. This claim is not governed by any statute having this innovation. The matter has to be resolved by looking at the law applicable to consent judgments.

What is the effect of a consent judgment?

10. Whenever it is said that a judgment is one of consent it is always important to determine what precisely is meant. I am using the word 'judgment' in its historical, and I daresay more accurate, sense of final decision in an action or claim. According to the case law, there are two meanings attached to this word when used in the context of judgments (see Lord Denning M.R. in *Seibe Gorman Ltd v Pneupac Ltd* [1982] 1 All ER 377, 380). According to his Lordship, consent may mean either (a) that the parties have entered into a contract which is evidenced by the presence of the words 'by consent'; or (b) that the parties are not objecting to the order of the court. Under the second meaning the parties have not entered into a contract. Therefore, whenever, a judgment is expressed to be 'by consent', the first order of business for the court is to determine which of the two meanings applies in the case before the court (see Lord Denning in *Siebe Gorman* at page 380).

11. The consequences of the resolution of whether the consent judgment was a contract or not are far reaching. One of these far reaching consequences is that if the judgment is a contract between the parties then the court will treat it like any other contract and can only interfere on the same grounds on which the court will interfere with any other contract (see Lord Denning in *Siebe Gorman* at page 380).

12. In this particular case before me, it would seem to me that there was a contract between the parties and not simply that they were not objecting to the judgment made by the court. The evidence is that the claimant brought a claim seeking a declaration that he was entitled to a 50% share of the property as well as other consequential orders as also a claim for

rent and mesne profits. No defence was filed and the claimant moved for judgment. This he did by filing a notice of motion for judgment on 11 July 2002 which was to be heard on October 10, 2002. That motion included the claim for rent and mesne profits. However, by October 10, 2002 Miss Mitchell retained counsel and on that date the consent judgment was agreed, evidenced by the signatures of counsel for the respective parties. The terms of that judgment suggest negotiation and agreement. This is shown by the fact that three of the paragraphs that were in the notice of motion did not appear in the final consent judgment. Those paragraphs are (a) the plaintiff (as claimants were called before the introduction of the Civil Procedure Rules) be at liberty to purchase the defendant's share of the property within 90 days of the date of this order; (b) an account be rendered of the rental collected by the defendant with respect to the said property and (c) mesne profits. The further evidence of the contractual nature of this judgment is that only the defendant was given the liberty to purchase the claimant's interest with no identical right being conferred on the claimant. There is no other rational or reasonable explanation for the consent judgment being in the terms that it is when compared to the filed motion other than negotiation and agreement. It is virtually impossible to see how any judge could exclude some of the paragraphs from the motion unless he was told that what is in the consent judgment is what the parties agreed.

13. The consent judgment was intended to be a final disposition of the matter. The words 'liberty to apply' in the judgment do not allow a judge to vary the judgment by including the claim for an accounting for the rent. The words 'liberty to apply' do not have this miraculous power. The presence of the expression does not prevent a final judgment from being a final

judgment. All that the words do is enable a party to return to court, not to vary the judgment, but to allow the parties to seek the decision of the court if it is that after the judgment is drawn up there are matters to be worked out to give full effect to the judgment of the court (see Somervell L.J. in *Cristel v Cristel* [1951] 2 All ER 574).

14. Mr. Stewart attempted to suggest that what he was doing was simply correcting an omission; a slip. Rule 42.10 of the Civil Procedure Rules permits the court to correct a mistake or error arising from any accidental slip or omission. I dare say that what Mr. Stewart is asking does not have the appearance of a mistake arising from an accidental slip or omission but is more in the nature of altering the fundamental obligation of the defendant under the contract entered into between the parties. No affidavit evidence was put before the court by the claimant explaining how such a fundamental omission could have occurred. This was all the more necessary when it was very clear during the hearing that the defendant was not countenancing such a proposition. Thus even if I were sympathetic to Mr. Stewart's submission, it is a submission that hangs in the air; it has no evidential foundation and so I cannot accept it.

15. The crucial point, though, is that the consent judgment has all the indicia of contract. Mr. Stewart has not presented any affidavit evidence to suggest that the judgment was not a contract and as I have already indicated he has not explained by admissible evidence how such an error, if it was an error, was made. The claimant having given up the claim to rent cannot now seek to resurrect it. That specific matter is res judicata. Mr. Lynch, through his counsel chose to abandon that part of the claim as he was entitled to do.

Conclusion

16. I cannot amend the judgment as asked for by Mr. Stewart and I grant the orders in terms of paragraph one, two and four of the notice of application for court orders dated February 1, 2008.