IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 01406

BETWEEN	NORMAN WRIGHT	CLAIMANT
AND	MARJORIE E.R. BROWN	DEFENDANT

Mr. Norman Wright, Q.C. and Mr. Steve Shelton instructed by Myers, Fletcher and Gordon for the Claimant.

Mr. David Batts instructed by Livingston, Alexander and Levy for the Defendant.

Heard: 25th June 2009, 22nd July 2009, 14th September 2009 and 28th October 2009,

Consent Order - Claimant refused to comply - Application to set aside by Claimant – time - Application to enforce by the Defendant.

G. Brown, J.

The applicant and the Defendant are Attorneys-at-Law and are co-owners of a two story commercial building situated at 22-24 Duke Street in the parish of Kingston.

The applicant filed a Claim Form dated the 26th day of March 2007 seeking a declaration, an injunction and damages against the Defendant.

On the 8th day of May 2007 the Defendant filed a Defence and Counterclaim in which she sought a Partition Order and an Order for Sale.

On the 8th day of February 2008 a consent order was made by Straw, J. as follows;

> "IT IS HEREBY ORDERED BY AND WITH THE CONSENT OF THE PARTIES, as is signified by the signatures of their said Attorneys-at-Law THAT:
>
> 1. The aforesaid Notices of Applications for Court Orders are adjourned sine die.

2. That there be a decree for partition of the property situated at 22 – 24 Duke Street, registered at Volume 315 Folio 57, Volume 314 Folio 82, Volume 603 Folio 81, Volume 315 Folio 44 and Volume 443 Folio 46, subject to the direction and supervision of the Court.

3. Status Quo inclusive of the Interim Injunction in relation to the property to remain until further Order.

4. The Parties will on or before the 9th June 2008 formulate and submit a plan for partitioning and issue two (2) strata titles for the approval of the Court.

5. Both Parties are responsible for the costs of developing the said plan equally.

6. The Claim and Counterclaim and all notices of Application are adjourned sine die pending a Final Order of this Honourable Court.

7. Liberty to apply to the parties generally.

8. No Order as to Costs.

9. The Claimant's Attorneys-at-Law to prepare file and serve this Order."

The parties have failed to formulate and submit a joint plan for partitioning and issue of two strata titles for the approval of the Court as stipulated by the consent order. In their respective affidavits they blamed the other for the failure to comply the order. This was clearly a major achievement as they had for a long time lived in acrimony. The records showed that this was the third court action between them. It was therefore not surprising that the agreement between them was short lived.

The Defendant on the 14th October 2008 filed an Application for Court Order Pursuant to Liberty to Apply. This was never heard as no date was fixed by the Registry.

On the 2nd February 2009 the Defendant again filed an Application for Court Orders in the Case Management format seeking to enforce the Consent Order for Partition.

The Claimant on the 30th day of April, 2009 filed an Application for Court Order seeking to have the Consent Order rescinded and an Order for Sale made. The Defendant opposed the application. Both applications were set before me for hearing.

It was the Claimant's contention that the Consent Order should be set aside as;

(a) The evidence disclosed that the Defendant by her conduct repudiated the Consent Order;

(b) The relationship between the parties made the implementation of the Order impossible;

(c) The Claimant's inability to afford the cost of Partition made the carrying out of the Order impossible;

(d) The Court's powers to set aside consent orders have been widen since the introduction of the new rules.

The Defendant on the other hand argued that:

(a) She did not repudiate the consent order and had endevoured to have it carried into effect.

(b) She was prepared to advance by loan the cost of partitioning and therefore the Claimant's inability would not be an issue.

(c) The poor relationship pre-existed the consent order.

RULE 42.7 of the Civil Procedure Rules 2002 governs the procedure with respect to the making of consent judgments and orders. It permits the making consents in certain circumstances. Rule 42.7(2) outlines the permissible circumstances under which such orders can be made. I am therefore satisfied that the parties were permitted to make the order.

It is well settled law that the court will not interfere with an order made by consent at a time after the order had been perfected. Harris, J.A., in Frank Phipps and Pearl Phipps v Harold Morrison [SCCA NO. 86/08] said at paragraphs 19 and 20:

> "As a general rule, an order obtained by the consent of the parties is binding. It remains valid and subsisting until set aside by fresh proceedings brought for that purpose - Kinch v Walcott and others [1929] A.C.482. The bringing of fresh proceedings would normally be grounded on the obtaining of the consent order by fraud, mistake or misrepresentation.
>
> However, the court may exercise jurisdiction to intervene in setting aside a consent order or judgment prior to the perfection of such order or judgment. There is a line of authorities which shows that if a consent has not been perfected and it is brought to the court's attention that there is some circumstance which would operate to vitiate it, the court is at liberty to set it aside."

At paragraph 22 she further said:

> "The word 'consent' may convey one of two meanings. It, on one hand, may mean that a valid contract has been concluded by the parties, in which event the court cannot intervene. On the other hand, it may be construed as one which was made without objection by the parties. In such circumstance, it would not be considered a genuine consent and may be varied or altered by the court."

In Wilding v Sanderson [1897] 2 Ch.534 at pp. 543-544 Byrne J., said:

> "A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at by the parties to the proceedings embodied in an order of the court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot if he conceives he is entitled to relief, simply wait until it is sought to be enforced against him, and then raised by way of defense the matters in respect of which he desires to be relieved. He must, when he has completed obey it, unless and until he can get it set aside in proceedings duly constituted for this purpose."

In the instant case the parties had agreed that the property was to be partition. This was subject to the direction and supervision of the court. They were to formulate and submit a plan with two strata lots to the court on or before the 9th June 2008. This date passed without them complying with the court order.

Shortly after the parties had filed the order the Claimant wrote the Defendant demanding that she should share the cost of repairing the roof to the building. He also sought to have her contribute to the costs of implementing the Fire Department's recommendations before strata approval can be obtained. The Defendant also refused to discuss these issues with the Claimant or to make any monetary contribution to remedy these defects.

At the same time the Defendant sought to have the Claimant's consent to appoint a land surveyor. He refused to do so unless she agreed to his proposals as outlined. As a result of the stalemate the parties did not comply with the consent order in the time stipulated.

The Claimant did not make an application for order to the court pursuant to Liberty to apply to extend time or to seek directions.

The Claimant argued that in the present case the court order was not final and could therefore be set aside. It was in the nature of an interim and or interlocutory order and the parties expressly submitted themselves to the court in the working out of the order.

He further argued that in this case the court should not enforce the consent order in that:

(a) There was a breach of a fundamental term of the consent order;

(b) Economic circumstances have changed since the making of the consent order and which have been exacerbated by the delay which the Claimant contends was as a result of the Defendant's refusal to cooperate;

(c) There are therefore now unusual and exceptional circumstances prevailing, namely the economic recession;

(d) The court's involvement was specifically preserved by the parties and as such the court can intervene in this case; and

(e) It would be inequitable given the evidence to enforce this order.

The Claimant also stated that he was in the process of retiring from his practice as an Attorney-at-Law.

Finally, he advanced that any compromise (i.e. consent order) involving a sale or other disposition of an interest in land must be made in writing and all the terms must be made in the consent order e.g. A Tomlim order or there will be no contract.

The Defendant on the other hand argued that that there was no distinction whether the consent order was interlocutory or a final judgment. In PURCELL v F.C.TRIGELL, Ltd., [1971] 1 Q.B. 358 at p. 365E Winn, L.J., said:

> "There is no fundamental distinction in law between a consent order made in interlocutory proceedings and a consent order made on a final judgment. However, there is this to be said, that apparently the Court would prefer to keep closer control over its interlocutory proceedings than it would over its final orders if satisfied that they had been agreed to by fully advised and competent parties."

In the same case Lord Denning, M.R. in his judgment at page 364 said:

> "But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion vary or alter them, even though made originally by consent."

It is clear that the Courts are reluctant to set aside a consent orders whether final or interlocutory unless the compromise was arrived at by mistake, misrepresentation, fraud, etc. The affected party was required to bring fresh proceedings to have the order set aside.

In the instant case there was no assertion by the Claimant of any mistake, misrepresentation or fraud. He relied on the changing economic circumstances and economic recession that have altered his financial position. He argued that due to his peculiar plight the Court ought to

exercise its discretion in his favour and vary the order to permit the sale of the property pursuant to the Partition Act instead of a division under the Strata Act. This clearly was not a valid reason to set aside a contract and therefore the Consent Order cannot be set aside.

It was known that the roof was in need of repair at the time the order was made and ought not to have been made an issue by the Claimant. All that were required was for the parties to employ the services of a Land Surveyor and an Architect to formulate and prepare a plan with two (2) strata lots to submit to the court. He refused to instruct his Architect or to sign the letter of instruction to the Land Surveyor.

The Defendant on the other hand maintained that the delay in submitting the plan as stipulated in the consent order was the Claimant's refusal to co-operate. In his letter dated April 11, 2008 to the latter Mr. Batts concluded;

> "Finally, we urge you to do everything in your power to comply with the Consent Order of the court and not allow matters extraneous to its implementation to cause frustration."

The Claimant responded by letter dated 28th April 2008 in which he said:

> "Your suggestion that we should proceed with the partition before resolving the issues as to repairs/replacement of the roof, with respect, fails to take into account the fact that the rules relating to partition will require cooperation of both parties and in the face of your client's refusal now, I have no reason to feel that she will be any more co-operative after the partition. It will still mean having to resort to Court proceedings to enforce these obligations.
>
> Whilst I have every intention of abiding by the Order, I have no desire, having spent money to implement it, to have to resort to Court proceedings to enforce your client's obligations. I am satisfied from what is happening now, that your client's clear intention is to have the building partitioned, leaving the costs of repairing and/or the roof as my responsibility."

The Claimant remained resolute that until the issues were resolved to his satisfaction there could be no compliance with the Court order. As a result he did not formulate or prepare a strata plan. It was his contention that the court should vary the partition order and order that the premises be sold in accordance with the Partition Act.

The Defendant on the other hand has complied with the court orders at her expense and without the Claimant's input after the 9th day of June 2008. The delay in complying with the court order was caused by the Claimant's unreasonable conduct. She would be prejudiced if the court was to vary the order after the parties had negotiated a settlement. She had indeed filed a Counter-Claim seeking an order for sale.

In the instant case the Claimant represented himself and was aware of the consequences if the order was not complied with. One can only conclude that the compromise was agreed to by parties who were fully advised and competent. The parties were present in Court when the Orders were made. They were bound to comply with them

The Consent Order cannot therefore be altered or varied to order a sale pursuant to the Partition Act.

It was clear that the delay in complying with the court was the Claimant's unreasonable refusal to give instructions to the Architect and the Land Surveyor. The Consent Order did not stipulate that the parties should formulate any agreement with regards to the maintenance and repairs to the building. It was concerned primarily with the division of the property into two strata lots. In any event he could have applied to the court for directions. He did not do so.

The court must ensure that there be a determination of the matter on the merits and that justice is done between the parties. The question to be determined is whether the order should be enforced.

This is a matter of the exercise of discretion of the court. In Baldeosingh v Sankerlall (1971) 18 W.I.R. 375 at p.377 McShine, C.J., said:

> "Apart from its inherent jurisdiction, extremely wide powers have been conferred by Rules of the Supreme Court permitting the court or a judge to enlarge or abridge the time for taking procedural steps appointed by the Rules for the purpose of ensuring the due administration of justice."

It was clear that the Defendant had retained the services of the land surveyor and architect to comply with the court order thereby incurring expenses. The failure to file a joint plan was caused by the Claimant as stated earlier. She had filed an application for Court Order to enforce the consent order however no date was set for hearing.

The Claimant on the other hand was seeking relief from making any expenditure towards the implementation of the strata.

I am satisfied that the Defendant would be seriously prejudiced if the consent order was not enforced. The Claimant should not benefit from his own misdeed. However in the circumstances should be given an opportunity to have his Architect prepares and submits a plan notwithstanding that the time has passed to submit a joint one.

I therefore order that the Claimant do formulate and submit a plan for partitioning and issue two (2) strata titles for the approval of the court within 4 months of the receipt of the written judgment.

Leave to appeal granted to the Claimant. There is also a stay of execution.