

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 1999/R096

BETWEEN	ROSEHALL LIMITED	CLAIMANT
AND	CHARLES FARMER	1 ST DEFENDANT
AND	JUDITH FARMER	2 ND DEFENDANT

Ms. Tavia Dunn instructed by Ana Gracie of Rattray Patterson & Rattray for Claimant

Mr. Raphael Codlin for the Defendants

Heard: October 12, 2006, February 27, and June 12, 2007

Straw, J

‘Liberty to Apply’

1. On the 16th day of September 2004, Mrs. Justice Marva McIntosh granted a

Consent Order between the above-named parties in the following terms:

- a. That the Summary Judgment entered by the claimant against the defendants be set aside.
- b. That the property be transferred to the defendants within three (3) months of the date hereof, total consideration having been paid.
- c. That the costs up to the 20th January 2003 when the defendants filed application to set aside Summary Judgment be the claimants to be taxed or agreed.
- d. Liberty to apply.

2. The property has not been transferred as agreed. The present application by the defendants is to request the enforcement of the Consent Order. The issue apparently will turn on whether the words 'total consideration has been paid' can be understood to include the costs of stamp duty and transfer taxes. However, the defendants are also requesting (per paragraphs two and three of the said application) that they be allowed to file an affidavit of damages suffered as a result of the claimant's failure to do the said transfer and also that the said damages, if any, should be set for assessment.

3. The claimant's attorney has taken a preliminary point in relation to paragraphs two and three of the application. This judgment relates to the preliminary point only, as the substantive issue has been set for hearing on the 2nd July 2007.

Preliminary Issue re Paragraphs two (2) and three (3)

4. Can the court entertain such an application under the order made for "liberty to apply?"

The claimant's attorney, Ms. Dunn, has submitted that it ought to be refused as such an order could only be made by way of a claim brought by the defendants for breach of contract.

Ms. Dunn cited two authorities (among others) in support of her submissions. These are **Michael Causewell et al and Dwight Clacken et al**, SCCA Appeal No. 129/2002; **Christel vs. Christel** 1951 2 All ER pg. 574

5. These authorities deal with the scope of an order made for 'liberty to apply'.

In **Christel**, supra pg. 574, it was held as follows:

"- - the words 'liberty to apply' in an order meant that when the order was drawn up, its working out might involve matters on which it might be necessary to obtain a decision

of the court; they did not confer any right to ask the court to vary the order; ---”

6 In **Causewell**, supra, Smith JA examined the term ‘liberty to apply’ and stated as follows) pg. 17:

“The insertion of ‘liberty to apply’ does not enable the court to deal with matters which do not arise in course of the working out of the judgment or to vary the terms of the order except possibly, on proof of changes of circumstances - - -.”

Both the claimant and defendants are entitled to have the Consent Order enforced. However, any variations that may be made can only be done if it is necessary for the working out of the order. These variations cannot be such that will fundamentally alter the agreement. “The court may only do what is necessary to carry the agreement into effect.” (per Smith JA at pg. 24 **Causewell** (supra)).

7. Is the defendants’ application to file an affidavit of damages and for an assessment to be made, necessary to carry the agreement into effect?

Mr. Codlin has submitted that the Supreme Court derives its jurisdiction from the Supreme Court of Judicature Act and not from the Civil Procedure Rules (CPR 2002). He states that the court’s jurisdiction is boundless and that since the claimant has disobeyed a Court Order, the court can make an order that damages should be assessed on behalf of the defendants and to make a finding of liability under Section 16 (4) of CPR 2002.

The court has the jurisdiction to do all that Mr. Codlin has submitted. But with due respect to learned counsel, Mr. Codlin, that is not the issue to be determined. The court can and will enforce the Consent Order (**Green vs. Rozen and Others**, 1955 2 All

ER 797 at pg. 799 e to f, page 800 g) and if necessary, will make variations for the working out of the order and to carry the agreement into effect.

However, Mr. Codlin is seeking orders under paragraphs two (2) and three (3) that go beyond what the court is allowed to do under the order for 'liberty to apply'.

Paragraphs two (2) and three (3) of the Notice of Application for Court Orders filed on October 11, 2006 are therefore refused.