[2011] JMCA App 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 37/2011

APPLICATION NO 110/2011

BETWEEN	**DALFEL WEIR**	**APPLICANT**
AND	**BEVERLY TREE (also known as Beverly Weir)**	**RESPONDENT**

Dr Leighton Jackson for the applicant

Mrs Judith Cooper-Batchelor instructed by Chambers Bunny and Steer for the respondent

26 July and 19 August 2011

IN CHAMBERS

PHILLIPS JA

[1] This is an application for a stay of execution and an injunction until the determination of the appeal of the judgment of D. McIntosh J on the applicant's claim which sought the following reliefs:

> "(i) A declaration that the claimant is soley [sic] entitled to ALL THAT parcel of land containing a dwelling house thereon, being the lot numbered 9 on the approved subdivision plan part of Norwich in the parish of Portland … and being part of the lands registered at Volume 899 Folio 23 of the Registered [sic] Book of Titles by virtue of a contractual licence given to the Claimant by [sic] Defendant, her then husband, she having

promised him that she intended to give him the said lot 9 and encouraged him to expend significant sums to build a dwelling thereon and the defendant would be unjustly enriched if allowed to retain the beneficial interest in the said lot 9 with the dwelling house thereon **or in the alternative.**

(ii) A declaration that the Claimant and the Defendant are beneficially entitled in equal shares to **ALL THAT** Parcel containing a dwelling house thereon, being the lot numbered 9 on the approved subdivision plan part of Norwich in the parish of Portland … being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles (hereinafter referred to as 'the family home' pursuant to Section 6 of the Property (Rights of Spouses) Act **and**

(iii) That the Claimant be given a right of first refusal to buy the Defendant's Interest if any, in the family home, provided the Claimant exercised his said right of first refusal within six (6) calendar months of the date hereof **and**

(iv) At the time of the sale of the aforesaid premises, a valuation report of the family home shall be obtained by an agreed Valuator by the parties or alternatively, by a Valuator appointed by the court."

The learned judge gave judgment in favour of the applicant in the sum of $1,300,000.00, being half the value of the dwelling house on lot 9 with interest from3/6/2008 – 27/9/2009. The applicant filed notice and grounds of appeal on 15 March 2011 challenging this decision.

Background

[2] The applicant and the respondent met in Portland, Jamaica at a small restaurant which the applicant owned and operated at the time. The respondent was on a visit to Jamaica from the United States of America where she resided. They apparently developed an intimate relationship and sometime later, in about 1986, the respondent purchased property in Portland, which is the property referred to in the applicant's claim as being registered at Volume 899 Folio 23 of the Register Book of Titles (the subject property). In 1987, the parties got married. The respondent continued to reside abroad while the applicant remained in Jamaica cultivating the land and eventually a wooden house was constructed on the land. It appears that the applicant and others provided the labour while the respondent provided the cash for the construction. During the respondent's visits to Jamaica (which, according to the applicant's affidavit, were several times per year), the respondent and the applicant stayed at this house. However, in due course, the house became infested with termites and was uninhabitable. Thereafter, when the respondent visited Jamaica, they would stay at a hotel. In 1989, the applicant replaced the wooden structure with a concrete one. In the words of the judge, he "started by replacing the stilts or supports of the wooden house with a concrete basement. Then he eventually removed the deteriorated wooden structure". This concrete structure remains on the property and is occupied by the applicant. The subject property was eventually subdivided into some 10 lots with the lot on which this house stood being numbered 9.

[3] In 1995, the parties separated and in 2007, they were divorced. The applicant commenced proceedings seeking the reliefs mentioned in paragraph [1] above. On 20 November 2008, Straw J made an order restraining the applicant, his servants or agents from entering or dealing with the subject property except for lot 9. On 12 October 2009, Beckford J ordered that DC Tavares and Company Limited should value the house and land located at lot 9 of the subject property. It appears from the formal order that at this hearing neither the applicant nor his representative was present. This valuation was used by D. McIntosh J in making his award.

The application for the stay

[4] In considering whether to grant or refuse a stay, the traditional approach of the courts as established by **Linotype-Hell Finance Limited v Baker** [1992] 4 All ER 887 was to apply a twofold test which required that the applicant demonstrate that (i) he had some prospect of succeeding in his appeal, and (ii) without the stay he would be ruined. However, in recent times, a more liberal approach has been adopted: see **Watersports Enterprises Ltd v Jamaica Grande Limited & Others** SCCA No 110/2008, Application No 159/2008, delivered 4 February 2009; **Reliant Enterprise Communications Limited & Another v Infochannel Limited** SCCA No 99/2009 Application Nos 144 & 181/2009, delivered 2 December 2009; **Paymaster (Ja) Limited v Grace Kennedy Remittance Service Ltd et al** [2011] JMCA App 1. In **Paymaster v GKRS**, Harris JA observed that the court's approach now is to "seek to impose the interest of justice as an essential factor in ordering or refusing a stay". She also referred to the judgment of Phillips LJ in **Combi (Singapore) Pte Limited v**

Ramnath Sriram and Sun Limited FC [1997] EWCA 2164 who expressed the following to be the proper approach:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

Therefore, in deciding whether to grant or refuse the stay, I must consider whether there is some merit in the applicant's appeal and whether the granting of the stay is the order that is likely to produce less injustice between the parties.

[5] As is apparent from paragraph [2], the applicant claimed that he had acquired an interest in the property by virtue of the principle of proprietary estoppel or alternatively, pursuant to the Property (Rights of Spouses) Act (the Act). The applicant's principal challenge in his appeal in relation to proprietary estoppel seems to be largely against findings of fact made by the learned judge, which, as Mrs Cooper-Batchelor submitted, can only be disturbed where it is shown that these findings are obviously and palpably wrong. The principal complaint in relation to the Act is that the learned judge failed to apply the provisions of the Act, particularly in relation to the meaning of "family home"

as defined by section 2. In his oral submissions, Dr Jackson argued, among other things, that the learned judge had not addressed his mind to the issue of whether the wooden structure could be considered as the family home and what impact the change of the structure to concrete would have had. He also sought to argue that the applicant would be entitled to 50% of the subject property, but as this was not consistent with his pleaded case, I do not think that these arguments can be of any relevance. Mrs Cooper-Batchelor argued that even though the judge may not have made explicit reference to the Act, the tenor of his reasoning indicated that he had applied the provisions of the Act. She conceded that there was a possibility that the wooden structure could have been regarded as the family home, but that it had been replaced by the concrete structure and the learned judge had found that the respondent had not lived in the concrete structure. He had accordingly, she argued, dealt with the property comprising lot 9 as being property other than the family home in accordance with section 14 of the Act, and had decided the interest of each party according to their contributions, which he was entitled to do.

[6] There is no express reference in the learned judge's reasons to either proprietary estoppel or the Act. It therefore cannot be said with any certainty that both causes of action were considered. In relation to the claim being considered under the Act, the award of 50% of the house instead of 50% of the total value of the property located at lot 9 (that is, the land and the house) does not appear to be an award of 50% of the family home as it is defined in the Act since section 2 of the Act defines "family home" as including the "land, buildings or improvements appurtenant to [the] dwelling house".

One possible interpretation to be put to such an award, as has been advanced by Dr Jackson, is that the definition of family home was not applied. On the other hand, Mrs Cooper Batchelor's alternative interpretation that the learned judge treated it as property other than family home is arguably supported by the learned judge's statement that the parties had never lived together in the concrete structure even though the applicant had averred that he had built it as the matrimonial home, assuming, of course, that "matrimonial home" is to be used synonymously with "family home". However, the learned judge not having used express words, it is not clear what his approach was. In any event, he seemed not to have made a finding on whether the concrete structure was used from time to time by both parties. More importantly, he made no finding on the critical issue of whether the wooden structure could be regarded as the family home nor on what impact, if any, the change of the structure to concrete would have had on that issue.

[7] Even if the learned judge had made findings relative to those issues, had concluded that there was no family home and had then proceeded to treat the property as property other than the family home in accordance with section 14, a further question would arise as to whether the Act permitted the learned judge to proceed to deal with the property as being the house separate from the land. There is also the issue of whether the valuation of the property could properly have been relied on by the learned judge in the light of the circumstances surrounding the making of the valuation order by Beckford J and the provisions of section 12(3) of the Act which stipulate that the spouses shall agree on a valuator or where there is no agreement, the

court shall appoint one. It may well be that a consideration of these issues could result in a finding in the applicant's favour. I therefore consider that there is some merit in the appeal.

[8] I must now consider the harm that may be suffered by either party if there is a stay of the judgment. In his affidavit in support of his application, the applicant stated that he is "a poor man and have nowhere to live should I be ejected from my home for 25 years". The respondent, in her affidavit, on the other hand, deponed that she was in financial difficulties and had sought to cultivate parts of lot 9 and dispose of several of the lots that she owned excluding the lot on which the applicant resided. She stated that these efforts were being thwarted by the applicant who had tried to force her workers to leave the land. She stated that his behavior had cost her the sale of one of the lots, as a prospective purchaser upon seeing his behavior had declined to purchase the lot despite her previous commitment to do so. The respondent stated that she fully intended to return to Jamaica to reside but could not afford to do so yet.

[9] It seems to me that this is one of those cases where, based on the affidavits of the parties, whichever way the application is decided, both of them are likely to suffer harm. If the stay of execution is not granted, the result would be that the applicant would be forced to leave his home at lot 9 and to find alternative accommodation. He would, of course, be entitled to the payment of $1,300,000.00,with which it is doubtful that this would be able to secure alternative permanent accommodation. The respondent has indicated an intention to "dispose of several of the lots" excluding lot 9, but her exclusion of lot 9 from the contemplated sale may well have been because the

applicant was at the time occupying the property. There would be nothing to prevent her from selling lot 9 if the applicant vacates the property. If lot 9 is sold, and the applicant is successful in his appeal, he would be permanently deprived of the opportunity to buy the respondent's share and to continue to reside in the home that he has known for 25 years.

[10] On the other hand, the respondent resides abroad. Her intention to reside in Jamaica does not appear to be for the immediate future. Therefore, the stay of execution would not deprive her of somewhere to reside. Although she indicated that she was having financial troubles, she has not provided any details of this. Her assertion to the effect that the applicant has prevented her from using the property to relieve some of her financial difficulties must be considered in light of her statement that she sought to cultivate part of lot 9 on which the applicant resides in circumstances where there appears to be nothing preventing her from cultivating the other lots, which prior to the dissolution of the marriage were cultivated by the applicant. Indeed, in his affidavit, the applicant stated that he had cultivated most of the areas including lots 1,2 and 3, which were of good soil. Furthermore, it is to be noted that the injunction granted by Straw J has been in place since 2008 and there is nothing in the order which restricts its duration. The respondent is always entitled to seek the assistance of the court to deal with a breach of this injunction by the applicant. This, I think, would go a far way towards alleviating any possible obstruction that the applicant may pose to the sale of or the cultivation of the other lots on the property. If the applicant is not successful on the appeal, he would be obliged to vacate the property and the

respondent would be entitled to the use of the entire property. On these facts, the applicant, it seems, is likely to suffer more prejudice or injustice if the stay is not granted.

The application for the injunction

[11] It is to be observed that the injunction being sought is, in substance, the reverse of what was granted by Straw J, as the applicant seeks to prevent the respondent from "entering the premises situate[d] at lot 9" until the determination of the appeal. Having been satisfied that the applicant has a good prospect of success on appeal and that the injunction would only keep the respondent out of the use of one lot, leaving the other nine lots at her disposal, I am of the view that it is in the best interest of justice to grant the injunction and preserve the status quo until the determination of the appeal.

[12] The application for the stay of execution and injunction until the determination of the appeal is therefore granted. Costs of the application are to be costs in the appeal.