NMLS

In the Supreme Court of Judicature of Jamaica
In Common Law

BETWEEN	NOEL WHITLEY	PLAINTIFF
AND	THE ATTORNEY GENERAL	DEFENDANT

Mr. Haughton Gayle for Plaintiff
Mr. Lackston Robinson instructed by The Director of State Proceedings for Defendant

Heard July 17, 31,1997

JUDGMENT IN CHAMBERS

KARL HARRISON J

This is an Originating Summons which at the outset had the Minister of Environment and Housing named as the defendant. An order was subsequently made however, substituting the Attorney General as the defendant. The summons seeks the following Declarations:

1. A. That the Plaintiff is the equitable owner of all that parcel of land part of Mineral Heights in the Parish of Clarendon situate the intersection of Gold Avenue and Aluminum Way being five (5) acres more or less in extent and being part of the land registered at volume 1117 folio 784 of the Register Book of Titles in the name of the Minister of Housing as registered proprietor.

B That the defendant has no right or title to the said land unless and until he carry out the oral agreement made between his predecessor in title, Flatlets (Jamaica) Limited and the Plaintiff whereby it was agreed that in consideration of the plaintiff giving up all his estate and interest in Lot 1 to Flatlets (Jamaica) Limited the latter would transfer to him all that parcel of land part of Curatoe Hill called Mineral Heights in the Parish of Clarendon.....

C. That Section 30 of the Housing Act whereby the Defendant claims the right

to eject from and dispossess the plaintiff of Lot 1 and Section 33 thereof are unconstitutional in that section 30 contravenes section 18 of the Jamaica (Constitution) Order in Council 1962.....

D. That the proper forum for the Defendant to try and enforce what he perceives to be his right to possession of Lot 1 is the Supreme Court where the plaintiff would have an opportunity to counterclaim for an order requiring the defendant to build the plaintiff two appropriate houses.....or alternatively for an order for adequate compensation; that the summary procedure provided by the Housing Act is most inadequate for the circumstances of the Plaintiff's case.

E. That the defendant has not complied with the requirements of section 34 of the Housing Act and among other things has not served the plaintiff any relevant notice in writing and has not under the Housing Act or any other Law acquired Lot 1 at all and that the Resident Magistrate's Court has no power under section 30 of the Housing Act to order the plaintiff to give up possession of Lot 1 to the defendant in the circumstances of the plaintiff's case.

Nature of the Plaintiff's Claim

The plaintiff is claiming to be the equitable owner of all that parcel of land (called lot number 1) part of Mineral Heights in the Parish of Clarendon. The land has been described as being part of land registered at volume 1117 folio 784 of the Register Book of Titles, but the defendant is claiming that the land in dispute is registered at volume 1160 folio 899. The defendant has produced a copy of the duplicate certificate of title whereas, the plaintiff has not exhibited any title. What is clear however, is that the parties are ad idem as to the location of the land in dispute.

The plaintiff deposes in his affidavit in support that during or about 1969 he had purchased five (5) acres of land,(lot 1) from Sevens Limited and was put in possession thereof. No title was issued but sometime in 1978 he built two houses on the said land. He further alleges that in 1972 Mr. John Hutton managing director of Flatlets (Jamaica) Limited had purchased about 383 acres from Sevens Limited and that his lot 1 was a part of this 383 acres. Flatlets then subdivided the land into lots. He then states inter alia:

"7. That subsequently the said Mr. Hutton informed me, and I verily believed, that there was a proposed road on the relevant subdivision plan which said road would pass through both of my said houses; that as managing director of Flatlets (Jamaica) Limited he would like to exchange Lot 1 for another 5 acre lot of land (called lot 2) part of the estate; that Flatlets (Jamaica) Limited would build for me on Lot 2 two new houses and a water tank and a cow pen better than my said 2 houses.....

8. That I accepted the said assurances and agreed to the proposals put forward by the said Mr. St. John Hutton.

9. That he then and there pointed out to me lot 2 which was situate a couple of yards from Lot 1 and said that as managing director of Flatlets (Jamaica) Limited he would shortly send a contractor to build the two new houses on lot 2. I believed and relied upon this assurance and have part-performed the said oral agreements

The affidavit evidence also revealed that sometime in 1975, Flatlets had mortgaged the said property to First National Citibank which subsequently exercised its power of sale under the said mortgage. According to the plaintiff a "large portion" of the land was eventually sold by Citibank to the Minister of Housing. He further states in his affidavit:

13. That in part-performance of the said agreements.....Citibank the successor in title of Flatlets (Jamaica) Limited transferred to me Lot 2 and caused certificate of title thereto registered at volume 1162 folio 180 to be issued to me during or about 1985.

14. That by letter to me dated the 23rd day of April 1991 the then Minister of Construction (Housing), the successor in title of Flatlets (Jamaica) Limited and Citibank stated inter alia, that in order to complete the agreement made between Flatlets (Jamaica) Ltd and me.....he had instructed that a housing unit be built for me on lot 2 and that Estate Development Co would finalise the arrangements....

.....

16. That by notice dated the 5th day of June 1991 served on me the Minister of

Housing required me to give possession to him of my said two houses and land (lot 1) within six weeks.....

The letter referred to in paragraph 14 of the above affidavit states inter alia:

April 23, 1991

Mr. Noel Whitley

.....

"It has come to my knowledge that Sevens Limited sold five (5) acres of land to you subject to certain conditions.

The property at Curatoe Hill was eventually sold by Sevens Limited to Flatlets Jamaica Limited on certain conditions in which your interest in the overall property would be protected.

As you are aware the Ministry of Construction is undertaking housing development on this property. In order to complete the transaction with you I have instructed that a housing unit be built on lands to be allotted to you and that Estate Development Company will finalise the arrangements....."

Sgd. O.D Ramtallie
Minister of Construction

It is being argued by Mr. Gayle that the transaction between the plaintiff and Flatlets Ltd was in the nature of a sale and although the full price was not paid the plaintiff has a vendor's lien on lot number 1. He maintained that this lien was in the nature of an equitable interest and would subsist until the actual price had been paid - see para 289 Halsbury's Laws of England 3rd Edn. He submitted that because of this lien, all liabilities that rested on Flatlets Jamaica Limited were transferred to its successors in title, hence the Minister of Housing was bound by those liabilities. Not only was the Minister of Housing bound he said by becoming a transferee of land, but also he was bound by estoppel having regard to his acknowledgment in the letter referred to above, that he had been aware of the agreement. Accordingly, Mr. Gayle submitted that the Minister is bound to fulfil his obligations in the full terms of the agreement and not by him erecting a "little

house of his choice."

Mr. Gayle also submitted that sections 30 and 33 respectively of the Housing Act (whereby the Minister claims the right to eject from and dispossess the plaintiff from lot number 1 had contravened the provisions of section 18 of the Constitution of Jamaica which provides that no property of any description shall be compulsorily acquired except by or under a the provisions of a Law) :

> (A) prescribes the principles on which and the manner in which compensation therefor is to be determined and give; and
>
> (B) secures to any person claiming an interest in or right over such property a right of access to the court for the purpose of:
>
> > (I) establishing such interest or right (if any);
> >
> > (2) determining the amount of such compensation to which he is entitled; and
> >
> > (3) enforcing his right to such compensation; that section 33 of the Housing Act secures to the plaintiff right of access to an arbitrator (only as to the question of the amount of compensation) but not to a court in relation to his rights as regards Lot 1 and does not secure to the plaintiff access to a Court for the purpose of establishing his said interest or determining the amount of compensation to him and of enforcing his right to such compensation.

Mr. Gayle further submitted that the proper forum for the defendant to try and enforce his right to possession of lot 1 was the Supreme Court where the plaintiff would have an opportunity to counterclaim for an order requiring the defendant to build appropriate houses or alternatively for an order for adequate compensation; that the summary procedure provided by the Housing Act was most inadequate for the circumstances of the plaintiff's case. He sought reliance upon the cases of Sivyer v Amies (1940) Ch D 285 and Bailey v Hookway (1945) 1 KB 266.

Finally, Mr. Gayle referred to section 34 of the Housing Act. He submitted that for the Minister to be on the "right track" in the Resident Magistrate's Court he ought to have served a notice in writing on the plaintiff and this he did not do. Until, this notice was given,

it was his view that the Minister cannot acquire the land. He moved the Court to make the declarations sought in favour of the plaintiff.

Case for the Defendant

Mr. Dave Domville, Legal Officer attached to the Ministry of Housing has deposed inter alia, in an affidavit sworn to on the 19th day of June 1997 that:

> "4. The Minister of Housing is the registered owner of premises registered at Vol. 1160 Folio 889(sic) of the Register Book of Titles...
>
> 5. Noel Whitley, the plaintiff herein, is the registered owner of premises registered at volume 1162 folio 180 of the Register Book of Titles..
>
> 6. The said property was transferred to Noel Whitley pursuant to an agreement between Sevens Limited and the said Noel Whitley.....
>
> 7. The Minister of Housing is not a party to any agreement to sell any property to Noel Whitley or to build any house on any property belonging to Noel Whitley.
>
> 8. The premises which are owned by the Minister of Housing and which are registered at Volume 1160 Folio 899 of the Register Book of Titles were declared a housing area in 1992 for the purpose of constructing a housing scheme, approved by the Minister under the Housing Act, at Mineral Heights in the Parish of Clarendon."

Exhibit "DD 2" referred to in paragraph 4 of Mr. Domville's Affidavit is Transfer dated December 17, 1979 between Citibank (the transferor) and the Minister of Housing (the transferee). It recites the mortgage given by Flatlets (Jamaica) Limited and the exercise of the powers of sale by Citibank Limited. Exhibit "DD 6" referred to and mentioned in paragraph 6 of Domville's affidavit is Transfer also dated December 17, 1979 and it is between Citibank and the Plaintiff in this case. The relevant paragraphs state inter alia, as follows:

> CITIBANK N.A (formerly known as First National Citibank).....(hereinafter called the transferor) being the proprietor of Mortgage dated the 19th day of March,

1975.....from FLATLETS (JAMAICA) LIMITED..... (hereinafter called "the Company") of all its estate in the land comprised in Certificate of Title.....in exercise of the powers of sale conferred on it pursuant to the said mortgage

AND IN PURSUANCE of an Agreement between Sevens Limited, a Company incorporated under the Acts of Jamaica and having its registered office at Sevens in the Parish of Clarendon of the ONE PART and Noel Whitley of Sevens aforesaid Farmer, (hereinafter called the Transferee) of the OTHER PART whereby Sevens Limited agreed to sell and the Transferee agreed to purchase.....

AND IN CONSIDERATION of the payment of the said sum.....made by the transferee to Sevens Ltd

AND IN PURSUANCE of the Agreements dated the 24th day of September 1971 and the 19th day of March respectively between Sevens Limited of the ONE PART and the Company of the OTHER PART whereby Sevens Limited requested and the Company agreed to transfer the said land to the Transferee DO HEREBY TRANSFER to the said NOEL WHITLEY in fee simple as sole proprietor ALL the estate and interest of the Company on the said 1st day of October 1975 or which it was then entitled to transfer and dispose of in the said land.....

AND for the same consideration the Transferor HEREBY GRANT unto the transferee....."

.....

Sgd. Citibank N.A Noel Whitley

At the very outset, Mr. Robinson maintained that the defendant was not disputing that the plaintiff had bought land from Sevens Limited and that there was a "swap" agreement between Flatlets Limited and the plaintiff. It was also clear he said, that pursuant to the oral agreement between the plaintiff and Flatlets Limited no transfer was effected by Flatlets. He has submitted however, that the Minister of Housing was not privy to any agreement between the plaintiff and Flatlets concerning the building of any house on property owned by the plaintiff. Accordingly, the Minister was a stranger to that agreement and consequently has no obligation under the agreement.

Mr. Robinson further submitted that the Minister of Housing did not owe the plaintiff anything so, the plaintiff was not entitled to a lien on the property. Neither had he acquired an interest in lot number 1 which he now occupies. It was also his view that the constitutionality of the sections under the Housing Act referred to by Mr. Gayle, did not arise in the case as the Minister had not acquired any land from the plaintiff. Secondly, Mr. Robinson maintained that where the Minister is acquiring property for purpose of the Housing Act such property is acquired pursuant to the Land Acquisition Act.

In relation to the proper forum, Mr. Robinson submitted that there was provision in section 30 of the Housing Act for an application to recover possession of the land to be made in the Resident Magistrate's Court. He contended that section 33 of the Housing Act was inapplicable as the Minister had not acquired any property from the plaintiff and that the land in question had belonged to the Minister before it was declared a Housing area. Therefore, he said, no question of compensation arose.

Finally, Mr. Robinson argued that the recovery of possession action was pending before the Resident Magistrate. It was his view that the plaintiff was a squatter in the circumstances; he has no right nor permission to be on the land and that the Minister has the right with reasonable notice given, to eject him.

Findings and Conclusion

One thing is certain and that is at the time when the plaintiff entered into agreement with Sevens Limited, no title was issued and no agreement between Sevens and the plaintiff has been exhibited. It seems to me therefore that there was no formal agreement between the parties then and this was probably the reason why Sevens Limited could have sold the 383 acres which according to the plaintiff included lot 1 which he had occupied. It would seem also that the agreement between Sevens Ltd and the plaintiff on the one hand and between Flatlets Ltd and the plaintiff on the other hand, was finally formalised in a Transfer on the 17th December 1979 and this is evidenced in Exhibit "DD6" referred to above. It is also evident that the Minister of Housing was not a party to this transaction as no mention is made of the Minister in that transfer document. Pursuant to this transfer, the plaintiff had been issued certificate of title registered at Volume 1162 Folio 180 of the Register Book of Titles. The exhibited title shows also that the plaintiff has exercised full control of the registered lot by further subdividing the land and transferring portions of it to T. Jerome and G. Jackson respectively.

The evidence has also revealed that the Minister of Housing was not privy to any agreement between the plaintiff and Flatlets Limited concerning the building of any house or houses. Accordingly, I do agree with the submission made by Mr. Robinson, that the Minister was a total stranger to the agreement and consequently he had no obligation to fulfil under that agreement. I also find merit in the submission that the plaintiff did not have a lien on lot number 1 and neither did he acquire an interest in it.

In so far as the letter from the Minister to the plaintiff is concerned, it is my considered view that no obligation has arisen on the part of the Minister. The letter recites the facts which have come to the Minister's knowledge as well as informing the plaintiff of the plans for a housing development on the property. Finally, the Minister concluded, "in order to complete the transaction with you I have instructed that a housing unit be built on the lands to be allotted to you". It is my view that the Minister's words are carefully chosen and they should be interpreted narrowly. I do agree with Mr. Robinson that the Minister was most gratuitous in offering to build on the lot. His offer to build must not be taken as an undertaking to fulfil any agreement between Flatlets Limited and the plaintiff. The end result is that the plaintiff has received a registered title for land over which he has exercised full control but he has refused to accept the unit which was offered to him by the Minister.

The evidence also showed that the Minister of Housing had not acquired any property from the plaintiff, so, no question of compensation can arise. The land in question was transferred to the Minister of Housing on the 17th December 1979 and it includes lot 1 which was occupied by the plaintiff. Simultaneously, there was a transfer of land made to the plaintiff and this was registered at Volume 1162 Folio 180. It was not until April 7, 1992 that the Rules and Regulations published in the Jamaica Gazette declared the land to be a Housing Area. This area is defined and excludes a rectangular parcel of land registered at Volume 1162 Folio 180 in the name of Noel Whitley. It is further my view that this Order also supports the contention that the Minister of Housing has not acquired any land from the plaintiff.

The matter of recovery of possession of the lot in dispute is pending in the Resident Magistrate's Court but was adjourned sine die in order to allow the plaintiff to pursue this summons. I do agree with Mr. Robinson that Mr. Gayle's submission regarding written notice to be given to the plaintiff is misconceived. Section 34 of the Housing Act in my view gives the Minister of Housing the power to require the owner of property to give particulars

of his interest in order that he carries out the scheme for building. In the circumstances of this case, it would seem that the plaintiff has no right to possession of that lot, hence the Minister of Housing is not obliged to give him written notice to vacate those premises. I further hold that the Magistrate has the jurisdiction under the Housing Act to deal with the application for recovery of possession.

I conclude that the plaintiff is not entitled to the declarations and consequential orders sought and his summons is hereby dismissed with costs to the defendant to be taxed if not agreed.