[2014] JMCA Civ 3

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 23/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

BETWEEN	**DELSIE CAIN**	**APPELLANT**
AND	**RONALD CAIN**	**RESPONDENT**

Gavin Goffe instructed by Myers Fletcher & Gordon for the appellant

Christopher Dunkley and Mrs Yualande Christopher-Walker instructed by Yualande Christopher & Associates for the respondent

20, 23 and 30 January 2014

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing further to add.

BROOKS JA

[2] On 23 January 2014, we handed down our decision in this appeal. The order of the court, given at that time, was:

a. The appeal is dismissed.

b. The judgment of D O McIntosh J is affirmed.

c. Costs to the respondent to be taxed if not agreed.

We promised then, to put our reasons in writing and now fulfill that promise.

[3] McIntosh J gave his decision on 8 March 2013. The formal order stated, in part, that Mr Ronald Cain "be immediately restored to sole occupancy of the property known as Lot 125 Blue Lagoon, Hellshire in the parish of St. Catherine, until further order of court". The order effectively dispossessed Mrs Deslie Cain of the premises and she was ejected from the premises shortly thereafter. Mrs Cain is aggrieved by the decision and has appealed against it. The main issues raised by her appeal are, firstly, whether the learned judge had any jurisdiction to make the order that he did, and secondly, if he did have that authority, whether he properly exercised his discretion in that regard.

The background facts

[4] On or about 30 October 2012, Mrs Cain broke into and entered the house mentioned above. Her former husband, Mr Ronald Cain, had previously locked the house. Mrs Cain went into occupation of the premises and placed her own locks upon it. She did so, she said, on the basis that she was one of the registered proprietors and that she had a beneficial interest in the property, having contributed significantly to the construction of that house. Mrs Cain also sought to justify her actions on the basis that she had no place else to live. She contrasted her situation with that of Mr Cain, who was the other registered proprietor. She said that he was ordinarily resident in Canada, and was not using the premises.

[5] Mr Cain strenuously disputes Mrs Cain's claim of a beneficial interest. Having been informed of Mrs Cain's actions, he filed a fixed date claim in the Supreme Court of this island, against Mrs Cain. He did so on 25 January 2013. In his claim, he is seeking, among other things, recovery of possession of the property, mesne profits for her occupation of the premises and a declaration that he was entitled to the entire legal interest in the property. In addition to the substantive claim, he also filed an application for an interim injunction for Mrs Cain to vacate the premises pending the finalisation of the claim.

[6] That application eventually led to the previously mentioned order made by McIntosh J. The learned judge had, however, made a previous order in the matter. Mr Cain's application for the interim injunction came before McIntosh J on 25 February 2013. At that time, he ordered, among other things, that Mr Cain should "have immediate access to the house which the parties will share until the hearing of this matter or until the Court otherwise orders".

[7] Although there is a dispute between the parties as to what transpired at the premises thereafter, it is clear that there was an acrimonious event. Mrs Cain filed an application, on 1 March 2013, that Mr Cain be prohibited from entering the premises, having any verbal contact with her or otherwise molesting her. That very day, Mr Cain also filed an application for court orders. He sought an order that Mrs Cain be committed to prison for failure to comply with the order made on 25 February 2013.

[8] Mr Cain's application was listed for hearing before McIntosh J on 8 March 2013. Mr Cain was, therefore, both the claimant and applicant at that hearing. Mrs Cain did not attend the hearing but counsel represented her. It was after hearing the application that the learned judge made the orders about which Mrs Cain has complained in this appeal.

[9] One of the issues raised by the appeal is that the formal order was materially different from the minute of order. The relevant portion of the minute of order stated as follows:

> "(1) Applicant/Claimant be immediately restored to occupancy of premises known as Blue Lagoon property until further order of Court
>
> (2) Leave appeal to [sic] granted
>
> (3) Costs to the Claimant/Applicant to be taxed if not agreed.
>
> (4) Claimant's attorney to prepare [,] file and serve court orders"

The minute of order was signed by McIntosh J.

[10] The important difference between the minute of order and the formal order concerns the nature of the occupancy. The formal order mentioned sole occupancy whilst the minute of order did not. The relevant portion of the formal order, which was signed by the registrar of the Supreme Court, stated:

> "1) That the Claimant be immediately restored to sole occupancy of the property known as Lot 125 Blue Lagoon, Hellshire, in the parish of Saint Catherine, until further order of court

(2) Leave to appeal is granted.

(3) Costs to the Claimant to be taxed if not agreed.

(4) The Claimant's Attorneys-at-Law are to prepare and file the Order herein"

The grounds of appeal

[11] Mrs Cain filed several grounds of appeal. Mr Goffe, who appeared on behalf of Mrs Cain, did not specifically argue all of them. Learned counsel argued four main points, which encompassed most of those grounds and may be summarised as follows:

a. There was no legal basis for the order made by the learned judge.

b. The learned judge's order was unreasonable and unfair, having regard to all the circumstances.

c. There was no jurisdiction to make any orders in respect of that claim as it sought relief under the Property (Rights of Spouses) Act (the PROSA), but had been brought outside of the time allowed by that Act.

d. The learned judge erred in failing to have the formal order rectified to reflect the order set out in the minute of order.

It is hoped that no injustice has been done by that summary of the eight grounds of appeal set out in Mrs Cain's notice of appeal and the additional one that Mr Goffe sought leave to argue. The grounds, as summarised, shall be addressed in the order mentioned above.

Whether there was a legal basis for the order

[12] Mr Goffe argued that other than in the court's jurisdiction in family law matters, there is no basis in law for the court to make an order evicting one of two or more registered owners of property from that property. Learned counsel cited sections 68 and 70 of the Registration of Titles Act and sections 4, 11 and 13 of the PROSA as authority for that proposition.

[13] Mr Goffe is not on good ground in respect of these submissions. Whereas sections 68 and 70 of the Registration of Titles Act speak to the indefeasibility of a registered title under the Torrens system of registration of titles to land, neither section prevents the court from exercising the jurisdiction given to it by section 49(h) of the Judicature (Supreme Court) Act. By that section, the Supreme Court is entitled to grant interlocutory injunctions "in all cases in which it appears to the Court to be just or convenient that such order should be made". The section specifically allows such injunctions to be granted in circumstances where the person, against whom the order is made, claims title to the property in question. The section states:

> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, **such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise**, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates

> claimed by both or by either of the parties are legal or equitable." (Emphasis supplied)

[14] The PROSA is similarly unhelpful to Mr Goffe. Section 4 stipulates that the provisions of the PROSA replace the "rules and presumptions of the common law and of equity". It does not affect the statutory right of the Supreme Court to grant injunctions. Section 11 of the PROSA permits the court, "during the subsistence of a marriage or cohabitation" to make orders with respect to property about which the spouses are in dispute. That situation does not arise with the Cains, who are neither still married nor cohabiting. Section 13 does not address the court's authority to make orders. Instead, it speaks to the time within which applications are to be made under the PROSA.

[15] Mr Goffe's submission that the learned judge did not have the jurisdiction to grant the injunction is, therefore, flawed. Section 49(h) of the Judicature (Supreme Court) Act does allow such an order. The grounds encompassing this point must, consequently, fail.

Whether the order was unreasonable and unfair

[16] Mr Goffe argued that if the basis for McIntosh J's order lay in family law, the learned judge erred in applying the principles established by the decided cases. Mr Goffe noted that Mr Cain's claim includes a relief under the PROSA. That relief is for the grant to him of the entire legal interest in the premises. Mr Goffe submitted that, in family law, the authorities require the court to balance the hardship likely to be caused by any order removing one or other party from matrimonial property. He submitted

that that balance clearly lay in favour of Mrs Cain. He argued that Mrs Cain and the couple's son, Jason, had no place to live whilst, on the other hand, Mr Cain had his home in Canada. Mr Goffe submitted that Mr Cain had not provided any evidence that, whilst he was in Jamaica, he had no other option but to stay at the premises.

[17] In addition, Mr Goffe argued that as there were allegations of previous physical abuse by Mr Cain, the protective powers of the court ought to have been exercised in Mrs Cain's favour and that of the couple's son.

[18] Mr Dunkley, on behalf of Mr Cain, in supporting the learned judge's decision, cited dicta in **Bassett v Bassett** [1975] 1 All ER 513. In that case, Omrod LJ relied on the principle that a spouse should not be excluded from premises "unless it is proved to be necessary for the protection of the health, physical or mental of the divorced wife or any child of the marriage living with her". Learned counsel submitted that this was not a case requiring protection for Mrs Cain or Jason. He pointed out that Jason was an adult.

[19] In any event, Mr Dunkley submitted, Mr Cain having been put back into possession of the property in place of Mrs Cain, it was not possible for this court, on this appeal, to order Mr Cain's removal. He submitted that, in the circumstances, the court should be unwilling to allow Mrs Cain back into the premises. He pointed out that Mrs Cain has been in other accommodation since April 2013. In the circumstances, he argued, the appeal should fail.

[20] The answer to Mr Goffe's complaints lies in the fact that this was an exercise of a discretion by the learned judge, who had an admission by Mrs Cain that she had broken into the house and taken possession of it. There is no note of the hearing before McIntosh J on 8 March, nor any record of his reasons for his decision. No reference will, therefore, be made to the dispute of fact that the affidavits, filed by each of the parties, revealed concerning their confrontation at the premises. What is clear is that this court will not lightly disturb a decision of a judge at first instance made pursuant to a discretion granted to that judge. That is the effect of the decision in **Hadmor Productions Limited and Others v Hamilton and Others** [1982] 1 All ER 1042, which has been often cited with approval in the decisions of this court.

[21] There is no error in principle made by the learned judge in exercising his discretion in this case. This was not a case involving the family home or requiring the protection of young children. In her affidavit, Mrs Cain deposed that she was living in rented premises in Mandeville for approximately five years and ran out of money. At paragraph 14 of her affidavit filed on 18 February 2013, she stated, in part:

> "I then ran out of money and decided it was not worth spending more money on accommodation when I had a perfectly good house that was just sitting idle."

Mr Cain, for his part, said that the couple's matrimonial home in Canada had been sold and the proceeds of sale were divided equally between them.

[22] The evidence revealed that Mrs Cain had broken into the house and had taken possession of it without prior discussion with Mr Cain. What is also clear from the

evidence is that there was no obedience of the learned judge's order made on 25 February 2013.

[23] Although in her affidavit Mrs Cain sought to include accommodation for Jason in her reasons for preference to be given to her, it must be noted that Jason is 34 years old. She deposed that he is immature for his age but provided no medical support for that assertion. Mr Cain contended that he knew of no medical or other disability affecting his son.

[24] In the circumstances, there is no basis for finding that the learned judge proceeded on an incorrect principle or misapplied or misunderstood the facts. This ground must also fail.

Whether the PROSA claim was invalid

[25] In response to an enquiry by the court, Mr Goffe submitted that Mr Cain's claim for relief under the PROSA had not been properly founded. He agreed with the court's indication that the fixed date claim had been filed more than a year after the parties had been divorced. In the absence of an application for permission to file the claim out of time, Mr Goffe argued, the claim for relief under the PROSA was invalid.

[26] Mr Dunkley, in response, pointed out that the claim for relief under the PROSA was only one of the items of relief claimed by Mr Cain. Learned counsel pointed out that the first claim was for recovery of possession of the property, the second was for mesne profits and the third was for a declaration that Mr Cain was beneficially entitled to the entire legal interest in the premises. Even if there had not been prior approval

for the claim for relief under the PROSA, he argued, the learned judge was still entitled to grant the interim relief that he did grant.

[27] There is much merit in Mr Dunkley's submissions. The reference to the PROSA does not prevent the court from granting to Mr Cain relief that is otherwise available under the court's jurisdiction. In any event, the absence of prior approval did not render the claim a nullity. As the claim has not yet been tried, it is still open to Mr Cain to apply for permission for the claim to proceed as filed (see **Bryant-Saddler v Saddler and Hoilette v Hoilette** [2013] JMCA Civ 11).

[28] This point, although initially raised by the court, does not assist Mrs Cain.

Whether the formal order is defective

[29] Mr Goffe argued that the learned judge erred in allowing the formal order to be issued despite the fact that it differed from the minute of order. The court was informed that the difference between the minute of order and the formal order was brought to the learned judge's attention, but he decided that the formal order properly reflected his decision and allowed it to be issued. Mr Goffe argued that that was incorrect and that no mature judicial system should allow a judge to, retroactively, state that what the registrar had erroneously produced was what he had intended to order.

[30] Mr Goffe contended that the learned judge's action was improper in light of the fact that Mrs Cain's counsel left the hearing on 8 March 2013 with the impression that Mrs Cain's occupation was not threatened. Learned counsel submitted that the order

made was that which was reflected in the minute of order, namely that the learned judge had made another order that the parties should share occupation of the property.

[31] Mr Dunkley countered that that was not a proper interpretation of the order. He argued that not only would the court not be repeating its previous order but that, on the latter occasion, the learned judge granted permission to appeal. Mr Dunkley argued that what McIntosh J did in the circumstances, was to confirm the accuracy of the perfected order. Learned counsel submitted that there was nothing improper about that action.

[32] The relevant principle is that the court is entitled, at any time prior to its order being perfected, to make adjustments to the order. The status of the order, prior to it being perfected was explained in **In re Harrison's Share under a Settlement Harrison v Harrison** [1955] 1 Ch 260; [1955] 1 All ER 185. In that case the court held in part:

> "that an order pronounced by a judge, whether in open court or in chambers, can always be withdrawn, altered or modified by him, either on his own initiative or on the application of a party, until such time as the order has been drawn up, passed, and entered. The oral order is meanwhile provisionally effective, and can be treated as a subsisting order where the justice of the case requires it and the right of withdrawal would not thereby be prevented or prejudiced....
>
> When a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed; such control, however, must be used in accordance with his discretion, exercised judicially and not capriciously"

[33] Those principles have not been affected by the introduction of the Civil Procedure Rules (the CPR). Rule 42.5 requires the judge or master trying a claim or hearing an application to "ensure that a minute of order is prepared and signed by him or her". The CPR does not stipulate the status or effect of the minute of order but rule 42.2 stipulates that a party who is present at the time of the delivery of the judgment or order, is bound by it, "whether or not the judgment or order is served".

[34] Rule 42.10 addresses the issue of correction of errors. It states as follows:

> "(1) The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
>
> (2) A party may apply for a correction without notice."

[35] Rule 42.10 permitted the learned judge to ensure that the formal order reflected his intention at the time of delivery of the judgment. It is to be inferred from his actions that he approved the issue of the formal order on that basis. There is no independent factor that indicates that the learned judge was departing from his original intention. It is unfortunate that he did not have the minute of order adjusted in accordance with rule 42.10 but, undoubtedly, it is the formal order that is recognised as reflecting the will of the court. This ground must also fail.

An observation

[36] This appeal cannot be concluded without the observation that it was a grossly impractical use of the court's resources. When McIntosh J made the order on 8 March 2013, it would have been effective until a decision was made in the claim or some other

order was made by the court. It had been earlier determined that the claim would have been heard on 23 and 24 April 2013. On that date, however, Mrs Cain applied for an adjournment of the claim on the basis that she was pursuing the appeal against the interlocutory order. It is noted that she has had to wait almost a year for the hearing of the appeal when the substantive matter could have long been heard, even if not decided.

Conclusion

[37] Neither the procedural nor the substantive complaints by Mrs Cain against the order of the learned judge can succeed. The learned judge was entitled, by virtue of section 49(h) of the Judicature (Supreme Court) Act, to grant an injunction pending the finalisation of the claim. His exercise of the discretion afforded him in the circumstances, has not been shown to have been unreasonable or unfair. Finally, the formal order that he confirmed as reflecting the will of the court, has not been shown to be contrary to his intention at the time of handing down his decision. In the circumstances this appeal must fail

MANGATAL JA (Ag)

[38] I too have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.