[2020] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

SITTING AT LUCEA IN THE PARISH OF HANOVER

PARISH COURT CIVIL APPEAL NO 12/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**CLIFFORD JAMES**	**APPELLANT**
AND	**JACQUELINE JAMES**	**RESPONDENT**

Ronald Paris instructed by Paris & Company for the appellant

The respondent was unrepresented and not present

21 June 2018 and 25 September 2020

MORRISON P

[1] I have read in draft the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing to add.

SINCLAIR-HAYNES JA

[2] On 21 June 2018, during a sitting of this court in the parish of Hanover, we heard the appellant Mr James' appeal against the consent order entered by Mrs Dionne Gallimore-Rose, Parish Judge for the Saint James Family Court. Mr James sought to impugn the learned judge's order which entitled the respondent, Mrs James, to a 50%

interest in property situate at Cornwall Courts, Montego Bay in the parish of Saint James (the property). He contends that he was coerced by the learned judge and the court staff into signing the consent order. Mrs James was neither present nor was she represented at the part-heard hearing of the appeal.

Background

[3] On 11 January 2017, Mrs James had applied by way of plaint note and particulars pursuant to the Property (Rights of Spouses) Act ("PROSA"), for a declaration that she was entitled to 100% interest in the property. That property was not the family home, but was held by the parties as joint tenants. Mrs James was represented by an attorney-at-law but Mr James was unrepresented.

[4] The learned judge explained, in the notes of proceedings, that the parties disagreed on several matters, but the matters on which they agreed were recorded in the form of a consent order. She averred that the court was empowered to arrive at consent orders by a process of enquiry and mediation with the parties and there was therefore no need to embark on a hearing which involved sworn evidence by parties on matters of clear consent.

[5] The parties appeared before her on three occasions and on the third, they arrived at a consent order regarding the division of the property in issue. The learned judge's notes revealed that on more than one occasion, Mr James told the court that the assets were to be shared equally between them. The learned judge further stated that Mr James,

in support of his assertion that they were co-owners, presented the court with the Certificate of Title and National Housing Trust (NHT) loan statements for the property.

[6] The contents of the relevant consent order were repeated several times in court and the learned judge assured Mr James on more than one occasion, that he would not be required to sign anything relating to their clear areas of disagreement.

[7] She further stated that Mr James enquired about a motor car which the parties owned and she advised him that he had to first sign the consent order in relation to what they had agreed up to that point. Mr James, she stated, objected to that approach. She consequently stood the matter down, allowed the parties the opportunity to go outside of the court and review the consent order. They agreed, signed the consent order and returned to the court to discuss the division of interest in the motor car.

The consent order

[8] In relation to the property in issue, the following consent order was signed by the parties and the learned judge on 11 May 2017:

> "Wife/Applicant is beneficially entitled to 50% share and interest in the property i.e. the house and land located at Lot 3204 Green Pond, Cornwall Courts Phase 2, Montego Bay, St. James comprised in the Certificate of Title Registered at Volume 1393, Folio 712 of the Registered [sic] Book of Titles.
>
> The Respondent/Husband is similarly entitled to 50% share and interest in the said property which is currently mortgaged to the National Housing Trust and is rented to a third (3rd) party.
>
> The Husband/Respondent agrees further to collect the full rental, presently in the sum of Twenty-Six Thousand Dollars

> ($26,000.00) and he will make payment to the Wife/Applicant of her half of this rental sum commencing the 1st day of June, 2017."

The appeal

[9] The following grounds of appeal, which were filed on 25 May 2017, were argued on his behalf:

> "(a) The Learned Family Court Judge erred when she held that the Applicant/Respondent is only entitled to 50% of the value of the land and house at Lot 3204 Green Pond Cornwall Courts Phase 2 Montego Bay in the Parish of Saint James without taking any evidence on oath from the parties and in circumstances in which the Appellant/Respondent was not in agreement with the Order being proposed by the Learned Judge since the subject property was not the family home within the meaning of the Property Rights of Spouses Act.. [sic]
>
> (b) The Appellant/Respondent reserved the right to add further grounds of appeal in due course after the Learned Family Court Judge has filed the Reasons for her Decision and upon taking full instructions from the Appellant/Respondent the said Order appealed against herein only coming to hand this 25th day of May 2017."

It was urged, by counsel on behalf of Mr James, that the matter be returned to the Family Court for determination by another judge.

The appellant's version

[10] Mr James has asked this court to set aside the consent order on the ground that he did not agree to its terms. He is adamant that he was "browbeaten" by the learned judge and the court staff into signing the consent order against his will.

[11] He, however, conceded that he had provided the court with information regarding the parties' co-ownership of the property. The NHT loans were in the names of both parties. The loan for the "serviced lot" was in the amount of $681,181.32 and the loan for the construction on the property was $1,237,770.20. Both loans were, however, repaid solely by him.

Submissions on behalf of the appellant

[12] Mr Paris, in support of the appellant's contention that Mr James was "browbeaten" into signing the consent order, referred the court to the learned judge's notes of the proceedings. The pertinent portion reads:

> "He tried to raise another point concerning the car and was told by the Court that he would need to endorse his signature to the terms of the consent arrived at up to that point before we launched into another discourse."

[13] Mr Paris contended that Mr James' understanding of that statement was that, until he signed the consent order, the court would not entertain any discussion on any other issue. He submitted that the learned judge pressured the appellant "to give in or resile from his preferred position in order to be able to resolve the issue regarding the car".

[14] Learned counsel posited that the learned judge ought to have taken notes in the matter and her enquiry ought to have been conducted under oath. In support of that submission, he referred the court to Rowe JA's (as he then was) statement in **R ATS v E Martin and A Martin** [1982] 19 JLR 394. At page 395, Rowe JA stated as follows:

> "This is a case in which an enquiry upon oath ought to have been conducted. There is no statutory procedure by which

> after an informal enquiry, (of which no record is made, in the sense that no notes of the enquiry are recorded,) a Resident Magistrate may under section 7 of the Maintenance Act, proceed to make an order for the payment of money which is binding upon the defendant."

[15] Mr Paris asserted that except for 50 bags of cement, Mrs James did not contribute financially to the acquisition of the land or the construction of the house. He explained that it was Mr James who made the monthly payments to NHT for both mortgages.

[16] Counsel posited that the learned judge, in circumstances where Mr James was unrepresented, ought not to have allowed Mr James to be persuaded by court staff outside of the courtroom.

The court's orders at the part-heard hearing

[17] Besides Mr James' *ipse dixit*, this court was bereft of sufficient evidence regarding the proceedings. We consequently made the following orders:

> "1. The directs [sic] that [Mr James] is to file an affidavit setting out his account of the event which lead [sic] to the signing of the consent order in relation to Cornwall Court on the 11th May 2017.
>
> 2. The Affidavit is to be filed on or before the 13th July 2018.
>
> 3. Upon receipt of the affidavit, the Registrar is hereby directed to send a copy of same to Her Honour Mrs. Dionne Gallimore-Rose inviting her comments on affidavit [sic] on or before the 10th August 2018.
>
> 4. Any response received from Her Honour will be sent to counsel for [Mr James] inviting him to make further submissions.

> 5. The court will thereafter consider the matter on paper and give its decision without the need for any further hearing.
>
> 6. The matter is adjourned part-heard."

[18] Mr James did not comply with the timelines delineated. His affidavit was sworn to on 14 December 2018 and filed on 16 January 2019. Upon receipt of same, on 27 May 2019, it was duly forwarded to the learned parish judge by way of both email and courier. On 18 June 2019, the Registrar received the learned judge's comments which were forwarded to the appellant's attorney-at-law.

[19] On 24 September 2019 by way of letter, Ms Jacqueline M Minto, attorney-at-law advised this court that she represented Mrs James. She was advised by way of letter dated 4 October 2019, that the matter was part-heard and was further advised that the court's record did not reflect her representation. She was also provided with the appellant's affidavit, skeleton arguments, and the learned judge's letter, and was invited to file submissions in response.

[20] On 24 June 2020, further submissions were filed on behalf of Mr James and were forwarded to Ms Minto. To date however, no submissions have been filed on behalf of Mrs James.

The appellant's affidavit

[21] At the hearing of this matter, we requested an affidavit from Mr James as to the circumstances which led to his signing of the consent order in relation to the property in issue. In compliance with the order of the court, he deponed that in 2004, whilst

overseas, he was employed. From his earnings he sent money to Mrs James with instructions to pay for the land at Cornwall Court. He commenced construction of the house on the property in 2005, which he completed in 2012.

[22] It was his desire to rent the house but Mrs James was opposed to it being rented. In spite of successfully finding tenants, Mrs James refused to rent same until 2016. At the time of the application, the property was rented by Mrs James' daughter. Initially, the rent was paid to either of them. That arrangement was later changed and the payments were made to a Victoria Mutual Building Society account in Mr James' name solely. He contended that Mrs James did not contribute to the purchase of the land or the construction of the house thereon.

[23] Notwithstanding that the NHT loans were taken in both of their names, Mr James averred that both loans were paid by him. It was his view that Mrs James was only entitled to a 30% interest in the property.

[24] Mr James averred that consequent on the learned judge's advice to Mrs James that her claim for 100% interest in the property would not be successful, she requested instead, a declaration that she was entitled to 50% interest. Upon his objection, the learned judge sent them out of the court to discuss the matter.

[25] Shortly after the parties left the courtroom, the learned judge, "sent somebody with a piece of paper" with instructions that they should sign the paper. Upon reading the paper, he realized that he would have been affixing his signature to an agreement that Mrs James was entitled to a 50% interest in the property and he refused to sign.

[26] Upon returning to the courtroom, the learned judge ordered him to give Mrs James half of the rent he had collected for the property. He initially refused but subsequently capitulated and signed the paper giving her one-half of the rent and one-half ownership of the property.

The learned judge's comments

[27] As aforementioned, upon receipt of the appellant's affidavit, pursuant this court's orders, a copy was sent to the learned judge for her comments. She responded by letter dated 13 June 2019.

[28] The learned judge explained that on the occasion the consent order was signed, the court session lasted "a little while" as the parties discussed the division of the subject property as well as the family home. Mr James offered to share both properties they owned equally. He, however, objected to Mrs James' proposal to purchase his one-half share in the property.

[29] She did not however recall telling the parties that they were taking too long to come to a decision, nor did she recall telling them to leave the courtroom and "make up their minds", because Mr James did not agree with Mrs James' claim for 50% interest in the property.

[30] It was her recollection that it was at the juncture at which they agreed that they would own the property equally, and that Mr James would pay one-half of the rent to Mrs James, that they were sent outside of the courtroom to sign the order. She explained that if the parties were taken to the "back section" of the courtroom, it would have been

to "facilitate" a quiet setting to deal with the parties and read to them the terms of the order.

[31] Having signed the consent order regarding the property in issue outside of the courtroom, the parties returned to the courtroom to discuss the issue of the motor car. She, however, did not consider it necessary to have the parties testify under oath because the matter had been resolved with their consent and the orders were made accordingly.

The appellant's further submissions

[32] Mr Paris' response to the learned judge's comments, on behalf of Mr James, refuted the learned judge's averment that Mr James admitted that the parties should share the property equally. Mr James did not at any time, make such an admission, counsel asserted. He reiterated his objection to Mrs James being entitled to one-half of the property and its rental income.

[33] Mr Paris disavowed the learned judge's statement that the parties were sent outside to sign the order upon their agreement to share the property equally. They were sent outside because of their inability to agree, he contended.

[34] Counsel contended that it was pellucid from the learned judge's statement that the disposal of the car would not have been dealt with until Mr James signed the consent order anent the property, which stance, counsel regarded as "serious arm twisting" by the learned judge in order to obtain Mr James' signature despite his objection.

[35] Mr Paris submitted that it was after waiting for "a good while" at the back of the court, Mr James made a final attempt to contest the equal sharing of the property. Without the benefit of counsel or giving his consent on oath, Mr James eventually signed the order.

[36] For those reasons, counsel submitted that Mr James did not willingly consent to the terms of the consent order. He reiterated that Mr James was "browbeaten" by the learned judge and the court staff into signing the order, against his free will. He consequently sought to set aside the consent order on the basis that Mr James' signature was vitiated by duress.

Law and analysis

[37] The grounds of appeal were filed prior to the receipt of the learned judge's comments. The second ground was a 'reservation ground', to reserve the appellant's right to file further grounds of appeal:

> i. upon receipt of the learned judge's reasons; and
>
> ii. counsel having taken full instructions from Mr James.

Upon receipt of the learned judge's comments, no further ground of appeal was filed, therefore the reservation ground was abandoned. Ground (a) remains as the only ground of appeal.

[38] The crux of the complaint levelled at the learned judge by that ground is that Mr James was intimidated into signing the consent order. Mr James' understanding that the

learned judge would not have addressed the issue of the car until he signed the consent order for the division of the property, resulted in him feeling pressured to do so. Mr Paris contended that the learned judge should have conducted an enquiry upon oath under section 7 of the Maintenance Act. Mrs James' claim however was brought under PROSA, not the Maintenance Act, therefore that section would not be relevant to this matter.

[39] Also it was counsel Mr Paris' submission that, in light of Mr James' objection, the learned judge ought to have heard the parties under oath before concluding that Mrs James was entitled to a 50% interest in the property, which was not the family home.

[40] It was unchallenged that the property in issue was not the "family home". Section 2 of PROSA delineates property which is the family home. It reads:

> "…'family home' means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;
> …"

This property was not the parties' family residence but rather rental property, accordingly, there is no presumption that each spouse is entitled to one-half of the property.

[41] The property is therefore classified as 'other' property. Section 15 of PROSA is the relevant section. It states:

> "15. (1) In any proceedings in respect of the property of the spouses or of either spouse (other than the family

home), the Court may make such order as it thinks fit altering the interest of either spouse in the property including-

(a) an order for a settlement of property in substitution for any interest in the property;

(b) an order requiring either or both spouses to make, for the benefit of either or both spouses, such settlement or transfer of property as the Court determines; or

…"

[42] The property, being classified as "other property", the parties were entitled to agree on the manner in which it ought to have been apportioned, and to advance their reasons. The learned judge was empowered to urge the parties to settle the matter and endorse the settlement agreement. She was. However, obliged to ensure that that settlement was entered into voluntarily and the terms endorsed were in fact agreed by both parties. The learned judge, however, sanctioned the consent order which conferred upon Mrs James a 50% interest in the property without hearing the parties.

[43] It was the learned judge's recollection that Mr James posited that they each had a 50% interest in the property. Mr James, however, denied that assertion. It is his submission that Mrs James was only entitled to a 30% interest, however there is no evidence that that apportionment was suggested to the learned judge.

[44] The issue, at this juncture, is whether this court has the prerogative to interfere with a consent order which has been duly signed by the parties. Stuart Syme, in his text "A Practical Approach to Civil Procedure" 4th edition dealt with the circumstances under

which a court may set aside an order purportedly made by consent. At paragraph 38, the learned author stated:

> "Many orders are made 'by consent'. A true consent order is based on a contract between the parties. As such, the contract is arrived at by bargaining between the parties, perhaps in correspondence, and the consent order is simply evidence of that contract (Wentworth v Bullen (1840) 9 B & C 840). **To be a true consent order there must be consideration passing from each side. If this is the case, then, unlike other orders, it will only be set aside on grounds, such as fraud or mistake, which would justify the setting aside of a contract** (Purcell v F.C. Trigell Ltd [1971] 1 QB 385).
>
> **However, there is a distinction between a real contract and a simple submission to an order**." (Emphasis supplied)

[45] An order made by an agreement between parties where consideration has passed, can be set aside on the following grounds: illegality, duress, mistake, fraud, misrepresentation. That list is not exhaustive. A contract can also be set aside on other grounds. Cogent evidence which destroys its legal effect is however necessary. But this is not the issue in this case.

[46] The issue is whether there was true consent by Mr James. Mr James contended that he was "browbeaten" into signing the order. If indeed he was, the intimidation would have vitiated the purported consent.

[47] Lord Denning's statement in **Siebe Gorman and Co Ltd v Pneupac Ltd** [1982] 1 WLR 185 which elucidates the meaning of "consent" is also helpful in determining

whether the affixing of his signature to the document constitutes a binding agreement. The Master of the Rolls stated:

> "… when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene, M.R. in the case of *Chandless-Chandless v. Nicholson* [1942] 2 King's Bench 321 at page 324. One meaning is this: The words "by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: The words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection? ..."

[48] That statement of the learned Master of the Rolls demonstrates that the court's hands are not tied because an order is stated to have been made "by consent". It is the court's duty to ascertain whether Mr James was merely submitting to the will of the court because he was intimidated by the learned judge and therefore signed against his will. Regarding the instant case, the issue therefore is whether Mr James' mere assertion that he was deprived of an opportunity to be heard, is sufficient to vitiate the consent order.

[49] Arising from that issue is whether, as argued by Mr Paris, the learned judge ought to have ensured that there was indeed consent between the parties by having them testify. Section 10 of PROSA is instructive. It states:

> "10. (1) Subject to section 19-

(a) …

(b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.

(2) …

(3) Each party to an agreement under subsection (1) shall obtain independent legal advice before signing the agreement and the legal adviser shall certify that the implications of the agreement have been explained to the person obtaining the advice."

[50] The legislation confers upon spouses the right to agree on the manner in which their property is to be divided. The Act however prescribes not only the necessity of obtaining independent legal advice prior to the signing of the agreement but also the necessity of having their respective legal advisers certify that the implications of the agreement had been explained to them.

[51] The parties were sent outside of the court with the clerk and Mrs James' attorney-at-law, by the learned judge to discuss the division of the property in issue. It is significant that:

(a) Mr James was unrepresented and therefore did not have the benefit of independent legal advice; and

(b) the implications of the agreement were not explained to the parties.

In light of Mr James' reticence in signing the order, the learned judge ought to have advised him to obtain independent legal advice.

[52] There is no indication that any of those requirements were complied with by either the learned judge or counsel for Mrs James. Compliance with section 10 of PROSA was indispensable more so because Mr James was unrepresented at the trial.

The effect of the order having been perfected

[53] The pertinent question is whether Mr James did in fact consent to the order. In light of Mr James' complaint that he was intimidated into affixing his signature to the order and the learned judge's failure to comply with section 10 of PROSA, which imposed upon her the responsibility of ensuring that he obtained independent legal advice and the absence of the requisite certification that the implications were explained to him, I am of the view that the appeal ought to be allowed and the matter returned to the Family Court to be heard before another Parish Judge.

F WILLIAMS JA

[54] I too have read the judgment of Sinclair-Haynes JA and agree with her reasoning and conclusion.

MORRISON P

ORDER

Appeal allowed. Consent order set aside. Matter remitted to the Family Court for the parish of Saint James to be heard by a different Parish Judge. No order as to costs.