[2019] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00016

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**EATON JOSEPHS**	**APPLICANT**
AND	**ERLDINE BROWN**	**1ST RESPONDENT**
AND	**WINSTON JOSEPHS**	**2ND RESPONDENT**

Raymond Samuels instructed by Samuels Samuels for the applicant

Miss Carleen McFarlane and Miss Rechella McNeil instructed by McNeil & McFarlane for the respondent

Mrs Allia Leith-Palmer for the Administrator General

1, 3, 5 July and 30 September 2019

F WILLIAMS JA

Background

[1] This matter came before us as an application for permission to appeal an order made by Wint-Blair J (Ag), (as she then was) ("the learned judge") on 26 April 2017. Permission to appeal had been sought from and refused by her on 17 December 2018. Having heard submissions on 1 and 3 July 2019, on 5 July 2019, we made the following orders:

> "a. The application for permission to appeal the order of Wint-Blair J (Ag) made on 26 April 2017 is refused.
>
> b. Costs of the application to the respondent and to the Administrator General (for and on behalf of the estate) to be agreed or taxed.
>
> c. The matter is referred to the Registrar of the Supreme Court for a case management conference to be scheduled for the earliest possible date."

This is the fulfilment of our promise to provide brief reasons for making those orders.

The order being challenged

[2] This is the order that the applicant sought permission to appeal:

> "1. Order in terms of paragraph 1 of the notice of application filed November 2, 2015 consolidating claims 2006HCV 03034 with 2015HCV01407."

[3] Other orders were made; but those are not being challenged. A synopsis of the two claims might now be in order.

The first claim

[4] By claim number 2006 HCV 03034 ("the first claim") the 1st respondent to this application, Erldine Brown (hereafter referred to as "Miss Brown") sued the 2nd respondent, Winston Josephs (hereafter referred to as "WJ"). WJ subsequently died in 2013 and his estate is represented in this application by the Administrator General. In the suit brought by Miss Brown, she sought several declarations. The primary one sought was that she is entitled to a half interest in a business known as "Depot Centre" ("the business"), located at Saint Ann's Bay in the parish of Saint Ann. She also sought a

declaration of her entitlement to a half interest in several bank and investment accounts and a motor truck. Significantly for this application, also sought were the following orders:

> "14. An order that the Defendant whether by himself, his servants and/or agents or otherwise are restrained howsoever from removing, disposing of and/or dissipating the assets of the business "Depot Centre".
>
> 15. An order that the Claimant is entitled to trace into the bank accounts held by the Defendant in his sole names or jointly held by nominees or otherwise on his behalf and/or businesses being operated by the Defendant or in which the Defendant has interest as well as the bank accounts of such businesses."

[5] On 25 August 2006 Reid J granted an injunction apparently in terms claimed by Miss Brown. (The word "apparently" is used, as the Supreme Court file has not been located for several years and many documents to which the parties have referred are unavailable for production. The formal order of Reid J is one such.)

[6] On 22 September 2006, Campbell J discharged the orders of Reid J and made, *inter alia*, the following other orders:

> "2. The Defendant be restrained, whether by himself, his servants and/or agents or otherwise howsoever from disposing of or dealing with or diminishing the value of assets of the business 'Depot Centre' until the trial of the matter herein.
>
> 4. The Defendant be permitted to deal with any sums in National Commercial Bank – Saint Ann's Bay Branch Accounts No 584468378 and 544028030.
>
> 5. The Defendant be permitted to deal with any sums on Certificate of Deposit LRS – 2007030-0019 held at the NCB Capital Markets Limited."

[7] Miss Brown's contention is that, within months of WJ's having been permitted to deal with the sums mentioned at orders 4 and 5 of the orders of Campbell J, a property which she and WJ had been negotiating to purchase (with one firm of attorneys-at-law representing them both in the proposed purchase), was bought by the applicant, Eaton Josephs (hereafter called "EJ") for a consideration of J$14,000,000.00 cash. EJ is the father of WJ. Miss Brown has sought, by way of a request for further and better particulars, to obtain information from EJ as to the source of the funds used to purchase the property, but this information has not been forthcoming. When eventually compelled by court order to address the request, EJ has generally responded that the questions are irrelevant. The property in question ("the property") is registered at volume 1066, folio 768 of the Register Book of Titles and is located at Hog Hole in the parish of Saint Ann. The relevant certificate of title reflects a transfer made to EJ on 15 August 2007. Miss Brown suspects that this transfer is an attempt at dissipating the business' assets, and that the funds for the purchase came from the business accounts released by Campbell J. She hopes that, through tracing, she will be able to establish that suspicion. To try to protect what she hopes to prove is her interest in the property, on or about 3 January 2014, she lodged caveat number 1858528 against any dealing with the property.

[8] It might be important to note at this time that Miss Brown had also sought, by way of application filed on 16 March 2011, to join EJ to the first claim. Unfortunately, the inability to locate the file has led to that application not yet being heard.

The second claim

[9] In the second case (claim number 2015 HCV 01407), EJ seeks to have the caveat lodged by Miss Brown removed on the basis that she has no caveatable interest in the property. By an affidavit filed on 6 April 2016 Miss Brown challenges this, setting out her contention as to the likelihood of the purchase price having come from the funds of the business. The substance of her contention can be seen in paragraph 18 of her said affidavit as follows:

> "18. That based on my knowledge, information and belief [I] do verily believe that I have an equal interest in their [sic] funds used to purchase the said lands which can be successfully traced to funds owned by Depot Centre in which I am a registered proprietor."

The application for permission to appeal

[10] By this application, which was filed on 17 January 2019, the applicant sought the following orders:

> "1. Leave is granted for the Applicant to appeal the order of Mrs. Justice S. Wint-Blair (Ag.) made on the 26th day of April 2017 consolidating **Claim No. 2015 HCV 01407 Eaton Josephs v Erldine Brown** and **2006 HCV 03034 Erldine Brown v Winston Josephs**;
>
> 2. The costs of this application are to be costs in the Appeal;
>
> 3. Such further or other relief as this Honourable Court may deem just in the circumstances."

[11] The applicant has proposed six grounds of appeal on the basis of which he contends that his appeal would have a real prospect of success. They read as follows:

> "(a) The Learned Judge erred when she consolidated the claims herein when there was no overlap of issues of fact

or law and in the circumstances exercised her discretion wrongly.

(b) The Learned Judge erred in consolidating the **Claim No. 2015 HCV 01407 Eaton Josephs v Erldine Brown** and **2006 HCV 03034 Erldine Brown v Winston Josephs** and failed to take into consideration that the two cases were at very different stages of the trial process **Claim No. 2015 HCV 01407** awaiting first hearing and **2006 HCV 03034** awaiting a further trial date.

(c) The Learned Judge erred in consolidating the matters and failed to take into consideration the procedural unfairness and prejudice which the Claimant Eaton Josephs would suffer.

(d) The Learned Judge erred in consolidating the matters herein and failed to take into consideration section 140 of the Registration of Titles Act which Act sets out the procedure for removal of caveats and confines the parties to that procedure.

(e) That the Learned Judge failed to fully address her mind to the Notice of Application For Court Orders filed on 2nd November 2015 and in particular Order No. 1 of the said Notice filed on the 2nd November 2015 and thereby fell into error.

(f) The Order made by the Learned Judge failed to state what order the judge was granting being whether the matter was consolidated or was to be heard together and cannot stand as same is inconsistent especially with regards to the Court's practice and procedure in dealing with consolidated matters as opposed to matters being heard together. In the circumstances the Learned Judge erred in coming to her decision."

[12] Grounds a, b, c and d might conveniently be considered together.

Grounds a, b, c and d

Summary of submissions

For EJ

[13] On behalf of EJ, Mr Samuels sought to persuade the court to the view that a comparison of the pleadings in the two claims showed that there was no connection between them. There was no mention of the property in the first claim, for example, he argued; and the second claim is simply seeking the removal of a caveat. Additionally, he argued, the order of Campbell J releasing the funds was unconditional and did not limit the release of the funds to use in the business only.

For Miss Brown

[14] For her part, Miss McFarlane asked the court to find that there is indeed a nexus between the two claims, as Miss Brown's contention is that it is likely that the funds for the purchase of the property came from funds belonging to the business. She asked the court to consider that EJ has failed to assist the process of resolving the issues by his failure to provide further and better particulars in relation to the purchase of the property. She questioned why this would be so if the transaction is, as EJ contends, above board. Miss McFarlane further contended that the funds released by Campbell J were released for the specific purpose of use in the business.

Discussion

[15] While, on the face of it, the order of Campbell J did not restrict the use of the funds on releasing them, there is some documentary evidence that supports Miss Brown's contention. We had hoped to have obtained copies of the affidavits that were before

Campbell J and on which his orders would have been based; but, despite our request, those were not forthcoming. However, we have an affidavit of WJ, sworn and filed on 1 March 2007, apparently, from its contents, on an application for the release of the remainder of the funds and the motor truck. Paragraphs 5 to 7 of that affidavit are relevant and read as follows:

> "5. Since the said Order of the Honourable Mr. Justice Campbell the monies held on the said accounts which were released have been injected into my said hardware business.
>
> 6. The said Order of the Honourable Mr. Justice Campbell had also released monies held on a Certificate of Deposit LRS-2007030-100019. This Certificate of Deposit contains the bulk of my life savings and is currently in the region of Sixteen Million Dollars ($16,000,000.00). However, the said Certificate of Deposit is a long term investment which is rolled over annually.
>
> 7. That since 2002 the said Certificate of Deposit has been used by me as collateral to secure a credit card which has a limit of Fourteen Million Dollars ($14,000,000.00), which I use for large stock purchases in my hardware business.
>
> That I have refrained as much as possible from using the said credit card since it would be financial suicide for me to incur large credit card debts without any source of income."

[16] From these paragraphs, it will be seen that WJ's contention is that the sums released were used in the business. It would be strange then if it later should be revealed that any of those funds were used to purchase the property. In the face of EJ's not providing any information about the source of the funds for the purchase of the property, Miss Brown has sought information from the Registrar of Titles. This information, if provided, she believes will help to show whether her suspicion that the funds used to

purchase the property can be traced from the business accounts, is justified. If the funds came from the business accounts, then it would point to a breach of Campbell J's order, prohibiting dissipation of the assets of the business. It is therefore of the utmost importance that that information be awaited and obtained. The documentary evidence in the form of a copy of the certificate of registration of the business name "Depot Centre", shows Miss Brown and WJ as the proprietors. That registration was effected on 12 October 2004. This, *prima facie*, supports her contention that she has an interest in the business.

[17] It is not surprising that the property is not mentioned in the first claim, as the transfer was not made until 2007 – after that suit was commenced. In these circumstances, and with the emphasis being placed on the remedy of tracing in the first claim, it would be injudicious to take the view that there is no link between the two cases. It is understandable, therefore, why the learned judge would have been persuaded to make the order for consolidation. It seems to me that a great injustice would be done if the two claims were to be regarded as completely separate and unconnected, if the caveat were permitted to be removed and ultimately tracing should establish that the funds for the purchase of the property did in fact come from the business accounts. This ground demonstrated no real chance of success and therefore failed.

[18] In relation to ground of appeal b: that is that the matters were at different stages, there are two considerations that are important in resolving it. For one, the court's view above of the potential for injustice if the matters were to be regarded as separate, and the importance of the desire to avoid any injustice, must be the primary concern.

Secondly, in furthering this concern and the overriding objective, it is to be remembered that the court is possessed of very wide powers of case management pursuant to part 26 of the Civil Procedure Rules (CPR). For example, rule 26.1(2)(d) to (k) provides that the court may:

> "(d) adjourn or bring forward a hearing to a specific date;
>
> (e) stay the whole or part of any proceedings generally or until a specified date or event;
>
> (f) decide the order in which issues are to be tried;
>
> (g) direct a separate trial of any issue;
>
> (h) try two or more claims on the same occasion;
>
> (i) direct that part of any proceedings (such as a counterclaim or other ancillary claim) be dealt with as separate proceedings;
>
> (j) dismiss or give judgment on a claim after a decision on a preliminary issue;
>
> (k) exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose;"

[19] And so, even if consolidation may have the effect of delaying an earlier-filed matter for it to be heard together with one that was filed some time after, or (as in this appeal) *vice versa*, that is sometimes what the interests of justice require. Indeed, there is no rule (nor could there rationally be one) that matters can only be consolidated when they are at the same stage of advancement in the system. It is apparent by this, therefore, that ground b had no merit.

[20] In relation to ground of appeal c, which alleges a failure to consider "procedural unfairness and prejudice" to EJ, there are two considerations that must be borne in mind. One is the background to the two suits and the substance of the claim being made by Miss Brown in respect of the purchase of the property. As observed at paragraph [17] of this judgment, considerations of justice favour consolidation. Joined with that is the fact that there has not been shown to the court any real unfairness or prejudice to EJ. For example, as Miss McFarlane pointed out to the court, although EJ alleges that there is a contract for sale of the property with a third party, no documents supporting that contention have been exhibited to his affidavit or otherwise put before the court. But then again, even if such a contract exists, if it should later be shown that the funds used to acquire the property came from the business, the sale to a third party could reasonably be regarded as part of a plan to dissipate the assets or funds of the business. And any possible unfairness or prejudice to EJ cannot be considered in isolation; the question arises: what about potential prejudice or unfairness to Miss Brown? Any apparent unfairness or prejudice will be addressed when the substantive hearing of the two claims occurs, and the appropriate remedies, including costs orders, given. Consolidation, therefore, may well aid fairness and minimize any prejudice to the party who eventually establishes his or her contentions and allegations to the court's satisfaction. The applicant failed too on this ground.

Ground d

Summary of submissions

For EJ

[21] The substance of this ground is the contention that the learned judge failed to take into consideration section 140 of the Registration of Titles Act. On behalf of the applicant it was contended that that section of the Act sets out a specific procedure for dealing with caveats, which the learned judge failed to follow. The section calls for matters for the removal of caveats to be dealt with separately from other matters, it was submitted.

For WJ

[22] On behalf of the estate of WJ, Mrs Leith-Palmer submitted that the wording of the section was wide enough to permit the court to deal with the matter as it sees fit. Additionally, she submitted, Miss Brown had filed an affidavit opposing the application to remove the caveat, thus requiring that the matter be fully ventilated.

Discussion

[23] Section 140 of the Registration of Titles Act, so far as is relevant to this appeal, reads as follows:

> "140. Upon the receipt of any caveat under this Act, the Registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the Supreme Court, or a

> Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either *ex parte* or otherwise, and as to costs as to such Court or Judge may seem fit."

[24] A reading of this section discloses that, as Mrs Leith-Palmer submitted, its terms are considerably wide and it does not necessarily require a separate hearing or proscribe consolidation. Additionally, the section seems to address a situation in which no other litigation exists. It would appear, as well, that, by filing an affidavit challenging the contentions of EJ in the second claim, Miss Brown is seeking to satisfy the basic requirements of the section – that is, seeking to "show cause" why the caveat should not be removed. In these circumstances, and given the involved nature of the claim that Miss Brown is seeking to establish, depending significantly on tracing, it cannot fairly be said that the learned judge erred in ordering the consolidation of the two matters. This ground of appeal therefore also failed.

Grounds e and f

[25] These grounds can be disposed of in fairly short order, as they seem to be based on a misapprehension of the learned judge's order.

[26] The substance of the grounds is that the learned judge ordered that the matters be consolidated or, in the alternative, that they be heard together and therefore erred, such an order being vague and imprecise.

[27] In the notice of application for consolidation, the order sought was stated in the alternative as follows:

> "That Claim # 2006 HCV 03034 be consolidated with Claim # 2015 HCV 01047 or in the alternative, that they be heard together."

[28] This exact wording was replicated as being the order of the learned judge in the formal order that was filed and that is included in the bundle prepared for the hearing of this application at pages 74-75. It is important to note, however, that that formal order has not been signed. To ascertain the learned judge's exact order, it was to the minute of order, signed by the learned judge, and found at page 73 of the bundle, to which we referred. The relevant part of that order states:

> "(1) Order in terms of paragraph 1 of notice of application filed November 2, 2015 consolidating claims 2006HCV03034 with 2015HCV01407." (Emphasis added)

[29] The learned judge's order therefore was not vague, as contended. The minute of order clearly indicates that the order was one for consolidation; and that no alternative was stated. Grounds e and f, as a result, also failed.

[30] The applicant not having made good any of his grounds, it was inevitable that the application would have been refused, and the orders stated in paragraph [1] of this judgment, made.

FOSTER-PUSEY JA

[31] I have read in draft the reasons for judgment of my brother F Williams JA and agree. I have nothing further to add.

FRASER JA (AG)

[32] I too have read the draft reasons for judgment of my brother F Williams JA. I agree and have nothing to add.