

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 787 of 2003

IN THE MATTER of an application for summary possession of a parcel of land situate at Pegwell Boggs in the parish of Christ Church in this island

AND

IN THE MATTER of Order 92 of the Rules of the Supreme Court

BETWEEN:

HAYDEN WILLIAMS

PLAINTIFF

AND

JANICE POPE

DEFENDANT

AND

BARBADOS PUBLIC WORKERS'

COOPERATIVE CREDIT UNION LIMITED

THIRD PARTY

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court.

2004: June 03

2006: May 15 and 16; September 28 and 29

2008: May 26

Mr. Larry A. C. Smith for the Plaintiff.

Mr. Tyrone C. Estwick for the Defendant.

Mr. Cecil N. McCarthy for the Third Party.

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DECISION
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Introduction

- [1] Before the court are two applications. The first is an application filed by summons on behalf of the plaintiff on 29th April, 2003 seeking to recover possession of a parcel of land situate at Pegwell Boggs in the parish of Christ Church. The plaintiff seeks relief under Order 92 of the Rules of The Supreme Court.
- [2] The second application filed on 2nd October, 2003 by the defendant is an application to have the plaintiff's application dismissed with costs.
- [3] The plaintiff's application is supported by an affidavit dated 2nd September, 2003. In summary, the plaintiff deposed that:
- A) The parties lived in a union other than marriage for 6 years and resided at the parcel of land under dispute;
 - B) At some point during the union, an opportunity to purchase the property arose. Given that the defendant by her actions was not interested in purchasing the property, the plaintiff made arrangements to purchase the property around October 1994 and approached the Barbados Public Workers Credit Union (The Credit Union) for a loan to assist with the purchase;
 - C) The plaintiff started a relationship with Ms Karleen Moseley in 1993 whilst he was still living with the defendant. The relationship between the defendant and himself had broken down in his view. In December, the plaintiff moved in with the Ms Moseley and remained there until their relationship ended in 2001;
 - D) During 1994 to 1998, the plaintiff would pass by the house to check on personal items which he later removed in July, 1998;
 - E) The plaintiff obtained a mortgage from the Credit Union in the amount of BBD \$17,996.00 and commenced payment of the mortgage loan;
 - F) By virtue of a letter dated November 7, 1997 to the defendant, the plaintiff commenced the process, through his attorneys, of trying to remove the defendant from the property the subject matter of this suit without success. The plaintiff applies for relief under Order 92 of the Rules of the Supreme Court.
- [4] An affidavit from Ms Karleen Moseley was filed in support of the plaintiff's application. Ms. Moseley deposed:
- A) That she and the plaintiff were involved in an intimate relationship which commenced in 1993 whilst the plaintiff was living at the property in question;
 - B) That the plaintiff moved into her residence from 16 December, 1994 and remained there until their relationship ended in 2001. She also deposed that during this time the plaintiff was her boyfriend;
 - C) As a result of this relationship, the deponent Ms. Moseley bore the plaintiff a child in December 1995.
- [5] The plaintiff filed two further affidavits in support of his application, by virtue of which, he further deposed that:
- A) At the time of purchase of the property, there was no relationship between the parties and given that the defendant had expressed no interest in purchasing the property, he was under no obligation to inform her of his intent to purchase the property or of the payment arrangements;

- B) The defendant indicated her wish to offer the sum of BBD\$18,000.00 at a meeting between counsel for both sides and herself. In excess of three years has passed without any action on that offer being taken;
- C) The defendant had indeed known about the sale of land since February 1997 and was informed by his counsel to that effect.

[6] The second affidavit (dated 8 December 2003) in support of the plaintiff's application was sworn to by Mr. David J. H. Thompson, Attorney-at-Law, in whose chambers the plaintiff's attorney at law practiced. Mr. Thompson deposed that he held a meeting with the defendant on 27 February 1997 and informed her of the intended sale of the property. He further deposed that the defendant did indicate an interest in purchasing the property but to the best of his knowledge took no steps in that regard.

[7] It must be stated that the defendant's counsel did not serve a notice to cross examine Mr. Thompson and at no time during the trial was any application made to cross-examine him. In the circumstances, the affidavit evidence of Mr. Thompson is unchallenged and no issue arises as to its veracity.

The defence

[8] The defendant filed an affidavit in reply dated 2 October 2003 in which she deposed that:

- A) She and the plaintiff had been in a relationship other than marriage for more than five years;
- B) The plaintiff left the property in 1998 at a time when the property was in dire need of repairs;
- C) She obtained a loan for BBD\$5000.00 to renovate the bathroom and to change the wood on the property;
- D) The property was conveyed to the plaintiff without her knowledge. She maintained that she always had an interest in acquiring the property. She further deposed that she and the plaintiff both had a right to purchase the property pursuant to the provisions of the Tenancies Freehold Purchase Act;
- E) She was never approached by the vendors or the plaintiff with respect to the sale of the land and she had offered to pay the plaintiff the sum of Bds. \$18,000.00 for the contribution he made to the purchase of the property. She stated that she remained committed to this position;
- F) She had family in the community and was quite comfortable where she was.

[9] She applied to have the plaintiff's application dismissed.

Third Party interest

[10] The Court ordered that the pleadings in the matter be served on the Barbados Public Workers' Co-operative Credit Union Limited (the Credit Union) since it held a mortgage over the property and it would be materially affected in its pocket by the outcome of the case. As a result of such service, Mr. Cecil N. Mc. Carthy, Attorney-at-Law appeared on behalf of the Credit Union and informed the Court that the Credit Union's mortgage was almost fully paid and that the potential prejudice to its security was small. Consequently he would not be filing any documents but would hold a watching brief.

The Issue

[11] There is one central issue for decision in the matter before the Court, that is, whether the defendant is in occupation of the subject property without the license or consent of the plaintiff or his predecessors in title within the meaning of Order 92 of the Rules of the Supreme Court?

Family Law Act v order 92 proceedings

[12] Having regard to the fact that the defendant's case was posited upon the allegation that the parties were involved in a union other than a marriage as defined by the **Family Law Act 1981 (the Act)**, the Court enquired of Ms. Kim Marshall, who originally appeared as Counsel for the defendant, whether or not an application under the **Act** would not be the appropriate method of ascertaining the defendant's entitlement to any interest in the property. The Court indicated that such an application could be filed out of time with the leave of the Court. Having regard to the fact that there is a conveyance to the Plaintiff under the provisions of the **Tenancies Freehold Purchase Act**, the Court also enquired whether there was going to be an application to have this conveyance declared null and void. These issues were not considered relevant by Miss Marshall and no action was taken on any of them.

[13] In determining the sole issue, the court considered the following matters as being relevant considerations:

- 1) What was the nature of the relationship between the parties prior to the plaintiff's leaving the home and, at what time did the plaintiff vacate the home?
- 2) What was the status, in law, of the plaintiff and the defendant in relation to the property (a) before purchase of the property by the plaintiff and (b) after the plaintiff's purchase?

Analysis of the evidence

[14] The defendant did not indicate when the relationship between herself and the plaintiff ended. She only mentioned that, in her view, the plaintiff moved out of the property in 1998. The plaintiff on the other hand deposed that in 1992 the relationship between himself and the defendant started to break down and there was a cessation of sexual and social intercourse between them. The plaintiff further deposed that he started a relationship with Ms. Karleen Moseley in 1993 and moved in with her in December of that year. Ms. Moseley in her affidavit dated 2 September 2003 confirmed the relationship between herself and the plaintiff. She, however, put the date that the plaintiff moved in with her in 1994. There was also no challenge to Ms. Mosely by way of cross-examination. I heard both parties to this matter and heard them under cross-examination. I find it hard to accept the defendant's assertion that the plaintiff moved out of the property in 1998 when it was quite clear that he was no longer living at that residence as of 1994 and had indeed moved in with another party. The plaintiff was quite forthright in his evidence and struck me as a witness of truth. I was more impressed with his evidence and demeanour than with the defendant. I find, therefore, as a matter of fact that at on 16 December, 1994 the plaintiff moved out of the home and that their relationship as a couple had been terminated prior to this date when the sexual and social relationship between them ceased.

[15] Evidence was presented and remained unchallenged that the defendant, prior to the plaintiff's purchase of the property, was the lessee of the property. The plaintiff was cohabiting with her and ceased to do so as of December 1994. I think it is immaterial that he left some of his belongings at the property and would return occasionally to check on those belongings. I do not think that this act, which was done with the consent of the defendant at least up until June 1998, was pursuant to an existing relationship between the parties. The conveyance to the plaintiff was executed in June 1998. It must also be stated that there has never been any assertion that the plaintiff does not also have a proprietary interest in the house.

[16] Prior to purchase of the land by the plaintiff the defendant was the lessee of the land. To date, the defendant has not paid any rent to the plaintiff as new owner, nor has she made any arrangements to do so.

[17] Both parties maintain an interest in the house but the plaintiff has chosen to give up his interest and only assert his right as owner of the real property. The plaintiff sent numerous notices to quit to the defendant. Only the last notice to quit dated July 2002 was served correctly.

[18] In these circumstances, the defendant had been on notice for quite some time that the plaintiff was seeking to have her removed from the property. She did not take any steps to either obtain the BDS \$18,000.00 to pay out the defendant as she alleged that she wished to do or alternatively to look for other accommodation. The defendant failed to take any steps to have the conveyance declared invalid or to assert her right, if any, to the land. She had ample time to do so. Her continued occupation of the property is, therefore, without the plaintiff's license or consent.

[19] Further, the defendant deposed that she had no knowledge of the sale of the property and no representations were made to her by the vendor or indeed by the plaintiff. The defendant made no mention of her meeting with Mr. Thompson in September 1997 in which she was informed by counsel of the intended sale of the property. As previously stated, Mr. Thompson's affidavit evidence was not challenged.

[20] If, therefore, one accepts Mr. Thompson's unchallenged evidence, as this Court does, then the defendant was aware of the proposed sale to the plaintiff. In this regard, it is a matter of inference as much as common sense, that the defendant must have been aware that there was a change in ownership of the property because she ceased paying land rent to the first landlord and made no enquiry about it. Having been informed by Mr. Thompson of his client's proposed purchase, she turned a blind eye towards the issue of ownership of the land.

The Tenancies Freehold Purchase Act and the conveyance.

[21] The plaintiff served on the landlord a notice of intention to purchase the property under the provisions of the **Tenancies Freehold Purchase Act, Chapter 239B** of the laws of Barbados (the form 1 notice). No such notice was ever served by the defendant. The conveyance to the plaintiff was pursuant to the provisions of this **Act**. There is no challenge to the conveyance by way of any allegation of

fraud, misrepresentation or impropriety on the part of the plaintiff. In conveying the property to the plaintiff, the landlord's relationship with the defendant ended. After being informed by Mr. Thompson of the proposed sale and not having taken any steps to purchase the land herself or exercise any rights against the landlord, can she now, in the absence of an application to have the conveyance declared a nullity, assert that she has an interest in the land? No, she cannot. At the most, the defendant had a right to purchase the land had she served the Form 1 notice. Having not done so, she waived that right and cannot now do so in the absence of a challenge to the conveyance. It was, for this reason, that the court first enquired of Ms. Marshall whether there was going to be a challenge to the conveyance.

[22] **Section 17 (1)** of the **Tenantries Freehold Purchase Act Chapter 239B** provides as follows:

Notwithstanding the Property Act or any other enactment, the conveyance of freehold of a lot made pursuant to this Part

(a) vests in the purchaser a good and marketable title for a fee simple absolute estate in the lot free from all encumbrances, and

(b) except as stipulated in the conveyance, discharges the interest specified in the conveyance from all estates, rights, interests, liens and encumbrances of all persons including the Crown (emphasis mine).

[23] It is also my view, and I so hold, that, if the defendant was claiming any interest in the freehold by virtue of having been a spouse within the meaning of the **Family Law Act of Barbados**, proceedings would have had to be brought under that legislation for a declaration that a union other than a marriage existed and that the defendant was entitled to a declaration and/or alteration of such interest under **sections 56 and 57** of the **Family Law Act** respectively. This informed the Court's enquiry of Ms. Marshall, whether an application was going to be made under the **Family Law Act**.

[24] The consideration for the court is whether, in the circumstances of this case, the plaintiff can assert his right to the land and recover possession from the defendant?

Case Law

[25] Counsel for the plaintiff relied upon the case of **Manchester Airport Plc v Dutton and Others** {[1999] 3 W.L.R 524} where the plaintiff was granted a license by a landowner to occupy a wood for the purpose of carrying out works in connection with the construction of an airport highway. Three days before the license was granted, the defendants, who were opposed to the works, entered the wood without permission with the intention of making it difficult or impossible for the plaintiff's work to be carried out. The plaintiff applied for an order of possession, which was granted and the defendants appealed.

[26] At the Court of Appeal the order for possession was granted but for the purposes of this matter their Lordships set down the criteria under which a plaintiff, not in possession of land, could apply to the court for an order to assert his rights over that land.

[27] **Kennedy LJ.** stated that, firstly, the plaintiff had to have a right to possession of the land and claim possession of the land which he alleged to be occupied by the defendant and secondly the defendant, whom the plaintiff sought to evict, should have entered or remained in occupation without license or consent.

[28] These requirements are met in this matter. The plaintiff does have a right to possession of the land the subject of this application by virtue of his purchasing the property and having received a conveyance under the **Tenantries Freehold Purchase Act**. The defendant has remained on the property in defiance of the notice to quit which effectively determined her right of occupation. She is, therefore, in occupation without the plaintiff's license or consent.

[29] It is the judgment of the court therefore that the defendant has no right to remain on the property in defiance of the plaintiff's clear wish to recover possession of his land. The plaintiff's application for relief under Order 92 of the Rules of the Supreme Court is, therefore, granted.

Disposal

[30] In the circumstances, it is ordered that the defendant do recover possession of the property on or before the 30th day of September, 2008, the time agreed to by both counsel as being a reasonable time.

[31] The defendant's summons for dismissal of the plaintiff's claim is dismissed. '

[32] Issue of costs reserved.

Judge of the High Court.