BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]
Suit No: 503 of 2009

BETWEEN

JUNE EVERETTE GRIFFITH - PLAINTIFF

AND

GWENDOLYN BARTON - 1st DEFENDANT
STEVE LUCAS - 2nd DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.
Judge of the High Court

2010: March 30.
2011: March 7

Mrs. Sally Comissiong for the Plaintiff
Mr. Anthony D. Wiltshire for the Defendants

DECISION

[1] ***Nature of the application:*** This is an application under **Order 92 R.S.C., 1982** for the recovery of possession of Lot 2 Duncans in the parish of Saint Philip on the ground that the Plaintiff is entitled to possession and that the Defendants are in occupation without her licence or consent.

[2] **Order 92 r. 1** provides that:

> *"Where a person claims possession of land which he alleges is occupied solely by a person of persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, proceedings may be brought by originating summons in accordance with the provisions of this Order."*

[3] In accordance with rule 3, the Plaintiff's originating summons was supported by the affidavit of June Everette Griffith filed on March 19, 2009 setting out her interest in the land and the circumstances in which Lot 2 Duncan's came to be occupied by the Defendants without her licence or consent. The Plaintiff's affidavit-in-support also set out the relevant facts and the various documents which, in her view, establish her right to an order of possession.

[4] For their part, the Defendants (who are brother and sister) relied on an affidavit-in-response ["the Barton affidavit"] filed by Gwendolyn Barton on February 5th, 2010 setting out the Defendants' view of the case and opposing the relief sought. On March 24th, 2010, the Plaintiff also filed a second affidavit responding to aspects of the Barton affidavit.

[5] At the hearing, Counsel for the respective parties produced written submissions and following the oral arguments, the Court reserved its decision.

[6] ***Background to the dispute:*** The circumstances which gave rise to the dispute between the parties have been distilled from the affidavits and the annexed exhibits thereto and are briefly outlined by way of background.

[7] There is no dispute that the Plaintiff is the owner of the freehold interest in a parcel of land situated at Duncans in the parish of St. Philip (hereinafter referred to as "the larger parcel").

[8] It is also not disputed that the Plaintiff had for several years rented out 3 house spots on the larger parcel to the 1st Defendant and to 2 other tenants who all paid land rent to her as her tenants.

[9] As is the custom in Barbados in such situations, the 1st Defendant then built a wooden chattel house on the rented house spot (hereinafter referred to as "Lot 2") and constructed a wall bathroom and dug a septic well to facilitate water-borne sanitary services.

[10] In and about the year 1989, the Plaintiff applied to the Chief Town Planner for permission to develop the larger parcel. On September 18th, 1989 permission was issued by the Town and Country Planning Office for the subdivision of the larger parcel into 3 smaller lots for residential purposes.

[11] A survey plan of the subdivision was subsequently certified by W.A. Scott, Land Surveyor on January 10, 1990. Each lot was identified on the survey plan and the boundaries and areas of each of the 3 lots clearly shown. The larger area was also stated to contain a total land area of 4,943 square metres, including a road reserve of 81 square metres.

[12] As the Plaintiff had no title deeds for the larger parcel, she simultaneously commenced title suit proceedings (also known as foreclosure proceedings) in the High Court.

[13] On completion of the proceedings on July 6th, 1990 she obtained a Registrar's Conveyance in respect of the larger parcel in accordance with the ***Judicial Sale of Land Act, Cap. 227.*** The larger parcel was described

in the Registrar's Conveyance as containing by admeasurement 4,896.5 square metres. There was, however, no survey plan attached to the Registrar's Conveyance, nor did the Conveyance make reference to the survey plan from which the area of the parcel described in the conveyance was taken.

[14] Armed with her Conveyance and subdivision approval, the Plaintiff approached her land tenants with a view to selling them their respective house spots.

[15] In or about the month of August 1991, the Plaintiff had informal discussions with the 1st Defendant with respect to the sale to her of Lot 2 for a total purchase price of $57,057.84. Following their discussions and as the 1st Defendant did not have the required deposit and was unable to qualify for a bank loan, the Plaintiff agreed to sell Lot 2 to the 1st Defendant, for the total price of $57,057.84, provided that the 1st Defendant would first raise the sum of $7,075.84 as a deposit.

[16] The Plaintiff and the 1st Defendant also agreed that following payment of the deposit, the Plaintiff would extend a loan to the 1st Defendant to cover the balance of purchase price of $50,000.00 and that the loan would be payable in monthly installments of $500.00 over a period of 18 years.

[17] Pursuant to the oral agreement, the 1st Defendant started to accumulate the agreed deposit of $7,075.84 by making periodic lump sum payments to the Plaintiff.

[18] ***The Agreement for Sale:*** In and around May or June of the following year (by which time the 1st Defendant had paid a total of $5,700.00 to the Plaintiff on account of the deposit) the Plaintiff arranged for a formal Agreement for Sale to be drawn-up in respect of Lot 2. An Agreement for the sale and purchase of Lot 2 was then drawn-up and formally executed by the Plaintiff and the 1st Defendant on June 1st, 1992. **[Exhibit "JG2"]**

[19] <u>*The purchase price, deposit and payment terms:*</u> In addition to the usual provisions identifying the parties, describing the property to be sold and stating the total purchase price as $57,075.84 and the deposit as $5,700.00, the Agreement clearly stated that there remained due and payable to the Plaintiff, the sum of $1,375.84 (being the amount remaining due on the agreed deposit of $7,075.84).The Agreement also provided for the balance of purchase price of $50,000.00 together with interest at 10% to be paid by monthly installments of $500.00 per month over a period of 18 years.

[20] <u>*Completion, Requisitions and Title:*</u> As the Agreement for Sale expressly provided for the balance of purchase price of $50,000.00 plus interest to be paid by the 1st Defendant in 18 years under the loan arrangement, the Agreement, quite naturally, contained no specific date for completion of the sale and purchase.

[21] Instead, Clause 17 of the Agreement for Sale made provision for completion in the following general terms:

> (a) *"the sale and purchase shall be completed* ***within 30 days following payment in full of the purchase money and all interest which would have accrued thereon****;*
>
> (b) *Within 14 days after payment as aforesaid the vendor shall cause to be delivered to the purchaser's attorney-at-law the title deeds and other documents relating to the lot to enable investigation of the title to be made. All requisitions on the title shall be in writing and sent to the vendor's attorney-at-law within fourteen days and delivery of the said title deeds and documents and all requisitions not sent within that time shall be deemed to have been waived. Should any requisition whatsoever be made or insisted upon which the vendor is unable or unwilling to satisfy or comply with, the vendor may*

(notwithstanding any attempt to remove or satisfy the same or any negotiation or litigation in respect thereof) rescind this Agreement by 14 day's notice to the purchaser or her attorney-at-law; and upon rescission all purchase money paid (but excluding any interest payment thereon) shall be forthwith repaid to the purchaser without interest, costs or compensation and the purchaser shall accept the same in full satisfaction of all claims under or in any way relating to this Agreement…

(c) ***A good and marketable title shall be given to the purchaser****."*

[22] Purchaser's Default, Forfeiture and Liquidated Damages: Clause 18 of the Agreement for Sale provided that in the event of the 1st Defendant's failure to complete the purchase in accordance with the terms of the Agreement, the Plaintiff would be entitled to forfeit the deposit and to retain and recover from the 1st Defendant, as liquidated damages, the deposit, interest and legal costs. Clause 18 accordingly provides:

"18. If the purchaser fails to complete the purchase in accordance with the terms of this agreement, the vendor shall be entitled to retain out of moneys paid in on account of the purchase price to recover from the purchaser as liquidated damages for breach thereof:

a) the deposit paid as specified in clause 10;

b) interest at the rate of 10% per annum on the remaining balance of purchase price from the date of default up to the date of forfeiture;

c) legal costs.

Upon forfeiture the vendor shall refund to the purchaser any monies paid in excess of the sums set out above."

[23] ***<u>The Case for the Plaintiff:</u>*** The Plaintiff complained that at various times following the execution of the Agreement for Sale, the 1st Defendant had breached the terms of the Agreement in that she had failed to pay the stipulated monthly installments of $500.00 due under the Agreement and in fact, did so only sporadically. She further complained that no installments due under the Agreement had been received since the year 2004 and that payments due under the Agreement have now stopped altogether.

[24] The Plaintiff also alleged that it had been orally agreed between herself and the 1st Defendant that upon payment of the deposit the 1st Defendant would become responsible for paying the annual land taxes for Lot 2 until it was legally conveyed to her. She complained that in breach of their oral agreement, the 1st Defendant never paid any of the land taxes due in respect of Lot 2 and that she had been obliged to pay the land taxes due on Lot 2 for the years 1992 to 2005 totaling $7,415.68.

[25] Counsel for the Plaintiff, Mrs. Sally Comissiong, submitted that on July 31st, 2008 pursuant to Clause 17 of the Agreement for Sale, a default notice had been issued on the Plaintiff's behalf to the 1st Defendant requiring her to pay all outstanding installments together with interest at the rate of 10% per annum in accordance with the terms of the agreement and that in default of payment, the Agreement would be rescinded.

[26] Mrs. Comissiong contended that as the Agreement for Sale of June 1st, 1992 had been rescinded, the 1st Defendant no longer occupies Lot 2 with the Plaintiff's licence or consent and that the Plaintiff is accordingly entitled to recover possession under **O. 92 R.S.C**.

[27] In relation to the 2nd Defendant, the Plaintiff deposed that it had come to her knowledge that the 2nd Defendant, Steve Lucas, had built a wooden house on Lot 2 which he had rented out to third parties. She further deposed that she had never given him permission to build a house on Lot

2 and that he had never paid her rent for the use and occupation of her land. She further states that she is not party to any arrangement which he may have had with the 1st Defendant and that the 2nd Defendant was therefore a trespasser on Lot 2.

[28] In closing, Mrs. Comissiong urged the Court to order that both Defendants vacate the land occupied by them at Lot 2 Duncans, St. Philip.

[29] ***The Case for the Defendants:*** While admitting that she had agreed to purchase Lot 2 from the Plaintiff for the sum of $57,057.84 and to raise a deposit of $7,075.85 and pay the balance of purchase price of $50,000.00 by monthly installments of $500.00, the 1st Defendant denied that interest on the balance of the purchase price was to be amortized over an 18 year period. She argues that if this were so, a provision to that effect should have been included in the Agreement for Sale.

[30] The 1st Defendant admitted that she had made sporadic payments to the Plaintiff of the installments due under the Agreement and stated that further payments under the Agreement had been stopped due to defects in the Plaintiff's title.

[31] While also admitting that the purchase of lot 2 had not been completed, the 1st Defendant argued that this was due to defects in the Plaintiff's title and because the Plaintiff had been unable to satisfactorily address certain requisitions on title raised by former attorney-at-law, Mr. Philip Pilgrim, on the Defendants' behalf.

[32] The 1st Defendant also stated that the 2nd Defendant had sought mortgage financing at Clico Mortgage & Finance Corporation to assist with the purchase of Lot 2. However, she deposed that the mortgage could not be finalized and the offer of financing was ultimately withdrawn due to the Plaintiff's inability address the difficulties with the title. She further stated that a subsequent attempt by the 2nd Defendant to obtain mortgage

financing had also failed due to the difficulties which had arisen with the Plaintiff's title.

[33] The 1st Defendant also contended that in the circumstances, interest on the balance of the purchase price should stop accruing in view of the Plaintiff's inability to rectify the defects in title.

[34] In the alternative, the first Defendant contended that she is a 'qualified tenant' under the ***Tenantries Freehold Purchase Act, Cap.239B*** and that Lot 2 should be transferred to her in accordance with that Act.

[35] In summary, Counsel for the Defendants, Mr. Anthony Wiltshire, urged the Court to find that the Plaintiff was not entitled to an order for possession and could not, in the current circumstances, be permitted to forfeit the deposit and insist on liquidated damages in accordance with the Agreement. He also urged the Court to find that the Defendants were 'qualified tenants' under the ***Tenantries Freehold Purchase Act, Cap.239B.***

[36] ***The Plaintiff's arguments in rebuttal:*** In rebuttal, Mrs. Comissiong submitted that the Plaintiff had provided the 1st Defendant's attorney-at-law with adequate information to adequately explain the requisition on title raised by the Defendants' attorney-at-law in relation to the discrepancy between the area of the larger parcel shown in the Registrar's Conveyance of July 1990 and in the survey plan of January 1990. She insisted, in effect, that the Plaintiff was in a position to give a good and marketable title to the 1st Defendant as purchaser under the Agreement for Sale.

[37] With respect to the 1st Defendant's contention that interest was not payable and should have been included in the Agreement for Sale, Mrs. Comissiong argued that it was clear from the Agreement that interest was payable along with the balance of purchase price of $50,000.00 at the rate of 10% per annum and that the Agreement also required the payment of

monthly installments of $500.00 over an 18 year period. She submitted that it was evident that the monthly installment of $500.00 did not represent principal but contained an interest component as well since at the end of the 18 year period, the 1st Defendant would have been required to pay a total of $108,000.00.

[38] Addressing Mr. Wiltshire's submission that the Defendants were qualified tenants under the ***Tenantries Freehold Purchase Act, Cap.239B***, Mrs. Comissiong submitted that the larger area which had at one time been owned by the Plaintiff was not a "tenantry" within the meaning of the Act since it had been subdivided into less than 5 lots.

[39] Finally, Mrs. Comissiong submitted that the Plaintiff was entitled to an order for possession under **O. 92 RSC** since the 1st Defendant was no longer a land tenant, had breached the oral agreement with the Plaintiff to pay land taxes, had further breached the terms of the Agreement for Sale by failing to pay the agreed installments and additionally, had been served with a notice to rescind the agreement dated July 31st, 2008.

[40] ***Discussion:*** This Court is satisfied that many of the issues which Counsel for the respective parties raised in their legal submissions go well beyond the scope of the current application, which is, after all, a simple application for possession of land under **O.92 R.S.C.**

[41] Accordingly, the Court does not propose to resolve, on this application, the many issues which Counsel for the parties have raised as to whether the Plaintiff is entitled to insist on the payment of interest on the balance of purchase price up to the date of default of payment; or as to whether the Plaintiff has failed to provide the 1st Defendant with a "good and marketable title" as required by Clause 17(c) of the Agreement for Sale or whether the larger area owned by the Plaintiff is, or ever was, a "tenantry" under the ***Tenantries Freehold Purchase Act***.

[42] In the view of the Court, the single issue which falls to be determined on this application is whether the Plaintiff has successfully brought herself within the scope of **O. 92 RSC** and established her entitlement to an order for possession as prayed.

[43] The scope and application of **O. 92** of the 'old' **RSC** is now well established in this jurisdiction and has been judicially considered in numerous decided cases. *[See **Joan Nall v. Henry Cox [Unreported] H.C. B'dos Civil Jurisdiction No. 718 of 1987. Greater London Council v. Jenkins [1975] 1 All E.R. 354** per **Lord Diplock** @ p. 356 and **Bristol Corpn v. Persons Unknown [1974] 1 All E.R., 593.**]*

[44] The law is that **O. 92** does not only apply in clear-cut cases of trespass where a person has entered into occupation of the land without the licence or consent of the person entitled to possession.

[45] An order for possession is also available under **O. 92** against a person who, having initially entered into occupation of land with the licence or consent of the person entitled to possession, subsequently has the licence or consent withdrawn and thereafter remains in possession without the licence or consent of the person entitled to possession.

[46] Based on Mrs. Comissiong's submissions, the Plaintiff's case against the 2nd Defendant would seem to be that he is a trespasser, insofar as the Plaintiff says she never put him in possession, knows nothing about him, and in particular, did not give him permission to build on Lot 2. In those circumstances, the Plaintiff has urged the Court to make an order for possession since the 2nd Defendant properly falls under the first of the two situations governed by the rule as outlined above. *[See paragraph [44] above.]*

[47] The Plaintiff's case against the 1st Defendant falls within the second situation envisaged by **O.92** in that the Plaintiff contends that having initially given the 1st Defendant permission to occupy and remain in

possession under the Agreement as a purchaser-in-possession, that permission must be regarded as having been withdrawn in the light of the notice of default issued on the Plaintiff's behalf on July 31st, 2008. *[See paragraph [45] above.]*

[48] Having considered the affidavits, together with the submissions of Counsel for the respective parties and the applicable law, the Plaintiff's application is dismissed for the following reasons:

i) While the Court is satisfied that the Plaintiff is the owner of Lot 2 Duncans, St. Philip and holds a Registrar's Conveyance covering the same, the Plaintiff has failed to establish that the Agreement for Sale dated June 1st, 1992 has been rescinded and brought to an end;

ii) The Court is satisfied that service of a notice of default under Clause 18 of the Agreement for Sale is no more than the first step in the process of terminating the agreement and does not automatically bring the Agreement to an end;

iii) The Plaintiff has failed to establish that following the expiry of the notice period, she took the further steps envisaged under Clause 18 of the Agreement to terminate the Agreement and to recover liquidated damages for breach of the agreement by forfeiting the deposit paid and deducting interest and legal costs in accordance with Clause 18 of the agreement;

iv) As there is no evidence that forfeiture of the deposit has taken place in accordance with Clause 18 of the Agreement, the Court is unable to find that the Agreement for Sale has been terminated and in the view of the Court, the Agreement for Sale remains valid and subsisting;

v) Additionally, the notice of default issued on the Plaintiff's behalf on July 31st, 2008 made no demand on the 1st Defendant (as the

purchaser-in-possession) for the delivery up of possession, nor did the notice purport to formally withdraw the Plaintiff's consent to the 1st Defendant's occupation of Lot 2;

vi) Finally, as the 2nd Defendant derived his right to occupation through the 1st Defendant as the purchaser-in-possession, he cannot be regarded as a trespasser since the Agreement for Sale has not been terminated and the 1st Defendant remains in possession as a purchaser-in-possession. An order for possession cannot, in such circumstances, properly be made against him.

[49] ***Disposal:*** In the result, the Plaintiff's application is dismissed with costs to the Defendants certified fit for one attorney-at-law to be agreed or taxed.

Maureen Crane-Scott
Judge of the High Court