

THE EASTERN CARIBBEAN SUPREME COURT

MONTSERRAT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. MNIHCV2004/0009

BETWEEN:

LILIAN RILEY

Claimant

and

CHRISTOPHER GERALD

REGISTRAR OF LANDS

HON. ATTORNEY GENERAL

Defendants

Before:

Ianthea Leigertwood-Octave

High Court Judge

Appearances:

Mr. David Brandt for the Claimant.

Mr. Kharl Markham for the First Defendant.

Ms. Sheree Jemmotte for the Second and Third Defendants.

2009: May 28; October 13

2011: June 23.

JUDGMENT

Introduction

- [1] The introduction to this claim starts with a reference to someone who is neither a party nor a witness in these proceedings but who is central to the dispute between the parties: Ms. Ruby Weekes ["Ms. Weekes"].

- [2] Ms. Weekes became the registered proprietor of Block 14/14 Parcel 88 [“the property”] in the St. John’s Registration Section on 7th April 1992. On 10th July 2001, the First Defendant, Christopher Gerald [“Mr. Gerald”] lodged a caution [“the Caution”] on the property at the Land Registry.
- [3] On 5th July 2001, the Claimant Lilian Riley [“Ms. Riley”] sought to have the property registered in her name by lodging various documents at the Land Registry. These documents included a Transfer of Land Document [“the Transfer Document”] dated 5th July 2001, which named Ms. Weekes as the Transferor and Ms. Riley as the Transferee.
- [4] On 12th February 2002, a Declaration by Ms. Weekes was filed at the Land Registry acknowledging her indebtedness to Mr. Gerald for services provided and expenditure incurred on her behalf.
- [5] On 10th February 2004, Ms. Riley’s solicitors wrote to the Second Defendant, the Registrar of Lands [“the Registrar”], indicating that there was no legal basis for the Caution and requested that the Registrar remove it. The Caution remained and on 15th March 2004, Ms. Riley commenced these proceedings against Mr. Gerald, the Registrar and the Third Defendant, the Hon. Attorney General, who was made a party by virtue of the Crown Proceedings Act. She sought an order that the Registrar remove the Caution. She also alleged that Mr. Gerald had placed structures on the property and sought an order that he remove them.
- [6] In his defence, Mr. Gerald claimed that he had cared for Ms. Weekes over the years and at some point in time, she had offered to transfer the property to him. On 28th January 2002, she had executed a declaration acknowledging expenditure that he had incurred on her behalf. He admitted constructing part of his business place on the property but alleged that Ms. Weekes had sanctioned it when it was brought to her attention. She had also given him permission to put a structure on a portion of the property.
- [7] The Registrar and the Hon. Attorney General have denied any liability in this matter, relying on Section 7 of the Registered Land Act¹.
- [8] At the trial of the claim, there was no evidence presented on behalf of Mr. Gerald, as he had failed to comply with the court’s directions for the filing of witness statements.

¹ 1999 Revised Edition

[9] Mr. Markham attacked Ms. Riley's case on two main points. His first challenge was that she had no standing to bring the claim and the second was that as she was not the proprietor of the property, she could not ask the court to make an order for the removal of the Caution.

Did Ms. Riley have the standing to bring this claim?

[10] An appropriate starting point for consideration of the locus standi issue is the evidence given by Ms. Riley. Her evidence was that around 5th day of July 2001, Ms. Weekes, who she described in her witness statement as being the "*then registered owner*", transferred absolute ownership of the property to her as "*beneficial owner*" by virtue of the Transfer Document, which was exhibited as part of her case.

[11] In cross examination, she testified that Ruby Weekes died in the United Kingdom in 2004. She did not know what Letters of Administration were. When she was asked whose name the land was registered in at the date of trial her somewhat off-handish response was "*the land is registered or should be registered in my name*". Following that answer, Mr. Markham put to Ms. Riley quite emphatically that the land was registered in the name of Ruby Weekes, to which she responded "*my contention is it should be registered in my name*", and she continued that it was in fact registered in her name.

[12] She did not have her Land Certificate in her hand but it should be with her attorney. What she knew was that it was her land and Mr. Gerald was on it. When she was shown the Land Certificate she agreed it showed that the land was registered in Ms. Weekes' name. In re-examination, Mr. Brandt referred Ms. Riley to her answer to Mr. Markham that her lawyer had a Land Certificate for the land. He suggested to her that when she gave that answer she did not what a land certificate was and she agreed, she also agreed with him that she did not have a Land Certificate like the one that was shown to her with Ms. Weekes' name on it.

[13] In her pleadings and in her evidence, it was clearly expressed that Ms. Riley's claim was grounded on the premise that she was the beneficial owner of the property. It was elicited from her in cross-examination that Ms. Weekes had died in 2004 and that fact, it was argued, had precluded Ms. Riley's entitlement to bring her action based on a beneficial interest.

[14] Mr. Markham contented that it was Ms. Weekes' personal representative and not Ms. Riley who had a cause of action or the requisite locus standi to bring the claim against Mr. Gerald. As the property remained vested in Ms. Weekes' estate the relevant interest fell to her personal representative for the purpose of the administration of her estate. He referred the court to three pieces of legislation in support of that contention:

- 1) All causes of action subsisting against or vested in a deceased survive against or for the benefit of his estate²;
- 2) Where there is real estate vested in a deceased person, and there is no right of survivorship, even if there is a testamentary disposition, the real estate devolves to and becomes vested in his personal representative³;
- 3) Where a sole proprietor dies, his personal representative is entitled to be registered by transmission as proprietor in his place, provided he applied to the Registrar in the prescribed form and produced the grant⁴.

[15] To emphasize the point that Ms. Riley was not entitled to bring this claim, Mr. Markham followed a line of cases starting with the **Commissioner of Stamp Duties v Livingston**⁵ and including **Lal v Lal**⁶, **Eastbourne Mutual Building v Hastings Corporation**⁷ and **Re Leigh's Will Trust**⁸. He relied on these authorities for the proposition that no person who is entitled to the residue has any proprietary interest in any particular asset in a deceased's estate, which would enable them to institute an action such as this. It followed that Ms. Riley's substantive action was against Ms. Weekes' estate to enforce the transfer through the removal of the caution.

[16] Mr. Brandt's response was that neither the statutes nor the cases supported Mr. Markham's arguments, having regard to the facts of this case. Not surprisingly, underpinning his arguments was the Transfer Document, which Mr. Markham had argued, gave Ms. Riley nothing more than a future interest in the property.

[17] Mr. Brandt noted that "*transfer*" was defined under the Act as "*the passing of land by an act of the parties and not by operation of law and also the instrument by which such passing is effected ...*"⁹, therefore by executing the Transfer Document, Ms. Weekes divested all her interests and rights in

² Section 2 (1) of the Causes of Action (Survival) Act Cap. 03.01

³ Section 2(1) of the Real Representative Act

⁴ Section 117(1) of the Registered Land Act

⁵ [1965] AC 694

⁶ [1965] 1 WLR 1244

⁷ [1965] 1 All ER 779

⁸ [1970] Ch 277

⁹ Section 2

the property and they were irrevocably passed to Ms. Riley. No further act by Ms. Weekes was required and she had acted within Section 83 of the Act which provided that a proprietor by an instrument in the prescribed form may transfer her land to any person with or without consideration. Mr. Markham's argument that on Ms. Weekes' death the property became part of her estate with Ms. Riley only possessing a chose in action was wholly misconceived.

- [18] There are valid submissions on both sides of the argument but there is at least one aspect that can be disposed of without much difficulty. It begins with Paragraph 5[iv] of Mr. Markham's submissions which states:

'At the time of Ruby Weekes' death in 2004 there was no trust consisting of Ruby Weekes' estate in which the claimant could be said to have had a beneficial interest, since no trust had as yet come into existence to affect the assets of Ruby Weekes.'

- [19] Mr. Markham was clearly of the opinion that Ms. Weekes' death was a material fact in this case and by so doing he would easily have concluded that the cases and the statutes he relied on would support his arguments that it was Ms. Weekes' personal representative and not Ms. Riley who could bring the claim. They are in fact good authorities for the propositions that a beneficiary's interest in an unadministered estate is no more than a chose in action to ensure the due administration of the estate and that a beneficiary had no specific or defined beneficial interests in the assets.

- [20] My view is that he came to an erroneous conclusion, which carried through his line of argument. In **Livingston**¹⁰, **Lall**¹¹ and the other authorities, the death of the proprietor was a material and proven fact. In this case, the evidence from Ms. Riley elicited under cross-examination was that Ms. Weekes died "sometime in 2004". These proceedings commenced on 15th March 2004, there is no evidence that on that date Ms. Weekes was deceased so there is therefore no basis for concluding that the issue of Ms. Weekes' estate or the property forming an asset in her estate arises in this case. The death of Ms. Weekes was not a material fact in these proceedings, nothing in this case turned on her death. In fact, her death was not even referred to in Fixed Date Claim, the Statement of Claim or Defence. A perusal of Mr. Gerald's Defence actually suggests that Ms.

¹⁰ Supra.

¹¹ Supra

Weekes was alive when the proceedings commenced. As a consequence, the authorities relating to personal representatives and beneficiaries cannot be of any assistance to Mr. Gerald.

[21] I now move on to the effect of the Transfer Document. Mr. Markham is correct that there had not been a transfer of the property by Ms. Weekes to Ms. Riley and that the definition of "*transfer*"¹², which was Mr. Brandt relied on, was not sufficient to support an argument to the contrary. Although Mr. Brandt referred the court to section 83[1] and a proprietor's power to transfer her land he did not refer to section 83[2], which states expressly that a transfer **shall** be completed by the registration of the transferee as proprietor of the land. It is registration that vests absolute ownership¹³. The Transfer Document fell within the definition of a disposition under the Act, it was an act inter vivos by a proprietor whereby her rights in and over her land was affected¹⁴ but there was no transfer, there was no "*passing of land*"¹⁵.

[22] There being no evidence to the contrary, I conclude that prior to executing the Transfer Document, Ms. Weekes held both the legal and beneficial interest in the property. However, as the registered proprietor of the property, by executing it her interests were affected¹⁶. Ms. Weekes intended to transfer both her legal and beneficial interest but as registration had not been completed, no legal interest was created. Ms. Weekes' interest was only affected to the extent that she no longer held the beneficial interest, this is what she transferred.

[23] I therefore find that Ms. Riley holds a beneficial interest and as such has the standing to bring the claim. This would be the only way that she could protect her interest. I must note that if I had accepted Mr. Markham's argument that the property fell to Ms. Weekes' estate, section 118 appears to provide some basis on which she could bring her claim. It provides that from the date of the death of the proprietor¹⁷, a person beneficially entitled, shall hold the land, subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and as held by the deceased proprietor¹⁸. For the purposes of any dealing she shall be deemed to have been

¹² See para. [] above

¹³ Section 23

¹⁴ Section 2

¹⁵ Look to see where the definition of "transfer" is

¹⁶ Section 107[1]

¹⁷ Section 118[2]

¹⁸ Section 118[1]

registered as proprietor with all the rights conferred by the Act on a proprietor who has acquired land for valuable consideration¹⁹.

Could Ms. Riley ask the court to remove the caution?

[24] Having regard to the conclusion I have reached, it is necessary to consider whether Ms. Riley could ask the court to remove the Caution. It cannot be disputed that Ms. Riley is not the proprietor of the property, in light the facts of this case and section 2 of the Act, which defines a "*proprietor*" as the person registered under the Act as the owner of land. The question however is whether that fact precludes her from applying to the court to have the caution removed. I note that in his submissions Mr. Markham, while holding to his locus standi challenge, stated that Ms. Riley was entitled to apply to the Registrar to have the caution removed²⁰ but he did not comment on similar applications to the court.

[25] Section 129[1] provides that a caution may be removed either by order of the court or by order of the Registrar. In this case, it is the court's power to make the order that has been invoked. There is no provision in the statute that applications for removal orders must be made by any particular person or persons or categories of persons. It is therefore my finding that as a person holding a beneficial interest in the property, Ms. Riley is entitled to ask the court to remove the Caution.

Should the Caution be removed?

[26] I turn next to consider whether the court should remove the caution. It is common ground that Mr. Gerald lodged his caution in accordance with Section 127 of the Registered Land. As Mr. Markham submitted even if the property had been transferred, it would still be subject to Mr. Gerald's rights or interest as against Ms. Weekes.

[27] Cautions are governed by the provisions in Division 2 of the Act. Any person who claims any unregistrable interest in land may lodge a caution²¹, which forbids the registration of dispositions and the making of entries. The caution must be in the form prescribed under the Act and must state the cautioner's interest in the land²². When a caution is lodged the Registrar must notify the

¹⁹ Ibid.

²⁰ See paragraph 5(i)

²¹ Section 127(1)(a)

²² Section 127(3)

proprietor of the land, in writing²³. Once the caution is registered, no disposition which was inconsistent with it, can be registered without the cautioner's consent or by an order of the court²⁴.

[28] It would be helpful to consider precisely what was stated in the in the Caution:

"I, Christopher Gerald ... claim an interest for monies for property tax, Utilities, Personal Sustenance, and Repairs to and upkeep of the Land and Building thereon in the land comprised in the above-mentioned title, and mostly due to the fact that Mrs. Ruby Weekes had faithfully requested that the said property be transferred to me in love and gratitude."

[29] On 12th February 2002, Mr. Gerald filed a document at the Land Registry headed "***Expenditure Incurred Re: Mrs. Ruby Weekes from 1998 to Present***". Expenses were listed under various heads totalling EC\$12,791.25.

[30] A Declaration executed by Ms. Weekes was filed at the Land Registry on 12th February 2002. She declared that over the past 10 years Mr. Gerald had catered to her needs, maintained her property, carried out certain acts on her behalf, including paying her utility bills and property taxes. She stated that she had not paid Mr. Gerald and acknowledged her indebtedness to him for his services and expenditures.

[31] Mr. Markham submitted that the Caution showed that Mr. Gerald had two main interests in the property. Firstly as a creditor, which was established by his breakdown of the debt and Ms. Weekes' acknowledgement of its existence. Secondly, as someone with an expectation that the property would be transferred to him in love and gratitude, as Ms. Weekes' had "*faithfully requested*".

[32] Mr. Brandt's counter-argument is that an interest by a creditor does not create an overriding interest in land²⁵. Mr. Gerald is not a bank²⁶ and as a creditor must first obtain a judgment against a debtor and by operation of section 3 of the **Judgment Act**²⁷, the judgment would then operate as a charge on the land. In this case there was no evidence that such a judgment had been entered against Ms. Weekes.

²³ Section 128(1)

²⁴ Section 128(2)

²⁵ Section 28 of the Act

²⁶ Section 127[1][b]

²⁷ Cap. 02.10

- [33] With regard to the second limb, he argued that an expectation that the property would be transferred to Mr. Gerald did not create an interest in land neither did it create an estoppel. His statement that Ms. Weekes had faithfully requested the transfer was self-serving and hearsay. In addition, estoppel must be pleaded and proved in evidence and this had not been done.
- [34] Section 127 refers to an unregistrable interest. This is an interest which is not capable of registration but is recognizable by law. Section 127 gives a person with such an interest the ability to protect it. What is clear is that the caveator must have the interest and it must be clear what that interest is and it must be an interest in the land. Lodging does not establish any right in the land it only gives notice that there is an interest which is not capable being registered on the Title.
- [35] What is the unregistrable interest that Mr. Gerald has in the property? What is the interest in the land that he is asking the court to protect by the entry of the caution? It is clear that he seems to have a pecuniary interest one which is only monetary in nature. As a creditor, I must agree with Mr. Brandt that he has not done what was required to establish his interest.
- [36] His caution suggests some element of a promissory estoppel but it is nothing more than a suggestion. There is no indication that he had taken steps to pursue such a claim which would allow him to establish his interest.
- [37] I conclude that Mr. Gerald does not have an interest in land, what he has is a personal claim, a claim for the payment of a sum of money and nothing else. It is not a lien or a charge. I disagree with Mr. Markham's submission that it was an interest directly related to the proprietor and to the property. It related to the former but not the latter. With regard to an interest based on estoppel, there was no evidence that he had sought to have his rights litigated, he had not commenced proceedings which might result in an interest being vested in him. The interest in the land must be in existence at the time the caution is lodged, it cannot be one to be established at a later date. I find that Mr. Gerald does not have an unregistrable interest in the property and there is therefore no basis for maintaining it. Accordingly, it must be removed by the court.

Should Ms. Riley be compensated for the loss and damage suffered?

- [38] I next turn to consider whether Ms. Riley should be compensated. Someone who lodges or maintains a caution wrongfully and without reasonable cause shall be liable in an action in

damages, at the suit of any person who has thereby sustained damages, to pay compensation to that person²⁸. Mr. Brandt has observed that the section is limited to the person in whose name the land is registered and anyone who has suffered by virtue of the caution can bring the suit.

[39] I agree with him on that point but suffering damage is not where the matter ends. What is imperative is that it must be proven on a balance of probabilities that the cautioner, in this case, Mr. Gerald, lodged the caution wrongfully and without reasonable cause. The onus therefore falls on Ms. Riley to discharge this burden.

[40] I have reviewed the evidence and there is not even what I would consider an attempt by Ms. Riley to address this issue. Her evidence concerns the damage she suffered but the burden that the section has placed on her has been disregarded.

[41] There is therefore no basis on which I can make an award for compensation in her favour and I make none.

The Claims for Possession and Mesne Profits

[42] I now turn to, Ms. Riley's claim for possession and mesne profits. This is a short point for one reason. I have found that Ms. Riley holds a beneficial interest in the property and not the legal interest. Mr. Brandt is wrong when he speaks of her "*absolute and beneficial interest*", the two cannot be maintained in law. Absolute interest arises on registration and until there is registration of Ms. Riley as proprietor the court cannot make an order for possession in her favour in the circumstances.

[43] Ms. Riley has also claimed mesne profits. It is settled law that that mesne profits relate to damages or compensation recoverable from a person who has been in wrongful possession of immovable property. It would therefore follow that to succeed the person making the claim for mesne profits must be entitled to possession, this is in my view a fundamental aspect of such a claim and it presents some difficulty for Ms. Riley. As these proceedings stand, Ms. Riley has never been nor is she presently entitled to possession. Therefore to grant her claim the court would be facilitating a benefit to which she is not entitled. It is irrelevant that she may become entitled in the future.

²⁸ Section 131

[44] Accordingly, her claims under both heads must fail.

The Registrar of Lands and the Attorney General

[45] There is no evidence in this case to suggest that there was any liability on the part of either the Registrar of Lands or the Attorney General and I so find.

Conclusion

[46] Based on my findings and the reasons that I have stated, I make the following orders:

- 1) Judgment is entered for the Claimant, Ms. Riley against the First Defendant, Mr. Gerald.
- 2) There is no liability on behalf of the Second and Third Defendants, the Registrar of Lands and The Hon. Attorney General, in this claim.
- 3) The Registrar of Lands is ordered to remove the Caution placed on Block 14/14 Parcel 88 St. John's Registration Section by 30th June 2011.
- 4) The First Defendant, Mr. Gerald is to pay the Claimant, Ms. Riley prescribed costs in the sum of \$14,000.00 in accordance with **Part 65.5[2][b][iii]** and **Appendix B** of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000**.

Ianthea Leigertwood-Octave

High Court Judge