

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2011/0547

BETWEEN:

CHARLESWORTH THEOPHILUS HARRIGAN
(As Administrator of the Estate of Selvin Harrigan a.k.a Seldon
Theophilus Harrigan, Deceased)

Claimant

and

GWENDOLYN KING

Defendant

Appearances:

Ms. E. Deniscia Thomas for the Claimant
Mr. Hugh Marshall Jr. and Ms. Kema Bemjamin for the Defendant

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2012: February 28
April 4
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JUDGMENT

[1] MICHEL, J.: By Fixed Date Claim Form and Statement of Claim filed on 24th August 2011, the Claimant (Charlesworth Theophilus Harrigan, as Administrator of the Estate of Selvin Harrigan, also known as SELDON Theophilus Harrigan, Deceased) claimed against the Defendant (Gwendolyn King) for possession of land situated at Bendals in the Parish of St. Mary and more

particularly described and registered as Registration Section: Bendals, Block: 51 1887C, Parcel: 14 and for damages for trespass.

- [2] By Defence and Counterclaim filed on 21st October 2011, the Defendant joined issue with the Claimant on some of the averments in the Statement of Claim and counterclaimed for damages for breach of a contractual licence.
- [3] By application filed on 8th November 2011 (with affidavit in support) the Claimant applied to the Court to strike out the Defence and Counterclaim and to enter judgment for the Claimant on the grounds that – (1) the Defence does not disclose any defence known to law, (2) the Counterclaim does not disclose any reasonable ground for bringing the claim and (3) the matter can be dealt with summarily.
- [4] When the case before the Court on 11th November 2011, leave was given to the Defendant to file and serve any affidavit(s) in response to the Claimant's application on or before 2nd December 2011 and to the Claimant to file and serve any affidavit(s) in reply on or before 23rd December 2011.
- [5] On 7th December 2011, five days after the stipulated deadline, the Defendant filed an affidavit in response to the Claimant's application of 8th November 2011. No affidavit in reply was filed by the Claimant.
- [6] The Claimant's application came up for hearing in Chambers on 28th February 2012 and oral submissions were made by Counsel on behalf of the parties.

[7] Ms. E. Deniscia Thomas, appearing on behalf of the Claimant, argued that the Defence and Counterclaim are based on the allegation by the Defendant that she was a contractual licensee of the Deceased (Selvin Harrigan, also known as Seldon Theophilus Harrigan) but that a contractual licence arises only when there is a contract between the licensor and the licensee and the licence is a provision of the contract. She argued, however, that there is no evidence to support the existence of such a contract in this case, that there is no evidence of any consideration or of any agreement intended to be binding, and that the only evidence is the evidence of an alleged discussion between a man and woman involved in an intimate relationship which (even if proved) would not bind the Estate.

[8] Ms. Thomas submitted that the Counterclaim fails on the same basis as the Defence. She further submitted that any licence which the Defendant had to remain on the land was a bare license which ended with the death of the Deceased and that the Defendant was also given notice to quit the land after the death of the Deceased.

[9] Mr. Hugh Marshall Jr., appearing on behalf of the Defendant, argued that the test to be met is that the Defence has no reasonable prospect of success and that this is not the case here. He submitted that it is clearly pleaded in paragraph 10 of the Defence that the Defendant is an individual in actual possession and has an overriding interest by reason of section 28 (g) of **the Registered Land Act**¹. He submitted that the overriding interest of which the Defendant speaks is that of contractual licence, as pleaded in paragraph 8 of the Defence. He argued that one must look at the circumstances to see what the licence was and that, according to paragraph 9 of the Defence, the Defendant's licence was for her life and it remains a matter of evidence for the Court

¹Cap 374 of the Laws of Antigua and Barbuda Revised Edition 1992

to make a determination on that issue. He argued that the averment that the Defendant was to be allowed to remain on the property for life stands unchallenged and the Court must act on the pleadings before it. Mr. Marshall cited the case of **Patel v Patel** (decided by the English Court of Appeal in 1983) in support of his submission that the onus of proving that a contractual license was not in fact that which it says it is, is not upon the person asserting the contractual license but upon the landowner.

[10] Mr. Marshall also submitted that the Claimant had not met the required test for striking out of a defence and that this case ought to go to trial for the determination (on the facts) of the nature of the Defendant's licence.

[11] Following the submissions by Counsel, the parties were ordered to file authorities in support of their submissions by 2nd March 2012, which both parties duly complied with.

[12] On the basis of the statements of case of the parties (the Fixed Date Claim Form, the Statement of Claim and the Defence and Counterclaim) this case concerns the occupation by the Defendant of property owned by the Claimant, which occupation the Claimant purported to terminate by the revocation of what the Claimant contends is a bare licence, but the termination of which the Defendant resists on the basis that her occupation of the property is as a contractual licensee entitled to possession of the property for the remainder of her life.

[13] The Claimant has made an application to strike out the Defendant's Defence and Counterclaim and to enter judgment for the Claimant on his claim. Of course, if the application is decided in favour of the Claimant, it follows that judgment in the case will be entered for the Claimant as per his

statements of case and the case will come to an end. If however the application is decided in favour of the Defendant, then the case will continue to trial.

[14] As submitted by Learned Counsel for the Defendant, in order to determine the application in the Claimant's favour, the Court must be satisfied (on a balance of probability) that the Defendant's Defence has no reasonable prospect of success.

[15] The Defendant's defence is that she was the live-in girlfriend of the Deceased and that, after living with the Deceased off and on at his home in Bendals, the Deceased asked her to relocate permanently to his home (along with her children) and advised her that she could reside on the land for life. She averred that on that promise (presumably the promise implied in his advising her that she could reside on the land for life) she gave up her house in Potters and her job and relocated (with her three children) to Bendals to live with the Deceased. The Defendant averred that thereafter (presumably after she had relocated to Bendals to live with the Deceased) she became a contractual licensee of the Deceased.

[16] Having thus built a defence based on her being a contractual licensee of the Deceased, the Defendant then set up a promissory estoppel based on her moving (presumably from her home in Potters to the Deceased's home in Bendals) to her detriment, in reliance on the Deceased's promise that she could reside on the land for life; then came an overriding interest subsisting (under section 28 (g) of **the Registered Land Act¹**) by virtue of her actual occupation of the land. By her counterclaim, however, the contractual licence had re-emerged as the foundation of the Defendant's case.

- [17] The first authority cited by the Defendant in her list of authorities is a statutory one – section 28 (g) of **the Registered Land Act**¹. Section 28 of the Act provides that “all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same” – “(g) the rights of a person in actual occupation of land”.
- [18] The second authority cited by the Defendant is a textbook authority – Kevin Gray's Elements of Land Law. At page 541 of the text, the author states the following - “A contractual licence comprises a permission to be present on land which derives its force from some contract express or implied. It differs from the bare licence in that it is not granted gratuitously but is founded upon valuable consideration moving from the licensee.”
- [19] The third authority cited by the Defendant is Volume 27 (1) of Halsbury's Laws of England 4th Edition. It is stated at paragraph 10 of Volume 27 (1) that – “A gratuitous licence is revocable by notice at any time, and is revoked by the death of either party”. Paragraph 10 also provides that – “Where a licence is granted by contract, the resulting right to occupy land is usually described as a ‘contractual licence’, but it is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract.” Paragraph 10 provides also that – “In order to establish a contractual licence there must be a promise which is intending to be binding and is either supported by consideration, or is intended to be acted upon and is in fact acted upon.” It is also provided in paragraph 10 that – “Since a licence does not create an interest in land, it is not binding upon a successor in title of the original grantor unless the circumstances are such as to give rise to a constructive trust.”

- [20] The final authority cited by the Defendant is the English Court of Appeal case of **Tanner v Tanner**². The facts of that case were that the defendant (a woman) had been induced by the claimant (a man with whom she had an intimate relationship) to give up her rented accommodation and to move in (along with their two children) to a house purchased by him; that some time after she had done so, the claimant formed a liason with another woman whom he subsequently married; and that afterwards he gave notice to the defendant to vacate the house so that he could move into it with his new wife.
- [21] In a judgment delivered by Lord Denning, with which the other two judges agreed, the Court of Appeal decided that although there was no express contract to that effect, the circumstances of the case were such that the court should imply a contract by virtue of which the defendant had a contractual licence to have accommodation in the house for herself and the two children so long as the children were of school age and the accommodation was reasonably required for her and the children.
- [22] The only authority cited and provided by the Claimant, is the case of **Winter v Richardson**³, decided by the Court of Appeal of the Eastern Caribbean Supreme Court on appeal from the High Court in Antigua and Barbuda.
- [23] In that case, the Court of Appeal held that the rights of a person in actual occupation under section 28 (g) of **the Registered Land Act**¹ are not protected as an overriding interest where that person is a bare or gratuitous licensee and that a bare or gratuitous licence is revoked by the death of either the licensee or the licensor.

²[1975] 3 ALL ER 776

³High Court Civil Appeal No.2006 /025

[24] The thrust of the submission of Learned Counsel for the Claimant is that there is no evidence to support the averment in the Defence that the Defendant was a contractual licensee of the Deceased. In particular, she submitted, there is no evidence of a contract between the Defendant and the Deceased in the form of an agreement intended to be binding and for which there was consideration. It is apparent from the pleadings, the submissions and the authorities cited, however, that this case cannot be concluded at this juncture. If on the evidence (at trial) the Defendant establishes (on a balance of probability) that the circumstances of the case are such as to enable the Court either to piece together a binding agreement between the Defendant and the Deceased or that the circumstances are such as to incline the Court to infer the existence of an implied contract between them (as was done by the English Court of Appeal in **Tanner v Tanner**²) then the Defendant's Defence would at least have a reasonable prospect of success. It would also appear that if the Defendant succeeds in establishing that she does have a contractual licence to occupy the property, her rights as a person in actual occupation of the land would be protected as an overriding interest under section 28 (g) of the **Registered Land Act**¹.

[25] If the submission of Learned Counsel for the Claimant was made at the conclusion of the trial of the case and there was then no evidence or no credible evidence to support the averment in the Defence that the Defendant was a contractual licensee of the Deceased and, in particular, that there was then no or no credible evidence of a contract – express or implied – by virtue of which the Defendant acquired a contractual licence, then there would be no difficulty in upholding the submission and in giving judgment in favour of the Claimant, based on the absence of any or any credible evidence to support an averment of the Defendant having a contractual licence to occupy the property for the remainder of her life. But Learned Counsel's submission has been made in support of an application filed even before the close of the pleadings – the Claimant not having

replied as yet to the Defence or defended the Counterclaim - so the Court cannot know at this juncture what if any evidence the Defendant has to support her averment that she is a contractual licensee.

[26] In these circumstances, the Claimant's application to strike out the Defendant's Defence (and the Counterclaim which stands or falls with the Defence) is hereby dismissed.

[27] The Court will decline to make an award of costs on the application and will treat the hearing of the application as the case management conference and make the following case management orders:

1. The Claimant shall file and serve a Reply to the Defendant's Defence and a Defence to the Defendant's Counterclaim on or before 18th April 2012.
2. Standard disclosure by the parties on or before 2nd May 2012.
3. Leave is given to the Claimant and the Defendant to call 3 witnesses each.
4. Witness statements to be filed and served by the parties on or before 16th May 2012.
5. Witness statements shall stand as the evidence in chief of the makers of the witness statements.
6. Witnesses to attend court to be cross examined unless specifically exempted in writing from so doing by the adverse party.
7. Listing questionnaires to be filed by the parties on or before 30th May 2012.
8. Pre-Trial Memoranda to be filed by the parties on or before 13th June 2012.
9. Pre-Trial Review is set for 22nd June 2012.
10. Trial date to be fixed by the Court office for the month of July 2012.



Mario Michel
High Court Judge