

THE EASTERN CARIBBEAN SUPREME COURT
SAINT KITTS AND NEVIS

THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHMT2007/0073

BETWEEN:

CHARMAINE WARNER nee PEMBERTON

Applicant

And

JAMES ELVETT WARNER

Respondent

Appearances:

Ms Marsha Henderson for the Applicant
Ms Teshari John for the Respondent

2012: July 20
2013: January 15

DECISION

[1] **THOMAS J (Ag):** The matter on which a decision is to be given relates to an application by Charmaine Warner for the following:

1. that the respondent be ordered to pay rents in relation to the property occupied by him and situate at Bird Rock, St. Kitts for the period during which the same was exclusively occupied by the respondent subsequent to the judgment of Belle J to wit the month of March 2010 to present;
2. that the respondent be ordered to pay the costs of this application.

[2] The grounds relied upon are as follows:

"(a) His Lordship Belle J on the 26th February, 2010 made several orders regarding the determination of interest in [the] matrimonial home situate at Bird Rock, St. Kitts.

- (b) His Lordship ordered that the applicant and the respondent are joint owners of the said property in equal shares. His Lordship also made further orders regarding the transferring of beneficial interest of the respective parties, and/or an order for the sale of the said property.
- (c) That subsequent to the making of the said order by His Lordship, the respondent continued to exclusively occupy the said property with the applicant having to rent other accommodation.
- (d) That an Order for sale of the said property was made by this Honourable Court on the 10th day of February, 2012.
- (e) That the Applicant wishes that until such time of the sale of the property that the Respondent pays rent for his accommodation of the property”.

Affidavit in Support

- [3] In her affidavit in support filed on 27th February 2012 the applicant contends that: “the area occupied by the respondent, being the main house would attract a higher rental income than the area which is currently being rented in the sum of EC\$3,070.00”
- [4] The applicant goes on to depose the following at paragraph 5 of her said affidavit:

“I am advised and verily believe that the Respondent living area of the property should be valued and considered together with the rented area. I believe that it would be fair and equitable that a rental value of the entire property be calculated at the sum of EC\$8000.00 and the sum be equally shared”.
- [5] It is further deposed by the applicant that the area of the matrimonial home occupied by the respondent “consists of three bedrooms fully on the upper floor”. And according to her, she has no access to the “apartment”.
- [6] In terms of the payment of rent the applicant contends at paragraph 11 of her affidavit that on previous occasions she has requested the respondent to pay rent for the area of the matrimonial home which he occupies but has refused or neglected to do so.
- [7] In all the circumstances the applicant is asking the court to order the respondent to pay rent in the amount of \$2500.00 per month until such time as the property is sold and also for the period during which the respondent occupied the portion of the house in issue.
- [8] In further evidence at the hearing the applicant indicated that her reason for making the application is because she left the matrimonial home in 2007 and went on to testify that she left the

matrimonial home for her own safety before 5th April 2007, and that this was not the only time she left, having left four times before.

[9] The applicant gave detailed evidence concerning her conversations with the respondent after she had left the home and the changing of the locks to the said home and her attempts to gain access to thereafter.

[10] With respect to the rental value the applicant said but she manages houses and has an idea of rental costs plus ideas in this regard from other persons.

[11] In cross examination by learned counsel for the respondent, Ms. Teshari John, the applicant said that her claim for the period commencing in February 2010.

[12] It is also the applicant's evidence that after she left the home there was contact with the respondent and maintenance that after 5th April 2007 she did go back to the matrimonial home.

[13] Regarding the keys to the home, the applicant testified that the respondent said the keys were on the table and that when she went to collect same there were not given to her.

[14] In further evidence concerning her departure from the matrimonial home, the applicant testified thus:

"On 5th April 2007 when I left the matrimonial home the respondent never told me that I should not return. I did leave the matrimonial home before but I did not leave the island. We were in touch. He asked me to come back home. He also asked me what was the problem. I left the matrimonial home in July 2002, March 2003, December 2004, and June 2005. I would stay two weeks".

[15] The applicant went on to testify that when she left she did not tell the respondent she was leaving. She added this: "when I left the island on 5th April 2007 I told the respondent where I was I was in Antigua".

[16] As to the reason for leaving, the applicant re-stated that she did this for her safety. And she went on to say that she never made a report to the police in this regard and that she was never taken to the hospital as a result of injuries from Mr. Warner. Further, that she never sought legal intervention against the respondent; but that she did complain to her father.

Affidavit in response and opposition

- [17] In his affidavit in response and opposition, the respondent says that contrary to the applicant's contention, he was only in sole occupation of the matrimonial home since 5th April 2007 when the applicant left the matrimonial home without his knowledge.
- [18] At paragraph 12 and 13 of his said affidavit the respondent outlines the composition of the matrimonial home in terms of living spaces and he acknowledges that one apartment downstairs generates income of \$3070.00 per month.
- [19] In terms of the location of the applicant, the respondent says that he does not know where she lives and has no contact information for her. On the other hand, he deposes that he continued to live at the matrimonial home and the applicant knows how to contact him.
- [20] At paragraph 15 of his said affidavit the respondent addresses the question of demands on him by the respondent concerning expenditure on the property without her consent. He continues in this way " . . . [s]ince the Applicant left the matrimonial home in April 2007 she has shown no interest in the property. She has never contacted me after or before a hurricane season or after the passage of hurricane to inquire as to the condition of the property".
- [21] As to the specific issue of rent to be paid by him, the respondent casts doubt on the basis for the prayer given the history of the matter, the relationship and the various attorneys who acted on her behalf "before now".
- [22] After various statements on the quantum of the rent being sought and its implications in financial terms, the applicant restated his opposition to the payment of rent retroactively.
- [23] In further evidence at the hearing of the application the respondent testified that the applicant left the matrimonial home without any confusion or troubles. The respondent also gave further evidence of his kind treatment of the applicant over the years of the marriage and his medical condition on and after April 2007 and his treatment by his medical practitioner.
- [24] It is the respondent's evidence under cross-examination that the applicant left the matrimonial home four times, and he denied that he was not loving to her or that he had done anything to cause her to be fearful for her safety. He went on to testify that the applicant was relating to a

senior police officer in Antigua. The respondent also agreed that he was saying this for the first time.

[25] When it was put to the respondent that he had promised to do better, he denied that he said this and went on to testify that he was doing anything wrong to warrant such a promise.

[26] With respect to the changing of the locks on the matrimonial home. The respondent admitted that this was done in May 2007 due to his concern for his safety. He testified further that he informed in September that the keys were at the home; but denied that the applicant told him that the key she had for the garage did not work.

[27] Finally, on this regard the respondent testified that in March 2010 the applicant did not ask for the keys and further that she came to the house but did not take the keys.

[28] In so far as applicant's living accommodation is concerned the respondent testified that he does not know where she lives and added that he does not believe she is paying rent. He later said that he did not agree that she was paying rent somewhere else.

[29] On the matter of the rental value of the portion of the house occupied by the respondent, he said that he did not agree that it could generate \$6000.00 per month and also denied that he has the means to pay \$3000.00 per month rental.

ISSUES

[30] The following are the issues for determination¹

1. Whether the matter of occupational rent sought by the applicant against the respondent is property before the court.
2. Whether the respondent is liable to pay occupational rent with respect to the matrimonial home occupied solely by him.
3. Whether the respondent should be ordered to pay the costs of the application.

¹ On 20th July 2012 the court ordered that closing submissions must be filed and exchanged on or before 20th August 2012. To date no such submissions were filed on behalf of the applicant.

ISSUE NO. 1

Whether the matter of occupational rent sought by the applicant against the respondent is properly before the court

Precursor

[31] The precursor to the current application with respect to the matrimonial home is a summons, filed on 31st July 2009, seeking an order for the determination of property interests. The property in issue is situated at Bird Rock, Basseterre. The order sought on the summons were to be in the following terms:

- “(i) that the applicant be given full legal right to title to the matrimonial home situate at Bird Rock after payment to the respondent such sum or sums as the court finds to be the respondent’s interest in the matrimonial home.
- (ii) That the applicant be awarded 75% of the market value of the land on which the matrimonial home was built.
- (iii) Or in the alternative that the matrimonial home be sold and the applicant be awarded 75% of the market value of the land and the respondent 25% and that the parties to receive half of the value of the matrimonial home.
- (iv) That the respondent gives the applicant a full account of the rental proceeds received by him from April 2007 to the date of the final determination.
- (v) That the respondent pays to the applicant half of the monies received from the rental of the apartments.
- (vi) That the applicant be given sole right and possession of the items of furniture by her late father, Eason Pemberton.
- (vii) That the remaining furniture, appliances and household effects be valued and the respondent pays to the applicant half of the said value.

(viii) That both vehicles PA507 and P5977 be valued and the respondent pay to the applicant half of the said value of in the alternative that both vehicles be sold and the proceeds of sale be divided equally between the respondent and the applicant”.

[32] It is fair and accurate to say that both in the application and in the supporting affidavit the applicant's main concern, as far as the matrimonial home is concerned, was on the value of the property, for purposes of division, and the income derived from the rental of the two apartments.

[33] In submissions filed on behalf of the then claimant, in the application for the determination of property interest the following is contained:

“Damages – the claimant was dispossessed of the matrimonial property by the respondent who unlawfully and maliciously locked her one of the matrimonial home and continues to the present day to refuse her access to the said house. The respondent continues to the present day to refuse her access to the said house. The respondent continues to do so in total disregard and defiance of the legal advice given to him. In light of the foregoing the respondent ought to pay compensation to the claimant for wrongfully and unlawfully locking her out of the matrimonial home for in excess of two (2) years and depriving her of the enjoyment of the same. In the case of *Dennis v McDonald* [1981] CA 63 it was held that: ‘A tenant in common, who has been excluded from occupation of the property by the other was entitled to compensation . . .’. It is the law that one co-owner of property who has exclusive possession of the property must account for the occupation rent for using the other's share in the house. It is a recognized principle of law that a co-owner who has the use of the other's share of the property should pay an occupation rent for it”.

[34] His Lordship Mr. Justice Francis Belle in rendering his judgment ruled, *inter alia*, on the property interests. He also ruled against issue of damages raised in the submissions on behalf of the claimant. This is His Lordship's reasoning:

“25. It is not proper for the Petitioner to raise the issue of damages at this stage of the proceeding, this claim takes everyone by surprise even if it is not surprising that it has been raised. I have already noted that in this case the pleadings were presented in a very long-winded manner. I will not allow them to be further complicated by a new issue of damages being raised at the eleventh hour. The parties are living separate and apart. The Respondent has explained his reasons for changing the locks for the sake of his own security in the home. It is probably in the best interest of both parties that one cannot enter the home without the permission of the other. It is only reasonable that having left the matrimonial home the Petitioner should give notice of any intention to return. This is common courtesy in the circumstances and no damages will be awarded pursuant to this claim”.

Submissions

[35] As noted before, no submissions were filed on behalf of the applicant. However, in relation to what is identified or characterized as the "Technicalities of the Application itself" the following submission are tendered on behalf of the respondent:

"There are fatal flaws, we submit, in the words of the Application itself.

- (i) The Applicant has not stated the jurisdiction or legal basis on which the Application is based.
- (ii) The five statements set out as 'grounds' or reasons for the
 - Application in items (a) – (d) are merely statements of bald facts which do not support the principle of the Application. Item (e) is not a ground or reason that supports the granting of the Application. The purpose of grounds in an application, use to say, is to indicate to the party against whom the relief is the basis of the application. The Court ought also be pointed to the issues that support the relief sought indicating an arguable position to begin consideration. We submit that these grounds do not disclose the basis of the principle [or] principle upon which occupation rent is based".

Reasoning

[36] In her affidavit in support of the application being considered the applicant deposes as follows at paragraph 2: "I make this application further to the judgment of His Lordship Honourable Justice Francis Belle made on the 26th day of February, 2010 in relation to orders made regarding the determination of interest in the matrimonial home situate at Bird Rock, St. Kitts".

[37] This suggests that the learned judge laid down some basis upon which this application may be grounded given the subject matter involved. But did he?

[38] The learned judge's criticisms of the application for damages taking everyone by surprise and the refusal to award damages have already been noted.

[39] In summary the learned judge's order at paragraph 28 of the judgment contained declarations and orders concerning the legal inseparability of the land comprised in lot C22 Bird Rock Residential and Commercial Development and building thereon, sale of the property with each taking one half of the market value, refusal to declare ownership of Lot C14, a refusal to award damages to be paid by the respondent to the petitioner for excluding the petitioner from the matrimonial home, respondent to give dull account of the rental income by the date specified and no order as to costs.

[40] It is therefore clear to this court that Justice Belle's order is devoid of any basis upon which this application can be grounded. This is in fact one of the submissions on behalf of the respondent.

[41] There exists a principle of great antiquity. It is variously articulated in the learning. Typical is the following in **Civil Litigation**² at page 145:

"Pleadings are the formal documents by which the parties state their cases. The trial is said to be 'on the pleadings'. This means that the pleadings show all the matters which have to be argued before and determined by the trial court. Listing all of the parties' claim and defences achieves several useful objects. Pleadings inform both or all sides of the nature of the case bring alleged against them and so enable them to prepare properly for trial (*Farrell v Secretary of State for Defence* [1980] 1WLR 172 HL). Pleadings disclose to the trial court the topics, upon which the parties are seeking its decision. Ultimately pleadings provide a permanent record of all matters involved in the action and thereby prevent further action between the same parties. The consequence of saying that trial is 'on the pleadings' is that trial is limited by the pleadings. If any party omits to plead a matter he will be prevented from raising at the trial (*Brunning v Oldhams* (1987) 75 LT 602). If he pleads a matter too narrowly he will be prevented from relying on evidence tending to prove a wider allegation (*Esso v Southport* [1956] AC 218)"

[42] The foregoing makes Justice Belle's ruling pellucid in refusing damages at the "eleventh hour".

[43] Therefore, in terms of the pleadings the matter of occupational rent should have been raised in the pleadings relating to property rights but neither the question of damages nor occupational rent was raised. That ends the litigation between the parties on the issue of the matrimonial home.

[44] In the **Metropolitan Bank Ltd v Pooley**³ Earl of Selbourne LC said that "The power seemed to be inherent in the jurisdiction of every court to protect itself from the abuse of its own procedure. Much later in **Bhola Nandlal v The State**⁴, Sharma JA at page 15 of his judgment restated the ancient principle that "It has never been doubted that from earliest times a superior court of competent jurisdiction has always had in the exercise of its inherent jurisdiction the power to control its own proceedings and process and by this means to prevent its process from being abused".

² John O'Hare and Robert N. Hill (8th ed)

³ [1855] 49 JP 756

⁴ Criminal Appeal No. 99/1988 CA T & T. See also Halbury's Laws of England Vol. 36 at para 74

[45] Abuse of process is a term of art and has been held in **Stephenson v Garnett**⁵ to include the process of setting up in anyway a case which has already been decided by a court of competent jurisdiction.

[46] The abuse of process in this case lies in the fact that the matter of damages raised in submissions was refused and almost two years later another application is filed seeking to have the respondent pay money for occupational rent ostensibly in furtherance of the judgment of Justice Belle's judgment of 26th February, 2010. This lacks legal sustainability.

[47] Having regard to all the foregoing this court agrees with submission on behalf of the respondent and as such the application is dismissed on ground that there is no jurisdictional basis for filing the said application.

ISSUE NO. 2

[48] In view of the ruling on Issue No 1 there is no basis upon which the question of occupational rent can be properly considered by the Court.

ISSUE NO. 3

[49] Given the nature and circumstances of the application, the Court determines that the applicant must pay the respondent costs in the amount of \$2000.00.

ORDER

[50] **IT IS HEREBY ORDERED** as follows:

1. The application filed by the applicant on 27th February 2012 is dismissed on the ground that there is no jurisdictional basis for filing the application.
2. The applicant must pay the respondent \$2000.00 in costs.

**Errol L Thomas
High Court Judge (Ag)**

⁵ [1898] 1 Q.B. 877