

SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 of 1990

BETWEEN:

JEMIMA BACCHUS - Appellant
and
DEFREITAS INVESTMENTS
HOLDINGS - Plaintiff/Respondent
and
CREIGHTON BACCHUS - Third Party/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron

Appearances: O.R. Sylvester, O.C., for the Appellant
Kenneth John for Plaintiff/Respondent
Ronald Jack for the Third Party/Respondent

1990: Dec. 12, 13,
1991: Mar. 25.

JUDGMENT

BYRON, J.A.

This appeal is against a judgment of Singh J. whereby the appellant was ordered to deliver up possession of the matrimonial home to the plaintiff/respondent and to pay mesne profits to the said respondent and the third party/respondent. The Court also ordered the rectification of Deed of Conveyance No. 1067/86.

The appellant and the third party/~~respondent~~ were divorced from each other in 1979 and their respective interests in their matrimonial home were determined by an Order in this Court in appeal No. 5/77 to be 2/3 to the third party and 1/2 to the appellant. Pursuant to an order made by Renwick J. the home was sold by public auction and following the said sale the third party conveyed the home to the plaintiff/respondent by the Deed No. 1067/86. The appellant thereafter remained in possession of the said home.

The appellant advanced many arguments in support of the appeal. I think that without doing any injustice to the eloquence of Counsel they can be briefly summarised as follows:

/1. That the....

1. That the auction sale was invalid because
 - (a) it took place on a date earlier than that authorised by the Court Order;
 - (b) the procedures laid down by Order 31 of the Rules of the Supreme Court were contravened;
2. That if the sale was legal it was not a bona fide purchase for value without notice of the the appellant's prior equity in the property derived from
 - (a) an option conferred by the Court Order;
 - (b) an agreement for sale made between the appellant and the third party/respondent prior to the auction sale.
3. That the plaintiff/respondent was not a competent party to obtain an order for possession against the appellant on the basis of the Deed of Conveyance because
 - (a) the plaintiff/respondent was not a party to the auction sale although wrongly so described in the Deed;
 - (b) the appellant, as a 1/3 owner was not made a party the Deed;
 - (c) any interest conveyed by the third party/respondent to the plaintiff/respondent was subject to the equities of the appellant and the purchaser at the auction sale.

I should mention that the record of appeal contained allegations by the appellant relating to bias on the part of the trial Judge and the unfairness of the trial. At the hearing of the appeal these allegations were mentioned only in passing and I do not consider that what was said requires any comment. More importantly the appellant has not challenged the material findings of fact made by the trial Judge but has relied on arguments challenging the legal principles which were applied to them. In the circumstances it seems to me that these allegations ought to be disregarded.

The factual background commenced on 5th August, 1953 when the third party/respondent and the appellant married each other. The marriage produced seven (7) children. On 27th June, 1967 by an Indenture Conveyance No. 1227/1967 Elaine Nanton conveyed the matrimonial home to the third party. In 1979 the parties were divorced.

/Their proprietary.....

Their proprietary rights in the matrimonial home were settled by an Order of the Court of appeal in Civil Appeal No. 5/1977 which granted the third party/respondent 2/3 interest and the appellant 1/3 interest together with the right of occupation rent free by the appellant until the last child attained the age of 19 years or left school, and ordered that thereafter the property was to be sold.

On 29th January, 1982 Renwick J, on the application of the third party/respondent ordered:

- (a) That the property be put up for sale by public auction with a valuation of \$119,969.00 ~~being the~~ reserve price.
- (b) That the Third Party be given the conduct of the sale.
- (c) That the parties must agree on a suitable auctioneer.
- (d) That both parties be given the option to purchase the property.

The trial Judge found as a fact that around 4th April, 1982, the appellant and the third party orally agreed that the appellant would purchase the third party/respondent's 2/3 interest in the matrimonial home, with the valuation of the property at \$190,000.00, and that it was a term of their agreement that she was to pay the purchase price by the end of April, 1982 but that she was unable to raise the money by the deadline of 30th April, 1982. He went on to state:

"The Third Party then, in my view, quite properly rescinded the contract as a result of her failure to perform and went ahead with the Order of the Court to sell."

The trial Judge also came to the conclusion that in any event the oral contract was not legally binding on, or enforceable against the Third Party/Respondent by action because he did not sign any memorandum in writing evidencing the agreement. The evidence adduced on that issue consisted of a letter written by the appellant setting out some but not all of the terms of the agreement and a prompt reply by the Third Party/Respondent pointing out to her that all of the terms of the agreement especially the one as to the time for payment were left out of the letter. The Judge concluded:

"I would therefore agree with the submission of Mr. Jack that the oral agreement of 4th April, 1982 between the defendant and the Third Party was not legally binding upon the Third Party nor was it enforceable against the Third Party by action as there was no or not sufficient evidence in writing of the said agreement to satisfy the Statute of Frauds."

/The trial.....

The trial Judge went on to find that the Third Party

"contacted Alex Hillocks to do the auction and having got the consent or agreement from the defendant over the telephone for Hillocks to be the auctioneer, after advertisement, the auction took place and the property was sold."

This sale took place on 25th June, 1982. The appellant opposed the sale in various ways. She published a notice in the press. She issued proceedings in High Court Suit 174/1982 against the Third Party seeking inter alia an injunction to restrain the auction sale from taking place. These proceedings, however, did not come on for hearing before the sale took place. On 18th March, 1985 Bertrand J. dismissed Suit 174/1982 and on 11th December, 1985 the Court of Appeal dismissed the appellant's appeal for want of prosecution.

The trial Judge also found that Counsel for the appellant and her family were at the auction sale with placards and sticks to interrupt and possibly stop the sale.

The Judge found that no directions were sought or obtained from the Court, and that the sale proceeded. There was considerable controversy at the trial about the appellant's contention that she was the highest bidder with a bid of \$238,000.00 but the trial Judge found as a fact that the final bid of \$237,000.00 came from Marcus DeFreitas and the property was sold to him. Marcus DeFreitas then and there wrote out a cheque for 10% of the purchase price and handed it to the Third Party. The Third Party and Marcus DeFreitas then arranged for the payment of the balance of the purchase price when vacant possession could be delivered and the Third Party told the appellant to leave the premises. She remained in possession.

On 30th June, 1982 she filed Suit 232/1982 against the Third Party to enforce the agreement made between them before the auction sale. This suit was never set down for trial by the appellant and it became abandoned under the Rules of the Supreme Court.

On 9th March, 1984 the Third Party obtained a judgment against the appellant in Suit No. 346/83 for mesne profits in the sum of \$15,600 for the appellant's use and occupation of the former matrimonial home for the months July 1982 to February 1984 but no order was made for the appellant to surrender her possession of the premises.

On 8th December, 1984 the Certificate of Incorporation of the Plaintiff/Respondent Company was signed by the Registrar of Companies, and the trial Judge found that the Company was thereby legally established. Counsel for the appellant argued that the Company was

/not properly....

not properly constituted and the Certificate of Incorporation should not have been issued. This argument was based on the finding of fact made by the trial Judge that when the Memorandum and Articles of Association were signed on 1st July, 1983 there were seven persons who signed in the column for subscribers but in the column for how many shares were taken, six of them entered "one" while in relation to the seventh there was no entry. It was contended by the appellant that the Company was in breach of section 4 of the Companies Act, Cap. 212 which requires seven subscribers. However section 5(5)(1) stipulates that "no subscriber shall take less than one share", and I agree with the trial Judge's conclusion that the blank space opposite the name of the seventh subscriber does not mean that he was not a subscriber or that he had taken less than one share. In my view the Registrar of Companies was entitled to sign the Certificate of Incorporation, and the Company is a legal entity.

In March, 1986 the balance of the purchase price was paid to the Third Party. On 21st March, 1986 by Indenture of Conveyance No.1067/86 the Third Party conveyed the said matrimonial home to the plaintiff/Respondent Company at the request of Marcus DeFreitas. The trial Judge found that this Deed contained the erroneous recital that the Plaintiff/Respondent Company was the purchaser by virtue of being the highest bidder at the Public Auction in 1982. The order for rectification was made to compel the correction of this recital by bringing it into conformity with the facts found in his judgment.

In support of the contention that the auction sale was invalid, Counsel argued that it took place before the last child of the family was 19 years old and was therefore contrary to the Order of the Court of Appeal in 5/1977. This argument however could not get off the ground because the entire dealings between the parties since January 1982 were conducted on the basis that the Order of Renwick J. on 29th January, 1982 was in conformity with the Order in Appeal 5/1977. The pleadings never raised that issue and when the appellant herself had been giving evidence the record revealed that she said on oath:

"The property was not to be sold until the last child became of age. Anthony was the last child. He became of age in 1981."

Counsel urged and it was conceded that there were breaches of Order 31 rule 2(2)(a) which provides:

"(2) The party entitled to prosecute the order must -

(a) leave a copy of the order at the judge's chambers with a certificate that it is a true copy of the order, and

/(b) subject.....

(b) subject to paragraph (3), take out a summons to proceed with the order."

I must agree with the trial Judge that the requirement to leave a copy of the Order with a Certificate at the Judge's Chambers is regulatory and the omission of the Third Party to do so could not invalidate the sale.

Counsel also submitted that it was the duty of the Third Party to obtain further directions from the Court as to the conduct of the sale. He referred to Order 31 rule 2(3) and (4) which read:

- "2(3) Where an order for sale contains directions with regard to effecting the sale, the party entitled to prosecute the order shall not take out a summons under paragraph (2) unless and until he requires the further directions of the Court.
- (4) On the hearing of the summons the Court may give such directions as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing words, directions - "

However Order 31 rule 2(3) makes it quite clear that it was unnecessary to obtain any further directions from the Court unless such directions were required because Renwick J's order of 29th January, 1982 contained directions with regard to effecting the sale which were not clear or sufficient. In my view it was open to anyone having conduct of the sale to consider that those directions were both adequate and clear.

Counsel also submitted that the failure of the auctioneer, or the Third Party's solicitor to send a certificate of the result of the auction to the Court meant that the highest bidder never became the purchaser. He referred to Order 31 rule 3(1) and (2) which provides -

- "3(1) If, either, the court has directed payment of the purchase money into Court, or, the Court so directs, the result of a sale by order of the Court must be certified -
 - (a) in the case of a sale by public auction, by the auctioneer who conducted the sale, and
 - (b) in any other case, by the solicitor of the party or person having the conduct of the sale;
 and the Court may require the certificate to be verified by the affidavit of the auctioneer or solicitor, as the case may be.
- (2) The solicitor of the party or person having the conduct of the sale must leave a copy of the certificate and affidavit (if any) at the Judge's Chambers and, not later than two days after doing so, file the certificate and any affidavit in the Registry."

/Although.....

Although Counsel urged this point very strenuously and referred to legal writings, this argument had to be rejected because neither the Order of Renwick J. nor any other Order of the Court directed payment of the purchase money into Court or that the result of the sale be certified.

Counsel submitted that the option to purchase referred to in the Order of Renwick J. and the agreement for sale created an interest in the matrimonial home in favour of the appellant.

The Order is not open to the construction argued. The Judge was making an order for the sale of the property by public auction with directions for the conduct of the sale. Paragraph "d" which reads: "That both parties be given the option to purchase the property" could only mean that either of them had the privilege to purchase the property. That Order did not vest any interest in either of them. The facts which the trial Judge found indicated that the appellant attempted to exercise that privilege by entering into an oral agreement with the Third Party before the auction sale and by bidding at the auction sale. That paragraph could no more have vested an interest in the appellant than in the Third Party.

The appellant would have had an equitable interest in the matrimonial home as purchaser if she had a contract to purchase it. The Judge's finding that the Third Party rescinded the contract because the appellant did not pay the purchase price within the agreed time, and that there was no written memorandum of the agreement signed by the Third Party were not challenged in this appeal. In my view the legal principles were properly applied to the facts that he found and he was justified in finding that at the time the auction took place the appellant did not have any equity or other interest in the land derived from an option or agreement to purchase the matrimonial home.

Counsel submitted that the Deed of Conveyance should not have been rectified when it wrongly recited that the plaintiff/respondent was the purchaser and highest bidder at the auction sale as the sale had not been to the plaintiff/respondent at all.

The facts which the trial Judge found were that Marcus DeFreitas was the purchaser at the auction sale in 1982, and that the recital in the Deed of Conveyance was erroneous in that it falsely alleged that the plaintiff/respondent was the purchaser being the highest bidder at the said sale.

/As a matter.....

As a matter of law Marcus DeFreitas was entitled to direct the issue of the conveyance to his nominee and it is not a relevant consideration what was his exact relationship with his nominee or the date of his nominee's incorporation unless the vendor would have been thereby prejudiced, which was not the case. See 4th Edition of Halsbury's Laws, Vol. 42, paras. 289 and 290:

Para. 289 -

"As a rule the conveyance is made to the purchaser, but, provided the vendor is not prejudiced, the purchaser can direct it to be made to a nominee, for such estate and interest, not exceeding the interest purchased, as he pleases."

And 290 -

"Where the purchaser has disposed of the land before the completion of the contract, it is usual, for the purpose of saving the expense of the second conveyance and double stamp duty, to make the assurance direct to the second purchaser."

My view therefore is that the date on which the respondent was incorporated, and the fact that Marcus DeFreitas was the purchaser at the auction sale could not affect the efficacy of the Deed of Conveyance to pass title to the respondent if the conveyance was effected, as it was, on the request of Marcus DeFreitas.

Counsel's submission that the participation of the appellant as a conveying party was essential was equally ill-founded.

The Third Party held the legal title to the matrimonial home by virtue of Deed 1227/1967 by which the property was conveyed to him by Elaine Nanton. The Court Order in Appeal 5/1977 ordered that the appellant become the beneficial owner of 1/3 interest in the said property. Her interest derived from that Court Order was an equitable one and failure to make her a party to the conveyance would not thereby invalidate its effect. See 4th Edition of Halsbury's Laws of England, Vol. 42, para. 280:

"The conveying parties on the sale of land for an estate in fee simple are determined by the principle that equitable interests are as far as possible kept off the title, and title is made to a purchaser by a conveyance of the legal estate."

And para. 285 -

"Where a sale takes place by order of the Court the persons to convey are, as a rule, the persons having the legal estate. The concurrence of persons having equitable interests only, who are parties to the action or have been served with notice of the judgment or order, is unnecessary."

/In my.....

In my judgment therefore the Third Party was competent to execute the Deed 1967/1986 in favour of the plaintiff/respondent without joining the appellant as a party to that Deed.

The purpose of recitals in a Deed is explained in 4th Edition of Halsbury's Laws of England, Vol. 42, para. 295:

"After stating the parties, the conveyance usually continues with recitals, which are intended either to explain the operation of the deed or to make evidence of matters of fact. Under the former head recitals are introduced to show the interests of the various parties, and the purpose and effect of their concurrence. In consequence however of the conveyance not disclosing, as a general rule, equitable interests, recitals are not so much required as formerly."

The effect of recitals is described in para. 296:

"A person is bound by the recitals in a deed to which he is a party, whenever they refer to specific facts and are certain, precise and unambiguous. By Statute, recitals contained in instruments more than twenty years old are prima facie evidence of the facts recited, and a purchaser must in general assume the correctness of recitals contained in abstracted documents and relating documents prior to the commencement of file."

The errors in the recitals do not have any effect in the title which the Deed conveys. There the effect is simply to cause time to give the erroneous statement, that it was the plaintiff/respondent who bid at the auction sale, a false cloak of veracity. I cannot fault the Judge for preventing this.

In 4th Edition of Halsbury's Laws of England, Vol. 32, para. 50 rectification is described as "an equitable remedy by which the Court will modify the terms of a written instrument so as to give effect to the real intention of the parties to it."

The trial Judge would not have the power to declare the sale invalid or the Deed 1967/1986 incompetent to pass the vendor's title because of the errors he found in the recitals.

The parties to the Deed have not appealed against or challenged the Order for rectification and the Court having refused to declare the sale invalid the appellant is not a party having any interest in the form of the Deed. In the circumstances I can see no justification in interfering with the Judge's Order for rectification of the Deed.

Counsel submitted that the orders for mesne profits should not commence from a date earlier than the date on which the Writ was issued.

/s/ referred.....

He referred to Elliott v Boynton (1924) 1 Ch. 236 and Thomas v Buxton (1869) 8 Eq. 120.

The headnote Thomas v Buxton (1869) 8 Eq. 120 reads:

"A purchaser of real estate upon a sale by the Court was kept out of possession for a year through the opposition of the Plaintiff in the cause, who was himself in occupation of the estate, and was ultimately let into possession by virtue of a writ of assistance issued by the Court:-

Held, that the purchaser was entitled to have paid to him out of the purchase-money in Court sums in respect of the following items: (1) The costs of obtaining the orders under which he succeeded in getting possession: (2) An occupation rent for the time during which he was kept out of possession: (3) Compensation for deterioration of the property during the same period (4) Arrears of tithes which he had been compelled to pay."

In Elliott v Boynton (1924) 1 Ch. 236, Warrington L.J. said at 250:

"Now damages by way of mesne profits are awarded in cases where the defendant has wrongfully withheld possession of the land from the Plaintiff. According to the authorities I have cited, until the determination of the lease by the writ his possession was under the lease and was not wrongful, and for this period therefore no damages could be recovered, as there was no wrong."

I do not think that these cases supported Counsel's submission. In my view the principle was adequately stated at 4th Edition Halsbury's Laws, Vol. 27, para. 255 as follows:-

"The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damages caused to him by the defendant's trespass, the landlord may recover as mesne profits the amount of the open market value of the premises for the period of the defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits, being a type of damages for trespass, can only be recovered in respect of the defendant's continued occupation after the expiration of his legal right to occupy the premises."

As I understand the principle the liability to pay mesne profits arises from the time that the person in occupation of the premises becomes a trespasser.

As between the Third Party/Respondent and the appellant the Court Order declaring that the appellant was 1/3 and the Third Party/Respondent 2/3 owner of the property created a tenancy in common with provision for its severance by sale. There could be no liability in trespass

/between.....

between tenants in common. It would therefore be inappropriate for any award to be made against the appellant in favour of the Third Party for mesne profits as he could not maintain an action for trespass against her. On that basis I would hold that the order for mesne profits made in favour of the Third Party/Respondent must be set aside.

The plaintiff/respondent did not claim to be entitled to mesne profits before he completed the purchase by payment of the balance of the price and with good reason. See 4th Edition Halsbury's Laws, Vol. 42, para. 193 which states:

"The vendor's right to receive the ^{purchase} money is secured, first, by a lien upon the property, and secondly, by his right, in the absence of express stipulation as to the time for delivering possession, to retain possession until the purchase money is paid."

On 6th June, 1986 the plaintiff/respondent gave the appellant notice to quit and deliver up the premises in 6 weeks with effect from 31st July, 1986. It was open to the respondent to bring an action for possession at the expiration of the notice and the appellant's liability for mesne profits will date from 1st August, 1986.

The trial Judge based his orders for mesne profits on an estimated rental value of the premises which would be the appropriate method of computation under normal circumstances.

It was admitted that the appellant has not yet received her share of the purchase price. It must be to her commercial disadvantage to receive now, the 1982 value of her interest in the property. The trial Judge found that it was her stubbornness that caused that delay. But it was the Third Party/Respondent who had conduct of the sale, and the duty that went with it of concluding the sale and distributing its proceeds within a reasonable time. Even the plaintiff/respondent has been guilty of great delay because the balance of the purchase price was paid nearly four years after the deposit and these proceedings for possession of the property were not issued until nearly seven years had elapsed from the date of the Public Auction.

In the circumstances therefore the damages for the appellant's trespass should not be based on the commercial value of her occupation of the property.

I would vary the order for the mesne profits payable to the plaintiff/respondent for the period 1st August, 1986 to the date of

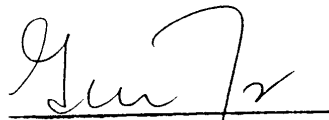
/the 25th.....

the 25th May, 1991 to the sum of \$24,000.00, and thereafter at the rate of \$2,400 per month until delivery of possession.

I would therefore make the following Order:

- (1) The appellant do deliver up to the plaintiff/respondent possession of the property held by Deed 1067 of 1986 on or before 25th May, 1991.
- (2) Vary the Order for mesne profits payable to the plaintiff/respondent to \$24,000.00 until the 25th May, 1991 and \$2,400.00 per month thereafter until possession is actually delivered.
- (3) Confirm the Order for rectification of the Deed No. 1067 of 1986.
- (4) Allow the appeal with regard to the mesne profits ordered to be paid to the Respondent/Third Party, and declare that the appellant is not liable to pay the Third Party any mesne profits.
- (5) Order that the appellant pay the costs of the Plaintiff/Respondent in this Court and in the Court below.
- (6) Order that there be no order for costs between the Third Party and the appellant in this Court or in the Court below.
- (7) The trial Judge had also ordered that the Third Party pay the 1/3 share of the appellant in the purchase price into Court after deduction of the expenses he found proved. He found that 1/3 share after expenses was \$62,375. The trial Judge also ordered that the Third Party/Respondent deduct the judgment debt of \$15,600 for mesne profits from the sum. In my view he should not have ordered that as an expense of the sale and that part of the Judge's order is set aside as not being an allowable deduction. I would therefore vary his order and direct that the Third Party pay the sum of \$62,375 into Court together with interest accrued thereon as a result of its having been deposited with a Commercial Bank, and that the Registrar pay from this sum the judgment debt of \$24,000.00 plus \$2,400.00 per month from 25th May, 1991 until possession is delivered (if applicable) and taxed costs to the plaintiff/respondent and the balance if any to the appellant.

/C.M.D.....


~~C. M. R. RYAN, C. M. R.~~ G. Moe
 Justice of Appeal


 L. L. ROBOTHAM,
 Chief Justice


~~G. C. R. MOE, C. M. R. RYAN~~
 Justice of appeal