

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2019/0064

BETWEEN:

STELLA PATRICIA FRANCIS

Claimant

AND

THE ESTATE OF ATIANA MADELINE FRANCIS (Deceased)

1st Defendant

AND

**CHRISTINA FRANCIS
(Executrix of the estate of Richard Francis)**

2nd Defendant

Appearances:-

Ms. Tamara Malcolm for the Claimant.
Mr. Jason Hamilton for the Defendants.

2021: February 22nd
May 13

DECISION

- [1] **WARD, J.:** By fixed date claim filed on 21st February, 2019, the claimant instituted proceedings seeking certain declarations and orders that: she is one of the registered proprietors as tenants in common (the other being Richard Alton Francis, deceased) with a 50% share of the Bird Rock property; that the certificate of title issued in the names of Richard Alton Francis and Atiana Madeline Francis be set aside for fraud; the first defendant has no entitlement in law or equity to the said property; that the interest of the claimant, purportedly transferred by memorandum of transfer dated 11th September, 1995 in consideration of the sum of \$EC500.00, was fraudulently effected; that the signature affixed to the said memo of transfer is not in substance or form the claimant's handwriting or signature; that any action taken by or on behalf of the

defendants in respect of the said transfer and subsequent lodging of memorandum of transfer transferring the claimant's interest in the said property was done fraudulently with the intention to deny the claimant's interest in the said property; a declaration that she continues to hold interest in the subject property along with Richard Alton Francis as tenants in common as registered proprietors of the property; that the certificate of title issued in the name of Richard and Atiana Francis be set aside for fraud; that the claimant is entitled to any and all rental sums collected from the property as of the date of death of Richard Alton Francis on September 9th, 2017 to the date of judgment; and that all items which formed part and parcel of the property is solely owned by the deceased and the claimant.

- [2] By notice of application dated and filed, the claimant seeks an interim remedy pursuant to CPR 17.1(1) (f) and (h) (iv), pending the determination of the claim. She seeks an interim order for the payment of all rents/funds collected from the lease/rental of the property into court or into an escrow account until the determination of the issues in the claim. The claimant also seeks an order that the 2nd defendant provides to the court and/or the claimant a list of all the tenants in possession of the said property at the time of hearing the application and until the determination of this matter and the amount of rental sums collected from each on a monthly basis.

Background

- [3] The claimant and Atiana Francis (deceased) are siblings. They are both daughters of the late Richard Alton Francis. Christina Francis is the wife of the deceased. She is the claimant's step-mother and biological mother of Atiana. She is executor of the estate of Richard Francis and intended administrator of the estate of Atiana.
- [4] The claimant contends that she and her father were registered proprietors as tenants in common of the property situated at 264 Hummingbird Circle, Bird Rock. This property is a two storey structure comprising the family home on the top floor and a two-bedroom and one-bedroom apartment on the ground floor, which were rented out for \$US1000.00 and \$US750.00 per month respectively. The family resided in Brooklyn, New York but would occupy the top floor on visits to St. Kitts.
- [5] It is the claimant's case that in or about September, 1995, her interest in the said property was fraudulently canceled and transferred via a purported memorandum of transfer which bore a forged signature purporting to be hers. The said memorandum of transfer purported that the claimant and her father had transferred her interest in the property to him and the claimant's sister, Atiana.
- [6] The claimant also disputes a will said to have been executed by her father in 2014 in which he revoked a former will made in 2009. In the latter, he expressly disinherited the claimant and left the Bird Rock property solely to Atiana. It is the claimant's case that the 2nd defendant and/or her agents have been intermeddling

in the estate although they have not been issued a grant of probate or letters of administration and have been collecting all of the rental income derived from the property.

- [7] The 2nd defendant does not deny that the claimant and her father once owned the property as tenants in common. However, she contends that the claimant relinquished her interest and that the memorandum of transfer was executed by the claimant with full knowledge and in the presence of a Notary Public. In exchange and as compensation for the claimant transferring her interest, her father paid off the outstanding balance owing on her New York apartment. The 2nd defendant contends that the claimant was never involved in the construction of the property or with any arrangements having to do with the rental of the apartments. She further claims that the 2014 will is valid. Accordingly, the 2nd defendant contends that the claimant has no interest in the subject property and is not entitled to any rental income derived from the rental of the two apartments.
- [8] The claimant's application seeks to preserve the rental income until the claim is determined. Ms. Malcolm submits that the overriding objective of dealing with cases justly necessitates such a course. Counsel further submits that the preconditions set out in rules 17.5 and 17.6 are inapplicable since the claimant is not seeking an interim payment but merely an interim remedy.
- [9] The defendant opposes the application. Mr. Hamilton submits that the claimant has not satisfied the conditions precedent imposed by CPR 17.5 and 17.6 for the grant of such an interim remedy.

Discussion

- [10] Based on the pleadings, it is clear that at issue is whether the claimant has a beneficial interest in the subject property and would therefore be entitled to the rental income or any part generated therefrom. CPR 17.1(1) sets out a number of interim remedies which the court is empowered to grant. This is not an exhaustive list as rule 17.3 provides that the court's power to grant any particular remedy is not affected by the fact that, that remedy is not listed in paragraph (1). Rule 17.2 regulates the timing of such applications. Rule 17.3 sets out the manner in which they are to be made. Rule 17.4 contains provisions relating specifically to applications for interim injunctions and similar orders, while 17.5 regulates the general procedure relating to applications for interim payments. Rule 17.6 (1) lists the circumstances under which a court may make an interim payment. It provides:

"17.6 (1) The court may make an order for an interim payment only if -

- (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;
- (b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for judgement for any amount certified due on taking the account;

- (c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (including costs) to be assessed;
- (d) except where paragraph (3) applies¹, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs;
- (e) The following conditions are satisfied -
 - (i) the claimant is seeking an order for possession of land (whether or not any other order is being sought) and
 - (ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession is pending."

[11] The only sub rule that can have any application to this case is sub rule (d).

[12] However, the claimant's application is grounded in rule 17. 1(1) (f) and (h) (iv). These rules provide:

"The court may grant interim remedies including -

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) an order for a specified fund to be paid into court or otherwise secured where there is a dispute over a party's right to the fund;
- (g) . . .
- (h) An order for the ...

(iv) payment of income from relevant property until a claim is decided."

[13] For the purpose of rule 17. 1. (1) (f) the meaning of "specified fund" must be ascertained as this bears on the question whether the rental income generated on a monthly basis falls within the rubric of specified fund. If not, the court would lack jurisdiction to act under this limb.

[14] In **Myers v Design Inc (International) Limited**,² the court was faced with an application to set aside an order obtained by the claimant, suing as the personal representative of the late Cyril and Marjorie Rosenberg ("the Deceased"), that the defendant should pay into court the debt of £900,000 which the claimant alleged was

¹ Paragraph (3) deals with interim payments in claims for personal injuries involving two or more defendants.

² [2003] EWHC 103 (Ch)

owed to her by the defendant. The order was made on the claimants without notice of application and was made pursuant to CPR 25.1 (1)(l), which is in identical terms to rule 17.1 (1) (f). The court had to construe the meaning of the term “specified fund” in the context of CPR 25.1 (1) (l) to determine whether the debt was a specified fund within the meaning of the rule.

- [15] Lightman, J cited with approval the two distinct meanings of the word “fund” articulated by Lord Greene MR in **Allchin v. Coulthard**³ at p.234:

“The word ‘fund’ may mean actual cash resources of a particular kind (e.g. money in a drawer or a bank), or it may be a mere accountancy expression used to describe a particular category which a person uses in making up his accounts. The words ‘payment out of’ when used in connection with the word ‘fund’ in its first meaning connote actual payment e.g. by taking the money out of the drawer or drawing a cheque on the bank. When used in connection with the word ‘fund’ in its second meaning they connote that, for the purposes of the account in which the fund finds a place, the payment is debited to that fund, an operation which of course has no relation to the actual method of payment or the particular cash resources out of which the payment is made... A fund in the second category is merely an accountancy category. It has a real existence in that sense, but not in the sense that a real payment can be made out of it as distinct from being debited to it.”

- [16] The learned judge went on to consider the meaning of the term in the context of the Rule and held:

“The provisions of the Rule require as conditions for exercise of the jurisdiction to make the order that at the date of the order (1) the person against whom the order is to be made has legal title to or is in possession or control of an actual identifiable fund, colloquially the fund must be in his hands; (2) there is a dispute as to a party’s proprietary entitlement to or interest in the fund; (3) the circumstances are such that the fund should be secured by payment into court or in some other way. The requirement that the person against whom the order is to be made should be the legal owner or in possession or control of the specified fund is implicit in the form of relief: the mandatory order could not be made unless it could be complied with. The reference in the Rule to the party’s right to the fund connotes the existence of a proprietary right or interest in the fund.”

- [17] This formulation of the concept or meaning of “specified fund” commends itself to me and I respectfully adopt it and apply it to CPR 17.1 (1) (f). The case is also helpful for articulating the conditions that must be satisfied before the court may be moved to grant an order under this rule. In my view, upon a proper construction, rule 17.1 (1) (f) does not avail the claimant. There is no sense in which the rental income derived from the

³ [1942] 2KB 228

apartments can be said to constitute a specified fund within the meaning of the rule. Indeed, the 2nd defendant asserts that, during his lifetime, the deceased remitted the rental income to his US bank account and applied it to Atiana's education. No evidence has been led that since his death in 2017, such income is in the hands of the defendant or in a specific account. The assertion is that the 2nd defendant is intermeddling in the estate and that she and/or her agents collect the rent for their benefit. This evidence does not establish that there is a specified fund within the meaning of the rule.

- [18] That leaves for consideration rule 17.1 (1) (h) (iv) which relates to payment of income from relevant property. Relevant property means "property which is the subject of a claim or in relation to which any question may arise on a claim." What factors should the court consider when met with an application under this rule for the payment of rental income to the claimant.?
- [19] Mr. Hamilton submits they are the same considerations that are set out under rule 17.6. Ms. Malcolm submits that the defendant's objections are misconceived and that rules 17.5 and 17.6 do not apply because what the claimant seeks is an interim remedy under 17.1; not an interim payment under 17.6. She contends that while an interim payment order is an interim order, an interim order is not always an interim payment. The sums which the claimant seeks to have paid into court do not represent sums on account of damages or costs to be determined in the matter.
- [20] While Ms. Malcolm is right to say that not all interim orders take the form of an order for interim payment, the interim remedy specifically sought in this case involves the payment of money into court or into an escrow account pending the determination of the claim. Ms. Malcolm argues that the conditions that must be satisfied under rule 17.6 have no application where the application is grounded in rule 17.1 (1) (f) or (h) (iv). Apart from invoking the overriding objective, Ms. Malcolm has not advanced any principles that should govern the exercise of the court's discretion to grant an interim remedy sought under rule 17.1.
- [21] In my view, such orders are not simply to be had for the asking. The court must exercise its discretion judicially. While consideration must undoubtedly be given to the overriding objective, factors such as the prospects of success on the claim must be relevant. Given that the substance of the interim remedy sought by the claimant is a payment into court of a sum of money for which the defendants may be held liable, I can discern no reason why the principles derived from cases that considered the provisions relating to interim payments under rule 17.6 should be irrelevant.
- [22] In that light, the court is required to be satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant. It has been held that the court must be satisfied that the claimant would

obtain judgment based on more than the making out of a prima facie case and that the interim payment procedure is ill suited to cases involving serious disputes of fact (see **Joseph Pinder v Trishell Wetherill**⁴).

[23] The facts in this case are vigorously contested and the issues are said by the claimant in her affidavit in support of the application to be complex (see para 15). The defendants contend that the claimant has no interest whatsoever in the subject property as she voluntarily relinquished her interest in the property in exchange for the deceased paying off the mortgagee on her New York apartment. Based on the affidavit evidence, it cannot be said at this stage, in the absence of cross-examination, that the claimant can satisfy the burden, on the balance of probabilities, that she would obtain Judgment. Further, while the claimant seeks an order for payment of all rental income into court, I note that her claim is that she is entitled to a 50% beneficial interest in the subject property. This means that if she were to prevail on the claim, any declaration regarding her entitlement to rental income will relate only to 50%.

[24] In these circumstances, I do not consider it appropriate to grant the order for the payment of rental income into court. The application for an order for the payment of rental income into court is accordingly dismissed.

[25] I will give directions for the expedited hearing of this claim.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar

⁴ HCVAP2011/041