

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

CLAIM NO. ANUHCV 2010/ 0304

BETWEEN:

HOLLIS HENRY

Claimant

AND

EVERETTE JONAS

Defendant

Appearances:

Mrs. Stacey Ann Saunders-Osbourne for the Claimant

The Defendant in person

Mrs. Denise Jonas-Parillon for Dylan Jonas (an Interested Party)

Mrs. Stacy Richards Anjo for the Eastern Caribbean Amalgamated Bank (an Interested Party)

2012: December 19

RULING

[1] **Remy J.:** By Claim Form and Statement of Claim filed on the 13th May 2010, the Claimant, Hollis Henry instituted proceedings against the Defendant, Everette Jonas, for the following:-

1. The sum of \$51,262.00 being the amount due for services rendered to the Defendant at the Defendant's request;
2. Interest pursuant to statute;
3. Such further or other relief; and
4. Costs.

[2] On 24th June 2010, the Claimant obtained Judgment in Default of Defence against the Defendant in the sum of \$52,962.00.

[3] By Notice of Application filed on 12th April 2012, the Claimant/Applicant sought an Order that:-

1. The interest of the Defendant in and to the parcels of land described in the Schedule hereto be sold by public auction to satisfy the judgment debt herein.

SCHEDULE

Registration Section	Block	Parcel
Potters & Belmont	613 1992F	43
Potters & Belmont	613 1992F	39

2. The Defendant do pay the costs of this Application.

[4] The grounds of the application were stated as follows:-

1. The Claimant obtained Judgment against the Defendant on the 24th day of June, 2010 for the sum of \$52,962.00 together with interest thereon at the rate of 5% per annum.
2. A copy of the Judgment was duly served on the Defendant on the 1st day of July, 2010.
3. The Defendant has only paid the sum of \$ 10,000.00 on the Judgment debt to date.
4. The sale of the said lands is most advantageous as it is the most effective method by which the Claimant can realize the fruits of his Judgment. Further, the Claimant has used other methods of enforcement which have not been effective in realizing a substantial liquidation of the judgment debt.

[5] An Affidavit in Support, sworn to by the Claimant on the 11th April 2012 and filed on the 12th April 2012, accompanied the Notice of Application.

[6] The matter came up for hearing on the 20th day of September 2012. At that hearing, Mrs. Denise Jonas Parillon appeared for an interested party Dylan Jonas. Mrs. Stacey Richards Anjo appeared for an interested party Eastern Caribbean Amalgamated Bank, (the Bank). They opposed the application for sale with respect to Parcel 39. The Court made an Order inter alia that:-

- a) The property recorded and registered in the Registry of Lands as Parcel 43 was to be sold by public auction:
- b) In respect of Parcel 39, the interested parties namely Mr. Dylan Jonas and the Eastern Caribbean Amalgamated Bank shall file and serve an Affidavit on or before the 28th September 2012.
- c) Hearing of the application for Order for Sale in respect of Parcel 39 is adjourned to the 4th October 2012.

[7] On 27th September 2012, Dylan Jonas filed an Affidavit in which he deposed as follows:-

- a) He is the true owner of the parcel of land registered as Parcel 39. In 2008, he took a loan from the Bank of Antigua to purchase parcel 39 from Everette Jonas, the Defendant, for the sum of \$200,000.00. He signed the transfer instrument at the office of Stacey Richards Anjo, the Attorney-at-Law for the Bank.
- b) He has been informed that due to a problem with respect to the verification of the boundaries of parcel 39, the transfer instrument has not been filed at the land registry. This is why he is not listed as the registered proprietor of parcel 39 on the land register of parcel 39.

- c) Since he has purchased parcel 39 from the Defendant since 2008, he asks that his interest in parcel 39 be protected from any form of enforcement against the Vendor, Everette Jones.

[8] On the 27th September 2012, Mr. Norris Antonio, Senior Loans Manager of the Bank, swore to an Affidavit, in which he deposed as follows:-

- i). On or about 22nd September 2006, Bank of Antigua Limited granted a loan to Dylan Jonas in the sum of \$190,000.00 for the purchase of the property, Parcel 39, owned by Everette Jonas.
- ii). On or about 22nd September 2006, Everette Jonas and Dylan Jonas executed the transfer of land Instrument and the proceeds of the sale were applied to the account of Everette Jonas.
- iii). On the 12th October 2010, Eastern Caribbean Amalgamated Bank Limited purchased and assumed certain debts, assets and liabilities of Bank of Antigua Ltd. pursuant to a Purchase and Assumption Agreement.
- iv). It has now been discovered that, through inadvertence, the above mentioned parcel and security related thereto was not included in the instructions given to counsel as the land had not yet been transferred and the interest of Bank of Antigua in relation to the loan to Dylan Jonas had not been registered.
- v). In or about January, 2012 Dylan Jonas, the rightful owner of the parcel of land (parcel 39) executed revised charge documents charging his interest in the said land to Eastern Caribbean Amalgamated Bank Limited.
- vi). They therefore assert an interest in the said parcel of land by virtue of the above.

[9] When the matter came up on the 4th October 2012, the Court made a further order:-

- (a) Counsel for the Claimant to file written submissions on or before 12th October 2012

(b) Counsel for the interested parties to file submissions in response on or before the 26th October 2012.

[10] In her Submission filed on 24th October 2012, Learned Counsel for the Claimant Mrs. Stacey Ann Saunders Osbourne contends, quite correctly, that where a registered proprietor is registered with absolute title under the Registered Land Act, Cap. 374, such a title is characterized as an indefeasible title. Counsel contends that the Defendant is the registered proprietor of parcel 39 with absolute title. She states that the provisions of the Registered Land Act, Cap. 374 should be examined in making a determination in this matter. Learned Counsel further submitted that:-

1. The Claimant/Applicant obtained Judgment against the Defendant on the 24th June, 2010 for the sum of \$52,962.00 together with interest thereon at the rate of 5% per annum and is entitled to apply for an order of sale of parcel 39 in accordance with Part 55 of the Civil Procedure Rules, 2000 and Section 4 of the Judgments Act, Cap. 227.(the Judgments Act) .
2. The Claimant/Applicant duly filed an application to register the said Judgment as a Charge in the Land Registry on the 18th April, 2012. The Registrar of Lands proceeded to register the said Judgment as a Charge as Entry No. 7 in the Incumbrances Section of the Land Register for parcel 39.
3. It is evident from paragraph 5 of the Affidavit of Norris Antonio filed on behalf of ECAB that the Charge in favour of Bank of Antigua Limited registered as Entry No.6 in the Incumbrances Section of the Land Register for Parcel 39 has been liquidated since about the 22nd September, 2006.

[11] Learned Counsel referred to Section 37(1) of the Registered Land Act, Cap. 374 which provides:

“No land, lease or charge registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be

ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land or charge."

Counsel also referred to Section 83(1) and (2) of the Registered Land Act, Cap. 374 in respect of transfers and to section 64(3) of the Registered Land Act, Cap. 374 in respect of charges.

- [12] Learned Counsel submitted that neither the Charges referred to and exhibited as "NA1" and "NA4" in the Affidavit of Norris Antonio nor the Transfer referred to and exhibited as "DJ1" in the Affidavit of Dylan Jonas can be considered as completed for the purposes of the Registered Land Act, Cap. 374. She states further that, with the Bank of Antigua Limited loan to the Defendant liquidated and the Charges and Transfer referred to above not being completed for the purposes of the registered Land Act, Cap. 374, the Claimant/Applicant's Judgment as a Charge now has first priority. Counsel contends that she is fortified in her position by the wording of section 41(1) of the Registered Land Act, Cap. 374 which provides:

"Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed: Provided that where an instrument is prepared in the registry it shall be deemed to have been presented on the date on which the application for its preparation was made to the Registrar."

- [13] It is the further submission of Learned Counsel that it is important to note that the evidence led by ECAB (the Bank) and Dylan Jonas do not support a claim for an overriding interest in Parcel 39 since they do not satisfy the provisions of section 28 of the Registered Land Act, Cap. 374. Counsel cites the St. Christopher and Nevis High Court of Justice case of Derek Ford v Registrar of Titles and Vernon S. Veira SKBHCV2009/0304 consolidated with Kenneth Kelly v Vernon Veira SKBHCV 2009/009; she submits that this case supports the Claimant/Applicant's Application for Order for Sale of Parcel 39 taking priority over the Charges and Transfer referred to in paragraph 12 above.

- [14] A Supplemental Affidavit was filed by Dylan Jonas on the 22nd November, 2012 (the Supplemental Affidavit). The Court notes in passing that this Affidavit was filed outside the period specified in the

Order dated 20th September 2012. The Court notes also that the Claimant's submissions were also filed outside the period specified in the Order dated 4th October 2012.

[15] In the Supplemental Affidavit, Dylan Jonas deposed that he has been the true owner of parcel 39 since September 22nd 2006 and not 2008 as inadvertently stated in his previous Affidavit. He states that he has occupied the property as its owner since September 22nd 2006 and has "dealt with the property as would a true owner." He adds that he has been living at the said property and he maintains and insures the property. He adds that he has met and continues to meet his monthly commitments under the legal charges since 2006. He states that he is the true owner of the property and has been at all material times in actual occupation of the property as its owner from and since September 2006.

[16] On 27th November 2012, Mrs. Denise Jonas Parillon, Counsel for the interested party Dylan Jonas filed Skeleton Arguments in which she submitted as follows:-

1. The affidavit and supplemental affidavit of Dylan Jonas respectively filed herein on September 27, 2012 and November 22, 2012 reveal the following crucial facts:
 - a. Dylan Jonas is the equitable owner of the parcel of land registered as Registration Section: Potters & Belmont; Block 613 1992F; Parcel: 39;
 - b. Dylan Jonas has been the equitable owner of the said parcel since September 22nd , 2006 when he purchased the said parcel of land from Everette Jonas for valuable consideration of \$200,000.00;
 - c. Dylan Jonas has been the owner in actual occupation and possession of the said parcel of land since 2006 and he has at all material times been residing on the said parcel of land and is still residing on the said parcel of land.
2. The Law provides at section 28(g) of the Registered Land Act Cap. 374 that the rights of a person in actual occupation of land is an overriding interest to which registered land is subject, even though not noted on the register.

3. The said parcel 39 has been since September 22, 2006 and continues to be subject to an overriding interest in accordance with the latter section of the Act constituting the rights of Dylan Jonas as the person in actual occupation of the said land.
4. In the premises, this Honourable Court is urged to dismiss the application herein for the sale of the said parcel 39, which is the property and residence of Dylan Jonas, a third party.

[17] In her Submissions filed on 28th November 2012, Learned Counsel for the interested party, Eastern Caribbean Amalgamated Bank, (the Bank) stated:-

1. Bank of Antigua Limited granted a loan to Dylan Jonas for the purchase of the property (sic) more properly known as Registration Section: Potters & Belmont; Block; 613 1992F; Parcel: 39 which was at the time owned by Everette Jonas, 22nd September, 2006. The loan was for the sum of \$190,000.00 and was to be secured by a legal charge over the said property. The Transfer of the said property and the Charge were duly signed by all parties and the monies for the purchase price of the said property were duly credited to Everette Jonas account.
2. On the 12th day of October, 2010, Eastern Caribbean Amalgamated Bank Limited purchased and assumed certain debts, assets and liabilities of Bank of Antigua Limited pursuant to a Purchase and Assumption Agreement, which included the loan in relation to the charged property.

[18] Learned Counsel also stated that in the Supplemental Affidavit of the other interested party, Dylan Jonas, he has stated from the date of purchase of the property he has been in occupation of the property and has dealt with the property as a true owner of the property.

[19] Learned Counsel for the Bank further submits that:-

1. The interest of Eastern Caribbean Amalgamated Bank Limited supersedes that of the Judgment Creditor in this instance.
2. The Customer of the Bank, Mr. Dylan Jonas, for whose benefit the monies were advanced, has lived on the said property and dealt with it like a true owner in possession and that his interest in the property would supersede that of the Judgment Creditor. The Judgment Creditor has benefited from the Bank paying over the purchase price of the property to his account, the other interested party, Mr. Dylan Jonas, has been living up to his monthly mortgage commitments and under these circumstances equity and good conscience require that this order for sale not be granted.
3. The Judgment Debtor in this instant case was given full payment for his interest in the property, and to allow the Judgment Creditor to sell the said property would be to unjustly enrich the judgment Debtor and allow him to be paid twice for the said property.

THE RELEVANT LAW

[20] The Registered Land Act, Cap 374 (the Act) of the Laws of Antigua and Barbuda deals with registration of title to land. Section 23 of the Act states:-

"23. Subject to the provisions of section 27 the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject –

- (a) To the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register;

Provided that ----

- i). Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;
- ii).

[21] Section 28 of the Act provides:-

"Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without there being noted on the register –

- i). rights of way, rights of water and any easement of profit subsisting at the time of first registration under this Act;
- ii). natural rights of light, air, water and support'
- iii). rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other law;
- iv). Leases or agreements for leases for a term not exceeding two years, and periodic tenancies within the meaning of section 2;
- v). any unpaid monies which, without reference to registration under this Act, are expressly declared by any law to be a charge upon land;
- vi). rights acquired or in process of being acquired by virtue of any law relating to the limitation of actions or by prescription;
- vii). the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed;
- viii). electricity supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit."

FINDINGS

[22] It is not in dispute that the Defendant is the registered proprietor of parcel 39. By virtue of Section 23 of the Registered Land Act, (the Act) he is therefore the legal owner of parcel 39, and as legal owner, he is entitled to absolute ownership of the said parcel. It is also not in dispute that Dylan Jonas purchased parcel 39 from the Defendant Everett Jonas and that Dylan Jonas took a loan from the Bank for the purpose of purchasing the said parcel 39. The undisputed evidence before the Court is that the proceeds of the said loan were applied to the account of the Defendant. The evidence before the Court is also that, although the instrument of transfer between Everette Jonas and Dylan Jonas has been signed, the said instrument was not registered due to the fact that there were some issues with the verification of the boundaries to the said land.

[23] As noted in paragraph 20 above, the Proviso to section 23 of the Act provides that "nothing in section 23 shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee." Does such a duty or obligation exist between Everette Jonas and Dylan Jonas? In the case of **Lysaght v Edwards**¹, Jessel M.R. described the relationship arising between the vendor and the purchaser of land before the conveyance is executed as a trustee and beneficiary relationship in these terms:-

"As between the parties to it, the contract creates a relationship of trustee and beneficiary; the vendor is said to be trustee for the purchaser, and the purchaser to be the beneficial owner."

[24] The Court is of the view that, notwithstanding the fact that the instrument of transfer has been signed, the relationship of trustee and beneficiary still subsists between Everett Jonas and Dylan Jonas with respect to Parcel 39. Further, that the Defendant Everett Jonas holds parcel 39 in trust for the beneficial owner Dylan Jonas, since Dylan Jonas has not yet been registered as proprietor of the said parcel of land in the Registry of Lands.

[25] The Court endorses the submission of Mrs. Denise Parillon that finds therefore, that Dylan Jonas is the equitable owner of parcel 39, and has been the equitable owner of the said parcel of land since September 22nd 2006 when he purchased the said parcel of land from Everette Jonas for

¹ (1876) 2 Ch.D. 499 at 507

valuable consideration. This is so notwithstanding the fact that the legal interest in parcel 39 is still registered in the name of the Defendant Everett Jonas.

[26] As stated in paragraph 3 above, the Claimant/Applicant Hollis Henry has made application for an order of sale of "the interest of the Defendant", Everett Jonas in and to parcel 39 pursuant to Section 4 of the Judgments Act, Cap. 227 of the Laws of Antigua and Barbuda (the Judgments Act) and Part 55 of the Civil Procedure Rules, 2000.

[27] Section 3 of the Judgments Act, Cap. 227 provides:

"A judgment already entered up or hereafter to be entered up against any person in the High Court shall operate as a charge upon all lands of such person within Antigua and Barbuda **to the extent of his beneficial interest therein:** (my emphasis):

Provided that no such judgment shall affect any such lands as to purchasers, mortgagees, or creditors, unless and until the person entitled to the benefit of such judgment shall have filed an application to the Court for an order for the sale of such lands towards satisfaction thereof."

[28] The interest of the Defendant Everett Jonas in parcel 39 for purposes of the Judgments Act extends only to his legal interest. Everett Jonas is not the beneficial owner of parcel 39, the Court having found that Dylan Jonas is the equitable owner of that parcel and is therefore entitled to the beneficial interest therein. In the view of the Court therefore, the judgment which the Claimant Hollis Henry has against the Defendant Everett Jonas does not extend to parcel 39, over which Everett Jonas does not have the beneficial interest.

[29] In his Supplemental Affidavit filed on the 22nd day of November, 2012, Dylan Jonas deposes that he has been in actual occupation of the said parcel from and since 2006. He claims that he therefore has an overriding interest in parcel 39, in accordance with section 28(g) of the Act. As stated above, Section 28(g) of the Act states that: "Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -(g) the rights of a person in actual occupation of land.....save where inquiry is made of such person and the rights are not disclosed."

[30] It is important to note that it is not the actual occupation that is protected but the "rights" of a person in actual occupation. In the case of **Spiricor of St. Lucia Ltd. v Attorney General of St. Lucia and another**², Chief Justice Byron (as he then was) stated that the equitable interest of a purchaser in possession whose title has not been registered should be included among those equitable rights which are treated as overriding. The Court is of the view that, in the circumstances, the equitable interest of Dylan Jonas is an overriding interest in parcel 39.

[31] The Court also agrees with the submission of Learned Counsel for the Bank that Everett Jonas, the Defendant in this instant case was given full payment for his interest in the property, and to allow the Judgment Creditor, Hollis Henry to sell the said property, namely parcel 39, would be to unjustly enrich the Defendant and allow him to be paid twice for the said property. The Court is of the view that, in the exercise of its equitable jurisdiction, it would be disinclined to lend its assistance to the grant of an order, the effect of which would be to unjustly enrich the Defendant.

[32] The Court is of the view therefore that the application for the order for sale with respect to Parcel 39 should be denied for the following reasons:-

(a) The equitable interest of Dylan Jonas by virtue of the fact that he has paid the Defendant in full for parcel 39; this coupled with the fact that Dylan Jonas has been in actual occupation of parcel 39 since 2006 gives rise to an overriding interest in parcel 39 by virtue of section 28(g) of the Registered Land Act;

(b) It is just and equitable to do so.

[33] Based on my above finding, I do not consider it necessary to address the submissions of Learned Counsel for the Eastern Caribbean Amalgamated Bank with respect to the interest of the said Bank. I note, however, that the submissions of Learned Counsel for the Bank stress the fact that Dylan Jonas is the equitable owner of Parcel 39 and that he has been in actual occupation of the said parcel and is still indebted to the Bank for payment of the loan for the purchase of the said parcel 39.

² (1997) 55 WIR 123

My Order is as follows:-

- (a) The Application filed on the 12th April 2012 with respect to the sale of the parcel of land shown as:

Registration Section	Block	Parcel
Potters & Belmont	613 1992F	39

is dismissed.

- (b) That there be no order as to costs.



JENNIFER A. REMY
Resident High Court Judge
Antigua and Barbuda