

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

In the Matter of the Estate of Adelaide Culpepper, deceased

CLAIM NO. ANUHCV 2009/0273

BETWEEN:

WAYNE ESANNASON

Claimant

AND

DORA WAITHE

Defendant

Appearances:

Mrs. Stacey Richards Anjo for the Claimant
Mr. Jason Martin for the Defendant
Ms. E. Denicia Thomas for the Applicant

2012: October 16

Ruling

- [1] **Remy J.:** The Claimant in this case is a beneficiary of the estate of Adelaide Culpepper, deceased. He is also a grandson of the deceased.
- [2] The Defendant is the sole surviving Administrator of the estate of the deceased. The other administrator died on the 2nd September, 1991.

[3] By Fixed Date Claim and Statement of Claim filed on the 28th May, 2009, the Claimant Wayne Esannason claimed against the Defendant Dora Waithe the following: -

1. An order for the administration of the real and personal property of the estate of Adelaide Culpepper, deceased; and in the alternative that Andre Esannason be appointed the personal representative of the estate of Adelaide Culpepper, deceased.
2. That Andre Esannason may be authorized to charge appropriate and reasonable remuneration in connection with his services as personal representative of the estate of Adelaide Culpepper.
3. That the Defendant be ordered to account for all monies relating to the estate of Adelaide Culpepper, deceased.
4. That the Defendant be ordered to account for all property which came into her hands as administrator of the Estate of Adelaide Culpepper, deceased.
5. An inquiry into what, if any, property of the estate of Adelaide Culpepper, deceased, has been disposed of or what is still within the Defendant's custody and control.
6. A payment into court of all sums held by the Defendant in First Caribbean International Bank, St. John's, Antigua and Antigua Commercial bank, St. John's, Antigua representing savings accounts, proceeds of any sale and/or rental income from any property being part of the deceased's estate.
7. An account of what is due to the Claimant, as well as the other beneficiaries of the estate.
8. All other necessary accounts inquiries and directions.
9. Payment of costs for legal fees and costs associated with this action.

[4] By Application without Notice filed on the 28th May 2009, the Claimant applied for an order for, among other things, injunctive relief against the Defendant, namely that the Defendant be restrained from removing any funds from her bank account at First Caribbean International Bank and Antigua Commercial Bank until further order of the Court. The Claimant also sought an order that the Defendant pay into court all sums held by her representing proceeds of any sale of the deceased's estate.

[5] By Order of the Court dated the 3rd June 2009, an interim injunction was granted.

[4] A Consent Order was entered by the parties on the 20th day of November, 2009. The said Consent Order was filed on the 23rd November, 2009. The terms of the Consent Order are as follows: -

"It is hereby Ordered by Consent that:-

- 1) Within 28 days of the date of this Order, the Defendant shall submit to the Claimant copies of bank account statements for the period January 2008 to November 2009 in relation to First Caribbean International Bank accounts held in the name of Dora Waithe which are subject to the injunction in this matter.
- 2) From the date of this order, any proceeds of sale of land paid to the Defendant or the Defendant's attorney's in relation to land registered as Registration Section: Gray's Farm; Block: 68 1691D; Parcel 102 and Registration Section: Sutherlands; Block 64 1792 B; Parcel 132 shall immediately upon receipt be paid into the Defendant's accounts at First Caribbean International Bank which are subject to the injunction in this matter.
- 3) The Defendant shall file with the Registrar of Lands, Withdrawals of Caution in relation to lands registered as Registration Section: Sutherlands; Block: 64 1792 B; Parcels 132 and 133 and Registration Section: Grays Farm; Block: 68 1691D; Parcel: 102 within 28 days of the date of this order or at such time as the Defendant produces copies of the First Caribbean International bank account statements.
- 4) The injunction shall continue until further order of the Court.
- 5) The matter shall be set down for mediation for resolution of any remaining issues within 45 days of the date of this order with Kelvin John as Mediator or Nelleen Rogers Murdoch as alternative Mediator.
- 6) Liberty to either party to apply or for further orders."

THE PRESENT APPLICATION

[5] On the 13th February, 2012, the Applicant Bargain Centre Building and Hardware Supplies Ltd. filed an application (the Application) seeking an order that: -

"Permission be granted to be added as a party to these proceedings."

[6] The grounds of the Application were stated as follows: -

- “1. The Applicant is the Bona Fide purchaser for valuable consideration of all that piece and parcel of land registered in the name of Adelaide Culpepper, (now deceased) and more particularly described as: **Reg. Sect.: Grays Farm; Block: 68 1691D; Parcel: 102.** The Applicant purchased the property in or about August 2008.
2. The said Parcels involved in the dispute in these proceedings.
3. The Defendant, Dora Waithe, is the personal Representative of the estate of Adelaide Culpepper; the Claimant is a 'grand-relation'.
4. An injunction granted in these proceedings on ____ 2009 after the date of purchase prohibits any dealings with the property; the injunction was continued by a Consent Order made on 20th November, 2009 and filed on November 23, 2009. The order also enforces a caution lodged against the property by the Claimant.
5. To the best of the Applicant's knowledge no steps have been taken by either of the Parties to satisfy or to perform the terms of the said Order so as to enable the Applicant to receive title, though the purchased price has been paid in full.
6. That as it relates to the above mentioned property all actions by the Claimant and Defendant – judicial and or otherwise – which prevents the transfer of the said property to the Applicant is contrary to Law and natural justice.
7. Further, the protracted delay in completing these proceedings by both the Claimant and Defendant has created undue hardship for the Applicant, is highly prejudicial to the Applicant's interest and has caused financial damage.
8. The Applicant verily believes that the Claimant and Defendant herein will not execute the transfer of title to the above property nor pay the requisite stamp duties and outstanding property taxes applicable on the transfer unless moved by the court so to do.”

[7] The Application was accompanied by an Affidavit in Support, deposed to by Mr. Cuthbert Joseph, Managing director of the Applicant Company. A draft Claim Form was exhibited to the said affidavit.

[8] The Application is opposed by both Counsel for the Claimant and Counsel for the defendant.

[9] On 3rd October, 2012, the Court heard the oral submissions for Counsel for all the parties.

SUBMISSIONS OF COUNSEL

[10] The Submissions of Ms. E. Deniscia Thomas, Counsel for the Applicant are as follows:-

(a) The fundamental principle behind rule 19.3 (2) (b) of the Civil Procedure Rules 2000 (the Rules), under which the application was made, is to prevent injustice by not allowing a party who is directly affected by proceedings before the Court from being heard. Admittedly, the rules do not specify any particular requirements for being added as a third party to proceedings where the application is being made by one who is not already involved in the proceedings. It is within the inherent jurisdiction of this Court and is regarded as a fundamental rule of procedure that persons whose rights interest or liabilities are affected by an order the Court should be allowed by the Court the opportunity of being heard. The application, along with the Affidavit in support sworn by Cuthbert Joseph, Managing Director explains the way in which the rights of the applicant, Bargain Centre has been affected by the Order of the Court which was made by the injunction granted on 3rd June, 2009 and then a Consent Order made on the 20th November, 2009 and filed with the Court on the 23rd November, 2009.

(b) Adelaide Culpepper is the mother of Dora Waithe, the Personal Representative of the Estate and the Defendant in this matter. The Claimant is the Grand-son of Adelaide Culpepper. The proceedings were started since 2009 and the injunction that was granted froze the assets of the Defendant located at First Caribbean International Bank which sums, based on the statement of Claim of the claimant includes the money paid for the parcel 102 by the applicant. Neither of the parties has denied that the monies were paid; the purchase price being \$ 850,000.00.

- (c) The injunction further enforces a caution which was lodged at the Land registry by the Claimant on the 2nd January, 2009. By said caution, no dealings are permitted with respect to that parcel without the consent of the Claimant. The Consent Order itself speaks to the removal of the caution when certain Bank account Statements have been presented by the Defendant to the Claimant. Since the Consent Order was filed with the Court, no steps have been taken by either the Claimant or Defendant to satisfy the terms of the Consent Order until this year 2012 after the proposed Third Party filed its application. The caution still exists on the register and whilst it remains, there can be no presentation of any transfer instrument as this would be in breach of the injunction and the Consent Order.
- (d) Further, notwithstanding the situation as is now, the law currently requires the beneficiaries of the estate to sign or give their consent to the transfer of the property. This law came into effect in March 2009. The property was purchased in 2008. It is the Applicant's belief that as long as this matter continues in the Court, it will not be able to gain title to the property, notwithstanding that it has fully paid the purchase price.
- (e) It is the Applicant's view that only an order of the Court directing the Registrar of Lands to register the Applicant as proprietor and a further order releasing the amount of payment of the vendors stamp duty from the accounts frozen at First Caribbean International Bank will be able to satisfy the rights of the Applicant. Note the length of time that the parties to the proceedings have taken in fulfilling the requirements of the order of the Court.
- (f) The Applicant needs to be added to the proceedings so that the time of the Court will not be further wasted and the matter can be moved along. It is the Applicant that will make the fundamental difference in the resolution of this matter. This is based on the fact that only since the applicant filed its application with the Court were any steps taken to satisfy the Consent Order. Whilst these proceedings remain in abeyance the

Applicant continues to suffer injustice – it is out of pocket \$850,000.00 since 2008 and to date, it has not been able to acquire title to the property.

[11] The Submissions of Mrs. Stacey Richards-Anjo, Learned Counsel for the Claimant are as follows:-

- (a) Counsel for the Applicant seems to be saying that the Application before the Court is primarily so that the Applicant can manage this matter almost like a case manager.
- (b) Counsel has rightly identified that there's nothing in Part 19 of the Civil Procedure Rules to guide the Court in an application such as this. There is guidance on what the Court should take note of when it is adding a party without an application. So the Court is left with a very wide discretion.
- (c) The sole point concerns this discretion and the Court looking to the justice of the matter and whether or not the matter can be better resolved by the addition of the Applicant. The Claimant is hampered by the fact that the application does not disclose whether the Applicant wishes to be added as a Claimant or as a Defendant. The Application seems to be some blending of the rules with reference to Part 18 and Part 19. Part 18 states that the party has to be added by either a Claimant or by a Defendant. There's further confusion in that there's a Draft claim exhibited to the Affidavit of Cuthbert Joseph – perhaps the suggestion is that the Applicant wishes to be added as a Claimant.
- (d) If one looks at the basis of the Fixed Date Claim filed on 28th May, 2009 by the Claimant, there is no room for the Applicant to be part of this Claim. The claim in the first instance speaks to "the order for the administration of the real and personal property of the estate of Adelaide Culpepper, deceased; and in the alternative that Andre Esannason be appointed the personal representative of the estate of Adelaide Culpepper, deceased." Broadly, the Fixed Date Claim requests accounting of all monies relating to the estate of Adelaide Culpepper. A caution which the Applicant has referred to the Court was not initially any part of this claim. A caution in the normal

course, as in this case, was filed with the Land Registry and was recognized as having been filed in the Consent Order filed between the parties on 29th November, 2009. It was recognized in this was that the Defendant was to file with the Registrar of Lands, withdrawals of Caution upon production of copies of account statements. Otherwise, this claim as filed does not touch and concern the Applicant at all, but for the caution.

- (e) There is no injustice to the Applicant; there's a procedure provided under the Registered Land Act at Section 129 (Cap 374), which states: - "A Caution may be withdrawn by the cautioner or removed by order of the Court or, subject to the provisions of subsection (2) by order of the Registrar."

Section 129 (2) states that (a) "The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice which shall not be less than fourteen days.

and (b) "If at the expiration of the time stated the cautioner has not objected, the Registrar shall remove the caution."

- (f) If the Applicant is so harmed, or if there is so much injustice done to the Applicant there is no need for the Applicant to be part of this case - that concerns so many other issues. This matter is not about the Caution.
- (g) The Court would note that a long period of time has passed since the Consent Order. Counsel is cognizant of the fact that there's no evidence from the parties on this front. Having regard to the ability of the Applicant to endure its matter, under the provisions of the Registered Land Act, there's no need to broaden the scope of this Claim by the addition of the Applicant as either Claimant or Defendant.

[12] Mr. Jason Martin, Counsel for the Defendant began his submissions by stating that he adopts the arguments of Mrs. Richards Anjo. Learned Counsel further stated that:-

- i. In looking at the Application and Affidavit in Support, and subject to correction, it does not seem to be anywhere averred that the Defendant at any point in time refused to perform its obligation under the contract as alleged by the Applicant. There's no indication in the documents that the Defendant (Executrix) was ever provided with a transfer document at all. Learned Counsel referred the Court to paragraph 3 of the Affidavit in Support which states that: "a decision was taken to purchase the property registered as: Grays Farm; Block: 68 1691D; Parcel: 102. The purchase price was \$850,000.00 Eastern Caribbean Currency and the entire sum was paid to Mr. Haynes Smith as acknowledged by his letter August 28, 2008. A copy of the letter is attached hereto and marked BCH1." He stated that, even from looking at this document - referred to in the Affidavit as a letter acknowledging receipt - he fails to see on the face of this document that it fully satisfies this description. He's not even sure that the Applicant has even satisfied the Court that it performed its obligations which he surmised would be the basis for locus standi in the matter. It has not satisfied the Court at all that the Defendant denied any request made.
- ii. Learned Counsel Mr. Martin asked the Court to note line 3 of Exhibit "BCH1" which states:
 - "Please prepare transfer for signature of the former owner." He states that this is the only line of significance to the Defendant. He states that, the Applicant having (1) not adduced evidence that it performed its part of the contract and (2) not adduced any evidence that it presented the Executrix (the Defendant) with a transfer document which she refused to sign, exhibits to the affidavit at BCH2, a Claim Form which he (Mr. Martin) is to assume would be the subject of the Applicant's Claim in this matter. In that Claim Form (page 1) and the "Third Party Case", is what the Applicants allege to be their cause of action, namely:-
 - a. "A Declaration that the Third Party is entitled to be registered as Proprietor of the Property registered and described as: Registration Section: Gray's Farm; Block: 68 1691D; Parcel: 102."
 - b. "Specific performance of the agreement for the sale and purchase of property registered and described as: Registration Section: Grays Farm; Block: 68 1691D; Parcel: 102."

c. "Removal of caution lodged against property registered and described as:
Registration Section: Grays Farm; Block: 68 1691D; Parcel: 102 since on or about
2nd January, 2009"

iii. Mr. Martin submits further that, looking at (a) above, this claim or cause of action is premature in that there has been no evidence adduced by the Applicant that either party to the substantive matter rejects or even disputes the applicant's entitlement to be registered as proprietor of the property. Looking at (b) above, that the claim is also premature in that no evidence has been adduced by the applicant that the defendant has refused to honour any agreement. Learned Counsel states that (c) above is covered by the arguments of Learned Counsel for the Claimant, Mrs. Richards Anjo.

iv. In short, it is the submission of Mr. Martin that the Defendant's application is premature.

[13] By way of rebuttal, Ms. Thomas submitted as follows: -

- (a) The Court will see for itself and the parties have admitted that until the filing of this application they had not been before the Court.
- (b) Except for the Applicant's application, nothing would have been done with respect to the Consent Order.
- (c) It cannot be said that the Applicant is wasting the Court's time or that the Court's time would be wasted by adding the Applicant as a third party.

[14] Ms. Thomas then responded to the submission of Mrs. Richards Anjo that it is only the presence of the caution which touches and concerns the Applicant and that there is a procedure within the Registered Land Act for the removal of such a caution. Ms. Thomas stated that what Mrs. Richards Anjo did not tell the Court is that the caution is further enforced by the injunction and the said Order of the Court dated the 20th November 2009. Ms. Thomas acknowledged that Mrs. Richards Anjo was correct in saying that whereas the rules provide guidance for adding a party without an application, and certainly where any of the existing parties would wish to join another entity to proceedings, it does not speak to what the Court ought to consider when an application is

being made by a person who wishes to be added as a party. Ms. Thomas stated that there is case law which gives the Court the discretion, notably the case of *Gurtner v Circuit* [1968] 2 QB 587.

[15] Ms. Thomas further submitted that it is a fundamental principle of procedure that where any person is affected by the Order of the Courts, their rights, interest, etc., the Court should give them the opportunity to be heard. She added that Mr. Martin has not said the money was not paid; he has not objected and certainly the agent would have written to the Applicant advising that the transfer be prepared for the signature of the former owner if the money was not paid. Mr. Martin has created another issue separate and apart from the caution; it puts the Applicant's rights and interest at extreme risk. Ms. Thomas asks the Court to exercise its discretion in favour of the Applicant.

[16] The Court reserved its ruling at the close of the submissions.

ANALYSIS

[17] Part 19 of the Civil Procedure Rules (CPR) 2000 (the Rules) deals with the addition and substitution of parties after proceedings have been commenced. The Applicant in the instant case, Bargain Centre, has made an application pursuant to Part 19.3(2) of the Rules.

[18] Part 19.3 (2) states as follows:-

- “19.3 (2) An application for permission to add, substitute or remove a party may be made by –
- a. An existing party; or
 - b. A person who wishes to become a party.”

[19] The Applicant company is not an existing party; it wishes to become a party.

[20] The Court is given a wide discretion under the Rules to order that a person be added, removed or substituted as a party to a claim. By virtue of Part 19.2(3): -

"the court may add a new party to proceedings without an application if:-

- (a) It is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
- (b) There is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue."

[21] As submitted by Mrs. Richards Anjo, the Applicant, namely Bargain Centre Building & Hardware Supplies Ltd. (Bargain Centre), has not indicated in what capacity it wishes to be added to the suit, whether as a Claimant or as a Defendant. In the view of the Court, this omission is fatal to Bargain Centre's application. The Applicant has attached a Draft Claim Form to its Notice of Application. Both in form and content, the said Draft "Claim Form" leads the Court to reasonably infer that the Applicant wishes to be added as a Claimant. Further, the Draft "Claim Form" states that the Applicant claims against both the Claimant and the Defendant.

[22] The relevant part of the draft "Claim Form" is hereby reproduced:-

"CLAIM NO. ANUHCv 2009/0273
BETWEEN:

WAYNE ESANNASON

Claimant

AND

DORA WAITHE

Defendant

AND

BARGAIN CENTRE BUILDING AND HARDWARE SUPPLIES LTD.

A Third Party

CLAIM FORM

The Third Party, BARGAIN CENTRE BUILDING & HARDWARE SUPPLIES LTD., a Company incorporated under the Laws of Antigua and Barbuda and having its principal place of business at Kentish Road in the Parish of St. John's in the Island of Antigua;

Claims Against

The Claimant, Wayne Esannason of 3 Foxwood Drive, Tomkins Cove, New York 10986 in the United States of America.

And the Defendant, Dora Waithe formerly of Kentish Road, St. John's, Antigua but now residing at 1047E 223rd Street, Bronx, New York in the United States of America

THE THIRD PARTY CLAIMS

- (a) Against the Claimant and Defendant a Declaration that the Third Party is entitled to be registered as Proprietor of the property registered and described as: Registration Section: Grays Farm; Block: 68 1691D; Parcel: 102.
- (b) Against the Defendant Specific Performance of the agreement for the sale and purchase of property registered and described as Registration Section: Grays Farm; Block: 68 1691D; Parcel: 102.
- (c) Against the Claimant the removal of the caution lodged against property registered and described as Registration Section: Grays Farm; Block: 68 1691D; Parcel: 102 since on or about 2nd January, 2009 via Instrument Number RLC200900001 and entered as Entry No 2 in the Proprietorship Section of the Register for the above mentioned property;
- (d) Against the Claimant and the Defendant damages to be assessed
- (e) Interest on the selling price of the property being \$850,000.00 from the 20th November, 2009 (the date of the Consent Order); alternatively interest from the 30th March, 2011 (the date when the Solicitor to the Claimant was informed of the bona fide purchase of the above mentioned property); Alternatively, for such period as the Court considers just;
- (f) Costs
- (g) Such further or other relief as to the court seems just."

[23] Part 19.3 (4) of the Rules states:-

"19.3 (4) - A person may not be added or substituted as a claimant unless that person's written consent is filed with the court office."

[24] In the case at bar, the written consent of the Claimant has not been obtained. In fact, the Claimant vehemently opposes the Applicant's application.

[25] In light of the above, the Court is of the view that it is not necessary to address the various other submissions of Counsel. Part 19.3 (4) is pellucid. The Court cannot exercise its discretion to grant permission to the Applicant to be added as a Claimant to the proceedings. Given the nature of the Applicant's draft "Claim Form", it is neither feasible nor logical that the Applicant be added as a Defendant to the proceedings. Accordingly, the application filed on the 13th February, 2012 is dismissed.

[26] Having said the above, I would not like the Applicant to understand that I have in any sense determined its rights in the matter of the acquisition of the property in question. It does not seem to be disputed by either the Claimant or the Defendant that the Applicant may have paid some \$850,000.00 under a written agreement for sale. Such payment, if made, would undoubtedly give rise to certain rights in the Applicant. Unfortunately, the determination of those rights is not a matter before the Court at this time. In all of the circumstances, I am of the view that there should be no order as to costs on the application.

My Order is as follows:-

1. The application filed by the Applicant Bargain Centre Building & Hardware Supplies Ltd. on the 13th February 2012 is hereby dismissed.
2. That there be no order as to costs.



JENNIFER A. REMY
Resident High Court Judge
Antigua & Barbuda