



[2021] JMSC Civ. 86

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2020CV03960**

**BETWEEN**

**GUY CHONG**

**APPLICANT**

**AND**

**WINSTON CHONG**

**RESPONDENT**

**Representation: Yakum Fitz-Henley instructed by Ramsay Smith for the Applicant.**

**Obika Gordon instructed by Frater, Ennis and Gordon for the Respondent.**

**Heard: April 27<sup>th</sup>, 2021 and May 14<sup>th</sup>, 2021**

***Application for recovery of possession – request for indemnity – procedure for bringing an action for indemnity – manner in which proceedings for possession of lands should be instituted***

**CORAM: HUTCHINSON, J**

## **INTRODUCTION**

**[1]** The application before me was filed on behalf of Mr Guy Chong who is the Defendant to a claim filed by his brother in respect of property located at 38 Neptune Avenue, Kingston 17. The application seeks a number of orders; the main ones being as follows;

1. The Claimant shall forthwith quit and deliver up possession of the property located at 38 Neptune Avenue, Kingston 17 in the parish of Saint Andrew.

2. The Claimant shall indemnify the Defendant in respect of all rent and mortgage payments the Defendant is required to pay by the registered proprietor of the property as a result of the Claimant's continued possession of same.

- [2] In respect of the first order, this was qualified by Mr Fitz-Henley to be an application for an order for the Claimant to quit the premises as no order was being sought for recovery of possession given the fact that the Applicant had transferred possession of same to a third party. It was contended however that, inspite of the transfer of ownership, the Applicant still retained the requisite standing to bring this action given the fact that it was by his license that the Respondent had been permitted to occupy the premises.
- [3] The Claim brought by Mr Winston Chong against the Applicant seeks a number of orders in respect of the 38 Neptune Avenue, on the basis that he had acquired an equitable interest in same. He also seeks orders that the property be sold and the net proceeds divided in accordance with the equitable interest that the Court may declare him as having in same. I note that the first hearing of that Fixed Date Claim Form is scheduled for the 25<sup>th</sup> of May 2021.
- [4] From the affidavits which have been filed in this application it is evident that the property has now been sold to a third party as the Respondent/Claimant's caveat has lapsed and the Court had refused to grant his application for an injunction barring the sale/transfer of the property on the 26<sup>th</sup> of November 2020. The Applicant has sought the foregoing orders on the basis that his brother who he described as a licensee, had resided at the relevant premises with his permission and had failed to honour the terms by which it had been agreed that he could be made a co-owner of same.
- [5] Once the decision had been made by the Applicant to sell the property he averred that the Respondent was served with a notice to quit but had failed to comply with

same. The urgency of the application was underscored by the fact that the Purchaser had been promised vacant possession of the property which the Applicant has failed to deliver and the concern was expressed that he could be sued by the Purchaser for any rent or mortgage payments which this failure may occasion.

[6] In support of this application, Mr Fitz-Henley relied on a number of authorities. In respect of the Respondent's classification as a licensee, and the lawfulness of the Applicant's revocation of said license, reference was made to the decisions of ***Burghardt and Burghardt v. Taylor [2012] JMSC Civ. 126*** and ***Minister of Health v. Bellotti [1944] 1 All ER 238***. Counsel also argued that since the property had changed owners the claim against the Applicant can no longer be pursued and should now proceed against the new owner.

[7] In relation to the request for indemnity, Counsel submitted that a right to indemnity exists where the relation between the parties is such that there is an obligation upon the one party to indemnify the other. He submitted that there are instances in which the law attaches a legal or equitable duty to indemnify another arising from an 'assumed promise' by an individual person to do that which, under the circumstances, he ought to do'. It was argued that this is one such case as there is documentary evidence to show that;

- i. The Claimant was aware of the intention to sell the property from 2019;
- ii. He had the opportunity to stop the sale of the property once the caveat was warned, but did not do so;
- iii. He had been required to quit the property since March 15, 2021 and his continued possession caused the Defendant to incur expenses which he would not have otherwise incurred.

- [8] In his submissions in response, Mr Gordon asserted that the application is misconceived. He argued that the request for an order for the Respondent to quit the premises and/or for recovery of possession must be grounded on a legal or beneficial Interest in the land. He asked the Court to note that the Applicant had exhibited a title which shows that Mr Guy Chong no longer owns the property and as such has no legal or beneficial interest in same. He made reference to the Court of Appeal decision of ***Leroy Morrison and others v Campbell 2017 JMCA Civ 14*** and asked the Court to take special note of paragraph 15 where in discussing the principle of recovery of possession, Straw JA (Ag) as she then was, emphasised the need for the Applicant to prove title. He submitted that applying these principles to the instant claim, the Court should not be asked to make an order generally in respect of property in which one has no legal or beneficial interest.
- [9] In respect of the Applicant's request for an indemnity, Mr Gordon submitted that this application resembles a summary judgment application as the Applicant has asked the Court to make findings on issues that are yet to be determined at a trial based solely on what is outlined in the notice and affidavits in support. He submitted that it is the Respondent's position that based on the agreement between the brothers he had developed an interest over and above that of a licensee. He argued that this contention as well as the Applicant's assertion that the Respondent is in fact a licensee are issues that would have to be resolved at trial and not by a ruling on a notice of application.
- [10] He submitted that the request for indemnification is premature and inappropriate as the Court is being asked to make findings of fact on issues that touch and concern the substantive claim. He asserted that it had been open to the Applicant at the time he still owned the property to obtain an order for recovery of possession and his failure to do so was the actual cause of his inability to give vacant possession. He also asked the Court to note that if the Applicant is sued for these sums by the purchaser it would still be open to him to bring an ancillary claim against the Respondent to be indemnified.

## Discussion/Analysis

- [11] On a careful review of this application, I was struck by the fact that the Applicant has sought to obtain the stated orders from this Court on a notice of application as opposed to a Claim, Counter Claim/Ancillary claim. Part 8 of the Civil Procedure Rules outlines the manner in which a claim should commence and 8.1(4)(b) makes it clear that in respect of claims involving the possession of land the filing of a Fixed Date Claim Form is the appropriate procedure by which a party should initiate proceedings.
- [12] The importance of an application being brought by the correct originating process was examined by the Court in a number of decisions to include *Div Deep Ltd etal v Tewani Ltd [2010] JMCA Civ 10* and *Manfas Hay v Clover Thompson etal [2018] JMCA Civ 26*. In both of these matters, the dispute before the Court concerned the appropriate proceedings by which actions involving possession of land should be brought. It was acknowledged by the respective Courts that this is specifically provided for at Rule 8.1(4)(b) which can or should only be departed from in certain instances such as an allegation of fraud where the appropriate process would be by way of Claim Form.
- [13] In addition to the failure to commence this action by the appropriate process, the Applicant also faces the hurdle of satisfying the Court that he has the requisite standing to initiate these proceedings. While reference has been made to the assertion that the Respondent/Claimant is but a licensee and the licence had been revoked, the Applicant having parted with possession of the property, no longer possesses a legal or equitable interest in same in order to seek an order for the Respondent to quit the premises or deliver up possession of same.
- [14] In the *Leroy Morrison* decision, after reviewing the provisions of Section 89 and 96 of the Judicature (Resident Magistrate) Act which specifically deals with actions brought in respect of possession of property, Straw JA (Ag) stated as follows;

*[19] These passages strengthen the position that the jurisdiction of the court is invoked to hear actions relating to land ownership under section 89 of the Act where there is proof of title against persons in possession without a right of possession. On that basis the learned parish court judge, having rejected all of the respondent's defences, would have erred in giving judgment for the respondent, on the sole premise that the 1st appellant could not maintain the action in the absence of the other joint owner. There would be merit therefore in this ground of appeal if the learned parish court judge meant her finding to be a general interpretation of section 89 of the Act. (emphasis added).*

- [15] Applying these principles to the instant matter, it is clear that although it is settled law that a licence is revocable at the will of the licensor and by the death of either party unless there are special circumstances prohibiting same<sup>1</sup>; this does not negate the need for an individual seeking an order of possession from the Court to provide proof of title against the person in possession. As such the Applicant would not be the appropriate individual to bring this action having transferred ownership to another.
- [16] In addition to the foregoing challenges, it was also observed that the Respondent is not in agreement with the Applicant's categorization of his status as a mere licensee and appears to be asserting proprietary estoppel. These are clearly triable issues which would have to be determined by the appropriate tribunal and in these circumstances, this Court would not be able to make a proper finding that the Respondent was a mere licensee. Accordingly, the relief which had been sought at paragraph one of the notice is denied.
- [17] In respect of the request to be indemnified, the Applicant raised a concern of being sued by the purchaser to recover sums expended as a result of the failure to give vacant possession. It is noted that this order sought relates to an event which has

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<sup>1</sup> Burghardt v Taylor para 28

not yet occurred as the Purchaser had not filed a claim against the Applicant up to the point of this hearing. In the event that such an action is in fact commenced against him, it is open to the Applicant to bring an action against the Respondent for an indemnity in respect of same and part 18 of the CPR outlines the procedure which should be followed in such circumstances. Rules 18.1(2)(b) and 18.3(1) provide as follows;

*18.1 (1) This part deals with ancillary claims.*

*(2) An “**ancillary claim**” is any claim other than a claim by a claimant*

*against a defendant or a claim for a set off contained in a defence and includes -*

*(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;*

*(b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and*

*18.3 (1) A defendant who has filed an acknowledgment of service or a defence may make an ancillary claim for contribution or indemnity*

*against another defendant by -*

*(a) filing a notice in form 10 containing a statement of the nature and grounds of the claim; and*

*(b) serving the notice on the other defendants.*

[18] The decision of ***Medical & Immundiagnostic Laboratory Ltd v Dorett O’Meally Johnson [2010] JMCA Civ 42*** was cited by Counsel for the Applicant in support of their request for an order for indemnity. In that decision, the relevant principles which govern such an order were extracted by Phillips JA from ***Eastern Shipping Co v Quah Beng Kee [1924] AC 177*** at paragraph 34 of her judgment where she quoted from the judgment of Lord Wrenbury as follows;

***"A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity, there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. ...it may arise (to use Lord Eldon's words in **Waring v Ward**; a case of vendor and purchaser) in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation" of the vendor." (emphasis added)***

**[19]** In that matter, the Defendant had sought to file an ancillary claim outside the limitation period in order to claim an indemnity from a third party. Although the facts in that case are different, the principle expounded is still relevant. The challenge for this Claimant however is that such a claim would have to be made in the manner prescribed at Part 18 which was in fact followed by the Defendant in the above cited case. The Court would then have to make a determination at a trial as to whether the Applicant would be entitled to an indemnity or contribution. As such, in addition to the procedural misstep, to the quote Counsel for the Respondent, this application is also 'premature.'

**[20]** In light of the foregoing discussion, I am unable to grant the orders sought by the Applicant herein. Accordingly, my orders are as follows;

1. The Application for Court Orders filed on the 8<sup>th</sup> of April 2021 is refused.
2. Costs awarded to the Respondent to be taxed if not agreed.