

JERSEY / JUDGMENT

# Marett -v- Marett [2014]

## JRC 087A (02 April 2014)

[2014] JRC 087A

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### judgment

the master::

### Introduction

1. This judgment represents my decision in respect of the application brought by the plaintiff Stephen Marett ("Stephen") against the defendant, his brother, Jonathan Marett ("Jonathan"). Stephen's application was to strike out Jonathan's counterclaim and was also for summary judgment in respect of an answer filed by Jonathan or in the alternative to strike out Jonathan's answer. 2. What has led to the dispute between Stephen and Jonathan starts with Jonathan's divorce from his wife Debra. Those proceedings were contentious and resulted in a judgment of the Court of Appeal

[2008] JLR 384 . Stephen was the unsuccessful appellant before the Court of Appeal having been joined as a third party to the divorce proceedings between Debra and Jonathan. Stephen's wife, Annette, also took part in the appeal as intervenor. 3. The central issue that lead to the appeal was the extent of Jonathan's assets in relation to his divorce from Debra. In particular Debra alleged that Jonathan and Stephen had so aligned their business activities as builders and property developers that to obtain a fair consideration of her claims it was necessary for the Royal Court to have a clear view of the assets of Stephen and Jonathan which she alleged had become intermingled. In particular she (and therefore the Royal Court) focused on the extent of Jonathan's interest in a company called Marett Homes Limited and a development known as Field 1218. This was the subject of a preliminary issue and which lead to the Court of Appeal decision. 4. Ultimately, the preliminary issue in respect of Marett Homes Limited and Field 1218 was resolved by agreement on 29th May, 2007, save for the question of costs. 5. Before the Royal Court Jonathan and Stephen were ordered to pay the costs of and incidental to the trial of the preliminary issue on an indemnity basis. The Court of Appeal summarised this decision as being made on the basis that Jonathan and Stephen "had engaged in a scheme, a sham that disguised the true beneficial ownership of Marett Homes Limited and that Jonathan and Stephen had abused the process of the court". 6. At the time of the

concession of the preliminary issue and the costs order made by the Royal Court, Jonathan and Stephen were both represented by Walkers. By the time of the appeal, Stephen was represented by Sinels and Jonathan was represented by Advocate Temple, of Ozannes, now Maurant Ozannes. 7. I address later the relevant points of the Court of Appeal decision but in summary the Court of Appeal refused to set aside the consent order resolving the preliminary issue and refused to set aside the indemnity costs order made by the Royal Court. These were the main issues before the Court of Appeal. The other issues are not relevant to the matter before me. 8. On 29 th and 30 th September, 2009 Stephen, Jonathan, Debra and Annette signed heads of agreement at a successful mediation conducted by Timothy Scott Q. C. I was informed during submissions that all were present throughout the mediation and all had separate legal representation. Their respective legal advisers also signed the heads of agreement as did the mediator. 9. The heads of agreement were then approved by an Act of Court dated 11 th January, 2010 signed by Deputy Registrar O'Sullivan following a decision of Sir Philip Bailhache, sitting as a Commissioner dated 6 th January,

2010. I refer to this decision in more detail later in this judgment. 10. The heads of agreement, as approved by the consent order, at clause ix) stated:- "the Respondent (Jonathan) Third party (Stephen) and Intervenor (Annette) have simultaneously agreed that the Respondent (Jonathan) abandons all rights that he has or may have had in respect of Third Party and Intervenor's assets and that Third Party will take over the Respondent's liabilities to JFMS. Furthermore the Petitioner (Debra) will resign forthwith as a director of JFMS without compensation for loss of office." 11. On 5 th August, 2010 Jonathan and Stephen entered a second agreement. 12. Clauses 3, 4, 6 and 12 of this agreement provide as follows:- "3. That Jonathan Marett abandons all and any benefit which he may have, whether incidentally or not, as a result of the Act of Court dated 29 May 2007. Further, it is accepted that the Act of Court dated 29 May 2007 does not, nor ever did, reflect the true position as between the parties.
4. That any assistance, financial or otherwise and including forgiveness of debts or acquisition of Jonathan Marett's assets, by Stephen Marett subsequent to the parties' position as set out in paragraph 3 above, was in full and final satisfaction of any interest that Jonathan Marett may have/or had in respect of assets held by Stephen Marett.
6. That Stephen Marett will allow Jonathan Marett to continue to occupy Les Frenaie free of charge until December 2012 and will provide Jonathan with an allowance of £2,000 per calendar month until 30 June 2011.
12. The parties have carefully read this Agreement, and freely and voluntarily agree to all of its terms and conditions. Each party acknowledges that it has been represented by or has a right to independent legal counsel of its choice throughout all the negotiations that preceded the execution of this Agreement, and this Agreement has been executed with the consent and upon the advice of such independent legal counsel." 13. The agreement was drawn up by Advocate Sinel who represented Stephen, was signed by Jonathan and Stephen and was

witnessed by Advocate Steven Chiddicks, an employee of Sinels. 14. Jonathan contends that he did not take legal advice in respect of this agreement although Advocate Temple had acted for Jonathan in relation to his divorce. The right to take legal advice was noted in clause 12 of the agreement. 15. The current proceedings were commenced in the Petty Debts Court by Stephen through Sinels seeking Jonathan's eviction from La Frenaie being the property referred to in clause 6 of the August 2010 Agreement ("the Property"). The matter was referred by the Petty Debts Court to the Royal Court by an order dated 20 th March, 2013. Particulars of claim were issued on 2 nd May, 2013, Jonathan filed an answer and counterclaim on 6 th June, 2013 and a reply was filed on 16 th July, 2013. Further and better particulars of the answer and counterclaim were provided by Messrs. Voisins who then represented Jonathan on 2 nd September, 2013. 16. On 2 nd October, 2013 a summons for directions issued on behalf of Stephen was adjourned to enable Sinels to consider whether it could continue to represent the plaintiff in light of certain matters alleged in the further and better particulars about the conduct of Advocate Sinel which might lead to him being a witness. The summons was also adjourned to enable Stephen and Jonathan to take all necessary steps to agree how mediation between the parties might occur. 17. By 21 st October, 2013 Stephen had issued an application to strike out Jonathan's counterclaim. Subsequently, this summons was amended to strike out both the answer and counterclaim and later also sought summary judgment. Directions were given for the hearing of Stephen's applications to strike out the answer and counterclaim and for summary judgment if matters were not resolved by mediation. Regrettably mediation proved unsuccessful. Stephen therefore filed an affidavit dated 17 th January, 2014 in support of his applications. Jonathan provided a statement and documentation in defence of his case as he was now acting in person, legal aid having been withdrawn. Stephen filed an affidavit in reply dated 14 th February,

2014. Although an earlier hearing had been listed, the matter was ultimately heard by me on 20 th March, 2014. Both parties also filed skeleton arguments. 18. Stephen's summons seeks firstly to strike out the counterclaim and then seeks summary judgment in respect of Jonathan's answer or alternatively seeks to strike out the answer. It is convenient to deal with these applications in the order they are set out in Stephen's summons. The application to strike out the counterclaim 19. The counterclaim pleaded by Jonathan relates to the transfer of his interest in various properties and companies to Stephen and alleges that building works to various properties were all carried out at under value without Jonathan receiving any benefit for carrying out these works. All of these transfers and works were carried out in the period of Debra and Jonathan's divorce and prior to the heads of agreement concluded in September, 2009. Jonathan alleged that both the transfer of assets and the carrying out of works for under value were agreed to by him as a result of undue influence by Stephen on him. This was made clear by the further and better particulars filed by Jonathan in particular in answers 1, 18, 20, 21 and 22. 20. The relief sought in the answer and counterclaim was damages by virtue of Jonathan having lost various interests in properties and the true value of the works carried out listed in the answer and

counterclaim. The damages sought included damages for the loss of Jonathan's right to occupy the Property. 21. The relief sought in Stephen's summons to strike out the counterclaim relied on every ground contained within Rule 6/13 of the Royal Court Rules 2004, as amended (the "Rules"). However, at the hearing, Advocate Journeaux conceded for the purposes of the application to strike out the counterclaim, but not the summary judgment application, that Jonathan's case in respect of undue influence as pleaded, was arguable. He therefore focussed his attention on striking out the counterclaim on the basis that either it was scandalous, frivolous or vexatious or was an abuse of process. He relied on two grounds:- (i) Jonathan's counterclaim was tainted by illegality and he was not therefore entitled to recover property transferred under an illegal contract; or (ii) Alternatively, Jonathan's claims had been compromised by the heads of agreement signed in September 2009 and approved by the court on 10 th January, 2010 and he could not go behind those agreements. 22. The legal principles applicable on a strike out application are well known. I considered them in *Lapidus v Le Blanq & Voisin & Co.*

[2013] JRC 181A . In that case I noted both that it is only in plain and obvious cases that recourse should be had to the summary process to strike out a counterclaim but also that a dismissal of proceedings may be necessary to prevent parties from being put to expense by frivolous, vexatious or hopeless litigation. I also noted in that decision provisions in the White Book which explain that a point of law that requires serious discussion is not a matter to be resolved on a summary determination. (See also *Corefocus v Cronk* 2013 JRC 194 at paragraphs 15- 21). The Illegality question 23. Advocate Journeaux's argument on this ground was that Jonathan was seeking to set up a counterclaim on the basis of a criminal conspiracy by Jonathan and Stephen to mislead the Royal Court about the extent of Jonathan's assets in response to Debra's claim for financial provision consequent upon her divorce. 24. I was referred by Advocate Journeaux to a number of documents where allegations of illegality were effectively raised. At paragraph 7c of the further and better particulars provided by Jonathan, he pleaded that he was told by Stephen that "only by concealing his assets from his wife he would be able to protect them for his children" . An allegation of concealing assets is also implicit in answer 10a. In his response to Stephen's first affidavit, Jonathan effectively stated that Stephen in taking over his divorce proceedings was a party to criminal conduct. Jonathan, by a letter dated 18 th March, 2013 to Stephen, also indicated that Debra was going to complain to the police about Stephen and Jonathan's conduct. In this letter Jonathan further admitted to lying in his divorce proceedings and stated it was his intention to admit his role in such fraud and conduct and that he had misled the courts and had committed perjury. It is right to note that no complaint has in fact been filed. 25. On the basis of these materials Advocate Journeaux contended that Jonathan's counterclaim should be struck out because he was seeking to sue on an illegal contract namely an agreement between him and his brother to mislead the court in the divorce proceedings between Debra and Jonathan. 26. It is right to record that Stephen in his affidavit and Advocate Journeaux in submission denied any such agreement. 27. The Royal Court in its judgment on indemnity costs

[2007] JRC 109 noted there was compelling evidence that Jonathan and Stephen had been "playing procedural games with a view to wearing down by attrition the will of petitioner". They were both described as having abused the process of the court. 28. At paragraph 94 of its Judgment of the Court of Appeal [2008] JCA 178 stated as follows:- "Against that factual background, which must have been well in the Bailiff's mind when considering the application for indemnity costs, it would not be irrational or perverse for a court to conclude that there had been some form of concealment, and possibly collusion between H and TP (and possibly, but not necessarily, involving others). What appears to have happened is that H (and TP) covered up (by omission, at least) the fact that H had a 50% interest in the development of Field 1218 up and until the matrimonial events of early to mid-2004. The change of position, the freezing out of H by TP, does not appear to have occurred earlier. What is significant, in terms of an indemnity costs order, is that there was a changing position between 2006 and 2007, and H and TP's argument appeared to weaken as documents were disclosed by RBSI (in response to an opposed witness order) and, finally, from Walkers' files ." 29. The Court of Appeal did not conclude that there was some form of concealment. Rather it reached the view that there was no basis to interfere with the Royal Court's decision and it could not be shown that the Royal Court's decision was irrational or perverse. In my view given the matters I have to decide, another way of looking at the Court of Appeal's decision is that by upholding the Royal Court's findings, the Court of Appeal's view was that it was at least arguable that there had been some form of concealment or collusion. Otherwise it would not have upheld the Royal Court's decision. 30. In support of his argument Advocate Journeaux referred me to *Collier v Collier*

[2002] EWCA Civ 1095 . He cited paragraphs 38 to 40 and the first part of paragraph 43 which provide as follows:- "38. Illegality

- Mr Phillips on behalf of the father accepted that a person cannot rely upon illegality in order to establish his case, but he submitted that that only applied when the illegal purpose had been carried into effect. For that proposition he referred us to *Tinsley v Milligan* and in particular to the passages in the speeches of Lord Goff at page 356 F-G and Lord Browne-Wilkinson at page 374 A-B.
- 39. At page 356 Lord Goff said: "From these two principles there is to be derived the principle invoked by the appellant in the present case, viz., that if A puts property in the name of B intending to conceal his (A's) interest in the property for a fraudulent or illegal purpose, neither law nor equity will allow A to recover the property, and equity will not assist him in asserting an equitable interest in it. This principle applies whether the transaction takes the form of a transfer of property by A to B, or the purchase of A of property in the name of B. ... the existence of the principle has been recognised on numerous occasions, even where it has not been given effect to on the facts of the case in question. In particular, an exception to the principle is to be found in cases in which the illegal purpose has not been carried into effect; but all those cases in which that exception has been recognised have

proceeded on the basis that, absent those exceptional circumstances, the principle would have applied."

40. He continued at page 357 B: "The reason why the court of equity will not assist the claimant to recover his property or to assert his interest in it has been variously stated. It is sometimes said that it is because he has not come to equity with clean hands. This was the reason given by the Lord Chief Baron Sir William Alexander in *Groves v Groves*, 3 Y. & J. 163, 174 and by Salmon L. J. (with whom Cross L. J. agreed) in *Tinker v Tinker*

[1970] P. 136,

143. Sometimes it is said that the claimant cannot be heard or allowed to assert his claim to an equitable interest, as in *Curtis v Perry*, 6 Ves. 739, 746, per Lord Eldon L. C.; *Childers v Childers*

(1857) 3 K. & J. 310, 315, per Page Wood V-C and *Cantor v Cox* 239 E. G. 121, 122, per Plowman V-C. But this is, as I see it, another way of saying that the claimant must fail because he has not come to the court with clean hands. It follows that in these cases the requirements necessary to give rise to an equitable interest are present; it is simply that the claimant is precluded from asserting them. This explains why, in cases where the unlawful purpose has not been carried into effect, the court is able to hold that, despite the illegality, there is an equitable interest to which the claimant is entitled." 43. Millett LJ, whose judgment was agreed to by Otton LJ, referred at page 928 to *Tinsley v Milligan* and continued: "It is, therefore, now settled that neither at law nor in equity may a party rely on his own fraud or illegality in order to found a claim or rebut a presumption, but that the common law and equity alike will assist him to protect and enforce his property rights if he can do so without relying on the fraud or illegality. This is the primary rule." 31. Although the case was not quoted to me in the hearing, the Royal Court, in *Valetta Trust* [2012] (1) JLR 1 noted, at paragraph 32, that Jersey law recognizes the ability of the court to hold an agreement unenforceable if it is contrary to public policy, citing the case of *Sarum Hotel Limited v Select Agencies (Jersey) Limited & Another*. At sub-paragraph (ii) of paragraph 32 of *Valetta* the Royal Court also cited Pothier as follows:- "Lorsque la cause pour laquelle l'engagement a été contracté est une cause qui blesse la justice, la bonne foi ou les bonnes mœurs, cet engagement est nul, ainsi que le contrat qui le renferme." 32. While the principles set out in the *Collier* case go further than the remarks of Pothier referred to in *Valetta*, I consider that the principles set out in *Collier* are an illustration of the cause for a contract being offensive to justice, good faith or bonnes mœurs. I am therefore of the view that generally the principle that a party cannot enforce an illegal contract and matters stand where they lie is part of the law of Jersey. I am also satisfied that Jonathan's case is that he and Stephen were party to an illegal contract. 33. However, the issue that then arises is whether a party is allowed to sue to recover property transferred pursuant to an illegal contract. In this case Jonathan's allegation is that he acted on the basis of the undue influence of Stephen. Stephen and Advocate Journeaux accept that the allegation of undue influence is arguable on the pleadings. The effect of an allegation of undue influence,

which is recognised as forming part of the law of Jersey (see *Toothill v HSBC Bank Plc* [2008] JLR 727), is to produce a *vice du consentement* (see *Sutton v Insurance Corporation of the Channel Islands*

[2011] JLR 80 at paragraph 47). 34. In the course of argument I raised with Advocate Journeaux whether a party to an illegal contract, which contract was brought about by the undue influence of the other party, could sue to set aside that contract. Advocate Journeaux responded that such an action could not be brought. I have reached the view however that this argument is not one that is appropriate to determine on a strike out application. Whether the principles set out in *Collier* reflect the law of Jersey has not directly been considered by the Royal Court. Moreover, no authority was produced to me on the inter relationship between the principle that a party cannot sue on an illegal contract and a *vice du consentement*. I also note that in *Chitty on Contracts* 18th Edition at paragraphs 16-186 it states:- "A person can recover money paid or property transferred under an illegal contract if he was forced by the other party to enter into the illegal contract. "Oppression" is here used in a somewhat broad sense." This may reflect the law of Jersey. 35. I am therefore not satisfied that Advocate Journeaux has met the required test to persuade me to strike out Jonathan's counterclaim on the basis of illegality where the party seeking to recover was acting under undue influence. This does not mean such an argument would not prevail at trial or indeed Advocate Journeaux's answer to the question I posed may not be correct. Rather I am simply not satisfied by reference to the test applicable on a strike out application that I can determine this argument in Stephen's favour. The effect of the September 2009 heads of agreement 36. The second ground relied upon by Advocate Journeaux to strike out the counterclaim arises out of the heads of agreement entered into in September 2009 and approved by the Royal Court by the Act dated 1st January, 2010. 37. I have set out at paragraph 10 above clause ix) of the agreement upon which Advocate Journeaux relies. I have also ascertained from a review of the court's files that the act of 10th January, 2010 followed a judgment given by Sir Philip Bailhache Commissioner on 6th January, 2010. 38. In his decision, Sir Philip Bailhache noted it had not been possible for the court to form a definitive view of the merits of the arguments. This was because of the many interlocutory disputes about disclosure of assets and costs. The court also noted that:- "This has been a melancholy case from start to finish. The substantive dispute between the parties was eventually resolved at mediation, but that resolution has not left either party feeling satisfied. Both have been bruised and battered by this bitter dispute and claim to have accepted compromise of mediation only because they were exhausted and worn down by the legal process." 39. I have referred to the above because ordinarily in matrimonial cases, where parties have reached a settlement, the merits of the settlement are evaluated by the court before approving the settlement. In this case although the court approved the heads of agreement, for the reasons I have referred to, it did not do so following an evaluation of the merits. Nevertheless, it did approve the settlement. 40. Advocate Journeaux contended by reference to the case of *S v S*

- [2014] EWCA Civ 95 that the effect of a consent order is to transform terms of a contract into a court order which has the same binding effect as if it were an order made at a full hearing to determine any claim. Moore-Bick LJ explained at paragraph 17:- "The only reasoned speech was given by Lord Brandon, who at page 435D-H emphasised four matters, three of which are of direct importance to the present case. The first is that the court's power to make orders for financial provision is derived solely from the relevant statutory provisions. The second is that no distinction is to be drawn for this purpose between orders made following a disputed hearing and orders made by consent of the parties; in each case the court is exercising the same statutory power. The third concerns the powers of registrars and does not bear on the present case. The fourth, which does, is that, when the court embodies in a consent order terms agreed between parties, the legal effect of those terms is derived from the order itself rather than the parties' agreement. These principles underpinned his conclusion at page 436H-437A that the court cannot properly exercise its statutory powers unless it has been provided with full information about all the relevant circumstances, which in turn requires the parties to give full and frank disclosure. It follows that an agreement to compromise a claim for ancillary relief cannot be treated as a simple contract between the parties to which each is bound, as would be the case with a compromise of a claim to enforce private rights. " 41. In *Marett v O'Brien*
- [2007] JRC 237A being the decision I have already referred to, the Court of Appeal at paragraph 37 summarised the relevant principles upon which a judgment given or made by consent may be set aside as follows:- "In exceptional cases, a court may exercise its jurisdiction (probably inherent but in England expressly included in the Civil Procedure Rules ("CPR"), r.3.1(7)) to vary or revoke a consent order (see, again, *Weston v. Dayman* (
- [2006] EWCA Civ 1165 , at para.
- 24) and *L v. V* (13) ). There is a useful summary of the applicable principles, at least in England, in 37 Halsbury's Laws of England, 4th ed. (Reissue), para. 1210, at 353-354: "A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation, or non-disclosure of a material fact which there was an obligation to disclose, or by duress, or was concluded under a mutual mistake of fact, ignorance of a material fact, or without authority. A compromise in ratification of a contract which is incapable of being ratified is not enforceable; and a compromise which is conditional on some term being carried out, or on the assent of the court or other persons being given to the arrangement, is not enforceable if the term is not carried out or the assent is given effectually." In relation to the law in Jersey, the reference to "mutual mistake of fact" has to be moderated to take into account applicable principles of contract law (see below)." 42. In relation to the agreement on financial provision reached between Jonathan and Debra, it is clear that this was approved by the Royal Court by Sir Philip Bailhache's judgment of 6 th January, 2010. I am therefore of the view that the terms of any financial provision agreed

between Debra and Jonathan cannot be set aside having regard to the principles in *S v S*. 43. I am not however satisfied that this principle applies to that part of the heads of agreement which resolved disputes between Jonathan, Stephen and Annette. That part of the settlement was not considered in the judgment issued by Sir Philip Bailhache which was only in respect of approving financial arrangements between Debra and Jonathan. I therefore consider the relevant part of the heads of agreement between Jonathan, Stephen and Annette in principle could be set aside if one of the grounds set out by the Court of Appeal in *Marett v O'Brien* cited above was made out. Ultimately, this part of the heads of agreement in my judgment was made on the agreement of the parties, rather than the court exercising the supervisory obligation imposed on it by statute in matrimonial matters requiring it to be satisfied as to the appropriateness of the order agreed between Debra and Jonathan. 44. In light of my view that a consent order and an underlying agreement can be set aside in principle, , if one of the grounds set out in *Marett v O'Brien* is made out, I now consider whether there is an arguable ground to set aside clause ix) of the heads of agreement. I note that Jonathan has pleaded a case of undue influence in relation to the transfer of properties or relinquishing his interests in properties by him to Stephen, and in his particulars he also alleges that he entered into the agreement of 5 th August, 2010 on the basis of undue influence (albeit without specifying any relief other than damages). However, his pleaded case does not contain any allegation that the settlement reached following the mediation is one that should be set aside on such a basis. Moreover, neither the statement he filed in response to Stephen's first affidavit nor his skeleton argument addresses the point. In other words he has not advanced any case at all, whether in pleaded form or in affidavit form or even in submission, to explain why the heads of agreement reached in September 2009 should be set aside. As I have noted above this agreement was reached after mediation which took over a day and a half where each party had legal representatives present throughout and where their legal advisers countersigned the heads of agreement. 45. In the absence of any evidence whatsoever to justify the setting aside of the heads of agreement subsequently endorsed in a consent order, I have reached the view it would be an abuse of process to allow the counterclaim to continue. All the damage claimed in the counterclaim occurred prior to the mediation agreement being entered into, save in respect of any right to occupy the property. I will deal with that aspect of Stephen's application later in this decision. However, all other matters relied in respect of Jonathan's counterclaim predated the mediation and the heads of agreement. I am of the view that to allow the counterclaim to continue would therefore be both vexatious and an abuse of process. 46. If Jonathan in his statement or his arguments before me had set out any grounds which could have formed the basis of a realistic argument to set aside the settlement agreement and the consequential consent order, I would have allowed him an opportunity to amend to do so. However, no such grounds have been identified at all. I am not therefore prepared to exercise my discretion to allow Jonathan time to formulate a new case in the absence of any explanation about what that case might look like. I therefore strike out the entirety of Jonathan's counterclaim save in respect of his claim to damages to occupy the property. It is more logical to deal with that part of the counterclaim when I deal with the application for

summary judgment and the alternative claim to strike out the Jonathan's answer because the question of Jonathan's occupation of the property is raised in the answer as well as being referred to in the counterclaim. The Application for summary judgment 47. In relation to the application for summary judgment, I consider this application on the basis that any references in the answer which replicate matters referred to in the counterclaim are also struck out. What therefore remains is whether the answer filed by Jonathan is a defence to Stephen's claim for possession of the Property on the basis that the answer does not amount to a defence to Stephen's claim. 48. The legal principles on an application for summary judgment are well known. I consider that in *Corefocus v Cronk*

[2013] JRC 194 and also in *Hard Rock Limited & Anor v HRCKY Limited*

[2013] JRC 244 at paragraphs 12 to 16. 49. I was also reminded by Advocate Journeaux by reference to *Amy v Amy*

[2011] JLR 603 and *Toothill v HSBC* that it was for the defendant to satisfy the court that there was a real issue which should be tried and that evidence would be required from a defendant rather than a mere assertion or the production of a pleading. As noted in *Toothill*, a defendant's affidavit must condescend upon particulars and should, as far as possible, deal specifically with a plaintiff's claim and affidavit and state clearly concisely what the defence is and what facts are relied upon to support it. There is therefore a distinction between a summary judgment application and a strike out test where it is said there is no reasonable cause of action. On the strike out test all that is required is an arguable claim on the face of the pleading whereas, on a summary judgment application, what is also required is evidence to show that there is a real issue to be tried. 50. Stephen's case is that Jonathan only enjoyed a right to occupy the property by reference to the agreement of 5 th August, 2010, the material parts of which I have set out above. The Petty Debts Court has already ruled that the basis of occupation is that Jonathan has a licence to reside in the Property. Stephen therefore argues, by reference to the agreement of 5 th August, that the licence has come to an end and he is entitled to possession. He also claims damages for lost rent he would have received had Jonathan vacated the property at the end of 2012 in accordance with the agreement of 5 th August. 51. Jonathan's defence, as set out at paragraph 3.6 of his answer, was that he had a right to reside at the Property indefinitely. In relation to the agreement of 5th August, by further and better particulars of paragraph 4 of Jonathan's answer, Jonathan argues that the agreement of 5 th August was entered into by him again on the basis of Stephen's undue influence. He also alleges that he was pressurised by Advocate Sinel. Finally, although the 5 th August agreement contains a provision noting the right of Jonathan to take legal advice, he argues that he did not take legal advice because of the pressure placed upon him by Stephen and Advocate Sinel. 52. Assuming for the moment, that Jonathan has an arguable case (which I deal with later) that the 5 th August agreement may be set aside for undue influence, it is then necessary to consider the effect of an order setting aside this agreement. In further and better particulars of Jonathan's answer, in response to a request relating to paragraph 3.6 and the

statement that Jonathan could stay in the property indefinitely, Jonathan pleaded at answer 10a, through Voisins, his then legal adviser, as follows:- " The defendant was asked to wait a reasonable period until after the transfer and after the divorce was settled, until the plaintiff could pay the defendant his due share of the joint assets. The defendant was led to believe that he would then be in a financial position to leave the property and to find his own future accommodation ." 53. At particular 14b and c in response to the questions:- "What is the consent that is alleged to have been given; and If the consent was explicit identify what was said?" Jonathan in response stated :- "To continue living at the property indefinitely", and "The plaintiff said "when the dust has settled we can sort out the money" or words to that effect." 54. In argument before me Jonathan accepted that the promise made to him was that he could stay in the property until he was paid out his share of the properties transferred to Stephen which share he stated amounted to 50% (my emphasis). The assertion in the first sentence at paragraph 3.6 of Jonathan's answer that he could stay at the property indefinitely is not therefore Jonathan's case. His answer has been modified by the particulars filed by Messrs. Voisins I have set out above, which Jonathan confirmed orally, in addressing me, is his case. 55. The issue that then arises is whether this promise gives rise to any form of estoppel that would amount to an arguable defence to Stephen's application for summary judgment. This requires me to consider firstly whether the promise is capable of amounting to an estoppel. Secondly, because the promise relates to occupation of real property, the issue arises whether the promise was a proprietary or promissory estoppel, the former not being recognised under Jersey law whereas the latter is. I will deal with each of these arguments in turn. First, I return to the issue of whether it is arguable that the 5th August agreement may be set aside on the basis of an allegation of undue influence. The 5 th August agreement and the allegation of undue influence . 56. By reference to the passage from *Marett v O'Brien* set out at paragraph 40 of this judgment, in principle the 5 th August agreement can be set aside on the basis of undue influence. An allegation of undue influence, if made out, would lead to a vice de consentement . What evidence is there which might support such a claim? 57. In addition to the particulars alleging undue influence, Jonathan, in his statement filed in response to Stephen's application, among other matters, explained that, now he was receiving counselling from a psychologist, he understood that Stephen had taken control and Jonathan went along with Stephen's requirements in relation to transfers of assets. I am satisfied, based on all the materials provided to me, that Jonathan's statement is supportive of an arguable case of undue influence. The concession Advocate Journeaux made in respect of the strike out application was a realistic one and I have reached the view that there is sufficient before me for there to be an arguable case of undue influence generally in relation to the relationship between Stephen and Jonathan. 58. What Jonathan has not explained are the circumstances as to how he came to execute the agreement of 5th August 2010 and why this was subject to undue influence beyond making an assertion in submission to me. His assertions may be said therefore to lack particularity. However, Stephen has not explained in his affidavit the circumstances in which the agreement of 5 h August came to be executed either, and has not responded to the allegations in the answer and the further

and better particulars provided. Just as Jonathan alleges undue influence, Stephen simply denies it. I also note that no evidence has been produced either by Advocate Sinel, notwithstanding the allegations against him, or by Advocate Chiddicks who witnessed the agreement. The Court of Appeal also noted in *Amy v Amy* that in general evidence is required from the party resisting the summary judgment application. In this case however, given that the allegations of undue influence predating the 5 th August agreement are arguable, in the light of the lack of any evidence from Stephen, Advocate Sinel or Advocate Chiddicks, I am satisfied that an arguable case exists in relation to whether the 5 th August may be set aside for undue influence. I also consider, insofar as Stephen's affidavit asserts that proper disclosure was made to the Royal Court and the 5 th August, 2010 agreement reflects proper disclosure having been made, this contrasts with the conclusions of the Court of Appeal to which I have referred where the Court of Appeal refused to interfere with the Royal Court assessment of Stephen and Jonathan's conduct. I was also not informed what disclosure was made between the Court of Appeal decision and the heads of terms agreed in September 2009. Even in 2010 Sir Philip Bailhache was not able to reach a view on the merits of the arguments. I therefore consider that I am entitled to conclude that Stephen's affidavit may not necessarily reflect the full picture of the relationship with Jonathan, the nature of their relationship, and how and why assets were dealt with in a particular way. I have taken this into account in reaching the view that Jonathan has an arguable case of undue influence to set aside the 5 th August agreement. Estoppel 59. In light of my conclusion on undue influence, I now address whether the promise Jonathan alleges Stephen made to him about occupation of the Property is one that is capable of amounting to an estoppel. 60. The promise I am considering is whether the statement Jonathan says was made to him by Stephen namely that Jonathan could reside in the property until Stephen paid Jonathan his "share" of properties or other benefits of value provided by Jonathan to Stephen (including not charging the full price of works carried out or not taking up options). 61. In *Mirpuri v Bank of India*

[2010] JRC 129 , at paragraph 31, Birt Bailiff cited a definition of an estoppel by reference to Snell's Equity as follows:- "Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it." 62. At paragraph 34 he stated " estoppel requires there to have been a clear and unequivocal promise or assurance either by words (oral or written) or by conduct" . 63. In this case the promise relied upon by Jonathan appears to amount to a clear and unequivocal promise or assurance intended to affect the legal relations between Jonathan and Stephen. However, the position is more complicated because of the findings I have already made. As Jonathan has settled any claims he had against Stephen by virtue of the heads of agreement I have already referred to, the second

part of the promise on which he relies namely that Stephen would pay him a share is not enforceable. The legal relations between Jonathan and Stephen were compromised by virtue of clause ix) of the heads of agreement signed by them in September 2009. 64. Jonathan is therefore left with only part of a promise, namely that he could stay in the property. However, that is not an unequivocal promise because it is not the promise he relies on. A promise to stay in the property indefinitely without any qualification is very different from a promise allowing someone to stay in a property until payment of a sum of money is made. I would be rewriting past events if I were to allow Jonathan to argue that he enjoyed the benefit of an unequivocal promise from Stephen to stay in the property for the rest of his life. That is not the case that Jonathan has advanced in his further and better particulars or in oral submission to me. Accordingly, I have reached the view that the promise relied upon by Jonathan is not one that is capable of amounting to an estoppel because part of the promise has been compromised by the heads of agreement. What remains is only part of the promise not the whole promise relied upon. The doctrine of estoppel cannot be used to enforce part of a promise where the parties have compromised the other part of the promise. To hold otherwise would be to allow Jonathan to argue for enforcement of a new and different promise which was not the promise made. I have therefore reached the view that there is no defence to Stephen's claim for summary judgment in respect of the Property and his claim for possession because Jonathan has no promise he can ask the Royal Court to enforce. 65. In view of this decision it is not necessary for me to deal with the remaining arguments advanced but I will do so, so that the parties have my view on all issues raised in argument. Other issues 66. Firstly, I deal with the question of whether any estoppel is a proprietary estoppel or a promissory estoppel, if the view I have reached on the nature of the promise is wrong. In summary I would have referred this issue to the Royal Court as, in my opinion, it involves a serious and complex question of law. In *Flynn v Reid* 2012(1) JLR 370 at paragraph 50 W. J. Bailhache, Deputy Bailiff stated "we do not think that the doctrine of proprietary estoppel forms part of Jersey law if its effect is to create an equitable interest in land that exists in parallel with the legal interest". The court's decision in *Flynn v Reid* however was not decided on this basis alone. The court also commented on the different approaches taken by the Royal Court in a number of earlier well known cases which had considered proprietary estoppel. It is also not clear to me whether a promise to reside in a property for a particular period creates an equitable interest in land or whether such a promise is only a promissory estoppel. I consider that, had I not found that there is no estoppel, these points are arguable and are points which it would have been appropriate for the Royal Court to determine. 67. Secondly, had there been a clear and unequivocal promise, I would not have prevented the matter from being referred to the Royal Court on the grounds of illegality, for the same reasons that I would not have permitted an argument on illegality to justify striking out Jonathan's counterclaim. 68. Thirdly, insofar as the counterclaim seeks damages for loss of a right to occupy the Property, I strike this out for the same reasons that I have given judgment in Stephen's favour, namely there is no promise that can be enforced. Had I found such a promise I would have allowed the relief

to be amended to seek an appropriate remedy to remain in occupation, rather than damages.- Damages 69. As part of his application for summary judgment, on the assumption he was successful, Advocate Journeaux sought damages for Stephen representing the rent that could have been earned in respect of the property had Jonathan vacated the property at the end of December 2012. 70. In support of this application, Stephen, at paragraph 24 of his affidavit deposed that he had incurred losses from rental income at the rate of £2,000 per month. That figure was justified by a drive-by valuation from Mr. Blackstone of Wills Associate Chartered Surveyors in a letter dated 6 th February, 2014 exhibited to Stephen's affidavit in reply. 71. Jonathan in his skeleton argument stated that the property had never been rented and set out that at different times Stephen and Annette, another employee and his family and then Jonathan had all occupied the property rent free. He also pointed out that he himself had been in the property since 2008 on a rent free basis i.e. some 2 years before the agreement of 5 th August, 2010 was signed. 72. Although I accept that Jonathan has been in the property without any legal basis to do so since the end of 2012, I am not satisfied that I should award the damages claimed on an application for summary

## judgment.

Stephen did not dispute, either in evidence or any submission made on his behalf, that the property had been a rent free property and had never been used to produce an income. I therefore consider that what damages Stephen has suffered from the end of 2012 is a matter that requires a trial. That matter can be dealt with by the Royal Court or by me by agreement if the parties are content for me to assess damages. When this judgment is handed down I therefore wish to give directions on how Stephen's claim for damages should be determined. Issues to be resolved 73. When this judgment is handed down I also want to be addressed on the following:- (i) Costs; (ii) What happened at the mediation? I note in particular that Jonathan alleges Advocate Sinel attended. This occurred after I had identified that Advocate Sinel might face a conflict of interest as he was alleged to be a party to an allegation of undue influence and after Advocate Journeaux had been instructed. I therefore do not understand, at present, why Advocate Sinel attended the mediation, in particular given the allegations made against him. I want to be addressed on this in relation to the question of what costs order I should make and whether there was a genuine attempt to resolve matters by mediation prior to this application being determined; (iii) Stephen is entitled to an order for possession. I want to be addressed by both Stephen and Jonathan, as I indicated at the conclusion of the hearing, on what period of time Jonathan should be allowed to remain in the property and subject to what conditions. I consider I have power to make such orders under Rule 7/2 of the Royal Court Rules 2004, as amended.

## Conclusion

74. In conclusion for the reasons set out in this judgment, I strike out Jonathan's counterclaim. I also give summary judgment for Stephen in respect of Jonathan's occupation of the Property but it gives me no pleasure to do so. Like Sir Philip Bailhache, I too am left with a feeling of melancholy by this family dispute, what it may have cost the parties and why they could not resolve their differences amicably. *Authorities Lapidus v Le Blanq & Voisin & Co.*

[2013] JRC 181A *Marett v O'Brien*

[2007] JRC 237A *Corefocus v Cronk*

[2013] JRC 194 . *Collier v Collier*

(2002) EWCA Civ 1095 *Valetta Trust*

[2012] (1) JLR Toothill v HSBC Bank Plc

[2008] JLR 727) *Sutton v Insurance Corporation of the Channel Islands*

[2011] JLR 80 S v S

(2014) EWCA Civ 95 *Hard Rock Limited & Anor v HRCKY Limited*

[2013] JRC 244B *Amy v Amy*

[2011] JLR 603 *Mirpuri v Bank of India*

[2010] JRC 129 *Flynn v Reid* 2012(1) JLR 370 Page Last Updated: 23 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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