



**IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 2009 No. 44**

BETWEEN:

GRETA LOIS MARSHALL

Plaintiff

-v-

JOSEPH EDWARD WAKEFIELD

-and-

DONNA JEAN ACCARDO

(Executors of the Estate of the late Hazel Jean Crozier)

Defendants

RULING

Date of Hearing: April 8, 2009

Date of Ruling: April 24, 2009

Mr. Paul Harshaw, Harshaw & Co, for the Plaintiff

Mr. Jai Pachai, Wakefield Quin, for the Defendants

The application

1. The Defendants apply by Summons dated March 11, 2009 to set aside an ex parte injunction I granted on February 24, 2009 restraining the Defendants from enforcing any writ of execution pursuant to judgments obtained in respect of the Plaintiff's husband's separate debts against any property which she jointly holds with her husband without leave of this Court.

2. The Plaintiff's Specially Indorsed Writ was issued on the same date that the injunction was granted and seeks what appears to be a permanent injunction in terms of the ex parte order initially sought. The application to set aside the injunction will effectively determine the entire action, which was brought by the 77 year old Plaintiff to prevent the family home which she jointly owns being sold by way of auction to discharge her husband's debts.
3. The Plaintiff prays in aid fundamental property rights in support of what in human terms is a compelling case: the law ought not, she contends, permit her only home to be amenable to execution in respect of judgments obtained against her husband, who jointly owns the property with her. The Defendants contend that the law governing the enforcement of judgments against jointly owned assets is perfectly clear, even taking into account fundamental property rights. Although the Courts may be reluctant to permit enforcement against a jointly owned family home as against one of the joint owners where enforcement is available against other assets, there is an absolute right to attach the interest of the judgment debtor in jointly owned real or personal property.

The facts

4. It is common ground that the Plaintiff and her husband jointly own a Mizzentop apartment in Warwick. It also common ground that on or about November 5, 2008, the Defendants obtained judgment for over \$3.8 million against the Plaintiff's husband in Civil Jurisdiction (Commercial Court) 2008: 221 ("the Judgment").
5. The Plaintiff complains that while she had prior notice of execution being levied in respect of another judgment against her husband which was settled in June 2008, she was given notice after the fact about any execution in respect of the Judgment. The Plaintiff's Affidavit sworn on February 24, 2009 does not assert that there are other assets owned solely by her husband against which the Judgment could be executed.
6. It appears that the family home is the only significant asset owned by the judgment debtor against which the Judgment can be partially enforced, the judgment debtor's 50% interest in the property being very roughly valued at less than 15% of the judgement debt.
7. The Defendants filed no evidence in support of their application which they supported purely on legal grounds and the materials the Plaintiff's counsel placed before the Court.

Legal findings

8. When the applicable legal principles are clinically examined in light of the uncontested facts and shorn of the strong sentimental attributes of the Plaintiff's

claim, it is clear that the Injunction was not properly granted and must be discharged.

9. Halsbury's Laws, 4th edition Reissue, Volume 17 (1), paragraph 164 states:

“Where goods belong to the judgment debtor jointly or in common with some other person, they may be seized under a fieri facias unless the co-owner has become solely entitled by survival upon the death of the debtor before the delivery of the writ.”

10. Footnote 1 to the same paragraph explains this assertion as follows: *“The principle is that each of the two persons has an interest in the goods which is capable of being seized, and each is entitled to possession and entitled to sell without the consent of the other.”* This proposition applies with equal force to real property as well. The notion of two distinct interests in jointly owned property, for which Mr. Pachai contended, is recognised by Bermuda's Partition Acts. This legislation provides a statutory mechanism to facilitate the exercise by one or more of several joint owners of their common law right to sell their partial interest in land.

11. So applying traditional established principles, the Defendants are entitled to execute the Judgment against the real property which the judgment debtor owns jointly with his wife, the Plaintiff herein, but only to the extent of his interest in the property. If the property has to be sold, the Plaintiff will be entitled to retain her 50% share of the sale proceeds.

12. Mr. Harshaw valiantly sought to establish that these settled principles were modified in the context of a family home by the provisions of section 13 of the Bermuda Constitution and Article 8 of the European Convention on Human Rights (“ECHR”). Article 8 of the ECHR (“Protection of Family Life”) provides as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

13. The ECHR is an international treaty which the United Kingdom Government has extended to Bermuda as a British Overseas Territory. This means that where

domestic remedies in the form of appeals to the Judicial Committee of the Privy Council have been exhausted, persons who contend that a public authority in Bermuda has contravened their Convention rights may petition the European Court of Human Rights for relief. The ECHR has not been incorporated into Bermuda law, so its legal status has two principal elements to it. Firstly, local statutes must be interpreted as far as possible so as to conform to Convention rights, applying the presumption that Parliament does not intend to legislate in a manner inconsistent with Her Majesty's international obligations in respect of Bermuda. Secondly, there may in certain circumstances be a legitimate expectation in public law that public authorities (including, potentially, the courts) will not act in a manner inconsistent with an international treaty applicable to Bermuda.

14. Where this Court has a discretion to exercise, I accept that the Court should have regard to ECHR rights and seek to avoid infringing them. But the right to respect for family life under Article 8 is not an absolute right and it is permissible to interfere with its exercise where this is (a) "*in accordance with law*", and "*necessary*", *inter alia* (b) "*for the protection of the rights of others*". No interference with the Plaintiff's Article 8 rights would appear to flow from permitting a judgment creditor to enforce a judgment against her co-owner's interest in a family home in circumstances where no other assets are available to satisfy the judgment.
15. Mr. Harshaw's diligent researches produced the unreported High Court of Northern Ireland decision of *Northern Bank Limited-v-Brolly & Brolly* (2002) NICH 7. This case concerned the interaction between Article 8 of ECHR and the ability of a judgment creditor to enforce a judgment against the interest of one of two married co-owners of a family home. It is persuasive authority which suggests no more than that: (a) it is for the Plaintiff in the present case to adduce evidence in support of her contention that her Article 8 rights are likely to be infringed, and (b) it is only if it appears that the Judgment might be satisfied without a sale of the family home that the Defendants would be required to demonstrate that the alternative enforcement options are not viable.
16. In my judgment the Plaintiff in the present case has adduced no evidence which could potentially support a finding that the sale of her family home would constitute an unjustifiable interference with her Article 8 rights because the Defendants have other assets against which to enforce the Judgment against the Plaintiff's husband which they ought to be pursuing instead.
17. Mr. Harshaw also sought to rely on section 13 of the Constitution, which prohibits the compulsory acquisition of property without compensation. This section is aimed at compulsory acquisition (a) by the Crown, and (b) by operation of law. Section 13 expressly provides that no contravention of section 13(1) occurs when the taking occurs through, *inter alia*, the execution of judgments "*except so far as that provision or, as the case may be, the thing done under the authority thereof is*

shown not to be reasonably justifiable in a democratic society”: section 13(2)(a)(vi).

18. But as far as the Plaintiff is concerned, however, section 13 is not even engaged by the execution of the Judgment against the interest of the judgment debtor in the property he jointly owns with the Plaintiff. The Defendants’ execution process will not result in the acquisition of the Plaintiff’s property rights at all.

Conclusion

19. For the above reasons, I find that the Plaintiff has no right to restrain the Defendants from seeking to enforce the Judgment against the Mizzentop apartment she jointly owns with her husband the judgment debtor.
20. The ex parte interim injunction I granted on February 24, 2009 is discharged. Unless either party applies to be heard within 21 days as to costs, I would order that costs should follow the event and that the costs of the present application should be awarded to the Defendants to be taxed if not agreed on the standard basis.

Dated this 24th day of April, 2009

KAWALEY J