REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011 – 03564

PHYLLIS CRAWFORD

SHERENE GOWRIE

(The Legal Personal Representatives of the

Estate of Henry Ramkalawan, Deceased)

CLAIMANTS

AND

FRANKIE RAMKALAWAN

DEFENDANT

DECISION

Before the Honourable Madam Justice C. Pemberton

Appearances:

For the Claimants: Mr G. Raphael

For the Defendants: E.A. Martinez instructed by D. Rampersad & Co.

[1] On 12th November 2012, the Court of Appeal remitted these proceedings to the High Court. The reason for the remittance is immaterial to the question to be determined by me. I received the file on January 30th 2013 and immediately dispatched directions for the parties to address me on the Notice of Application filed by the Claimants asking the court to enter judgment without a trial and a counter Notice of Application filed by the Defendant seeking leave of the court to file his defence even though the time limited for so doing had expired.

[2] **THE ACTION**

This action concerns the efforts of Executrices to collect in and distribute a Testator's assets in accordance with his wishes as expressed in his last Will and Testament.

[3] **BACKGROUND**

The Claimants, Phyllis Crawford (PC) and Sherene Gowrie (SG) are the joint Executors of the Estate of Henry Ramkalawan having proved his will in the High Court of Justice on January 23rd 2004. Frankie Ramkalawan (FR) the Defendant is one of the beneficiaries under the said will of Henry Ramkalawan. One of the devises under that will comprises a property situate at 27 Southern Main Road in Curepe, East Trinidad. The will devised that property "wholly and impartially", to four persons, PC, Sylvia Ramkalawan, the Testator's widow, the Defendant, and the Testator's daughter Joycelyn Dean. The Testator devised to each of them the residence for the terms of their natural life. In relation to the "Beer Garden" business, housed at the premises, the real issue between the parties, the Testator gave and devised this business to PC for her use and benefit. This will was made on November 12th 2000.

[4] During the course of his life, in 1991, and before the execution of his will, the Testator entered into an agreement/arrangement with his son to *"temporarily transfer the business to him as he was facing financial difficulties until such time as the Father deems fit to have the said business re-conveyed to him"*. This document was not made under seal and was not registered, but I shall reserve my comments on its enforceability until later. The Son took delivery of the 'Beer Garden' and has been in possession and control of it up to the time of filing of this action.

[5] Suffice it to say that the Testator departed this life on May 24th 2003, without having revoked or altered his will. Probate of that will was as was said granted to the Executrices named in the will on January 23rd 2004. Letters were penned by and on behalf of the Executrices for the Son to relinquish his possession and control of the 'Beer Garden'. He has refused. On September 20th 2011, the action at bar was filed by the Executrices for the recovery from the Defendant, their brother, of the Business, the 'Beer Garden'.

[6] **THE APPLICATIONS FOR CONSIDERATION**

On October 6th 2011, an Appearance was filed on FR's behalf. The relevant questions and answers read:

1. Have you received the Claim Form with the above claim number? Yes
2. If so, when? Not served but **waiving service**
3. Did you also receive the Claimant's Statement of Case? Yes
4. If so, when? Not served but **waiving service**
5. **…**
6. Do you intend to defend the Claim? Yes

If so you must file a defence within 28 days of the service of the claim form on you.

(Emphasis mine).

[7] At the most generous, the defence ought to have been filed on or before November 7th 2011. No defence was filed within the time stipulated in the Acknowledgement of Service Form. PC and SG instructed their Attorney to apply for Judgment without a trial pursuant to Part 12.1(1), FR having failed to file his Defence in accordance with Part 10 of the CPR.

[8] This application was made on January 25th 2012 a period just shy of 4 months after the claim was filed and a little over 2 months after the defence fell due. The application was supported by an affidavit. The application was met as it were by a counter application filed on April 19th 2012, for an extension of time for FR to file his defence. I shall address the second application first.

1. DEFENDANT'S APPLICATION TO EXTEND THE TIME TO FILE HIS DEFENCE

The grounds of this application can be summarized as attorney inadvertence and the fact that FR has a good defence to the action.

[9] **ATTORNEY INADVERTENCE**

The Acknowledgement of Service Form admonishes a defendant who intends to defend an action to file his defence within 28 days of its service upon him. This mirrors Part 10.3(1) of the CPR which sets this out as the general rule. Upon expiration of that period, or when a Defendant observes that the period is about to expire, he may seek an extension of time from the Claimant. If the Claimant so agrees, the time is extended. This is the conjoint effect of Part 10.3 (5), (6) and (7). If there is no such agreement, a Defendant may apply to the Court – See Part 10.3(9). As at the time of writing this decision, FR had availed himself of Part 10.3(9).

[10] The authorities are clear, both the CPR[1] and case law. If a Defendant does not file his defence, a Claimant is well within his rights to take up a judgment in default of defence, either by direct application to the Court office or upon application to the Court.[2]

[11] I need not rehearse the authorities on the issue of Attorney inadvertence. Suffice it to say that this excuse is not tenable in these courts without more. All that needs to be said in relation to this issue has been said in this court, the Privy Council and the CCJ[3]. I can add no further to the store of knowledge.

[12] Even if I were so inclined, this application was filed in excess of 5 months after the defence was due, again, just shy of 4 months from the date of the first application. No excuse has been proffered for its late filing save that alluded to. There is nothing to satisfy me that this matter was attended with any urgency or promptitude. That is fatal to FR's application.

[13] **GOOD DEFENCE TO THE CLAIM**

FR has attached a draft defence for my consideration. I must examine it to see if there is indeed a good defence to the claim. The bases of this claim by FR lay on the doctrine of

[11] See Part 12 – Default Judgments and in particular Part 12.1(b).

[2] See Part 12.2 (3);and Part 12.4(e) and Part 12.7(4).

[3] **MAHABIR v PHILLIPS Civ App 30 of 2002; NCB v POUCHET Civ App 233 of 1995; RAMKISSOON v RAMKISSOON Civ App 161 of 1998; WILLIAMS v AG Civ Appeal 73 of 2002;THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO v UNIVERSAL PROJECTS LIMITED [2011] UKPC 37.**

res judicata; equity; lack of locus standi in the claimants; inadequate pleadings and the effect of not pleading that a chose of action survives death.

[14] One of the main planks of this defence is the issue of *res judicata.* There was an earlier matter filed in these courts by PC in her personal capacity. The learned Judge correctly found that she had no *locus standi* to bring that action. The English decision of Chadwick LJ in **FRIEND v CIVIL AVIATION AUTHORITY**[4] gives some guidance as to how this issue is to be approached. From this, I glean as follows:

- Identify the issue in the present proceedings in relation to which there is said to be an estoppels; and

- Carefully examine all of the circumstances that the issue on which the Claimant is to succeed in the claim which he seeks to bring is indeed the same issue as that which has been considered and decided in earlier proceedings by a competent court.

[15] There is no real issue with respect to the similarity of the issues in the case at bar and the former action. The question is, was there a decision on those issues in the previous proceedings to satisfy the record limb of the test?

[16] In **WILLIAMS v WILLIAMS** the sitting judge asked the same question that I ask now: how am I to regard the learned Judge's statements and findings in his Judgment as findings of fact by a **competent court and conclusive of the issues before it**? If the court was competent to hear the case, then the matter would end there. If not, can the argument of *res judicata* be advanced with much force?

[17] Once *locus standi* is raised and determined against the person bringing the action, to my mind, the case can go no further since there is no proper Claimant before the court after a careful examination of all of the circumstances, the inescapable conclusion therefore is that in any subsequent hearing, like this one at bar, even if the original issues are raised and

[4] [2001] 4 ALL ER 385

commented upon, they cannot be regarded as adjudicated upon and consideration of same will not be barred by the application of the doctrine of *res judicata.*

[18] The previous action was a non starter. The court had no jurisdiction to entertain the matter.[5] Once properly brought, any court would then be seised with jurisdiction to hear and determine the matter on the merits. Respectfully, I suggest that any parts of the judgment in the previous matter towards the merits of the claim are *obiter* **-** the considered opinion of that court but not conclusive or binding on the merits of the case and not on a court of concurrent jurisdiction.

[19] This court therefore is seised of jurisdiction to look at both the claim and the defence more closely to see:

- If the other limbs of the defence constitute a "good" defence; and if not
- Whether the claim as brought is one that can benefit from a judgment without a trial pursuant to Part 12.

[20] **OTHER GROUNDS OF DEFENCE**

The submissions address the broad heading of **Equity** without pointing the court to the particular paragraphs in support in the defence. The submissions outline the fact that FR has maintained that part of the building which housed the business; expended monies for the Beer Garden and creating good will. I notice though that no statement of income or profit has been appended to the defence. These statements to my mind do not carry FR's case far. What is the equitable principle which he prays in aid? That has not been identified.

[21] As far as **Adequacy of Pleadings** is concerned, is the fact that there has not been a description of the business the "Beer Garden" in the Statement of Case fatal? I think not. PC and SG call for an account of the business to be taken. That to my mind is sufficient.

[5] See Civil Suit No 28 of 1999 (St Christopher and Nevis) **LEONARD WILLIAMS v LEROY WILLIAMS**. In this case, the learned Magistrate decided that she had no jurisdiction to hear and determine the matter before her, her jurisdiction being ousted by statute. Her Worship however went on make findings on the issues before her.

The other ingenuous fatality identified by FR was PC and SG did not plead that the **chose in action was to survive death of the deceased**. All I wish to say now is that one must first establish that a chose in action did arise and was alive at the Testator's death. I find none but I shall address this later.

[22] **CONCLUSION**

I do not find that the defence as appended and discussed by FR's Attorney is a "good" one. I cannot see that the Overriding Objective can be furthered by allowing an extension of time for its filing. In the premises, I deny the FR's application for the extension and would order that he pays the costs of that application personally.

2. IS THERE A PROPER CLAIM FOR THE DEFENDANT TO ANSWER

The facts have been recited above and I shall not repeat them. As far as I see it, this is the law which informs the claim. The two documents which form the basis of the claim are:

a. **The Agreement of March 23rd 1991**

b. **Provision of the Will**

I shall deal with each.

[23] **(a) The Agreement of March 23rd 1991**

The basic requirements for a valid and enforceable contract are offer, acceptance, consideration, intention to create legal relations and privity of contract. As I see it, two issues spring to mind – intention to create legal relations and the existence of consideration. For the sake of completeness, I shall reproduce the document in vital parts:

> *THIS AGREEMENT made this 23rd day of March, in the Year of Our Lord one thousand Nine Hundred and Ninety-One Between HENRY RAMKALAWAN ... ("The Father") AND FRANKIE RAMKALAWAN ...("the Son") ...*

WHEREAS the Father is the Owner of a 'BEER GARDEN' diyuyrf sy,(situate at) 27 Southern Main Road, Curepe.

AND WHEREAS because of the Father's failing health and age and the Son's financial difficulties it is agreed between the parties as follows:

(a) The Father has temporarily agreed to and has transferred the said business known as 'THE BEER GARDEN' to the Son and the Son has AGREED WITH the Father to accept the transfer of the said Beer Garden ***until such time as the Father deems fit to have the said business re-conveyed to him.***

….

(Emphasis mine).

[24] **INTENTION TO CREATE LEGAL RELATIONS**

The learning is quite clear. The existence of a family relation belies any intention to enter into formal and binding legal relations unless the contrary intention is shown whether by documentary evidence or by conduct. The onus would be on the person asserting that there is such a contrary intention. This of course must be pleaded quite clearly. If there is no pleading to that effect, then the basic rule holds and the agreement/arrangement is not a valid contract, far less being enforceable as one. If there is no contract, there can be no rights to enforce or obligations to observe.

[25] **CONSIDERATION**

The second element under scrutiny is consideration. Consideration must be of "'*some value in the eyes of the law, that means that it must be capable of estimation in terms of economic or monetary value*"[6]. Consideration is not necessary for a contract made under seal. In this jurisdiction, a contract made under seal must be made by Deed and all deeds must be registered. There is no evidence that this agreement fell into this category. It

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[6] **CHITTY ON CONTRACTS Vol 1 para. 3-022 p 268 (30th ed.)**

means therefore that the ordinary rules of contract will apply, that is that for any agreement to be valid and enforceable as a contract, creating rights and obligations, there must be consideration. Where is the consideration on the face of this agreement? It is obvious that there is none.

[26] **PROPRIETARY ESTOPPEL**

FR cannot even raise a plea of proprietary estoppel. What was his forbearance? What was the promise made and what did he give up to accept the promise made? I therefore conclude that there was no consideration supporting this agreement.

[27] **NATURE OF THE AGREEMENT**

Even if I am wrong on the law, I now examine the nature of the agreement. It was expressed to be a temporary transfer of the business because of ill health on the Father's part and financial difficulties on the Son's part. There was expressed in the agreement that there was to be a re-conveyance of the business when the Father deemed it fit. Can one conclude that the Father intended to totally divest himself of ownership? I can only say that the words do not convey to me that the Father intended to have parted with his business forever or of permanently depriving himself of the profits and above all his ownership of the business. The Defendant cannot say otherwise. Anything would be his word and his word only. This cannot provide him with a viable defence, but does show the Father's intention at the time of the Agreement. No legal interest has been divested so that the business remained that of the Father.

[28] **PROVISION ON THE WILL**

The Testator's will I believe is in concert with my analysis above. This will was made on November 12th 2000, many years after the agreement. It would have given a clear indication of the Father's intention at the time of the agreement. The will clearly spoke as follows:

> *I declare that I am the owner of a 'Beer Garden' business situate at*
> *27 Southern Main Road, Curepe.*

I give devise and bequeath this business to my daughter Phyllis Crawford for her use and benefit…

To my mind, the Father intended that at the date of his death that the business be given to his daughter PC as expressed in the will. By the date of his death, he had not divested himself of the business. The bequest therefore is a valid bequest. The agreement was just that – a family arrangement and **not** family arrangement made under seal. The business therefore was part of the estate of the deceased Testator to be called in by the Executrices and dealt with as part of their probate and administration duties. The existence of the business therefore can be the basis of the claim of PC and SG and they are well within their rights to ask the court for relief concerning same.

[29] **CONCLUSION**

As I outlined above, this action was brought by Executrices, concerned with the collecting in of a Deceased's assets to be distributed in accordance with his last will and testament. The business called the "Beer Garden" was his at the date of his death and was part of his estate. The Executrices were well within their right to bring this action. From the pleadings, the Statement of Case, there was a proper case for the Defendant to answer. From the Draft defence, the defendant has no good defence to this action on their part. No issues of chose in action arose so that whether it survived death and if it was pleaded or not is immaterial. I am therefore of the view that PC and SG have succeeded in their application for judgment without a trial pursuant to Part 12.1(b) and 12.7(4) of the CPR.

[30] **ORDER:**

ON THE APPLICATION FILED APRIL 19th 2012 TO EXTEND THE TIME TO FILE A DEFENCE

1. **The Application filed by the Defendant herein be and is hereby refused and is dismissed.**

2. **The Defendant is to pay the Claimants' costs of this Application personally to be assessed if not agreed.**

3. If not agreed, the Claimants to file and serve their Statement of Costs on or before May 1st 2013.

4. The Defendant to file any objections on or before May 15th 2013.

5. Assessment to take place on June 11th 2013 at 10:30 a.m. in POS #17.

ON THE APPLICATION FILED JANUARY 25th 2012 TO ENTER A JUDGMENT WITHOUT A TRIAL

6. By virtue of Part 12.7(4) CPR that judgment be without a trial and is hereby entered for the Claimants against the Defendant for the failure of the Defendant to file his defence in accordance with Part 12 .1(b) of the CPR.

7. That the Defendant do pay the costs of this Application personally to be assessed if not agreed.

8. If not agreed, the Claimants to file and serve their Statement of Costs on or before May 1st 2013.

9. The Defendant to file any objections on or before May 15th 2013.

10. Assessment to take place on June 11th 2013 at 10:30 a.m. POS #17.

AND IT IS FURTHER ORDERED

11. That the Registrar do take an account of the receipts and outgoings of the business the "Beer Garden" from the date of the death of the Testator HENRY RAMKALAWAN late of #27 Southern Main Road, Curepe, being May 24th 2003 until 30 days before the date scheduled for the hearing of the taking of accounts.

12. Thereafter the parties are advised to meet to settle this matter between them.

Dated this 9th day of April 2013.

/s/ CHARMAINE PEMBERTON
HIGH COURT JUDGE