[2018] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 9/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**COURTNEY BRISSETT**	**APPELLANT**
AND	**CARLTON DIXON**	**RESPONDENT**

Craig Carter instructed by A McBean & Co for the appellant

Lorenzo Eccleston and Miss Heatha Miller instructed by Firm Law for the respondent

25 April and 27 July 2018

MORRISON P

[1] I have had the pleasure of reading in draft the reasons prepared by F Williams JA for our decision given on 25 April 2018. I agree with everything he has written and there is nothing that I can possibly add.

F WILLIAMS JA

Background

[2] By this appeal, the appellant sought to overturn the decision of Her Honour Ms Sheron Barnes, Judge of the Parish Court for the parish of Hanover, ("the learned

judge") delivered on 31 October 2016. By that decision, the learned judge granted the respondent (who was the plaintiff in the court below) an order for recovery of possession of lot 7, Industry Cove, Hanover, registered at Volume 1207 Folio 899 of the Register Book of Titles (hereafter referred to as "lot 7").

[3] The order for recovery of possession was made on a plaint filed pursuant to section 89 of the Judicature (Parish Court) Act (the Act).

[4] When the matter came before us on 25 April 2018, after hearing submissions, we dismissed the appeal and ordered that there should be costs to the respondent to be agreed or taxed. We also promised to give brief reasons for the decision. This is the fulfilment of our promise to do so.

Summary of the respondent's case below

[5] The basis of the claim and of the respondent's contended entitlement to recover possession of lot 7 was an oral agreement that he testified that he had entered into with the now-deceased registered proprietor, Mr Kenneth Brissett ("the vendor") in or around 1988. His evidence was that the transaction was to have been done through an attorney-at-law, on whom he and the vendor attended and to whom he paid $20,000.00, which was paid by the attorney-at-law to the vendor on 28 December 1988. The purchase price was $40,000.00. He testified that he paid more than that amount and, in this regard, tendered into evidence four receipts evidencing payment of $45,000.00.

[6] The respondent further gave evidence that he had entered into possession of the lot and started building a house, after causing the lot, located on swampland, to be dumped with marl to prepare it for building. He also allowed the vendor to remain on a part of the lot until he died. He would go to the land three times per year on his return to the island from overseas, where he resides. However, on the vendor's death (which later evidence confirmed as having occurred in 2006), he was prevented by the appellant (who was the defendant in the court below) from entering the property.

[7] The respondent's nephew's testimony was to similar effect, indicating that in 2013 he had been barred by the appellant from entering lot 7 when he went there on the respondent's behalf.

Summary of the appellant's case in the court below

[8] The appellant testified that he was aware of a transaction between the respondent and the vendor relating to the lot. However, he further testified that it was only a part of the said lot ("2½ squares") that was being sold and that the purchase price for that part of the lot was $700,000.00 and not $40,000.00, as the respondent was contending. He further gave evidence that work on the building about which the respondent testified had ceased within weeks of the transaction, on instructions of the relevant parish council from which the respondent had not obtained permission to build. It resumed but stopped again after a few months.

[9] The appellant also gave evidence that his right to be on the land emanated from a power of attorney dated 25 August 2015. That power of attorney was granted to him

by his cousin, Miss Beverley Kerr, a beneficiary under the will of the vendor of half-an-acre of lot 7 with a dwelling house thereon. He admitted in his testimony that the vendor's will had not yet been probated. The executor for the will is Miss Isolyn Bailey, who did not authorize him to go onto the land.

[10] The appellant had also filed a formal defence resisting the claim on the basis that: (i) it was only part of the lot (and not the entire lot) that was the subject of the sale agreement; and that (ii) the claim was barred by the provisions of the Limitation of Actions Act.

[11] Four receipts purporting to reflect payment for the lot were admitted into evidence (exhibits 1-4). Also admitted into evidence as exhibit 5 was the certificate of title for lot 7 and the death certificate for the vendor as exhibit 6.

Summary of the decision of the court below

[12] The learned judge did not find the appellant to be a credible witness. She rejected his testimony on that basis. Additionally, she found that he had no proper, recognizable or legitimate connection with the lot in the circumstances of his possession set out at paragraph [9] above. On the other hand, the learned judge accepted the respondent's evidence as credible. She accordingly granted him the orders he sought on his plaint, based on her acceptance of his contended-for agreement with the vendor which she found to have been completed, but for the formal transfer of ownership.

The appeal

[13] Being dissatisfied with the court's ruling, the appellant filed amended notice and grounds of appeal on 14 November 2016. The appellant also filed further amended grounds of appeal on 17 July 2017. At the hearing of the appeal, the appellant sought and was granted permission to argue these further amended grounds alone. They read as follows:

> "1. The learned Parish Judge erred in law and misdirected herself in holding that the Court had jurisdiction to adjudicate upon the Plaintiff's claim for the following reason:
>
> a. There was a bona fide dispute respecting the Plaintiff's title to the land subject of the action arising from the Special Defence as well as the evidence laid before the Court.
>
> b. Therefore the Court could only have had jurisdiction under S. 96 of the Judicature (Parish Court) Act.
>
> c. Section 96 provides that where there is a dispute as to title to land the Parish Judge has jurisdiction only where the annual value of the land in dispute does not exceed $75,000.00.
>
> d. There was no evidence before the learned magistrate that the value of the said land did not exceed $75,000.00.
>
> 2. The learned Parish Judge erred in law and misdirected herself in finding that the evidence did not disclose a bona fide dispute in respect of the title to the land subject of this action.
>
> 3. The learned Parish Judge erred in law in holding that the evidence of the Plaintiff constituted a recognized

equitable interest and rather not a claim to a recognizable interest in the property.

4. The Learned Parish Judge erred in law and misdirected herself on the facts and the law in holding that the plaintiff was entitled to possession of the land subject of this action.

5. The Judgment is unreasonable and inconsistent with the evidence adduced before the Court."

Summary of submissions

For the appellant

[14] In keeping with the further amended grounds of appeal, the appellant's main submission was that this court should allow the appeal, set aside the orders made below and transfer the matter to the Supreme Court for trial. This should be done, it was submitted, on the basis that the court below did not possess the requisite jurisdiction to try the matter, in the absence of evidence of the annual value of the property. A bona fide dispute as to title had been raised by the appellant, it was submitted. The circumstances therefore required the matter to be dealt with pursuant to section 96 of the Act (the submission ran); rather than section 89 of that Act, pursuant to which the learned judge purported to have acted.

[15] In support of his submissions, counsel for the appellant relied on a number of cases, which included **Ivan Brown v Perris Bailey** (1974) 12 JLR 1338, **James Williams v Hylton Sinclair** (1976) 14 JLR 172, and mainly that of **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37. Reliance was placed on **Danny McNamee v Shields Enterprises Ltd**, primarily for the proposition that a claimant's

right to recover possession of property ought to be determined based on the strength of his own title; and without regard to the weakness of a defendant's title. It was also cited in an effort to buttress the submission that, where a legitimate dispute of title is raised, the matter ought to be dealt with under section 96 of the Act and so evidence as to annual value of the land would be necessary.

[16] The appellant's counsel also traced the evidence given by the appellant in the court below as to the cancellation of the agreement and what he also said was the failure of the respondent to return to lot 7 after the cancellation about three or four months after the agreement was entered into.

[17] It was submitted on behalf of the appellant that, in order for the learned judge to have had jurisdiction, the respondent's title would have to have been recognized. If it was recognizable and was challenged, it was submitted, then a bona fide dispute would have arisen. All that was necessary was for the appellant to prove the respondent's "lack of title". The "lack of title" on the part of the respondent was suggested by the certificate of title itself (the submission further went).

For the respondent

[18] On behalf of the respondent it was submitted by Mr Eccleston that the action for recovery of possession in this case falls squarely under section 89 of the Act, treating with squatters or trespassers or otherwise persons with no interest in or right to the land in question. In a situation such as this, it was submitted, no evidence as to annual

value would have been necessary and the matter did not evolve into a section 96 matter.

[19] Mr Eccleston further submitted that, for there to be a dispute, there has to be a recognizable interest in law or equity on the part of the defendant to the action for recovery; and here there was none. The appellant in this case, he argued, was clothed with no lawful authority and had no right to challenge the respondent's title. He sought to emphasize that, in all the cases cited on behalf of the appellant in which the party raised a bona fide dispute as to title, that party had some title or claim to title himself or herself.

[20] It was further submitted that, contrary to the appellant's submission, the special defence was insufficient to raise a bona fide dispute as to title.

[21] It was also submitted that the appellant could not properly seek to rely on the general power of attorney that he purported to have received from a beneficiary of a will that had not been probated; and that, in any event, was not issued until after the appellant had been sued.

[22] Counsel for the respondent also sought to rely on the cases of **Danny McNamee v Shields Enterprises Ltd**; **Ivan Brown v Perris Bailey**, **Shawn Marie Smith v Winston Pinnock** [2016] JMCA Civ 37, **Sylvester Solomon v Daphne Smith** [2016] JMCA Civ 9, **Arnold Brown v The Attorney-General** (1968) 11 JLR 35, **James Williams v Hylton Sinclair**.

[23] It was clear that the respondent had shown to the court below an equitable interest in lot 7, by way of the agreement, it was submitted. It was also submitted that the vendor, having been paid, held the property on trust for the respondent. The receipts and supporting evidence were enough to create a definite equitable interest (the submission further went).

The appellant's response

[24] On behalf of the appellant, Mr Carter accepted that, the will not having been probated, the beneficiary had no authority to have put the appellant into possession. He sought to emphasize, however, that the legal position was that, in an action for recovery of possession, anyone at all could question the title of the person seeking to recover possession.

Discussion

[25] These are the terms of sections 89 and 96 of the Act:

> "89. When any person shall be in possession of any lands or tenements without any title thereto from the Crown, or from any reputed owner, or any right of possession, prescriptive or otherwise, the person legally or equitably entitled to the said lands or tenements may lodge a plaint in the Court for the recovery of the same and thereupon a summons shall issue to such first mentioned person; and if the defendant shall not, at the date named in the summons, show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the Magistrate shall think fit to name; and if such land be not

given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such premises to the plaintiff". (Emphasis added)

"96. Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed seventy-five thousand dollars, any person claiming to be legally or equitably entitled to the possession thereof, may lodge a plaint in the Court, setting forth the nature and extent of his claim; and thereupon a summons shall issue to the person in actual possession of such land or tenements, and if such person be a lessee, then a summons shall also issue to the lessor under whom he holds; and if the defendant or the defendants, or either of them, shall not, on a day to be named in such summons, show cause to the contrary, then, on proof of the plaintiff's title and of the service of the summons on the defendant or the defendants, as the case may be, the Magistrate may order that possession of the lands or tenements mentioned in the said plaint be given to the plaintiff on or before such day, not being less than one month from the date of the order, as the Magistrate may think fit to name; and if such order be not obeyed, the Clerk of the Courts, on proof to him of the service of such order, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such lands or tenements to the plaintiff."

[26] In the case of **Danny McNamee v Shields Enterprises Ltd**, Morrison JA (as he then was) reviewed the main authorities on this area of the law and, with characteristic clarity, summarized the difference between sections 89 and 96 at paragraphs [36] and [37] of the judgment as follows:

"[36] It seems to be clear, therefore, that an order under section 89 is appropriate in cases in which the defendant's occupation of the property is not attributable to any kind of right or title. This is how Shelley JA put it in **Arnold Brown v Attorney General** (at page 41):

> 'In short, this section shows how to deal with the squatter. The question of annual value does not arise in proceedings under it. The plaintiff is required to prove that the defendant is a squatter…'
>
> [37] Section 96 on the other hand, is appropriate to cases in which a dispute as to title to property has arisen, in which case the plaintiff claiming to be entitled to possession on either legal or equitable grounds may lodge a plaint setting out the nature and extent of his claim, whereupon a summons will issue to the person in actual possession of the property. If when the matter comes on for hearing that person does not show cause to the contrary, the plaintiff, upon proving his own title, will thereupon be entitled to an order for possession of the property. However, in any such case, the jurisdiction of the resident magistrate is limited to property the annual value of which does not exceed $75,000. The requirement in Order VI, rule 4 of the Resident Magistrate's Court Rules that in all actions for the recovery of land 'the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof…' is obviously, in my view, particularly applicable to section 96 claims for recovery of possession." (Emphasis added)

[27] At paragraph [39] of the judgment, Morrison JA also referred to the dicta of Graham-Perkins JA at page 1343 of the case of **Ivan Brown v Perris Bailey**, in which the following was said of the true test to be applied to see under which of the two sections the particular case falls to be determined:

> "All the authorities show with unmistakable clarity that the true test is not merely a matter of *bona fide* intention, but rather whether the evidence before the court, or the state of the pleadings, is of such a nature as to call into question the title, valid and recognisable in law or in equity, of someone to the subject matter in dispute. If there is no such evidence the *bona fides* of a defendant's intention is quite irrelevant." (Emphasis added)

[28] If we begin with section 89 and the case of **Danny McNamee v Shields Enterprises Ltd**, then it is necessary to first examine the question of whether the respondent had claimed to be "the person legally or equitably entitled to the said lands...", thus entitling him to lodge a plaint. To my mind the evidence accepted by the judge indicates that the clear answer to this question must be "yes". On the evidence as accepted by the judge, the respondent entered into an agreement for the purchase of lot 7 and paid the purchase price in full and more. The receipts in support of this were tendered and admitted into evidence. All that remained for the transaction to have been completed was for lot 7 formally to have been transferred to the respondent by having his name registered on the certificate of title. He would therefore have acquired a beneficial or equitable interest in lot 7.

[29] If the support of authority be needed for this position it is, for example, to be found in the discussion headed: "Effect of agreement for sale" at paragraph 484 of Halsbury's Laws of England, 3rd edition, volume 34 at page 290 as follows:

> "**484. Effect of agreement for sale**. An agreement for the sale of land, of which specific performance can be ordered, operates as an alienation by the vendor of his beneficial proprietary interest in the property. As from the date of the contract, his beneficial interest is transferred from the land to the purchase-money, and, if his interest was of the nature of real estate, it is, from that date, converted into personalty. As regards the land, he becomes, as between himself and the purchaser, constructively a trustee for the purchaser, with the right as trustee to be indemnified by the purchaser against the liabilities of the trust property; and the purchaser becomes beneficial owner, with the right to dispose of the property by sale, mortgage, or otherwise, and to devise it by will..." (Emphasis added)

[30] The next point that might conveniently be discussed is that taken from paragraph [36] of the case of **Danny McNamee v Shields Enterprises Ltd**, at which it is stated that section 89 of the Act will be appropriately used where: "the defendant's occupation of the property is not attributable to any kind of right or title". To arrive at the answer to this issue, it will be necessary to explore the circumstances by which the appellant came to be in possession of lot 7 and the right, if any, pursuant to which he sought to challenge the respondent's title.

[31] The appellant sought to assert a right to possession which, he at first argued, was granted to him by someone named in the deceased vendor's will as a beneficiary of a part of lot 7. At the time of trial that will had not been probated. The appellant also sought to rely on a general power of attorney that was never admitted into evidence. The beneficiary is not the executor. He holds no authority from the executor. The transaction was entered into on 28 December 1988 (see exhibit 1) and completed by 21 March 1990 (see exhibit 4): that is, several years before the date of the execution of the will which appears to be 25 October 2004. This raises two matters. The first is evident from a perusal of section 3 of the Wills Act, which sets out the property that a testator might devise. It reads as follows:

> "**3.** It shall be lawful for every person to devise, bequeath, or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to either at law or in equity at the time of his death…" (Emphasis added)

[32] Lot 7 having been disposed of before the will was executed, it ceased to be property in which the testator could have bequeathed an interest.

[33] The second point that arises from the relative dates of the transaction and the execution of the will is that this is not a transaction that could have been challenged pursuant to section 18 of the Wills Act as being one made after the execution of the will.

[34] With these matters in existence and having been before the learned judge, it is difficult to see how the appellant purported to show a connection to the land as a basis for challenging the title of the respondent who, on the facts as accepted by the judge, had a clear equitable title to it. The submission made by Mr Eccleston in relation to this point – that is, that in all the cases cited by the appellant, the challenger had some title to or lawful connection with the land – appears to have merit. A summary of these cases will confirm this:

Case	The parties' position
Arnold Brown v The Attorney-General	The appellant claimed an equitable title as the surviving spouse of a tenant whose tenancy had been determined and sought to set up a right to possession.
Ivan Brown v Perris Bailey	The appellant claimed to have purchased a part of the land for which the respondent

	had a certificate of title.
James Williams v Hylton Sinclair	The appellant claimed to be in possession as owner, having bought a part of the land from the respondent; whereas the respondent had sought to recover possession of the land, claiming that the land had been leased to the appellant.
Danny McNamee v Shields Enterprises Ltd	In what Morrison JA described at paragraph [3] as "...a wholly unusual set of facts", the respondent had claimed for recovery of possession of land transferred to it by the appellant to secure money said to be due collateral to criminal proceedings brought against the appellant's daughter, of which she was subsequently acquitted. On the other hand the appellant claimed that the certificate of title relied on by the respondent had been obtained by fraud.

Bona fide dispute

[35] The authorities require a party first to establish the existence of a "bona fide" dispute as to title in order to have a matter that was originally brought under section 89 evolve into a matter to be determined pursuant to section 96. In the Concise Oxford Dictionary, 12th edition, "bona fide" is defined as:

> "...adj. genuine; real. adv. chiefly Law without intention to deceive ORIGIN L., lit. 'with good faith'...".

[36] The judge devoted some attention to an assessment of the credibility of the witnesses and, as previously indicated, found that the appellant was not credible. In the light of the definition of "bona fide", the judge cannot be faulted for using the assessment of credibility as a part of the approach in determining the viability of the position being advanced by the appellant in the court below, vis-à-vis the legal position of the respondent. Apart from the demeanour of the witnesses, there appears to be on the documentary evidence at least two matters that would have raised questions in the mind of a reasonable person about the bona fides of the appellant's assertions. For one, the appellant claimed that it was not the entire lot 7 that was being sold; but only 2½ squares of it. When one looks at exhibit 1, however, which was prepared (on both cases) by an attorney-at-law, that position is not, on the face of it, borne out. That exhibit (the first receipt) speaks to the money paid "Re Sale of Lot 7 Industry Cove..."; not to a sale of part of lot 7 or the specific area to which the appellant testified. For another, the appellant claimed that the purchase price for the 2½ squares was $700,000.00. Exhibit 5, however, raises questions about the likelihood of this claim. When one looks at that exhibit, which is the relevant certificate of title, the transfer

noted thereon to the deceased vendor indicates a date of registration of 28 September 1988 - that is a few months before the deceased vendor contracted to sell it to the respondent. More importantly, however, that notation discloses a consideration of two hundred or two hundred thousand dollars. (The word "thousand" appears to have been struck out and initialled.) Even if it was two hundred thousand dollars that was paid for that parcel of land (consisting of three roods, 23 perches and eight-tenths of a perch) in September of 1988; it would be unusual, to say the least, for 2½ squares of it to have been sold for $700,000.00 a few months after.

[37] The learned judge was also entitled to have accepted the evidence of Mr Cecil Dixon that he had visited lot 7 since the respondent bought it and up to 2013 on the respondent's behalf. Her acceptance of that bit of evidence would have resulted in a rejection of the limitation defence advanced by the appellant at trial.

[38] While being mindful of the dicta of Graham-Perkins JA in **Ivan Brown v Perris Bailey**, to the effect that, where the evidence is lacking, the bona fides of the case need not be gone into, it appears that in this case the evidence would have come from witnesses whose credibility the judge would have been duty bound to assess. She ought not, in my view, to be faulted for doing so. It would have been difficult, if not impossible, for her to have assessed the evidence without at the same time assessing the witnesses from whom the evidence came. It cannot be farfetched to make a determination as to credibility when a judge's role as "gatekeeper" in seeing whether a matter falls under section 96 includes assessing whether a "bona fide" dispute as to title exists.

Recognized as opposed to recognizable

[39] Mr Carter, on behalf of the appellant sought to make a point out of the fact that, whilst section 89 speaks to an applicant needing to have a title "recognizable" in law or equity, the learned judge found that the respondent had a "recognized" title. In my respectful view, (and recognizing that Mr Carter was trying his best to advance his client's case) not much turns on this point and it seems to be a matter of semantics. What the section requires is that the plaintiff should have some interest known to law.

Conclusion

[40] From the evidence presented in the court below, it is apparent that the respondent, who has an equitable interest in lot 7, correctly proceeded against the appellant, who, in the words of section 89, was someone "in possession of … lands or tenements without any title thereto from the Crown**,** or from any reputed owner, or any right of possession, prescriptive or otherwise…" The appellant raised no bona fide dispute as to title. The consequence of this is that no evidence of the annual value of the land was necessary and so the learned judge correctly dealt with the matter as one properly falling under section 89 of the Act.

[41] It was for these reasons that we made the orders reflected in paragraph [4] of this judgment.

PUSEY JA (AG)

[42] I have read in draft the reasons for judgment of F Williams JA. I agree with his reasoning and conclusion and I have nothing further to add.