[2016] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL NO 17/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**SONIA EDWARDS**	**1ST APELLANT**
AND	**CAROL OSBOURNE**	**2ND APPELLANT**
AND	**DERRICK BECKFORD**	**3RD APPELLANT**
AND	**NEVILLE RICHARDS**	**4TH APPELLANT**
AND	**STEPHANIE POWELL**	**RESPONDENT**

Norman Hill QC and Raymond Samuels instructed by Samuels and Samuels for the appellant

William McCalla instructed by Robinson Phillips and Whitehorne for the respondent

9, 11 December 2015 and 10 June 2016

BROOKS JA

[1] I have read, in draft, the judgment of my sister Sinclair-Haynes JA. I agree with her reasoning and conclusion and have nothing further to add.

SINCLAIR-HAYNES JA

[2] This is an appeal by Sonia Edwards, Carolyn Osbourne (nee Beckford) (deceased), Derrick Beckford and Neville Richards, the appellants from the decision of Her Honour Mrs Andrea Pettigrew-Collins, Senior Resident Magistrate, in which she ordered the appellants to deliver up possession of land which was owned by Joslyn Spencer (deceased) and her order of costs in favour of Ms Stephanie Powell, the respondent.

Background

[3] On 6 November 2009, the respondent instituted proceedings against the appellants in the Port Maria Resident Magistrate's Court for recovery of possession of land against all the appellants except Mr Beckford against whom recovery of possession of a dwelling house was sought. The land, the subject of her claims, was land which was registered in the name of Mr Joslyn Spence. The land on which the dwelling house occupied by Mr Beckford stood, was also registered in the name of Mr Spencer.

[4] Mr Spencer died intestate on 20 December 1995. At the time of his death, his only issue was Mabel Spencer who will be referred to as "Mabel" for convenience, no disrespect intended. Mabel obtained letters of administration on 5 June 1998 of the entire residual estate of her father's estate which was land registered at Volume 1202 Folio 875 of the Register Book of Titles. She transitioned from this life on 5 February 1999, leaving children, Leroy and Eric Edwards and Anthony and Angella Sullivan. She

also left a will dated 10 December 1998 in which Messrs Joseph Francis and Leonard Turner were named executors. Her will was probated on 22 April 2005.

[5] The respondent had however obtained an order of the Supreme Court on 9 January 2001 declaring her Mr Spencer's spouse. On 12 January 2009 she also obtained a grant of letters of administration *de bonis non* in Mr Spencer's estate. Armed with her letters of administration, she instituted these proceedings against the appellants. The plaints against the appellants were consolidated.

The evidence before the learned magistrate

The respondent's evidence

[6] The respondent's evidence was that she resided with the deceased as his spouse and was declared to be so by the court by virtue of the Intestate and Property Charges Act. Her evidence was that whilst she resided with the deceased, Ms Edwards was a tenant who resided on the land. Mr Beckford and Ms Osbourne also resided on the land with their mother who was also a tenant but had vacated the land five years before the evidence was adduced before the learned magistrate. Mr Richards, she asserted, constructed a car wash on the property after Mr Spencer died and three years prior to her testimony.

[7] It was her evidence that after the passing of Mr Spencer, she removed to another house on the property. Mr Spencer's grandson Anthony Sullivan was put in possession of the house which Mr Beckford occupied without paying rent.

[8] She was also was unaware that the appellants had purchased the portions of land which they occupied from Mabel's estate. She said the property had not been distributed to the beneficiaries.

The Appellants' case

Mrs Carolyn Osborne's evidence

[9] It was Mrs Osbourne's evidence that she purchased three quarters of an acre of land from Mr Joseph Francis for $700,000.00. She had made down payments of $70,000.00 and $35,000.00 and other payments. She made further payments totalling $400,000.00. She was unable to recall the date she purchased the land. It however was her evidence that it was "6 years or so or 7 years". It was also her evidence that Mr Francis was her stepfather and Derrick Beckford, who occupied "Mabel's house" before Mr Spencer's death, is her brother.

Ms Sonia Edwards' evidence

[10] Ms Edwards' evidence was that "some twenty odd years" ago she was permitted to occupy three-quarters of an acre of land by Mr Spencer on a "lease and sale basis". After the expiration of that lease, she entered into another lease agreement with his daughter Mabel between the years 1996 and 1997.

[11] After Mabel's death, her executors Mr Francis and Mr Turner, showed Ms Edwards a grant of probate and offered to sell her the land. An agreement for sale was prepared at a lawyer's office on Duke Street. She deposited the sum of $100,000.00 towards the purchase of the land with the executors in the presence of her lawyer and

Mabel's children, Angella and Leroy Edwards. Further payments were made to Mable's son, Leroy Edwards. She commenced constructing a house on the property after the death of Mr Francis.

Mr Neville Richards' evidence

[12] Mr Richards testified that in 2009 he entered into a lease agreement with Mr Leroy Edwards and Mr Edward's siblings to erect a car wash on the property. That agreement was to expire in 2014. Mr Edwards should have taken the lease to his lawyer to be signed by his (Mr Edwards') siblings.

[13] Mr Edwards also showed him the probate document in Mabel's estate and informed him that Mabel was his mother and Joslyn Spencer was his grandfather. It was also his evidence that the names Joseph Francis and Leonard Turner were stated on the document as executors.

Mr Ronald Beckford (also called Derrick)

[14] Mr Ronald Beckford, the brother of Ms Carolyn Osbourne, received a letter to vacate the premises he occupied. His evidence was that he occupied Mabel's house. He began living on the property in 2003 with his mother who migrated and left him there. He initially paid rent to Mr Francis who was his mother's husband. Mr Francis, he said, instructed him to pay rent to Leroy, Mabel's son. After Mr Francis' death, in accordance with Mr Francis prior instructions, he continued paying the rent to Leroy.

The learned magistrate's decision

[15] The learned magistrate rejected Ms Osbourne's evidence that, in furtherance of a lease and sale agreement, on various occasions she paid amounts totalling $400,000.00 for the following reasons:

> "She did not produce a single receipt as proof of the fact of making any payments. Even more surprising is her evidence that documents evidencing the transactions were prepared by the very Attorney At Law who had conduct of this matter, yet no such document was produced in evidence. It goes without saying that counsel would have been aware of the extreme importance of producing the documents yet the defendant Osbourne was heard to say she was not aware of the need to produce the documents which she said were in the possession of her attorney at law."

[16] She also rejected Ms Edwards' evidence that she purchased land or that she had any enforceable agreement to purchase the portion of land which she claimed. The learned magistrate said:

> "My assessment of her evidence is much the same as it is in the case of Miss Osbourne and the reasons are the same. Like Miss Osbourne, her evidence is that she was represented by Mr. Samuels in her capacity as purchaser, yet she produced no documentary proof of the transactions. Her account is some what more vague since she was not even able to say how much money she has paid to date towards the purchase of the land and in fact said there was no purchase price agreed upon and that whatever price the executors would have asked she would have paid."

[17] Likewise she rejected Mr Richards' evidence that there was a lease agreement which would expire in 2014 between Leroy Edwards and him. She gave these reasons for having done so.

> "He produced no agreement in writing. Even assuming that there was some oral agreement, he said that agreement was between himself and Leroy Edwards, the son of Mabel Spencer. I am of the view that any such lease entered into between those two persons would be valid only as between them. Mr. Richards in my view did not act with due diligence. He did not enter into an agreement with someone who was authorized to lease the land in question. Leroy Edwards was not entitled to do so. I take the view there is no valid lease as between him and Miss Powell. He said the agreement was entered into sometime in 2009. He didn't say when in 2009. Of course both executors had died before the beginning of 2009. If it was after the 12th January 2009, then Miss Powell would have been the only person entitled to enter into any agreement with him regarding the land."

[18] The learned magistrate rejected the submission on behalf of the appellants that there remained no portion of the estate of Mr Spencer which was unadministered at the date the respondent obtained her grant of letters of administration *de bonis non*. She also rejected the submission that Mr Spencer's entire estate vested automatically in Mabel upon the grant of letters of administration to her on 5 June 1998. The learned magistrate held that in order to vest real estate, a personal representative must execute an assent to device. Having so found, she concluded thus:

> "There is no evidence that this essential step had been taken as at the time of the death of Mabel on the 5th February 1999, on [sic] fact, the evidence is to the contrary. It is clear to me that there was no administration of that portion of Joslyn Spencer's estate comprising land registered at Vol.1202 Folio 875 of the Register Book of Titles during the lifetime of Mabel Spencer. This parcel of land was never transferred to Mabel Spencer during her life time. Up to 11th January 2010, the day before the respondent was granted a declaration that she was the common law spouse of Joslyn, Mabel was the sole beneficiary of Joslyn's estate."

[19] The appellants, being entirely dissatisfied with the learned magistrate's findings and decision, have consequently filed the following grounds of appeal:

Ground 1

> "The learned trial Judge erred in rejecting counsel's submissions:-
>
> i. That by virtue of item 2 Section 4 of the Intestates [sic] Estates & Property Charges Act and as disclosed by the evidence; Mabel Spencer was the sole issue of her deceased father, Joslyn Spencer, who died without a spouse him [sic] surviving and therefore Mabel Spencer was entitled absolutely to the residuary estate of Joslyn Spencer, deceased.
>
> ii. That by virtue of Letters of Administration in the estate of Joslyn Spencer deceased granted to Mabel Spencer on the 5th day of June 1998, the real and personal property of the deceased Joslyn Spencer devolved upon and was vested in Mabel Spencer.
>
> iii. The said Mabel Spencer by her Last Will and Testament dated the 10th day of December 1998 and probated on the 22nd day of April 2005, Mabel Spencer completely and effectually disposed of the residuary estate of Joslyn Spencer which was granted to her by operation of Law.
>
> iv. That on the 12th day of January 2009, when the Plaintiff/Respondent obtained a Grant of Administration De Bonis Non in the Estate of Joslyn Spencer there was no longer any residuary estate in Joslyn Spencer's Estate.
>
> v. That the Spousal Status obtained by the Plaintiff/Respondent by Order dated the 9th day of January 2001 was unknown to anyone interested in the estate of Joslyn Spencer at the date of the death of the deceased Joslyn Spencer and certainly Mabel Spencer had no notice of the Status of the

Plaintiff/Respondent at the death of the deceased, Joslyn Spencer.

vi. That the Plaints herein:

1) Stephanie Powell v Sonia Edwards - Plaint No. 303/2009;

2) Stephanie Powell v Carolyn Beckford - Plaint No. 304/2009;

3) Stephanie Powell v Derrick Beckford - Plaint No. 298/2009; and

4) Stephanie Powell v Neville Richards - Plaint No. 299/2009

taken out on the 9th day of November 2009 were therefore misconceived and of no validity as there was not in any of these cases any residuary estate of the deceased Joslyn Spencer which was left unadministered."

Ground 2

"The Learned resident Magistrate erred in giving Judgement [sic] to the Plaintiff/Respondent in that the failure of the Plaintiff/respondent to comply with the Order VI Rule 4 of the Rules and Forms of the Resident Magistrates Courts as to the full description of the property sought to be recovered to be stated in all actions for recovery of land was fatal to the success of the Plaint on Trial, particularly as regards to the nature of evidence in respect of the property in issue."

Ground 3

"The Learned Resident Magistrate erred in not giving any regard to and the legal effect to the estate of Mabel Spencer, deceased whose Last Will and Testament and the Probate thereof were exhibited at the Trial of these matters and was referred to and relied upon by the Defendant at the Trial."

Ground 4

> "The Judgment of the Learned Resident Magistrate is harmful and prejudicial to the beneficiaries of the estate of Mabel Spencer deceased and creates a situation, which the estates of Joslyn Spencer and Mabel Spencer cannot co-exist and is inconsistent both with the law and reality and ought to be set aside.
>
> 1) Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate, as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

The learned Magistrate's following findings of law were also challenged in respect of those grounds.

> "(1) That Item 2 of Section 4 of the Intestates [sic] Estates and Property Charges Act was not relevant to the issue.
>
> (2) That the Letters of Administrations in the Estate of Joslyn Spencer granted on the 5th day of June 1998 was no more than administrative procedure.
>
> (3) That the Probate granted in the estate of Mabel Spencer on the 22nd day of April 2005 was no more than administrative procedure.
>
> (4) That the failure by the[respondent] to comply with Order VI Rule 4 of the Rule of the Rule [sic] and Forms of the Resident Magistrate [sic] Court was not fatal to the respondent's case.
>
> (5) That the respondent's right to bring the action as Administrator De Bonis Non in the estate of Joslyn Spencer in 2009 was not misconceived, bearing in mind that the residuary estate of Joslyn Spencer had devolved on and vested in Mabel Spencer by Letters

> of Administration granted to her in 1998 and the said Residuary Estate disposed of by her (Mabel Spencer) by her Last Will and Testament dated the 10th day of December 1998 and probated on the 22nd day of April 2005."

Grounds 1, 3 and 4

Was Mr Spencer's estate unadministered?

[20] Learned Queen's Counsel submitted that by virtue of the grant of letters of administration *de bonis* in the estate of Mr Spencer to Mabel, the respondent could neither interfere with any portion of the estate which he said was administered, nor properly institute the actions against the appellants. It was his submission that at the point in time that the respondent instituted the proceedings against the appellants the entire residuary estate of Mr Spence would have passed to Mabel by virtue of the grant of letters of administration on 5 June 1998. It was therefore her prerogative to distribute, in accordance with the law, to "the known next of kin".

[21] He posited that by virtue of section 4(1) Item 2 of the Intestates' Estate and Property Charges Act or by grant of letters of administration, Mabel's estate, consequent on her probated will, was "capable of carrying and distributing what was once the residuary estate of Joslyn Spencer".

[22] Mr McCalla however contended that estate remained unadministered. He pointed out that the following remained to be done:

i. the preparation and filing of the revenue returns and payment of estate duties and the obtaining of the estate duties certificate;

ii. the preparation of the transmission application in respect of the deceased's titles;

iii. surveying of the properties and approval for subdivision of the land, obtaining of separate titles for the beneficiaries; and

iv. if the lands were sold or leased before the death of the executors, surveying of the plots sold and approvals from the parish council were to be obtained to facilitate the issuing of titles to lawful purchasers.

[23] He refuted Queen's counsel's assertion that the grant of letters of administration to Mabel left no unadministered property which would necessitate the grant of *de bonis non.* It was his submission that upon obtaining a grant of letters of administration, the personal representative, on transmission, takes charge of the deceased assets. The assets are held by the administrator as trustee for the beneficiaries of the estate.

[24] The legal ownership of the property passes to the beneficiary when the personal representative assents in favour of the beneficiary. Mabel's failure to assent to any conveyance to herself as beneficiary resulted in a crucial part of the administration of the estate being incomplete. According to counsel, even if she had completed the process, that assent could have been overturned by a court of competent jurisdiction once it was established that other persons were beneficially entitled to an interest in the estate.

[25] Counsel submitted that Mabel was not the sole beneficiary. He postulated that upon being declared spouse, by virtue of section 4(1) item 1(d)(ii)(A) of the table of distribution of the Intestate's Estates and Property Charges Act the respondent became entitled to two-thirds interest in the residue of the deceased estate which consisted of land being part of Liberton registered at Volume 1202 Folio 875 of the Register Book of Titles and land at Washington Gardens. It was his submission that the grant of letters of administration *de bonis non* in Mr Spencer's estate enabled her to take steps to complete the administration of the estate.

[26] He contended that after Mabel's death it is disputed whether her executors lawfully sold portions of the property to Sonya Edwards and Carolyn Beckford (nee Osbourne). Ms. Edwards' evidence, he submitted, was that she had rented a spot from Mr Spencer while Mr Beckford's evidence was that she "was just there with her mother". He said they provided no written document as evidence of sale land.

Discussion and the law

[27] The learned authors of Halsbury's Laws of England third edition volume 16, sought to clarify the "Nature of the personal representative interest". Page 281 of the text reads:

> "The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right. He has full control of all the items making up the estate and can give a good title to them. The beneficiaries have no specific interest in any of the property comprising the residue until the residue has been ascertained in due course of administration but they do have a general title to residue, and this general title is not

> affected by the completion of the administration, so that their interests remain the same before and after the administration is complete."

[28] As observed by the learned magistrate "there was no administration of that portion of Joslyn Spencer's estate comprising land registered at Vol.1202 Folio 875 of the Register Book of Titles during the lifetime of Mabel Spencer". The crucial steps in administering Mr Spencer's estate had not been taken up to 5 February 1999 as pointed out by Mr McCalla and noted by the learned magistrate.

[29] Indeed the incontrovertible evidence is that Mr Spencer's entire estate remained unadministered as it was never transferred to Mabel at the time of her death. Mable's estate therefore only had an interest in her father's unadministered estate as a residual legatee.

[30] Mabel's failure to transfer the property to herself during her lifetime and before the respondent was declared Mr Spencer's spouse, meant that the respondent consequently became entitled, by virtue of section 4(1) Item 1(d)(ii)(A) of the Intestates Estates and Property Charges Act to a two-thirds interest in the property. Mabel, who was Mr Spencer's sole issue, would have been entitled to one-third interest of the residue of his estate. Upon her decease, her interest fell to her children. Section 4(1) of the Intestates Estates and Property Charges Act provides:

> "The residuary estate of an intestate shall be distributed in the manner or held on the trusts specified in the following Table of Distribution-
> ...

Item 2 *The Issue*:

There shall be held upon the statutory trusts for the issue of the intestate-

(b) if the intestate leaves no surviving spouse, the residuary estate;

(c) if the intestate leaves a surviving spouse, the residuary estate after taking account of all entitlements of the surviving spouse under Item 1"(Italics as in original)

[31] At the point that the respondent obtained her grant of letters of administration in 2012, Mabel's will had already been probated. Her executors were also alive. As pointed out by Morrison JA, as he then was, in **Jamaica Redevelopment Foundation Inc v Max Eugene Lambie (as administration of the Estate of Elaine Vivienne Tully, deceased)** [2012] JMCA Civ 12 at paragraph [10]:

"It is, however, equally well settled that there is no chain of representation in relation to administrators of an intestate's estate, even where the administrator himself dies testate. The reason for the distinction was explained by Blackstone (in a passage quoted in Parry on Succession, 5th edn, at page 183), as follows:

'The power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom the deceased has responded [sic] no trust at all; and, therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh of the goods of the

> deceased not administered by the former executor of administrator'."

[32] In light of the foregoing, the land in question remained unadministered at the date of Mabel's death and was still a part of Mr Spencer's estate. The learned magistrate was therefore correct in so finding. Grounds 1, 3 and 4 therefore fail.

Ground 2

> The learned resident Magistrate erred in giving judgement to the respondent in that the failure of the Plaintiff/respondent to comply with the Order VI rule 4 of the Rules and Forms of the Resident Magistrates Courts as to the full description of the property sought to be recovered to be stated in all actions for recovery of land was fatal to the success of the plaint on trial, particularly as regards to the nature of evidence in respect of the property in issue.

[33] Learned Queen's Counsel submitted that the plaints against Sonia Edwards, Carolyn Beckford and Neville Richards merely claimed lands belonging to Joslyn Spencer without specifying the boundaries. He said that the evidence before the learned magistrate in respect of Ms Edwards and Mr Beckford was for "house spots". As regards Mr Richard's claim, he said the respondent was unable to state the extent of the land which Mr Richards occupied. Her evidence, he pointed out, was that "it was within the circumference of the home". According to Queen's Counsel the orders of the learned magistrate are inconsistent with the respondent's evidence in respect of what she sought to recover from each appellant.

[34] Learned Queen's counsel pointed out that the claim against Mr Beckford was "to recover possession of the dwelling house owned by the deceased and situate on land

registered at Volume 1207 Folio 875". He submitted that the respondent's evidence before the learned magistrate was for two rooms which she was unable to identify in a house which consisted of eight bedrooms however the judgment was for recovery of land.

[35] Further, he submitted, there was no sum stated as to rental (fixed or paid) as required by Order VI rule 4 of the Rules and Forms of the Resident Magistrate's Court (the Resident Magistrates Court Rules).

[36] Queen's Counsel also pointed out that the learned magistrate's order was for Mr Beckford to deliver up possession of land owned by Mr Spencer being part of land registered at Volume 1202 Folio 895 which he occupies. That order, he submitted, was inconsistent with the respondent's evidence in respect of what the respondent sought to recover from Mr Beckford.

[37] It was Queen's Counsel's further submission that the respondent's failure to comply with Order VI rule 4 of the Resident Magistrate's Court Rules must be fatal as it will frustrate the bailiff's efforts in executing a warrant of possession especially in the cases in which the claims are for "house spots" and land "within the circumference of the home". He complained that the learned magistrate fell into error by relying on the cases **Elsie Raffington v Joseph McIntosh (Agent of Paulina Lindsay and Margaretta Anderson)** RMCA No 5/2007, delivered 24 April 2009 and **Doyle v Stephenson** (1959) 1 WIR 296. He relied on the following passage from Maxwell on

the Interpretation of Statutes 7th Edition at page 316 which was cited and relied upon in Doyle's case. The passage reads:

> "It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the Statute under consideration must be regarded."

[38] He argued that the learned magistrate's formal order calls in aid the maxim "a court does not act in vain" the statement of the learned authors in the passage that "the whole scope and purpose of the statute must be regarded". It was his submission that the statement "[t] he whole scope and purpose of the Statute under consideration must be regarded comprehensively to mean that an order of the court must be effectually and positively carried out and understood by the parties". He argued that the court must act precisely on the parties' evidence and must satisfy itself that it has the jurisdiction to so act.

[39] It was his submission that the relevant statute must be carefully examined in order to give efficacy to its purpose and to ensure that the requirements are met. His submission in respect of Order VI rule 4 of the Resident Magistrate's Court Rules was:

"(a) In an action for recovery of land the particulars shall contain a full description of the land sought to be recovered.

The purpose of this requirement it is submitted is to enable the court to judicially determine the proprietary rights of the parties upon evidence which can be factually supported or disputed by either party.

(b) To enable the Warrant of Possession to be effectively carried out without trespassing on the land of innocent parties or effectively recognize the land as described.

(c) To enable by keen observance of the Order of the Court and the particulars as described on the Particulars of Claim.

The Annual Value of the Land
This requirement will effectively:

(i) Determine the jurisdiction of the Court whether it is a matter for the jurisdiction of the Lower or the Higher Court.

(ii) To reconcile the land as described with the annual value as a determination of the correctiveness of the court in which the action relates."

[40] He argued that the importance of stating the rent in the particulars of claim is to ensure that the court has the jurisdiction to hear the matter. He submitted that each requirement depends on the merit of each case and the issue on which the resolution of the matter depends. For that proposition he relied on **Doyle v Stephenson**.

[41] Mr McCalla however contended that order VI rule 4 of the Resident Magistrate's Court Rules does not assist either Ms Edwards or Ms Osbourne as they asserted that

they were purchasers and not tenants. He submitted that the particulars of claim addressed the parcels of land each occupied and the value of each was pleaded and was not challenged. He further argued that the unchallenged evidence was that each appellant occupied a parcel within the property which consisted of 8 acres, it mattered not whether it was to live, or to operate a car wash or shop. In the circumstances, he said the appellants are deemed to have accepted the respondent's assertion of value.

Relevant law/ Discussion

[42] Sections 89 and 96 of the Judicature (Resident Magistrate's) Act provide the jurisdictional basis for an action of recovery of possession. Section 89 provides:

> "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 time 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 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."

Section 96 reads:

> "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."

Order VI rule 4 of the Resident Magistrates' Court Rules provides:

> "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, **and of the rent if there be any, fixed or paid in respect thereof**." (Emphasis mine)

[43] Matters which fall within the ambit of section 89 concern trespassers or persons with no right to possession. It is of significance that the respondent in her particulars of claim regarded all the appellants, except Mr Beckford (whom she referred to as "a tenant at will"), as tenants. Having so designated them in her particulars of claim, which provided the basis for the Magistrate's jurisdiction, certainly Ms Edwards, Ms Osbourne and Mr Richards cannot be regarded as a trespassers or persons with no right of possession. They ostensibly disputed the respondent's title. The actions against them therefore fall within the ambit of section 96.

[44] The claim against Mr Beckford was for recovery of possession of a dwelling house on the said property which the respondent claimed he occupied as a tenant at will. The respondent's evidence was that Mr Beckford had lived on the land in the big house with his mother who was Mr Spencer's tenant. His mother was however no longer living on the property. About five years before the matter was heard by the learned magistrate she left the property. She also left Mr Joseph Francis, Mabel's executor there. It was the respondent's evidence that Beckford occupied two rooms in a house with eight rooms.

[45] Mr Beckford testified that he had been paying rent to Mabel's executor in the sum of $1,500.00 monthly but of his own volition he increased the sum to $3,000.00. After the demise of the executors, he paid the rent to Mr Leroy Edwards. He was supported by the evidence of Ms Angella Sullivan, Mabel's daughter. If Mr Beckford is properly categorised as tenant at will, his matter falls within the ambit of section 89.

[46] In **Jamaica Public Service Company Limited v Rose Marie Samuels** [2012] JMCA Civ 42, Brooks JA at paragraph [54] defined trespass to land as "any unjustifiable intrusion by one person upon land in the possession of another". The learned author Sampson Owusu in his text Commonwealth Caribbean Land Law explains some circumstances under which a tenancy at will may arise. For example, "where property is let on the understanding that the letting can be determined at the will of either party". In such circumstances, the tenant, he explained, "has a right to the use and possession of the land for indefinite duration" which "can be determined at will or on demand" (page 530).

[47] The learned author also identified other situations which may give rise to tenancy at will such as:

> "(a) where after the expiration of a term of a lease or tenancy, the lessee or tenant obtains the permission of the landlord to remain in possession and holds over without the renewal of the lease or tenancy agreement;
>
> (b) where a tenant enters into possession under a lease which turns out to be void;
>
> (c) where a party to a negotiation for a tenancy agreement is allowed into possession while the negotiations are going on;
>
> (d) where a party enters into possession in pursuance of an agreement to let whether parole or in writing in which no provision is made for rent or periodic payment which gives rise to periodic tenancy."

[48] At page 530 of the text he said: "if in addition to entering into possession, the tenant pays rent for the premises, he will be held to be a periodic tenant". Instructively at page 531, the learned author added that a tenant at will "has exclusive possession by virtue of which he can maintain an action in trespass against a stranger". The respondent, having herself deemed Mr Beckford a tenant at will, cannot now assert that he had no right to possession which would characterise him as a trespasser.

The failure to state the annual value and to provide a full description

[49] A clear distinction was made between section 89 and section 96 matters in respect of the requirement to state in the plaint the annual value and description of the property. In the case **Elsie Raffington v Joseph McIntosh**, Harrison JA (as he then was), in a very detailed decision, examined the legal implication of the word "shall" in the context in which it is used in Order VI rule 4 in respect of section 89 matters for "recovery of possession and damages for trespass against a person who can show no title" (page 13). He concluded that the failure to state the annual value of the property and to provide a description of the property in the plaint would not render the claim bad in the light of the evidence which was before the court.

[50] Although the court found that in section 89 matters, failure to plead the annual value of the land and the rent was not fatal, it is of significance that in **Raffington's** case, the surveyors report and diagram had been tendered into evidence in response to the appellant's attorney-at-law notice to produce. The learned judge noted that "the description which Margaretta Anderson had given of the property together with the surveyor's diagram and report which had "clearly delineated the boundaries of the land

in question" and which showed the "adjoining lands and the ownership of each parcel of land". The reasonable inference to be drawn from that statement is that although failure to provide a full description of the property in the particulars of claim in section 89 matters is not fatal, cogent evidence must be adduced to assist the court.

[51] Morrison JA (as he then was) in **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37 also a decision of this court, at paragraph [39], cited Graham-Perkin's JA's statement in **Ivan Brown v Bailey** (1974) 12 JLR 1338 as the correct test to be applied in determining whether a defendant who disputes title, "has invoked the jurisdiction of section 96 of the Judicature (Resident Magistrate's) Act. At page 1343, Graham Perkins JA enunciated:

> "All the authorities show with unmistakably 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."

[52] In the instant case, the respondent's contention is that she is entitled to the said lands and house by virtue of the court's declaration that she was the spouse of Mr Spence. Furthermore, the grant of letters of administration *de bonis non* entitles her to deal with the property. The appellants Edwards Osbourne and Richards however contend otherwise. This matter is therefore captured by section 96. Section 96 gives the magistrate the jurisdiction to determine matters in respect of premises which annual value of do not exceed $75,000.00.

[53] On the authorities emanating from this court, the failure to plead the annual value of the land, in accordance with Order VI rule 4 of the Resident Magistrates Court Rules in respect of section 96 cannot be cured by evidence as in the matters which fall under section 89. This was made plain by Morrison JA in **Danny McNamee v Shields Enterprises Ltd**. At paragraph [40], he said:

> "... It was incumbent on the resident magistrate to hear the evidence before determining that she had no jurisdiction in the absence of proof that the annual value of the property fell within the statutory limit of $75,000. The respondent did not specifically plead the annual value of the property, as required by Order VI, rule 4, the whole purpose of which, in the view of one learned commentator well over 35 years ago, "is to enable the Magistrate to see whether or not the case falls within the jurisdiction of the Court" (see an article by R.N.A Henriques QC, 'The action for the Recovery of Possession of Land in the Resident Magistrate's Court', Jamaica Law Journal, October 1973, page 79). But further, there is absolutely no indication on the record that the property in this case did not exceed the statutory limit and it therefore seems to me that the resident magistrate's jurisdiction to make the order that she made under section 96 had not been established."

[54] Harris JA in **Donald Cunningham, Audley Harrison and Ivette James v Howard Berry, Joseph Matthews and Errol Myrie** [2012] JMCA Civ 34 also drew a distinction between section 89 and section 96 matters. She too expressed the view that the omission to state the annual value of the land or description of the land in a plaint which is captured by section 89 would not be fatal. She however said, at paragraph [19]:

> "...In contrast to section 96, which specifically refers to the annual value and the need for the plaint to set out the

> nature and extent of the claim, section 89 does not contain these requirements. Strict compliance with Order VI rule 4 is not required under section 89..."

[55] The learned judge sought to further distinguish section 89 requirements from those of section 96. In so doing she relied on **McNamee v Shield Enterprises Ltd**. At paragraphs [20]-[21] she said:

> "[20] In **McNamee v Shields Enterprises Ltd**, Morrison JA, after embarking upon a comparative review of sections 89 and 96 and a number of authorities, said section 89 is appropriate "in cases in which the defendant's occupation is not attributable to any kind of right or title", while cases falling within section 96 are ones in which there is a dispute as to title but the jurisdiction of the Resident Magistrate is restricted to property of which the annual value does not exceed $75,000.00. Speaking to Order VI rule 4, he said:
>
> > '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.'
>
> [21] In our opinion, this reinforces our view, that in claims for recovery of possession, section 89 being designed to deal with matters in which there is no dispute as to title, there would be no necessity to include a statement as to the annual value or a <u>full description</u> of the land in the claim." (Emphasis and underline as in original)

[56] Notices to amend the particulars of claim against each appellant were filed. The amendment in respect of Mr Beckford and Mr Richards included the annual value of the lands as $60,000.00. An annual value was ascribed to the portions of land occupied by Ms Edwards and Ms Osbourne respectively at $50,000 each.

Failure to provide a full description

[57] Order VI rule 4 of the Resident Magistrates Courts Rules also mandated that the particulars of claim "...contain a full description of the property sought to be recovered". Apart from a statement in each particulars of claim which referred to land registered at Volume 1202 Folio 875, the property of Mr Spencer, there was no further description given of the property occupied except as stated above.

[58] Although it is settled that failure to comply with Order VI rule 4 of the Magistrate's Court Rules is not fatal to applications under section 89, cogent evidence describing the property is nevertheless necessary. It seems to me that Harrison JA's observation in **Raffington's** case makes that requirement palpable. The learned judge considered it important to the determination of the matter, that not only had the appellant in her evidence, described the land, she also provided the court with expert evidence of the demarcations.

A full description

[59] Having regarded Ms Edwards, Mr Beckford and Mr Richards as tenants, in her particulars of claim, by virtue of section 96 of the Judicature (Resident Magistrates) Act the respondent was required to give a "full description of the property". Not only was no description of the property occupied by the appellants provided in the particulars of claim, the respondent's evidence in that regard was not only lacking, it was also inconsistent.

[60] Although the respondent resiled from her pleaded case that Mr Beckford and Ms Osbourne were tenants, she maintained that Ms Edwards was a tenant. Her claim against Ms Edwards was for recovery of possession of "land registered at Volume 1202 Folio 875 the property of the deceased, Joslyn Spencer in which you have constructed a dwelling house". Her evidence was that Ms Edwards had "rented a place there" but the rent was not paid to her.

[61] Her claim against Ms Edwards was for a "house spot". She could not provide the court with any measurement or where on the property it was located. It was her evidence that she "was not claiming any land from Ms Osbourne", she was claiming a shop which Ms Osbourne had constructed "in the doorway of the house" which she described as "just a house spot". She did not provide any evidence as to where on the property the "house spot was to be found". She said she could not say whether it was north, south, east or west. Nor did she know the boundaries. Her evidence against Mr Richard's occupation of the property was similarly lacking. She said he had constructed a car wash but said she was unable give any measurement because "it is in the circumference of the house". There was no evidence as to which "house" the respondent was referring.

[62] Regarding Mr Beckford, although her pleaded claim was for a dwelling house, her evidence was that he occupied two rooms in a house which consists of eight rooms. She was also unable to say which rooms he occupied. Learned Queen's Counsel submitted that any attempt of a bailiff to execute warrants in the circumstances would

certainly be frustrated. Warrants of possession were however executed on the appellants in accordance with the learned magistrate's order to deliver up possession of the parcels of land each appellant occupied which defeats learned Queen Counsel's argument.

[63] Undoubtedly, the quality of the respondent's evidence as to where specifically on the land and what exactly she was claiming against the respondents was not the best. It is nevertheless important to examine exactly what it was that the respondent claimed against each appellant in her particulars of claim and what it was that the learned magistrate granted.

[64] Against Ms Osbourne, she sought to recover possession of land owned by the deceased and registered at Volume 1202 Folio 875 on which she "constructed a shop". Her claim against Miss Edwards, was for "possession of land owned by the deceased and situate at Volume 1202 Folio 875 on which she constructed a house. From Richards she claimed possession of land owned by the deceased and situate on the land registered at Volume 1202 Folio 875 and against Mr Beckford, she sought to recover possession of the dwelling house owned by the deceased and situate on the land registered at Volume 1202 Folio 875 the property of Joslyn Spencer.

[65] Although she could not point specifically to the location of each piece of land, she adequately stated in her plaint and in her evidence that these were lands which were registered at Volume 1202 and Folio 875. The description was clearly adequate as each warrant was duly executed. Furthermore, there was no challenge by the

appellants that they were not occupying the portions of land so registered. Miss Brown and Ms Obourne's defence was that they were purchasers of the land claimed. Mr Richard's defence was that he was a lessor. Mr Beckford acknowledged that he was tenant of a room.

[67] The learned magistrate's order against each appellant was to "deliver up possession of the land owned by the deceased Joslyn Spencer, being part of the registered land registered at Volume 1202 Folio 875 of the registered book of titles".

[67] In my view, in light of the peculiar circumstances of these matters, the description of the land by its volume and folio numbers satisfactorily dealt with the requirement for a full description pursuant to Order VI Rule 4 and (by her amended particulars of claim), by section 96 of the Judicature (Resident Magistrates) Act. In light of the foregoing ground 2 fails.

[68] In the circumstances the appeal should be dismissed.

P WILLIAMS JA (AG)

[69] I too have read the draft judgment of my sister Sinclair-Haynes JA and agree with her reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

Appeal dismissed. Costs to the respondent in the sum of $25,000.00.