[2017] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 5/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**NATIONAL WATER COMMISSION**	**APPELLANT**
AND	**RICHARD VERNON**	**RESPONDENT**

Colin Alcott and Mrs Nadine Henry-Freckleton instructed by Williams Alcott & Williams for the appellant

Alexander Williams and Odeanie Kerr instructed by Alexander Williams & Co for the respondent

14 and 17 February 2017

MORRISON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] The main question raised by this appeal is whether a judge, before whom an application is made for summary judgment against a claimant, may, in effect, grant summary judgment against the defendant without any notice to the defendant of an

application for such an order, and without having given notice to the defendant that he, the judge, was minded to grant such an order.

[3] That was in effect what occurred when National Water Commission (NWC) appeared before a judge of the Supreme Court, in June 2013, to prosecute its application for summary judgment against Mr Richard Vernon, who had filed a claim against it. NWC sought, as an alternative, an order that Mr Vernon's claim be struck out. Mr Vernon resisted NWC's application but did not file any application, in that regard, of his own.

[4] The learned judge heard the application and reserved his decision. On 25 September 2014, he made a ruling in which he dismissed the application for summary judgment, dismissed the application to strike out the claim and ordered that a "hearing be set for the assessment of damages" to be awarded against NWC. Curiously, the learned judge did not make an explicit order concerning judgment for Mr Vernon. It may be supposed, however, that he intended for Mr Vernon to have had summary judgment against NWC with damages to be assessed.

Mr Vernon's claim

[5] Mr Vernon filed his claim against NWC in February 2013. In it, he claimed damages for trespass and an injunction to prevent NWC from entering his land to use a water pump and pump house that were located on the land. The pump house was on the land when he acquired title to the property in 2003.

[6] Mr Vernon subsequently filed an application for an interim injunction preventing NWC from entering on the land until the claim had been determined. He filed an affidavit in support of the application.

NWC's defence

[7] NWC's defence was that it was in possession of the pump house from 1980; that is long before Mr Vernon acquired his title to the property. According to NWC, it had acquired a possessory title to the property by the time Mr Vernon came into the picture and he took his title with actual notice of and subject to NWC's possession and ownership. NWC relied on the fact that the pump house was in place when Mr Vernon had entered into an agreement to purchase the land. His attorneys-at-law had even written to the vendor's attorneys-at-law asking about the pump house and whether its status would affect the purchase price or the land area being transferred.

[8] NWC, in addition to that defence, also relied on the fact that, in 2012, the Minister of Government responsible for water and land had declared the land necessary for use for a public purpose. The declaration was made in accordance with the Minister's powers under the Land Acquisition Act.

[9] It was on these bases that NWC filed its application that came before the learned judge. NWC's application came on before the learned judge at the same time as Mr Vernon's application. The affidavits filed in support of the respective applications set out the factual circumstances on which each party sought to rely. Mr Vernon, however, withdrew his application, and only NWC's was heard.

The learned judge's decision

[10] In his written reasons for judgment, the learned judge carried out an assessment of the law in respect of summary judgement, prescriptive rights, adverse possession and the provisions of the Land Acquisition Act. He assessed the competing claims against the background of the law as he found it and decided:

a. NWC would not be able to refute Mr Vernon's "chances of successfully proving that he had a single and exclusive possession of the land from 2003; nor that [NWC] did not have any physical control of the pump house, before 1996, 1980 and 1969" (paragraph 25);

b. Mr Vernon would be able to show that NWC trespassed on his land (paragraph 25);

c. Mr Vernon could "successfully resist [NWC's] claim under either the Limitation Act or the [Prescription Act]" (paragraph 25);

d. Mr Vernon "would be entitled to damages for trespass for the [period 1969-2003]" (paragraph 27);

e. there is no notice under the Land Acquisition Act that vests the land in NWC and therefore "there was

trespass to [Mr Vernon's] land since he acquired it in 2003…he was [therefore] entitled to damages for trespass" (paragraph 33);

f. "[t]he quantum of damages should be set for hearing for an entitlement of damages" (paragraph 33).

The appeal

[11] NWC contends that the learned judge erred in a number of respects. Mr Alcott, on its behalf, argued, in essence, that:

a. the learned judge "failed to recognize that there was no application before [him] to strike out [NWC's] Defence and/or for Summary Judgement against [NWC]";

b. if the learned judge "was endeavouring to determine the contested issues of facts joined on the pleadings… [NWC should have been] given a right to be heard before the Learned Judge undertook the unilateral course of action [of making the orders that he did];

c. the learned judge erred in deciding issues of fact relating to whether or not NWC had acquired a

possessory title to the land on which the pump house is situated;

d. the evidence before the learned judge was insufficient for him to have decided the issues concerning either or both the Limitation of Actions Act and the Prescription Act;

e. the learned judge failed to appreciate the import or the procedure required under the Land Acquisition Act and how they affected the claim for trespass.

[12] Learned counsel for NWC argued that the learned judge usurped the province of a trial judge. He contended that the learned judge made decisions based on contested issues of fact. The decision was, therefore, he submitted, made in breach of the provisions of the Civil Procedure Rules (CPR) and the overriding objective, and should, consequently, be set aside. He cited, among others, the case of **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited** [2016] JMCA Civ 38, as being in support of his submissions.

[13] Mr Alcott submitted that based on the matters that were raised in the submissions, the appeal ought to be allowed and the judgment and orders of the learned judge set aside. Learned counsel further submitted that the case should be set for a case management conference to be held and for a trial date to be fixed at that

case management conference. It is at a trial, based on admissible evidence, Mr Alcott argued, that the issues should be resolved.

Mr Vernon's response

[14] Mr Williams, on behalf of Mr Vernon, supported the learned judge's approach and decision. Learned counsel submitted that the learned judge was entitled, under the provisions of rule 15.6 of the CPR, to enter summary judgment for Mr Vernon. Learned counsel also relied on rule 26.2 of the CPR but placed less emphasis on that rule. He contended that the learned judge's approach was entirely consistent with the overriding objective. That objective, Mr Williams submitted, required that cases should be dealt with fairly, expeditiously and with a view to saving unnecessary expense.

[15] On learned counsel's submissions, where, as in this case, an application for summary judgment is brought before the Supreme Court, the court has both specific and general powers to manage that case so as to achieve the overriding objective. The court, he argued, was entitled to act on its own initiative, in the absence of any specific application by any of the parties. The court was also seised of the powers afforded to it in relation to applications for summary judgment.

[16] On the issue of the evidence, learned counsel submitted that there was clear authority for the court to proceed to decide matters where the documentary evidence enabled it to do so. He cited **ED & F Man Liquid Products Ltd v Patel and another** [2003] EWCA Civ 472; [2003] All ER (D) 75 (Apr) in support of his submission on this point. Mr Williams argued that the contemporary correspondence between the parties

showed that NWC could not have been in possession of the land prior to 2003. At best, he submitted, the "evidence before the learned Judge was that [NWC] never exercised custody and control of the land, but merely to use a pre-existing pump house from time to time" (page 20 of the written submissions).

[17] The law, learned counsel also submitted, also supported the learned judge's position that NWC had not acquired a possessory title to the land. The logical extension to such a finding, based on learned counsel's submission, was that Mr Vernon was entitled to treat NWC as a trespasser.

[18] As far as the operation of the Land Acquisition Act was concerned, learned counsel submitted that whereas the Commissioner of Lands may have been entitled to possession of the land pursuant to the Minister's declaration, there was no evidence that supported any claim by NWC to possession of the property.

[19] Based on all the principles of law and the evidence that were before him, Mr Williams submitted, the rulings by the learned judge were inevitable and therefore the appeal ought to be dismissed.

The analysis

[20] Although the submissions from counsel on both sides were wide-ranging and covered both procedural and substantive points of law, the appeal must be determined on a very narrow procedural issue, namely that which was identified in the first paragraph of this opinion. It is understood, however, that this court will not disturb an exercise of discretion by judges at first instance unless they have misapplied the law or

taken factors into account where they were not entitled to do so (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at page 1046).

[21] In this case, there are two main difficulties with the approach taken by the learned judge. Firstly, he made a decision, based on his own initiative, but without giving notice to NWC that he intended to take an approach that was adverse to it. This was in breach of rule 26.2 of the CPR.

[22] Rule 26.2 speaks to the court's power to make orders of its own initiative. It states:

> "(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.
>
> (2) **Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations**.
>
> (3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.
>
> (4) Where the court proposes –
>
> (a) to make an order of its own initiative; and
>
> (b) to hold a hearing to decide whether to do so,

> **the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing**." (Emphasis supplied)

[23] Whereas it may be said that NWC did have a hearing, in respect of which it had been given notice, and that it made representations at that hearing, it cannot be said that it attended that hearing and made submissions on the basis that the learned judge was considering taking a step which was adverse to its interest. Mr Williams quite candidly informed this court that he did not expect that outcome from NWC's application. In this sense, the spirit of the provisions of rule 26.4 was not followed.

[24] The other relevant rules are in Part 15 of the CPR. Rule 15.4 rule stipulates the procedure by which applications for summary judgment should be conducted. The rule states:

> "(1) Except in the case of a counterclaim a claimant may not apply for summary judgment until the defendant against whom the application is made has filed an acknowledgment of service.
>
> (2) If a claimant applies for summary judgment before a defendant against whom the application has been made has filed a defence, that defendant's time for filing a defence is extended until 14 days after the hearing of the application.
>
> (3) Notice of an application for summary judgment must be served not less than 14 days before the date fixed for hearing the application.
>
> (4) The notice under paragraph (3) must identify the issues which it is proposed that the court should deal with at the hearing.

(5) **The court may exercise its powers without such notice at any case management conference**.

(Part 11 contains general rules about applications.)" (Emphasis supplied)

[25] In association with that rule it will be noticed that rule 15.6(1) allows the judge who hears an application for summary judgment to, among other things, "(e) make such other order as may seem fit". Rule 15.6(3) states that where an application for summary judgment does not bring the claim to an end, the court must treat the hearing as a case management conference.

[26] Those rules do not, however, allow for the judge to make such an adverse ruling without notice of his intention so to do. Fairness required notice to be given to NWC.

[27] Having decided to refuse NWC's application, the learned judge was entitled to exercise his case management powers. He was, nonetheless, obliged to inform NWC of his inclination to give summary judgment against it and allow it to address him on the relevant points. Even if it could be held that NWC, having argued the matter extensively when it was pursuing its application before the learned judge, had had all the opportunity to address him that it could have wanted, there is a second difficulty with the learned judge's decision. It is that he decided the case on disputed issues of fact and without proper evidence in respect of those facts.

[28] It is well established that judges should not convert applications for summary judgment into mini-trials. The decision of **Swain v Hillman and another** [2001] 1 All

ER 91 has been cited with approval in several judgments of this court. In that case Lord Woolf MR, stated at page 95:

> "...the proper disposal of an issue under Pt 24 [which is the equivalent of Part 15 of the CPR] does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[29] A fundamental plank on which the learned judge based his decision was that NWC was unable to establish that it was in possession of the pump house before 2003. That was an issue on which the parties held opposing positions in respect of the pleadings. NWC at paragraphs 1, 3 and 5 of its statement of defence, specifically stated that it was in possession of the land. It contended at paragraph 3 that its occupation was for a period sufficient to entitle it to claim the benefit of the Limitation of Actions Act and the Prescription Act.

[30] Unfortunately, the learned judge used letters written after 2003 to decide the issue of the occupation of the land by NWC. Those letters were written by persons who did not claim to be speaking from personal knowledge. Those circumstances distinguish the situation envisaged in **ED & F Man Liquid Products Ltd v Patel and another**. Their Lordships spoke of resolving the case based on contemporary documents. Although the less said about the evidence in this case is the better, it may be said that the documents exhibited to the affidavits in this case could not be said to have satisfied that requirement. In relying on them, the learned judge improperly usurped the trial procedure. Those were issues of fact which were to be aired at a trial, or at earliest,

after witness statements had been tendered in preparation for trial. The learned judge did not exercise his discretion in accordance with the principles set out in **Swain v Hillman**.

[31] The words of Judge LJ in **Swain v Hillman** also give guidance in this area. He said, in part, at page 96:

> "To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step."

The learned judge took that serious step without allowing NWC an opportunity to convince him to resile from that inclination. He also took that step based on evidence, which may not have been accurate, or even properly admissible for those purposes.

[32] Based on this reasoning, it must be held that the learned judge did err in granting summary judgment to Mr Vernon. The judgment and orders should be set aside and the case set for mediation and, if necessary, a case management conference. It would seem, however, that bearing in mind the steps taken under the Land Acquisition Act, that a serious effort should be made to resolve the claim through mediation.

Costs

[33] It is noted that the learned judge did not, however, make an order for costs. Where an appeal, such as this is allowed, costs would be awarded to the appellant both in respect of the appeal and in the court below. The submissions by Mr Alcott in the appeal suggest that NWC's applications before the learned judge should have failed and

the learned judge should have taken the steps to have the matter proceed to trial. In those circumstances, NWC would, in the normal course, have had an order of costs against it. The order made in this court should reflect that situation.

F WILLIAMS JA

[34] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

MORRISON P

ORDER

1. The appeal is allowed.

2. The judgment and orders of the court below, made herein on 25 September 2014, are set aside.

3. The case is referred to the Registrar of the Supreme Court for mediation to be arranged and, if necessary, a date to be fixed for a case management conference to be held.

4. Costs of the appeal to the appellant to be agreed or taxed. Costs in the court below to the respondent, to be agreed or taxed.