[2016] JMCA App 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 86/2016

APPLICATION NO 183/2016

BETWEEN	**SEATON CAMPBELL**	**APPLICANT**
AND	**DONNA ROSE-BROWN**	**1st RESPONDENT**
AND	**CARLTON BROWN**	**2nd RESPONDENT**

Andrew Graham instructed by Bishop & Partners for the applicant

Mrs Claudia Forsythe instructed by Forsythe & Forsythe for the respondents

18 October, 2 and 10 November 2016

IN CHAMBERS

MORRISON P

[1] This is an application for a stay of execution, pending the hearing of an appeal to this court, of a judgment given by K Anderson J (the judge) on 15 July 2016. On 10 November 2016, having heard submissions from the parties, I refused the application, with costs to the respondents to be agreed or taxed. These are the promised reasons for this decision.

[2] The applicant currently occupies all that parcel of land known as 8D Albert Street, Franklyn Town, Kingston 16 in the parish of Saint Andrew, being the property comprised in Certificate of Title registered at Volume 557 Folio 67 of the Register Book of Titles (the property). The respondents are the registered proprietors of the property.

[3] The applicant's case at trial was that he had been in occupation of the property since 1984. In 1993, the property was purchased by his brother, David George Campbell (Mr Campbell), who became the registered proprietor of the property on 28 April 1993. At all material times, Mr Campbell resided overseas and, according to the applicant[1], "left the [applicant] as the sole occupant of the premises". On 3 July 2014, Mr Campbell offered to sell the property to the applicant for $400,000.00, but this offer was rejected by the applicant, who, he said[2], "asserted his rights as owner". The offer was subsequently withdrawn and, on 17 December 2014, Mr Campbell entered into an agreement for sale of the property to the respondents for $1,750,000.00. The respondents were duly registered as proprietors of the property on 25 February 2015. By letter dated 4 March 2015, the respondents served notice on the applicant requiring him to vacate the property on or before 11 April 2015.

[4] On 15 April 2015, the applicant commenced action against the respondents claiming that, on the basis of his "undisturbed possession from 1993 to present", during

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[1] Para. 4 of the particulars of claim filed 15 April 2015.
[2] Para. 6

which he had "exercised as of right continuously since that time all rights as owner over the land", he was entitled to:

1. An injunction barring the respondents from advertising for sale, selling, dealing in any way, or entering on the property;

2. An order that the respondents deliver the Duplicate Certificate of Title registered at Volume 557 Folio 67 to the Registrar of the Supreme Court;

3. A declaration that the respondents hold the property "on trust for [the applicant] absolutely"; and

4. An order instructing the Registrar of Titles to cancel the said Duplicate Certificate of Title and thereafter to issue a new title in the applicant's name.

[5] In their defence filed on 26 May 2015, the respondents relied on their position as registered proprietors of the property, as a result of which, they asserted, they were therefore "bona fide purchasers for value without notice of any defects in the vendor's title"[3]. Further, the respondents averred[4], the allegations made on behalf of the applicant:

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[3] Para. 4 of the defence of the 1st and 2nd defendants dated 26 May 2015.
[4] At para. 5

> "... do not support a claim for adverse possession ... pursuant to Section 3 of the Limitations of Actions Act [sic] in that [the applicant] by virtue of the said allegations admits expressly or inferentially that he occupied the premises on behalf of and with the consent of his brother David Campbell, [the respondents'] predecessor in title."

[6] In these circumstances, the respondents denied the applicant's entitlement, either to the relief which he sought, or to any relief at all. The respondents also filed an ancillary claim against (i) the applicant, claiming, among other things, an order for possession of the property; and (ii) Mr Campbell, claiming, among other things, (a) an indemnity or contribution in respect of the applicant's claim, (b) recovery of the purchase money and costs of the purchase, with interest, and (c) general damages for the loss of the deal.

[7] The respondents sought summary judgment on the applicant's claim and on their claim for ancillary relief against the applicant and Mr Campbell. However, up to the time of the hearing before the judge, there was no proof that Mr Campbell had been served with the ancillary claim against him. The judge accordingly declined to make any order against him.

[8] But the judge granted the respondents' application for summary judgment against the applicant on the claim and on the ancillary claim against him. In addition to entering judgment in favour of the respondent in respect of each claim, the judge ordered (i) an assessment of damages for trespass against the applicant; and (ii) that

the claimant vacates the property by or before 27 August 2016. In giving his reasons for this decision, the judge said this[5]:

> "[51] It is important to note that open and undisturbed possession of property, is not to be equated with, 'adverse possession'. Accordingly, whenever adverse possession is being alleged, it is imperative that there be set out in the statement of case of the party alleging same, circumstances which can properly lead a trial court, at a later stage, to conclude that the property was possessed in a manner adverse to the rights of the title holder. In the case at hand, not only has the [applicant] failed to do that, but worse yet for him, he has made it abundantly clear in his statement of case and affidavit evidence, that he had, throughout most of the years that he has been in open and undisturbed possession of the property, enjoyed such open and undisturbed possession, as a consequence of the licence given to him by his brother, to do so. It is for all of the reasons as noted above, that this court has reached the conclusion as set out below.
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> **Conclusion**
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> [52] In the case at hand, the [applicant's] claim would have been bound to fail at trial, as too, would his defence to the ancillary claim brought against him, by the [respondents]. That is so because, at all times, although he occupied the disputed property openly and thus, had openly possessed same, he did not have adverse possession of same for the twelve (12) years as required by the statute of limitations, so as to have extinguished the title to that property. His possession of same was disturbed by the [respondents] within a very short time after they had acquired title to the property. Additionally, at all times, while he was in open and undisturbed possession of the property, during his brother's ownership thereof, as the then registered title holder, he was in possession of same, by means of a licence, in the form of permission given to him,

[5] At paras. [51]-[52]

either expressly or implicitly, by his brother, to occupy the premises."

[9] By an order made by Thompson-James J on 19 August 2016, the applicant was given leave to appeal against the judge's decision and a stay of execution of the judgment was granted until 10 October 2016. In grounds of appeal filed on 25 August 2016, applicant challenged the judge's decision on the following grounds:

"A. The Learned Judge erred in fact and in law when he found that the Appellant herein was deemed to have been a licensee and as such could not disposes [sic] the initial paper title holder, despite the affidavit evidence showing that the initial paper title holder has never been back to Jamaica and or has no input in the subject property for well over two decades since the subject property was transferred.

B. The learned Judge erred in law when he sought to address the state of mind of initial paper title holder [sic] and not the state of mind of the Appellant herein, who was in possession and occupation of the subject property at the material time and in excess of the requisite limitation period.

C. The Learned Judge erred in law when he found that the Appellant herein did not adversely possess the subject property, despite being in factual possession and having the intention to exercise such custody and control over the property for his own notwithstanding the affidavit evidence that deponed that the Applicant [sic] did extensive repairs, constructed perimeter fencing, paid or caused all the taxes associated with the property to be paid and planted fruit trees and reaped the fruits thereof and in general exercising the rights and privileges as an owner to the exclusion of all others."

[10] By notice of application for court orders filed on 6 October 2016, the applicant sought a further stay of execution of the judgment pending the hearing of the appeal. That application came on for hearing before me, on paper and on a without notice basis, on 7 October 2016. On that day, I granted a stay of execution, pending the hearing of an *inter partes* application for a stay, until 18 October 2016. I also directed that the application should be listed before the judge of appeal in chambers for consideration on that date and that the parties should be notified accordingly. As it happened, the application came back before me on 18 October 2016, when the application was part heard and adjourned to 2 November 2016 and then again to 10 November 2016, when, as I have indicated, it was refused.

[11] In his very able submissions before me in support of the application for a stay, Mr Andrew Graham for the applicant contended that he had a real prospect of success on appeal in that the judge erred in finding him to be a mere licensee of the property. Rather, Mr Graham submitted, the applicant has been in continuous occupation of the property for the requisite period and as such has a valid claim to title by adverse possession. In these circumstances, it was submitted, the court's duty is to balance the risk of injustice and to make such order as will minimise the possibility of injustice. For the respondents, Mrs Claudia Forsythe resisted the application, submitting that the judge's finding that the applicant is a licensee was correct and that there is no real prospect of that finding being displaced on appeal. In these circumstances, it was submitted, the respondents as bona fide purchasers for value of the property without

notice will be prejudiced by the grant of a stay and no stay should therefore be granted.

[12] As is well known, rule 2.14 of the Court of Appeal Rules 2002 (the CAR) provides that, without an order of the court below, a single judge of this court, or the court itself, "an appeal does not operate as a stay of execution or of proceeding under the decision of the court below". Rule 2.11(1)(b) of the CAR empowers a single judge to make such an order pending the hearing of the appeal. In his oft-cited judgment in **Watersports Enterprises Ltd v Jamaica Grande Ltd and others**[6], K Harrison JA described it[7] as a matter of "established principle" that a stay should not be granted "unless the appellant can show that the appeal has some prospect of success". Once that threshold has been crossed, the decision whether or not to grant a stay will turn on "whether there is a risk of injustice to one or other or both parties if [the court] grants or refuses a stay"[8].

[13] So the first question which arises is whether the applicant can show that he has an appeal with some prospect of success. The principal issues on this appeal appear to be whether, firstly, the applicant has demonstrated that he has been in undisturbed possession of the property for the statutory period of 12 years[9]; and, secondly, whether

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[6] SCCA No 110/2008, Application No 159/2008, judgment delivered 4 February 2009
[7] At para. 7
[8] Para. 10. See also **Cable and Wireless Jamaica Limited (T/A Lime) v Digicel (Jamaica) Limited (formerly Mossel Jamaica Limited)** SCCA No 148/2009, Application No 196/2009, judgment delivered 16 December 2009
[9] Limitation of Actions Act, section 3

the nature of his possession of the property was such as to entitle him to claim title under the doctrine of adverse possession.

[14] On the first issue, which is a pure question of fact, there is no evidence to suggest otherwise than that, after he was left in charge of the property by Mr Campbell in 1993, the applicant remained in undisturbed possession of it right up to the date of the filing of the respondents' claim in 2015. This was a period of 22 years, therefore making it clear that the judge erred in at least twice suggesting[10] that the applicant had been in possession for a period less than that required by the statute. Had this been the only issue on appeal, I think the applicant would clearly have shown that he has an appeal with some prospect of success.

[15] The second issue has to do with whether the applicant occupied the property by virtue of a licence given to him by Mr Campbell, as the judge found. In his submissions before me, Mr Graham did not seek to challenge the judge's finding to this effect. Rather, his contention was that the judge gave insufficient weight to the manner of the applicant's undisturbed occupation of the property from 1993 to 2015 to the exclusion of others. In so doing, Mr Graham submitted, the judge ignored the fact that the applicant dealt with the property as an occupying owner might have been expected to

[10] At paras. [5] and [7] of his judgment.

deal with it, in the sense laid down by the House of Lords in **JA Pye (Oxford) Ltd and another v Graham and another**[11].

[16] But the problem with this approach, as it seems to me, is that, as Lord Millett put it in **Ramnarace v Lutchman**[12], "[p]ossession is not normally adverse if it is enjoyed by a lawful title **or with the consent of the true owner**"[13]. The position is more fully explained by the learned authors of Gray and Gray, Elements of Land Law[14], under the rubric, "Adverse possession cannot be consensual", as follows:

> "The adverse quality of a claimant's possession is more generally negatived by any consent by the paper owner to the claimant's presence on the land. Thus possession is never 'adverse' if enjoyed under a lawful title or by the leave or licence of the paper owner. For example, the presence of a landlord-tenant relationship between the paper owner and the occupier is plainly inconsistent with a claim of adverse possession. Nor can adverse possession stem from other forms of mandate or permission given by the paper owner. Thus no adverse possession arises on the basis of occupation which is exercised at the request or with the consent of the paper owner. The courts have tended, in any event, to guard against the possibility that acts founded on mere 'amity and good neighbourliness' may ripen into some form of unassailable adverse possession. The permission which negatives adverse possession may be present even where it is unaccompanied by any obvious process of offer and acceptance and unsupported by any consideration."

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[11] [2002] UKHL 30
[12] [2001] UKPC 25, para. 10
[13] My emphasis
[14] Kevin and Susan Francis Gray, Elements of Land Law, 5th edn, Oxford, para. 9.1.47

[17] It is clear that, on the applicant's own case, as the judge found, he was left in possession of the property in 1993 by the leave or licence of Mr Campbell. Accordingly, his possession of the property was at no time adverse to Mr Campbell's title. Mr Campbell therefore remained the owner of the property up to the time he sold it to the respondents in 2015. In these circumstances, it appeared to me that the applicant could not possibly show that he had a reasonable prospect of a successful appeal against the judge's decision ordering him to give up possession of the property to the respondents. I therefore considered that it would not be a proper exercise of the court's discretion to grant him a stay of execution of the judgment. On the question of costs, no reason having been shown why a contrary order should be made, I further considered that the usual rule, which is that costs must follow the event[15], should apply.

[15] Civil Procedure Rules 2002, rule 64.6(1)