JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

RESIDENT MAGISTRATES' CIVIL APPEAL NO 18/2015

BEFORE: **THE HON MR JUSTICE MORRISON P**
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**FREDERICK ECCLESTON**	**APPELLANT**
AND	**FRANCELLA ECCLESTON**	**1st RESPONDENT**
AND	**CLEVE LEWIS**	**2nd RESPONDENT**
AND	**DESMOND GILLETTE**	**3rd RESPONDENT**

Albert Morgan instructed by Albert Morgan & Co for the appellant

Lambert Johnson instructed by Johnson & Co for the respondent

30 November 2016 and 13 July 2017

MORRISON P

[1] This is an appeal from a judgment given on 31 March 2011 by Her Honour Mrs Natalie Hart-Hines, then the Resident Magistrate for the parish of Saint James ('the

Resident Magistrate'), in three consolidated actions[1] for damages for trespass to land and an injunction restraining further acts of trespass.

[2] The appellant and the 1st respondent are brother and sister, while the 2nd and 3rd respondents are sons of the 1st respondent. Cedric Blackhall, another son of the 1st respondent who was also sued in the court below, was already dead by the time of the trial. At the trial, the issue between the parties was whether the respondents were liable to the appellant for trespass to portions of a parcel of land owned by him at Glascow, Adelphi in the parish of Saint James ('the land'); or whether, by way of defence, the respondents were entitled to rely on section 3 of the Limitations of Actions Act, on the basis that they had been in open and exclusive possession of the relevant portions of the land for a period in excess of 12 years. After a nine day trial spanning a period of over two years, the Resident Magistrate gave judgment for the respondents, with costs to be taxed or agreed. The issue which arises on this appeal is whether, based on the evidence in the case, the Resident Magistrate was correct in pronouncing judgment for the respondents.

[3] The Resident Magistrate was called upon to resolve two sharply conflicting accounts of the circumstances in which the appellant and the respondents respectively occupied the land. The appellant grounded his claim in his status as registered proprietor of the land, as evidenced by the Certificate of Title registered in his name at Volume 1403 Folio 408 of the Register Book of Titles ('the title').The title, which was

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[1]Plaints Nos 2517/2008, 2518/2008 and 204/2009.

issued on 23 October 2006, describes the land as "the land formerly comprised in Certificate of Title registered at Volume 672 Folio 51, SAVE AND EXCEPT the portion Transferred by Transfer No. 312274 (39.9P)".

[4] The appellant's case was that he got the land from his father in 1991. Although he had understood the land to be his father's land, there turned out to be problems with the title to the land. There was some evidence that (i) the land comprised in Certificate of Title registered at Volume 672 Folio 51 had been previously registered in the name of one Basil Binns; (ii) the appellant had lodged a caveat on the land in 1986, in which he claimed an interest as equitable owner of the land; and (iii) it was not until after court proceedings involving Mr Binns, a lost title application and a resurvey of the land, that the title was ultimately issued to the appellant in 2006.

[5] At the time when he got the land from his father, the appellant testified, the 1st respondent "was living there and going and coming". But, sometime after that, he invited her to come onto the land to help him take care of their sick mother. Initially the 1st respondent would stay at their mother's house on the land and come and go, but the appellant said that, after she came there to stay, he put her in a board house on the land. But the appellant contended that, over his protests, the 1st respondent subsequently settled on the land with her children sometime after his mother's death. The appellant alleged that the 2nd and 3rd respondents also committed various acts of trespass on the land and that, when challenged, the 2nd respondent asserted that it was his grandmother's land and that nobody, "[n]either [the appellant], police nor Judge", could stop him.

[6] The 1st respondent denied that the building of her home on the land was an act of trespass. She said that she had gone to reside on the land as a child and that she eventually had and raised her own children there. She erected her home with the permission of her mother before she died in the 1980s, long before the appellant became the registered owner of the land. She also claimed that her mother bequeathed half an acre of the land to her and five acres to the appellant, but she admitted that the will had not been probated. However, she denied the suggestion that her mother had no authority to give her any part of the land as a gift, or to give her permission to build on it. Her position was, in essence, that she believed that she owned the section of the land on which she built her house. She therefore based her claim to possessory title on her undisturbed possession of the land for a period in excess of 12 years and her intention to occupy the land to the exclusion of all others.

[7] The 2nd and 3rd respondents also denied committing any of the acts of trespass alleged by the appellant. Although the 2nd respondent gave evidence as to the construction of his mother's house in the 1980s when he was a child, he denied having built any structure of any kind on the land or having any interest in it. In the case of the 3rd respondent, while he admitted having erected a board house on the land, he said that he had done so with the permission of his mother.

[8] Before turning to an assessment of the evidence, the Resident Magistrate, in an altogether admirable judgment, referred to sections 68 and 70 of the Registration of Titles Act; the Limitation of Actions Act; the still leading authority of the Privy Council in

Chisholm v Hall(1959) 7 JLR 164; and the well-known decision of the House of Lords in **JA Pye (Oxford) Limited and Others v Graham and another** [2002] UKHL 30.

[9] Applying **Chisholm v Hall**, in which it was held that the combined effect of sections 68 and 70 of the Registration of Titles Act was that, after first registration, a purchaser of registered land was obliged to look behind the certificate of title to see what rights by limitation might have accrued in the interim, the Resident Magistrate said this (at paragraph 22 of her judgment):

> "... as the certificate of title registered at Volume 1403 Folio 408 was issued in place of the certificate of title previously registered at Volume 672 Folio 651, the later issued title cannot be regarded as a 'first' title, but rather a replacement or substitute title. The date of the first issue of a title in respect of the said lands at Glascow is unclear. However, if [the 1st respondent] is able to prove her adverse possession for a period of 12 years prior to 2006, then the replacement or substitute title (issued in 2006) in respect of largely the said lands (as title previously registered at Volume 672 Folio 51) would have no effect on her adverse possession."

[10] Then, as regards the law of adverse possession, the Resident Magistrate stated the position in this way (at paragraph 23):

> "In order to acquire an interest in the land by adverse possession, the occupation of land by a trespasser must be in a manner which is inconsistent with the rights and title of the true owner. The requirement that the possession be 'adverse' requires the trespasser or squatter to show that his possession was not pursuant to a licence, tenancy or some other grant or permission, expressed or implied, by the owner. In establishing his possession of the land the trespasser or squatter must demonstrate [1] factual possession and [2] and [sic] intention to possess or *animus*

> *possidendi.* To establish 'factual possession' the trespasser must demonstrate a sufficient degree of physical custody and control of the land which must be open and unconcealed, continuous and exclusive and without the permission or agreement of the owner. To establish 'an intention to possess' the trespasser or squatter must demonstrate an intention to enjoy possession to the exclusion of the paper owner. The effect of adverse possession is that the person who is in possession as the trespasser or squatter can obtain good title if the true owner fails to assert his superior title within the requisite twelve year limitation period."

[11] This is, if I may say so with respect, a perfectly lucid statement of the applicable law in a notoriously difficult area. There is, happily, no contest as to its accuracy in this appeal, particularly given the later decisions of this court and of the Privy Council in **Recreational Holdings (Jamaica) Limited v Lazarus and another** [2014] JMCA Civ 34; [2016] UKPC 22.

[12] Next, in assessing the evidence on both sides of the case, the Resident Magistrate found that there were several inconsistencies and incongruities in the appellant's account, some of which she described as "quite glaring". Among these was the fact that, although the appellant had initially suggested that his lawyer had written letters to the respondents in respect of their acts of trespass in 1992 and 1993, the actual letters relied on and put in evidence by him were dated 2001, 2002 and 2003 respectively. Having considered in detail the various inconsistencies, as well as the appellant's explanations for them, the Resident Magistrate concluded as follows (at paragraphs 37 and 38):

> "I observed the [appellant] as he gave his evidence, and I do not find that these inconsistencies in his account are due to poor recollection, or are due to age ... I have given careful consideration to [his] account to see if there can be any explanation for these apparent inconsistencies and I have found none. When I consider his evidence cumulatively, and consider the inconsistencies, I am only able to conclude that the [appellant] is not a forthright, credible or honest witness, particularly as regards when [the 1st respondent] moved and started to build on the land ... Indeed, it seems more plausible on his evidence regarding events between 1991 and 1993, that [the 1st respondent] lived on the land and started constructing her house on the land in or before 1991, rather than in 2001 ...
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> The [appellant's] evidence that his sister would 'go and come' seemed designed to persuade me that her possession of the land was not continuous. However, in light of the inconsistencies and incongruities in the [appellant's] account, I do not accept his account that his sister moved on to the land with his permission, or that she would 'go and come' between 1986 and 2001."

[13] The Resident Magistrate then turned to the 1st respondent's evidence, but not before observing that, although she had not found the appellant to be a credible or reliable witness, "this is not the end of the matter, as it is for the [1st respondent] to prove her trespass and the continuous and exclusive possession of the land for the requisite 12 years". The Resident Magistrate therefore considered that the onus was on the respondents to establish factual possession of the land for over 12 years and an intention to possess the land or the portion occupied by them over that period.

[14] The Resident Magistrate found the respondents to be credible witnesses. There were, she said, "few inconsistencies in their accounts and these did not seem to be major inconsistencies either individually (internally) or when compared cumulatively".

She found that the 1st respondent was "largely consistent in her account and has not been discredited on any significant issue". As regards the 1st respondent's credibility in relation to when she started building and the duration of her occupation of the land, the Resident Magistrate concluded (at paragraph 41) that –

> "I find that she gave cogent evidence of her open, undisturbed and continuous occupation of the land prior to her mother's death, and that she believed that she owned that area of the land by virtue of her mother giving her half an acre, or intending so to do. I observed her demeanour and assessed her evidence regarding her possession of the land since the 1980s before her mother's death. I do not find that she has been discredited on this issue."

[15] Accordingly, the Resident Magistrate found for the respondents and set out her findings of fact as follows (at paragraph 56):

> "FINDINGS OF FACT
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> 56. I have set out my findings throughout this document, but for the sake of completeness, I now summarize my findings in relation to the issues identified earlier:
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> (1) The certificate of title issued to Frederick Eccleston in 2006 was not a 'first issued' title, and has the same the effect as a substitute or replacement title. Time did not start running afresh when the new title was issued in 2006 in place of the lost and cancelled title. Consequently, any period of adverse possession by Francella Eccleston prior to 2006 would not be affected by the issuance of the new title.
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> (2) I find that Frederick Eccleston was not a credible or reliable witness as regards (1) when he got the land from his father, (2) when he moved unto the land, (3) when his sister moved unto

the land, and (4) the nature and duration of his sister's occupation of the land ...

(3) In contrast, I find that Francella Eccleston gave cogent evidence of her open and undisturbed occupation of the land from in the 1980s and more specifically, after the death of her mother in 1986. I find that Francella Eccleston was a credible witness as regards the nature and duration of her occupation of the land. As regards the nature of her occupation of the land, Francella Eccleston said it was by virtue of a gift from her mother. Though she was unable to provide any documentary evidence to substantiate this, her evidence of her occupation of the land was of such a strength to demonstrate her intention to possess the land exclusively, as well as continuous and exclusive possession, physical custody and control of the land. It matters not that she thought she initially took possession and occupied the land with the permission or agreement of her mother. What matters is that her possession was without the permission or agreement of the true owner, that it was contrary to the rights of the true owner, and that such acts of possession amounted to the dispossession or ouster of the paper owner Basil Binns.

(4) I accept the accounts of Francella Eccleston and Cleve Lewis that Francella Eccleston started building on the land in the 1980s and that the construction of the concrete house was completed in the 1980s.

(5) I find that the act of building a two-storey seven (7) bedroom concrete structure on the land clearly demonstrated that Francella Eccleston had the requisite *animus possidendi*, and this was an unequivocal act of adverse possession. Relevant too is the fact that she kept animals such as goats on the land which might have been farm land, in Glascow, Adelphi. I find that Francella Eccleston occupied the land between at least 1986 and 2006 and that such occupation of

the land was without the permission, licence or consent of the paper owner, Basil Binns, and such occupation was adverse to the true owner's proprietary rights. There is no evidence that Basil Binns ever challenged her possession of the land. Francella Eccleston's adverse possession of the land would have been open, undisturbed and uninterrupted between 1986 and 1999. Basil Binns as the legal owner would have been dispossessed by about 1999, as regards the area of land occupied by Francella Eccleston and her children.

(6) I also find that Frederick Eccleston's possession of an area of the land around the same time as his sister, did not affect her possession since he was not the true owner until 23rd October 2006. Both Francella Eccleston and Frederick Eccleston were trespassers against Basil Binns, and there was no 'joint possession' with the paper owner. Likewise, merely sending letters through his Attorneys objecting to the construction on the land, would have been ineffective to stop time running in relation to Francella Eccleston's open, continuous and undisturbed adverse possession of a portion of the land.

(7) I therefore find that the plaintiff's action is statute-barred pursuant to section 3 of the Limitation of Actions Act. However, Francella Eccleston has not successfully raised any other basis on which to challenge the certificate of title, and the plaintiff's title is not impeachable on the basis of fraud."

[16] On the basis of these findings, as I have already indicated, the Resident Magistrate gave judgment for the respondents, with costs to be taxed or agreed. In a notice of appeal filed on 15 July 2013, the appellant challenged the judgment on the ground that the Resident Magistrate erred in finding for the respondents. Notices of

applications to argue an additional ground and to amend the original grounds were also filed on 24 and 30 November 2016 respectively. At the hearing of the appeal, Mr Morgan for the appellant sought and was granted permission, without objection, to argue the grounds comprised in the notices as grounds one and two, which is how I will refer to them after this. They are as follows:

> Ground one
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> "The Learned Resident Magistrate erred in giving Judgment for the Defendants instead of making an Order that the Plaintiff be non-suited on the basis that 'satisfactory proof' was not given to her either by the [appellant] or the [respondents] 'entitling either of them to judgment' in accordance with section 181 of the Judicature (Resident Magistrates) Act."
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> Ground two
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> "That the learned Resident Magistrate erred in finding that the Plaintiff/Appellant was barred from recovering possession of the disputed property from the Defendants by virtue of section 3 of the Limitation of Actions Act."

[17] Mr Morgan dealt with both grounds together and I trust that I will do his submissions no disservice by summarising them in this way. Although recognising this court's usual reluctance to allow appeals from pure findings of fact, Mr Morgan submitted that this was a proper case in which to do so. It was submitted that in the light of the evidence relating to the events which preceded the issue of the title to the appellant, the Resident Magistrate should have drawn an inference as to his earlier ownership of the land. In this regard, the Resident Magistrate failed to appreciate the significance of the fact that Mr Binns had taken no steps to recover the land from the

appellant. Mr Morgan also observed that it might have been helpful for the Resident Magistrate to have visited the land, which she did not do. In all these circumstances, Mr Morgan submitted that, instead of giving judgment for the respondents, the Resident Magistrate ought, pursuant to section 181 of the Judicature (Resident Magistrates) Act (now the Judicature (Parish Courts) Act) ('the Act'), to have non-suited the appellant, given the absence of any satisfactory basis on the evidence for a finding in favour of either party.

[18] For his part, Mr Johnson for the respondents contented himself with the simple submission that (i) the issues in this case turned entirely on credibility and in this regard the Resident Magistrate made a strong finding against the appellant and in favour of the 1st respondent; and (ii) if the Resident Magistrate was correct on the facts, then the limitation period would have run in favour of the 1st respondent by the time the appellant became the registered proprietor in 2006.

[19] I will first consider Mr Morgan's point that the Resident Magistrate ought to have non-suited the appellant. The point is based on section 181 of the Act, which provides as follows:

> "181 The Magistrate shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him entitling either the plaintiff or defendant to the judgment of the Court."

[20] Mr Morgan referred us to the decision of this court in **Lorna Taylor (Administratrix of the estate of Wilbert Taylor dec'd) v Eric Williams and**

others [2014] JMCA Civ 53, in which Brooks JA explained (at paragraph [19]) that "[w]hether or not section 181 should be applied, must ... depend on the circumstances of each case". That case turned on the question whether the appellant's brother, who was her predecessor as personal representative of their late father's estate, had bound the estate when he entered into sales agreements with each of the respondents. So the prior factual issue for determination was whether he was the qualified administrator of the estate when he entered into the agreements. There being no evidence of any kind as to the period during which the brother was the administrator, it was held that the Resident Magistrate in that case could not be faulted for having non-suited the parties, thereby, as Brooks JA observed (at paragraph [35]), "leaving the situation open for the litigation to be properly pursued".

[21] In my view, this case is in a different category altogether. The appellant and the 1st respondent presented to the court two diametrically opposed versions as to the date on which, and the circumstances in which the 1st respondent came into possession of a portion of the land. Once the 1st respondent's version was preferred, the only remaining issue was whether more than 12 years had elapsed between that date and the date on which the appellant obtained title to the land. It seems to me that, upon that determination also having been made in the 1st respondent's favour, there was then clear evidence which, if accepted, supported the conclusion that the limitation period had run in the 1st respondent's favour against the appellant.

[22] That being so, the only remaining question would therefore be whether there is any basis for disturbing the Resident Magistrate's detailed findings of fact in the 1st

respondent's favour. In this regard, **Rayon Sinclair v Edwin Bloomfield** [2016] JMCA Civ 7, to which Mr Morgan quite properly referred us as well, is yet another decision of this court which restates the well-known principle that an appellate court "will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility" (per Brooks JA, at paragraph [7]). Accordingly, in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, at paragraph 12, addressing the proper role of an appellate court in an appeal against findings of fact by a trial judge, Lord Hodge emphasised that, in order to disturb such findings, "[t]he court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions".

[23] In my view, despite Mr Morgan's best efforts, no such mistake has been identified in the Resident Magistrate's evaluation of the evidence in this case. Given the nature of the case, involving as it did a long history of a broken family relationship, it seems to me that this is a case in which much would have turned on the advantage which the Resident Magistrate enjoyed of observing the demeanour and the manner of giving evidence of the appellant and the 1st respondent.

[24] I would therefore dismiss the appeal, with costs to the respondents, fixed at $40,000.00.

SINCLAIR-HAYNES JA

[25] I have read the judgment prepared by the learned President. I agree with his reasoning and conclusion and have nothing to add.

EDWARDS JA (AG)

[26] I also agree with the judgment of the learned President and have nothing to add.

MORRISON P

ORDER

Appeal dismissed. Costs to the respondents fixed at $40,000.00