[2012] JMCA Civ 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 118/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**BEVERLEY HARVEY**	**1ST APPELLANT**
AND	**ELAINE HARVEY**	**2ND APPELLANT**
	(In their capacity as administratrices of the estate of the late NAOMI FRANCIS, deceased)	
AND	**GLORIA SMITH**	**1ST RESPONDENT**
AND	**PHILLIP SMITH**	**2ND RESPONDENT**

Mrs Marvalyn Taylor-Wright instructed by Taylor-Wright and Co for the appellants

Leighton Miller instructed by Lyn-Cook, Golding and Co for the respondents

28, 29 March and 29 June 2012

HARRIS P(Ag)

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

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion.

BROOKS JA

[3] The appellants, Beverley Harvey and Elaine Harvey, seek to evict the respondents, Gloria Smith and Phillip Smith, from the property, which the respondents say, has been their home, since 1976. The property comprises land, which is situated at Golden Spring, in the parish of Saint Andrew, and a house, which Mrs Smith built on it.

[4] The appellants are the duly appointed administratrices of the estate of the late Naomi Francis. They filed a claim in the Supreme Court seeking a declaration that the land forms part of Naomi Francis' estate and that the respondents' occupation of it is unlawful.

[5] The respondents filed a defence to the claim. The defence denied any unlawful occupation and averred that the land in issue had been given to Mrs Smith by Naomi Francis' son, Reuben. Mrs Smith asserted, in the defence, that in pursuance of that gift, she had built a concrete structure on the land and had had the land surveyed.

[6] The appellants applied to have the defence struck out on the basis that, among other things, it failed to disclose any reasonable defence. On 21 October 2011, George J (Ag) made the following orders:

"(1) The Claimants' Notice of application filed on 17/2/11 dismissed.

(2) The claim proceed as if started by fixed date claim form in accordance with Rule 8.1(4)(b).

(3) No Order as to Costs.

(4) Counsel for claimant to prepare, file and serve this order.

(5) Leave to appeal granted."

[7] The appellants, being dissatisfied with that decision, have appealed to this court asking that that orders be set aside and the defence be struck out. The essence of the appeal is the question of whether George J (Ag) erred in the exercise of her discretion when she refused to strike out the defence.

[8] In this judgment, I shall give a brief chronology of the relevant facts, set out the grounds of appeal and outline Mrs Taylor-Wright's submissions on behalf of the appellants. It is against that background that I shall examine the comprehensive written judgment of George J (Ag), to determine whether she erred in a manner, which would allow this court to disturb her decision.

The chronology

[9] A chronology of the events, which seem to be undisputed, may assist the understanding of the analysis. I therefore outline those events below:

1. Mrs Smith entered into occupation of the premises in 1976 with the permission of Naomi Francis, the then proprietor of the land. It is

disputed whether it was by way of licence or tenancy. There was, however, a payment for the privilege of occupation.

2. In January 1980, Naomi Francis directed Mrs Smith to make payments to Reuben instead of to her. Those instructions were obeyed.

3. Phillip Smith, who is Mrs Smith's son, was born in July 1980.

4. Naomi Francis died testate in December 1984. It appears, subject to the will being produced, that the land at Golden Spring was devised to Reuben. He asserted that devise in his own will.

5. Mrs Smith has produced a document, dated 12 June 2001, whereby Reuben purported to certify that he had given one half square of the land at Golden Spring to her. The authenticity of the document is strenuously disputed by the appellants.

6. Sometime during 2001 Mrs Smith ceased paying for her occupation of the land.

7. Sometime after June 2001, she partially converted her board house to a concrete structure.

8. In December 2002, she had the land, which she occupied, surveyed. The surveyor measured the land as being 507.95 square metres.

9. Reuben died in or about 2005.

10. The appellants produced a document, dated 20 January 2005, which is said to be Reuben's last will and testament.

11. On 4 July 2006 Letters of Administration with will annexed, in the estate of Naomi Francis, were granted to the appellants.

12. The present claim was filed in October 2008. At or about the same time, the appellants filed at least three other claims, against other persons, apparently seeking to secure possession of other portions of Naomi Francis' land from those persons as well.

13. The Smiths filed their statement of defence on 17 December 2008.

14. An amended claim form and particulars of claim were filed on 6 October 2009.

The grounds of appeal

[10] The grounds of appeal may, conveniently, be set out in full:

> "1. The learned trial Judge erred in the exercise of her discretion when she refused to strike out the Defence for the reasons set out in her written judgment dated October 21, 2011, by
>
> 1) being influenced by irrelevant factors and considerations.
>
> 2) failing to take into account the relevant factors and considerations
>
> 2. The learned trial judge failed to correctly apply the principles of law applicable to striking out proceedings and in particular the principle of ensuring the possibility of a fair trial."

The submissions

[11] Mrs Taylor-Wright raised a number of issues, some of which were not immediately evident from a perusal of the grounds of appeal. The essence of her major submissions may be summarised as follows:

1. The learned judge erred in failing to recognise, that in challenging the title of Naomi Francis, the respondents were challenging Reuben's title, which title they were relying on as the basis of their own; in those circumstances they have no defence and their statement of case ought to have been struck out.
2. The learned judge erred in failing to recognise that the statement of defence failed to show any defence to the claim brought in trespass or in fraud and that to allow the statement of defence to stand would "militate against a fair trial".
3. The learned judge erred in failing to recognise that the statement of defence did not raise any issue which deserved a trial and it has no reasonable prospect of success.

The analysis

[12] An appellant who seeks to overturn a decision of a judge of the Supreme Court, which decision is based on an exercise of that judge's discretion, undertakes an arduous task. That is because an appellate court will not set aside such a decision on the basis that it would have come to a different conclusion in the circumstances (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2). In **Mackay**,

Morrison JA, with whom the rest of the court agreed, reiterated the principle that an appellate court may exercise an independent discretion in limited circumstances only. He quoted from Lord Diplock's judgment in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 at page 1046 b:

> "[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently."

[13] In **Jamaica Citizens Bank Ltd v Yap** (1994) 31 JLR 42, at page 51C, Rattray P highlighted the portion of Lord Diplock's speech in **Hadmor**, which identified the limited circumstances in which this court would exercise an independent discretion. These include "the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist…" (page 1046c).

[14] Where the discretion exercised is in respect of an application to strike out a statement of case, an appellate court is also loath to interfere with the exercise of a judge's discretion therein, once the judge has demonstrated that she has considered all the alternatives (see **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934). It is also an established principle that statements of case should only be struck out "in plain and obvious cases" (see page 29 of **S & T Distributors Ltd and another v CIBC Jamaica Ltd and another** SCCA No 112/2004 (delivered 31 July 2007).

[15] Mrs Taylor-Wright, in her written submissions at paragraph 12, argued that the "only question [to be resolved in this appeal] is whether a legitimate basis for lawful ownership in the [respondents] has been shown in the Defence on which they can reasonably defend the claim". Learned counsel, in her oral submissions, put the issue a little differently, she said:

> "The only question is whether the defence, on its face, shows a legitimate basis for lawful occupation."

Learned counsel, however, raised several issues in the context of that question. In light of what has been said above, the issue is whether George J (Ag) improperly exercised her discretion in addressing those issues and answering that question.

[16] Few would disagree with the assessment that the statement of defence, filed in this claim, was settled with scant regard for the provisions of the Civil Procedure Rules (the CPR). Few, also, would disagree with the deprecatory terms used by George J (Ag) in describing the conduct of the case, up to the point of the hearing before her, by the attorneys-at-law representing the respondents in the court below. The learned judge mentioned, "non-compliance", "[a] tardy approach", "consistent tardiness", "a great deal of sluggishness" and "a nonchalant approach". Despite those chidings, the learned judge ruled that the defence raised triable issues. She also ruled that the claim was, in essence, a claim for recovery of possession and on that basis, and in accordance with rule 8.1(4) of the CPR, ordered that the claim should proceed as if commenced by way of fixed date claim form.

[17] Before us, Mrs Taylor-Wright was at pains to argue that the claim was not for recovery of possession *per se,* but was brought in trespass and fraud. With regard to the former, she pointed to the fact that the amended particulars of claim averred that the respondents' licence to occupy was revoked in 2001 when they ceased paying an annual sum of $2000.00. Paragraph 5 of the particulars of claim identifies the trespass. It says:

> "The [respondents] were never tenants of the deceased [Naomi Francis] and since 2001 have been asked to vacate the premises...Despite the repeated requests of the [appellants] the [respondents] have remained in unlawful occupation of the property, continuing in trespass and threaten to so continue unless restrained."

[18] Subsequent to the statement of defence being filed, the appellants filed an amended claim, which included the averments concerning fraud. The allegation was that the documents proffered by the respondents "to base their claim to the said land...when...taken together...amount to fraud" (paragraph 9 of the amended particulars of claim).

[19] The respondents did not bother to file an amended defence to address the allegations of fraud and the particulars cited in that regard. They relied on their defence as originally filed. In the defence, they asserted that, in or about 2001, Reuben gave the land to Mrs Smith. The defence further averred that, acting on that gift, and without objection from Reuben or anyone else, Mrs Smith converted the board structure on the land, which was her home, to a concrete structure. She also, again without objection, had her portion of the land surveyed. Based on those averments,

the respondents denied that they occupied the land unlawfully and asserted that they are the lawful owners thereof.

[20] It would have been deduced from the chronology that Reuben died before the claim was filed. The spelling of his surname is one of the issues which has arisen from the statements of case. As part of their averments concerning fraud, the appellants assert that Reuben did not sign the document, on which the respondents rely, to base their assertion of a gift. This is because, the appellants say, Reuben's name is spelt therein as "Ivery" instead of "Ivey".

[21] I agree with the learned judge that the statement of defence does disclose a real prospect of success in respect of the claim as it has been formulated. In my view, it discloses, to use Mrs Taylor-Wright's formulation of the main issue, "a legitimate basis for lawful occupation" of the land by the respondents. That basis is the gift by Reuben. The assertion of the gift raises three issues. The first is whether Reuben did in fact make that gift. The second is whether Reuben had any title which he could validly transfer and the third is whether the method which he allegedly used was effective.

[22] The first issue involves the averment of fraud. The respondents' assertion that the occupation is by virtue of a "Deed of Gift dated June 16, 2001" made by Reuben is what impelled the appellants to assert fraud and join issue on that matter. There was no need for any further response, by the respondents, as to the validity of that document. He who asserts must prove. It is for the appellants to show, at a trial, that the document is fraudulent. In **Horizon Resorts Services Ltd., Norma Lee-Haye**

and Jackson C. Wilmot vs. Ralph Taylor Suit C.L. H 176/1996 (delivered 18 January 2001) F A Smith J (as he then was) reiterated that fraud should not be lightly alleged and that a court will require clear evidence of it. He cited as authority for the proposition, the case of **Hornal v. Neuberger Products Ltd.** [1957] 1 QB 247.

[23] The appellants in the instant case, set out the following as the particulars of fraud, in their particulars of claim:

> "(1) Claiming to have been given a Deed of Gift by one Reuben Ivery whom the [respondents] claim to be the son of Naomi Francis when the deceased Naomi Francis had no son by that name
>
> (2) The son of the said Naomi Francis was Reuben Ivey and he could not have misspelt or signed his name incorrectly
>
> (3) Claiming to have obtained the land by Deed of Gift
>
> (4) Claiming to have obtained one half square of the said land
>
> (5) Claiming to have obtained one half acre of the said land
>
> (6) Procuring pre-checked diagram no. 294920 claiming 507.95 sq. meters [sic] of the said land."

As to whether the name could have been spelt incorrectly, the learned judge was of the view that the testator's signature on Reuben's will, seemed to include an "r". The authenticity of the signature may, however, be a matter for expert evidence and, like the other particulars of fraud, is definitely a matter for a trial.

[24] In further support of their assertion that the document was fraudulent, the appellants averred at paragraph 10 of the particulars of claim that:

> "The [appellants] will say further that under the Will of the late Reuben Ivey now deceased, their uncle, they are the lawful beneficiaries of the said land and that **the said deceased could not have given the land to strangers and still make [a devise] to them**." (Emphasis supplied)

Rather than being a pleading of facts, at best, that would seem to be an argument to be placed before a tribunal of fact.

[25] The second issue identified above addresses Reuben's title and whether he was entitled to transfer anything to Mrs Smith. Mrs Taylor-Wright submitted, on the basis that Reuben was the sole devisee of the land in his mother's will, that he had no interest that he could have transferred to Mrs Smith. Learned counsel relied on the authority of **Commissioner of Stamp Duties v Livingston** [1965] AC 694 in support of that proposition.

[26] In **Livingston**, the question was whether a surviving spouse, who was a beneficiary of property forming part of her husband's estate, had any beneficial interest in that property at the time that she died, it not having yet been transferred to her. The Privy Council ruled that all that she had was a chose in action. Lord Radcliffe, in giving the judgment of the Board made it clear at page 707 that a residuary legatee of an unadministered estate does not have a beneficial interest therein. His Lordship outlined the basis on which the executor of such an estate holds the property therein:

> "There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a

> deceased, but subject to the working of these rules whatever property came to the executor *virtute officii* came to him in full ownership, without distinction between legal and equitable interests. **The whole property was his**. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate." (Emphasis supplied)

[27] The proposition is supported by the learned authors of Parry and Kerridge: **The Law of Succession** 12th Ed. at paragraph 24-33. There they state that the "true status of a beneficiary under a will or an intestacy is that he has a chose in action to have the deceased's estate properly administered". The learned authors do state, however, that the chose in action is transmissible by the beneficiary. They cite as authority for that proposition **Re Leigh's Will Trusts** [1970] Ch 277. In that case the court held that a beneficiary, "could transmit to her own executor the right to require the administrator of her husband's estate to administer it in any manner she or her personal representative might require" (see headnote). The effect of the transmission was explained at page 282B. Buckley J said:

> "If a person entitled to such a chose in action can transmit or assign it, **such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature**. The chose in action itself may be incapable of severance..." (Emphasis supplied)

The fact that the chose in action may be incapable of severance is also a factor which may affect the instant case.

[28] The decision in **In re Leigh's Will Trusts** was approved and adopted in **In re Hemming, dec'd Raymond Saul & Co (a firm) v Holden and another** [2008] EWHC 2731 (Ch). In **In re Hemming**, Richard Snowden QC stated at paragraph 51 of his judgment:

> "It is therefore correct to describe the right of the residuary legatee as a composite right to have the estate properly administered and to have the residue (if any) paid to him as and when the administration is complete. That composite right is a chose in action, **which is transmissible**..." (Emphasis supplied)

[29] Apart from the fact of the transmissibility of the chose in action, there also exist the relevant legislation in this jurisdiction which recognises that a personal representative holds the real property in the estate on trust for the beneficiaries of the estate. Section 5(1) of the Real Property Representative Act states as follows:

> "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**." (Emphasis supplied)

[30] Mr Miller, for the respondents, also submitted that Reuben could be considered an executor *de son tort* and that, unless and until challenged, the acts of an executor *de son tort* are legally valid. It must, however, be pointed out that Reuben was not one of the executors named in Naomi Francis' will. Those executors survived her but died

before obtaining probate. There is no evidence of any interaction between Reuben and those executors.

[31] These several legal principles need not be considered in detail at this stage. Their direct or indirect relevance to the circumstances of the instant case, nonetheless establishes that there is an arguable defence that Reuben could have transmitted his right in the subject land to Mrs Smith, or that she may otherwise, have some claim to remain on the property. George J (Ag) repeatedly pointed out in her judgment that these were matters for trial.

[32] The third issue mentioned above is whether Reuben used an effective method to transfer title to Mrs Smith. Mrs Taylor-Wright submitted, firstly, that the document by which Reuben is said to have certified that he had given Mrs Smith the land is "unknown to law" (paragraph 39 of her written submissions). Secondly, Mrs Taylor-Wright submitted that Reuben's purported gift was in breach of section 5 of the Local Improvements Act. That section requires approval by a local authority of any subdivision of land. There being no such approval, learned counsel submitted, the action by Reuben was illegal and therefore void and unenforceable. She relied on the case of **Hogg v Woolcock** SCCA No 93/2002 (delivered 30 July 2004) as authority for her submissions on this point.

[33] Insofar as the Local Improvements Act is concerned, **Hogg v Woolcock** makes it clear that a contract for the subdivision of land, "though attracting criminal

sanctions…is not invalid" (page 10). Smith JA, with whom the rest of the court agreed, ruled at page 10 of his judgment:

> "Indeed, if the requirements of section 5 were met subsequent to the formation of the contract but prior to its execution by transfer or conveyance of the land concerned, such a contract would not only be valid but would be enforceable – see **Nunes and Appleton Hall v Williams and Registrar of Titles** (1985) 22 JLR 339".

It is, of course, to be noted that there has been, as yet, no conveyance to Mrs Smith.

[34] In my view, the effect of the document, said to have been signed by Reuben, depends, not only on the document itself, but the actions of Mrs Smith thereafter and whether they were done in reliance on its contents. The Statute of Frauds 1677 requires writing for any assignment of an interest in land to be binding. It does not, however, require the execution of a deed. Such an assignment may also be effective if it is secured by part-performance. Evidence will be required to establish whether the Statute of Frauds was satisfied or if not, whether there was part-performance of any agreement. The validity of the document, in the instant case, is an issue of law, the resolution of which will depend on findings by a tribunal of fact.

[35] I now address some of the appellants' specific complaints. The first is that "the learned judge erred in failing to recognise, that in challenging the title of Naomi Francis, the defendants were challenging Reuben's title, which title they were relying on as the basis of their own; in those circumstances they had no defence and their statement of case ought to have been struck out". I find no merit in this complaint. It fails to recognise that the respondents assert that Naomi Francis' original title to the whole land

has been reduced and now does not include the land which the respondents occupy. The respondents clearly accept that they derive title from Naomi Francis, through Reuben.

[36] The second complaint is that the learned judge erred in failing to recognise that the statement of defence failed to show any defence to the claim brought in trespass or in fraud and that to allow the statement of defence to stand would "militate against a fair trial". Again, I find no merit in this complaint, the statement of defence addresses both issues raised by the particulars of claim. I agree with the learned judge that efforts should have been made to conform with the requirements of rule 10.5 of the CPR which stipulate the requirements for a statement of defence. I accept, however, as was submitted by Mr Miller, that the non-conformity should not be deemed fatal to their case. I also accept Mr Miller's praying in aid the maxim that litigants should not be driven from the judgement seat for purely technical breaches.

[37] The third complaint is that the learned judge erred in failing to recognise that the statement of defence did not raise any issue which deserved a trial and it had no reasonable prospect of success. The examination, above, of the various issues of law would demonstrate that the appellants are not on good ground in this complaint.

[38] The last complaint that I shall address is that concerning the learned judge's order that the claim proceed as if begun by fixed date claim form. Mrs Taylor-Wright submitted, at paragraph 55 of her written submissions, that the learned judge "erred in regarding the case for both the [appellants] and [respondents] as based on a landlord

and tenant relationship". It is true that the learned judge, not unreasonably in my view, stated that the "claim, however 'couched', is clearly one for the possession of land". For that reason, the learned judge stated that rule 8.1(4)(b) of the CPR, mandating a fixed date claim form for recovery of possession, should apply. She went on to explain her view that a cause of action for trespass did not apply in the circumstances.

[39] Regardless of whether the learned judge was correct in determining that this was a claim for recovery of possession, in my view, she ought not to have directed that the claim should proceed as if begun by a fixed date claim form. In my view, the issues of fact and the allegations of fraud which arise in this case are more suited for a trial in open court. I accept that issues of fraud may in certain circumstances be dealt with by way of a fixed date claim form (see **Bastion Holdings Ltd v Bardi Ltd and another** SCCA No 14/2003 (delivered 29 July 2005) at pages 35 – 37). Such proceedings would, however, be exceptional. In **Honiball v Alele** (1993) 30 JLR 373; (1993) 43 WIR 314, Lord Oliver of Aylmerton, in delivering the advice of the Privy Council said, at page 319d of the latter report that a "motion supported by affidavit evidence is not an ideal way of defining or trying issues of fraud and misrepresentation".

[40] In the instant case, despite the learned judge's assessment of the substance of the cause of action, its trappings, including the allegations of fraud and disputes as to fact, required the process of an ordinary claim form. I would reverse her order in that regard.

[41] This finding does not, however, affect the substance of the appeal, which, I find, for the reasons stated above, has no merit.

Conclusion

[42] The learned judge correctly answered the question as to whether the respondents had shown, in the defence, a legitimate basis for lawful ownership in the [respondents] and that the defence had a real prospect of success. That was the kernel of the application which was before her. She carefully assessed all the points raised by the appellants as to both the substance of the claim and the manner in which the respondents had dealt with them, both as to pleadings and attendances and found that the respondents should be allowed to present their defence at a trial.

[43] The exercise of her discretion does not allow any interference by this court in that regard. I find, however, because there are questions of fact and allegations of fraud to be considered, that the learned judge erred in ordering that the claim should proceed as if begun by fixed date claim form. The more appropriate forum for the trial of the substance of the claim, is by way of cross-examination in open court.

[44] For those reasons, I would dismiss the appeal in part, affirm, except for order 2, the judgment of George J (Ag), set aside the order that the claim should proceed as if started by fixed date claim form, order that the claim should proceed in accordance with the procedure relating to an ordinary claim form and grant costs of the appeal to the respondent, with such costs to be taxed if not agreed.

HARRIS P (Ag)

ORDER

1) The appeal is dismissed in part.
2) The judgment of George J (Ag), except for order (2) thereof, is affirmed.
3) The order that the claim should proceed as if started by fixed date claim form is set aside.
4) The claim shall proceed in accordance with the procedure relating to a claim form.
5) Costs of the appeal to the respondent to be taxed if not agreed.