[2019] JMCA App 3

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 119/2018

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**TANCOUR CONSTRUCTION JAMAICA LTD**	**1ST APPLICANT**
AND	**TYRONE SEAN LEWIS, ANNETTE JEAN BLOUNT COURTNEY GEORGE LEWIS, TANYA RITCH (TRADING AS LEWIS AND BLOUNT CONSTRUCTION DEVELOPERS)**	**2ND APPLICANT**
AND	**REGISTRAR OF TITLES**	**1ST RESPONDENT**
AND	**SOLID ENGINEERING LIMITED**	**2ND RESPONDENT**
AND	**PAUL WITTER AND ALL ENCUMBRANCES**	**3RD RESPONDENT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION**	**4TH RESPONDENT**

Mr Courtney George Lewis in person and representing the other applicants

Miss Carla Thomas instructed by the Director of State Proceedings for the 1st respondent

15 and 21 January 2019

P WILLIAMS JA

[1] This is an application for leave to appeal. The case concerns a parcel of land (the lot) located in Pembroke Hall in the parish of Saint Andrew. The lot is part of land that

was previously registered in the name of the Director of Housing. The Director of Housing subdivided the land and sold lots in the subdivision to several persons. The lot comprises the portion that remained. It was sold to Solid Engineering Limited (Solid Engineering) and was registered at Volume 1232 Folio 119 of the Register Book of Titles. Solid Engineering entered into a contract to sell it to the applicants, or to one or more of them.

[2] Apparently, Solid Engineering became defunct and the applicants were unable to secure a registered title to the lot.

[3] The applicants are also unable, they say, to ascertain the boundaries of the lot. Apparently, the registered title for the lot has no plan showing the shape, dimensions or position in relation to the other lands that were comprised in the parent title. The applicants say that the failures of the Registrar of Titles created that situation, which has placed them in the position that they would have to do extensive survey work to identify the size, boundaries and exact location of the lot. In addition to those problems is the fact that it seems that some people are squatting on a part of the land, but uncertainty exists as to which of those persons are actually on the lot.

[4] The cost of curing these difficulties, the applicants contend, will burden them. They are unable to obtain compensation from Solid Engineering and so they seek to obtain it from the Assurance Fund established under the auspices of the Registration of Titles Act (the Act).

[5] The applicants complained to the Registrar of Titles in or about 2009. They did not receive a satisfactory answer and so filed a claim in 2015 against the Registrar of Titles and other parties. The claim form or particulars of claim were not amongst the documents filed in this application and this court is unaware of the exact nature of the claim.

[6] In 2017, the Registrar of Titles, being satisfied that the applicants had entered into an agreement with Solid Engineering, and had paid the purchase price, issued to the applicants a vesting instrument, which entitled them to be registered as the proprietors of the lot.

[7] The Registrar of Titles applied to strike out the claim as against her. The application was made on the basis that the provisions of the Act, concerning the immunity of the Registrar of Titles from suit and the filing of claims against the Registrar of Titles, which provisions are mandatory, had not been followed in filing the present claim.

[8] Straw J (as she then was) heard the application. On 17 May 2018, she agreed with the submissions made in support of the application. Straw J ordered that the applicants' claim be struck out as against the Registrar.

[9] The applicants contend that the learned judge has wrongly interpreted the provisions of the Act. Their application to the learned judge for leave to appeal her

decision was refused. Hence, this is their application to this court for leave to appeal from Straw J's decision.

[10] The basis on which this court can grant such permission is found at rule 1.8(7) of the Court of Appeal Rules, which provides as follows-

> "The general rule is that permission to appeal in civil cases will only be given if the court or court below considers that an appeal will have a real chance of success."

[11] Several cases from this court have interpreted the phrase "real chance of success" to mean a real and not fanciful or unrealistic chance of success of the proposed appeal (see, for example, **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace** [2015] JMCA App 27A).

[12] The Registrar of Titles' application to strike out the applicants' claim was made pursuant to rule 26.3(1) (b) and (c) of the Civil Procedure Rules. That is, on the bases that the applicant's statement of case is an abuse of process and/or that it discloses no reasonable grounds for bringing the claim. In granting the application, the learned judge was exercising her discretion and this court will only interfere with the exercise of the discretion of a judge in the court below in certain circumstances. The circumstances are now well settled. It must be shown that there was a misunderstanding by the judge of the law or the evidence before her or her decision is so aberrant that no judge regardful of his duty to act judicially could have reached it (see, for example, **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 2).

[13] The applicant has set out, in a notice of application filed 21 May 2018, what is described as the five grounds on which it is seeking the orders. The grounds as well as the notice of application itself are however somewhat unclear. In his oral submissions before this court, Mr Courtney Lewis, on behalf of the applicants, contends primarily that in the absence of Solid Engineering, the Registrar of Titles should be made to pay damages for the failure to have the boundaries properly designated.

[14] The learned judge firstly agreed with the respondent's submissions that the Registrar of Titles is generally immune from suit (per section 160 of the Act). She found that the applicants had not credibly demonstrated that the Registrar of Titles had acted in bad faith as is required by the provisions of the Act.

[15] The applicants have failed to advance any arguments to demonstrate that the learned judge was wrong in any way in her understanding of the law or her application of it to the evidence, which was before her. There is no indication of any fraud, collusion or complicity in wrongdoing on the part of the Registrar of Titles such that the immunity from suit can be set aside.

[16] The applicants were apparently seeking to bring the action for damages in reliance on section 162 of the Act. This section provides inter alia :-

> "Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by the registration of any other person as proprietor of such land,

> estate or interest, or in consequence of any error or misdescription in any certificate of title, or in any entry or memorandum in the Register Book, may bring and prosecute an action for recovery of damages against the person on whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud, error or misdescription…"

The section also provides that in case the person against whom such action for damages can be brought "is dead, or shall have been adjudged bankrupt, or cannot be found within the jurisdiction of the Supreme Court, then and in such case such damages, with costs of action may be recovered out of the Assurance Fund by action against the Registrar as nominal defendant".

[17] The learned judge found that the applicants could not be said to be irrevocably deprived of the land in light of the vesting order, which expressly recognises and gives effect to their interest. She also noted that the applicants had not indicated that they were ever excluded from the land at any point in time, save and except for the complaint about squatters on certain portions. The applicants have failed to advance any arguments to challenge these findings.

[18] The conclusion reached by the learned judge that the applicants had not demonstrated that they had the requisite standing to bring the claim, in the circumstances, cannot be faulted.

[19] The learned judge also found that, in any event, the statutory process as set out in sections 165 and 166 of the Act had not been properly engaged. The preconditions set out there are mandatory. The applicants had failed to (i) make an application in writing supported by an affidavit or statutory declaration, and (ii) serve a written notice of the action one month prior to the claim. The learned judge found that a 2009 letter that the applicants had written to the Registrar of Titles, complaining about the situation with the land, did not satisfy the requirement of the section, particularly as it was not proved that it was accompanied by the requisite affidavit or declaration.

[20] The learned judge correctly appreciated the mandatory nature of the requirements of the Act to render the Registrar of Titles liable in a claim against her and cannot be faulted for relying on the failure of the applicants to comply with them as a basis for striking out their claim.

[21] In the circumstances, the applicants have failed to demonstrate that any appeal from the decision of the learned judge has a real chance of success. The application for leave to appeal is therefore refused. Costs to the 1st respondent to be taxed, if not agreed.