[2022] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA

SUPREME COURT CIVIL APPEAL NO 47/2017

BETWEEN	**EVON C A BENNETT**	**APPELLANT**
AND	**RAYMOND RAMDATT**	**RESPONDENT**

Ms Lisamae Gordon & Ms Rayhnah Spence instructed by Malcolm Gordon for the appellant

Leslie Campbell instructed by Campbell McDermott for the respondent

7, 11 October 2019 and 29 April 2022

BROOKS JA

[1] I have read the draft reasons for judgment of Sinclair-Haynes JA. Her reasoning reflects my own bases for agreeing to the court's decision and I have nothing to add.

SINCLAIR-HAYNES JA

[2] This appeal is consequent on the striking out of Mr Evon Bennett's ('the appellant's') statement of case by Wint-Blair J ('the learned judge'), on 9 November 2016, prior to the commencement of the trial of this matter for the following reasons:

1. The statement of case disclosed no reasonable ground for bringing the claim; and

2. the appellant's lack of the requisite standing to bring the claim.

[3] We heard the appeal on 7 and 11 October 2019. On the latter date, we made the following orders:

1) The appeal is allowed.

2) The judgment entered herein in the court below on 9 November 2016 is set aside.

3) The claim is to be set for pre-trial review by the registrar of the Supreme Court with a view to setting it down for trial.

4) The parties are to make written submissions on or before 25 October 2019 in respect of costs.

[4] We received the appellant's submissions on 25 October 2019. We promised that our written reasons for our decision would follow. This is a fulfilment of that promise. We apologise for the late delivery of these reasons.

Background

[5] By fixed date claim form filed on 15 April 2013 in the Supreme Court, the appellant sought the following orders:

"1. **An Order** restraining the Registrar of Titles from proceeding to register any transfer in respect of the said land to any third party of any interest in the said land registered at Volume 971 Folio 554 of the Register Book of titles or any part thereof to any person other than the Claimant, (appellant) until after the trial or determination of the matter herein.

2. **An Order** that the Registrar of titles provide the Claimants [sic] (appellant) Attorney-at-Law with a copy of the Defendant's application.

3. **An Order** that the Defendant's application be discontinued forthwith and/or put on hold pending the outcome of this application.

4. **A Declaration** that the Claimant is the fee simple owner of the property at LONGWOOD in the parish of Saint Elizabeth and registered at Volume 971 Folio 554.

5. **An Order** that the Registrar of Titles allow the Applicant to make an application for the Certificate of Title to be registered in the applicants [sic] name and/or his nominee(s).

6. **An order** that the property at LONGWOOD in the parish of Saint Elizabeth registered at Volume 971 and Folio 554 be transferred into the name of the Claimant and/or his nominee(s).

7. Such further or other relief as this Honourable Court deems fit." (Emphasis as in the original)

[6] In support of his claim the appellant deponed that all that parcel of land part of Longwood in the parish of Saint Elizabeth and registered at Volume 971 Folio 554 of the Register Book of Titles ('the property') had been known to him all his life as property owned and controlled by his father, Keith George Bennett. The property was purchased by his father in 1974 and from the date of purchase, his father enjoyed "sole, open, quiet, undisputed, continuous and undisturbed possession" of the property.

[7] In 2011, the appellant attempted to pay the taxes for the property and discovered that a Mr Ramdatt (the respondent), had paid the property taxes for the years 2005 to 2010. He consequently instructed his attorney-at-law to advise Mr Ramdatt, that he (Mr Ramdatt) had no interest in the property.

[8] In 2012, the appellant became aware that Mr Ramdatt might have been seeking to claim ownership of the property. He consequently instructed his attorney to lodge a caveat against the property.

[9] On 9 July 2012, the appellant and his father, Keith Bennett, executed an instrument of transfer of the property to the appellant. Keith Bennett, however, transitioned this life on 14 July 2012.

[10] The appellant is adamant that Mr Ramdatt was never in possession of the subject property, nor did he conduct any act of ownership. He contended that Mr Ramdatt's application to be registered as the owner of the subject property, by way of adverse possession, was made purely on fraudulent grounds.

Sharon Lindsay's evidence

[11] Sharon Lindsay, the appellant's sister, sought to corroborate the appellant's claim. She averred to having lived on the property intermittently, with the permission of her father, Keith Bennett, until 1995. Her father reared cattle and goats on the property.

[12] Several portions of the land, which consisted of approximately nine acres, were leased to various persons. Mr Ramdatt leased four acres. Mr Headley Powell, she averred, is the caretaker who oversaw the property and collected the rent from the lessees including Mr Ramdatt. In support of her contention, Ms Lindsay exhibited letters dated from 1991 to 1994. One of the letters referred to the rental of the property by a Mr Ramdatt for two years. Another of the letters contained instructions to a Mr Ramdatt regarding, *inter alia* the collection of rent. Ms Lindsay also exhibited receipts of payment of rent by other tenants.

[13] She contended that her father and the appellant were the only persons known as owners of the property. It was her evidence that the appellant was well known to Mr Ramdatt.

Mr Ramdatt's version

[14] Mr Ramdatt, however, disputed the claim and insisted that he has been in custody and control of the subject property since 1986 and has treated it as his own by planting various fruit trees, ploughing, fencing around the land and carrying out other acts of ownership, which included paying property taxes. Among the documents he exhibited, in support of his claim, was his application to the Registrar of Titles to acquire the property by adverse possession.

The applications before the learned judge

[15] In urging the court to strike out the appellant's claim, Mr Campbell, on behalf of the respondent, raised the following points *in limine*,

1. the appellant had no standing to bring the claim; and
2. lacked the interest which he claimed.

[16] Mr Campbell urged the court, to strike out the claim, in light of those circumstances.

[17] The learned judge noted the absence of a formal application to strike out the claim, and observed that the issues raised by Mr Campbell were not pleaded but merely stated in the skeleton submissions which were filed on behalf of the respondent on 13 May 2016. Notwithstanding the absence of a formal application, the learned judge granted the application.

<u>The application to appoint the applicant as a representative of Mr Bennett's estate</u>

[18] The day before the trial, on the appellant's behalf, Ms Gordon filed a notice of application for court orders for the appellant to be appointed as a representative of the estate of Keith Bennett, pursuant to rule 21.7 of the Civil Procedure Rules, 2002 ('CPR'). No affidavit in support of this application was filed and the application was refused.

The decision of the learned judge

[19] In refusing the appellant's application to be appointed as a representative, the learned judge made the following observation and ruling in a written judgment with neutral citation [2016] JMSC Civ 206:

> "[4] There was no supporting affidavit filed as required by Rule 21.2(3)
>
> *(3)An application for such an order - (a) must be supported by affidavit evidence;*
>
> There was therefore no evidence to ground the application. 'An issue as to an equitable interest can only be determined after cogent evidence is adduced to satisfy the court that, on the balance of probabilities, the defendant is entitled to such an interest: [sic] Per Harris, J.A. in **George Mobray v Andrew Joel Williams** …. There should have been an affidavit exhibiting a copy of the death certificate, stating whether the deceased died testate or intestate; whether the deceased person was an interested party and indicating any person interested in the order appointing a representative for the estate.
>
> [5] The evidence cannot come from the submissions of counsel. Given the age of this matter and the fact that the trial commenced on November 9, 2016, it was expected that any such application would have been made well in advance of the trial date. Even if the application were granted it would be for the appointed representative to commence the process of obtaining a grant and not a grant in itself. This is clear from paragraph (5) of Rule 21.7 which uses the words 'as if' to refer to the representative. This means that the representative is not yet an administrator or executor and the appointment does not confer this status upon the person interested in the order.
>
> [6] Rule 21.7(4) makes it clear that until a representative is appointed there can be no further steps taken in the proceedings. This section operates as a stay. For the foregoing reasons, the application to appoint a representative under Rule 21.7 is refused.

> [7] Counsel Ms. Gordon had also submitted that the application to appoint a representative could be granted as an administration claim. I do not agree as this is not an administration claim part 67 does not apply."

[20] In accepting the preliminary point made by Mr Campbell, the learned judge stated:

> "[10] The [appellant] desired registration of a transfer to a **third party**. The transfer concerned land which was part of his deceased father's estate. At the time of the purported transfer **by** the [appellant] , the land formed part of his father's estate. He, having died intestate, the estate would be held upon statutory trust for a surviving spouse, and thereafter his issue in accordance with section 4(1) of the Intestates' Estates and Property Charges Act. Section 6 imposes a trust for sale of the real and personal estate of a deceased who dies intestate. …
>
> …
>
> [13] … I hold that in the instant case at the date of the purported sale of the land **by** the [appellant], the estate of Keith Bennett remained un-administered. … The [appellant], although a beneficiary of the estate of Keith Bennett would not have been entitled to any legal or equitable right therein. He could not have had the right to sell any of the assets of the estate or pass title **at the time he is said to have sold the land**.
>
> [19] Rule 26.3(1)(c) allows the court to strike out a statement of case if it appears to disclose no reasonable ground for bringing a claim. The [appellant]t cannot embark upon a trial as he has no standing before the court with which to do so, this is settled law" (Emphasis added)

Grounds of appeal

[21] In challenging the decision of the learned judge, the appellant filed the following ten grounds of appeal:

> "a) That in keeping with the overriding objective it would be in the interest of justice to grant leave of appeal.

b) That the Appellant has a good prospect of succeeding on the Appeal.

c) The Learned Honourable Judge erred in that she failed to recognize the Claimant as a person in possession, and having equitable right to audience before the Court.

d) That the Learned Judge's judgment did not reflect the substantive facts reflected in the Affidavits herein and demonstrated both legal and factual errors.

e) That the Learned judge failed to take into consideration the relevant aspects of the Civil Procedure Code in coming to her conclusions.

f) That the Learned Judge misdirected herself on the issues which are relevant in determining whether the Claimant had locus standi before the Court.

g) The Learned Judge failed as a matter of procedure in that an application to strike out was made without notice to the Claimant, which was allowed to succeed.

h) The Learned Judge erred in holding that the written submissions constituted proper notice of application for Court Orders.

i) The Learned Judge erred in law in that she failed to recognize any other interest that the Claimant could have in order to have *locus standi* in proceedings.

j) That the Learned Judge erred in that she overruled the judgment of earlier Judges, which is ultra vires."

Submissions on behalf of the appellant

[22] It was Ms Gordon's submission that the application to appoint the appellant as a representative in his father's estate, made pursuant to rule 21.7 of the CPR, was made out of an abundance of caution. Learned counsel drew the court's attention to the affidavits filed in support of the claim and which exhibited the following documents:

1. Keith Bennett's death certificate;

2. the instrument of transfer; and

3. the appellant's application to be appointed as administrator in Keith Bennett's estate.

[23] It was Ms Gordon's submission that the learned judge erred in her finding that there was no evidence to support the application.

[24] Learned counsel further contended that the learned judge erred in finding that part 67 of the CPR was inapplicable. She submitted that rule 67.2 permits anyone claiming to have a beneficial interest in an estate, to institute such proceedings. This, counsel argued, is permitted, whether or not the court is of the view that the person lacks the requisite standing. The court may, notwithstanding, consider whether to grant permission for the person to appear in the proceedings.

[25] It was, however, counsel's submission that the appellant had proper standing to bring the claim. In support of that submission, counsel posited that the court was tasked with the responsibility of deciding between the appellant and the respondent, who possessed the superior title. The appellant's standing, she contended, therefore ought not to be restricted to his capacity as a beneficiary.

[26] Learned counsel referred the court to the evidence adduced before the learned judge that both parties were claiming ownership of the property. Relying on the authority of **Gardener and another v Lewis** (1998) 53 WIR 236, she submitted that the appellant had the requisite standing in four different capacities as:

(1) claimant in possession,

(2) claimant as transferee,

(3) claimant as trustee; and

(4) claimant with an equitable interest.

[27] It was learned counsel's further submission that the appellant was not seeking to have the property registered to a third party. He sought registration to himself by virtue of the instrument of transfer which was executed prior to his father's death.

[28] The issue before the court, she submitted, was whether the property was validly transferred to the appellant and whether the appellant had the right to dispute the respondent's claim to adverse possession. Counsel submitted that the instant case is distinguishable from that of **George Mobray v Andrew Joel Williams** [2012] JMCA Civ 26 ('**George Mobray**') and that the appellant was not claiming as a trustee.

[29] Learned counsel, Ms Gordon directed the court's attention to the learned judge's repeated reference in her judgment that the appellant was engaged in a sale and was seeking to sell and to pass title. Those averments, she submitted, were not factual and did not accord with the evidence before the court. Ms Gordon submitted that the learned judge ought not to have dismissed the claim without a full investigation into its facts which was the only way to determine whether the appellant had the right to bring the claim.

[30] Regarding the issue concerning the provision of a statutory trust, it was Ms Gordon's submission that the Intestates' Estate and Property Charges Act provides for a statutory trust for the son of the deceased. She referred the court to item 2 of the distribution table found in section 4 of the said Act along with section 73 of the Registration of Titles Act. Ms Gordon also relied on several cases including; **Business Ventures and Solutions Inc and another v Capital One NA (Trustee of the estate of Alexander Burnham)** [2012] JMCA Civ 49, **Jamaica Defence Force Co-operative Credit Union v Georgette Smith** [2019] JMCA Civ 7 and **Biguzzi v Rank Leisure plc** [1999] 4 All ER 934. She particularly relied on the dictum in the **Biguzzi** case that:

> "In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."

[31] Learned counsel argued that the striking out of the claim was against the spirit of allowing the appellant to obtain the grant of administration, which had been sought from the court. In support of her contention that the power to strike out should only be exercised in plain and obvious cases, which this case was not, she referred the court to the cases of **S & T Distributors Limited and another v CIBC Jamaica Limited and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007 and **Drummond-Jackson v British Medical Association and Others** [1970] 1 WLR 688.

[32] Learned counsel further posited that the learned judge also erred by her award of costs to the respondent in light of the fact that it was a "motion *in limine*" which she submitted is not recognised under the CPR. The application, she submitted, was one, which could have been made at either a case management conference or pre-trial review. In support of that submission, she relied on rule 11.3(2) of the CPR, which provides that where the application could have been dealt with at either case management or pre-trial review, but was not, the applicant should pay the costs of the application unless there are special circumstances.

Submissions on behalf of the respondent

[33] No written submissions were filed in this court on behalf of the respondent. However, permission was granted for the respondent to rely on the written submissions which were filed on his behalf in the court below. Relying on those submissions, Mr Campbell contended that the appellant's case hinged on an executed instrument of transfer that, up to the date of the trial remained unregistered. He directed the court's attention to the fact that Keith Bennett, who died intestate, and in whose estate no grant of administration had been issued, remained the registered owner of the property.

[34] Mr Campbell challenged the appellant's *locus standi* to institute the claim against Mr Ramdatt, in those circumstances. He contended further that he had no recognisable interest or estate in the land. He relied on section 63 of the Registration of Titles Act in

support of his submission that an unregistered instrument of transfer was not effective to pass any estate or interest in land unless and until it is registered.

[35] Learned counsel argued that an agreement between the appellant and his father, the registered proprietor, to transfer the land, merely created an equitable interest which could only be enforced against his father and not against third parties. In support of the argument, Mr Campbell relied on **Barry v Heider** (1914) 19 CLR 197.

[36] Mr Campbell further pointed to what he submitted to be the absence of any evidence that the appellant had the authority to act on behalf of his deceased father. It is trite law, he submitted, that an administrator derives his title solely under a grant of representation and therefore cannot institute an action before obtaining a grant. For that submission, he relied on the cases of **Meyappa Chetty v Supramanian Chetty** [1916] 1 AC 603, **Snell and others v Evans** [2011] EWCA Civ 577 and **Ignall v Moran** [1944] KB 160 and further argued that a claim brought on behalf of an intestate's estate without a grant, is an incurable nullity.

[37] According to Mr Campbell, the appellant's statement of case disclosed no cause of action known to law. It was learned counsel submission that although the appellant sought various declarations, he failed to state the bases on which those remedies were sought. The appellant's case, taken at its best is either for a declaration of ownership on the basis that he holds an unregistered instrument of transfer or alternatively, by reason of fraud on the respondent's part, learned counsel submitted.

[38] Addressing the issue of fraud, it was Mr Campbell's submission that:

a) there was no proper allegation of fraud in the appellant's statement of case; and
b) the allegations of fraud were not pleaded with sufficient clarity.

[39] Learned counsel argued that in light of the foregoing, no proper claim was before the court. Reliance was placed on the cases of **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 and **Thomas v Stoutt and Others** (1997) 55 WIR 112 in support of that submission.

[40] Learned counsel further submitted that the appellant has failed to particularize:

a. the manner in which the alleged fraud was effected; and

b. the nature and quality of the misrepresentations purportedly made by Mr Ramdatt.

[41] The appellant's allegation of fraud was spurious and far too general to be regarded by the court. In those circumstances, he submitted, the appellant's statement of case disclosed no reasonable ground for bringing the claim and was properly struck out on that basis.

Discussion

[42] The appellant was granted leave to appeal by this court on 29 March 2017, we therefore considered it unnecessary to address grounds a) and b) of the grounds of appeal. The remaining grounds raise the following issues for this court's consideration:

1. Whether the learned judge made factual and/or legal errors in arriving at her decision (ground d);

2. Whether the learned judge erred in finding that the appellant lacked standing to bring the claim (grounds c), f) and i));

3. Whether the learned judge erred in allowing the respondent to argue the preliminary point in the absence of a formal notice of application for court orders (grounds e), g), and h)); and

4. Whether the learned judge, by her decision, overruled the judgments of earlier judges (ground j).

[43] Although not expressly raised in the grounds of appeal, by way of his submissions, the appellant raised the issue of whether the learned judge erred in refusing to grant his application to be appointed as a representative in his father's estate, and this issue will also be considered.

Issues 1 and 2: Whether the learned judge erred on the facts and the law and whether the appellant lacked *locus standi*

[44] Mr Bennett's fixed date claim form and affidavit in support, plainly demonstrate that he was endeavouring to give effect to an *inter vivos* transfer between himself and his father. A fact which eluded the learned judge. She, instead, concluded that the appellant desired to sell property which formed part of his deceased father's estate to a third party, in his capacity as a beneficiary of his father's estate.

[45] This was not the appellant's case. The facts of the case and the affidavit evidence, demonstrate that this was not an appropriate case for striking out. It was the learned judge's misunderstanding of the facts of the case that led her to strike out the claim.

[46] Before any finding regarding the appellant's standing, was made, a full investigation by the court into the merits of the claim, by way of a trial, was necessary. More so, the appellant's averments in his affidavit, plainly claimed a possessory title, superior to that of the respondent. The learned judge was therefore plainly wrong in striking out the claim and thereby erred in the exercise of her discretion (see **Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042 and the **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[47] In **George Mobray**, Harris JA explained a beneficiary's interest in an unadministered estate. The learned judge explained thus at paragraphs [23], [24] and [28] of her judgment:

"[23] In specifying that the assets of the estate shall be held on trust for sale, the law contemplates that the residue would not come into existence until all liabilities of the estate, as stipulated by the Act, are satisfied. On the death of an intestate, his estate devolves on and vests in his personal representative upon a grant of letters of administration and remains so vested until the completion of the administration process: see ***Commissioner of Stamp Duties (Queensland) v Livingston*** [1964] 3 All ER 692. So then, **what is the nature of the interest of a beneficiary of an estate prior to or during the administration process?** There are a number of English authorities, dealing with testate and intestate succession, which show that although a beneficiary is entitled to share in the residuary estate, he/she has no legal or equitable interest therein: see ***Lord Sudeley v Attorney General*** [1897] AC 11; ***Re K*** (1986) Ch 180; and ***Lall v Lall*** [1965] 1 WLR 1249.

[24] In the Australian case of the Commissioner of Stamp Duties (Queensland) v Livingston, the Privy Council, although dealing with a case of testate succession, firmly established the principle that, **in an unadministered estate, a beneficiary of an estate acquires no legal or equitable interest therein but is entitled to a chose in action capable of being invoked in respect of any matter related to the due administration of the estate**. In that case, a widow died prior to the administration of her husband's estate in which she was entitled to the residue. It was held that she had no beneficial interest in the husband's estate.

[28] At the date of the purported sale of the land by Emmanuel, Rachael's estate remained unadministered. Accordingly, until a grant of administration is obtained, the legal estate remains vested in her estate. After a grant of administration is obtained, the assets of her estate vests in the administrator. Emmanuel, although a beneficiary of her estate would not have been entitled to any legal or equitable right therein. He could not have had the right to sell any of the assets of the estate or pass title at the time he is said to have sold the land. He would only have been entitled to a chose in action in the unadministered estate. **Such chose in action is a transmissible interest enabling him to receive the benefits which may accrue to him from the estate**. The appellant, as the administrator of Emmanuel's estate, would not have been under any obligation or duty to honour any sale carried out by Emmanuel." (Emphasis added)

[48] The case of **Hubert Samuels v Pauline Karenga** [2019] JMCA App 10 ('**Samuels v Karenga**') is also instructive. At paragraph [101] this court said:

> "It is settled law that the equitable and legal interest of a beneficiary named in an unprobated will only become effective upon the administration of the estate. Until such time, all that a potential beneficiary has is *espere*. Scrutiny of the learned judge's reasons, confirmed that although the will was admitted into evidence, her recognition of Mrs Karenga's entitlement to the property, was grounded in her evidence that the possessory title remained with her and her family."

[49] In **Samuels v Karenga**, Mrs Karenga instituted proceedings against Mr Samuels for recovery of possession of premises situated at Bloomfield District in the parish of Manchester. The property was originally owned by Mrs Karenga's grandfather; in whose estate her mother had obtained letters of administration. The property had however, not been not transferred to her mother before her decease. Also, at the time the action was instituted, Mrs Karenga had not obtained a grant of probate in her mother's estate. Mrs Karenga instituted the claim in her personal capacity and by virtue of being the sole beneficiary under her mother's will.

[50] At the commencement of the trial, counsel for Mr Samuels raised a point *in limine*, that Mrs Karenga did not have *locus standi* to bring the action. It was contended that it was the executrices under her mother's will, who were the appropriate persons. The learned Senior Parish Court Judge allowed the trial to proceed and ultimately found in Mrs Karenga's favour. Mr Samuels sought to appeal.

[51] Mr Samuels' application for an extension of time to file grounds of appeal was refused on the ground, *inter alia*, that he did not have a real prospect of succeeding on the appeal. On the other hand, the court found that Mrs Karenga had demonstrated that:

> (i) she had openly exercised custody and control over the disputed property; and
>
> (ii) she had a chose in action which entitled her to the due administration of her mother's estate and to the benefits of the estate upon administration.

[52] Importantly the court also considered the fact that the evidence adduced at trial demonstrated that Mrs Karenga had sued in her capacity as a person in possession of the disputed property. She had established both factual and legal possession through various acts of ownership. The absence of a grant of probate, therefore, did not preclude her from instituting a claim.

[53] A claim for adverse possession cannot succeed against a person having a superior title, or a person claiming through one with a superior title. This is so if that person is able to demonstrate even slight possession of the disputed property. Lord Hatherley's statement in **Bristow v Cormican** (1878) 3 AC 641, at page 657, is instructive:

> "There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever, - as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser."

[54] The appellant's claim is that he has been in possession of the property. His evidence on affidavit supports his claim that he was also claiming title through the person whom he alleges to have been in possession, his father. It was his evidence that his father, Keith Bennett, exercised sole, continuous and undisturbed possession of the land, including leasing the land to various persons. By that evidence, the appellant has *prima facie* demonstrated, that he has the required *locus standi* to institute these proceedings.

[55] Langrin JA's following statement in **Thelma Grant (by Attorney Dotlyn White) v Beatrice Barnes** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 16/2000, judgment delivered 7 June 2001, is instructive. The learned judge of appeal explained:

> "It is trite law that possession is, prima facie, evidence of ownership. It is nine tenth of the law which means that it is

> good against all the world except a person who has a better right e.g. the owner."

[56] The issue, therefore, is whether Keith Bennett was in fact the person in possession of the property, and not Mr Ramdatt. If the answer is in the affirmative, a further finding that the appellant has the superior title ought to follow. These issues, however, require investigation at a trial. A determination of the issue on a preliminary point was premature.

[57] Importantly also, the appellant was not required to obtain a grant of administration prior to instituting these proceedings in its current form as would be required had he claimed in another capacity.

[58] The appellant, succeeds on grounds c), d), f) and i) of his grounds of appeal.

[59] Although the reasoning and conclusion on these issues explain our reason for allowing the appeal and for the making of the orders set out in paragraph [3] above, since the parties provided the court with submissions on all the issues, I will provide brief reasons for judgment in relation to the other issues raised on this appeal.

Issue iii): Whether the learned judge erred in allowing the respondent to raise the point *in limine.*

[60] *In limine* is a Latin phrase which translates in English as "on the threshold". By virtue of the court's inherent jurisdiction, a technical legal point, which challenges the court's jurisdiction to hear a matter in courts at all levels, can be raised prior to the commencement of the proceeding. Counsel has not directed this court's attention to any provision or case law in support of her contention that the learned judge erred in allowing the point to be argued.

[61] Successful submissions can result in matters being summarily disposed of, that is, without the necessity to engage in a trial, either fully or partly, or without the need to address certain issues. Indeed, the ability to raise such points, pre-dated the implementation of the CPR and the Court of Appeal Rules ('CAR').

[62] There is no express provision in either the Judicature (Parish Courts) Act, the Judicature (Supreme Court) Act or the CPR which speaks to the hearing of points *in limine*. In the absence of express provisions, in statute, or the rules of court, the court has an inherent jurisdiction, to regulate its own procedures. Section 28 of the Judicature (Supreme Court) Act provides:

> "28. Such jurisdiction shall be exercised **so far as regards procedure and practice**, in manner provided by this Act, and the Civil Procedure Rules and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; **and where no special provision is contained in this Act, or in such Rules or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary**." (Emphasis added)

[63] Lord Diplock in the case of **Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd** [1981] AC 909 commented on the inherent jurisdiction of the High Court. At page 977 he stated:

> "… a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. … it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute. Thus, where a party in a High Court claim makes an application for an order which is not contemplated by the SCA 1981 or the CPR or seeks an order in circumstances not envisaged by those provisions, it is always possible for the court to grant relief by resorting to its inherent jurisdiction."

[64] Similar commentary is also made by the learned authors of Halsbury's Laws of England, Volume 11 (2020). At paragraph 23 the learned authors summarize the court's inherent jurisdiction thus:

> "… it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent *vexation or oppression*, to do justice between the parties and to secure a fair trial between them."

[65] By invoking its inherent jurisdiction, the court is empowered/enabled to exercise its mandate appropriately, fairly and effectively. What, however, is not permitted, is a disregard by the court, for the rules of court. In the exercise of its inherent jurisdiction, the court must ensure that the rules of natural justice are observed and that parties are not capriciously denied their right to participate in the proceedings.

[66] Whilst it is true that there is no express provision in the CPR, which references the term "point *in limine*", a judge of the Supreme Court, by virtue of the court's inherent jurisdiction and the CPR, is empowered to hear and consider such points. This is so with or without a formal notice of application.

[67] Rule 26.1(2)(j) of the CPR provides:

> "Except where these Rules provide otherwise, the court may –
>
> (j) dismiss or give judgment on a claim after a decision on a preliminary issue."

[68] The possibility that the court may, in an appropriate case, wish to dispose of proceedings summarily, instead of embarking upon a hearing on the merits was therefore contemplated by the drafters of CPR. The court is also empowered to strike out a claim on its own initiative. This is in keeping with the intended reason for the inclusion of these provisions which is to give effect to the court's overriding objective of dealing with cases justly and not having hopeless cases continue. Indeed, it would be an aberration if the Parish Court, a court of lower jurisdiction, is empowered to hear points *in limine*, while the Supreme Court, a court of higher jurisdiction, would not be so empowered.

[69] The criticism that the learned judge erred in permitting arguments on the issue of the appellant's standing to institute these proceedings, is unfounded. It is the overriding objective of the court at an early stage to rid itself of matters that are hopeless. Points successfully taken *in limine*, assist in accomplishing that objective. The issue of whether a party to an action possesses the standing by which he or she intends to act is integral in determining whether a claim should be permitted to go forward. It would certainly be unjust that a defendant should be put to great expense in defending a claim, in which *prima facie,* the claimant is bereft of the requisite standing. This would certainly be contrary to the court's overriding objective of utilising the court's limited resources.

[70] It is also evident that the appellant was not taken by surprise at the respondent's application to raise the preliminary point. The appellant's application to be appointed as a representative in his father's estate was in response to the point *in limine* raised by the respondent to ensure that he was properly clothed with requisite standing. The application was, in fact, unnecessary in light of the foregoing discussion and conclusion on his standing.

[71] The absence of a formal notice of application for court orders was not prejudicial to the appellant. The respondent's skeleton submissions were filed and served on the appellant approximately five months prior. The appellant was, therefore, aware of the preliminary point, which the respondent intended to raise. The learned judge was satisfied that the appellant had ample notice of the respondent's arguments and ample opportunity to respond to the point.

[72] I find, therefore, that there is no merit in grounds e), g) and h) of the appellant's grounds of appeal.

Issue iv): Whether the learned judge overruled the decision of previous judges

[73] This issue can be summarily dealt with. The appellant has not directed this court's attention to any specific order which the learned judge overruled. A review of the orders of the court which were made before, does not disclose that any order was made on to

the issue of the appellant's standing. Neither is there any indication that the question of the appellant's standing was raised at a previous hearing. Nor has the appellant so contended. Ground j is also unmeritorious.

Whether the learned judge erred in refusing the appellant's application to be appointed as representative in the estate of Keith Bennett

[74] The application to appoint the appellant as Keith Bennett's personal representative was grounded in rules 21.7 and 67.2(1)(c) of the CPR. Rule 21.7 states:

> "(1) Where in any proceedings it appears that a deceased person was interested in the proceedings then, if the deceased person has no personal representatives, the court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.
>
> (2) A person may be appointed as a representative if that person –
>
> (a) can fairly and competently conduct proceedings on behalf of the estate of the deceased person; and
>
> (b) has no interest adverse to that of the estate of the deceased person.
>
> (3) The court may make such an order on or without an application.
>
> (4) Until the court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.
>
> (5) A decision in proceedings in which the court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate." (Emphasis added)

[75] The estate of Keith Bennett was not a defendant in these proceedings. The rule seems to contemplate claims involving the estate of a deceased person and is therefore

not relevant. The evidence before the court, by way of the affidavit of Sacha-Gaye Russell, which was sworn to on 1 July 2014, is that in November 2013 the appellant applied for letters of administration in Keith Bennett's estate. The appellant contends that he derives his title from a transfer to him by the rightful owner, Keith Bennett.

[76] The learned judge would, therefore, not have been empowered to accede to the appellant's request under that rule in light of rule 21.7(4), which expressly precludes a "claimant" from taking any further steps in the proceedings, save to move the court to have a representative appointed.

[77] If that conclusion is incorrect, the learned judge was also precluded from acceding to the appellant's request because the appellant had not yet received a grant of administration and therefore would have lacked the *locus standi* to act as a personal representative in Keith Bennett's estate. It is settled law that any action brought by a purported administrator, before receiving letters of administration is an incurable nullity.

[78] It is also settled law that an executor is entitled to institute legal proceedings in the capacity of a personal representative of a deceased, not from the grant of probate, but by virtue of the will. An administrator is however so authorised by the grant of letters of administration. **Chetty v Chetty** [1916] 1 AC 603 at page 608 and 609 and **Ingall v Moran** [1944] KB 160, are regarded as the authority on the issue.

[79] Rule 21.7 cannot be utilized to circumvent the requirement for a grant of letters of administration, before instituting the proceedings. A similar issue arose in the case of **Millburn-Snell and others v vans** [2011] EWCA Civ 577. Faced with an application to strike out their claim for the reason that they had not received a grant of letters of administration and were therefore not entitled to sue, the claimants urged the court to exercise its power under part 19.8(1) of the English CPR, which would authorize them to continue the claim nonetheless.

[80] Part 19.8 of the English CPR, although different in several respects from our rule 21.7, similarly empowers the court to appoint a person to represent the estate of a

deceased person where no personal representative has been appointed. It provides as follows:

> "Death
>
> 19.8— (1) Where a person who had an interest in a claim has died and that person has no personal representative the court may order –
>
> (a) the claim to proceed in the absence of a person representing the estate of the deceased; or
>
> (b) a person to be appointed to represent the estate of the deceased.
>
> (2) Where a defendant against whom a claim could have been brought has died and –
>
> (a) grant of probate or administration has been made, the claim must be brought against the persons who are the personal representatives of the deceased;
>
> (b) a grant of probate or administration has not been made –
>
> (i) the claim must be brought against 'the estate of' the deceased; and
>
> (ii) the claimant must apply to the court for an order appointing a person to represent the estate of the deceased in the claim.
>
> (3) A claim shall be treated as having been brought against 'the estate of' the deceased in accordance with paragraph (2)(b)(i) where –
>
> (a) the claim is brought against the "personal representatives" of the deceased but a grant of probate or administration has not been made; or
>
> (b) the person against whom the claim was brought was dead when the claim was started.

> (4) Before making an order under this rule, the court may direct notice of the application to be given to any other person with an interest in the claim.
>
> (5) Where an order has been made under paragraphs (1) or (2)(b)(ii) any judgment or order made or given in the claim is binding on the estate of the deceased." (Emphasis added)

[81] In striking out the claimants' claim and refusing to grant the order requested under part 19.8, the learned trial judge ruled that the proceedings were a nullity. In dismissing the claimants' appeal, and in agreeing with the conclusion of the trial judge, Rimer LJ stated:

> "16. I regard it as clear law, at least since [**Ingall v Moran**], that an action commenced by a claimant purportedly as an administrator, when the claimant does not have that capacity, is a nullity. …
>
> 29 … What [**Ingall v Moran**] decided, by a decision binding upon us, is that a claim purportedly brought on behalf of an intestate's estate by a claimant without a grant is an incurable nullity. Subject only to whatever Part 19.8(1) may empower, it follows that the claim the appellants issued was equally an incurable nullity. The logic of Mr Oakley's submission is however that the force of Part 19.8(1) is to confer a jurisdiction upon the court to turn such a nullity into valid proceedings which may be pursued to judgment.
>
> 30. I am unable to accept that and, in agreement with the judge, consider that Part 19.8(1) has no application to the present case. The appellants' invocation of Part 19.8(1) was responsive to the defendant's strike out application. Logically, however, if they are right about Part 19.8(1), they could (indeed should) promptly after issuing their claim form have applied to the court for an order that the nullity they had thereby conceived should have life breathed into it by way of an order that they be appointed to represent the estate of the deceased intestate and the claim permitted to proceed to trial. **The reason that any such application should and would have failed is because Part 19.8(1) does not, in my view, have any role to play in the way of correcting deficiencies in the manner in which proceedings have been instituted. It certainly says nothing express to**

> **that effect and I see no reason to read it as implicitly creating any such jurisdiction. It is, I consider, concerned exclusively with giving directions for the forward prosecution towards trial of validly instituted proceedings when a relevant death requires their giving.** In the typical case, that death will occur during their currency and will usually be of a party. More unusually, it may have preceded them. But on any basis it appears to me clear that it is no part of the function of Part 19.8(1) to cure nullities and give life to proceedings such as the present which were born dead and incapable of being revived. In ordinary circumstances there is no reason why anyone with a legitimate interest in bringing a claim on behalf of an intestate's estate should not first obtain a grant of administration and so clothe himself with a title to sue. I am unable to interpret Part 19.8(1) as providing an optional alternative to such ordinary course. I would dismiss the appeal on the Part 19.8(1) issue." (Emphasis added)

[82] Similarly, in the instant case, the learned trial judge was not empowered to allow the appellant to represent the estate of Keith Bennett. The proper party authorised to institute the claim on behalf of the estate of a person, who died intestate, is the duly appointed administrator.

[83] Rule 67 of the CPR was also of no assistance to the appellant in seeking to act in a representative capacity. Rule 67.1 states:

> "(1) This Part deals with –
>
> (a) claims for –
>
> (i) the administration of the estate of a deceased person; and
>
> (ii) the execution of a trust
>
> under the direction of the court, referred to as '**administration claims**'; and
>
> (b) claims to determine any question or grant any relief relating to the administration of the estate of a deceased person or the execution of a trust.

(2) Such claims must be brought by a fixed date claim in form 2." (Emphasis as in the original)

[84] Rule 67.2(1)(c) on which the appellant relied says:

> "(1) An administration claim or a claim under rule 67.4 may be brought by –
>
> (a)…
>
> (b)…
>
> (c) any person having or claiming to have a beneficial interest in the estate of a deceased person or under a trust."

[85] The claim before the court was not one for the administration of Keith Bennett's estate or to determine any question or grant any relief relating to the administration of his estate. The learned judge was, therefore, correct in finding that the application did not fall for consideration under rule 67. This complaint is also unmeritorious.

[86] It is for the above-mentioned reasons that I agreed that the appeal should be allowed.

Costs

[87] In obedience to the court's order for the filing of submissions on costs, the appellant filed written submissions on 25 October 2019. No submissions were, however, filed on behalf of the respondent.

[88] Ms Gordon, on the appellant's behalf, contends that the appellant should be awarded full costs, as he was the successful party on appeal. Indeed, this would be in keeping with the general rule that costs should follow the event. She submitted further that there is no basis for the court to deviate from this general rule. That argument cannot be impugned. Mr Bennett is entitled to his costs. The costs of the appeal are awarded to the appellant, to be taxed, if not agreed.

P WILLIAMS JA

[89] I have read in draft the reasons for judgment of Sinclair-Haynes JA. They sufficiently reflect my reasons for concurring in the decision of the court and I have nothing to add.

BROOKS JA

ORDER

Costs of the appeal to the appellant to be agreed or taxed.