

**JAMAICA**

**IN THE COURT OF APPEAL**

**PARISH COURT CIVIL APPEAL NO 30/2018**

**SITTING IN LUCEA, HANOVER**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MR JUSTICE F WILLIAMS JA  
THE HON MRS JUSTICE FOSTER-PUSEY JA**

<b>BETWEEN</b>	<b>DESMOND CLARKE</b>	<b>APPELLANT</b>
<b>AND</b>	<b>HARRIS SPENCE</b>	<b>RESPONDENT</b>

**Albert Morgan instructed by Albert S Morgan & Company for the appellant**

**Trevor Ho-Lyn instructed by Ho-Lyn, Ho-Lyn & Morris for the respondent**

**22 November 2019 and 21 February 2020**

**PHILLIPS JA**

[1] I have read in draft the judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusions and have nothing to add.

**F WILLIAMS JA**

[2] I too have read the draft judgment of my sister Foster-Pusey JA and agree with her reasoning and conclusions.

## **FOSTER-PUSEY JA**

[3] On 26 November 2015, a Parish Court Judge (Formerly Resident Magistrate) for the parish of Hanover non-suited the appellant and gave judgment in the counterclaim to the respondent. The Parish Court Judge ruled that the appellant is a trespasser and granted an injunction restraining him, as well as his servants or agents, from trespassing on the lands at Belvedere, Chester Castle, Hanover which are owned by the estate of Adam Watt.

[4] The appellant contended in his notice of appeal that the respondent should have also been non-suited. As a consequence, his appeal should be allowed and the injunction granted against him should be set aside.

[5] On 22 November 2019, we heard this appeal and made the following orders:

- "1. The appeal is dismissed.
2. Judgment to the respondent on the counterclaim is affirmed- which is that the appellant is a trespasser and is restrained with his servants and or agents from entering or trespassing on the Belvedere property situated at Chester Castle, Hanover, owned by the estate of Adam Watt.
3. Costs in this appeal and in the proceedings below to the respondent are agreed at \$50,000.00."

[6] We indicated that brief reasons would follow and now provide same.

## **Background**

[7] The appellant claimed damages for trespass and an injunction against the respondent. He stated that the respondent unlawfully entered his land at Belvedere and interfered with his tenants. He claimed that he was in possession of the property by way of adverse

possession, and had paid the taxes for the property for 12 consecutive years. The property had belonged to his grandmother, Sarah Watt, and then his father Granville Clarke. In 2001, he was introduced to the land by his cousin, Dennis Brissett. He took possession of the land and spent a lot of money repairing a house and shop. He fenced the land, he sued a person not paying rent in order to obtain possession, he rented a portion of the property and the shop. He also got a survey done. The respondent started to interfere with his tenant who had rented the shop. He therefore brought the claim against the respondent for damages for trespass.

[8] The respondent, on the other hand, said that he was born on the property in question, and his claim to the property was through his mother, who was the granddaughter of Adam Watt, in whom title rests. He produced the will of Adam Watt, and gave a history of the family tree. He testified that the descendants of Adam Watt always lived on the land and paid the taxes, until the appellant started paying the taxes and removed their tenants. Although he went to work in the Cayman Islands, he returned to Jamaica periodically and carried out work on the property. When he became aware of the appellant's actions of renting, trying to sell a portion of the land and evicting tenants, he spoke to him on numerous occasions, asking him to desist from doing so, starting from the 1990s. When he discovered the appellant's further attempt to take possession, he went to the Land Valuation Office and was able to have the appellant's name removed from the relevant valuation roll, after the appellant had sought to replace the estate of Adam Watt with his name, as that appearing as the person in possession of the property. The respondent told the appellant what had occurred at the Land Valuation Office. The appellant then sued the respondent for trespass.

[9] The respondent counterclaimed, stating that the appellant was the trespasser and requested an injunction against him.

### **The proceedings below**

[10] After both parties had given evidence, the attorney-at-law for the appellant conceded that the appellant was not in adverse possession of the property, and submitted that both the appellant/claimant and respondent/counterclaimant should be non-suited.

[11] The learned Parish Court Judge non-suited the appellant and gave judgment in the counterclaim to the respondent.

### **The appeal**

[12] By notice of appeal filed 10 December 2015, the appellant challenged the decision of the learned Parish Court Judge, in so far as she granted judgment to the respondent on the counterclaim.

[13] He relied on two grounds of appeal, which were as follows:

**Ground 1** -The learned Resident Magistrate erred in finding that Harris Spence (the respondent) had been in possession of the lands for a longer period than Desmond Clarke and by virtue of that fact was entitled to bring the action for trespass.

**Ground 2** -The learned Resident Magistrate erred in finding that the [respondent] Harris Spence, not being the Personal Representative of the estate or any of the named beneficiaries thereunto, had the necessary locus standi to bring and maintain a cause of action by virtue of the counter-claim filed by him and ought to have non-suited the [respondent] on the counterclaim."

[14] The appellant sought an order that the appeal be allowed and that the respondent be non-suited on the counterclaim.

## **The submissions**

### **The appellant's submissions**

#### **Ground 1 - The learned Resident Magistrate erred in finding that Harris Spence (the respondent) had been in possession of the lands for a longer period than Desmond Clarke and by virtue of that fact was entitled to bring the action for trespass**

[15] In the appellant's initial submissions, counsel Mr Morgan acknowledged that, in respect of findings of fact, the Court of Appeal is hesitant to disturb the findings of the lower court. He referred to the judgment of this court per Brooks JA in the case of **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 in respect of that principle of law.

[16] There appeared to be an implied concession, in the initial submissions by the appellant, that there was sufficient evidence before the learned Parish Court Judge to support the findings in question. The appellant referred to the judge's findings that the respondent had acted as the family's estate manager, had control over the property and had warned the appellant since the 1990s to desist from trying to take control of the property. The appellant also highlighted the heavy emphasis placed by the learned Parish Court Judge on the fact that the respondent had the necessary documents to get the Land Valuation Office to reverse the decision "to put the appellant in charge of the land".

[17] The implied concession was highlighted when the appellant went on to submit, that even if the above findings were valid, "it would not entitle the learned parish judge to find that the respondent could maintain the cause of action". This suggested that the main ground

of appeal on which the appellant relied initially, was that in respect of locus standi (ground 2).

[18] Counsel for each party was then asked to make further submissions in writing to address, in particular, the cases to which reference had been made in each other's written submissions.

[19] Mr Morgan then proceeded, in his further submissions, to argue that the respondent never entered the lands in dispute with the requisite "intention to possess". This was, of course, somewhat of an about face, in light of the initial submissions. Counsel submitted that the respondent's visits to the land were infrequent, that he only visited the property "now and then" and that he was not the only one who visited the property as other family members would also do so. In addition, the respondent said that he had received the relevant documents from his mother Gretel Spence and that it was his intention to have the estate divided in accordance with Adam Watt's will. The land therefore remained in the possession of the Adam Watt estate, which is reflected in the Valuation Roll.

[20] In so arguing however, Mr Morgan, on behalf of the appellant, was seeking to challenge the findings of fact made by the learned Parish Court Judge in respect of possession by the respondent. It will be recalled that in his initial submissions, there had appeared to be an acknowledgment that there was evidence on the basis of which such a conclusion was clearly open to the learned Parish Court Judge.

## **The respondent's submissions**

[21] Mr Ho-Lyn, on behalf of the respondent, highlighted the fact that the appellant, having conceded that he could not prove that he had adverse possession of the property, had no entitlement to possession on that basis. The respondent, he argued, falls within the beneficiaries under the estate of Adam Watt, so he would be entitled to have possession of the property in his own right. He argued that the respondent proved to the satisfaction of the learned Parish Court Judge, on the balance of probabilities, that he had the documents in relation to the property, he knew the history of the property and he had exercised possessory rights over the property. The conclusions to which the learned Parish Court Judge arrived were based on the facts that were before her, as she clearly preferred the evidence of the respondent over that of the appellant.

## **Analysis**

[22] Mr Morgan, in addressing the guidelines by which this court approaches findings of fact by first instance tribunals, has quite properly referred to the case of **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7. In paragraph [7] of that case, Brooks JA highlighted the relevant principles, which include:

- a) It is only in cases where the findings of the tribunal are not supported by the evidence or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings.

- b) The appellate court must consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.
- c) The 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 so far as the respondent was concerned, the learned Parish Court Judge stated:

"In relation to the [respondent], although, he lived in the Cayman Islands, doesn't mean he was not in possession of the property. He doesn't have to physically live on the property to be in possession. He maintained a presence in Jamaica. He had not abandoned the property. He was the family's estate manager. He had control over the property. Family members would give him instructions regarding the administration of the property, for example, his mother and Beryl Anderson. The [respondent] was in possession of the necessary documentation to enable the Land Valuation Office to reverse the decision that placed the [appellant] in possession of the property. Thereafter, they instructed him to carry out a survey...**I do find that the [respondent] was in possession of the property, and being a successor in title to the Adam Watt's estate.**"  
(Emphasis supplied)

[24] It should also be noted that, contrary to the manner in which ground 1 of the appeal is framed, nowhere in the reasons for judgment provided by the learned Parish Court Judge is there any express finding of fact that:

- a) the respondent was in possession longer than the appellant and further; and

b) that by virtue of the above, this entitled him to bring an action for trespass.

[25] The learned Parish Court judge found that the respondent was in possession of the property and was a successor in title in Adam Watt's estate.

[26] There was no comparison as to the length of time of possession of the respondent as against the appellant, but instead, a finding that the appellant was a trespasser. Since the appellant had conceded that he was not able to prove adverse possession of the property, all that remained was for the respondent to prove that he had the intention to and actually possessed the property. The learned Parish Court Judge was convinced, on a balance of probabilities, that the respondent intended to possess and was in possession of the property. Further, since he was in possession of the property, the respondent was entitled to bring the counterclaim. The respondent was not claiming to be in possession of the property in a manner which was adverse to the estate of Adam Watt, and it was not necessary for him to do so. On the contrary, he was claiming to be in possession of the land on behalf of the beneficiaries, with the ultimate intention of having the estate divided in accordance with Adam Watt's will.

[27] The very points made by the appellant's attorney-at-law in the initial submissions, show that there was evidence to support the findings of fact made by the learned Parish Court Judge. It was clearly open to the learned Parish Court Judge to have found that the respondent was in possession of the lands in question. In addition, no mistake has been

shown in the findings made, so as to allow for a successful challenge to these findings of fact. This ground therefore fails.

**Ground 2 - The learned Resident Magistrate erred in finding that the [respondent] Harris Spence, not being the Personal Representative of the estate or any of the named beneficiaries thereunto, had the necessary locus standi to bring and maintain a cause of action by virtue of the counter-claim filed by him and ought to have non-suited the [respondent] on the counterclaim**

**The appellant's submissions**

[28] Mr Morgan submitted that a counterclaim stands on its own and can proceed independently of the original claim. The person bringing the counterclaim must have the standing to bring the same. He submitted that the respondent did not have the requisite locus standi to bring the counterclaim in trespass, as among other things:

- a) The respondent was not claiming that he was owner of the land and that his possession is adverse to the ownership of the estate of Adam Watt;
- b) The chain of representation had been broken when Rachel Wright died without carrying out the various devises under the will of Adam Watt as apparently she left no will with an executor;
- c) There was no evidence to show that any steps had been taken since Rachel's death to apply for letters of Administration to the estate of Adam Watt;

(See; **Sonia Edwards v Stephanie Powell** [2016] JMCA Civ 33, and **Jamaica Redevelopment Foundation, Inc v Max Eugene Lambie (as Administrator of the estate of Elaine Vivienne Tully, deceased)** [2012] JMCA Civ 12); and

- d) The respondent had done nothing to place himself as the Personal Representative in respect of Adam Watt's estate or any of the estates of the persons that the parish court judge found to be successors in title to the estate of Adam Watt.

[29] The respondent should therefore have been non-suited.

### **The respondent's submissions**

[30] Mr Ho-Lyn, in his submissions, relied on the case of **Rowe v Rowe** [2014] JMCA Civ 46, at paragraphs [15], [16] and [17], where Brooks JA highlighted the fact that a person complaining of a trespass does not have to be the owner of the land in question. It is the party who has the greater right to possession that is entitled to maintain a claim for trespass. Counsel submitted that, contrary to the submissions of the appellant, it was not necessary for the respondent to have been appointed a personal representative, in order for him to have locus standi to complain of trespass. The respondent was found to have been in possession of the property in question, on behalf of the beneficiaries in the estate of Adam

Watt. The appellant, on the other hand, was found to have been a trespasser. The respondent was therefore entitled to bring an action for trespass in respect of the land.

[31] Mr Ho-Lyn, in his further written submissions, commented on the appellant's reliance on the case of **Sonia Edwards v Stephanie Powell** [2016] JMCA Civ 33, in the course of which reference was made to the case of **Jamaica Redevelopment Foundation, Inc v Max Eugene Lambie (as Administrator of the estate of Elaine Vivienne Tully, deceased)** [2012] JMCA Civ 12. He submitted that:

"**Edwards v Powell** is a case of recovery of possession which concerned the ownership of property while **Jamaica Redevelopment Foundation, Inc v Lambie** is a case of the appointment of a personal representative where a party to a suit has died and the issue for determination revolved around the principles concerning the claim of representation. Although making interesting reading neither are helpful in determining the principles relevant to issues of trespass."

### **Appellant's further submissions**

[32] Mr Morgan, in responding to the authority of **Rowe v Rowe**, on which the respondent relied, stated; "it is agreed that trespass is an action against possession and the principles outlined by Brooks JA in **Rowe v Rowe** [2014] JMCA Civ 46 at paragraphs [15], [16], and [17] and relied on by the respondent are a correct statement of the law". As indicated above, counsel then argued that the respondent did not have the intention to possess the property.

### **Analysis**

[33] The learned Parish Court Judge stated:

**"I do find that the defendant was in possession of the property, and being a successor in title to the Adam**

**Watt's estate. He does not have to be a personal representative of the said estate.**

I do find that...the counterclaim is a valid cause of action. It is a defence to the actions taken by the plaintiff. It is a claim for relief against the plaintiff who is a trespasser on the estate." (Emphasis supplied)

[34] The appellant relied, in his initial submissions, on the case of **Sonia Edwards v Stephanie Powell**. That case is authority for a number of principles, including the fact that there is no chain of representation in relation to administrators of an intestate's estate, even where the administrator himself dies testate. Mr Ho-Lyn is correct in his analysis of the two cases to which Mr Morgan had referred. They concern the issue of the chain of representation and that issue does not arise in this matter.

[35] Mr Morgan has conceded, however, that the relevant principles in the instant case, in so far as the locus standi to bring an action in trespass are concerned, are correctly reflected in the case of **Rowe v Rowe**. In that matter Brooks JA, in delivering the judgment of the court, stated at the following paragraphs:

"[15] **The law regarding trespass to land does not require a person complaining of trespass to be the owner of that land. Trespass to land consists of interference with possession.** The person claiming possession may be mistaken as to his ownership of the property but would still be entitled to maintain an action for trespass against another..."

[16] The learned Resident Magistrate correctly identified that **it is the party who has the greater right to possession that is entitled to maintain a claim for trespass...**" (Emphasis supplied)

[36] It is also helpful to refer to a recent judgment of this court. In the case of **Samuels v Karenga** [2019] JMCA App 10, Hubert Samuels applied to the court by way of notice of

application for an extension of time within which to file grounds of appeal against the decision of the Senior Parish Court Judge of Manchester. Pauline Karenga had instituted proceedings against Hubert Samuels for recovery of possession. The action was instituted in Mrs Karenga's personal capacity. She sought at the trial to claim locus standi, by virtue of being the sole beneficiary under her mother, Miss Ivy Morris' will, as well as being the person in possession of the property. The Senior Parish Court Judge had ordered Hubert Samuels to quit and deliver up possession of property situated at Bloomfield district in the parish of Manchester.

[37] This court examined Mr Samuel's proposed grounds of appeal. One of the proposed grounds of appeal was as follows:

"The Learned Parish Judge erred in law when she found that the plaintiff/respondent had standing in law to initiate and maintain the action for recovery of possession, she claiming through the unadministered assets of the estate of the deceased."

[38] Mr Samuels argued that Mrs Karenga ought to have been non-suited. At paragraphs [71], and [77] to [80] of the decision, Sinclair-Haynes JA, in delivering the judgment of the court, stated:

"[71] Standing in law was not ascribed to Mrs Karenga by the learned Senior Parish Court Judge by virtue of her merely being a beneficiary of the unadministered assets of her mother's estate, but by her also being a person in possession....

...

[77] The learned Senior Parish Court Judge had correctly stated and applied the relevant law. Her conclusion cannot be regarded as plainly wrong. Mrs Karenga had demonstrated by evidence that was not controverted, that not only had she openly exercised

custody and control over the property, but she was also entitled to a chose in action, to the benefits of the estate upon administration.

[78] Lord Hatherley's statement in **Bristow v Cormican** (1878) 3 AC 641 confirms the argument that Mrs Karenga's possession of the property as a beneficiary *de jure* entitled her to enforce her right to possession against intruders such as the applicant. At page 657 he said:

'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'."

[79] Mrs Karenga has demonstrated that she has both factual possession by virtue of the custody and control she exercised over the property, and also the *animus possidendi* that is, the intention to possess, by her regular visits, appointing a caretaker (Mr Leroy Knight), paying for the property taxes, attempting to survey the property, establishing her ownership by entering into lease agreements with the persons who had unlawfully entered the property, and by instituting these proceedings against the applicant. Undoubtedly she has dealt with the land 'as an occupying owner might have been expected to deal with it.' See **Powell v McFarlane** (1977) 38 P & CR 452.

[80] The learned judge also differentiated the instant case from that of **Dorrett Thompson, Carmelita Cole and Gifford Stone v Wilmot Campbell** [2010] JMCA Civ 17. She observed that in that case, a plaintiff who sought to rely on his status as a beneficiary in possession, had failed to establish factual possession as he could not state the location of the property, or provide evidence of the contents of the will or that it had been probated."

[39] In the case at bar, the respondent clearly showed the intention to possess the property in various ways, including warning the appellant to desist from his attempts to take over the land, the work he did on the property and his attendance on the Land Valuation Office to have the appellant's name removed as the person in possession. The learned Parish Court Judge found that the respondent, Harris Spence, was in possession of the property in question, on behalf of the beneficiaries in the estate of Adam Watt and, being in possession of the property, was entitled to pursue the counterclaim for trespass. The learned Parish Court Judge was, therefore, correct in her statement that the respondent did not have to be a personal representative of the estate of Adam Watt, in order to pursue the claim in trespass against the appellant. Therefore, ground 2 of the appeal also fails.

[40] It is for the above reasons that we dismissed the appeal, and made the orders at paragraph [5] herein.