[2015] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 6/2014

BEFORE: **THE HON MR JUSTICE MORRISON JA**
THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE MANGATAL JA (AG)

BETWEEN	**LLOYD COLE**	**APPELLANT**
AND	**HYACINTH HUE**	**RESPONDENT**

Rudolph Francis instructed by Frater Ennis & Gordon for the appellant

Debayo Adedipe for the respondent

24 July, 19 December 2014 and 16 January 2015

MORRISON JA

[1] I have read in draft the reasons for judgment of my sister Phillips JA. I agree with her reasoning and have nothing to add.

PHILLIPS JA

[2] On 19 December 2014 we made the following order:

> "The Notice of Preliminary Objection filed on 17 July 2014 by the respondent succeeds. This Court does not have jurisdiction to hear this appeal.

> Costs on the Notice of Preliminary Objection to the respondent to be taxed, if not agreed."

These are my reasons for that decision.

[3] The appeal in this matter arises from an action in trespass in the parish of Clarendon. On 29 September 2000, the respondent filed a plaint note and particulars of claim against the appellant for the sum of $150,000.00 for damages for trespass in respect of various instances in 1999, 2000 and continuing, for destroying the respondent's fence, and depositing building materials on her land. The land was described as:

> "All That parcel of land part of Tweedside in the parish of Clarendon butting and bounding:
>
> Northerly on land of Ralph Walters
> Southerly on the main road from Alston to Tweedside
> Easterly on land of Lloyd Cole
> Westerly on land of George Brown."

The respondent claimed a perpetual injunction restraining the appellant from committing any further acts of trespass on the said land.

[4] The appellant denied the trespass, and stated that the area claimed by the respondent belonged to him as he had purchased the land on 28 July 1980 from the owner, Ms Maria Coore. The appellant averred that the respondent was unlawfully on his land and that she could not have any legitimate claim to the land, as she had not purchased it, and could not claim it by adverse possession as the land was owned by

the government, and she would therefore have been required to demonstrate 60 years possession of the land to acquire ownership through that route. He further stated that as a consequence, $150,000.00 as claimed by her, could not be due from him by way of trespass, or, he added, in any way whatsoever. The appellant also filed a counterclaim in the suit claiming against the respondent the sum of $150,000.00 for damages for trespass on various times in 1998, to the present and continuing, by erecting a fence and preventing him from enjoying the quiet use of his land. His land was described in this way:

> "All that parcel of land part of Tweedside in the Parish of Clarendon butting and bounding:
>
> Northerly by land of Ralph Walters
> Southerly by land of Rudolph Myers
> Easterly by the Main Road
> Westerly by land occupied by Hyacinth Hue."

[5] The respondent filed a defence to the counterclaim denying the claim for trespass and in the defence, stated that since the wall which she had erected was on her own land, no damages in respect of trespass could be due from her.

[6] By consent of the parties, the matter was on 11 March 2008 referred to Mr Noel K Brown, Commissioned Land Surveyor. A survey was done on 28 April 2008, and the report was prepared and dated 1 June 2008. The respondent, the appellant and the surveyor gave evidence, and exhibits were tendered and received in evidence.

[7] On 11 September 2012, counsel for the appellant attempted to adduce into evidence in re-examination of the appellant, as exhibit 10, a document allegedly

referring to the lands and their boundaries. He stated that it was a map which is a public document. Counsel for the respondent objected on the basis that the deponent was not the maker of the document, and that it was not a public document. Counsel in response endeavoured to say that the document was a sketched plan or survey map, and contained the seal of the National Land Agency. The court suggested that the commissioned land surveyor be recalled, and asked to peruse the document in an effort to shed some light on the same. Counsel for the appellant did not think that that approach was necessary. The court ruled that the document was inadmissible.

[8] In fact, the learned Resident Magistrate opined that having perused section 22 of the Evidence Act, which deals with official and public documents, the document was neither a public nor an official document. He stated further that on examination of section 31 F(1)(a)(4) of the said Act, the map sought to be adduced into evidence was inadmissible. Additionally, he indicated that he was unable to see how the document would assist the court in its deliberations in the matter, in that, it had no probative value. Counsel, the learned Resident Magistrate noted, had not taken the opportunity to recall the surveyor, and to place the same before him for his comments. As a consequence, the learned Resident Magistrate agreed with the submissions of counsel for the respondent, and refused the application to tender the document into evidence at the trial.

[9] The appellant filed a notice of appeal on 21 September 2012, against the said ruling of the learned Resident Magistrate, challenging his finding that the map showing

enclosure 10504020 issued by the National Land Agency submitted as exhibit 10 in the case on behalf of the appellant was not admissible in evidence.

The grounds relied on were that the learned Resident Magistrate erred in his interpretation of sections 22 and 31F(b) of the Evidence Act and that the learned Resident Magistrate's reasons for ruling that the document was inadmissible were clearly in error.

[10] When the appeal came before the court for hearing, the respondent filed a notice of preliminary objection . It stated that:

> "The Notice of Appeal is a nullity because the only right of appeal granted by section 251 of the Judicature Resident Magistrates Act is against any judgment order or decree of the Court and what the Appellant seeks to appeal from is merely a ruling refusing to admit a particular piece of evidence and not a judgment decree or order of the Court."

[11] Counsel for the respondent submitted that a judgment, or decree, referred to in the section, appear to be final decisions, but that an order may or may not be interlocutory. He referred to the dictum of Lord Esher MR in **Onslow v Commissioners of Inland Revenue** (1890) 25 QBD 465; 466, where he stated that "[a] 'judgment', … is a decision obtained in an action, and every other decision is an order". Counsel submitted further that the learned Resident Magistrate had not made a judgment, decree or order in the instant case, he had merely made a ruling on the admissibility of evidence. Counsel commented that although he had made a decision, not every decision was appealable. He submitted that "[t]he Court of Appeal has no

inherent jurisdiction to hear appeals. It is a creature of statute. Its appellate jurisdiction is statutory in origin". For this submission, counsel relied on **Re D C, An infant** [1966] 9 JLR 568.

[12] **Re D C, An Infant**, a case out of this court, concerned an appeal from an adoption order made by a Resident Magistrate's Court, in which a preliminary point arose as to whether the court was seized of jurisdiction to hear the appeal. The court found that the right of appeal given by section 293 of the Judicature (Resident Magistrate's) Law, Cap 179, from any judgment of a magistrate in any case tried by him on indictment or on information by virtue of a special statutory summary jurisdiction, did not apply to an adoption order made by a magistrate under section 9 of the Adoption of Children Law. Duffus P, in delivering the judgment of the court, stated at p 569E:

> "The matter is one which has caused us considerable anxiety as it would be a grave injustice to deny a person a right of appeal if such a right existed. On the other hand, the Court of Appeal which is a creature of statute cannot go outside of the law and clothe itself with a jurisdiction which it may not have. No person has an automatic right of appeal from a court. The right of appeal must be given by the legislature and it is usual to set out in the relevant statute in clear language the right of appeal and the powers vested in the appellate court. Similarly, when the legislature intends that the order of a court or other body or authority shall be final, a clear statement to this effect usually appears in the relevant law."

[13] Counsel also referred to the leading case of **Haslam Foundry v Hall** (1888) 20 QBD 491 to underscore this principle, and reiterated that as there was no judgment,

decree or order in the instant case there was no *right* of appeal from the ruling given. Counsel argued further that if it were otherwise, "it would be virtually impossible to conclude a trial because every ruling on the admissibility of evidence could potentially result in an appeal". Counsel made the contention of the appellant clear in his written submissions at paragraph 14 where he stated that:

> "14. This does not mean that the wrongful admission or rejection of evidence cannot be a ground of appeal or a basis for the reversal of a judgment decree or order. What it means is that there is no interlocutory appeal against the wrongful admission or rejection of evidence. The appeal, if any, has to be against he [sic] judgment decree or order. This is apparent from the express terms of section **251 of the Judicature (Resident Magistrates) Act** which makes a distinction between the right of appeal itself and the grounds on which it can be exercised."

[14] Counsel therefore submitted that the appeal should be struck out as one which the Court of Appeal has no jurisdiction to hear.

[15] The appellant responded by setting out the bases on which the document was sought to be admitted in evidence, and submitted that on a proper construction of section 251 of the Judicature (Resident Magistrate's) Act the *order* made by the learned Resident Magistrate refusing the admissibility of the surveyor's map or surveyors plan, was an appealable order. To support this submission, he referred to the meaning of the word "Order" as described in Words and Phrases legally defined, Volume 4, second edition, page 41, which reads,

> "The difference between a request and an order is this, the former purports to be made without authority, the latter with authority to command."

Analysis

[16] The determination of this preliminary objection requires a true and proper construction of section 251 of the Judicature (Resident Magistrates) Act. There is no question that the Resident Magistrate's Court and the Court of Appeal are creatures of statute. It may be useful at this point to set out section 251 of the Act. It reads:

> "**251**. Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury…"

[17] The basic principles of statutory construction are that the words and sentences must be construed in their ordinary and natural meaning. That is, words must be construed in their ordinary meaning or common or popular sense, and as they would have been generally understood the day after the statute was passed, unless such a construction would lead to a manifest and gross absurdity, or unless the context requires some special or particular meaning to be given to the words (see Halsbury's Volume 36, 3rd edition, 392).

[18] The literal meaning of the words in the above section in the statute, in my view, are clear and unequivocal. An appeal shall lie from a judgment, decree or order of a court in all civil proceedings. Those words are the focus of the section and the intent of it, and the remaining words are governed by those specific words. That is, that the judgment, decree or order, can be **upon** (that is may concern, relate to and or be from) any point of law; or upon the admission or rejection of evidence; or the question of the judgment, decree or order being founded on legal evidence or legal presumptions; or on the question of the insufficiency of the facts found to support the judgment, decree or order. Or, additionally, on any ground which may be made to the Court of Appeal from the verdict of a jury, or from the judgment of a judge of the Supreme Court sitting without a jury.

[19] The provision was therefore setting out the various matters which could form the basis of the judgment, decree or order. And, once the judgment, decree or order was made in respect of those various matters, then the appeal shall lie.

[20] When the arguments were being made by counsel before this court on the notice for preliminary objection, certain cases from this court were brought to counsel's attention as having some relevance to the question as to whether the decision of the Resident Magistrate was appealable.

[21] The three cases all related to appeals from the Supreme Court in civil proceedings, namely **Moncris Investments Limited, Allan Deans and Reynu**

Deans v Lans Efford Francis and Carol Marie Francis and the Registrar of Titles SCCA No 50/1992, delivered 23 June 1992, **Wilmot Perkins v Noel B Irving**, (1997) 34 JLR, 396 and **Dyche v Richards & Banbury** [2014] JMCA Civ 23. However, in my view, they are very helpful and instructive. It may therefore for clarity, be useful to set out section 10 of the Judicature (Appellate Jurisdiction) Act which governs the jurisdiction of the appellate court. It reads as follows:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

[22] What is clear is that the words of section 10 above are similar to those in section 251 of the Judicature (Resident Magistrates) Act, as both provisions speak to appeals from judgments or orders, although the word "decree" is omitted from the latter Act.

[23] **In Moncris Investments Limited**, the appellants' appeal was against an order of Pitter J, who had ruled:

> "That parole evidence was not admissible to show that the memorandum of agreement dated the 10th day of July, 1989 entered into between the 1st Defendant and the Plaintiffs did not contain all the terms agreed between the said parties."

In that case, the question was whether the order made by the judge was appealable. Carey JA referred to the old case of **Haslam Foundry & Engineering Co Ltd v Hall**, to show the meaning of judgment and order, within the context of the relevant statute dealing with appeals. Carey JA noted that the circumstances of the case were different, although the terms of the English Act were similar, but thought that the comments of Lord Justice Fry who stated the following, were helpful.

> "…The question arises under the 19th section of the Judicature Act, 1873, which gives appeal in all cases of a judgment or order."… "By s.100 the interpretation put on these terms is that judgment is to include decree, and order to include rule. Matters of appeal are, therefore, judgments, decrees, orders, and rules. At the time the Act passed there was another well-known method of expressing judicial decisions, namely certificates. Of these there are many-"

The learned Lord Justice gave many examples and then he went on to say:

> "… I come, therefore, to the conclusion that 'certificates' cannot be included in the words 'judgment or order.'…"

Carey JA then explained the importance of the words of Fry LJ, with reference to the facts of the **Moncris** case. He commented as follows:

> "The reason I have adverted to this case is that, it was suggested that what the learned judge did in this case was a rule. Well, the rule he made, is not the same rule that is contemplated by Lord Justice Fry. Those rules to which he refers are what are today regarded as orders. He had in mind, and I illustrate as an example – rule nisi. A ruling on the admissibility of evidence, plainly does not come within that definition. It would make for a great loss of time and money if, on every occasion, a judge made a ruling on the

> admissibility of evidence, which some party thought was incorrect, that by itself enabled him or her to apply to this Court by way of appeal. One can understand quite easily, the situation where the question of the admissibility of the evidence is made an issue in the case to be determined. As for example, a trial within a trial, in which an order for such a determination is made. Plainly, there would, in those circumstances, be an appealable order."

The court found that the ruling on admissibility of evidence by Pitter J was not appealable.

[24] In **Wilmot Perkins v Noel Irving** the facts were altogether different, as at the commencement of the trial counsel for Perkins, made an application for an adjournment of the matter which was refused. A further application was made for the judge to recuse himself on the basis of bias, which was also refused. Leave to appeal was refused but was obtained on appeal. Forte JA first identified as an issue on appeal whether the refusal by the learned judge to withdraw from the case was an order of the court and therefore appealable? He stated that a person had a constitutional right to have his dispute determined by an independent and impartial tribunal and to give him a fair hearing within a reasonable time (see section 20 of the Jamaica Constitution). That person would also be entitled to protect that right by redress in the courts. The court would then have to make a determination, he said, as to whether the infringed contravention was real and make an order accordingly. In dealing with how this court would approach such an order, Forte JA opined as follow:

> "In the instant case, it was before the commencement of the trial, that counsel moved the Court to allow for another Judge to try the case, as the appellant contended that a real danger of bias was likely. This was not an application made

> during the process of trial as to a matter affecting evidence which required a ruling as to admissibility or other matters of that sort. This application affected the more fundamental question of whether the particular tribunal was competent (in the sense of likely bias (unfairness)) to adjudicate upon the issues joined. In those circumstances the learned judge was bound to determine that issue once and for all, and having done so to make an order consequential on his determination."

[25] Forte JA stated at page 401 of the judgment that the circumstances in the **Perkins** case were very different from the facts in the **Moncris** case . In his view, he said:

> "...The application here went to a more fundamental issue which really had nothing to do with the actual conduct of the trial process, but related to the competence of the tribunal to adjudicate on the particular case. The **Gleaner Co** case [supra] is also a case which went to the fundamental issue as to whether the jurors, having regard to the likely bias, were competent to continue the case, and in those circumstances I would agree that there was an order by the learned judge which was an appealable order."

He continued:

> "In my judgment, the preliminary point by the appellant with the purpose of avoiding what he perceived as a danger of bias, was a motion which called for a determination which would be final as to that fundamental question, and consequently the result was an order by the learned judge that he would proceed to adjudicate on the case."

And the learned judge concluded that as it was an order of the court, it was appealable.

[26] Gordon JA, (although he dissented on the issue as to whether the trial judge should have disqualified himself) agreed that an order and not a mere ruling had been made by the trial judge. He said this at page 421 of the judgment:

> "The Court is only enabled to hear appeals from any judgment or order of the Supreme Court. The first question therefore for consideration is whether the decisions complained of are orders or rulings, and if Orders, whether they are final or interlocutory. The proper basis for distinguishing what is an order or a ruling is whether it is determinative of the rights of a party…"

[27] In **Dyche v Richards & Banbury**, a preliminary objection was also taken on appeal as to whether the decision of the learned trial judge that the promissory note dated 30 May 2005 not being adequately stamped, had no evidentiary effect and could not therefore be relied on as a promissory note, was an order or judgment as contemplated by section 10 of the Judicature (Appellate jurisdiction) Act. The authorities having been reviewed, I took the view that the stage of the proceedings at which the question was determined was important for the resolution of the issue. The application to determine the admissibility of the promissory note was made before the commencement of the trial and was therefore an order of the court within the context of section 10 of the Judicature (Appellate Jurisdiction) Act and therefore appealable.

Conclusion

[28] There is therefore no doubt in my mind that the application in the middle of the trial process for the admissibility of the survey map which was refused by the trial judge was not determinative of any rights. Furthermore, it was on a ruling on the admissibility of evidence which as was held in the **Moncris Investments Limited** case, does not come within the definition in section 10 of the Judicature (Appellate Jurisdiction) Act, and also would not fall in the definition of the words judgment, decree or order in the governing statute, namely, the Judicature (Resident Magistrate's Court) Act. Those

words have been judicially interpreted in several cases in this court, as discussed, and the issue is now therefore impatient of debate.

[29] In my opinion, the notice of preliminary objection would therefore succeed. This court does not have jurisdiction to hear this appeal. The costs of the notice of preliminary objection should be the respondent's.

MANGATAL JA (Ag)

[30] I too have read the draft reasons for judgment of Phillips JA and agree with her reasoning. I have nothing further to add.