[2021] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

PARISH COURT CIVIL APPEAL NO 15/2016

BETWEEN	**RICHARD HALL**	**APPELLANT**
AND	**VALERIE WILLIAMS (appointed as the representative of Zada Hall deceased)**	**RESPONDENT**

Ronald Paris instructed by Paris & Co for appellant

George Traille instructed by Phillip Traille & Co for respondent

11 November and 17 December 2021

STRAW JA

[1] On 11 November 2021, after carefully considering both counsel's submissions, we made the following orders:

> "1) The appeal is dismissed.
>
> 2) Costs in the amount of $40,000.00 to the respondent."

At that time, we indicated that brief reasons would follow. These are our reasons.

[2] This is an appeal from the Resident Magistrate's Court, now named the Parish Court, by virtue of the Judicature (Resident Magistrates) (Amendment and Change of Name) Act, 2016. The appellant, Mr Richard Hall ('Mr Hall') is appealing against the order of the learned Resident Magistrate, Her Honour Mrs Lawrence-Grainger ('the learned magistrate') (now Judge of the Parish Court), for the parish of Saint James, given on 23 October 2014, wherein judgment was entered for the defendant, Mrs Zada

Hall ('Mrs Hall') and costs awarded to her. The learned magistrate's reasons for judgment is at pages 128 to 144 of the record.

[3] The court was advised on 25 April 2017 that Mrs Hall is now deceased, and a copy of the death registration form was supplied. Accordingly, this court (Morrison P, F Williams and P Williams JJA) granted an order appointing Ms Valerie Williams as the representative of the late Mrs Hall for the purposes of this appeal. Of note, Ms Valerie Williams (now respondent, 'Ms Williams') is Mrs Hall's daughter, and she was called as a witness at the trial.

Background

[4] Mr Hall lodged a plaint (1686/12) against his step-mother, Mrs Hall, seeking recovery of possession of premises situated at Granville in the parish of Saint James ('the disputed property'). The disputed property is unregistered, but of note, there is a deed (which was before the learned magistrate and marked exhibit 4 - page 102 of the record) from the then Governor General (Sir Clifford Campbell), dated 18 June 1970, authorising the waiver of the rights of the Crown to the property. The property, described (in the deed) as one half acre, was granted to Samuel Hall, Edward Hall (Mr Hall's father), and Rebecca Bowen. There is no evidence that Samuel Hall or Rebecca Bowen, or parties claiming under them, have asserted any claim in relation to the disputed property.

[5] Mr Edward Hall died on 18 October 2008. Both he and Mrs Hall lived on the property. On his death, Mrs Hall continued her occupation of the disputed property. Mr Hall has contended that Mrs Hall is a mere licensee and that her licence to occupy the said property had been determined. He also stated that the annual value of the property did not exceed $75,000.00.

[6] Mrs Hall's defence was that she was not a licensee, rather she was a beneficiary under a will. The disputed property was owned by her late husband (Edward Hall), who left a will that was probated in 2011. By virtue of the said will, Mrs Hall and three others

(Ms Valerie Williams, Greg Bernard and Abigail Bernard) were given equal shares in the disputed property. However, she has also asserted that she was entitled to have an interest of at least 50% by virtue of section 6 of the Property (Rights of Spouses) Act. She had also advanced adverse possession as a defence, and reference was made to section 3 of the Limitations of Actions Act.

[7] It is common ground that there have been a number of persons who have resided on the disputed property as tenants, some of whom operated businesses there. It is also not in dispute that a portion of the disputed property was at some time leased to one Spencer Brown ('Mr Brown') and that he constructed a concrete building thereon. At some point, there was a dispute between the late Mr Edward Hall and Mr Brown concerning compensation for the concrete structure erected. This was evidenced by a document that was relied on by Mr Hall at the trial in proof of his right to possession. This document (dated 26 August 1977) was admitted into evidence and marked as exhibit 9. By virtue of that document, Mr Brown agreed to relinquish and abandon his rights in the building (which was described as "...a Building consisting of six apartments...on the lands of Edward Hall") to Mr Edward Hall in consideration of the sum of $1,000.00. It was also specified that this was to be paid in $100.00 instalments commencing on 12 September 1977, to Mr Brown's account at the Bank of Commerce, Montego Bay Branch.

Mr Hall's evidence

[8] Mr Hall's evidence before the learned magistrate was that the disputed property was owned by his grandfather (also named Edward Hall) and, after that, by his father. This was where he was born. He stated (without reference to any particular date) that Mr Brown "put up a nog, building block building" ('the Brown building'), and he described it as having two bedrooms, a bar, a shop and a long passage way. Mrs Hall and Ms Valerie Williams operated the shop and the bar (apparently as tenants, before Mrs Hall married Edward Hall). Sometime later, Mr Edward Hall started living in the Brown building. Mr Hall contended that Mr Brown left in 1972 and that he bought the

Brown building in 1973 (the record stated 1873 – clearly a typographical error). He does not recall the purchase price, but stated that his ex-wife, Daisy Hall, signed about 10 cheques. He further stated (at page 9), "I bought the house from Spencer Brown, because if I never buy it my father would be in the street, he wouldn't have anywhere to live. My father never afforded to buy it. Spencer Brown wanted to get rid of the building. My father and I spoke about the building. I paid the money for the building after they were in the Supreme Court over the building".

[9] Mr Hall's understanding (based on his evidence) was that "[t]he building selled [sic] with the land. Spencer Brown had leased the land and owned the building. I paid for the building with the land. The building could not go without the land". Later he said, "[a]s far as I was concerned I bought the house and my father owned the land. My father had owned the land, he lived there. After I bought the building, the land was mine but my father was living there, he had nowhere else to go" (at page 10).

[10] Later he said (at page 14) that Mr Brown occupied the whole place, but a third party leased a little place from his father, and then puzzlingly stated that Mr Brown was both a tenant and owner of the disputed property. His exact words were, "Spencer Brown occupied the whole place…Spencer Brown paid rent. Mr Brown actually owned the whole place. I don't know if he paid rent for the whole place. The whole land sell with the building".

Findings of the learned magistrate

[11] The learned magistrate set out the evidence in her reasons for judgment as well as identified questions to be answered. The questions relevant to the appeal are

> "1. Who paid the monies pursuant to the acknowledgment signed by Spencer Brown? Was the money paid by the plaintiff? Did the Plaintiff have a contract with Spencer Brown?"
>
> "4. If the plaintiff advanced moneys to Spencer Brown what was he purchasing, building alone or building with the land?"

[12] The learned magistrate accepted (at page 136) that the disputed property was owned by Mr Edward Hall. She noted that this was conceded by counsel for Mr Hall, Mr Paris, although Mr Hall's evidence in cross-examination shifted and was that the disputed property was owned by Samuel Hall (his uncle). However, the finding of the learned magistrate, that Mr Edward Hall was the owner, has not been specifically challenged on appeal.

[13] The learned magistrate accepted that Mr Hall (or his then wife) paid Mr Brown and sent the money (at page 137, paragraphs 13 and 14) to the bank. Although it may be inferred, it is not seen where she stated that he intended the Brown building to be "a gift" as termed in the ground of appeal. For clarity, it would have been useful for counsel for the appellant to indicate (by reference to the page and paragraph) where the findings being challenged are found in the reasons for judgment.

[14] In the notes of evidence, Mr Paris, in closing, submitted that the Brown building/house, not being a chattel house, formed a part of the land (at page 57). The learned magistrate agreed, and this was reflected in her reasons for judgment at paragraph 25 (at page 139) that "[w]hatever is attached to the soil becomes a part of it" (also at paragraph 47 on page 141). The learned magistrate thereafter made a number of logical findings (at paragraphs 28 to 31 on page 139) that are set out:

> "28. It appears that [Spencer Brown] had been a lessee of the land.
>
> 29. Exhibit 9 refers to Spencer Brown relinquishing and abandoning his rights to the building not the land. There was therefore no evidence that Spencer Brown owned both the land and building and **he cannot sell what does not belong to him.**
>
> 30. It appears that the Plaintiff himself was not sure what he purchased because throughout his evidence he vacillated between purchasing the building and the building with the land.

> 31. At some point in his evidence he said he bought the building but Spencer Brown gave the land to him. Then later he said even after he bought the house, his father still owned the land. **I therefore find that the Plaintiff purchased the building and not the land**." (Emphasis added)

The appeal

[15] The grounds of appeal (dated 5 November 2014) were:

> "(a) The Learned Magistrate erred when she found that the Plaintiff/Appellant had purchased Spencer Brown's house in order to make a gift of it to his father Edward Hall thereby making the said property part of the estate of Edward Hall upon his death to which the Defendant was entitled under the professionally prepared Will of Edward Hall.
>
> (b) The Appellant/Plaintiff reserved the right to add further grounds of appeal after the Learned Resident Magistrate files her Reasons for Decision."

[16] The findings that were challenged were:

> "(a) Findings of facts: That Spencer Brown did not have any interest in the land on which his house was built and for which he paid rent.
>
> (b) Findings of law: That the Plaintiff/Appellant intended to purchase Spencer Brown's house in order to make a gift of it to his father Edward Hall.
>
> That Spencer Brown's house and the land on which it sits forms part of the estate of Edward Hall."

Submissions on behalf of the appellant

[17] Counsel, Mr Paris, contended that Mr Hall was entitled to the disputed property by reason of the purchase of his father's debt to his tenant Mr Brown. It was argued that Mr Brown had rights in the disputed property by virtue of his ownership of the Brown building. This was so because the Brown building was affixed to the land and the

fee simple interest was subject to Mr Brown's interest as "land tenant". So as not to do any injustice to counsel's submissions, they will (where necessary) be restated in his own words and placed in quotation marks.

[18] There being no evidence that Mr Hall's father terminated the equitable interest of Mr Brown as "land tenant", the upshot was that Mr Hall was entitled to all the rights Mr Brown had.

[19] It was submitted that the learned magistrate failed to take into account Mr Hall's acquiescence in the collection of rent by his father for his father's maintenance and that Mr Hall's evidence was that he bought the Brown building in order to provide a place for his father to live. Even if Mrs Hall succeeded to the fee simple interest of her husband (Mr Hall's father) under his will, it was clear that Mr Hall, having purchased his father's debt (in counsel's words) "which included Spencer Brown's interest therein qua land tenant [,] that the fee simple interest was subject to the land tenant's equitable interest to which [Mr Hall] succeeded by purchasing the house of Spencer Brown".

[20] Mr Paris submitted that there was no evidentiary basis on which the learned magistrate could have concluded that Mr Hall made a gift to his father of the Brown building by purchasing it together with "the possessory rights of Spencer Brown".

[21] On the subject of Mr Brown's possessory rights, it was Mr Paris' contention, that having built the Brown building on the disputed property, Mr Brown "naturally acquired legal and/or equitable rights over Edward Hall's land which Spencer Brown would be giving up, relinquishing, abandoning to Edward Hall in consideration for the payment of $1,000.00". Reliance was placed on exhibit 9 as well as exhibits 2A-E, which were copies of cheques payable to Mr Brown, drawn on the account of the ex-wife of Mr Hall. These amounted to $680.00.

[22] Counsel's conclusion was that exhibit 9 proved that Mr Brown "had either acquired a building lease from Edward Hall or a contractual or equitable licence to the land coupled with his ownership of the nog house", which the learned magistrate

accepted. His complaint was that the learned magistrate failed to take into account that Mr Brown "had acquired possessory rights over the land other than the fee simple". Mr Paris submitted therefore that, when Mr Hall purchased the house from Mr Brown, he would have also acquired the same legal and equitable rights over the land which Mr Brown had enjoyed, "such as the right not to be dispossessed therefrom…. the right to remain in possession of the land as long as he owned the house".

[23] Heavy weather was made of Mr Hall's view that the purchase of the Brown building was the only way to keep his father off the street and in possession of the land. Accordingly, the learned magistrate was wrong to conclude that the purchase of the Brown building by Mr Hall did not give him any rights over the land.

[24] The only authority cited was **Errington v Errington and Woods** [1952] 1 KB 290. Mr Paris submitted that prior to the decision in this case, difficulties arose whenever the question was asked, whether a contractual licensee acquired a personal right enforceable only against the licensor or a proprietary interest binding upon the licensor's successors in title, except a bona fide purchaser for value without notice. In **Errington**, it was held that the son and daughter-in-law were neither tenants at will nor weekly tenants but licensees entitled to occupy the house as long as they paid the instalments, and their equitable interest was capable of binding third parties, as in the case of restrictive covenants.

[25] Mr Paris submitted that the relevant principle was the doctrine of estoppel by acquiescence, and its operation in the case of licensees in occupation of land is that, if the licensee expends money on land under an expectation induced or encouraged by the licensor, he will be allowed to remain in possession. The result will be that a court of equity will not allow that expectation to be defeated. A supervening equity to be protected vests in him, though the exact nature and extent of the protection will vary with the circumstances; some circumstances may entitle him to call for a conveyance of the legal estate. It was submitted that even though the issue did not arise in **Errington**, the court favoured the view that the payment by licensees of all the

instalments would entitle them to a conveyance of a house. This would avail them against all successors in title of the licensor, except a purchaser for value without notice. This is a form of proprietary estoppel, and it was submitted that the learned magistrate did not consider the principles arising in equity or proprietary estoppel. Rather, she viewed the issues as being completely contractual and paid no regard to the applicable equitable principles.

[26] In relation to the will and the learned magistrate's finding that the disputed property formed a part of the estate of Mr Hall's father, Mr Paris made the following submission: the will was professionally drafted, and the description of the disputed property was the same as the description contained in the first schedule of the indenture from the Governor General (exhibit 4). He submitted that the disputed property devised to Mrs Hall is the entire half acre of land that was vested in all three of Mr Hall's grandfather's children. In the circumstances, Mr Hall's father did not have the legal capacity to devise the entire half acre.

[27] It was argued that the learned magistrate also placed undue regard on the allegations contained in a fixed date claim form and particulars of claim that had been filed by Mr Hall before filing the plaint, which is the subject matter of the appeal.

Submissions on behalf of the respondent

[28] Counsel, Mr Traille made very brief but pointed submissions. He contended that the arguments on appeal simply did not make sense in light of the fact that Mr Hall, in a fixed date claim form (filed in the Supreme Court), admitted that his father died possessed of the disputed property but that he was entitled to it as the only surviving child. This admission that his father was the owner of the disputed property could not be reconciled with the argument that he was the owner.

[29] It was submitted that the learned magistrate was correct in her findings, as it was trite law that in an action for recovery of possession, the plaintiff is required to prove title. He argued that Mr Hall's father was free to do as he liked with the disputed

property. By this, we understood counsel to mean that the disputed property was owned by him and as such he had the testamentary capacity to devise it to his wife.

[30] In all the circumstances, counsel submitted, the appeal should be dismissed with costs to the respondent.

Discussion and analysis

[31] In **Paymaster (Jamaica) Limited and another v Grace Kennedy Remittance Services Limited** [2017] UKPC 40, the Board recognised the constraints on an appellate court when called upon to review the findings of fact of the judge at first instance, who has heard and seen the witnesses give oral evidence in court. The principle was restated by reference to a number of authorities, including the well-known **Watt (or Thomas) v Thomas** [1947] AC 484 as well as more recent authorities. Lord Hodge stated at paragraph 29:

> "... In *Thomas v Thomas* [1947] AC 484 the House of Lords and more recently in *McGraddie v McGraddie* [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600; 2014 SC (UKSC) 203 the United Kingdom Supreme Court have given guidance on the circumstances in which an appellate court may interfere with the findings of fact by a trial judge. In *Thomas v Thomas*, 487-488 Lord Thankerton stated:
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> > '[T]he principle … may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given

> by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then be at large for the appellate court.'
>
> In *Henderson* (para 67) Lord Reed stated:
>
> > 'in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.'
> >
> > The Board itself has recently given similar guidance in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, paras 11-17 and in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, paras 4-8."

[32] An appropriate starting point is a restatement of the principle that a condition precedent to a claimant obtaining an order for recovery of possession (as sought in the case at bar) is proof of title.

[33] Although not raised on the appeal, jurisdiction was accepted by the learned magistrate pursuant to section 96 of the Judicature (Resident Magistrates) Act ('the Act') (as it was then named). Morrison JA (as he then was) considered the jurisdiction of the Resident Magistrate in respect of recovery of possession by reference to both sections 89 and 96 and stated that in respect of both sections, "the person seeking to recover possession is put to the proof of his title" (see paragraph [35] of **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37 where reference was made to **Arnold Brown v The Attorney General** (1968) 11 JLR 35, 38).

[34] In the instant case, the learned magistrate (who had the benefit of hearing the evidence and observing the witnesses) was not satisfied as to Mr Hall's title and was clearly unimpressed by his inconsistent evidence.

[35] The disputed property was owned by his father, Edward Hall. This has been supported by the evidence adduced at the trial. Mr Edward Hall leased a piece of the land to Mr Brown, who built a concrete structure on the land. In the course of time, Mr Brown signed the agreement with Edward Hall (exhibit 9), relinquishing all legal and beneficial rights in the building on the land. This was in consideration of the payment of $1,000.00.

[36] There is no dispute, and the learned magistrate so found, that Mr Hall had paid the money to Mr Brown through his then wife, Mrs Daisy Hall.

[37] Counsel for Mr Hall has submitted that all the interest in the disputed property passed to Mr Hallas a result of a constructive trust. The learned magistrate rejected this and found there was no such evidence. This court is of the view that she was correct for the following reasons:

1) The evidence did not reveal any common intention between Mr Hall and his father, Edward Hall, that this was to be the case. In fact, the evidence of Mr Hall was somewhat inconsistent, as he spoke to paying Mr Brown so that his father would not be out on the street but have somewhere to live. Therefore, it cannot be said that the learned magistrate was incorrect when she found that the money was paid as a gift from Mr Hall to his father. The inescapable conclusion was that, once the money had been paid, all the legal and beneficial interest in the building was restored to Edward Hall.

2) Edward Hall, in his will, devised the disputed property to his wife, Mrs Hall and three others (as identified at paragraph [6]). There is also no evidence

of any claim by Edward Hall's siblings or their estates disputing his ownership or possession of the land, which is the subject of dispute.

3) There was no agreement between Mr Brown and Mr Hall that if Mr Hall paid the monies as requested, Mr Brown's interest in the Brown building would pass to him. The general position being that, unless the contrary is shown the beneficial title in land follows the legal title (see **Pearline Gibbs v Vincent Stewart** [2016] JMCA Civ 14, paragraph [44]). In **McCalla et al v McCalla** [2012] JMCA Civ 31, McIntosh JA set out the established principles in relation to constructive trusts:

> "[27] It is settled law, approved and applied in this jurisdiction in cases such as **Azan v Azan** (1985) 25 JLR 301, that where the legal estate in property is vested in the name of one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties."

4) Mr Hall did nothing over the years asserting any right to possession of the Brown building or the disputed property, thereby negating any inference from his conduct of any common intention that he should have an interest in the disputed property, having paid the sums to Mr Brown.

5) At the time Mr Hall served the notice to quit the premises and the plaint for recovery of possession, he asserted that Mrs Hall was a licensee but failed to establish any right to possession. Accordingly, it would appear that he ought to have filed a claim for a declaration of his interest in the property before attempting to recover possession.

6) There was no proof of title established in order to secure a grant of recovery of possession.

[38] Before leaving the matter, we would make a few comments about the sole authority relied on by Mr Paris. Despite having a slight degree of factual similarity, the case of **Errington** was not particularly helpful to resolving the issues raised on appeal.

[39] In that case, a father bought a house for his son and daughter-in-law. He paid £250.00 in cash and borrowed £500.00 from a building society on the security of the house, the loan being repayable with interest by instalments of 15s a week. The house was in the father's name, and he was responsible to the building society for the payment of the instalments. He told the daughter-in-law that the £250.00 was a present to her and her husband, handed the building society book to her, and said that if and when she and her husband had paid all the instalments, the house would be their property. From that date onwards, the daughter-in-law paid the instalments as they fell due out of money given to her by her husband. About nine years later, the father died and, by his will, left the house to his widow. Shortly afterwards, the son left his wife.

[40] In an action by the widow against the daughter-in-law for possession, the English Court of Appeal held (1) the occupation of the house by the son and the daughter-in-law was not determinable by the widow on demand, since they were entitled to remain in possession so long as they paid the instalments to the building society, and, therefore, they were not tenants at will of the premises; (2) the payments of instalments could not be regarded as payments of rent made for convenience to the building society and not to the father, since the daughter-in-law and her husband were not bound under any agreement with the father to make those payments, and, therefore, they were not weekly tenants or tenants for the period during which the instalments fell to be paid; and (3) the daughter-in-law and her husband were licensees, having a permissive occupation short of a tenancy, but with a contractual or equitable right to remain in possession, so long as they paid the instalments which

would grow into a good equitable title to the house when all the instalments were paid, and, therefore, the widow was not entitled to an order for possession.

[41] The key distinguishing feature that immediately stands out is the matter of possession. In **Errington**, the son and daughter-in-law occupied the house and thus were in possession of the property; the fact that they were regarded as licensees is not terribly relevant. Mr Hall, by his own account, had not lived on the disputed property since at least 1964, when he went on the farm work programme, and then in 1968, he emigrated to the United States of America. Although he said that he returned to Jamaica often, he did not stay at the disputed property as "the house was breaking down"; however, he would visit his father there. He was unable to say when Mrs Hall began living in the Brown building, and he spoke of his father leasing the disputed property to third parties. He recalled that one of those third parties was Mrs Hall's sister (Ms Pringle), but he was not able to say how long she was living there. The point of these observations is merely to show that Mr Hall was neither in possession of the disputed property nor was he treating it as his own.

[42] A second distinguishing feature is that, unlike the couple in **Errington**, Mr Hall gave no evidence of any understanding between himself and his father regarding the ownership of the disputed property as a condition of expending money. By all appearances, his father treated the disputed property as his own, without any reference to Mr Hall. He entered into lease arrangements, collected rent without accounting to Mr Hall and left a will devising the disputed property.

[43] Having considered all of the above, we concluded that there was no basis on which to interfere with the learned magistrate's decision. It is for these reasons that we made the orders set out at paragraph [1].

V HARRIS JA

[44] I have read the draft judgment of my learned sister Straw JA. I agree with her reasoning and conclusion and have nothing useful to add.

BROWN BECKFORD JA (AG)

[45] I too have read the draft judgment of my learned sister Straw JA. I agree with her reasoning and conclusion. There is nothing I could usefully add.