

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 50/2018

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE L PUSEY JA (AG)**

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|----------------|--------------------------------------------------------------------------------------------------------------|----------------------------------|
| BETWEEN | DELORES LINDSAY (Personal representative in the Estate of Lauriston Fitzgerald Lindsay) | APPLICANT |
| AND | V B WILLIAMS REALTY COMPANY LIMITED | 1st RESPONDENT |
| AND | VB WILLIAMS | 2nd RESPONDENT |

Canute Brown instructed by Brown, Godfrey & Morgan for the applicant

Clive Munroe instructed by Munroe & Munroe for the respondents

10 and 11 May 2018

MORRISON P

[1] I have read in draft the judgment of Pusey JA (Ag) and agree with his reasoning and conclusion. I have nothing further to add.

PHILLIPS JA

[2] I too have read in draft the judgment of Pusey JA (Ag). I agree with his reasoning and conclusion and have nothing to add.

PUSEY JA (AG)

[2] This is an application for leave to appeal against an order of Beswick J, made on 29 September 2016. Her order was that:

"The Claim be struck out as it concern [sic] the matters that do not affect the [respondents]. That is, declaration [sic] as to [the applicant's] ownership and or quiet possession of the land and/or whether he received [it] as a gift or as a beneficiary.

Leave to the [applicant] to file an additional affidavit including documentary evidence to prove entitlement of Estate Lauriston Lindsay to rental monies and to possession of the property at 2 Randwick Drive, Kingston 19.

All these documents to be filed and served within 3 weeks of today's date that is 20th October 2016 failing which the remainder of the claim stands struck out.

Pre-trial Review set for 17th February 2017 at 10 am for half an hour.

Listing Questionnaires and List of Documents are to stand as properly filed.

Costs to the [respondents] to be agreed or taxed.

[Applicant's] attorney-at-law to prepare file and serve this order."

[3] This order is an interlocutory order, making it necessary for an application to be made for leave to appeal within 14 days of the order. Application for leave to appeal was in fact filed in the Supreme Court on 12 October 2016.

[4] Beswick J had made this order on an application to strike out the claim which had been brought before her. The date on which she heard the application had been set for the determination of the claim, after the matter had been through a first

hearing of the fixed date claim form and a pre-trial review. The material which was before her consisted of the fixed date claim form and the affidavit in support of the fixed date claim form, as well as the affidavit in opposition which was filed by the second respondent on behalf of both respondents.

[5] Beswick J had set a further pre-trial review for 17 February 2017. On that date, the matter came before Wiltshire J (Ag) and she ordered that the remainder of the claim be struck out for non-compliance with the order of Beswick J. Wiltshire J (Ag) also granted leave to appeal to the applicant, that is, to appeal the order she made on 17 February 2017.

[6] The original application for leave to appeal which had been filed on 12 October 2016 came up for hearing before J Pusey J (Ag) on 21 February 2018, and it was refused. The notice of application for leave to appeal the order of Beswick J was filed on 6 March 2018, in this court.

[7] An application for leave to appeal in this court is grounded by rule 1.8 (1) of the Court of Appeal Rules 2002 ("CAR"). A proper consideration of the CAR and the principles set out in **The Attorney General of Jamaica v John McKay** [2011] JMCA App 26 and **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited (by original action)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008, indicates that an application for leave to appeal in this court ought to have

been filed within 14 days of the order of Beswick J, since the application in the court below had not been determined within that 14 days.

[8] However, having heard arguments from the parties on the merit of the application, we have not elected to dispose of this matter based solely on the procedural missteps.

[9] The general rule is that permission to appeal in civil cases will only be given if this court or the court below considers that the appeal has a real chance of success.

[10] Real chance of success has been described as one that is realistic and not fanciful. In this case, my view is that the proposed appeal is hopeless. The applicant brought a claim before the Supreme Court for proprietary declarations, recovery of rental income and profits as well as possession of land known as 2 Randwick Drive, in the parish of Saint Andrew ("the property"). The property is registered in the name of Ruth Maud Lynch.

[11] In the fixed date claim form and the affidavit of Delores Lindsay (who is the personal representative in the estate of Lauriston Fitzgerald Lindsay) she states that Miss Lynch is deceased and that before her death, she gave the property to Mr Lindsay. She further states that the inter vivos gift of the property was confirmed in the will, when Miss Lynch devised the land to him.

[12] There are no documents to demonstrate that Miss Lynch is dead, when she died, whether she made a will with Mr Lindsay as legatee, or that the will was

probated. The applicant indicated in her evidence that Mr Lindsay was in possession as a legatee, collected rents and engaged the respondents to handle the renting of the premises and that the respondents would render accounts of the rental income and expenditure to him.

[13] The fixed date claim form indicated that Mr Lindsay was in quiet and undisturbed possession. This wording implies that the claim was grounded in the Limitations of Actions Act, as learned counsel Mr Canute Brown, on behalf of the applicant, argued before this court. However, the affidavit of the applicant only mentions his possession as a legatee. It does not ground or support a claim for a possessory title.

[14] Mr Victor Williams indicated, in his affidavit on behalf of the respondents, that although the property was managed pursuant to Mr Lindsay's directions, Mr Lindsay did not own the property and he did not know that there was a devise to Mr Lindsay. Mr Williams further stated that he had no interest in the property and the 1st respondent company also had no interest in the property. Mr Lindsay had indicated that the proceeds of the property were to be passed to a niece of Miss Lynch who resides in Jamaica.

[15] It is not surprising that, faced with this evidence, Beswick J struck out the claim for a declaration in relation to the property. No nexus or basis was submitted for the declaration being made in an action against these respondents solely. The respondents neither claimed the property nor had any connection to the registered

owner. In fact, the respondents' connection to the property came only through their contract or relationship with Mr Lindsay.

[16] Although a declaration made by the court can establish a party's rights to the world at large, it is a fundamental principle that a civil action ought to involve those persons who have an interest in the legal principle and the fact situation that founds the declaration sought. One reason for this is that parties who are concerned and informed of the relevant facts would be able to join issue with a claimant in support of or in opposition to their assertion. These respondents would not in any way be able to support or oppose the assertions that the applicant made on behalf of the estate, in relation to the proprietorship. The affidavit of Mr Williams has gone as far as he could to indicate his understanding and what he was told of the ownership.

[17] For a party to have a real chance of success, they must show, among other things, that they have brought the proper party before the court and presented the necessary evidence to the court to make a decision. In this case, the respondents were not the proper party to be brought before the court. The evidence to support a declaration of ownership attempted to support both a claim founded in a gift before Miss Lynch died and completed with the devise by a will. There was no evidence of a will of Miss Lynch or the gift made by her while she was alive.

[18] Mr Brown asserted before this court that the learned trial judge failed to understand that the applicant, on behalf of the estate, was relying on a possessory

title under the Limitation of Actions Act. The only reference made to possessory title can be deduced from paragraph 4 of the fixed date claim form, which claims:

"4. That Lauriston Fitzgerald Lindsay was in possession of the said land and enjoyed quiet undisturbed possession thereof for upwards of twenty three years up to the time of his death on the 15th June, 2012. During that entire period he was in receipt of rent and profits of the land and paid all taxes."

[19] Paragraph 4 of the applicant's affidavit contradicts this and states that Mr Lindsay was in possession of the land as legatee up to the time of his death.

[20] These two claims cannot stand together. The general principle is that possession is not usually exclusionary if it is with the consent of the owner. That principle is cited in the case of **Ramnarace v Lutchman** [2001] UKPC 25 at paragraph 10, which was quoted with approval by the Privy Council in paragraph 10 of **Recreational Holdings 1 (Jamaica) Ltd v Lazarus** [2016] UKPC 22.

[21] In any event, no evidence has been provided to suggest that Mr Lindsay had exclusive possession to oust the interest of Miss Lynch and that he had the animus possidendi. Therefore, cases like **JA Pye (Oxford) Ltd v Graham** [2002] UKHL 30 and **Wills v Wills** [2003] UKPC 84 are not applicable to this case.

[22] Mr Clive Munroe, for the respondents, has added that the overriding objective could not be served in putting the respondents to the cost and expense of defending a claim in which they had no legal interest.

[23] The proper parties to such an action may include the estate of Miss Lynch and any persons who may claim from her. Alternatively, the applicant as personal representative, could perhaps proceed under the Registration of Titles Act section 85, to seek a determination of Mr Lindsay's possessory title.

[24] The evidence before Beswick J did not disclose any cause of action or basis against the respondents in this matter in respect of the ownership or quiet possession of the land.

[25] Therefore she was correct to strike out the first part of the claim.

[26] The learned judge exercised her discretion to require additional affidavits in support of the claim between the applicant and the respondents. This order, in my view, gave the applicant the opportunity to adduce evidence to show that the sums received from the property were for the benefit of the estate of Mr Lindsay. In the context where the evidence showed that Mr Lindsay directed the involvement of the respondents and received an account, there is no evidence (receipts, cheques or bank statements) to show that that money was paid to him. It was logical therefore in those circumstances that the learned judge permitted a limited time for proof that money and possession of the property should inure to the benefit of Mr Lindsay's estate. This position is sustained and supported by the respondents' as yet uncontradicted evidence that they paid the money to another party and not to Mr Lindsay.

[27] There is no dispute that the applicant did not in fact comply with the order to provide the additional affidavit and failed to seek relief from sanctions or in fact, even at this late stage, provide evidence to explain her non-compliance. An order of the court stands and is to be complied with even when appealed.

[28] It is my view that there is no real chance for success in an appeal against the learned judge's exercise of her discretion to require the filing of additional affidavits and to order that the remaining part of the claim be struck out if the applicant failed to do so within three weeks of the order being made.

[29] In light of the above, I am of the view that the application for leave to appeal should be refused.

[30] The costs of the application should be paid by the applicant, such costs is to be taxed if not agreed.

MORRISON P

ORDER

1. The application for leave to appeal is refused.
2. Costs of the application to the respondent to be taxed if not agreed.