JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL NO: 25/2000

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag.)

BETWEEN	**AUDREY McLEAN**	**DEFENDANT/ APPELLANT**
AND	**CRANE-ORR PROPERTIES LIMITED**	**PLAINTIFF/ RESPONDENT**

Dr. Bernard Marshall for Appellant

John Graham & Georgette Scott instructed by
Jennifer, Messado & Co., for Respondent

14th December, 2000

FORTE, P:

This is an appeal from the learned Resident Magistrate Mrs. Ingrid Mangatal Munroe sitting in the Resident Magistrate's Court for the Corporate area in which she ordered recovery of possession of property at 16 Melwood Avenue, Kingston 8 in the parish of Saint Andrew. The order arose out of a claim made by the plaintiff Crane-Orr Properties Limited for such recovery from the defendant/appellant Audrey McLean. It is necessary only to relate in summary the facts of this case which I take from the reasons

for judgment given by the learned Resident Magistrate which adequately sets out the facts in so far as it relates to the issues involved in the case. I will now read from that:

> "The plaintiff called as its only witness Mrs. Ivy Forbes. Mrs. Forbes indicated that she resides in Jamaica part-time and that she and her husband Trevor Forbes are the directors and shareholders of the Plaintiff company. The witness indicated that the Plaintiff purchased the property from Jamaica National for $8M and that they paid out the said sum from May 1999. A certified copy of the Duplicate Certificate of Title registered at Volume 1206 Folio 88 which shows that the Plaintiff was the registered owner from July 1999 (and that document) was admitted in evidence."

The witness had also stated at the trial that the plaintiff, up until the time of the trial had not been able to obtain possession of the property which they had bought.

The defence filed in the Resident Magistrate's Court alleged first of all that the defendant denied that the plaintiff was entitled to the property and sought to allege that the legal owner of the said property was in fact the defendant. The defence also averred that any transfer of the said property to the plaintiff or to any other person was vitiated by fraud, as she has never signed any instrument of transfer to pass the property from herself to any other person. It is only necessary to relate those aspects of the defence having regard to how this appeal has proceeded, because in contending that the learned judge exercised her powers incorrectly, three grounds of appeal were filed by the appellant. The first two I shall read:

> 1. "That the Leamed Resident Magistrate erred in proceeding to make a determination in this matter granting recovery of possession whilst dealings in relation to the property and appurtenant to the proceedings are under investigation by the Police Fraud Squad.
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> 2. That the Learned Resident Magistrate erred in proceeding to make a determination in this matter granting recovery of possession whilst the property in issue is the subject of proceedings between the parties in the Supreme Court of Judicature of Jamaica."

In respect of those two grounds we need only say that learned counsel for the appellant Dr. Marshall quite correctly did not advance those two grounds. In that event no other comment need to be made in relation to those two grounds.

Dr. Marshall however, very strongly advanced the following ground:

> "That the Learned Resident Magistrate erred in proceeding to determine the matter in circumstances where the Defendant/Appellant was disadvantaged in respect of legal representation at the hearing."

Now, unfortunately the manner in which the defendant/appellant was disadvantaged was not set out in any detail in the grounds of appeal as it ought to have been. We however allowed Dr. Marshall to develop that ground of appeal, and to indicate to the Court what the complaint was in relation to any disadvantage that the defendant/appellant suffered.

Before commenting on the submissions it is very relevant to refer to the reasons for judgment of the learned Resident Magistrate to see under what circumstances she refused the application for adjournment. To do so, it is necessary to set out in full without any apology the reasons advanced in the learned Resident Magistrate's judgment because it sets out in detail the history of the case and in particular the manner in which she exercised her discretion in refusing the application. I therefore read:

> "On the 19th September 2000 this matter arose for trial before me, the matter having been fixed as a priority fixture. The claim is by the registered owners of premises at 16 Melwood Avenue, Kingston 8 in the Parish of Saint Andrew, being all the that parcel of land comprised in Certificate of Title" (and I need not refer to the registered number again). "The Plaintiff in its particulars of Claim recites that it purchased the premises from the Jamaica National Building Society for the sum of $8 Million dollars, Jamaica National having exercised its power of sale arising under mortgage No. 911403. The Defendant, who continued in occupation, is a former registered owner of the premises.

> The Plaint herein was filed in or about August 1999. On or about the 30th November 1999 His Honour Mr. George Burton ordered that the application for recovery of possession herein be stayed pending the hearing of the Supreme Court Suit No. C.L.M. 235 of 1999 upon certain conditions. Both the Plaintiff and the Defendant appealed. On the 15th of May 2000 the Plaintiff's appeal was allowed and the Cross-Appeal by the Defendant was withdrawn. The Court of Appeal ordered that the matter be remitted to the Resident Magistrate's Court on the issue of possession.
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> On the 31st of August 2000 the matter came on for hearing but was not reached. It was then fixed for trial on the 12th September 2000. On that date the then Attorney-at-law for the Defendant Messrs. Nunes Scholefield DeLeon and Co. indicated that they were not in a position to proceed as all their witnesses were not then available. In any event, the matter could not be reached as the Court had a part-heard mater proceeding before it at that time. Given the age of the matter, the fact that it was an action for recovery of possession, the circumstance that the Court of appeal had remitted the question of recovery of possession to the lower court, the averment by Counsel for the Plaintiff of the alleged hardship being suffered by his client in not being able to take possession for over one year, and the fact that the Plaintiff's witness had had to travel from abroad for the trial of the matter and would have to change her travel arrangements, the matter was given special priority fixture for the 19th of September, 2000."

I pause here to indicate that on the day of the adjournment on the 12th of September 2000 it must have been known by the defendant/appellant that the matter was set as priority for trial on the 19th of September 2000 and the reasons therefor. The learned Resident Magistrate no doubt, was cognizant that the matter had been in the courts for over a year and that it was about time that it should be disposed of, given the circumstances of plaintiff's witness who had to come from abroad and who had come specially for the 12th of September to have the case heard . The matter was then put off to the 19th of September a week hence obviously allowing the plaintiff's witness to stay here to await that trial date. But on the 19th another attorney presented himself to the court as representing the defendant, Mr. Lowell Morgan of the firm Messrs. Nunes, Scholefield, DeLeon & Company having attended to say that his firm no longer

represented the defendant. Mr. Leighton Miller was the new attorney for the defendant. Mr. Miller then applied for an adjournment in the matter on the basis that he had only been retained on the 15th of September, 2000. The application was opposed by counsel for the plaintiff and the learned Resident Magistrate refused that application. Her reasons for doing so appear in her Reasons for Judgment which I will now read:

> "In exercising my discretion to refuse the application for an adjournment I took into account the following matters:
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> (a) The Defendant was aware of the matter being fixed for priority hearing and was aware of the Plaintiff's witness' predicament regarding the extension of time to be spent in Jamaica and the change in travel plans necessitated. The Defendant had a duty to ensure that both herself and whoever her Counsel of choice were would be ready to proceed on the appointed day.
> (b) The matter is an old one, involving the issue of recovery of possession.
> (c) The Court of Appeal had some months ago directed that the lower court deal with the issue of possession.
> (d) There are many matters scheduled before the courts. Where matters do not proceed as scheduled, particularly where they are fixed for priority, (which is really similar to being fixed as a 'first case' in the Supreme Court), the matters can take a long time before they can be heard, since other matters of priority will already have been fixed in the Court's schedule."

The learned Resident Magistrate in refusing the application for the adjournment nevertheless set it for trial at 2.00 p.m. on the same day. So, in fact there was a short adjournment. Now, that is the history and the background which this court accepts as the basis for the adjournment which now forms the complaint by Dr. Marshall for the appellant.

In advancing the argument before the court Dr. Marshall could not point the court to any evidence at all of any prejudice that might have befallen the defendant/appellant by this refusal of the adjournment, short of saying that he had only been instructed four or five days before the trial date. He did however refer us to

the English Rules of Court 1999 which we find might be of some help to us in this case and I refer to paragraph 35/3/1 which reads as follows:

> "**3.** The Judge may, if he thinks it expedient in the interest of justice, adjourn a trial for such time, and to such place, and upon such terms, if any, as he thinks fit."

A rule which we also have here in our jurisdiction. But I go back to 35/3/1 which reads:

> "The following matters should be taken into account when deciding whether or not to grant an adjournment:
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> 1. The importance of the proceedings and their likely adverse consequences to the party seeking the adjournment.
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> 2. The risk of the party being prejudiced in the conduct of the proceedings if the application were refused.
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> 3. The risk of prejudice or other disadvantage to the other party if the adjournment were granted.
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> 4. The convenience of the court.
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> 5. The interests of justice generally in the efficient dispatch of court business
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> 6. The desirability of not delaying future litigants by adjourning early and thus leaving the court empty.
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> 7. The extent to which the party applying for the adjournment had been responsible for creating the difficulty which had led to the application."

Those matters read as if the learned Resident Magistrate had acquainted herself with these particular rules before she came to her decision. As to the importance of the proceedings and the likely adverse consequence to the party seeking the adjournment, nothing short of saying that counsel had only been instructed a few days before was put forward to her. As to the risk of the party being prejudiced in the conduct of the proceedings in which the application was refused, again, nothing short of the fact that counsel was only instructed a few days before was put forward to the learned Resident

Magistrate. Indeed counsel, when the adjournment was granted, undertook the defence and put forward the defence for his client.

On the third, the risk of prejudice or other disadvantage to the other party if the adjournment were not granted, no evidence or information was put before the learned Resident Magistrate in that regard. Indeed nothing was put before this court in relation to either of those three paragraphs which I have referred to in detail. Therefore, no such ground exists to enable this court to act upon the complaint advanced by the appellant.

Four, i.e. the convenience of the court, the learned Resident Magistrate was at pains to set out the fact that the case has been set as a priority because of its age and because of the particular circumstances that attended on this case. She was also particular in pointing out that when cases are postponed there are so many other cases in the courts that have priority, that had this case been postponed the chances are that a date would not have been found in any early time. Those are the aspects that we think we need to refer to in relation to the submission made by Dr. Marshall. However, we cannot leave this case without indicating and commenting upon the fact that learned counsel who undertook the defence conceded during the case that there is no defence to the plaintiff's claim. An allegation of fraud was not exactly made against the plaintiff. It was guardedly worded to say that the transfer was vitiated by fraud. There is absolutely no such evidence advanced at the trial, and counsel for the defence was quite correct to have conceded that there was no defence in the case. In spite of that, Dr. Marshall has spent some time advancing to us without any evidence, that the appellant had been prejudiced as a result of the refusal of the application for the adjournment. He also referred to several cases which we need only say were decided on their own particular facts and did not advance new great principle of law which is not well known to us concerning the exercise of a judge's discretion. We find that no

incorrect principle of law was applied by the learned Resident Magistrate, nor were there any factors which she should have taken into account which she did not. In the circumstances we see no good reason, or any reason at all, to interfere with the exercise of her discretion to refuse the adjournment. The appeal is therefore dismissed. The order of the learned Resident Magistrate is confirmed. The respondent will get its costs fixed at $2000.00.