[2010] JMCA Civ 37

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 15/2007

BEFORE: THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA
THE HON. MRS JUSTICE McINTOSH JA (Ag)

BETWEEN DANNY McNAMEE APPELLANT

AND SHIELDS ENTERPRISES LTD RESPONDENT

Miss Kerry-Ann Ebanks instructed by Bishop & Partners for the appellant

Garth McBean and Jeffrey Daley for the respondent

24, 29 June, 1 July and 24 September 2010

MORRISON JA:

Introduction

[1] This is an appeal from the judgment of Her Honour, Mrs Sonia Bertram-Linton, resident magistrate for the parish of Manchester, given on 9 February 2007. By her order made on that date, the learned Resident Magistrate struck out the appellant's defence to the respondent's claim for recovery of possession of land, on the ground, among others, that it was frivolous and vexatious, and ordered that the appellant should

vacate the premises in question on or before 9 May 2007, with costs in the sum of $20,000.00 to be paid by the appellant.

[2] Pursuant to the order of the learned Resident Magistrate, a Warrant for Possession was duly executed and possession was given over to the respondent on 7 June 2007.

The facts in outline

[3] The background to this appeal discloses a wholly unusual set of facts, which it is necessary to state briefly for the purposes of the appeal. At about 9:30 am on 9 November 1994, the appellant's daughter, Miss Suzzette McNamee, who was employed to the respondent in its retail establishment in Mandeville as a cashier, was summoned to the office of Mr Harry Shields, the managing director of the respondent, where she saw Mr Shields and Mr Barlow Ricketts, an attorney-at-law in private practice in Mandeville. Upon her arrival in the office, she was accused by Mr Shields of having stolen in excess of $300,000.00 from the company.

[4] Some time later that day, the appellant, who was at home on his property at Spitzburgen, Chudleigh, in the parish of Manchester, received a visit from a truck driver, who told him that he had been sent by Mr Ricketts, who was also his attorney-at-law, who was asking him to come to see him immediately and had instructed that he should bring with him the duplicate certificate of title to his property, which was registered at

volume 1113 folio 51 of the Register Book of Titles. The appellant complied (because, he would subsequently indicate, it was Mr Ricketts himself who had assisted him in acquiring title to the property) by boarding the truck, armed with the duplicate certificate of title aforesaid. The appellant was then taken by the driver to the respondent's business place, where he saw Mr Ricketts and Mr Shields and, at Mr Ricketts' request, handed over the duplicate certificate to him. The appellant alleges that he was then given some blank sheets of paper, to which he was asked to affix his signature. At some point during that same afternoon, Miss McNamee was also asked by the respondent in the presence of Mr Ricketts to sign a document. The upshot of all of this was that at the end of the day, there were three documents dated 9 November 1994, one signed by Miss McNamee and the others signed by the appellant (and all witnessed by Mr Ricketts), as follows:

(1) A handwritten agreement signed by Miss McNamee, acknowledging that she had fraudulently removed $359,000 in cash, the property of the respondent, from her cash register, and agreeing to transfer her Subaru motor car licence no. 1958BB, said to be worth $80,000 "to offset some of this vast amount owed by me, also my father Mr Danny McNamee will give his house title as collateral to offset the balances owed when a detailed audit is completed".

(i) A document headed 'Agreement', signed by the appellant, whereby he agreed, "in consideration of amounts owed by my daughter", to give his property at Spitzburgen registered at Volume 1113 Folio 51 "as

collateral to offset all amounts owed by her to you when this audit is completed".

(ii) A document, also headed 'Agreement', signed by the appellant, whereby he agreed to deposit his certificate of title aforesaid with the respondent "as security for monies owed to the company by my daughter, Suzzette McNamee, and I hereby agree that when the sum is determined that a first legal mortgage for the amount to be registered against the title and I agree to execute all the necessary documents to give effect to the registration of the said mortgage".

[5] On that same day, the respondent took possession of Miss McNamee's Subaru motor car and in due course (on 25 November 1994) mortgage number 837906 dated 11 November 1994 was registered in the respondent's favour on the appellant's said certificate of title to secure the sum of $810,285.48, with interest.

[6] On 15 March 2001, Miss McNamee was convicted in the resident magistrate's Court for the parish of Manchester of 10 counts of larceny as a servant from the respondent, arising out of the same series of events already described. She was sentenced to 12 months imprisonment at hard labour on each count, suspended for two years and the sentences were ordered to run concurrently. However, on 13 March 2008, Miss McNamee's appeal to this court (which had been filed as long ago as 29 March 2001) was allowed and the convictions were quashed, the sentences set aside and a judgment and verdict of acquittal was entered in her favour.

[7] In the interim, pursuant to an Order for Foreclosure made under section 120 of the Registration of Titles Act (on the application of the respondent) by the Registrar of Titles on 27 January 2005, a new certificate of title was issued to the respondent (on 16 November 2005) as proprietor in fee simple of the property previously owned by the appellant at Spitzburgen in the parish of Manchester (see certificate of title registered at volume 1393 folio 493).

Other proceedings

[8] As early as 18 November 1994, Miss McNamee and the appellant, by writ of summons generally endorsed, commenced an action in the Supreme Court (Suit No. C.L. 1994/MC 468) against Mr Harry Shields for (i) an injunction to restrain Mr Shields from dealing in any way with Miss McNamee's Subaru motor car and the appellant's property registered at volume 1113 folio 51, (ii) an order that the said car and duplicate certificate of title be returned, and (iii) damages for detinue of the said motor car and duplicate certificate of title.

[9] An appearance was entered in this action on 19 January 1995, but no statement of claim was filed and this resulted in summonses for dismissal of the action for want of prosecution and for an extension of time to file a statement of claim coming on for hearing before Harrison J (as he then was) on 27 November 2001. In a written ruling given on 7

February 2002, the judge dismissed the application for extension of time and also dismissed the action for want of prosecution on the ground, among others, of inordinate and inexcusable delay on the part of Miss McNamee and the appellant in prosecuting the action. There is an indication in the skeleton arguments filed on behalf of the appellant that although an appeal was filed against this ruling, "it was not pursued due to financial constraints" (see para. 8 of the appellant's supplemental skeleton arguments filed on 19 June 2008).

[10] On 16 February 2005, Miss McNamee and the appellant filed a second action in the Supreme Court (Claim No. 2005 HCV00402) against the respondent and the Registrar of Titles, and by notice of application for court orders filed on the same date, sought an injunction to prevent the Registrar from issuing an Order for Foreclosure to the respondent and to prevent the respondent from foreclosing on the land comprised in certificate of title registered at volume 1113 folio 51 of the Register Book of Titles. However, when this application came on for hearing before Donald McIntosh J on 16 July 2005, it was dismissed, the court indicating that it was without merit. (In any event, by the time this application came to be heard, the foreclosure order had already been made by the Registrar on 27 January 2005 – see para. [7] above.)

[11] And then finally, on 2 February 2007, yet another action was commenced in the Supreme Court (Claim No. 2007 HCV00711) by Miss McNamee and the appellant against the respondent, claiming the following reliefs:

> "1. An injunction to prevent the Defendant by itself its agent or otherwise from selling, mortgaging, leasing, renting or otherwise disposing of the land registered at Volume 1393 Folio 493;
>
> 2. An order barring the Defendant from recovering possession of the premises mentioned at paragraph I above until further orders by the court;
>
> 3. A declaration that the 1St Claimant is the rightful owner in law of the premises registered at Volume 1393 Folio 493;
>
> 4. A declaration that the Defendant holds the property on trust for the 1st Claimant;
>
> 5. An order directing the Registrar of Titles to cancel the Duplicate Title registered at Volume 1393 Folio 493 and further order directing the said Registrar to Transfer the said premises to the 1st Claimant;
>
> 6. An order directing the Registrar of the Supreme Court to sign all documents on behalf of the Defendant in order to facilitate the transfer of the aforesaid premises to the 1st Claimant;
>
> 7. The sum of $130,000 plus interest to the 2nd Claimant for the loss of her motor car;
>
> 8. The sum of $8,030,000 representing loss of use of the said motor car and continuing;
>
> 9. Attorneys-at-law [sic] costs; and

10. Costs."

[12] In particulars of claim filed in this action Miss McNamee and the appellant gave particulars of the fraud alleged by them against the respondent, as follows:

"PARTICULARS OF FRAUD

a. Using the office of Managing Director along with physical and mental abuse on the 2nd Claimant to force her into a [sic] signing a document alleging a debt which does not exist;

b. Encouraging the 1st Claimant to hand over his title with the belief that Attorney-at-Law: Barlow Ricketts would require the said title for further legal work not connected to the Defendant;

c. Using Barlow Ricketts, Attorney-at-Law, for the 1st Claimant, to encourage him to sign documents well knowing that the said Barlow Ricketts is acting as the Attorney-at-Law for the Defendant;

d. Causing the signature of the 1st Claimant to be witnessed by [sic] Justice of the Peace in the absence of the 1st Claimant;

e. Using the services of Barlow Ricketts to prepare mortgage documents without the permission of the 1st Claimant; and

f. Mortgaging the property of the 1st Claimant without his knowledge or consent."

[13] This action remains pending in the Supreme Court.

The Resident Magistrate's Court proceedings

[14] The action which is the subject of this appeal (Plaint No. 75/06) was actually commenced by the respondent on 24 January 2006, that is, a year before the filing of the action in the Supreme Court last referred to. In it, the respondent sought an order for recovery of possession of the property from the appellant. By this time, of course, the respondent was the registered proprietor of the property and in its brief particulars of claim, it did no more than to refer to and to exhibit its certificate of title and the order for foreclosure. This was met by a defence filed on behalf of the appellant on 1 September 2006, in which the history that I have attempted to summarise above was set out in great detail and the respondent's right to possession was directly challenged by the appellant on the ground that the certificate of title relied upon by the respondent had been obtained by fraud. Particulars of fraud along the same general lines as, but not identical to, those set out in the Supreme Court action, were also provided. By a request filed on 24 February 2006, the appellant sought further and better particulars of the claim from the respondent, but it is not clear from the record whether this request was ever answered.

[15] The action was listed for trial on 9 February 2007 and, by notice filed on that same day, the appellant sought an order from the court transferring it to the Supreme Court "to join with Claim No. 2007 HCV00711" or, in the alternative, that the proceedings in the Resident

Magistrate's Court be stayed pending the outcome of that Supreme Court matter. In support of this application, an affidavit sworn to by Mr Keith Bishop, attorney-at-law, was filed on behalf of the appellant and in that affidavit the then value of the property was stated to be $16,000,000.

[16] When the matter finally came on for trial on 9 February 2007, the court was told by Miss Kerry-Ann Ebanks, who appeared for the appellant, that she was not instructed to conduct the trial, but had instructions only to make the application which had been filed that morning for an order transferring the action to the Supreme Court. The learned resident magistrate duly heard submissions from counsel in support of and against the application, reviewed the history of the matter as it appeared from the documents filed in support and ruled as follows:

> "Application to transfer the matter to the Supreme Court is denied/dismissed as the issues are concurrent with those previously raised in that arena and considered in the judgment of His Lordship on the 7th February 2002.
>
> A stay of the action would cause irreparable injustice to the Plaintiff/Respondent for reasons stated above as the Plaintiff is registered [sic] proprietor on the title and would be entitled in the absence of any other claim proved to possession".

[17] The court having ruled that the trial should proceed, Miss Ebanks then told the court that she would be relying on the defence filed in the matter. In response, counsel for the respondent applied for the defence

to be struck out, apparently on the basis that it raised issues which the Resident Magistrate's Court could not adjudicate upon, pursuant to section 105(10) of the Judicature (Resident Magistrates) Act ("the Act"). But the court was also told that "the defence was a repeat and recital of the issues and matters that had been fully interred as far back as 2002 in the Supreme Court by…Mr Justice Harrison and to attempt to resurrect them in this fashion was an abuse of process and certainly vexatious".

[18] The learned resident magistrate accepted these submissions and proceeded to make the following order:

> "1. The Defendants' defenses are struck out as they fail to state a cause of action within the Court's jurisdiction and due to the frivolous and vexatious nature of said defenses in the circumstances as they relate to matters, raised previously in the Supreme and the Court of Appeal.
>
> 2. Having considered the case *of* ***Dextra Bank and Trust Company Limited*** **vs.** ***Bank of Jamaica*** 31 JLR 342, the Defendants' Application for Stay of Proceedings is denied.
>
> 3. Order for possession is granted. Defendant shall give possession to the Plaintiff on or before May 9, 2007.
>
> 4. Plaintiff is awarded costs of Twenty Thousand Dollars ($20.000.00)."

The appeal

[19] Dissatisfied with this result, the appellant appealed to this court, filing amended grounds of appeal as follows:

"1. The Learned Resident Magistrate erred in striking out the Appellant's Defence on the basis that it failed to state a cause of action within the court's jurisdiction.

2. The Learned Resident Magistrate erred in striking out the Appellant's Defence as frivolous and vexatious as they [sic] relate to matters raised previously in the Supreme Court and the Court of Appeal.

3. The Learned Resident Magistrate erred in refusing to stay or in the alternative transfer the proceedings to the Supreme Court. In addition to which the case cited by the Learned Resident Magistrate, ***Dextra Bank and Trust Company Limited v Bank of Jamaica*** 31 JLR 342 does not contain any references to principles concerning Stay of Proceedings.

4. The Learned Resident Magistrate erred in making an order for possession without a trial being held in light of the defence raised."

The submissions

[20] At the outset of her submissions, Miss Ebanks very helpfully identified the issues arising from the amended grounds of appeal as follows:

(i) whether the learned Resident Magistrate had jurisdiction to make the order for the recovery of possession;

(ii) whether the learned Resident Magistrate erred in striking out the appellant's defence on the basis that it failed to state a cause of action within the court's jurisdiction;

(iii) whether the learned Resident Magistrate erred in striking out the appellant's defence as frivolous and vexatious as it relates to matters raised

previously in the Supreme Court and the Court of Appeal;

(iv) whether the learned Resident Magistrate erred in refusing to stay or in the alternative transfer the proceedings to the Supreme Court. In addition to which the case cited by the learned Resident Magistrate, ***Dextra Bank and Trust Company Limited v. Bank of Jamaica*** *31* JLR 342 does not contain any references to principles concerning stay of proceedings;

(v) whether the Learned Resident Magistrate erred in making an order for possession without a trial being held in light of the defence raised."

[21] To these five issues, Miss Ebanks added a sixth issue, originally described as a preliminary point, which was what was the effect on the proceedings, if any, of the verdict of acquittal entered in Miss McNamee's favour by this court when her appeal from conviction in the Resident Magistrate's Court was allowed on 13 March 2008.

[22] Taking the first and second issues together, Miss Ebanks referred us to section 96 of the Act and to the authorities which establish that it is for a plaintiff to show that his case is within the jurisdiction of the court by proving that the annual value of the property is not in excess of the prescribed limit, which is $75,000.00 (***Brown v The Attorney General*** (1968) 11 JLR 35, and ***Williams v Sinclair*** (1976) 14 JLR 172). She also referred us to Order VI Rule 4 of the Resident Magistrates Court Rules, which requires the plaintiff in actions for the recovery of land to furnish particulars containing

a full description of the property sought to be recovered, and of its annual value. On this basis, Miss Ebanks submitted that the respondent had not only not complied with Order VI Rule 4, but it had also failed to call any evidence to establish the annual value of the property, with the result that the learned resident magistrate's jurisdiction to make an order for recovery of possession had not been established and the appellant's defence ought not therefore to have been struck out.

[23] With regard to the third issue, Miss Ebanks submitted that Harrison J's order in the original Supreme Court proceedings had been based solely on the time which had passed between the filing of the writ of summons and the application for permission to file the statement of claim out of time and was not an adjudication on the merits of the matter.

[24] On the fourth issue, Miss Ebanks' submission was that the resident magistrate ought either to have stayed the proceedings for recovery of possession before her, pending the outcome of the Supreme Court proceedings, or, alternatively, to have transferred those proceedings to the Supreme Court to be tried with the Supreme Court action. In this regard, she referred us to section 130 of the Act and to the decision of this court in ***George Graham v Elvin Nash*** (1990) 27 JLR 570. A possible consequence of the proceedings not having been transferred to the Supreme Court, counsel pointed out further, was that there could be a

conflict in the decision of the resident magistrate and the Supreme Court. Miss Ebanks also questioned the relevance of the case of ***Dextra Bank and Trust Company Ltd v Bank of Jamaica***, to which reference was made by the resident magistrate, to the issue of a stay of proceedings. It had not been cited to her by either of the parties and neither of them had been given an opportunity to respond to it.

[25] On the fifth issue, Miss Ebanks submitted that the resident magistrate had made an order for possession without hearing any evidence, either in support of the claim or from the defence, and that the order had therefore been made in breach of section 96 of the Act, which requires the plaintiff to give proof of his title as well as that the defendant be given an opportunity to "show cause to the contrary". Miss Ebanks referred us on this point to the unreported decision of this court in ***Dave Dunkley v Jennifer Taylor*** (RMCA No. 29/2005, judgment delivered 10 May 2006) and to section 181 of the Act.

[26] And finally, on the sixth issue, Miss Ebanks referred us firstly to the well known (and widely disliked) rule in ***Hollington v F. Hewthorn & Co. Ltd*** [1943] 2 All ER 35, the effect of which is that a conviction in a criminal case is inadmissible in subsequent civil proceedings as evidence of the facts upon which the conviction was based. She went on to point out that the rule had been criticised (for instance, in ***Barclays Bank Ltd v Cole*** [1967] 2

QB 738, 743, in which Lord Denning MR described the case as an "unfortunate decision") and that in England, its actual effect has long been reversed by statute (Civil Evidence Act 1968, section 11). On this basis, Miss Ebanks then invited us to disregard ***Hollington v Hewthorn & Co. Ltd*** and to treat Miss McNamee's acquittal of the charges against her as proof of the fact that she did not commit larceny as a servant, with the result that the basis upon which the appellant's title was used to secure her alleged indebtedness to the respondent would disappear, as would the basis upon which the order for recovery of possession was made against the appellant. This approach, Miss Ebanks concluded in her submission on this point, was "not only a common sense approach but an approach whose time has come".

[27] On the strength of these submissions, Miss Ebanks asked us (i) to set aside the order made by the resident magistrate, (ii) to order that the appellant be allowed to enter and remain upon the property, and (iii) to order that the matter be transferred to the Supreme Court to be heard with the action currently pending in that court.

[28] Mr Daley responded on behalf of the respondent generally, save in respect of the sixth issue, which was dealt with last by Mr McBean. Mr Daley began his submissions by making the point that the respondent's title to the property can only be challenged if the order for foreclosure

pursuant to which it was issued is impeached, pointing out that the injunction which had been sought by the appellant in Claim No. 2005 HCV 00402 to prevent the making of that order had been refused. All issues of fraud, he submitted, had therefore been "interred". Although he eventually conceded that section 105(10) of the Act, to which the resident magistrate had referred in her reasons, was "probably" not applicable in these circumstances, he nevertheless maintained that the only basis on which the order for foreclosure could successfully be challenged was by proof of actual fraud. In this regard, Mr Daley referred to sections 119 and 120 of the Registration of Titles Act and the cases of ***Patch v Ward*** (1867) 3 Ch App 203 and ***Assets Company Ltd v Mere Roihi and Others*** [1905] AC 176.

[29] On the wider issue of the jurisdiction of the resident magistrate, Mr Daley submitted that since it was not competent of the resident magistrate to set aside the title obtained pursuant to the foreclosure order, no question of a bona fide dispute as to title, as contemplated by section 96 of the Act, could arise, and the applicable section of the Act was therefore section 89. It followed that in this case, the respondent as plaintiff in the court below had only to show that it was the registered proprietor and this would entitle it to an order for possession. In this regard, Mr Daley submitted, the case of ***Brown v The Attorney General*** (in particular, the judgment of Moodie JA at page 38) was relevant and

applicable to this case. The appellant's evidence as to the value of the property ($16,000,000.00), he concluded on this point, was further evidence that the resident magistrate had no jurisdiction to deal with the matter under section 96 of the Act.

[30] Mr Daley then referred us to the well known decision of the House of Lords in ***Hunter v Chief Constable of West Midlands and Another*** [1981] 3 All ER 727, to make the point that the appellant in this case was attempting to launch a collateral attack on the decision of a competent court, viz, the earlier decision of Harrison J, and that this amounted to an impermissible abuse of the process of the court.

[31] With regard to the sixth issue, that is, the effect of Miss McNamee's acquittal by this court, Mr McBean submitted that her appeal had been allowed on a "technicality", as a result of the fact that the proper foundation for the admission of computer generated evidence had not been laid by the prosecution. However, there was still the evidence of Miss McNamee's "confession", which remained a live issue upon which there had, to date, been no adjudication by the court.

[32] In all of these circumstances, both counsel for the respondent submitted, the learned resident magistrate had been correct to strike out the appellant's defence pursuant to section 172 of the Act and the appeal ought therefore to be allowed.

Discussion and analysis

[33] For ease of reference, I propose in the first place to adopt Miss Ebanks' formulation of the issues and to deal with them in the same order that she did. To these issues, I will add (as the seventh issue) the question of the effect of the order for foreclosure, which was so strongly urged by Mr Daley on behalf of the respondent.

Issues 1 and 2 – the resident magistrate's jurisdiction to make the order for recovery of possession and the striking out of the defence for want of jurisdiction

[34] The appellant says that section 96 of the Act is applicable to the respondent's claim for recovery of possession in this case, while the respondent asserts that section 89 is the relevant section. Both sections are set out below:

> "**89**. When any person shall be in possession of any lands or tenements without any title thereto from the Crown, or from any reputed owner, or any right of possession, prescriptive or otherwise, the person legally or equitably entitled to the said lands or tenements may lodge a plaint in the Court for the recovery of the same and thereupon a summons shall issue to such first mentioned person; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or

> before such day as the Magistrate shall think fit to name; and if such land be not given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the court to give possession of such premises to the plaintiff. "
>
> "**96.** Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed seventy-five thousand dollars, any person claiming to be legally or equitably entitled to the possession thereof may lodge a plaint in the Court, setting forth the nature and extent of his claim ... and if the Defendant or the Defendants, or either of them, shall not, on a day to be named in such summons, show cause to the contrary, then on proof of the plaintiffs title and of the service of the summons on the defendant or the defendants, as the case may be, the Magistrate may order that possession of the lands or tenements mentioned in the said plaint be given to the plaintiff…"

[35] It will immediately be seen from a comparison of these two sections of the Act that, while in both the person seeking to recover possession is put to the proof of his title, the question of the annual value of the land does not arise under section 89, while under section 96 it is explicitly made a limiting factor in relation to the court's jurisdiction. This is how Moodie JA, in a dictum referred to by counsel on both sides, contrasted the provisions of these sections in ***Arnold Brown v The Attorney General*** (at page 38):

> "These two sections apply to different circumstances (see ***Francis v. Allen*** (1)) but it is to be observed that in both sections proof of his title is a condition precedent to the plaintiff obtaining an order for possession, albeit that the quality of such proof may vary according to the facts of the particular case. However, under s. 96 the Plaintiff is required to set forth in his plaint the nature and extent of his claim, whereas in s. 89 there is no such requirement.
>
> In the English Country Court Practice the particulars are required to contain the ground on which the Plaintiff claims possession. It would seem that this was the practice followed in the District Courts, the precursor of the Resident Magistrate's Court (see ***Paisely v. Butterworth*** (2)).
>
> The respondent has chosen to bring this action for recovery of possession in the Resident Magistrate's Court, and in so doing two elemental considerations call for attention: one, that the appellant is in possession, thus the respondent must rely on his right to possession accompanied by actual possession, and, in such case, to succeed he must recover by strength of his own title without regard to the weakness of the appellant's title; two, that the Resident Magistrate's Court is a court of limited jurisdiction and if he invokes its process he must be prepared to show that his case falls within its authority *(**R v. Gavin*** **(3)**)."

[36] It seems to be clear, therefore, that an order under section 89 is appropriate in cases in which the defendant's occupation of the property is not attributable to any kind of right or title. This is how Shelley JA put it in ***Arnold Brown v Attorney General*** (at page 41):

> "In short, this section shows how to deal with the squatter. The question of annual value does not arise in proceedings under it. The plaintiff is required to prove that the defendant is a squatter…"

[37] Section 96 on the other hand, is appropriate to cases in which a dispute as to title to property has arisen, in which case the plaintiff claiming to be entitled to possession on either legal or equitable grounds may lodge a plaint setting out the nature and extent of his claim, whereupon a summons will issue to the person in actual possession of the property. If when the matter comes on for hearing that person does not show cause to the contrary, the plaintiff, upon proving his own title, will thereupon be entitled to an order for possession of the property. However, in any such case, the jurisdiction of the resident magistrate is limited to property the annual value of which does not exceed $75,000. The requirement in Order VI, rule 4 of the Resident Magistrate's Court Rules that in all actions for the recovery of land "the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof…" is obviously, in my view, particularly applicable to section 96 claims for recovery of possession.

[38] The question of what is required for a defendant to raise a dispute as to title within the meaning of section 96 has not been without controversy. In ***Arnold Brown v The Attorney General*** it was held by the

majority (following the earlier decision of this court in ***Francis v Allen*** (1956-60) 7 JLR 100) that the defendant was required only to show a *bona fide* intention to dispute the plaintiff's title in order to bring the matter within the ambit of section 96. However, Shelley JA in a powerful dissenting judgment, considered that it could not be enough for a defendant to remove an action from the sphere of section 89 into the sphere of section 96 merely by stating as his defence "Plaintiff is not entitled to possession and defendant puts plaintiff to proof of his title" (see page 41).

[39] Shelley JA's position was fully vindicated by the subsequent decision of the court in ***Ivan Brown v Bailey*** (1974) 12 JLR 1338 (though, curiously, without any reference to ***Arnold Brown v The Attorney General***). In that case (later followed in ***Williams v Sinclair*** (1976) 14 JLR 172), it was held that in order to bring the section into play, the *bona fides* of the defendant's intention is irrelevant in the absence of evidence of such a nature as to call into question the title of the plaintiff. This is how Graham-Perkins JA, who delivered the judgment of the court, stated the position after a review of the relevant authorities (at page 1343):

> "All the authorities show with unmistakable clarity that the true test is not merely a matter of *bona fide* intention, but rather whether the evidence before the court, or the state of the pleadings, is of such a nature as to call into question the title, valid and recognisable in law or in equity, of someone to the subject matter in dispute. If

> there is no such evidence the *bona fides* of a defendant's intention is quite irrelevant."

[40] Against this background, it appears to me that the instant case is clearly a section 96, rather than a section 89, case, since the position of the appellant can by no measure be equated to that of a squatter in the sense in which Shelley JA used that word in ***Arnold Brown v The Attorney General*** (see para. [36] above). It appears to me further that the appellant's detailed written statement of his defence, together with the request for further and better particulars of the plaintiff's claim, both filed well in advance of the trial, were sufficient to indicate on the pleadings not only that he was seeking to raise a *bona fide* dispute as to the respondent's title, but also the base on which that dispute was premised. Further still, that even if the pleadings were insufficient for this purpose, it was incumbent on the resident magistrate to hear the evidence before determining that she had no jurisdiction in the absence of proof that the annual value of the property fell within the statutory limit of $75,000. The respondent did not specifically plead the annual value of the property, as required by Order VI, rule 4, the whole purpose of which, in the view of one learned commentator well over 35 years ago, "is to enable the Magistrate to see whether or not the case falls within the jurisdiction of the Court" (see an article by R.N.A. Henriques QC, 'The action for the Recovery of Possession of Land in the Resident Magistrate's Courts', Jamaica Law Journal, October 1973, page 79). But further, there is

absolutely no indication on the record that the property in this case did not exceed the statutory limit and it therefore seems to me that the resident magistrate's jurisdiction to make the order that she made under section 96 had not been established.

[41] The notes of evidence taken by the resident magistrate clearly suggest that, in ruling that the appellant's defence should be struck out "as being outside of the jurisdiction of the Resident Magistrate's Court", she had primarily in mind section 105(10) of the Act. That section provides as follows:

> "105. Every Court shall have and exercise jurisdiction in the suits or matters hereinafter mentioned, that is to say -
>
> …
>
> 10th. In all suits for the rectification or cancellation of deeds or instruments, including instruments under the Registration of Titles Act, where the value of the property affected thereby does not exceed the sum of one million five hundred thousand dollars."

[42] It will be seen immediately that subsection (10) is explicitly limited by its terms to suits "for the rectification of deeds or instruments" and therefore has, as Mr Daley quite properly conceded during the argument, no bearing at all on this matter, which is an action for recovery of possession. I accordingly consider that the learned resident magistrate also fell into error in striking out the appellant's defence on the ground of it having failed "to state a cause of action within the Court's jurisdiction"

(this was, in any event, a curious statement, since, as Miss Ebanks also pointed out, the appellant was the defendant and not the plaintiff in the action).

Issue 3 – should the appellant's defence have been struck out as frivolous and vexatious?

[43] The learned resident magistrate's further stated reason for striking out the appellant's defence was that it was "frivolous and vexatious …in the circumstances as they relate to matters raised previously in the Supreme Court and the Court of Appeal" (see para. 1 of the Formal Order dated 11 May 2007). The two actions filed by the appellant in the Supreme Court prior to the filing by the respondent of the current Resident Magistrate's Court proceedings were Suit No. C.L. 1994/MC 468, in which Harrison J dismissed an application for extension of time to file a statement of claim on 7 February 2002 (although an appeal was filed against this decision, it was not pursued – see para. [9] above), and Claim No. 2005 HCV00402, in which McIntosh J refused to grant an injunction to prevent the making of an order for foreclosure on 16 July 2005 (see para. [10] above).

[44] ***Hunter v Chief Constable of West Midlands and Another***, upon which the respondent primarily relies on this point, is an example of an abuse of process arising from "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against

the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made" (per Lord Diplock, at page 733).

[45] But that case is in my view clearly distinguishable from the instant case in several respects, not least of which is that neither of the previous actions brought by the appellant in the Supreme Court has resulted in a final adjudication of any kind on the matters complained of by the appellant in his defence filed in the court below in this matter. But further, and in any event, the instant case is not one that was brought by the appellant, who is therefore not the plaintiff but the defendant in the proceedings in the court below, with the inescapable result, it seems to me, that the appellant cannot be said to have mounted a collateral attack of any kind on a previous decision, even if any such could be identified. I can in these circumstances accordingly see no objection to the appellant defending himself against the claim for an order of recovery of possession in these proceedings by pleading fraud on the part of the respondent/plaintiff.

Issue 4 – whether the resident magistrate erred in refusing to stay or in the alternative transfer the proceedings to the Supreme Court

[46] Section 130 of the Act gives to a resident magistrate the power to transfer a case to the Supreme Court "in any case which shall appear to

the said Magistrate fit to be tried in the Supreme Court, and subject to any order of the Supreme Court upon such terms as he shall think fit". In ***Graham v Nash***, to which we were referred by both Miss Ebanks and Mr Daley, Carey JA said this (at page 572):

> "The Resident Magistrate is required to exercise the discretion conferred on him by Section 130 of the Act, judicially. This court can only interfere with the exercise of that discretion where he is shown to have relied on some wrong principle of law or incorrectly applied the correct principle or did not take into consideration relevant circumstances."

[47] It is therefore necessary to examine carefully the basis upon which the resident magistrate exercised her undoubted discretion in respect of the appellant's application that the matter before her should be transferred to the Supreme Court to join with Claim No. 2007 HCV00711 and for a stay of the proceedings before her to await the outcome of the Supreme Court action.

[48] The resident magistrate's stated reason for dismissing the application to transfer the matter was that "the issues are concurrent with those previously raised in that arena and considered in the judgment of [Harrison J] on the 7th February 2002". It seems to me, with the greatest of respect to the resident magistrate, that this statement reveals a complete misconception of what was before Harrison J and of what he decided. It

will be recalled that what was before that learned judge were two applications, one by the appellant/plaintiff for an extension of time to file a statement of claim and the other by the respondent to dismiss the action for want of prosecution. In dismissing the former and granting the latter application, what the learned Harrison J was primarily concerned with was whether the delay in filing the statement of claim was inordinate and inexcusable and had in the circumstances of the case caused prejudice to the respondent. For these purposes it was not necessary for the judge to consider, and he did not in fact consider the issues in the case.

[49] With regard to the application for a stay of the action, which she also refused, the learned resident magistrate's stated reason was that a stay "would cause irreparable injustice to the [respondent]…as the [respondent] is registered proprietor on the title and would be entitled in the absence of any other claim proved to possession". It does not appear from this statement that any consideration was given to attempting to balance the possibility of injustice to the respondent against the possibility of injustice to the appellant, who was the previous registered proprietor on the title in actual possession of the property in question and who was alleging fraud against the respondent. But quite apart from this, the only way in which "any other claim" could be proved could only be

by a trial of the very action in which the appellant was asserting his claim to be entitled to remain on the property.

[50] The difficulty with the resident magistrate's approach to this aspect of the matter is further compounded, it seems to me, by the statement in para. 2 of the Formal Order that "Having considered the case of ***Dextra Bank and Trust Company Limited vs. Bank of Jamaica***…the Defendant's Application for Stay of Proceedings is denied". The reference to the ***Dextra Bank*** case in this context was clearly in error, as Miss Ebanks submitted, since the brief report of Harrison J's ruling in that case demonstrates that what it was concerned with was the right to begin in a civil case (indeed, the ruling is explicitly captioned, it appears by the judge himself, "Determination of the right to begin").

[51] It therefore seems to me that in respect of both limbs of this issue, that is, the application to transfer the matter to the Supreme Court and for a stay of proceedings, in the exercise of her discretion the learned resident magistrate had regard to some irrelevant factors and also failed to take into account relevant factors. In these circumstances it is clear from the authorities that this court has not only the power, but also a duty, to intervene.

Issue 5 – whether the resident magistrate erred in making an order for possession without a trial being held in the light of the defence raised

[52] The notes of evidence taken by the resident magistrate demonstrate that, having refused to grant the application to transfer the action and for a stay, she proceeded immediately to consider and to accede to the respondent's application to strike out the defence. It is therefore clear that no evidence was adduced by either the respondent in proof of his title or by the appellant in an attempt to "show cause to the contrary". It appears to me that the appellant was thus deprived of his statutory right to put before the magistrate the material foreshadowed in the defence which had been filed on his behalf and that the order for possession which was thereafter made against him was made without there being any evidence to support it.

Issue 6 – the effect of Miss McNamee's acquittal by this court

[53] Miss Ebanks invited us to take two bold steps on this issue. The first is to decline to follow ***Hollington v Hewthorn & Co. Ltd*** and the second is, having done that, to hold that an acquittal of a criminal charge may be treated as evidence that the defendant did not commit the wrong for which he (or, as in this case, she) was previously charged.

[54] The first of Miss Ebanks' two steps would involve the court ignoring a well established rule of the common law which has been previously applied by this court and which has not been abrogated by legislation. In

Ivanhoe Baker v Michael Simpson (SCCA No. 50/2000, judgment delivered 20 December 2001), Smith JA (Ag), as he then was, referred to ***Hollington v Hewthorn and Co. Ltd*** as an authority which "I think we have followed in this jurisdiction" (at page 8). More recently, in ***Michael and Richard Causwell v Dwight and Lynne Clacken*** (SCCA No. 28/2008, judgment delivered 24 October 2008), Cooke JA subjected ***Hollington v Hewthorn & Co. Ltd*** to a searching examination and ultimately distinguished it on the basis that it "did not consider findings emanating from tribunals empowered by statute to enquire and come to conclusions" (para. 8). However, it seems clear that that learned judge nevertheless considered that ***Hollington v Hewthorn & Co. Ltd***, despite the judicial criticism to which it has been subjected over the years, remained good authority for what it decided, that is that evidence of a conviction in criminal proceedings was not admissible in subsequent civil proceedings as evidence of the facts upon which the criminal conviction was based.

[55] In these circumstances, the basis of Miss Ebanks' invitation to the court to treat Miss McNamee's acquittal by this court as evidence in the civil proceedings that she had not stolen any money from the respondent as alleged must, it seems to me, fall away. It may, however, be a relevant factor in determining whether any kind of issue estoppel could arise in

these circumstances in the civil proceedings, but that is a matter to be determined, in my view, in those proceedings.

Issue 7 – the effect of the order for foreclosure

[56] Among the powers given to a mortgagee of registered land in the event of a default in payment by the mortgagor is the power to "foreclose the right of the mortgagor…to redeem the mortgaged land in the manner hereinafter provided" (Registration of Titles Act, section 109). The actual procedure for foreclosure is set out in sections 119 and 120 of the Registration of Titles Act, section 119 providing for an application to be made to the Registrar of Titles for an order for foreclosure upon stated conditions and section 120 providing for the issue of such an order by the Registrar and stating its effect as follows:

> "…and every such order for foreclosure under the hand of the Registrar when entered in the Register Book, shall have the effect of vesting in the mortgagee or his transferee the land mentioned in such order, free from all right and equity of redemption on the part of the mortgagor or of any person claiming through or under him subsequently to the mortgage; and such mortgagee or his transferee shall, upon such entry being made, be deemed a transferee of the mortgaged land, and become the proprietor thereof, and be entitled to receive a certificate of title to the same in his own name, and the Registrar shall cancel the previous certificate of title and duplicate thereof and register a new certificate."

[57] It is therefore clear that the effect of the issue of the order for foreclosure and the subsequent issue to the respondent of a certificate of title to the property was to invest the respondent with all the rights and protections of a registered proprietor of land generally. So that the provisions of the Registration of Titles Act which insulate the registered proprietor from challenge to his title save in very limited circumstances (the most notable of which is in cases of fraud – see section 161(d) of the Registration of Titles Act) will equally avail a person whose title derives from a foreclosure order having been made in his favour pursuant to the statutory provisions.

[58] This is obviously a point which the respondent makes with great force, with Mr Daley going on to submit that the respondent's title in the instant case can only be defeated by the setting aside of the order for foreclosure if the appellant can prove that it was obtained by fraud and, further, that fraud in this context connotes actual (as opposed to constructive or equitable) fraud. Authority for both of these points is to be found in the old case of ***Patch v Ward***, which was concerned with an action to set aside a decree absolute for foreclosure which had been made several years before. It was held by the Court of Appeal that to set aside such an order it was necessary to show fraud, Lord Cairns LJ observing (at page 207) that fraud for this purpose "…must clearly…be actual fraud, such that there is on the part of the person chargeable with

it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him". (See also the judgment of Sir John Rolt LJ, at page 212, in which it was said that "the fraud must be positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case…", as well as the better known decision on this point of the Privy Council in ***Assets Company Ltd v Mere Roihi***, to which we were also referred by Mr Daley.)

[59] The upshot of all of this, Mr Daley submitted, is that there can be no *bona fide* dispute as to title so as to bring the case within section 96, since in the pending Supreme Court action none of the appellant's particulars of fraud is directed to the issue of foreclosure. There can be no doubt that these are powerful points which are, also undoubtedly, clearly apt to give the appellant and his legal advisors considerable food for thought in due course. However, I do not think that it would be safe to regard them as decisive of the outcome of this matter at this still very preliminary stage of the litigation, particularly as, despite the best efforts of counsel, this aspect of the matter was not fully argued before us.

Disposal

[60] So how then, in the light of all the foregoing, is this appeal to be disposed of? The judgment of the resident magistrate was given effect to

shortly after it was made known by the appellant being put out of possession of the property in favour of the respondent. However, we were advised by Mr Daley that the property remained in the ownership of the respondent, pending the outcome of the criminal case. I therefore think that this appeal should be allowed and the orders of the learned resident magistrate set aside. I would propose that the following orders be made in their place:

(i) The order of the resident magistrate striking out the appellant's defence is set aside.

(ii) The matter is transferred to the Supreme Court to be consolidated and tried with Claim No. 2007 HCV00711 and all further proceedings in the Resident Magistrate's Court are to be stayed pending the outcome of the Supreme Court action.

(iii) The order of the Resident Magistrate for possession to be given to the respondent is set aside and it is hereby ordered that the appellant is to be restored to possession of the property, pending the outcome of the Supreme Court action.

(iv) Costs of the appeal and of the hearing before the resident magistrate to the appellant, to be taxed if not sooner agreed.

PHILLIPS, JA

I have read the judgment of my brother Morrison JA. I agree with his reasoning and conclusions and have nothing further to add.

McINTOSH, JA

I too have read and agree with the reasoning and conclusions of my brother Morrison JA.

MORRISON, JA

ORDER:

(1) Appeal allowed and the orders of the learned resident magistrate set aside.

(2) The order of the resident magistrate striking out the appellant's defence is set aside.

(3) The matter is transferred to the Supreme Court to be consolidated and tried with Claim No. 2007 HCV00711 and all further proceedings in the Resident Magistrate's Court are to be stayed pending the outcome of the Supreme Court action.

(4) The order of the Resident Magistrate for possession to be given to the respondent is set aside and it is hereby ordered that the appellant is to be restored to possession of the property, pending the outcome of the Supreme Court action.

(5) Costs of the appeal and of the hearing before the resident magistrate to the appellant, to be taxed if not sooner agreed.