[2019] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CIVIL APPEAL NO 7/2013

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MS JUSTICE EDWARDS JA
THE HON JUSTICE MR JUSTICE FRASER JA (AG)

BETWEEN	**BEVERLEY SIMMS**	**1ST APPELLANT**
AND	**DONOVAN SIMMS**	**2ND APPELLANT**
AND	**LIONEL JOHNSON**	**RESPONDENT**

Raymond Samuels instructed by Samuels Samuels for the appellants

Anthony Pearson instructed by Pearson & Co for the respondent

5 March and 17 June 2019

MCDONALD-BISHOP JA

[1] I have had the privilege of reading, in draft, the comprehensive reasons for judgment of Edwards JA. They fully accord with my own reasons for agreeing with the decision of the court made on 5 March 2019 as set out in paragraph [2] below. I have nothing useful to add.

EDWARDS JA

Background

[2] The appellants brought this appeal against the order of the Parish Court Judge (then known as Resident Magistrate) for the parish of Saint Elizabeth, made with the consent of the parties. The appellants, in this appeal, are impugning the validity of that consent order, and indeed, the trial of the plaint. On 5 March 2019, we heard this appeal and, after hearing arguments from counsel on both sides, we made the following orders:

> "(1) The appeal is dismissed.
>
> (2) The consent judgment entered by Her Honour Mrs Sonya Wint-Blair is affirmed.
>
> (3) Costs of this appeal to the respondent in the sum of $50,000.00."

At that time, a promise was made to give reasons in writing for that decision. This is a fulfilment of that promise.

[3] The facts, in brief, are that in 2009, the respondent brought an action against the appellants, jointly and severally, for trespass and damages in the sum of $250,000.00 and for an injunction. To that action, the appellants raised the defence of ownership, claiming that their family had a common law title to lands, which included the disputed portion, for which the respondent claimed he was the owner.

[4] The respondent's case was that he had purchased a piece of land at Burnt Ground in the parish of Saint Elizabeth in the year 1985, containing by survey 3935.55 square meters, surveyed it and had it cut off from a larger portion of the land which was

approximately 4 ½ acres. At the time of his purchase, the land was conveyed to him by common law indenture dated 28 October 1985 and was recorded at Liber New Series 7606 Folio 89 at the Records Office and on Surveyor's Diagram bearing examination number 195458. The respondent bought the land from his grandaunt Evelyn Fagan. The transaction was done through an attorney-at-law and the land was surveyed, fenced, transferred on the tax roll and he was given a common law indenture. The respondent had been on the tax roll since 1987. The respondent resided in England but left his cousin, Noel Fagan to oversee and use the land. He visited Jamaica and the land from time to time. Noel Fagan reared goats on the land.

[5] In 2009, the respondent through Noel Fagan, attempted to erect two columns on the property and was prevented from doing so by the appellants. Interestingly, the appellants and the respondent are cousins, as the 1st appellant's father is the respondent's granduncle. The 1st appellant's grandfather, Phillip Fagan, is the respondent's great-grandfather. Evelyn Fagan, the respondent's grandaunt, was the sister of the 1st appellant's father, Granville Fagan. Their father was Phillip Fagan. Evelyn Fagan was, therefore, the 1st appellant's aunt as well as the respondent's grandaunt. The land sold to the respondent by Evelyn Fagan, had been a gift to her by her father Phillip Fagan, who let her into possession from 1932.

[6] The appellants claim that Evelyn Fagan had sold her land to their father, Granville Fagan, and that the only land she had remaining was further away from the land in dispute. The respondent and his witness, Noel Fagan, agreed that Evelyn Fagan had sold

land to the 1st appellant's father but claimed that that land was 40 metres south east of the respondent's property and was not the same piece of land. They also claimed that the land being claimed by the 1st appellant was a different piece of land from that owned by the respondent. Evidence was also given that the 1st appellant occupied land approximately one-half of a mile from the respondent's land.

[7] The boundaries of the land which the respondent claims as his, are described in the Indenture of Conveyance as "…butting Northerly on the parochial road from Burnt Ground to Santa Cruz, Southerly on land belonging to Kenneth Fagan, Westerly on land belonging to Norman Harrison, and Easterly on a 24 feet wide reserved road". This reserve road also adjoins land belonging to Curtis Johnson. The boundaries of the land being claimed by the 1st appellant are described in her evidence (having apparently refreshed her memory from documents in her possession) as "Northerly on lands belonging to May McClean, Southerly on lands belonging to Daniel Smalling, Easterly on lands belonging to Egbert Sherman and Westerly on lands belonging to Osmond Mullings".

[8] The parcel of land comprising 4 ½ acres of land being claimed by the appellants, is colloquially known as 'family land'. The 1st appellant claimed to have lived on it for 30 years and two of her daughters have built houses on it. Noel Fagan also lives on the land. However, the portion of land claimed by the respondent is an empty lot occupied only by Noel Fagan and his goats.

[9] Following the respondent's filing of the plaint for trespass, there were several trial dates without the matter being heard. The several adjournments were due to a variety of reasons, including the absence of the attorneys representing one or both of the parties. After numerous adjournments, with the parties, on occasion, expressing to the court, their dissatisfaction with the delays, the Parish Court Judge took the decision that the matter must be heard with or without the lawyers present.

[10] Although the respondent began the plaint with a common law title, by the time the matter came to be heard the land was registered at Volume 1453 Folio 590 of the Register Book of Titles.

The trial of the plaint commenced on 15 March 2012 and was adjourned part-heard to a further date. The evidence of the 1st appellant was taken after the close of the respondent's case and a further adjournment was taken for the appellants' counsel to agree a date for continuation of the trial. On the day set for continuation, counsel for the appellants appeared. Upon being confronted with the evidence that the respondent had secured a registered title for the disputed portion of land, the attorney spoke privately to the appellants. After speaking with the appellants, the attorney addressed the court and asked for a consent judgment to be entered. No further evidence was taken and the case was determined in favour of the respondent by consent. The Plaint Note was endorsed that the order was made by consent and was signed to that effect by all the parties. It was also signed by the Parish Court Judge.

The grounds of appeal

[11] The appellants, initially, filed the following three grounds of appeal:

> "Ground 1: That the learned trial judge did not make any finding as to the ownership despite the fact that this entire property had been held for three (3) generations and over 80 years.
>
> Ground 2: That the owner on the Tax Roll is Phillip Fagan, the grandfather of the Defendant.
>
> Ground 3: That the Defendant held documentary evidence of ownership of the entirety of the land that is 4½ acres going back 55 years to 1957 which was produced at trial."

[12] The appellants sought leave to argue additional grounds of appeal by way of an amended notice of application for court orders, filed 27 July 2015. Permission was granted to the appellants to argue three additional grounds of appeal as follows:

> "GROUND 4
>
> That the trail [sic] took place without [their] Attorney-at-Law being present and given the nature of the claim the Appellants could not adequately defend themselves at the trial. The Attorney-at-Law only appearing at the conclusion of the evidence. The Appellants not being properly represented and in any event in the circumstances the Appellants did not receive a fair trial which was prejudicial to their interest.
>
> GROUND 5
>
> That the Consent Judgment entered herein be set aside in that:
>
> (a) That [sic] at no time did Counsel for the Appellants or themselves ever discuss a compromise
>
> (b) That [sic] the Appellants gave no instructions as to acceptance of any compromise nor did they consent to such compromise any or at all.

GROUND 6

That [sic] Resident Magistrate's Court of St. Elizabeth holden at Santa Cruz had no jurisdiction to hear Plaint No. 149/09 as the subject matter of the Plaint was outside the jurisdiction of the said court and in the circumstances the Plaintiff should have been non-suited."

The issues

[13] The issues arising in this appeal are:

(1) whether the consent judgment entered into by the parties should be set aside;

(2) whether the appellants had a fair trial; and

(3) whether the parish court judge had the jurisdiction to hear the plaint.

Submissions

The appellants' submissions

[14] Counsel for the appellants, Mr Samuels, submitted that the appellants did not get a fair trial as the Parish Court Judge tried the matter in the absence of the appellants' attorney-at-law. He argued that the appellants were, thereby, left to defend themselves at the trial and in those circumstances, they were severely prejudiced. Counsel also argued that at no time did the appellants enter into a compromise agreement and that the consent judgment entered by the Parish Court Judge was antithetical to the defence that the appellants were advancing in the court.

[15] Counsel argued further that, in any event, the Parish Court Judge had no jurisdiction to hear the matter. Counsel pointed to section 96 of the Judicature (Parish Court) Act, noting that since the appellants had produced documentary proof of ownership of the land at the trial, the title was in dispute and therefore section 96 was applicable.

[16] Counsel submitted that a dispute having arisen, the Parish Court Judge ought not to have proceeded with the trial before ensuring she had jurisdiction to hear the matter.

[17] Counsel also argued that the consent judgment, which was entered on 20 September 2012, for the payment of $100,000.00 to the respondent and for an injunction against the appellants, was not valid as the appellants gave no such instructions to, and did not themselves, agree to a consent order. Counsel relied on the case of **Leeman Vincent v Fitzroy Bailey** [2015] JMCA Civ 24.

[18] Counsel argued further that the issue which was raised before the Parish Court Judge was in regard to having the matter transferred to the Supreme Court, pursuant to section 130 of the Judicature (Parish Courts) Act, and not the entry of a consent judgment against the appellants. The entry of the consent judgment, he submitted, would prove prejudicial to any future proceedings in any event, especially in the light of the fact that both attorneys-at-law were present when the issue of the proper forum was raised by the appellants' attorney-at-law before the Parish Court Judge.

[19] Counsel maintained that if the appellants were to consent in those circumstances, it would be tantamount to saying that they agreed that the respondent was the owner of

the land and that they were, indeed, trespassers. Counsel contended that this would preclude the appellants from later challenging the respondent's title in the Supreme Court, as they would be held to their consent to his ownership in the Parish Court.

Respondent's submissions

[20] Counsel Mr Pearson, on behalf of the respondent, submitted that sections 89 and 96 of the Judicature (Parish Court) Act were irrelevant to the case. He maintained that those sections relate specifically to matters pertaining to a claim for recovery of possession. Counsel argued that the respondent's claim in the Parish Court was for trespass and at no time did he claim for recovery of possession. Counsel argued further, that all the respondent did in the Parish Court was to hold up his title and say "these people are trespassing on my land".

[21] Counsel pointed out that the Parish Court Judge had taken into account no less than six exhibits from the respondent, to include; his common law title, certificate of payment of taxes, survey diagram, two receipts showing payment of property taxes and his registered title.

[22] Counsel also pointed to the fact that the appellants had filed two joint affidavits, both sworn on the same day. Counsel indicated that in both affidavits, the appellants admitted that at the time the consent judgment was made, counsel acted on their behalf. The consent order, he noted, bore the signatures of the respondent, who was the plaintiff, that of both appellants, who were the then defendants, and the Parish Court Judge.

[23] Counsel argued that the appellants did not need to give authority to counsel to consent on their behalf because it was their deed. The signatures, he said, are theirs. He pointed to paragraph 18 of their joint affidavits and contended that at the material time, the steps they took were explained to them. Their consent, he argued, was informed consent.

[24] Counsel argued further that it was plain that when their attorney arrived in the middle of the trial and was met with the existence of the respondent's registered title, he simply must have explained to them that the "buck stops here". Counsel also pointed to the affidavit of the Parish Court Judge, which stated that the consent was arrived at after hearing submissions from the attorneys.

[25] Counsel submitted that it is clear that the consent order indicated that the parties had struck a true bargain. Their affidavits, he said, showed that they were advised of the legal position which was that the case must be determined against them, in the light of the registered title. Counsel submitted further, that the consent order was not one imposed on the appellants by the court but had been arrived at by them with submissions by their own counsel to the court, to that effect.

[26] Counsel argued further that the benefit to the appellant in agreeing the order was that, although the respondent had filed a claim for damages in trespass for $250,000.00, he compromised by accepting $100,000.00 and an injunction restraining the appellant from trespassing on his property. The appellants, he said, were well aware that any challenge they wished to make to the respondent's title to the property had to be made

to the Supreme Court in a claim for fraud against the title. This, he said, was clearly explained to the appellants as indicated in their affidavits.

Discussion

Issue 1-Whether the consent judgment ought to be set aside (ground 5)

[27] I will begin the discussion with the appellants' complaint in ground 5 as it is more convenient to do so, bearing in mind the fact that the case had been determined by the consent order and considering the conclusion I would necessarily have had to reach, on the remaining grounds.

[28] The circumstances of this case are not altogether unusual in the Parish Courts. The plaint was filed by the respondent on 9 April 2009. Three years later, the plaint still was not heard. Several trial dates were not met. On 15 March 2012, the Parish Court Judge began hearing evidence in the case, in the absence of the attorneys on record for both parties. It was noted on the record, however, that counsel for the respondent, had another counsel holding in the matter on her behalf. On that occasion, the respondent and his witness gave evidence and the case for the respondent was closed. The 1st appellant began giving evidence and the matter was then adjourned to 12 July 2012 for mention, for a date to be fixed for continuation, presumably, so that the appellants' attorney could attend at a date convenient to him.

[29] The matter was set to resume on 20 September 2012. On that day, counsel for the appellants attended court. He spoke to the appellants and he addressed the court. Part of what is recorded as having been said, by the appellants' attorney, to the court, is

the fact that the respondent had, since filing the action, received his registered title on 3 November 2011. Counsel also submitted to the Parish Court Judge that, the respondent's substantive claim being based on the existence of this title, the appellants' only recourse was to apply to set it aside in the Supreme Court. Counsel also submitted a joint position that a consent judgment be entered for $100,000.00 inclusive of costs, along with an injunction to be granted as prayed.

[30] Following that position, all the parties signed on the back of the Plaint Note and the Parish Court Judge also signed.

[31] In this appeal, the appellants sought to impugn the validity of the consent judgment. On 28 July 2015, when the matter came before this court, an order was made for an affidavit to be filed by the Parish Court Judge and the then attorney-at-law for the appellants. The affidavit of the Parish Court Judge was filed on 5 October 2015. There is no affidavit from the attorney-at-law who represented the appellants in the Parish Court, and it is said that he is now deceased. Two joint affidavits were filed by the appellants in this court on 22 July 2015. The first is an "Affidavit in support of application for court orders". The second is "Affidavit of Beverley Simms and Donovan Fagan".

[32] In her affidavit, filed in obedience to the order of this court, the Parish Court Judge gave a brief history of the matter and explained how it was that the consent judgment came to be signed by the parties in her presence and entered by her. The affidavit evidence given by the Parish Court Judge may be summarised as follows:

i) that due to the numerous delays the litigants were becoming frustrated. This was expressed by them on many occasions when the trial was adjourned;

ii) both counsel were absent at the start of the trial with another counsel holding for counsel for the respondent;

iii) the trial began on 15 March 2012, and the evidence of the respondent and his witness was taken. The trial was adjourned part-heard, for continuation on 5 June 2012, when the 1st appellant gave evidence. On that date counsel for the respondent was present but counsel for the appellants was not. Cross-examination of the 1st appellant was deferred and the matter set for 12 July 2012 for a date to be set for continuation of the trial. That date was fixed for 20 September 2012;

iv) on 20 September 2012, both counsel were present. Counsel for the appellants made a submission to the court at the end of which he requested that a consent judgment be entered. The trial was determined by the entry of the consent judgment;

v) the order by consent was for judgment in favour of the plaintiff in the amount of $100,00.00 inclusive of costs and for an injunction prayed to be granted;

vi) the order was entered into the record on 20 September 2012 and all three parties to the action signed on the court record in her presence and hearing evidencing their consent. A formal order was filed on 26 September 2012;

vii) at no time did the appellants who were present indicate that they did not wish the court to determine the matter as it then was or that they did not understand or consent to the submissions of their then counsel; and

viii) there was no duress, inducement or promise made to the appellants in her presence or hearing, no fraud or forgery attendant upon the affixing of their signature to the record on 20 September 2012 that she could see.

[33] The appellants, in their joint affidavit which was filed in support of the application for court orders for leave to amend notice and grounds of appeal, claimed in summary that:

i) a plaint was filed against them by the respondent for trespass and an injunction, and they instructed counsel to act on their behalf in the matter;

ii) the trial in the matter began in the absence of their attorney and they had to conduct the trial themselves, which was prejudicial to their interest and in those circumstances they did not get a fair trial;

iii) at the conclusion of the trial their attorney-at-law attended court and consented to a formal order. They gave him no instructions to do so;

iv) they did not agree to the terms of the consent judgment contained within the formal order;

v) they had documentary proof that the land belonged to their family and had contested the plaint for over three years.

vi) no compromise had been discussed with them by their attorney or anyone else and they did not agree to a compromise;

vii) the Parish Court Judge did not indicate that a compromise had been arrived at; and

viii) they were informed by counsel at the material time that the matter had to be taken to the Supreme Court, as the respondent had a registered title.

[34] The evidence contained in the appellants' second joint affidavit is summarised as follows:

i) that the respondent brought a case against them involving land which was already in their possession but which he claimed he was in possession of;

ii) they attended court on several occasions but their attorney-at-law failed to attend on the numerous court dates set for the matter;

iii) in July 2010 they signed a consent order for reference to a surveyor which was filed in the court on 9 July 2010 but no survey was ever carried out pursuant to the order of the court;

iv) after numerous adjournments of the trial dates the trial commenced on 15 March 2015 and they were called upon to state their defence;

v) the trial began in the absence of their attorney and they had to conduct the trial themselves;

vi) throughout the trial over two separate dates the attorney was absent;

vii) at the conclusion of the evidence on 20 September 2012, the attorney attended court;

viii) their attorney spoke with them privately. He told them that they would have to pay the respondent $100,000.00. They enquired about their case as it was not yet finished and he told them that it would have to go to a different court and that a new attorney-at-law would have to be retained;

ix) they told him they would not pay the respondent as the judge had said nothing about it and the case was not finished;

x) after they had instructed the attorney that they would not pay the respondent he addressed the court telling the court that he found out the respondent had a registered title from 2011 and because of that the matter before the court could not be tried and would have to be tried in a higher court;

xi) after their attorney addressed the court, they were told they could leave;

xii) they were told by the Clerk of Court that since the matter was going to a higher court they had to sign a paper. They

were given a blank paper to sign and the Clerk of Court placed an 'X' twice on the paper where they were both to sign, which they did in the presence of the Clerk of Court;

xiii) it was only after the bailiff for the parish of Saint Elizabeth served them with a copy of the formal order that they became aware of the formal order. They then sought legal advice as they had not agreed to the contents of the consent judgment;

xiv) at no time did they give their attorney-at-law any authority to consent to any judgment on their behalf as the land belonged to their family. They were never consulted regarding the entry of a consent judgment as they thought the matter was going to the Supreme Court;

xv) the attorney without any consultation and without their consent, instruction or knowledge, consented to a judgment on their behalf of which they knew nothing until served with the formal order; and

xvi) the trial began in the absence of their attorney and in the circumstances they had to conduct the trial themselves, which was prejudicial to their interest and in the circumstances they did not get a fair trial.

A. *The factual circumstances surrounding the entry of the consent order*

[35] The order, which was expressed to be made "by consent" of the parties, was for judgment by consent in favour of the plaintiff in the amount of $100,000.00 inclusive of costs and for the injunction prayed to be granted. The consent order was signed by the appellants and the respondent, on the back of the plaint, in the presence of the Parish Court Judge and the Parish Court Judge also signed and dated the order. A formal order was made, signed and filed by the Parish Court Judge.

[36] The Parish Court Judge also indicated, in her affidavit, that the appellants did not at any time indicate that the consent order was not in accordance with their wishes or that they did not understand or consent to the submissions made by counsel. The Parish Court Judge further pointed out that no duress, inducement or promise was made to the appellants in her presence, neither was there any fraud or forgery attendant on their affixing their signatures to the plaint.

[37] The appellants in their joint affidavits made certain statements which accord with the submissions made by counsel for the respondent. There was some variation in the dates given by them and those given by the Parish Court Judge but suffice it to say, it was agreed that when the trial began their lawyer was not present. He turned up on 20 September 2012. They indicated that, on that day, the attorney spoke to them privately, and that he told them they would have to pay $100,000.00 to the respondent. They said he told them the case would have to go to a different court with a new attorney-at-law.

[38] They maintained that they refused to pay $100,000.00 and that the judge had not said anything about that, and the case was not finished. They then instructed him that they would not pay that sum or any other sum to the respondent. They also admitted that the attorney-at-law rose to address the court and told the court that he had discovered that the respondent had a registered title from 2011 and because of that the matter would have to be tried in a higher court.

[39] On the question of their signature to the consent order, it is best if I try not to paraphrase, but instead to quote verbatim from paragraphs 19 to 22 and 25 to 29 of their affidavit dated 21 July 2015:

> "19. That on our leaving the Court the Clerk of Court called us back and told us that since it was going to a Higher Court we would have to sign a paper and she presented to us a paper, that the paper presented to us [sic] we looked at the paper to see if there was anything on it to read however there was nothing on it to read as it was a blank piece of paper.
>
> 20. That the Clerk of the Court thereafter put two x's [sic] on the paper where the both of us should sign our names on the paper which we did in the presence of the Clerk of Court.
>
> 21. That after some time around one (1) week after we left court we found [sic] about the consent judgment when the Bailiff in St. Elizabeth one Mr. Nathan Mclean served Mrs. Beverly Simms with a copy of the Formal Order wherein a Consent Judgment was entered in the matter herein on the 26th day of September 2012. That we exhibit hereto marked "BSDF 2" a copy of the said Formal Order.
>
> 22. That I asked the said Bailiff why he was serving with [sic] this paper and he told me to read it and that was when I discovered the content of the said Consent

> Judgment which was filed in the proceedings in the Resident Magistrates Court for the parish of St. Elizabeth."

[40] Further at paragraphs 25-29, they said:

> "25. That we wish to state that at no time did we give Mr. Carlton Campbell our previous Attorney-at-Law any authority to consent to any Judgment on our behalf as the land the subject of the plaint belong [sic] our family.
>
> 26. That we never consulted as to there being any consent judgment as we were led to believe that matter was going to the Supreme Court in Kingston.
>
> 27. That we the Appellants herein conducted the trial ourselves and Mr Campbell who came and [sic] the last minute and without any consultation with us or without our consent, instruction and knowledge consented to a judgment on our behalf and to which we [sic] nothing about until being served with the Consent judgment herein.
>
> 28. That the trial in this matter begun [sic] without our lawyer being present and in the circumstances we the Appellants herein had to conduct the trial ourselves which was prejudicial to our interest and in the circumstances we did not get a fair trial.
>
> 29. That we the Appellants herein could not adequately defend ourselves at the hearing of this matter and with respect to the nature of the claim herein."

[41] Counsel Mr Samuels asked that this court accept the evidence of the appellants as true because, based on their defence, they would never have consented to such a judgment.

[42] An examination of the back of the form headed 'No. 7 - Summons to appear to a Plaint' which is part of the record of the court, and on which the parties signed to the consent order, it revealed that:

1. it is not a blank piece of paper;

2. it carries to the left of the document endorsements of the several dates for hearing which were adjourned, the parties present on those dates and reasons for adjournment;

3. in the centre are the names of the parties, the amount and substance of the claim, some further dates, and the consent of the parties for referral to the surveyor; and

4. to the right of the document it bears the date of 20 September 2012 and the endorsement:

> "By Consent
>
> Judgment for the Plaintiff $100,000.00 inclusive of cost.
>
> Injunction granted as prayed.
>
> Signature of respondent [illegible]
>
> Signature of 1st appellant [legible]
>
> Signature of 2nd appellant [legible]

Signature of [illegible]

RM St. Elizabeth"

[43] It is my observation that even if the Summons to Appear to a Plaint had been folded at the time of signing, so that only the part which was to be signed was right side up (giving the appellants the benefit of the doubt that the paper was blank when they signed), the words of the endorsement on the summons are clear and not capable of confusion. The signature of the respondent appeared first and the appellants signed below it.

[44] It is in those circumstances, that it is not reasonable to infer that the appellants did not make an informed consent to the judgment.

[45] As regards the notion that the consent is inimical to their defence, it seems to me that the respondent who is the registered owner, holds title until and unless that title is defeated by fraud or on any other basis recognized in law. The fact that the appellants, by their admission, accept that he is the registered title holder does not preclude them from later challenging the validity of that title on any basis open to them in law.

B. *The legal principles applicable to consent judgements and orders*

[46] The law makes a distinction between real consent, as in a contract, and mere submission, as in a failure or refusal to object to an order. That distinction was made by Lord Denning MR in **Siebe Gorman and Co Ltd v Pneupac Ltd** [1982] 1 ALL ER 377. Lord Denning MR, at page 380, said this:

> "We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Green MR in Chandless-Chandless v Nicholson [1942] 2 ALL ER 315 at 317… One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used..."

[47] Stuart Syme in his very useful text, "A Practical Approach to Civil Procedure" 12th edition at paragraph 41.15, states the following:

> "Many orders are made 'by consent'. A true consent order is based on a contract between the parties. As such, the contract is arrived at by bargaining between the parties, perhaps in correspondence, and the consent order is simply evidence of that contract: *Wentworth v Bullen* (1840) 9 B & C 840. To be a true consent order there must be consideration passing from each side. If this is the case, then, unlike other orders, it will be set aside only on grounds, such as fraud or mistake, which would justify the setting aside of a contract: **Purcell v FC Trigell Ltd** [1971] 1 QB 358."

[48] The case of **Leeman Vincent v Fitzroy Bailey** also dealt with this issue. At paragraph [41], McDonald-Bishop JA said this:

> "[41] The whole circumstances attendant on the entry of the judgment by consent in this case would have had to have been explored to see whether if, indeed, it had resulted from a contract or compromise between the parties or whether there was no more than a simple submission by them to the order. This enquiry would be necessary since different considerations would apply to each situation. For, if it were to

> be found that the judgment arose from a bargain or contract between the parties, then it could only be set aside on the ground of fraud, mistake, illegality, misrepresentation, duress or any other ground on which a contract or compromise may be set aside. However, the respondent would have to provide evidence of the existence of such vitiating factors. If on the other hand, the judgment was a mere submission by the parties to an order, then it may be set aside like any other judgment entered without consent but, again, the respondent would have to provide evidence of that fact. The appellant would also have the right to bring evidence to rebut any disputed assertions made by the respondent in relation to those matters. The consideration of the application had not advanced along those lines."

[49] In **Purcell v FC Trigell Ltd and another** [1971] 1QB 358; [1970] 3 All ER 671, it was held that there was no basis for setting aside the consent order in that case because a consent order whether interlocutory or final must be given full contractual effect and may only be set aside on grounds which would justify setting aside a contract and can only be done in a fresh action taken for that purpose. See Halsbury's Laws of England 4th edition, volume 26 paragraphs 527 and 562.

[50] In this case the order endorsed on the plaint was said to be by consent. It was signed by all the parties. All the parties were present at the time the consent order was made. The attorneys-at-law for both sides were present when the order was made. The terms of the order were discussed with the appellants. Submissions on the terms and reasons for the consent order were made to the court, in the presence of the parties. The terms of the consent order were in the nature of a contract. Consideration was provided for it by both sides. In return for damages less than that which he claimed, the respondent's claim against the appellants ended.

[51] In the light of the indefeasibility of the respondent's title, it is clear that the consent order was deliberately made with the full knowledge of the appellants, after private deliberations with their attorney and equally with the full agreement of the respondent and his attorney-at-law. All this took place in the face of the court and according to the Parish Court Judge's affidavit, there was nothing to suggest the appellants were coerced or pressured into consenting to the order that was made.

[52] Such orders, made in those circumstances, according to the authorities, cannot be set aside. As Winn LJ said in **Purcell**:

> "... If a consent order is to be set aside; it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons; and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

[53] As he found in that case, so I too find in this case, that there is no suggestion that anything occurred in the Parish Court that would justify setting aside the consent order, looked at as a valid agreement.

[54] Section 201 of the Judicature (Parish Court) Act grants jurisdiction to set aside judgments and orders made in civil proceedings. It provides as follows:

> "The judge of a Court shall, in every civil proceeding, have power to set aside any verdict or judgment, and order a new trial, upon such terms as he shall think reasonable."

[55] The appellants chose to challenge the consent order on appeal, which is their right. However, there is no power in this court to set aside a consent order, where there is no evidence of any vitiating factors and where no such evidence had not been ventilated in the Parish Court in fresh proceedings. See **Re Affairs of Elstein** [1945] 1 ALL ER 272.

C. *Conclusion on the merits of this ground*

[56] This court in conducting its own review of the matter took into account the special considerations applicable generally to consent judgments. Having applied the relevant principles to the facts of this case, I found that the consent judgment was arrived at by agreement of the parties and was not one imposed by the court. No appeal lies from such a judgment, made with the consent of the parties unless there are circumstances, evidence of which, if accepted, would vitiate a contract.

[57] No evidence was produced by the appellants of any relevant vitiating factor which would cause the court to say the consent order carries no true consent and therefore ought to be set aside. The appellants claimed to have signed a blank document but the signatures were affixed to the Summons to Appear to a Plaint, and the order is stated clearly thereon, as to what is being agreed by their signatures.

[58] The evidence from the appellants themselves is that, what was ultimately agreed was privately discussed with them by their attorney. The evidence of the Parish Court Judge is that submissions regarding the entry of the consent judgment were made openly in court. All the parties were present. There is nothing factually or legally disclosed in the

affidavits of the appellants and/or the Parish Court Judge that would cause this court to say the consent judgment should be set aside.

Issue 2- Whether the appellants were prejudiced by the absence of their attorney and did not have a fair trial (grounds 1, 2, 3 and 4)

[59] The complaint in ground 1 was that the Parish Court Judge did not make any findings as to the ownership of the property, despite the fact that the entire property had been held by the appellant's family for three generations for over 80 years.

[60] This ground is without merit. It was clearly not necessary for the Parish Court Judge to make any findings in this case, as a consent judgment had been entered by the parties before the conclusion of the case and, furthermore, no defence was raised by the appellants based on the Statute of Limitation, to defeat the respondent's registered title. The case was determined with the entry of the consent judgment. This ground would necessarily fail.

[61] The complaint in ground 2 was that the owner of the land on the Tax Roll was Philip Fagan, the grandfather of the 1st appellant. It is unclear what this ground is meant to dispute, as the Parish Court Judge made no findings in this case and certainly made no findings with regard to whose name was on the Tax Roll. In any event, there was evidence that the respondent's name appeared on the Tax Roll for the portion of land which he claimed to have bought from his grandaunt, the daughter of Phillip Fagan, which was a little less than a quarter of an acre. That was the portion for which he obtained a registered title. This ground was also without merit.

[62] The gravamen of ground 3 was that the appellants had documentary evidence of ownership of the entire land, that is, 4½ acres, going back 55 years to 1957, which it was said they produced at the trial. Again, it is unclear what the ground is meant to dispute. No findings were made in this regard by the Parish Court Judge. In any event, the respondent made no claim to 4 ½ acres of land and there was no challenge to the registered title of the respondent for the portion of land that he alleged was sold to him. This ground failed.

[63] In ground 4, the appellants complained that the trial took place in the absence of their attorney-at-law and that they were prejudiced because, given the nature of the claim, they could not adequately defend themselves at the trial. They complained further that, in those circumstances, they did not have a fair trial.

[64] The trial of a plaint in the Parish Court is to proceed in a summary manner. Section 184 of the Judicature (Parish Court) Act provides as follows:

> "On the day in that behalf named in the summons, the plaintiff shall appear, and thereupon the defendant shall be required to answer by stating shortly his defence to such plaint; and on answer being so made in Court, the Judge of the Parish Court shall proceed in a summary way to try the cause, and shall give judgment without further pleading, or formal joinder of issue."

[65] All parties in civil proceedings before a court of competent jurisdiction, are entitled to a fair hearing, within a reasonable time. See section 16(2) of the Constitution of Jamaica. Although a plaintiff in the Parish Court may retain counsel to appear and act on his or her behalf, it is lawful under the Judicature (Parish Court) Act for the plaintiff or a

family member, or an employee to appear and act on his or her behalf in the suit, pursuant to section 188 of that Act, which provides:

> "It shall not be lawful for any person, except the party to a suit or other proceeding, or a member of his family, or his clerk or servant, or his master, or any officer or clerk of a company or corporation duly authorized under the seal of such company or corporation, or an admitted solicitor, being the solicitor generally in the action for such party, or a barrister or advocate retained by or on behalf of such party, to appear and act for such party in such suit or proceeding; but an appearance by any such person shall be deemed to be an appearance of the party for whom he acts:.."

[66] A Parish Court Judge also has the discretion to adjourn a trial to a new date by virtue of section 169 of the Judicature (Parish Court) Act. This is a discretion that must be judicially exercised as the Parish Court Judge sees fit, right and proper, based on the circumstances of the case, and the grounds for the application.

[67] The relevant records in this case show that before the commencement of the trial, the Parish Court Judge noted that it was the fifth trial date and that the matter had been on the list from 2009 for discussions to take place. She also noted that those discussions had not taken place, due mainly to the absence of the appellants' counsel, and went on to observe that counsel was again absent. It was also clear to her that the parties to the action were anxious to get on with it.

[68] The trial did commence in the absence of counsel for both sides, however, there was an attorney present, holding for the respondent's attorney. On that date, the appellants stated their defence, which on the part of the 1st appellant was that the land was hers, it belonged to her father, brothers and sisters and there was a will and a title

to the land. On the part of the 2nd appellant, his defence was that the 1st appellant was his mother and she told him to "carry her over to the land".

[69] After the respondent and his witness gave evidence, the matter was adjourned to another date. On that date the appellants' attorney still did not attend to act on their behalf and the 1st appellant gave evidence in chief. The matter was again adjourned for a date to be agreed with the appellants' attorney for cross-examination of the 1st appellant to take place. The attorney for the respondent was present. It should be noted that the respondent resided abroad. The case was set for continuation on 20 September 2012, when counsel for the appellants could appear and did appear.

[70] It was unclear how this ground of appeal could have assisted the appellants. It is true that the appellants were indeed entitled to have the attorney of their choice present to act on their behalf. However, that is not an absolute right. In the circumstances of the particular case, the question of whether to adjourn the trial was a matter for the Parish Court Judge, in the exercise of her discretionary power. There was nothing in the circumstances of this case which would have caused this court to find that, in commencing the trial in the absence of the appellants' attorney-at-law, the Parish Court Judge exercised her discretion in an improper manner.

[71] In any event, contrary to the appellants' assertions, their attorney did not appear at the conclusion of the evidence. The notes of evidence clearly showed that the 1st appellant had given evidence-in-chief but had not yet been cross-examined, when their attorney attended court on 20 September 2012. The 2nd appellant had not yet given

evidence. However, instead of choosing to continue with the trial on that day, following a private consultation with their counsel and following submissions by their counsel to the court, a consent judgment was entered. It is important to note, as previously stated, that the trial was determined with the entry of the consent judgment. It was, therefore, difficult to see how the question of prejudice to the appellants could arise in those circumstances, where the Parish Court Judge made no findings of facts and made no judgment based on any evidence given in the trial. This ground failed.

Issue 3- Whether the parish court judge had jurisdiction to hear and determine the matter, there being a dispute as to title (ground 6)

[72] In ground 6, the appellants contended that the "Parish Court in Saint Elizabeth holden at Santa Cruz had no jurisdiction to hear Plaint No 149/09", as the subject matter of the plaint was outside the jurisdiction of that court and in those circumstances the plaintiff should have been non-suited.

[73] Although I held the view that, in the light of the consent judgment this issue was otiose, having given it some consideration, I found it was hopeless. Counsel for the appellants argued that because they had documentary evidence of ownership of the entire land, title was in dispute and section 96 would be invoked. The basis for grounds of appeal 6 was, therefore, that title was in dispute and the gross annual value of the land would likely exceed the limit of $75,000.00, which was the jurisdiction of the Parish Court at the time the plaint was filed.

[74] Section 96 states:

> "Whenever a dispute shall arise respecting the title to land or tenements, Possessory or otherwise, the annual value whereof does not exceed five hundred 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 thereupon a summons shall issue to the person in actual possession of such land or tenements, and if such person be a lessee, then a summons shall also issue to the lessor under whom he holds; 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 plaintiff's title and of the service of the summons on the defendant or the defendants, as the case may be, the Judge of the Parish Court may order that possession of the lands or tenements mentioned in the said plaint be given to the plaintiff on or before such day, not being less than one month from the date of the order, as the Judge of the Parish Court may think fit to name; and if such order be not obeyed, the Clerk of the Courts, on proof to him of the service of such order, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such lands or tenements to the plaintiff."

[75] Counsel submitted that there being a dispute as to title, the trial ought not to have begun as the Parish Court Judge was required to ascertain her jurisdiction with reference to evidence of the annual value of the land, of which there was none. Counsel posited that the Parish Court Judge should have taken the following approach:

> (a) request both attorneys to attend and make submissions as to whether the Parish Court was the proper forum to determine the issue of legal title to the land; and
>
> (b) in the absence of the attorneys, the Parish Court Judge should have adjourned the matter and not proceed with the evidence since it became clear that legal and factual

issues arose for consideration especially as to title and jurisdiction.

[76] A claim for trespass is a claim grounded in possession. It involves a complaint of an unwelcome and unjustifiable interference by one person on or with the land in the possession of another. Any right to sue in trespass is based on actual possession or the right to possession. In such a claim, proof of actual possession or the greater entitlement to possession than the alleged trespasser is required. The right to possession arises either from the paper title to the land or actual possession of the land or both. The paper title owner, however, has the actual right to possession and is deemed to be in possession. A person not in possession must show a greater title than the paper owner. A person with no title must be in actual possession with an intention to possess. See the case of **Francis & Francis v Graham** [2017] JMCA Civ 39 where this court embarked on a more comprehensive discussion of those general principles and the authorities.

[77] In this case the respondent claimed to be the paper owner with the right to possession of the portion of land in dispute. The 1st appellant claimed to be the owner of the land by virtue of the law of succession. She made no claim to being in possession or to having acquired a possessory title by virtue of the Statute of Limitation, subsequent to the respondent being registered as owner. In fact, the evidence was that Noel Fagan was in possession with the authority of the respondent. When the claim was filed the respondent had a common law title. When the trial began he had a registered title. The appellants had no registered title. What they had was a common law root of title for 4 ½

acres of land which by boundary description did not match that of the description of the boundaries to the respondent's land. They were claiming under that root of title.

[78] Where the claim is in trespass and parties are claiming a right of possession, the Parish Court Judge ought not to conclude that her jurisdiction is ousted without evidence of the annual value being given and without hearing such "sufficient evidence as to call into question the title, valid and recognisable in law or in equity, of someone to the subject matter in dispute". See **Brown v Bailey** (1974) 21 WIR 394; 12 JLR 1338 and **James Williams v Hylton Sinclair** (1976) 14 JLR 172. The Parish Court Judge, upon hearing the defence stated, is not bound by the mere statements of a defendant but is enjoined to enquire into so much of the case as is necessary to determine whether there is a bona-fide dispute as to title. See **Lilley v Harvey** (1848) 17 LJQB 357, also cited in **Brown v Bailey.**

[79] At the start of the trial in the instant case, the respondent was in possession of a registered title, which he tendered into evidence. Section 68 of the Registration of Titles Act provides that:

> "68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is

seised or possessed of such estate or interest or has such power."

[80] Section 70 provides that:

> "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:"

[81] Section 71 of the said Act provides as follows:

> "71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, **or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud**."(Emphasis supplied)

[82] Other relevant sections which may be mentioned here are sections 69, 73, 161 and 163. For example, section 161 provides:

> "No action of ejectment or other action, suit or proceeding for the recovery of land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say-
>
> (a) The case of a mortgagee as against a mortgagor in default;
>
> (b) The case of an annuitant as against a grantor in default;
>
> (c) The case of a lessor as against a lessee in default;
>
> (d) The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;
>
> (e) The case of a person deprived of or claiming any land included in any certificate of title or other and by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;
>
> (f) The case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,
>
> And in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee

> of the land therein described, any rule of law or equity to the contrary notwithstanding."

[83] These sections individually and collectively confer on the registered title owner what is now commonly referred to as the 'indefeasibility' of that title. A registered title, unless it is fraudulently obtained, contains a misdescription or is extinguished by the operation of the Statute of Limitation, is unimpeachable, that is, it is immune from attack by adverse claims. This is a principle enshrined in the Torrens system of registration. The appellants, who were out of possession and claiming under an inferior title, could not claim a better title or a better right to possession than the respondent.

[84] In those circumstances, where the registered title is indefeasible, the Parish Court Judge would have had to hear sufficient evidence to determine whether there was adduced in evidence, a credible narrative setting up a superior title in the appellants or one of them, which was capable of defeating the registered title. In those circumstances, the Parish Court Judge could not be faulted for embarking upon a trial.

[85] For the jurisdiction of the Parish Court Judge to be ousted, a real and substantial dispute as to title to the land must be raised. The appellants' inferior title could never defeat the respondent's registered title, there being no defence of fraud, misdescription or adverse possession before the Parish Court Judge for consideration. The issue before the parish court judge was simple one of trespass, therefore section 96 was not applicable and the annual value was irrelevant.

Conclusion

[86] The consent judgment had been deliberately entered into by the appellants and the respondent in the presence and with the full knowledge of and on the advice of counsel present. There was also no evidence in the joint affidavits of the appellants of any circumstance that would vitiate the consent of the appellants. For those reasons, I found no basis in fact or law for the consent judgment to be set aside. The matter having been determined by consent, the Parish Court Judge was not called upon to make any findings of fact. Although the trial began in the absence of the appellants' attorney-at-law, in the circumstances of this case, it could not be said that the Parish Court Judge improperly exercised her discretionary power not to further adjourn the commencement of the trial. After the commencement of the trial, it was further adjourned for the appellants' attorney to attend and he did attend and participated in the proceedings. The trial was, therefore, not unfair and prejudicial to the appellants.

[87] Section 96 of the Judicature (Parish Court) Act was inapplicable as there was no bona-fide dispute as to title and the Parish Court Judge did not err in embarking on a trial of the plaint.

[88] There was no merit in this appeal and it is for that reason that I concurred with the orders set out in paragraph [2].

FRASER JA (AG)

[89] I have read in draft, the reasons for judgment of Edwards JA. I agree that they reflect the basis for the decision of the court made on 5 March 2019, as set out in paragraph [2]. I have nothing to add.