[2015] JMSC Civ 157

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2014HCV02649

BETWEEN	**ANDREA EDWARD GREEN**	**FIRST CLAIMANT**
AND	**MARK EDWARDS**	**SECOND CLAIMANT**
AND	**CHRISTINE FINDLAY**	**FIRST DEFENDANT**
AND	**LLOYD FINDLAY**	**SECOND DEFENDANT**
AND	**JACQUELINE FINDLAY**	**THIRD DEFENDANT**
AND	**CARLTON MCLEAN**	**FOURTH DEFENDANT**

IN CHAMBERS

Avrine Bernard and Claudia Forsythe instructed by Forsythe and Forsythe for the claimant

Caprice McFarlane instructed by Winston H McFarlane and Company for the first, second and third defendant

Laurence Haynes for the fourth defendant

June 30 and August 13, 2015

CIVIL PROCEDURE – STRIKING OUT – ABUSE OF PROCESS - EXTINCTION OF TITLE

SYKES J

[1] Miss Christine Findlay, Mr Lloyd Findlay and Miss Jacqueline Findlay have said that the very facts alleged in this claim were made in Claim No 2012HCV03045. The claimants were the same in both claims and with the exception of Mr McLean, the defendants were the same. The 2012 claim was struck out by Lindo J (Ag) in March 2014. The claimants were absent as was their attorney when the striking out occurred. The attorney for the claimants at that time was served with the formal order. No application was made to set aside Lindo J's order and neither was there an appeal.

[2] By May 2014, this present claim was filed. Should this claim be struck out on the ground of abuse of process in respect of the first, second and third defendants? Regarding Mr McLean, he takes the point that none of the claimants is the right person to bring the claim because the documentation filed in support of the claim shows that they are claiming through estates of various deceased persons. These estates have not been administered and so, it was said, the claimants are at best beneficiaries and would need to bring the claim in a representative capacity and not in their personal capacity.

[3] Mr McLean also takes the point that he has been accused of fraud in becoming the registered proprietor and on this score his view is that the pleadings do not point to any specific act or acts of dishonesty. The pleadings are nothing more than generalised accusations which are insufficient to ground any finding of fraud.

[4] Mr Haynes, for Mr McLean, also took issue with the fixed date claim being used for a claim in fraud. His submission was that the proper procedure is to commence by claim form and particulars of claim and not by way of fixed date claim form and affidavit.

The claim

[5] The matter was commenced by fixed date claim form. The core remedies sought are declarations that the claimants are the legal and equitable owners of the land they now occupy and that Mr McLean came to be the registered proprietor because of fraud.

[6] Miss Green swore an affidavit setting out the claimants' case. According to Miss Green she and the other claimant were born at the disputed property in 1965 and 1966. She then refers to her grand uncle Mr Joseph Thompson who was travelling from Portland to Kingston and this proved gruelling. This was many years ago prior to 1962. He then asked a Mr Shroeter who lived nearby for assistance and Mr Shroeter told him to clear a bit of land and settle there. The story continues right though to 1962 and beyond.

[7] The court must observe that much of the pre-1962 history and some of the history shortly after 1962 given by Miss Green must necessarily be hearsay since she was not borne during the time of this history and where she was borne, she would have been a very small child who would be unlikely to be pre-occupied with the history of land tenure. She was old enough to know that Mrs Lydia Thompson, wife of Mr Joseph Thompson died in 1988 and that Mr Joseph Thompson died in 2000. She was aware that her grand uncle was paying rent. It appears that after her grand uncle died her father who, apparently, was living on the property continued living there as did she. Her affidavit, while not giving exact dates, stated that Mr George Connolly who became the owner of the land died. His wife brought Mr Carlton McLean and introduced him as her agent and that rent should be paid to him. Later, Mr McLean turns up as the registered proprietor for the disputed land. It was said that Mr McLean came to be the registered proprietor by fraud.

[8] Finally, she said that the disputed property was cleared by her uncle and her family has always lived there.

The objections to the claim

[9] As noted earlier, Miss McFarlane submitted the very same allegations were made in the 2012 claim which was struck out in 2014. The court has examined in detail the statement of case in the 2012 claim and it is indeed the identical case. Miss Bernard did not contend otherwise.
[10] The court should add that Miss McFarlane is also seeking an order for possession here as well as an assessment of mesne profits.

[11] Miss Bernard's position was that there was nothing precluding the issuing of a new claim. The court agrees that there is nothing in the Civil Procedure Rules ('CPR') precluding the issuing of this present claim but that does not mean that it is not an abuse of process.

[12] A striking out is one way of bringing a claim to an early end without a trial. While it is not a disposition after a trial or hearing it is a valid and legitimate way for a defendant to defend himself against a claim. Indeed the rules permit a defendant to seek to strike out a claim. Summary judgment is another quick way of terminating a claim. Can it be seriously contended that a defendant who successfully resists a claim on either a striking out or summary judgment basis has not received a decision in his favour? Is he not entitled to think that subject to appeals or a setting aside that the claim is at an end? If the rules indicate how the claimant can overturn a decision on either of these two bases is not the defendant entitled to think that those means will be used rather than face a new claim?

[13] Rule 11.8 provides the means by which an absent litigant can have a striking out set aside. The claimant has fourteen days after the date of service to apply to have the claim set aside. In this case, the claimants' attorney at law on record was served with the formal order and nothing was done. The time for applying to set aside the order had passed. The defendant would be entitled to think that the claim was now at an end and that the claimants had accepted the decision in light of the fact that they were served with the formal order and took no action to have it reversed.

[14] Miss Bernard did not advance any reason for not seeking to have the order set aside. The court concludes that this claim is an abuse of process and should be struck out against the first three defendants.

[15] Mr Haynes raised an even more fundamental point. He submitted that the claimants are not claiming that they themselves occupied the land in their own right. They seem to be relying on the conduct of ancestors prior to their birth. After their birth, the affidavit speaks to a Mr Connelly being acknowledged as owner, then his wife. Nowhere is it asserted that the claimants themselves extinguished the title of the paper owner by virtue of their own acts of possession accompanied by an intention to exercise the rights of owner as if they were in fact the owner.

[16] Learned counsel also said that since the affidavit makes it clear that they are relying on previous occupiers it means that they are not claiming in their own right. According to counsel if they are relying on the 'title' of others who are now dead then they can only make that claim if the estates of those deceased persons are administered. The claimants, it was submitted, are at best beneficiaries under the estates of the deceased person and on that premise they have no standing to bring the claim. The land would now vest in the administrators or executors of the deceased and until the estate is administered, the claimants have no legal basis to bring the claim.

[17] In dealing with this submission by Mr Haynes it must be recalled that these two Supreme Court actions arose because the present defendants sought an order for recovery of possession against the present claimants in the Resident Magistrates' Court for the Corporate Area (Civil Division) ('RMC'). The response of the present claimants to the RMC action seemed to be based on the notion that in order to resist that action they must show that they have title but that is not the case.

[18] The case of **Fullwood v Curchar** [2015] JMCA Civ 37 deals with this. Her Ladyship Mcdonald Bishop JA (Ag), in the leading judgment, laid out the following principles:

a. the concept of indefeasibility of title under the Registration of Titles Act ('RTA') is not absolute. It is subject to defeat on the ground of fraud or extinction of title under sections 3 and 30 of the Limitation of Actions Act ('LAA');

b. under sections 3 and 30 of the LAA the time for the registered owner to bring an action for recovery of possession of any person is 12 years from the time the right to recovery came into being;

c. when a claimant brings an action for recovery of possession he must prove that he is entitled to recover the land against the person in possession;

d. where the person against whom the recovery action is brought raises the LAA then the claimant must prove that his title is not extinguished;

e. the reason for (d) is that the claimant recovers on the strength of his title and if the defendant was indeed in possession with the requisite intent to possess for the requisite time then the claimant's title is no longer good enough to eject the defendant because his title has now been extinguished;

f. if the title of the claimant passes away it does not necessarily mean that the defendant has acquired title. The LAA does not confer title, it merely says that after the lapse of the stated period the recovery action can be resisted successfully;

g. the LAA need not be pleaded if the defendant once the defendant is in possession under a lease or tenancy granted by the claimant or his predecessor in title;

h. if the claim against the defendant is one of trespass there is no need to plead the LAA because the proper way to resist trespass is by saying that the claimant has been dispossessed and not that the defendant has title.**;**

i. when there is a claim for recovery of possession the claimant must state the basis of his claim which is his title and once that assertion is made, the LAA arises automatically for consideration because it operates to stop a state claim. Since the LAA arises for consideration automatically then its operation and effect do not depend on whether the defendant chooses to avail himself of it;

j. a defendant enjoys the benefit of the statute without having to rely on it expressly.

[19] From this there is no reason for the recovery action not proceeding in the RMC. That issue could have been determined long ago but for the present claimants commencing these two claims. There is no need for the claimants to seek a declaration in the Supreme Court that defendants' title has been extinguished in order to resist the action for recovery of possession. The recovery action can proceed in the RMC and whatever issues arise then the RMC can decide as is usually done by deciding whether the person on whom the burden rests has discharged the burden.

[20] Mr Haynes also raised a point about the standing of the claimants to bring the claim. The locus standi point made by Mr Haynes is not quite as simple as he puts it. In **Paradise Beach & Transport Company Ltd v Price-Robinson** [1968] AC 1072 the question arose an acute way. A testator died and left for his children and grandchildren real property. They were to hold as tenants in common. During his life, his two daughters farmed the land on his behalf so that their possession was his. After his death, they continued to farm the land. Nine years after their father's death the daughters built a house and were in exclusive possession of the land from the time of their father's death to their own deaths in 1962. Since their deaths, the land was possessed by the daughters' successors in title. These successors were not in

possession long enough for them, after the daughters' death, to have extinguished the title of anyone. The action was brought within a year of the daughters' death. The eventual appellants had established that they had a paper title to an undivided share in the testator's land. This paper title had come through the appellants predecessors in title who have never entered into possession of the land. One year after the daughters' death the appellants brought the action against the respondents who were the daughters' successors in title. One of the arguments made by the appellants was the at no time were the daughters ever in possession in their own right and so time never ran in their favour so as to extinguish the title of the other co-owners. The trial judge found that the two sisters, after their father's death, had entered into joint exclusive possession in their own right. He also found that the other co-owners never entered into possession. These findings were upheld.

[21] The implication of this is that the even if the two sisters did not get their interest under the will, their acts of possession were sufficient to displace the title the other co-owners had. In other words, the fact that the sisters did not derive the title to the whole through the father did not prevent them eventually gaining possession of the whole under the doctrine of extinction of title. The other point arising from the case was that the successors to the daughters successfully resisted the claim to displace them. This could only have been on the basis that the daughters, during their lifetime, had extinguished the title of other co-owners thus leaving the successors to the daughters as the lawful possessors.

[22] In the present case, the fact that the claimants were children or grandchildren or grandnieces and grandnephews of previous occupiers who are all now deceased does not prevent them resisting a recovery of possession action on the ground that claimant's title is not strong enough to evict them. As the **Paradise** case shows, the successors in title to the two daughters were not able to rely on their own possession for the requisite period of time but they were able to rely on the exclusive possession of the daughters to resist the claim. By parity of reasoning, the present claimants may

be able to resist the recovery of possession action by relying on the exclusive possession of their ancestors.

[23] This issue between the parties has been unnecessarily complicated. This is nothing more than a recovery of possession action. There is no need for all this complication. All that is necessary is to keep focussed on what the issues are and approach the matter in the way indicated by **Fullwood**.

[24] It follows from what has been said that the order for recovery of possession sought by Miss McFarlane cannot be granted in light of the analysis of the law in **Fullwood**. Miss McFarlane based her claim to this remedy on the fact of having a registered title. However, the **Fullwood** case has put to rest the proposition (once and for all it is hoped) that a registered title holder cannot be knocked from his perch by a person who has exclusive possession with the requisite intention for the stipulated time. The law has been fully explained in **Fullwood**.

[25] It is well known that fraud must be specifically pleaded, that is the acts being relied on to prove dishonesty need to stated. That has not been done and to that extent the pleadings regarding Mr McLean are defective and it does not appear that any further particulars are forthcoming. In addition, the claimants have not made an unvarnished claim of fraud against Mr McLean. They also allege that his title might have been procured by negligence, mistake, inadvertence or error. The law is that where fraud is being alleged then the pleading must be unequivocal that it is dishonesty that is being relied on. If the pleadings are consistent with fraud and something else then it is not unequivocal and therefore it is defective (**Armitage v Nurse** [1998] Ch 241, 257 (Millett LJ).

Disposition

[26] The claim against fourth defendant is struck on the basis that the known case of the claimant is not a clear and unequivocal allegation of fraud and there is no evidence that the pleadings can be improved to make the allegations better. In fact, on reading

the affidavit of Miss Green what she is really saying is that she does not know how he came to be the registered proprietor because the last she knew of him he was the agent of the registered proprietor. This explains why the affidavit state that Mr McLean acquired title 'by fraud, inadvertence, negligence, mistake or error.' There is no reasonable ground to bring the claim against Mr McLean.

[27] The claim against the first, second and third defendants is struck out on the ground of abuse of process. The 2012 Supreme Court was struck out. If the claimant was dissatisfied with the ruling the CPR indicates the way to deal with it. If it were otherwise, then each time there is a summary determination of the matter all the litigant would need to do is to file another claim. The rules of civil litigation do not contemplate multiple claims between the same parties on the same issue. The claimants not having acted after the dismissal the defendants were entitled to think that the Supreme Court action was at an end and the parties could return to the RMC to resolve the case that has been pending.

[28] There is a recovery of possession action before the RMC that can resolve the real issue between the parties and that need not be complicated by seeking a declaration that the claimants are the legal and equitable owners of the disputed property.

[29] The court must note that within recent times it appears that litigants are being advised that if their matter is before the RMC and they do not like what is happening then without following the expected route of appeals or judicial review, depending on the nature of the complaint, then they can simply move to the Supreme Court under the guise of a new type of claim. This approach is not to be encouraged.

Orders

[30] The claim is struck out against the first, second, third and fourth defendants. Costs to the defendants to be agreed or taxed.