[2018] JMSC Civ 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2017HCV01342

BETWEEN	**MANFAS HAY**	**CLAIMANT**
AND	**CLOVER THOMPSON**	**1ST DEFENDANT**
AND	**JONATHON PRENDERGAST**	**2ND DEFENDANT**

Ms. Christine Chung instructed by Charmaine Patterson and Associates for the claimant.

Mr. Kevin Williams and Ms. Regina Wong instructed by Grant, Stewart, Phillips and Company for the defendants.

Heard January 15, 2018, January 31, 2018 and February 22, 2018

Claim for Recovery of Possession and for damages for Trespass – Proceedings brought by Fixed Date Claim Form – Defence of Adverse Possession – Procedural objection – Whether proceedings ought to have been commenced by means of Claim Form – Whether conversion of proceedings appropriate.

Master N. Hart-Hines (Ag)

[1] This claim concerns a dispute over land located at 12 Dillon Avenue, Kingston 5, St. Andrew and comprised in Certificate of Title registered at Volume 1491 Folio 85 of the Register Book of Titles (hereinafter "the land").

The claimant and his wife are the registered owners of the land, having purchased it in 2015. The 1st and 2nd defendants have been in occupation of the land prior to its acquisition by the claimant.

BACKGROUND

[2] On October 20, 2017 the claimant initiated proceedings against the 1st and 2nd defendants by way of a Fixed Date Claim Form (hereinafter "FDCF") and also filed an Affidavit in support. The claimant is seeking, *inter alia*, an order to recover possession of the land and declarations that, as the registered proprietor, he has a legal interest in the land and is entitled to possession by virtue of section 68 at the **Registration of Titles Act**, and also that the defendants have no legal or equitable interest in the said land. The issues for me to consider are whether the proceedings ought to have been brought by way of FDCF, and whether it is appropriate for me to order that the claim proceed as if begun commenced by Claim Form.

[3] The claimant initially commenced proceedings in the Corporate Area Parish Court (formerly Resident Magistrates Court) in June 2015 against the same defendants, for an order for the recovery of possession of the same land. The matter was transferred from the Corporate Area Parish Court to the Supreme Court pursuant to section 131 of the **Judicature (Parish Court) Act** for want of jurisdiction. After the matter was transferred to the Supreme Court, a claim number was assigned by the Registrar and a notice produced and served on the claimant and the defendants regarding the date set for Case Management Conference (hereinafter “CMC”). When the matter came before Master Mason on September 27, 2017, she issued directions including that proceedings be filed on or before October 20, 2017. Master Mason also set the matter for trial in open court before a judge for two days, on May 13 and May 14 2020. The CMC was adjourned to January 15, 2018. In the interim, on January 2, 2018, the claimant's counsel filed a Notice of Application for Court orders pursuant to Rule 17.10 of the Civil Procedure Rules (hereinafter "the CPR"), seeking an expedited trial in 2018 due to the claimant's physical disability and ill-health.

THE SUBMISSIONS

[4] The matter came before me on January 15, 2018 for a CMC hearing and for the Notice of Application filed on January 2, 2018 to be heard. It was at that hearing that the defendants' counsel Mr. Kevin Williams, made a procedural objection that the proceedings had been improperly commenced by FDCF and ought to have been commenced by claim form as it would have been apparent to the claimant's counsel that the matter involved substantial disputes of fact, since the claimant and 1st Defendant had given evidence indicating the issues joined and for determination in the Parish Court before the matter was transferred to the Supreme Court. Counsel currently representing the parties also represented them when the matter was before the Parish Court. Mr. Williams relied on the Privy Council decision of ***Eldemire v Eldemire*** [1990] 38 WIR 234 in support of his submission that the claim form was the most appropriate machinery in a case such as the instant case where there are substantial disputes of fact. Mr. Williams submitted that the nature of the dispute necessitated that there be a trial in open court, and he further submitted that the fact that Master Mason set the matter for trial in open court in May 2020, indicates that Master Mason had not intended that the matter commence by way of FDCF when she gave directions on September 27, 2017. In addition, Mr. Williams submitted that the claim has not been properly brought as the claimant's wife Maisene Hay ought to be added as the 2nd claimant, as she is a registered proprietor.

[5] In response to those submissions, the claimant's counsel Ms. Chung indicated that Rule 8.1(4) of the CPR prescribes that claims for possession of land ought to be brought by way of FDCF, and that the matter could be properly heard in chambers and a direction be given for the cross-examination of the parties. Further, Ms. Chung referred to the application for earlier trial dates, made on the basis of the claimant's ill-health. One effect of the matter proceeding by way of FDCF, is that the claimant is likely to get an earlier date for a trial in chambers.

[6] I invited counsel to make written submissions and adjourned the CMC to January 30, 2018. However on that date I did not have the benefit of seeing

both submissions filed and the hearing was therefore adjourned to February 22, 2018. I have now considered the submissions filed by counsel for the parties and I am grateful for these.

[7] In her written submissions, Ms. Chung indicated that the use of the FDCF was in full compliance with Rule 8.1(4)(b) of the CPR and she relied on the decisions of ***Div Deep Limited, Mahesh Mahtani and Haresh Mahtani v Tewani Limited*** [2010] JMCA Civ 10 and ***James Brown v Karl Rodney and Maureen Rodney*** [2017] JMSC Civ. 32. Ms. Chung also submitted that ***Eldemire v Eldemire*** is distinguishable from the instant case as it involved a trust estate. I have addressed these and other cases below.

[8] In their written submissions, Mr. Williams and Ms. Wong indicated that this was not an appropriate claim to be commenced by FDCF and having regard to the nature of this claim and defence, contemplation should have been given to commencing it by way of claim form. The defence also relied on the decision of ***Georgia Pinnock v Lloyd Property Development Ltd and others*** [2011] JMCA Civ 9.

THE LAW

[9] The scope of Rule 8.1(4)(b) and intent of the drafters of the Rule might be determined by looking at the other words that surround it and the purpose of Rule 8.1(4) itself. I have considered Rule 8.1(4) cumulatively, and, in particular, I have noted the wording of Rule 8.1(4)(d). Rule 8.1(3) and (4) of the CPR state:

> *"8.1 …*
> *(3) A claim form must be in Form 1 except in the circumstances set out in paragraph (4).*
> *(4) Form 2 (fixed date claim form) must be used*
> *(a) in mortgage claims;*
> *(b)in claims for possession of land;*
> *(c) in hire purchase claims;*
> *(d)where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;*
> *(e) whenever its use is required by a rule or practice direction; and*
> *(f) where by any enactment proceedings are required to be commenced by petition, originating summons or motion."* (My emphasis)

[10] It seems to me that it would be an anomaly if Rule 8.1(4)(b) would have wider application than Rule 8.1(4)(d), so that, under the latter rule, only claims which were "unlikely to involve a substantial dispute of fact" could be brought by FDCF, but under the former rule it would not matter that a claim was likely to involve a substantial dispute of fact. In light of the wording of Rule 8.1(4)(d), it must have been envisaged by the drafters that for all claims brought pursuant to Rule 8.1(4), consideration would be given to the nature of the claim to be brought and the likely defence to such a claim, so that it would be permissible for proceedings to be brought by claim form instead of FDCF, or, for the proceedings brought by FDCF to be treated as if begun by claim form. In many of the cases I have considered, the courts have adopted the latter approach. I will first address the cases referred to me by counsel and then refer to other cases considered.

[11] In ***Eldemire v Eldemire***, Dr. Arthur Eldemire commenced proceedings by writ against his brother Dr. Herbert Eldemire, seeking that the latter, as personal representative of their late mother's estate, give an account in respect of the estate. Dr. Herbert Eldemire in turn commenced proceedings against his brother by originating summons seeking, *inter alia*, a declaration that he was entitled to lands remaining in their parents' estate, and in response to his brother's action, he filed a defence and counterclaim, seeking the same relief in the writ action. The Privy Council considered both suits. In delivering the judgment, Lord Templeman stated at page 238 that "[a]s a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts".

[12] In the case of ***Div Deep Limited***, the Court of Appeal had to consider whether Marsh J erred in dismissing the appellants' procedural objection that the respondent's claim ought to have been brought by claim form, and erred in finding that the appellants (the occupiers) had no defence to the claim for possession by the respondent (the purchaser) in the absence of fraud. The Court of Appeal upheld the decision of Marsh J that the claim was unlikely to involve substantial disputes of fact with issues of equity and legal principles.

However, the Court of Appeal did not expressly indicate that every claim for possession ought to be commenced by FDCF. Instead, Harris JA indicated at paragraph 53 that it was the right method in that case, having regard to the nature of that claim. The instant case is therefore distinguishable from ***Div Deep Limited*** on the basis that the respondent (registered owner) was indeed correct in filing his claim using the FDCF since it would not have been apparent to him that the occupiers (who were tenants) had any basis to challenge his title. In contrast, in the instant case, the claimant knew that the defendants would raise the defence of adverse possession, and that there were substantial facts in dispute.

[13] As regards the case of ***James Brown***, it seems clear that Anderson J was strictly applying the wording of Rule 8.1(4)(b) wherein it states that the fixed date claim form "must be used … in claims for possession of land". However, despite the wording of the Rule, a Court may exercise its discretion to convert the proceedings, in order to ensure that all the issues in the case are fairly placed before the Court. However, case law indicates that the exercise of such discretion must be based on the nature of the claim and the likely or apparent disputes as to fact. In ***Melville and others v Melville*** (1996) 52 WIR 335 at pages 339-340, Patterson JA said:

> *"The Rules of the Supreme Court in England provide for the continuation of proceedings begun by originating summons as if begun by writ in cases where it appears to the court at any stage of the proceedings that they should for any reason have been begun by writ. It is a very useful provision that was introduced in England for the first time in 1962. The Civil Procedure Code does not have such an express provision, but, by virtue of section 686, the procedure and practice that obtains in England is followed in the court below. Consequently, even where proceedings could not have been properly commenced by originating summons, the court below, in the exercise of its discretion, may order that the proceedings continue as if begun by writ instead of striking out the matter."* (My emphasis)

[14] The Court of Appeal decision of ***Georgia Pinnock*** is comparable with the instant case, as it involved a claim for the determination of the priority of interests in land, and the instant claim involves a dispute as regards whether or not the claimant is entitled to possession of the land in question. Phillips

JA said at paragraph 40 that the FDCF is an inappropriate method to be adopted if the questions for the court's decision are likely to involve a substantial dispute as to fact, and reiterated that the claim could be ordered to proceed as if begun by claim form.

[15] I have considered some additional cases to delineate the consistent approach of the courts. In ***Melville and others v Melville*** the plaintiff sought declarations regarding a management agreement and the termination of her employment, and sought an order restraining the defendants from interfering with her exercise of a Power of Attorney granted to her. It was apparent that the claim did not involve a mere construction of the management agreement or the Power of Attorney, but instead involved matters in substantial dispute. The Court of Appeal applied ***Eldemire v Eldemire*** and ***Lewis v. Green*** [1905] 2 Ch. 340, and Patterson JA said at page 339 "where there is no question of construction the procedure by originating summons is inappropriate" and he referred to ***Lewis v. Green*** where Warrington J said at page 344 that the procedure by originating summons "… is only intended to enable the court to decide questions of construction where the decision of those questions, whichever way it may go, will settle the litigation between the parties. ..."

[16] In ***Ralph Williams and others vs The Commissioner of Lands and Times Square West Holdings Ltd*** [2012] JMSC Civ. 118, Mangatal J (as she then was) had to determine an application for an injunction in relation to a claim for possession of land where one party relied on the doctrine of adverse possession. One issue which Mangatal J addressed was whether the matter ought to have been brought by Claim Form. At paragraph 9 of her decision, Mangatal J said: "…I ordered the Fixed Date Claim Form by which the claim was initially commenced to continue as if begun by Claim Form since I was of the view that given the nature of the claim, and the fact that there may be significant disputes as to fact, a Claim Form was the more appropriate procedure".

[17] Matters in which fraud or undue influence is alleged are clear cases in which

the originating summons procedure has been held to be unsuitable, as seen in ***Re Deadman (deceased) Smith v Garland and others*** [1971] 2 All ER 101. However, the originating summons procedure was also found unsuitable in the case of ***In re Old Wood Common Compensation Fund Arnett v. Minister of Agriculture, Fisheries and Food and others*** [1967] 1 WLR 958, where the plaintiff brought an action for the purpose of ascertaining the nature and extent of his rights and the extent of any compensation payable to him, after part of his land was requisitioned by the Minister of Agriculture during the war. Though the plaintiff seemingly commenced proceedings to get a declaration regarding his rights, Goff J discerned that there was likely to be a substantial dispute as to the facts and he ordered that the proceedings continue as if begun by writ. It seems therefore that the originating summons or FDCF procedure is only unsuitable in straightforward cases with few facts in dispute.

ANALYSIS

[18] Having regard to the nature or the types of matters addressed by Rule 8.1(4) (such as mortgage and hire purchase claims) and its apparent purpose to allow matters of less complexity or contention as to facts to be dealt with swiftly, the words “must be used” do not seem to be necessarily mandatory. However, if the words are to be regarded as mandatory, they clearly do not preclude a court from converting the proceedings depending on the nature of the claim and whether there is likely to be a substantial dispute as to facts. The court has a discretion to order that the claim commenced by way of FDCF proceed as if begun by claim form.

[19] In order to determine whether or not it is appropriate to exercise my discretion to direct that the proceedings be converted to a claim form, I believe that it is necessary to identify the disputed facts and the issues which the trial judge is likely to consider, and whether they are indeed likely to be “substantial”. I have perused the Particulars of Claim and the Defence filed in the Parish Court and the FDCF and Affidavit filed in the Supreme Court. I have also read and considered the notes of evidence of the trial which

commenced on July 20, 2016 in the Parish Court, which were attached to the claimant's affidavit and exhibited by as MH-5. It is clear from the Defence and the notes of evidence that the defendants do not deny that the claimant is the registered proprietor. However, the 1st and 2nd defendants contend that the claimant's title to the land has been extinguished pursuant to section 30 of the **Limitation of Actions Act**, by virtue of their dispossession of the paper owner by their open and undisturbed possession of the property for over 20 years. The 1st and 2nddefendants allege that their mother and grandmother, Adassa Kong was granted a lease in 1984 but ceased paying rent in or about 1991 to the previous registered proprietors, referred to in the certificate of title at Transmission No. 1002035 as being George Best, Fitzroy Best and Carmen Best. The defendants further allege that they themselves did not pay rent to the previous or current owners of the land.

[20] The notes of evidence suggests that some of the disputed facts and issues for the court's determination would include:

1. The length of time the defendants occupied the land;
2. Whether or not such occupation was open, undisturbed, continuous and exclusive;
3. The capacity in which the defendants occupied the land, namely whether or not the defendants occupied the land by virtue of licence or by way of adverse possession;
4. What role did Fitzroy Best's grandson (Dwight Wedderburn) play in relation to the collection of rent from tenants on the land, and what was the effect of his presence on the land with the 1st defendant, as her partner;
5. Whether or not of the 1st defendant left the land from 2003 when the claimant alleges that he bought and "took over" the land, and in what way did the claimant take over the land;
6. Whether there is a lot located at 12A Dillon Avenue as distinct from 12 Dillon Avenue, and if so, which lot did the defendants occupy, and at what point, and for what duration;
7. Whether or not the defendants abandoned the relevant land after a fire in or about 2004;

8. When was the Notice to Quit actually served and is it is valid; and
9. What was the date of the first issuance of the Certificate of Title, since the Certificate of Title registered at Volume 1491 Folio 85 (issued on May 22, 2015) was not the first issued title in respect of the land. This would seem relevant when determining the factual issue of whether or not there was adverse possession for the requisite 12 year period.

[21] It is clear that this matter will involve substantial disputes of fact. Notwithstanding, I have also considered the submission of counsel for the claimant that a trial in chambers will allow the issues to be aired and the witnesses to be cross-examined, and therefore it is not necessary that the matter be tried in open court. However, I am not of the view that directing that the deponents attend for cross-examination on specific issues would lead to a satisfactory determination of all the issues. It seems to me that that approach is only suitable where there are few facts in dispute, but in the instant case, there appear to be many facts in dispute, as reflected in the notes of evidence.

[22] In addition to relying on cases referred to above, it seems appropriate for me to briefly consider the common law principle of open justice. In the recent Court of Appeal decision of ***Norton Hinds, Phillip Paulwell and others v The Director of Public Prosecutions*** [2017] JMCA Civ 17, Morrison P discussed the common law principle of open justice and referred to the earlier Court of Appeal decision of ***William Clarke v The Bank of Nova Scotia Limited*** [2013] JMCA App 9. Morrison P said that the common law principle of open justice also finds expression in section 16(3) of the Constitution which states that "[a]ll proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court … shall be held in public." Morrison P further said at paragraphs 61 and 62 that:

> "[61] However, the general rule enshrined in section 16(3) is expressly qualified by section 16(4)which permits a judge hearing the proceedings to exclude members of the public from a hearing in interlocutory proceedings, income tax appeals, and to any extent that it is necessary or expedient to do so to avoid prejudice to the interests

> of justice, or in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of persons concerned in the proceedings."
> [62] ... a departure from the open court principle, may be justified in some instances ... depending on the nature of the proceedings and the type of function conferred upon the court. ... the court may depart from the strictures of a public hearing where in a particular case, economy and efficiency so dictate".

[23] Ms. Chung's submission that the claimant is unwell and therefore requires an earlier trial date than the May 2020 date, without more, does not seem to be a good reason for me to depart from the principles enunciated in ***William Clarke*** and ***Norton Hinds***, and to order that the matter be heard in chambers instead. I would instead urge counsel for the claimant to provide medical evidence of the claimant's condition and to write to the Supreme Court Registrar to request that earlier trial dates be afforded in the circumstances.

CONCLUSION

[24] In light of all the cases considered, the procedure utilising the FDCF is only suitable if the proceedings involved the construction of an Act, contract or other document or involved some other question of law, or, if the facts of the case were largely agreed and the parties sought a decision from the court on a question of law arising from the agreed facts, or, if the proceedings arose under an Act of Parliament, Rule or Practice Direction. As has been clearly said in the cases considered above, the FDCF is an unsuitable method of beginning proceedings if there are likely to be substantial disputes of fact. I therefore believe that a conversion of the proceedings is appropriate in this case as there are a significant number of issues and disputed facts involved in the instant case. Further, I am not satisfied that having the deponents attend for cross-examination would result in adequate evidence being presented before the court. I see no prejudice to the claimant if the claim is ordered to proceed as if commenced by Claim Form as it seems to be in the interests of justice that the evidence be distilled more comprehensively in a trial in open court.

ORDERS

[25] In light of the above, and having regard to the fact that claimant's wife Maisene Hay is not a party to the proceedings, I make the following orders:

1. That the claimant's Attorney-at-law file a Claim Form using the current claim number (2017HCV01342) and add Maisene Hay as the 2nd claimant. I order that the Claim Form and Particulars of Claim be filed and served by March 16, 2018.
2. That the Attorney-at-law for the defendants file an Acknowledgment of Service by March 23, 2018.
3. That the Attorney-at-law for the defendants file their Defence by April 20, 2018.
4. At this time, the trial dates will remain as May 13 and 14, 2020. However the Attorney-at-law for the claimant may write to the Registrar and provide medical evidence of the claimant's illness before the CMC hearing, with a view to requesting that the Registrar assist the parties in obtaining a speedy trial.
5. The CMC hearing is adjourned to April 30, 2018 at 11am for half an hour.