NMS.

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL 16 OF 2001

BEFORE: **THE HON. MR. JUSTICE FORTE, P.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN: **BRYAN CLARKE** **APPELLANT**

AND: **ALTON SWABY** **RESPONDENT**

R. N.A. Henriques, Q.C. instructed by M. N. Hamaty & Co., for the appellant

Ian Wilkinson and Ms. Shawn Steadman, instructed by Mrs. Dawn Gray, for the respondent

December 16 and 17, 2002 and December 19, 2003

FORTE, P:

Having read in draft the judgment of Panton J.A. I am entirely in agreement and have nothing further to add.

PANTON, J.A.

1. On September 20, 2000, His Honour Mr. G. A. Burton, Resident Magistrate for the parish of Westmoreland made an order for possession by June 30, 2001, in favour of the respondent, who is the stepson of the appellant, in respect of a dwelling-house situated at Darliston, Westmoreland. The order was conditional

2. In his particulars of claim, the respondent, who has a registered title to the property in question, asserted that the appellant was a licensee thereon and that the licence was terminated on March 31, 2000, when a notice to quit served on him had expired. The appellant filed a special defence to the claim to the effect that the respondent was not entitled to enter upon the land or to bring an action to recover it as twelve years had passed since the right to make such entry or bring such suit had accrued.

The Resident Magistrate's findings

3. The Resident Magistrate found that the land which had been owned by Mrs. Ellen Maud Watt, the aunt of the respondent, was passed to him in her will. During her lifetime, she had permitted Winnifred her sister, the respondent's mother, to occupy the house rent-free. The permission continued after Winnifred's marriage to the appellant in 1964. Mrs. Watt died in 1983. The Resident Magistrate also found that the respondent "made frequent visits to the property both as agent for Mrs. Watt and later as executor and ultimately owner of the property". The respondent paid the taxes. The appellant has improved the property from his own resources, and has been given money on at least one occasion by the respondent to do repairs to the roof, install a water closet and build a room.

4. The Resident Magistrate concluded that the appellant and his wife remained licensees at all times, and obtained no proprietary rights in the property. However, the appellant was entitled to be compensated for his labour

as well as the expenditure that he had made, thereby improving the value of the house. The amount of compensation was determined on the basis of the invoices presented at the trial as well as the Court's estimate of the value of the labour.

5. The oral and documentary evidence indicate that the respondent's aunt died on December 26, 1981, so the finding by the Resident Magistrate that she died in 1983 is an error. It was the appellant's wife who died in 1983. This error produced no significant consequences and is being mentioned only for the sake of accuracy.

The grounds of appeal

6. The appellant filed five supplementary grounds of appeal. They allege errors on the part of the learned Resident Magistrate as follows:

(i) finding that the appellant was a licensee at all times and that neither he nor his wife obtained any property rights;

(ii) failing to appreciate that in the absence of evidence as to how the appellant came to occupy the property, the appellant could never be a licensee of the respondent or the respondent's successor in title;

(iii) failing to appreciate that the appellant's continued occupation of the premises and improvement of the property by building a permanent structure thereon is inconsistent with any title or proprietary interest of the respondent, and consequently a case of adverse possession has been established;

(iv) further or alternatively, failing to appreciate that the appellant having been permitted to remain on the premises and to expend funds thereon, an equitable estoppel has been

> created in his favour and so he was entitled to a proprietary interest in the property and to remain in possession; and
>
> (v) making the order for possession without any supporting evidence.

So far as ground (iii) is concerned, the appellant seems to have made an about turn since the trial. In his address to the Resident Magistrate, the appellant's attorney-at-law, Mr. Smart, is recorded at page 37 of the record as saying:

> "The first defence, a special defence, refers to section 3 of the Limitation of Actions Act. This section does not speak to the law relating to adverse possession. Counsel referred to several cases that relate to adverse possession but this case is **NOT** for adverse possession"

Mr. Smart was replying to submissions made on behalf of the respondent. The emphasis on the word "not" in the quoted passage was placed there by the Resident Magistrate, no doubt in keeping with the manner in which learned counsel stressed it in his address. In view of the clear position enunciated by Mr. Smart, it is not difficult to regard this late claim to adverse possession as being made tongue-in-cheek. It fails for reasons which follow.

The issues for determination

7. There are two issues involved in the case. Firstly, has the appellant been occupying the premises under licence? Secondly, does the respondent have the right to bring this action against the appellant? The first issue arises from the terms of the particulars of claim, whereas the other springs from the special

defence that was filed. The judgment appealed from, indicates that the learned Resident Magistrate gave answers to these questions in a manner that was not consistent with what had been advanced by the appellant.

The licence

8. The Resident Magistrate found that Mrs. Watt had permitted her sister to reside rent-free in the house, and that the permission continued after the latter's marriage to the appellant. He found that the appellant and his wife resided on the property during their marriage, and that the appellant remained thereon after his wife's death with the permission of the respondent. He held that the appellant remained a licensee at all times.

Mr. Henriques, Q.C., for the appellant, submitted that there was no evidential support for the finding that the appellant was a licensee. This, he said, was an error on the part of the Resident Magistrate who had failed to appreciate that there had to be an agreement between the parties to the suit for the grant of a licence by the respondent to the appellant in order that the appellant may be regarded as a licensee - and there was no such grant. Even if Mrs. Watt had granted her sister a licence, it would have ended on Mrs. Watt's death. Thereafter, a grant by the respondent to his mother (the appellant's wife) would also have ended at her death. On the other hand, Mr. Wilkinson for the respondent submitted that the appellant had a bare licence. It is clear, he said, that the appellant was on the property with the respondent's permission.

9. The respondent gave evidence that during the lifetime of his aunt, he acted as her agent in respect of the property, and that there was no act done by the appellant which was inconsistent with the fact that Mrs. Watt was the registered owner. He also produced several tax receipts indicating that he had the responsibility for the payment of taxes during and after Mrs. Watt's lifetime. The learned Resident Magistrate accepted the evidence as to the respondent's role as agent for Mrs. Watt. He also had before him evidence that the respondent had informed the appellant in about 1979, that is, prior to Mrs. Watt's death, that the land did not belong to the appellant's wife. Then, on the death of the appellant's wife, there was a conversation in which the respondent advised the appellant that he (the respondent) was now the owner of the property. The respondent also advised the appellant that he could continue to live on the property if he agreed to purchase it. Thereupon, the appellant said that he would go to the bank to "see what they say about it".

10. The appellant gave evidence that his wife had told him that the land belonged to her and Mrs. Watt. He also said he gave her three pounds sterling to buy the land from Mrs. Watt in England but he had no documentary evidence to present to the Court to verify this statement. According to him, his wife "called" him to do work on the house. He did the work but was not paid. He also worked on the house in 1979 and was paid money by the respondent for that work. However, he also said that he never met the respondent until after his wife (the respondent's mother) had died in 1983. This latter statement was clearly false,

and the Resident Magistrate appreciated this as he accepted that the appellant carried out repairs on the property in 1979 and was paid by the respondent.

11. A licence, as given in this case, is permission to enter and remain on the land, thereby avoiding the label of trespasser. In the circumstances that have been advanced and proven in this case, it is, with respect, a curious argument to say that there is no evidence of a licence having been granted to the appellant. He has never been the registered owner of the property. He was taken on the land by his wife who was not the registered owner, and who had no form of proprietary interest therein. If the appellant were honestly and seriously interested in purchasing an interest in the property at the time he said he gave his wife three pounds sterling for the purpose, he would have made the appropriate enquiries and would have learnt that Mrs. Watt was registered as the sole proprietor of an estate in fee simple on August 8, 1968. If the effort to purchase was between 1964 (the time of the appellant's marriage to Mrs. Watt's sister) and 1968 (the time of the registration), Mrs. Watt was probably not then in a position to sell any interest in the land. In any event, it is clear, although not specifically expressed, that the Resident Magistrate rejected the idea of the appellant having bought an interest in the land. That is why he found that the appellant was a licensee. However, he recognised that the appellant had expended monies on the property and so was entitled to compensation. The expenditure by the appellant, it should be added, was not as a result of his being encouraged by the registered owner, nor was it due to any promise of a

compensating stake or interest in the property. The expenditure appears to have been done by him with his personal comfort in mind.

12. At the trial, the appellant unequivocally disclaimed any right as accruing to him through adverse possession. That disclaimer is irreversible in the absence of compelling circumstances that would permit the Court to countenance otherwise. No such circumstances have been put forward. Indeed, they do not exist. If the appellant is not a registered owner, and he is not claiming that he extinguished the rights of the registered owner, and he is not a trespasser, it seems conclusive in the circumstances of this case that he must be a licensee. This is so because there is no proprietary interest of any kind that he can point to as being in his favour. He lived on the property at the invitation or sufferance of his wife. The registered title being in the name of Mrs. Watt, it is obvious that the appellant's wife was there with the permission of Mrs. Watt. On the death of Mrs. Watt on December 26, 1981, the respondent became entitled to the property. It is undisputed that he was sole beneficiary of Mrs. Watt's estate. On July 9, 1993, his interest was entered on the title. After Mrs. Watt died, the respondent's mother and the appellant continued to live on the property. They were now residing at the premises with the permission of the respondent. A licence, if not explicit, is implicit in the circumstances.

13. ***The right of the respondent to bring an action***

At the trial, the defence of the appellant was simply that the respondent had no right to enter upon the land or to institute any proceedings against

anyone in respect of the said land. This defence was based on section 3 of the Limitation of Actions Act which reads:

> "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same".

This defence is usually relied on by persons who are seeking to have recognition of the fact that an owner of land has been ousted. In this case, the situation is different because, as pointed out earlier, the appellant's claim is not on the basis of adverse possession. Mr. Henriques submitted that the Resident Magistrate erred in not making a finding in favour of the appellant in respect of the special defence. On the other hand, Mr. Wilkinson submitted that the appellant was on tenuous ground in this respect, he being on the property with the permission of the respondent. In any event, the period of twelve years had not elapsed so there was no bar against the respondent so far as entry on the land or the filing of the suit was concerned.

14. ***Conclusion***

On any construction that may be put on the facts of this case, the appellant's position in respect of the special defence is indeed tenuous. Mrs. Watt died on Boxing Day 1981. The respondent is the executor of her estate.

There was no challenge to his position as such or as to his right to enter upon the premises. The evidence discloses multiple visits by him over the years to the property, without even a suggestion of a challenge to his legitimacy . His name was registered on the title on July 9, 1993. It is since then that there has been resistance to his rights. He filed suit on April 10, 2000. In this situation, section 3 of the Limitation of Actions Act does not apply; neither to the period between the death of Mrs. Watt and the registration of the respondent's name on the title, nor to that between the registration of the name on the title and the date of the filing of the suit. The appeal therefore fails. It is noted that there has been no challenge to the award of compensation by the learned Resident Magistrate. In the circumstances, the appeal is dismissed with costs of the appeal fixed at $15,000.00 awarded to the respondent.

SMITH, J.A:

I have had the advantage of reading the draft of the judgment of Panton J.A. For the reasons given by him I also agree that the appeal should be dismissed.