

listed
Nov. 3, 2004

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 9 OF 2003

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

BETWEEN	THE REGISTRAR OF TITLES	APPELLANT
A N D	MELFITZ LIMITED	1ST RESPONDENT
A N D	KEITH DONALD REID	2ND RESPONDENT

Mrs. Nicole Foster-Pusey and Miss Nicola Brown, instructed by Director of State Proceedings for the Appellant

Mr. Terrence Ballantyne instructed by Ballantyne, Beswick & Company for the 2nd Respondent

January 17 and July 29, 2005

FORTE, P.

I have read in draft the reasons of Smith, J.A. and am in agreement with both his reasons and conclusions. There is nothing useful that I could add.

SMITH, J.A.

Background facts

In 1979 the 2nd Respondent, Mr. Keith Reid, took adverse possession of 15 acres 6 perches of land part of Weston Park in the parish of Clarendon. The said land was registered at Volume 372 Folio 66 of the Register Book of Titles in the name of the 1st Respondent, Melfitz Limited. In or around November 1994,

Mr. Reid applied to the Registrar of Titles, the appellant, for himself to be registered as proprietor of the land.

Melfitz Limited ("the Company") lodged a caveat on November 14, 1994. But as of November 10, 1994 the Certificate of Title registered at Volume 372 Folio 66 had been cancelled and a new Certificate of Title registered at Volume 1276 Folio 21 had been issued to Mr. Reid.

The Company lodged a caveat against the new title on May 16, 1995 and in June filed a suit against Mr. Reid, The Registrar of Titles and the Attorney General. In this suit it was alleged that Mr. Reid falsely and fraudulently caused the Company's land to be transferred to himself and that the Registrar was negligent and was in breach of her statutory duty. The Attorney General was joined by virtue of the Crown Proceedings Act. The Company claimed damages, a declaration, injunction and cancellation of the Certificate of Title registered at Volume 1276 Folio 21. Defences were filed by the respective parties denying the allegations.

On November 1, 2001 the Registrar and the Attorney General filed a Notice of Intention to take a Preliminary Point that the action against the Registrar was premature and that the action against the Attorney General was misconceived.

On October 3, 2002 the Registrar and the Attorney General filed a Summons to amend the Defence and to strike out or stay the action against them. The bases of this application were that the preconditions outlined in

sections 162 and 164 of the Registration of Titles Act for the action to be taken against the Registrar had not been fulfilled and that the action against the Attorney General was misconceived as the Registrar can sue and be sued.

The Summons was heard by Campbell J. On January 15, 2003, the learned judge granted the Registrar and the Attorney General leave to amend their Defence. He dismissed the application to strike out the action against the Registrar but granted the application to strike the action against the Attorney General.

Before us now is an appeal against the decision of Campbell J in refusing to strike out the action against the Registrar.

The Appeal

Five grounds of appeal were filed and were addressed in the written and oral submissions of counsel for the Appellant Registrar:

- 1) "The Scheme of the Registration of Titles Act ("the Act") requires that the Registrar of Titles be sued only where certain pre-conditions are satisfied."
- 2) "One such pre-condition is that the Registrar is to be sued only where it is not possible for the Plaintiff to recover the land in question. The Plaintiff has sued the First Defendant, who is still in possession of the disputed land. Recovery of land is still possible."

- 3) "The learned trial judge erred in ruling that the exemption of the Registrar of Titles from actions is restricted to cases where the remedy sought is for recovery of damages."
- 4) "The learned judge erred in ruling - "there is no restriction on actions against the Registrar where the remedy is for a declaratory relief, injunctions or cancellation of certificates as the Plaintiff prayed for." These remedies did not necessitate any suit against the Registrar of Titles."
- 5) "The learned judge erred in ruling - "It could be argued that the acts done by the Registrar were not bona fide in exercise or supposed exercise of the powers of the Act," in circumstances where the pleadings do not reflect any such allegation".

It seems to me that 1 and 2 (supra) are more in the nature of submissions than grounds of appeal. Grounds 3, 4 and 5, in my judgment, raise one issue namely: Whether a person wrongfully deprived of land through the operation of the Registration of Titles Act ("the Act") may bring any action against the Registrar where it is possible to recover the land from the person who fraudulently brought about the deprivation.

Grounds 3, 4 and 5

Mrs. Foster-Pusey submitted that:

- 1) The remedies sought by the company against the Registrar cannot be obtained by virtue of a suit. See section 148 and Baalam, **The Torrens System**. 1N N.Z. (2nd Edition).
- 2) The action by the Company is not permissible as the Company has not satisfied the pre-conditions outlined in sections 162, 164, 165 and 166 of the Registration of Titles Act ("the Act).

The remedies claimed by the Plaintiff Company against the Registrar are:

- (i) A Declaration that the Company is entitled to possession of the said land'
- (ii) Cancellation of Certificate of Title registered at Volume 1276 Folio 21 and the issue of a new Title in the name of the Plaintiff;
- (iii) An order that the Registrar do forthwith re-transfer the said land to the Company;
- (iv) Damages.

Section 158 of the Act provides:

"158. – (1) Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or a Judge to direct the Registrar-

- (a) to cancel or correct any certificate of title or instrument or any entry or memorandum in the Register Book, relating to such land, estate or interest; and
- (b) to issue, make or substitute such certificate of title, instrument, entry or memorandum or do such other act, as the circumstances of the case may require,

and the Registrar shall give effect to that direction.

(2) In any proceeding at law or equity in relation to land under the operation of this Act the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar -

- (a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or
- (b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge."

This section clearly empowers the Court or a Judge to grant such remedies as those sought at (i) (ii) and (iii) (supra) upon the recovery of land from the person registered as proprietor thereof without the Registrar being a party to the suit.

In the instant case the Plaintiff Company is seeking to recover land registered in the name of Mr. Reid, the 2nd Respondent. If the Company succeeds in its claim the trial judge may grant the Declaration sought at (i) and direct the Registrar to cancel the Certificate of Title in question (ii) and to re-transfer the land to the Company (iii). To grant these remedies the Registrar need not be a party to the suit. Indeed to include the Registrar in such a suit where only these remedies are sought would only serve to incur unnecessary legal expenses. Additionally apart from the remedies sought the Company is also claiming damages against the Registrar.

It is the contention of Mrs. Forster-Pusey that the scheme of the Act requires that the Registrar be sued only where certain pre-conditions are satisfied. The Legislative scheme must be examined. I will start with section 160. This section reads:

“160. The Registrar shall not, nor shall the Referee or any person acting under the authority of either of them, be liable to any action, suit or proceeding, for or in respect of any act or matter *bona fide* done or omitted to be done in the exercise of the powers of this Act.”

This section exempts the Registrar and the Referee of Titles from suit in respect of any action done, pursuant to the provisions of the Act without fraud, collusion or complicity in wrong doing. In the instant case there is no allegation of fraud, collusion or complicity on the part of the Registrar or any person acting under his/her authority. I entirely agree with counsel for the appellant that there is no basis whatsoever for the trial judge's conclusion that “It could be argued reasonably that the acts done were not bona fide in exercise of the powers of the Act.”

Section 161 along with sections 68 and 71 provides for the indefeasibility of the registered title save in exceptional circumstances. Where none of the exceptional cases applies the production of the certificate of title is an absolute bar to any action against the registered proprietor. One of the cases excepted from the principle of indefeasibility of the registered title is the case of a person deprived of land as against a person registered as proprietor of the land through

fraud or as against a person deriving otherwise than as a transferee bona fide for value – see subsection (d).

The Company is alleging fraud against the 2nd Respondent who is the registered proprietor. In these circumstances the principle of the indefeasibility of the registered title will not bar an action against the 2nd Respondent for the recovery of the land.

Section 162 provides for an action for damages by any person wrongfully deprived of land in certain defined circumstances. This section, as also section 164, provides a remedy for persons who suffer from the effects of the indefeasibility of title under the Torrens system.

Section 162 reads:

“ **162.** Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by registration of any other person as proprietor of such land, estate or interest, or in consequence of any error or misdescription in any certificate of title, or in any entry or memorandum in the Register Book, may bring and prosecute an action for the recovery of damages against the person on whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud, error or misdescription:

Provided always that, except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription, in the application of such person to bring such land under the operation of this Act, or to be registered as proprietor of such land, estate or interest, or in any instrument signed by him, such person shall upon a transfer of such land *bona fide* for valuable consideration, cease to be

liable for the payment of any damage beyond the value of the consideration actually received, which damage but for such transfer might have been recovered from him under the provisions herein contained; and in such last mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged bankrupt, or cannot be found within the jurisdiction of the Supreme Court, then and in any such case, such damages, with costs of action, may be recovered out of the Assurance Fund by action against the Registrar as nominal defendant:

Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation shall be excluded."

This section has been described as being "confused and ill-drafted." Its format is Victorian and lacks clarity. What seems tolerably clear, though, is that the section creates a statutory cause of action. It sets out the circumstances under which a person deprived of land may bring an action for damages and identifies the person to be made a defendant.

By virtue of this section one of the circumstances in which a person deprived of land may bring an action for damages is where such deprivation was in consequence of fraud. In so far as it is relevant to this case, such action for the recovery of damages may be brought in the first instance against the person on whose application the land was brought under the operation of the Act or **who acquired the title to the land through such fraud.**

The proviso is interesting. It outlines the circumstances in which a person deprived of land may bring an action against the Registrar as nominal defendant to recover damages out of the Assurance Fund. These circumstances seem to indicate that the intention is not to relieve the wrongdoer of the consequences of his wrongful acts. An action for damages may only be brought against the Registrar where the person liable for the payment of damages ceases to be liable by virtue of the proviso or where the person against whom such action is directed to be brought is dead or has been adjudged bankrupt or cannot be found within the jurisdiction.

Clearly, the circumstances under which the respondent Company may bring an action against the appellant Registrar pursuant to this section do not exist.

Section 163 protects a bona fide purchaser of registered land for valuable consideration against actions for recovery of land or for recovery of damages.

Section 164 is important in this general scheme. It reads:

"164. Any person sustaining loss through any omission, mistake or misfeasance, of the Registrar, or any other officer or clerk, in the execution of their respective duties under the provisions of this Act or by an error, omission or misdescription in any certificate of title, or any entry or memorandum in the Register Book, or by the registration of any other person as proprietor, and who by the provisions of this Act is barred from bringing an action for the recovery of the land, estate or interest, may, in any case in which the remedy by action for recovery of damages as herein provided is inapplicable, bring an action against the Registrar as nominal defendant for recovery of damages:

Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation, shall be excluded."

This section permits a person wrongfully deprived of land or any interest therein through the mistake, omission or misfeasance of the Registrar or any other officer, or by the registration of any other person as proprietor, to bring an action against the Registrar as nominal defendant for the recovery of damages in two situations. These are:

- 1) Where the person deprived of land is barred, by the provisions of the Act, from bringing an action for the recovery of land ; and
- 2) Where the remedy by action for recovery of damages as provided by the Act is inapplicable.

The 2nd Respondent is still the registered owner of the land. The 1st Respondent is entitled to sue and in fact has sued the 2nd Respondent for recovery of the land. In these circumstances the 1st Respondent is not permitted by section 164 to bring an action for damages against the Registrar.

A comment on certain statutory provisions, which are similar to these, by the learned authors of **Baalman – The Torrens System in New South Wales "Second Edition 1974**, on which Mrs. Foster-Pusey relies, is apt. It reads (page 392):

"The general scheme (of the Act) is to confer on a person deprived of land through the operation of the Act a right to pecuniary compensation, in substitution

for the right which he would have had under common law to bring an action for recovery of land. Action must be brought, or attempted to be brought in the first instance against the person who caused the deprivation. If, for any of the stated reasons, that attempt fails, then a person suffering loss can look to the Assurance Fund."

I agree with counsel that this summary could properly be applied to the statutory provisions which I have examined, particularly sections 162 and 164.

Two other sections of the Act were referred to by counsel for the appellant – sections 165 and 166. Section 165 stipulates that any person who is entitled to bring an action to recover damages under the provisions of sections 162 and 164 shall before commencing proceedings, make an application in writing to the Registrar for compensation. Mrs. Foster-Pusey pointed out that there was nothing to indicate that such an application was made.

Further section 166 provides that in any case in which an action for recovery of damages is permitted to be brought against the Registrar as nominal defendant, notice in writing of such action and the cause thereof shall be served upon the nominal defendant at least one month before the commencement of such action. Such a notice was not served, counsel for the appellant observed. It is the contention of counsel for the appellant, that even if the 1st respondent, the Company, were entitled to bring an action to recover damages under the provisions of sections 162 and 164, the Company having failed to comply with the mandatory provisions of section 165, the Court would have no jurisdiction to

entertain the action against the Registrar. In my judgment, there is merit in this submission.

Conclusions

Having examined and analysed the sections above I have come to the following conclusions:

1. Where the remedies sought are declarations, injunctions, cancellation of certificate and retransfer of land, there is no necessity or requirement for the Registrar to be made a party to the action – see section 158 (supra).
2. The 1st Respondent is not entitled to bring an action for damages against the Registrar as nominal defendant since the person who, allegedly deprived of the land, is now the registered proprietor and is in fact sued for recovery of the said land – see section 164 (supra).
3. Where fraud is alleged and the recovery of the land is not possible the person deprived of such land may only bring an action against the Registrar for the recovery of damages where:
 - a) the person against whom the fraud is alleged is dead or
 - b) has been adjudged bankrupt or
 - c) cannot be found within the jurisdiction of the Supreme Court – see section 162 (supra).
4. An application in writing to the Registrar for compensation is a condition precedent to the commencement of proceedings for the recovery of

damages against the Registrar pursuant to sections 162 and 164 of the Act – see section 165.

5. A notice in writing of an action against the Registrar pursuant to sections 162 and 164 for recovery of damages and the cause of such action must be served upon the Registrar as nominal defendant one month at least before the commencement of such action.
6. Common law remedies of negligence and breach of statutory duties are not available against the Registrar or any person acting under the authority of the Registrar because there are exclusive statutory remedies pursuant to sections 162 and 164.
7. It is for the above reasons that I agreed that the appeal should be allowed and the suit against the Registrar struck out.

K. HARRISON, J.A.

I agree with the reasons and conclusions of my brother Smith, J.A. and I have nothing further to add.

FORTE, P.

ORDER:

1. The appeal is allowed.
2. The suit against the Registrar is struck out.
3. Costs to the appellant both here and in the court below to be taxed if not agreed.