[2021] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

PARISH COURT CIVIL APPEAL NO 21/2018

BETWEEN	**LAWRENCE ROBERTSON**	**APPELLANT**
AND	**DELORES ROBERTSON**	**RESPONDENT**

Appellant in person

Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co for the respondent

7 October 2020 and 15 October 2021

MCDONALD-BISHOP JA

[1] I have read the draft judgment of my sister Foster-Pusey JA and I agree that it was for these reasons that we dismissed the appeal.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of my sister Foster-Pusey JA and I agree that it was for these reasons that we dismissed the appeal.

FOSTER-PUSEY JA

Introduction

[3] This is an appeal from the decision of Her Honour Ms Marjorie Moyston ('the Parish Court Judge'), delivered on 29 June 2015 in the Parish Court for the parish of Portland. The Parish Court Judge refused the appellant's application to set aside the default

judgment entered against him in favour of the respondent, for recovery of possession of premises located at Lot 10 Darlingford Housing Scheme, Weybridge, Manchioneal, in the parish of Portland ('the property').

[4] Upon considering the parties' submissions and the relevant law, we made the following orders when we heard the appeal on 7 October 2020:

> "1. The appeal is dismissed.
>
> 2. The decision of Her Honour, Ms Marjorie Moyston made on 29th June 2015 is affirmed.
>
> 3. No order as to costs."

With apologies for the delay, we now provide these short reasons for our decision.

Background

[5] On 8 April 2014, the respondent filed a plaint note and particulars of claim seeking recovery of possession of the property. The matter came up for mention on a number of dates including 1 May 2014, 22 May 2014, 5 June 2014 and 3 July 2014. While the respondent or her representative were present on all occasions except for 22 May 2014, when the matter had been transferred to the Port Antonio Parish Court, the appellant only attended court on 5 June 2014.

[6] The court set the matter down for trial on 4 September 2014, 11 September 2014, 18 September 2014 and 2 October 2014. Neither the appellant nor his attorney-at-law attended court on any of those dates, although the respondent or her representative were present. By letter dated 17 September 2014, the appellant indicated that, for various reasons, he did not wish for the Parish Court Judge who had been dealing with the matter to continue doing so. The Parish Court Judge who had been handling the matter since 3 July 2014, was Her Honour Mrs Tara Carr.

[7] In addition, at the trial date on 18 September 2014, the court noted that the appellant had been granted 10 days' sick leave with effect from 9 September 2014.

[8] As a result of the appellant's request for a different Parish Court Judge to handle the matter, Her Honour Miss Marjorie Moyston presided in the matter on 2 October 2014 and at all the hearing dates afterwards.

[9] The respondent did not, at any time leading up to the entry of the default judgment, indicate that he was relying on a special defence.

[10] When the matter came up for trial on 4 December 2014, the respondent was present, but the appellant was again absent. An attorney-at-law had called the court to indicate that the appellant's car had mechanical problems. The Parish Court Judge decided to commence a default judgment hearing in the matter, and heard evidence from the respondent. The Parish Court Judge then adjourned the matter part heard to 11 December 2014, and instructed the court's office to contact the appellant, informing him of the date on which the trial would continue. The Parish Court Judge also arranged for her notes, taken at the hearing on 4 December 2014, to be typed for the assistance of the appellant. On 10 December 2014, an individual collected the notes on behalf of the appellant.

[11] On 11 December 2014, the court received a message that the appellant was out of the parish and could not attend the hearing. The Parish Court Judge continued with the default hearing, and took the evidence of Mrs Tanya Robertson Lue, the daughter of both of the parties.

[12] At this point, it is important to outline the evidence which the Parish Court Judge heard. The respondent testified that she had married the appellant in 1974 and they had two children together. At the time that she was giving evidence on 4 December 2014, she had been divorced from the appellant for "some twenty-five years".

[13] In 1977, she bought the property from the Ministry of Housing. Caribbean Housing Finance Corporation Limited provided her with a mortgage to facilitate the purchase of the property. The respondent testified that she completed payment of the mortgage in

1997. The court admitted into evidence a letter dated 27 November 1997 (Exhibit 3), which read:

> "Ms. Delores Robertson
> Lot 10 Darlingford
> Darlingford Housing Scheme
> Manchoniel P.O.
> Portland
>
> Dear Ms. Robertson,
>
> Re: Lot 10 Darlingford – A/C 33-3604
>
> We are pleased to advise that the captioned account has been fully settled.
>
> The Ministry of Environment and Housing is being advised and they will confirm that the debt is now fully settled. Kindly contact that Ministry's Legal Department at 2 Hagley Park Road, Kingston 10 in respect of the duplicate Certificate of Title.
>
> We take this opportunity to let you know that it has been a pleasure doing business with you over the years.
>
> Yours truly,
>
> CARIBBEAN HOUSING FINANCE CORPORATION LIMITED
>
> …
>
> MORTGAGE ADMINISTRATION MANAGER"

The respondent stated that she had not yet received the registered title for the property. She testified that, even during the marriage, the appellant had not made any payments towards the purchase of the property. In fact, he had owned another property in a housing scheme.

[14] The respondent stated that in late 2009 or early 2010, she left the property and went to stay at her daughter's house.

[15] In 2009, both of her daughters asked her to allow the appellant, their father, to stay at the property. At first, she refused, but she eventually capitulated, and he moved on to the property in 2010. She did not ask him to pay any rent. Initially, he was given permission to occupy a half of the house, but he eventually began to occupy a larger part of it. In 2012, the respondent asked the appellant to return to occupying only half of the house so that she could send some workers to be accommodated there. The appellant told the respondent that he was not coming out until he was ready, and stated that he owned the property.

[16] Mrs Robertson Lue testified in support of the respondent's case. She corroborated the respondent's evidence as to the circumstances in which the appellant came to be living at the property, including that he was to have been occupying only a part of it, but had eventually occupied the entire house. She communicated with the appellant, who suggested to her sister and her that they should write a letter giving him permission to collect the title for the property. Mrs Robertson Lue and her sister refused to do so.

[17] Mrs Robertson Lue testified that she was present on 9 August 2013 when the appellant was served with a notice to quit dated 7 August 2013 (Exhibit 1). She received from the appellant a letter dated 9 August 2013, addressed to both her and the respondent (Exhibit 2), in which he wrote:

> "2013, August 9
> Delores Robertson & Tania Lue
> Manchioneal P.O.
> Portland
>
> Dear Ms. Robertson/Lue
>
> **RE: NOTICE TO LEAVE PREMISES BY SEPTEMBER 21, 2013**
>
> I have received your notice of August 9, 2013, to vacate premises by September 21, 2013.
>
> In a previous letter [sic] you, my Attorneys had indicated that we would vacate the premises on October 30, 2013.

> However, because of the lack of available rental properties in the parish, we will not be able to leave until on or before November 30, 2013.
>
> Best regards
> Yours truly,
> …
> Larry Robertson"

[18] Mrs Robertson Lue testified that the appellant did not live at the property, even during her childhood, and that it was her mother who paid for the property.

[19] The Parish Court Judge concluded that the evidence presented by the respondent was sufficient and, on 11 December 2014, granted a default judgment for recovery of possession in her favour.

The application to set aside the default judgment

[20] Four months after the judgment had been entered, by application dated 21 April 2015, and an affidavit sworn on the same date, the appellant applied to set aside the default judgment.

[21] In the affidavit, the appellant asserted that both he and the respondent purchased the premises while they were married, and they occupied it as the matrimonial home. He stated that, although it was purchased with joint funds from himself and the respondent, the property was held in her name only. He stated that when they divorced, he moved from the property leaving the respondent there until 2009, when she moved into a house owned by their daughter, Mrs Robertson Lue.

[22] The appellant stated that he was engaged to carry out certain works for the Resort Board and the Portland Parish Development Committee and, as a result, he needed somewhere to live in Portland. His daughters suggested that he could reside at the property because it was empty and he agreed, especially since he had an equitable interest in the property.

[23] In 2009, he began to reside at the property and it was agreed that he would refurbish and improve it at no cost to the respondent. He intended that any improvements to the house would enure to his and their daughters' benefit. Accordingly, he had building plans drawn to add another floor to the property and commenced grilling and improving the property. The appellant stated that the respondent began harassing him and telling him to vacate the property, but he refused to do so. In 2014, he received a plaint summons filed by the respondent to recover possession of the property.

[24] The appellant gave evidence concerning the dates when he attended or was absent from the various court hearings. He explained that on the trial date of 4 December 2014, he was absent because he was traveling from "the other end of the island", and upon arriving at the Mandela Highway at around 7:30 am, his car broke down and he was stranded. Once he realized he would not make it to court, he contacted Ms Andrea Moore, attorney-at-law from the firm Moore, Eubank, Moore and asked her to represent him at court, explain his difficulty and seek an adjournment. The matter, however, commenced in his absence, evidence was taken and it was adjourned to 11 December 2014. The appellant averred that although he was not informed that he should attend court on 11 December 2014, the Parish Court Judge entered a judgment in default against him.

[25] He stated that he had a good defence to the claim for recovery of possession because he had an equitable interest in the property as well as an interest under the Property (Rights of Spouses) Act ('PROSA').

The learned Parish Court Judge's decision on the application to set aside

[26] The Parish Court Judge referred to section 186 of the Judicature (Parish Court) Act ('the Act'), which outlines the circumstances in which a judge may grant a default judgment, and may also set aside any judgment given in the absence of the defendant. She outlined in detail the various dates on which the matter had come up for mention and trial, the parties or their representatives who were present or absent, and reasons (if any) which were given for their absence. She noted that there had been four mention

dates and four trial dates before she commenced the hearing of the matter on 4 December 2014, and then granted default judgment on 11 December 2014. The Parish Court Judge noted that all adjournments on the trial dates were due to the appellant's absence, and no attorney-at-law had attended representing him at any of the hearings. She formed the view that the appellant was delaying the start of the trial, and that the reason proffered for his absence on 11 December 2014, that he was out of parish, was not a reasonable excuse.

[27] The Parish Court Judge stated that she commenced hearing the matter on 4 December 2014 and took evidence from the respondent. She adjourned the matter to 11 December 2014, arranged for her notes to be typed for the benefit of the appellant, instructed the court's office to inform the appellant of the next hearing date and an individual collected the notes for the appellant.

[28] On 11 December 2014, she continued the default hearing and took the evidence of Mrs Robertson Lue. At the end of the hearing, she concluded that the evidence given and on behalf of the respondent was sufficient to justify the entry of the default judgment.

[29] The Parish Court Judge stated that the default judgment was therefore regular, not irregular. Since the judgment was regular, the appellant needed to put forward a defence appearing to have merit.

[30] The Parish Court Judge considered the matters which the appellant had raised in his affidavit. She noted that the appellant sought to rely on PROSA, however, he had not indicated when he and the respondent were separated or divorced, whether the marriage had been annulled and if a decree absolute had been granted. On the other hand, the respondent had, in her evidence indicated that she had been divorced from the appellant for 25 years. The Parish Court Judge stated:

> "That is not a defence that I could even consider."

She then wrote:

> "I am aware that he was married to someone else after this marriage."

[31] In continuing to assess the merits of the points raised by the appellant, the Parish Court Judge considered his assertion that he had made monetary contributions towards the purchase of the property. She noted that the appellant did not outline the period or time when he expended funds, or the amount of money allegedly spent. She highlighted that his failure to refer a time period handicapped her, as she was not able to determine whether the expenditure had occurred more than 12 years before he was raising the issue, with the possibility that the Limitation of Actions Act could apply.

[32] Insofar as the appellant's assertions that he had recently expended funds on the property were concerned, the Parish Court Judge noted that the appellant had stated that he had done so with his daughter's consent. There was, however, no evidence that the respondent was aware of or consented to the alleged expenditure.

[33] In concluding, the Parish Court Judge highlighted the fact that the default judgment she had entered was in respect of a proceeding for recovery of possession and even if recovery of possession was granted, this did not prevent the appellant from bringing proceedings in the Supreme Court seeking "damages based on equity and property rights of spouses act [sic]".

[34] Since, in her view, no merit had been shown in any of the appellant's proposed defences, the Parish Court Judge refused the application to set aside the default judgment.

The appeal

[35] In his notice and grounds of appeal filed on 9 July 2015, in the Parish Court of Portland, the appellant sought an order that the decision of the Parish Court Judge be set aside and a new trial ordered on the following grounds:

"**GROUND 1**

That [the Parish Court Judge] erred in rejecting [the appellant's] Counsel's submission that he had a good defense [sic] to the action for recovery of possession, when he stated in his affidavit that he was claiming an equitable interest in the property which he was in possession of, and that he desired to contest [the respondent's] claim to recover possession against him in the circumstances, and especially in view of the fact that:-

a. Title to the property was in issue, which claim would have served to oust the jurisdiction of [the Parish Court Judge], and;

b. The fact that [the respondent] failed to plead in her pleadings filed to ground the action for recovery of possession a value for the property over which the order for recovery of possession is being sought.

GROUND 2

That [the Parish Court Judge] admitted, on the day that the order for the default Judgement [sic] was entered, that she had received word from attorneys Messrs. Moore Eubanks that [the appellant] was experiencing mechanical problems with his motor car, and was unable in the circumstances to attend court in Manchioneal on the 4th of December, 2014, when she commenced hearing evidence in respect to the default Judgement [sic].

That in the circumstances, [the Parish Court Judge] erred in entering the default Judgement [sic], she being fully aware of [the appellant's] inability to attend court.

GROUND 3

That [the Parish Court Judge] erred when she failed to disqualify herself from hearing the matter, especially after she had received correspondence from [the appellant] wherein he complained to her about remarks that he had reportedly heard that she had made about him since the filing of the plaint, which caused him to write to her to request that she disqualify

herself from the matter when he stated *'I think that if you don't trust my family doctor, lawyer, nor myself, then the best thing for you to [sic] dismiss yourself from the matter so that justice can be served, honestly I must confess that because of your utterance I have no confidence with you being the Trial Judge in this matter.'*

GROUND 4

That [the Parish Court Judge] further erred when she stated in making her ruling that [the appellant], Lawrence Robertson, was previously well known to her, and that she knew that he had been married and divorced from [the respondent], and had in fact been since remarried and divorced.

That in so stating, [the Parish Court Judge] clearly demonstrated that she, in refusing [the appellant's] application, considered matters extraneous to the submissions, and indeed served to highlight her apparent bias against [the appellant] by bringing into the equation her personal knowledge and feelings.

GROUND 5

That [the Parish Court Judge] erred when, in commenting on [the appellant's] affidavit, she stated that it was not enough for [the appellant] to state that he had a good defense [sic] to the action as he was claiming an equitable interest in the property as well as an interest under the Property Rights Of Spouses Act, and further that he had to establish something more.

That [the Parish Court Judge], in refusing [the appellant's] action, failed to consider that she would have had no jurisdiction to try the matter." (Italics as in the original)

[36] The following additional grounds of appeal were filed by the appellant on 8 September 2020:

"Ground

6. Proof of making payment: Cheques and counterfoil I sent to her from London, Israel and Cuba and Postal Orders counterfoil.

Ground

7. She testified that she applied for the house, that is not true. It was I who went to the office in Port Antonio and apply [sic] for the house. I wrote the application in script in her name in 1977, lot number 10 at Darlingford.

Ground 8

A letter dated 17th September, 2014 addressing a remark that was made by the clerk of court where I clarified my position in the letter of the 10th September 2014.

Ground 9

Letter dated 16th November, 2015 to the clerk of court is [sic] to constantly accquire [sic] the notes of appeal.

Ground 10

Correspondence admitting that there were other support and good health and well being [sic] of Mrs. Robertson [sic] quiet enjoyment and there were other correspondence.

Ground 11

Correspondence dated 10th November, 1992 to pick her up at work and that she need [sic] some money to pay the mason to prove that I was a part of the expansion of the property and to show good faith."

I had taken the view that these were not, strictly speaking, additional grounds of appeal, but instead additional arguments which the appellant wished to raise.

Discussion

[37] The issues which arose for determination were:

1. Was the default judgment irregular? (Ground 1)
2. Did the Parish Court Judge err when she commenced hearing the evidence on 4 December 2014? (Ground 2)

3. Ought the Parish Court Judge to have recused herself from the matter in light of correspondence that the appellant had written to the court? (Ground 3)

4. Did the Parish Court Judge exhibit bias when she stated that she knew that the appellant had been married and divorced from the respondent and had since remarried? (Ground 4)

5. Was the appellant required to, and did he show that he had a defence of merit? (Ground 5)

[38] There is no dispute that where a default judgment was improperly entered, the person against whom it was entered is entitled, on application, to have it set aside. The Parish Court Judge has no discretion to refuse to set aside an irregular default judgment. On the other hand, if a default judgment was regularly entered, the Parish Court Judge may exercise her discretion as to whether to set it aside if "sufficient cause" has been shown. See section 186 of the Act, which states:

> "If on the day so named in the summons, or at any continuation of adjournment of the Court … the defendant shall not appear or sufficiently excuse his absence, or shall neglect to answer when called in Court, [the Parish Court Judge], upon due proof of the service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only: and the judgment thereupon shall be as valid as if both parties had attended:
>
> **Provided always, that [the Parish Court Judge]** in any such cause, at the same or any subsequent Court, **may set aside any judgment so given in the absence of the defendant** and the execution thereupon, and may grant a new trial of the cause, upon such terms as to costs or otherwise as he may think fit, **on sufficient cause shown to him for that purpose**." (Emphasis supplied)

[39] Where the decision, which an appellant challenges, was arrived at as a result of the exercise of the discretion of the Parish Court Judge, such as in the instant case, I was

mindful that, in reviewing that decision, I had to be cautious. The case of **Juici Beef Limited (Trading as Juici Patties) v Yenneke Kidd** [2021] JMCA Civ 29 was instructive. Straw JA in dealing with the standard of review of the exercise of a judge's discretion in that case, outlined at paragraph [27]:

> "It is convenient to indicate at the outset that regard was had to the well-settled principle that **this court must defer to the exercise of discretion by a judge (or master) and must not interfere with it merely on the ground that the members of this court would have exercised the discretion differently**. As such, this court will only set aside the exercise of a discretion by a judge (or master) where it was **(i) based on a misunderstanding of the law or evidence; (ii) based on an inference which can be shown to be demonstrably wrong; or (iii) so aberrant that no judge regardful of his duty to act judicially, could have reached it** (see **Hadmor Productions Ltd and others v Hamilton and another** [1982] 1 All ER 1042, 1046 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paragraphs [19] and [20])." (Emphasis supplied)

[40] In **Leeman Vincent v Fitzroy Bailey** [2015] JMCA Civ 24, McDonald-Bishop JA (Ag) (as she then was), outlined the requirements that a Parish Court Judge should consider on an application to set aside a default judgment. The requirements are as follows:

> i. The reason for the failure of the defendant to appear when the case was listed to be heard;
>
> ii. The question of prejudice to the plaintiff if the judgment were to be set aside and a new trial ordered; and
>
> iii. The prospect of success of a defendant who was applying for a new trial.

[41] In ground of appeal 2, the appellant stated that the Parish Court Judge admitted on the day that the order for the default judgment was entered that she had received word from his attorney-at-law that he was experiencing mechanical problems with his motorcar and was unable to attend court on 4 December 2014 'when she commenced

hearing evidence in respect to the default judgment'. He further stated that the Parish Court Judge erred in entering the default judgment "she being aware of the appellant's inability to attend court".

[42] Firstly, the appellant had incorrectly combined the facts relating to 4 December 2014 and that of the day when the default judgment was entered, which was 11 December 2014. It was on 4 December 2014 that he sent word to the court that he had mechanical problems and could not attend. This is the date when the Parish Court Judge commenced taking evidence from the respondent. The Parish Court Judge, after noting that there had been three trial dates when the appellant had not attended court, formed the view that he was delaying the start of the trial and decided to proceed with the hearing. This was a matter which raised the question as to whether the Parish Court Judge properly exercised her discretion when she decided to continue with the hearing.

[43] In light of the numerous mention and trial dates when the appellant did not attend court, it was clearly open to the Parish Court Judge to have concluded that the appellant was delaying the start of the trial. Her decision to commence the hearing on 4 December 2014 could not have been seen as aberrant or unreasonable. On 11 December 2014, the appellant sent word that he was out of parish and could not attend the hearing. The Parish Court Judge expressed the view that being out of parish, without anything further, was not a reasonable excuse for his absence. Her decision therefore to proceed with the hearing on 11 December 2014 could also not have been seen as aberrant or unreasonable.

[44] The appellant raised questions as to whether title to the property was in issue, and whether the respondent's failure to plead a value for the property resulted in her having failed to satisfy a fundamental requirement for the grant of an order for recovery of possession. These two points can be dispensed with quickly. The appellant had not pleaded a special defence under section 150 of the Act. In fact, the respondent entered into evidence the appellant's letter asking for additional time to vacate the property. There was nothing before the court to indicate that title to the property was in issue. In the

circumstances, it was section 89 of the Act that was applicable to the proceedings based on the respondent's case. It states:

> "89. **When any person shall be in possession of any lands or tenements without any title thereto** from the Crown, or **from any reputed owner, or any right of possession, prescriptive or otherwise**, **the person legally or equitably entitled to the said lands or tenements may lodge a plaint in the Court for the recovery of the same** and thereupon a summons shall issue to such first mentioned person; and **if the defendant shall not, at the time named in the summons show good cause to the contrary then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, [the Parish Court Judge] may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff**, either forthwith or on or before such day as [the Parish Court Judge] shall think fit to name; and if such land be not given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such premises to the plaintiff." (Emphasis supplied)

[45] Order VI rule 4 of the Parish Court Rules provides that, where a plaintiff seeks to recover possession of property, a description of the land and its annual value should be included in the particulars of claim. It states:

> "In all actions for the recovery of land the particulars shall contain a full description of the property sought to be recovered, and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof."

[46] However, in a number of authorities, this court has ruled that, where claims for recovery of possession fall within the scope of section 89 of the Act, the failure to comply with Order VI rule 4 would not be fatal.

[47] In **Donald Cunningham and Others v Howard Berry and Others** [2012] JMCA Civ 34, Harris JA wrote, in part, at paragraph [19]:

> "It appears to us that, when considering matters falling within the scope of section 89 of the Act, the failure to comply with Order VI rule 4 would not be fatal. Section 89 does not speak to the inclusion of a statement as to the annual value and a description of the land, in a plaint … Strict compliance with Order VI rule 4 is not required under Section 89…"

[48] After referring to the judgment of Morrison JA (as he then was) in **McNamee v Shields Enterprises** [2010] JMCA Civ 37, Harris JA wrote at paragraph [21]:

> "In our opinion, this reinforces our view, that in claims for recovery of possession, section 89 being designed to deal with matters in which there is no dispute as to title, there would be no necessity to include a statement as to the annual value or a full description of the land in the claim."

Grounds of appeal 1 and 2 therefore failed.

[49] Grounds of appeal 3 and 4 raised the issue of bias. Again, one of these grounds, ground 3, can be quickly addressed.

[50] The appellant argued that the Parish Court Judge who entered the default judgment, Her Honour Ms Marjorie Moyston, ought to have recused herself from hearing the matter, after she received correspondence from him in which he complained about remarks relayed to him which she had purportedly made. This was the letter in question:

> "Portland Parish Development Committee
>
> 2 Harbour Street
>
> Port Antonio P.O
>
> Portland
>
> September 10, 2014
>
> **The Residence [sic] Magistrate**

Manchioneal,

Portland

Dear Judge:

Because of the position I hold as a Parish Development Chairman, and Resort Board Chairman, I should never insult the Courts of my country. I prefer to change them. It is against this background that I sent a bearer with my medical certificate to explain that I had health issues.

It was reported to me by some very well place [sic] and reliable source inside the court and my bearer corroborated this information and [sic] that you doubt my medical certificate and made some cynical remark undermining the credibility of my doctor and myself.

Well I am afraid that I have no trust in you to be the judge of the circumstances in this case and **I am asking you to remove yourself as the trial judge because of the cynical remarks you made on Thursday, 4th Sept 2014 at the Manchioneal hearing.**

I was present at all sittings with an exception of that on September 4, 2014. At the last hearing which I attended, my lawyer Howard Hamilton QC was engaged in a superior Court and you instructed me to call him while he was addressing in the Superior Court **(Supreme Court)**. I had done this without the knowledge of not knowing that I would have being out of order to disturb the counsel while he was on his feet in the Superior Court.

I think if you don't trust my family doctor, Lawyer nor myself then the most descent [sic] thing to do is for you to dismiss yourself from the matter so that justice can be served. Honestly I must confess that because of your utterance's [sic] I have no confident [sic] with [sic] you being the trial judge in this matter.

This document with the encl. is also to inform you that my situation has remained the same and I have other investigation that must be done at the lab at the National Chest Hospital or in Havana if they don't have the equipment here in Kingston. So I have the equipment here. So I have to

> be absent from court on this occasion also my lawyer Mr. Howard Hamilton QC. will be in contact with the courts [sic] office to arrange a new date, or the date can be communicated to the bearer of this correspondence.
>
> Respectfully,
>
> …
>
> Mr. Larry Robertson" (Emphasis added)

[51] It was clear that the appellant's complaint emanated from what he heard had been said at the 4 September 2014 hearing which was held at Manchioneal. It turned out, however, that Her Honour Ms Marjorie Moyston, the Parish Court Judge who made the decision, which the appellant challenged, according to records provided to this court, and reflected in her reasons, had not presided at the 4 September 2014 hearing about which the appellant complained. The court records reflected that it was Her Honour Mrs Tara Carr who had presided at that court on that day. In the circumstances, this ground of appeal, in which the appellant stated that Her Honour Ms Marjorie Moyston ought to have disqualified herself from hearing his matter due to remarks which she reportedly made at the 4 September 2014 hearing, could not succeed.

[52] As regards ground 4, the appellant complained that the Parish Court Judge, in stating that she was aware that the appellant had divorced the respondent and had remarried, demonstrated that, in refusing his application, she considered matters extraneous to the application.

[53] In **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions** [2020] JMCA Civ 47, Phillips JA noted that the law is well settled with regard to the test for apparent bias (see paragraph [36] of the judgment). The test is no longer whether there appeared to be a real danger of bias. Instead, as enunciated in **Porter v Magill** [2002] 1 All ER 465, the question is now "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Phillips JA also highlighted a number of other principles including that:

1. The fair-minded person is not unduly sensitive or suspicious;

2. Fairness requires that a judge must be, and must be seen to be, unbiased;

3. The fair-minded person will not shrink from the conclusion, if it can be justified objectively, that things that a judge has said or done or associations that they have formed may make it difficult for them to judge the case before them impartially;

4. It is the court's view of the public's view, not the court's own view, which is determinative; and

5. It is important for the court to ascertain all the circumstances, and then to ask whether those circumstances could lead the fair-minded observer to conclude that there was a real possibility that the tribunal was biased.

(See paragraphs [36] – [41])

[54] In the case at bar, the respondent had led evidence that she and the appellant had been divorced for over 25 years. The appellant, in his affidavit in support of his application, also stated that he had divorced the respondent. The only difference in the information to which the Parish Court Judge referred was the fact that the appellant subsequently remarried another individual. The appellant, it appears, was well known in the parish due to positions that he held. In his 10 September 2014 letter to the court, he referred to the fact that he was a Parish Development Chairman and Resort Board Chairman. It is understandable that a Parish Court Judge would possess the local knowledge that the appellant had remarried. However, the fact that the appellant had remarried was not a critical ingredient or issue impacting the decision to which the Parish Court Judge was to arrive.

[55] The Parish Court Judge had to determine whether the default judgment had been properly granted, including whether the appellant had attended court, whether the appellant gave a good reason for his absence from court and whether he had demonstrated a defence with good prospects of success. The appellant's remarriage, although mentioned by the Parish Court Judge, appeared to have only been said in passing, and could not have been a basis for her decision.

[56] It was my view that a fair-minded member of the public, who is not unduly sensitive or suspicious, would not have concluded, on the basis of the statements made by the Parish Court Judge, that there was a real possibility that the Parish Court Judge was biased. Ground of appeal 4 therefore failed.

[57] A question which arose was whether the Parish Court Judge erred when she stated that it was not enough for the appellant to raise defences, but he had to show that they had merit. In addition, did she err in concluding that the appellant had not demonstrated that his proposed defences had merit?

[58] At page 26 of the record, the Parish Court Judge wrote:

> "This authority also indicates that if the default judgment is not irregular the defendant has to put forward a defence before the matter can be set aside. What standard does he have to reach? It was put forward by Counsel for [the appellant] that all he has to do is just raise the matter of a defence in his affidavit. Counsel for the respondent indicated differently. It should be an application of merit - good reasons to show that defence has merit. I could not find any authority to show that [the appellant] only had to raise any defence. I must be constrained to look to see if [the defence] has any substance. Because setting aside the default judgment means that the matter will come to be tried. It is at the beginning of a trial when a defendant states his defence. If the defence has no merit the case will not be tried and judgement [sic] will be given for the plaintiff."

It was my view that the Parish Court Judge was correct. In **Ivan Brown v Perris Bailey** (1974) 12 JLR 1338, the question arose as to whether, in an action for recovery of

possession of land in the Parish Courts, a dispute as to title had arisen within the meaning of section 96 of the Act. Graham-Perkins JA delivered the judgment of the court. At page 1343, he stated:

> "In view of the very precise terms of this section, of which the resident magistrate must have … been aware, there can be, in my view, not the least doubt that in the circumstances of this case a question of title would have arisen if, but only if, there had been adduced before the magistrate a credible narrative of events probably pointing to the existence in the appellant's favour of an equitable interest, albeit not registered. In that situation, and arising further that the annual value of the land was in excess of $200, it is clear that the magistrate would have been obliged to acknowledge the absence of jurisdiction. I formed the clear view, however, that the appellant did not merely fail to show the probability of the existence of an equitable interest in his favour, but rather that he demonstrated by his own admissions and conduct the non-existence of any such interest. He does not appear to have taken any of the steps that a reasonable and prudent man in his circumstances would have been expected to take."

[59] In the case at bar, the Parish Court Judge concluded that the appellant had not raised a credible narrative of events in support of his proposed defences. After I had reviewed the appellant's affidavit, I found no error on the part of the Parish Court Judge in this regard. The points made by the appellant in relation to his proposed defences were:

a) The respondent was his former wife and while they were married, they bought a house in Manchioneal known as Lot 10 Darlingford Housing Scheme in which they occupied as the matrimonial home. The property was purchased in her name alone, but with joint funds which they both held (see paragraph 4).

b) When he needed somewhere to live in Portland, his daughters suggested that he reside in the house since it was

empty and he agreed "especially in view of the fact that I own an equitable interest in the property…."

c) It was agreed that he would refurbish and improve the house at no cost to the respondent as he intended the improvements would enure to his benefit and the benefit of his daughters.

d) He commenced improving the property but the respondent objected and told him to "come out".

[60] At paragraph 22 of his affidavit, the appellant stated:

> "That I have a good defense [sic] to this action, as I am claiming an equitable interest in the Property, as well as an interest under the Property Rights of Spouses Act, and I desire to contest this action."

The Parish Court Judge was clearly entitled to have concluded, on the evidence before her, that the appellant had not raised a credible narrative of events in support of his proposed defence.

[61] Furthermore, she was also correct when she stated that the grant of the order for recovery of possession did not prevent the appellant from pursuing a claim pursuant to the PROSA, or a claim to establish an equitable interest in the property. In the circumstances ground 5 also failed.

[62] It was for the foregoing reasons that I had agreed with my learned sisters that the appellant's appeal was to be dismissed with the additional orders made as detailed at paragraph [4] above.