[2014]JMSC Civ. 158

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013/HCV 01021

IN CHAMBERS

BETWEEN	**RICHARD VERNON**	**CLAIMANT**
AND	**NATIONAL WATER COMMISSION**	**DEFENDANT**

Alexander Williams instructed by Usim and Williams for claimant
Kevin Williams and Colin Alcott for National Water Commission

Applications for summary judgment – land acquired for public purpose – Land Acquisition Act and National Water Commission Act. Action for Injunction and or Trespass to land – Defence – adverse possession – under Limitation of Actions Act – Prescription Act – Damages.

Heard June 5,6, 20, 2013 and September 25, 2014

Daye, J.

[1] There is a deep well situated at part of Lot 66, Irwindale, Irwin, in the parish of St. James. The claimant Richard Vernon is the registered owner of this land. A pump house is constructed at a well site on the land.

[2] The claimant bought this land on the 30th July 2003 and obtained a duplicate Certificate of Title Registered at Vol. 1056 Folio 11. He bought the land from a businessman Basil Chang, his predecessor in title.

[3] Since the purchase of the land, the National Water Commission (NWC) has shown interest in this land and continues to do so in order to operate

the pump house to supply public water to certain communities in the parish of St. James. The claimant objected to this as he claimed he has not consented to this nor did is predecessor in title. Therefore, he contends that the defendant is trespassing on his land. In fact, the claimant has put a chain and padlock on the land to restrict access to his property.

[4] On the 22nd February, 2012, the claimant filed a notice of application for court order for an interim injunction against the defendant. This was withdrawn at the commencement of the hearing.

[5] The NWC countered has countered this claim with the present application in Chambers requesting the court to give summary judgment to them under R. 15 (2) (a) of the CPR or in the alternative to strike out the claimant's claim. R. 26 (3) (c).

[6] About 6,000 houses need for water in and around the communities of Irwindale, Irwin and its environment located four (4) miles from and to the south east of Montego Bay centre, St. James are likely to be affected if the defendant are not able to access and use this pump.

[7] The Government of Jamaica has accepted the 1994 Cairo Declaration on Population and Development (ICPD) "that citizens of the country are entitled to clean and safe water to ensure their welfare and development." The applicant/defendant is an agency of the Government that has responsibility by law to execute and implement the Government's duty to the citizen.

[8] Therefore the issue raised in this claim affect not only the right of an individual land owner or statutory corporation, but also the public interest.

[9] The land was part of a subdivision comprised in a parent title held by Mr. Basil Chung. This subdivision was approved in 1969. There is only one encumbrance on the Certificate of Title to claimant's land. It is a

reservation that the Government has free access to the land to prospect for mine, mineral or mineral oil. There is no encumbrance on the claimant's land related to water.

[10] On the 17th January, 2001, Mr. Trevor Ho-Lyn Attorney-at-law, St. James acting on behalf of the purchaser, Mr. Richard Vernon wrote to Mrs. Dawn Parris who had carriage of sale of this lot for the vendor Mr. Basil Chung, about the pump house but he got no response. Mr. Trevor Ho-Lyn raised the question that the claimant ought to be compensated for the presence and possible use of this pump house on the land. He suggested that the purchase price should be abated for this purpose. So the main concern was compensation for the claimant.

The following timeline is instructive:

(a) On May 29, 2004, the National Water Commission responded to Mr. Trevor Ho- Lyn's letter of May 17, 2004 and advised him that they had referred it to their legal officer.

(b) On January 9, 2011, Mr. Trevor Ho-Lyn wrote to the National Water Commission to send the agreement to lease his client well site.

(c) On June 20, 2011, the NWC wrote to Mr. Ho-Lyn and offered to enter into a formal lease agreement of the well site subject to a valuation of the site.

(d) On June 22, 2011, the NWC withdrew the offer of purpose to lease the well site on the ground that the land was bought with notice of the well on it and hence the claimant was not entitled to compensation.

(e) On June 23, 2011, Mr. Ho-Lyn wrote to NWC and explained the history of the pump house on the land. He explained the pump was erected to operate a block factory and stone mill to first construct houses on the land and secondly to supply water

to those houses. The pump house was later taken over by NWC as there was no continuous water supply on the land as the pump was defective. Permission was given to NWC to replace the pump and add it to the water supply.

(f) On August 6, 2011, the NWC replied to Mr. Trevor Ho-Lyn that it operated the pump house from 1996. The NWC claimed that when the claimant purchased the land, it had constructive notice of the pump house. Therefore the claimant was not entitled to compensation.

(g) On September 10, 2011, the NWC wrote to Mr. Trevor Ho-Lyn, that they were acquiring the well site for a public purpose, namely to house a well site to provide public water supply in the parish of St. James. Mr. Ho-Lyn responded that he did not agree.

(h) On December 21, 2011, NWC advised the Minister to take possession of the land (Sec.15 of Land Acquisition Act).

[11] It is against this background that the claimant on the 22nd February, 2012 commenced proceedings against the defendant for damages for trespass to his land and an injunction restraining any trespass to his land.

Summary Process

[12] In Chapter 12 of Pleadings: Principle and Procedure (Sweet and Maxwell 1990) p. 213 para. 4, the learned authors, Jacob and Goldstein outlined what is involved in a summary application. They said:

> "The exercise of the Court's power by 'summary process' means that the court may exercise its jurisdiction without the benefit of pre-trial discovery or other pre-trial processes and without a trial, is without hearing the evidence of witnesses examined and cross examined orally and in open court. Thus

> by procedure which is different from the normal plenary trial procedure.....".

This statement was describing the rules under the old civil procedure code but it is still relevant to the our present Civil Procedure Rules 2002 (CPR).

Summary Judgement

[13] R. 15. (2) (a) of the CPR provides that:

"The court may give summary judgment on the claim on a particular issue if it considers that:

> (a) The claimant has no real prospect of succeeding on the claim;
> (b) The defendant has no real respect of successfully defending the claim or issue.

The Test for Summary Judgment

[14] The Court of Appeal stated the test for summary judgment in **Gordon Stewart, Anderson Reid, Bay Roc Ltd. v Merrick Samuels S.C.C.A. 2005** delivered November 18, 2005. In his judgment, P. Harrison, J.A. at pp.6-7, explained:

> "The prime test being "no real prospect of success – he queries what the learned judge did on assessment of the party's case to determine its probable ultimate success or failure. Hence, it must be a "real prospect" and not a "fanciful" one – **Swain v Hillman (supra.)** The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straight forward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case or "a serious question to be tried" test, in the case of a grant of the injunction, is directed to a preliminary assessment of the party's contribution in contrast to an ultimate result."

[15] Then Panton, J.A. as he then was, at pp. 21-22, (supra.) para. 10 added:

> "The provision [that guides a judge before whom an application for summary judgement is taken i.e. Rule 15.2 CPR 2002] is similar to that which guides the English Courts."

Panton, J.A. further said that in **Sinclair v Chief Constable of West Yorkshire and Another [2000] ALL ER (D)** 2240, Lord Justice Otton confirms the position with these words:

> "In order to defeat the application for summary judgement, it is sufficient for the respondent to show 'a prospect' i.e. some chance of success. However, the prospect must be 'real'. The court must disregard prospects which are merely fanciful, imaginary, or intrinsically unrealistic."

Analysis

[16] It is now my duty to determine if the claimant has no real prospect of succeeding on his claim for trespass. The applicant's affidavit in support of application for summary judgement reviews the history of the purchase of this land by the claimant and the steps taken by the defendant to acquire the land under the Land Acquisition Act. In the early history of the review of the purchase of the land, the applicant/defendant in paragraphs 5 and 6 of their affidavit dated April 10, 2013, resisted the claimant's claim on the basis that:

(a) They have been in possession of the land from 1980 when the water assets of St. James Parish Council were transferred to them. In other words, this has been in occupation of the pump house and well site for in excess of 12 years under the Limitation of Action Act.

(b) They have been in occupation and exercising a right of way over the claimant's land to use the pump house and well site for in excess of 20 years under the Prescription Act.

(c) They have acquired the land since December 2012 under the Land Acquisition Act.

(d) The claimant acquired the land with constructive notice of the well site.

[17] As the defence to the claim and possession of title rests on the law of adverse possession, the applicant/defendant contend they have met the full requirements of the law (para. 13 and 14 of affidavit).

[18] Do the facts and law support the applicant/defendant? It is only if the answer to these issues is in their favour that they would have satisfied the test of summary judgment that the claimant does not have a real prospect of succeeding on his claim to trespass.

[19] The contemporaneous documentary material exchanged between the applicant/defendant and the claimant from 2001to 2012 discloses:

(a) A pump house and well site was on Lot 66 in 2001 when the claimant agreed to purchase the lot

(b) The pump house was not in operation in 2001

(c) In 2003, the claimant obtained possession of the land when he bought it

(d) In 2004, the applicant/defendant acknowledged that the claimant's attorney wrote them about their client's right to the land and the pump house

(e) A certificate of valuation dated June 2004 shows the applicant/defendant commenced negotiation to lease the portion of land on which the pump house and well was located. This certificate was prepared on the instruction of the applicant/defendant to obtain the market rent of the portion of land where the pump house and well were located

(f) In 2011, the applicant/defendant advised the claimant's attorney that it was in 1996 that they commenced operation of the pump house and well site on the land.

(g) In 2011, the applicant/defendant formally offered to enter into negotiation to lease the land from them.

(h) In 2012, the applicant/defendant commenced steps to compulsorily acquire the land, after withdrawing their offer to lease the land. It is then that they obtained another certificate of valuation on this later valuation of the market value of the entire land.

[20] The applicant at no time rebutted Mr. Ho-Lyn's explanation that it was the predecessor of title and vendor of the land to the claimant who had built the pump house and well station. Throughout the applicant's dealing with the claimant, they did not assess any right of possession or occupation of the land. They conceded that they did not know when and how they first started to use the pump house. They did not have any intention to take possession of the portion of land on which the pump house was situated. The factual basis is vital to any claim of possession of title under the Limitation of Action Act or the Prescription Act. Both claims under the above-named legislations rest on long and interrupted use and occupation except that the first rest on possession of the whole and the second is based upon possession, occupation and use of a portion of the land i.e. a right of way.

Law of adverse possession

[21] The modern law on adverse possession is stated in the leading judgement of Lord Browne-Wilkinson in the House of Lords decision **J.A. Pye (Oxford) Ltd. v Graham** [2003] 1 A.C. 470, at 435 para 39-40. There he asked the question, what then constitute "possession" in the ordinary sense of the word? He answered simply by quoting and adopting Slade J's definition in **Powell's** case (38 Plcr. 470). Then His Lordship summarised as follows:

> "what is crucial to understand, that, without the requisite intention, in how there can be no possession..... there has always, both in Roman. law and common law, being a requirement to show an intention to possess in addition to objection of acts of physical possession. Such intention may be and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgement that there are two separate elements to legal possession."

[22] In Slade J's judgement in the **Powell** case, supra, he stated that the owner of the land with paper title or a person claiming through him is the first one entitled to possession of the land. A person who does not have paper title can only be entitled to possession if he shows both factual possession and the requisite intention to possess.

Lord Browne-Wilkinson relying further on **Powell's** case adopted Slade J's definition of factual possession found in the following passage (at page 36 para.4).

> "(3) Factual possession signify an appropriate degree of physical control. It must be a single and [exclusive] possession though there can be a single possession exercised by or on behalf of several persons jointly. Thus the owner of the land and a person intruding on that land without his consent cannot both be the possessor of that land at the same time. The question of what acts constitute a

> sufficient degree of exclusive control must depend on the circumstances, the particular nature of the land and the manner in which land of that nature is commonly used or enjoyed ....."

[23] There was no need to prove that the person without paper title occupation of the land was adverse to the owner with paper title. The right to possession did not depend on the intention of the paper title of the owner. The judge clarified that aspect of the law in these words
(at p.437, para.8):

> "The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user ....."

[24] The law on adverse possession expounded by Lord Browne Wilkerson was applied to Jamaica by the Privy Council in **Myrna Willis v Elma Willis,** P.C. 50 of 2002., delivered. Dec. 1, 2003. After reviewing Lord Browne-Wilkerson's judgement, Lord Walker of Gistingthorpe stated
(at p.10 para. 21):

> "The statutory abolition mentioned by Lord Browne-Wilkinson .... to the Limitation Act 1980. There was not parallel legislation in Jamaica. But it seems clear that the heresy, if not abolished by statute, would not have survived the House of Lords' decision in Pye."

[25] It is my view that the applicant/defendant's position based on the state of the law of adverse possession is such that they would not be able to refute the claimant's chances of successfully proving that he had a single and exclusive possession of the land from 2003, nor that the

applicant/defendant did not have any physical control of the pump house, before 1996, 1980 and 1969. It means he would be able to show that there was trespass to his land for which they are entitled to damages. In short, as a matter of law the claimant can successfully resist the defendant's claim under either the Limitation Act or the Prescriptive Act.

The Land Acquisition Act

[26] The applicant/claimant contends they did not trespass on the claimant's land because they had compulsorily acquired the land. The time they say they acquired the land is relevant.

They submit in their written submission of the 29th December, 2013 the following:

That the Minister of Land issued a declaration that the claimant's land;

> "is needed for a public purpose to supply public water to the parish of St. James. They contend that their possession, even if it was a trespass in law becomes a legal possession and a claim in trespass cannot therefore be maintained." (para.2).

The applicant defendant submits further that any claim in trespass would fall away as of the date of the Minister's declaration that the land was needed for a public purpose. The only claim the claimant would have, they say, is one for compensation. The Land Acquisition Act sets up a specific regime for compensation for land compulsorily acquired. They have followed that regime and the Court has no jurisdiction to deal with an issue of compensation. The claimant filed his claim in February 2003 and the land was compulsorily acquired in 2012.

[27] The submission only addresses the issue of trespass after the purported compulsory acquisition of the claimant's land in 2012. But it did not deal with any trespass to the claimant from 2003 to 2012. The

applicant/defendant has simply denied the trespass. But the Court has shown that they cannot in law support any right to possession of this land under the Limitation Act and the Prescription Act from 1969-2003. Hence the claimant would be entitled to damages for the trespass for these years.

[28] The defendant set in motion the procedure for compulsory acquisition and compensation for the claimant's land. Does this now exclude the claimant from obtaining damages from the Court? The only monetary payment the claimant is entitled to from the perspective of the defendant is the amount of compensation determined by the award of the Commissioner of Lands. This award is "final and conclusive" under Sec. 12(1) of the Land Acquisition Act. If a person dispute this award he/she must request that it be referred to the Supreme Court within the specified time of the Act (sec.17). After this there would be a hearing by a judge and two assessors.

[29] An issue of the jurisdiction of the Supreme Court and whether it can be excluded by the specific provisions of legislation was addressed by Downer, J.A. in **Infochannel Ltd. v. Cable & Wireless Ja. Ltd.** S.C.C. 1999/2000 delivered December 2000. His Lordship ruled that if a statute established a mandatory procedure inclusive of a tribunal to settle and determine dispute between parties then the Supreme Court does not have original jurisdiction to hear the dispute as it is excluded by such statute. His Lordship based this decision on the authority of **Barraclough v Brown** (1891) A.C. 615, 619 to 623.

[30] Infochannel's case was a dispute between it and Cable and Wireless Jamaica Ltd's. over allegation of "bypass". Infochannel applied to the Supreme Court for an injunction against Cable and Wireless who had terminated certain services to their network. Cable and Wireless submitted

at the hearing of the interim injunction that it was only the Office of Utility Regulations and the Appeals Tribunal set up under the Telecommunications Act 2000 could hear the dispute at first instance.

[31] His Lordship acknowledged that even though the Supreme Court's jurisdiction may be limited by statute, it does not remove constitutionally the power of judicial review of the decision of a statutory body.

[32] Section 5-17 of the Land Acquisition Act provides a strict regime for the compulsory acquisition of compensation and determination of disputes of land acquired for public service. The National Water Commission (NWC) invoked all of these provisions against the claimant. The claimant did not submit to the jurisdiction of the Act though he was given all the required notice. Therefore the defendant contends he is bound by the award of compensation by the Commissioner of Lands. In other words, their contention is that under the steps they took under the Land Acquisition Act, the claimant has no real prospect of success as his claim for trespass and the consequential remedy of damages is not well founded.

[33] It would appear that the applicant/defendant is correct in this respect. But the Court found that the claim goes beyond just the compensation for the acquisition of the land but is one for trespass to the claimant's land from he bought it. There is no notice published in the gazette under the Act (Sec. 15 of the Land Acquisition Act) that the claimant's land is vested in the National Water Commission so until that time, the applicant/defendant would be trespassing on the claimant's land. Further, there was trespass to the claimant's land from he acquired it in 2003.
The claimant would be entitled to damages for trespass. The quantum of damages should be set for hearing for an entitlement of damages.

Permanent Injunction

[34] In view of the Court's decision that the claimant's remedy is damage, it means that damages would be an adequate remedy to the claimant. This would mean that it would not succeed in his claim for a permanent injunction (**American Cyanamid Co. V. Ethicon Ltd.** [1975] 1 ALL.E.R. 504). Counsel for the applicant/defendant would be correct that claimant would not have a real prospect of succeeding on his claim for a permanent injunction. I remind myself that the claim for interim injunction was withdrawn and it is reasonable to hold that any claim for a permanent injunction was not pursued. It would not be correct and reasonable for the claimant to now erect and maintain barriers to his land to prevent the National Water Commission access to the pump house and well site on his land. This portion of the land is required to provide public water to the citizens of Irwindale, Irwin and its environs which is vital to the welfare of the parish of St. James.

Conclusion

[35] In the circumstances, the application for summary judgment is dismissed.

Application to strike out dismissed.

A hearing to set for assessment of damages

Costs to the claimant

Liberty to apply

Leave to appeal granted.