

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCivApp. No. 64 of 2020

**IN THE MATTER of ALL THOSE pieces parcels or lots of
land situate at "Signal Point" also known as "Sumner Point"
on the Island of Rum Cay one of the Islands of the
Commonwealth of The Bahamas and designated Lots 2, 3, 5, 9, and 10.**

IN THE MATTER of the Quieting Titles Act, 1959.

**IN THE MATTER of the Petition of Scott E. Findeisen and
Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust).**

BETWEEN

WAHOO RESORT FOUNDATION

Intended Appellant

AND

SCOTT E. FINDEISEN and BRANDON S. FINDEISEN

Intended Respondent

BEFORE: **The Honorable Mr. Justice Isaacs, JA**
 The Honorable Mr. Justice Jones, JA
 The Honorable Madam Justice Bethell, JA

APPEARANCES: **Ms. Travette Pyfrom, Counsel for the Intended Appellant**
 Mr. Timothy Eneas with Ms. Knijah Knowles, Counsel for the
 Intended Respondent

DATES: 1 September 2020; 14 June 2021;

Civil Appeal- Application for extension of time- Quieting Titles Act 1959- Whether the judgment was a final or interlocutory order- Prospect of Success

On 27 March 2020 Charles, J. dismissed the intended appellant's claim holding that the intended appellant had no *locus standi* and no claim to documentary or possessory title in the quieting action between the intended respondents and the Crown. On 18 May 2020 the intended appellant filed an application for an extension of time to this Court to appeal the ruling of Charles, J. After hearing arguments, the Court reserved its decision.

Held: Extension of time within which to appeal is refused. Costs are awarded to the intended respondent to be taxed if not agreed

The Court will refuse an application for an extension of time if it is satisfied that the applicant had no realistic prospect of succeeding on appeal. In this instance, the intended appellant not only acknowledged but also pleaded that it was a licensee of the Crown, the Crown itself being an adverse claimant. It is well settled law that as a licensee of the Crown the intended appellant cannot be vested with an interest in the land which will defeat a documentary or possessory title to the land.

Johnson and others v Exuma Estates and another (no 101 of 1966) considered

R. v. Oxfordshire County Council ex p. Sunningwell Parish Council [2000] 1AC 335 considered

Outten (as Administrators of the Estate of Julian Outten) v Attorney General SCCivApp No. 37 of 2019 considered

Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd [2014] 2 BHS.J. No 73 considered

Salaman v Warner and Others [1891] 1 Q.B. 734 considered

INTRODUCTION

1. This is an appeal from a written judgment of Charles, J handed down on 27 March 2020 on a preliminary point in which the learned judge held that the intended appellant had no *locus standi* in a quieting action between the intended respondents as petitioner and the Crown as adverse claimant as the intended appellant was a licensee of the Crown. The learned judge also found that the intended appellant had no claim to documentary or possessory title as based on its own pleadings and evidence it is a licensee of the Crown with no legal or equitable interest in the subject properties and therefore has no entitlement or right to apply to the Supreme Court for a Certificate of Title. The learned judge therefore dismissed the adverse claim filed by the intended

appellant with costs to the petitioners to be taxed if not agreed. The intended appellant's claim was dismissed on its merits.

2. On 18 May 2020 the intended appellant applied to Charles, J for leave to appeal the said judgment. On 4 June 2020, the learned judge refused leave to appeal finding first of all that no leave was required to appeal as the judgment of 27 March 2020 was a final order. The learned judge found in the alternative that in the event that leave to appeal was required, the appeal had no reasonable prospect of success and dismissed the application.
3. By way of Notice of Motion filed on 19 June 2020 the intended appellant applied to this Court for leave to appeal the judgment of 4 June 2020 refusing leave to appeal.
4. In the alternative, the intended appellant seeks leave for an extension of time pursuant to Rule 9(1)(a) and / or 29(1) of the Court of Appeal Rules in order to file a Notice of Appeal in respect to the judgment of the 27 March 2020.

BACKGROUND

5. It appears that the parties in this matter have had a history of litigation in other matters.
6. One of the intended appellant's grounds of appeal speaks to a judgment of Bain, J in one such action, namely, *Findeisen et anor v. The Wahoo Resort Foundation et anor* CLE/gen 1263 of 2013. Both parties were represented at that hearing by the same attorneys who appeared before Charles, J and also before this Court. The action before Bain, J. was a claim for damages in trespass to the Lots 2,3,5,9 and 10 being parcels of land situate at "Signal Point", also known as "Summer Point", on the island of Rum Cay. At Paragraph 21 of the judgment, dated 30 September 2014, in relation to three summons that the learned judge had before her, Bain ,J had this to say:-

“Counsel for the Defendants admitted that the Defendants had no interest in the land and as they maintained that the land was Crown Land..”

7. At paragraph 31 of the said judgment the learned judge stated :-

“The Plaintiffs claim title to the property and have produced documentary title. The Defendants did not claim any title to the property. They allege that the property is Crown Land and therefore the Plaintiffs cannot sustain an action for trespass as they did not own the land.”

8. The above proceeding was discontinued by the plaintiffs before Bain, J on the 27 February 2015 “*without prejudice to their claims in this action or any future claim or*

claims which they may have against the Defendants or either of them or any other person howsoever with regard to the subject matter of the action or otherwise.”

9. This application for leave to appeal arose out of action 2016/CLE/qui/01564 filed by the intended respondents pursuant to the Quieting Titles Act (QTA) in relation to Lots 2,3,5,9 and 10 being parcels of land situate at “Signal Point” also known as “Summer Point” on the Island of Rum Cay.
10. The intended appellant and the Crown both filed adverse claims.
11. The intended appellant’s adverse claim filed on 27 April, 2017 stated that it claimed to be entitled to an interest in possession in the land the subject of the petition as a licensee of the Crown.
12. The hearing began before Charles, J in March 2020. During the hearing of the intended appellant’s case, the learned judge inquired of their witness, David Cummings, whether he was claiming possessory or documentary title or both. He deposed that he was claiming as a licensee of the Crown. At the close of the intended appellants case, both counsel for the intended appellant and intended respondents were asked by the learned judge to lay over submissions on the intended appellant’s *locus standi* in the proceedings.
13. After hearing the parties, the learned judge ruled that the effect of the intended appellant’s evidence and pleadings is that it is a licensee of the Crown with no legal or equitable interest in the properties under investigation and, therefore, had no entitlement or right to apply to the Supreme Court for a Certificate of Title. The Court further found that the intended appellant had no *locus standi* in the proceedings and dismissed their adverse claim with costs to the intended respondents to be taxed if not agreed.

ISSUES AND ANALYSIS

14. The first question that the Court has to consider is whether the judgment of Charles, J of the 27 March 2020 was a final order or an interlocutory order.
15. Counsel for the intended appellant cited a decision of the Court of Appeal, differently constituted, in the matter of **Outten (as Administrators of the Estate of Julian Outten) V Attorney General** SCCivApp No. 37 of 2019. Evans, JA in considering the very same point had this to say:-

“..we are satisfied that the law, as we understand it, makes it quite clear that in determining the question as to whether an order is interlocutory or final, we do not look at the results of the order but we are required to look at the nature of the

application which is being made, and where the application, depending of the results, may or may not result in the disposition of the action, the order is considered interlocutory. In order for it to be final, the application must be one whereby no matter which way the judge makes a decision, he disposes of the action.”

- 16.** In the matter of **Peace Holdings Limited v First Caribbean International Bank (Bahamas) Ltd** [2014] 2 BHS.J. No 73 the Court of Appeal, differently constituted, at para 24 of the judgment, adopted the test in **Salaman v Warner and Others** [1891] 1 Q.B. 734 determined that:

“...if the decision whichever way it is given will, if it stands, finally dispose of the matter in dispute, it is final. If, on the other hand the decision if given one way will dispose of the matter in dispute, but if given in the other, will allow the action to go on, then it is interlocutory.”

- 17.** In the present application before the Court the learned judge, after the close of the case of the intended appellant, determined that the intended appellant had no locus standi in the proceedings with respect to having its title to such land investigated and the nature and extent thereof determined and declared in a Certificate of Title as its mandate under section 3 of the Quieting Titles Act (QTA). As such, the matter involving the intended appellant was at an end and the order against the intended appellant was final.
- 18.** We are satisfied that the impugned order handed down on 27 March, 2020 was final in its very nature against the intended appellant and therefore appealable as of right to the Court of Appeal. We are further satisfied that it was an interlocutory order in the proceedings with respect to the other parties namely the claimant and the adverse claimant.
- 19.** As such, the need to seek leave to appeal the decision of the trial judge in order to comply with section 11(f) of the Court of Appeal Act Chapter 52 of the Statute Laws of the Bahamas does not arise.
- 20.** The second question that the Court has to consider is whether to grant an extension of time to appeal the order of 27 March 2020.
- 21.** As noted above leave to appeal to this court for an extension of time was filed on the 19 June, 2020.
- 22.** The Court will refuse an application for an extension of time if it is satisfied that the applicant had no realistic prospect of succeeding on appeal. Further the Court can grant the application even if it is not so satisfied where the issue raised may be one which the Court considers should in the public interest be examined by the Court or where, the Court takes the view that the case raises an issue of law which requires clarifying.

23. For the reasons set out below, the Court finds that the intended appellant has no realistic prospect of success nor is one which the Court considers should be examined in the public interest or one which raises an issue of law which requires clarifying.

24. The Supreme Court has been given the jurisdiction pursuant to the QTA to investigate any persons claim in interest in land in order to have his title investigated. Section 3 of the QTA states the following:

“Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted by the court in accordance with the provisions of this Act.”

25. Section 8(1) of the QTA sets out what evidence the court can receive in investigating title.

“ The court in investigating the title may receive and act upon any evidence that is received by the court on a question of title, or any evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.”

26. After hearing the petitioner’s claim to title of the disputed land and or hearing any adverse claimants claim to title of the said land the Court under the QTA has the power to grant a Certificate of Title to the petitioner or any other claimant as the legal and beneficial owner in fee simple of the land.

" 16. Without limiting the generality of the provisions of section 3 of this Act, the court shall have power to declare by a certificate of title in the form prescribed by section 18 of this Act that the petitioner is the legal and beneficial owner in fee simple of the land mentioned in the petition in any of the following circumstances —

(a) where the petitioner has proved a good title in fee simple to a share in land and has proved such possession as, under the Limitation Act, would extinguish the claim of any other person in or to such land;

(b) where the petitioner has proved such possession of land as, under the Limitation Act, would extinguish the claim of any other person in or to such land;

(c) where the petitioner has proved that he is the equitable owner in fee simple of land and is entitled at the date of the petition to have the legal estate conveyed to him.

17. (1) After the court has completed the hearing of an application made under section 3 of this Act it may —

(a) dismiss the application;

(b) dismiss the application and grant a certificate of title in the form prescribed by section 18 of this Act to any person who shall have filed an adverse claim in accordance with the provisions of section 7 of this Act;

(c) grant a certificate of title in the form prescribed ,by section 18 of this Act to the petitioner;

(d) grant separate certificates of title in the form prescribed by section 18 of this Act to the petitioner and to any person who shall have filed an adverse claim in accordance with the provisions of section 7 of this Act in respect of the whole or separate parts of the land described in the petition. (2) The court may give one certificate of title comprising all the land described in the petition, or may give separate certificates of title as to separate parts of the land.”

27. In other words what the Court is investigating under the QTA is whether a party to the proceedings **has possessory or documentary title to the land**. A successful party or parties at the conclusion of the hearing may be awarded a Certificate of Title to the land in question.

28. In the matter of **Johnson and others v Exuma Estates and another** (No 101 of 1966) a judgment of James Smith, J. The Supreme Court had to consider whether a certificate of title had been obtained by fraud pursuant to s. 27 of the Quieting Titles Act.

29. Although the facts in this case can be distinguished from the intended appellant’s present application before the Court, I adopt the finding of the learned judge of whom he considered to be a person who had an interest pursuant to section 7 of the QTA and could be considered an adverse claimant.

30. In that case Smith, J had this to say:-

“In the present action I am concerned only with the case of a person, who not being a party in the proceedings in which title was investigated, seeks to have the certificate of title declared null and void on the ground of fraud. Such a plaintiff must I think first prove that he or she had an interest in the land in question which if it had been brought to the notice of the Court in the investigation of title proceedings, that court would not only have directed a notice to issue to that person under section 7(1) of the Quieting Titles Act but also that the interest in the land thus disclosed was such as would be likely to defeat the title

upon which that court adjudicated and ordered a certificate of title to issue. Put another way, a plaintiff is to show that he has a prima facie title to the land which would have been likely to defeat the title presented to the court in the quieting of title proceedings.” [Emphasis Mine]

31. In the present case the intended appellant not only acknowledges but also pleaded that it is a licensee of the Crown. The Crown itself being an adverse claimant.
32. In the matter of **R. v. Oxfordshire County Council ex p. Sunningwell Parish Council** [2000] 1AC 335 at 350, Lord Hoffmann in considering the quality of a user which would justify a prescriptive right had this to say:-
- “ It had become established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner.”**
33. It is the judgment of the Court, as it is well settled law that the intended appellant company cannot be vested with an interest in the land which will defeat a documentary or possessory title to the land as its use of the land was as a licensee of the Crown.
34. It is the decision of the Court that the intended appellant has no realistic prospect of succeeding on appeal.
35. Nor is it one which the Court considers should be examined in the public interest or one which raises an issue of law which requires clarifying.

DISPOSITION

36. In the premises, the application for an extension of time is refused. Costs are awarded to the intended respondent to be taxed if not agreed.

The Honourable Madam Justice Bethell, JA

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Jones, JA