In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: No. 22

BETWEEN:

BUFORD PAUL SMITH

Appellant

and

MICHAEL SMITH

Respondent

JUDGMENT

Appeal against grant of a possession order and refusal to set it aside, Civil Appeals Act 1971 section 14, Meaning of appeal by re-hearing, Bias, Statutory jurisdiction of the Magistrates Court, Natural Justice

Date of Hearing: **22 June 2021**
Date of Judgment: **28 September 2021**

Appearances: **Judith Chambers, McKenzie Friend, for Appellant**

Craig Rothwell, Cox Hallett Wilkinson Limited, for Respondent

Judgment of Mussenden J

Introduction

1. The Appellant was raised by Willis Cecil Smith ("**Willis Smith**") as his son and enjoyed a good father-son relationship with him. In an agreement with Willis Smith, the Appellant paid rent for a period starting in 2008 for his occupancy of a structure at his father's house referred to as the "Storage Room", also known as the Lower Back Unit (the "**Unit**") situated at 12 Lusher Lane, Warwick WK 03 (the "**Property**").

2. Willis Smith had four other children, including his daughter Janette Smith. Therefore, Janette Smith and the Appellant were "half-siblings". In 2002 Willis Smith voluntarily conveyed the Property to Janette Smith whilst keeping a life interest in it. She tried to evict the Appellant from the Unit in 2012. Willis Smith died in December 2013, Janette Smith died in 2018 and in February 2019 the Property was vested in her son the Respondent.

3. In May 2019 the Respondent commenced proceedings in the Magistrates' Court for possession on the grounds that the Appellant had failed to pay the monthly rent and the Respondent intended to carry out renovations to the property. The Respondent was granted possession of the Unit on 7 June 2019 (the "**Possession Order**"), when the Appellant did not appear before the Magistrates' Court, and it was further ordered that the Appellant give the Respondent such possession by that date.

4. In an expedited hearing on 28 June 2019, the Learned Magistrate heard submissions from Mrs. Chambers and the Appellant to set aside the Possession Order but he declined to do so, confirming his earlier order that vacant possession be granted forthwith to the Respondent.

5. There is some useful material background as follows:

a. On 14 May 2002 Willis Smith voluntarily conveyed the Property to his daughter Janette Smith subject to a life interest for himself.
b. In 2008, the Appellant entered into a tenancy agreement with his father Willis Smith to pay rent of $300 for the Unit. In June that year it was increased to $700. The rents were always paid by the Department of Financial Assistance (the "**DFA**").
c. In 2012 Janette Smith commenced proceedings to evict the Appellant from the Unit because of his conduct and a failure to pay the monthly rent.
d. On 19 December 2013 Willis Smith died.
e. In 2014 Magistrates Court proceedings took place in respect of the non-payment of rent and eviction.
f. On 27 April 2015 the Appellant commenced proceedings in the Supreme Court (the "**2015 Supreme Court Proceedings**") seeking *inter alia* a stay of the proceedings in the Hamilton Magistrates' Court and a declaration and determination of an equitable interest.
g. On 14 May 2015 Hellman J, as he then was, ordered the Appellant to commence fresh proceedings by Writ and Statement of Claim (the '**Fresh Proceedings**"). However, to date, the Appellant has not complied with the order of Hellman J.
h. On 22 January 2018 Janette Smith died and later on the ownership of the Property was vested in Janette's Smith's son, the Respondent in this matter, who is the nephew of the Appellant.
i. Around February 2018 the DFA confirmed that rental payments of $700 per month were approved until August 2018.
j. On 25 April 2018 the Appellant filed a Caveat in the estate of Janette Smith. However, it was dismissed on 14 December 2018 by the Learned Registrar for failure to proceed.
k. On 26 February 2019 the Property was vested in the Respondent who commenced proceedings for the Possession Order.
l. No rent was received from the DFA or the Appellant as of 1 August 2018.

The Appeal

6. The Appellant appeals against the decision of the Learned Magistrate as follows:

> *"The Respondent (then the Plaintiff) be given possession of the Storage Room/Lower Back Unit at 12 Lusher Lane, Warwick, which unit is occupied by the Appellant."*

7. The Appellant applies for the Decision to be overturned or set aside on the following grounds:

> *1. The Magistrate did not apply the right test in considering whether to make or set aside the order for possession.*
> *2. The Magistrate was biased against the Appellant (the then Defendant).*
> *3. The Magistrates' Court does not have jurisdiction due to section 17 of the Magistrates Act 1948.*
> *4. The Decision is against natural justice.*

Affidavit Evidence - Background

Affidavit of the Respondent Michael Smith sworn 20 November 2019

8. In the First Affidavit of the Respondent sworn 20 November 2019 along with Exhibit "**MJS-1**" he stated that Willis Smith had four children which included his mother Janette Smith. Willis Smith continued to live at the Property after his wife died, eventually needing help from his daughter Janette Smith who assisted him with his expenses and care in return for the Property being conveyed to her with a life interest remaining for him. The Respondent stated that Willis Smith required rental payments from all his children who lived on the Property and even he, the Respondent, as a grandchild paid rent up until the date he became the legal owner of the Property.

9. In respect of the Appellant, in 2008 he entered into a tenancy agreement (the "**Oral Lease**") with his father Willis Smith in which he paid $300 per month to rent the Unit, such rent being paid by the DFA increasing to $700 per month which over time fell into arrears with no payments made by the DFA between March 2012 and October 2012. Due to disruptive behaviour by the Appellant towards members of the family and non-payment of rent, Janette Smith as Receiver for her father Willis Smith commenced proceedings in 2012 to have the Appellant's tenancy terminated and for the rental arrears (the "**2012 Eviction Proceedings**").

10. The Respondent states that Willis Smith died intestate on 19 December 2013 and as he was by then only a life tenant, the Property did not form part of his estate and the Appellant did not acquire any interest in the Property. The Eviction Proceedings continued in 2014 but were adjourned from time to time to allow the Appellant to seek relief in the Supreme Court for his interests in the Property. In 2015 the 2015 Supreme Court Proceedings commenced and on 14 May 2015 Hellman J ordered that the Fresh Proceedings be commenced by Writ and Statement of Claim thereafter. However, the Appellant did not take any steps to comply with the order of Hellman J to file the Fresh Proceedings.

11. The Respondent states that on 22 January 2018 his mother Janette Smith died intestate. The Appellant by way of his counsel's letter inquired whether Willis Smith had left a will or voluntarily conveyed the Property to Janette Smith (his daughter). 0n 25 April 2018 the Appellant filed a Caveat in Janette Smith's Estate which on 14 December 2018 was dismissed by the Registrar for *"(i) failure to enter an appearance within 8 days of serving of the warning upon him; (ii) failure to state an interest in the Will of the Deceased; and (iii) failure to issue Summons for Directions*." The Respondent states that on 14 December 2018 he was granted Letters of Administration of his mother's estate and by a Vesting Deed dated 26 February 2019 the Property was vested in him in fee simple absolute.

12. The Respondent states that due to not having received any rent since 1 August 2018, he commenced proceedings for possession for failure to pay rent and because he was going to undertake renovations. The Appellant was duly served and the hearing was set for 7 June 2019 when the Appellant failed to appear and the Learned Magistrate ordered vacant

possession which was followed by the filing of a Warrant to Evict dated 12 June 2019. As a result of the Appellant filing two letters with the Magistrates' Court, a hearing was set for 28 June 2019 when the Learned Magistrate heard submissions from the Appellant and Ms. Chambers but declined to set aside his order of 7 June 2019.

13. The Respondent stated that following the Possession Order, the Appellant remained in possession of the Unit but since 13 July 2019 he believed the Appellant had secured alternate accommodation and had vacated the property. He had reviewed his security camera and noted that the Appellant had visited the Unit two times in July 2019, three times in August 2019 and two times in September 2019 but had not returned to the Unit since 18 September 2019.

14. In respect of the 2015 Supreme Court Proceedings, the Appellant failed to obey the order of the Court to proceed with the Fresh Proceedings and no other action had been taken on the file for four years to the date of the Respondent's affidavit. The Respondent stated that both he and his mother Janette Smith have sought to evict the Appellant from the Unit since 2012 and given all the delays, it was unclear whether the Appellant intended to pursue his claim of an interest in the Property or Unit.

Affidavit of the Appellant sworn 5 December 2019

15. The Appellant swore an affidavit on 5 December 2019 in support of his appeal and in reply to the Respondent's affidavit. Hs stated that his mother had three biological children, namely himself, Willis Smith Jr and Janette Smith. His brother Willis Smith lived in the Property in the main unit whilst the Respondent lived in the Property in an apartment which is smaller than the main unit. He explained that his father Willis Smith was receiving pension of $640.14 plus rental income from people who lived on the Property. He recognised that his father needed funds so he arranged to pay rent for occupation of the Unit. In respect of the Respondent's contention that his mother Janette Smith assisted her father in return for conveying the Property to her whilst keeping a life-interest, he stated that their father was already suffering dementia, was under duress to execute the conveyance, did not voluntarily convey the Property to Janette Smith and was forced to do it. He noted that from conversations with his father, his father had no recollection of signing

a conveyance but repeated that he owned the Property and that the Appellant could not be evicted.

16. The Appellant stated that the Learned Magistrate Chin remanded him in custody for one night when Magistrate Chin ordered him to leave the courtroom quietly but he did say "excuse me" to the Corrections Officer who was blocking the door. It was only a few days later on 7 June 2019 that he missed the court appearance when the Possession Order was made. He stated that this shows that Magistrate Chin was biased against him, does not like him and should have set aside the Possession Order and ruled that he did not have jurisdiction because of his claim to have an interest in the Property.

17. The Appellant stated that in respect of the Respondent stating that the Appellant was fully aware of the conveyance in 2002, he did not know about it at the time and only knew of it when his sister Janette Smith sent him a letter as "Landlord" in 2012. As a result of that letter and his claim to an interest in the Property he instructed his counsel to write a letter to find out more information. In respect of the dismissal of the Caveat, he submitted that he did not have anyone to assist him, he did not know Ms. Chambers at that time and he is not legally trained. He stated that he never gave up his claim to an interest in the Property and he will resume his matter in the Supreme Court.

18. The Appellant states that in respect of the court appearance that he missed on 7 June 2019, he was not well, was under a lot of pressure and had been locked up overnight on 4 June 2019 and subsequently overlooked being in Court on 7 June 2019 when Magistrate Chin granted possession. He states that he did not deliberately not appear and when he did appear on 28 June 2019 he did not object to Magistrate Chin hearing the matter because he did not know that he could and Mrs. Chambers was not aware of his full history with Magistrate Chin at the time.

19. The Appellant states that he explained how he came to pay rent in an affidavit he swore in 2015. One page of that affidavit is included in the Record of Appeal and states that "*The sole purpose of the rental arrangement with my father was to assist in the provision and care of my father.*" He stated that he never had a tenancy agreement with Janette Smith and

he never had an understanding or agreement with her for payment of rent to satisfy her mortgage payments or at all. Further, he stated that he did not believe he needed to pay rent now because of his claim to an ownership in the Property. The Appellant stated that he is currently staying in a room elsewhere because of the eviction hanging over his head but that he has not vacated the Unit and he has not given up possession of the Unit. He described the Unit as a small room, with a kitchen and a bathroom but that it does not have an assessment number but since his family moved there in 1981 it has been his accommodation. Although he had not been there recently, he had not given up possession of it and he still had some possessions in it.

20. The Appellant stated that Janette Smith wanted to buy him out but she did not have the funds to do so and backed off from trying to evict him. Although the 2015 Supreme Court Proceedings were not kept active, he intended to apply to Legal Aid for a new lawyer as he wanted to move forward with the case as soon as possible.

21. The Appellant referred to a letter dated 4 September 2018 sent to him by the Respondent's lawyer part of which is in the Record of Appeal. The letter complains of his behaviour at the Property and makes mention of a dispute as to the Appellant's entitlement to live in the Unit noting that until the matter is adjudicated, there is objection to recent activities and behaviour. The Appellant states that such wording shows that the Respondent knows there is a dispute, and that he should not be evicted until there is adjudication of the matter of any rights of the Appellant. Further, he intended to challenge the Vesting Deed to have it declared void. He stated that the question of his rights should be heard in the Supreme Court and that the matter should not have been dealt with in the Magistrates' Court as if he was a normal tenant.

The Appellant's Submissions

22. Mrs. Chambers made several submissions generally in support of the appeal with Ground 3 being the main ground of appeal.

Ground 3– Statutory Jurisdiction of the Magistrates' Court

23. The Appellant submitted that the Magistrates' Court does not have jurisdiction due to section 17(b) of the Magistrates' Act 1948 (the "**Act**") and the Supreme Court was already seized of the matter in the 2015 Supreme Court Proceedings. Section 17 states as follows:

> ***Restriction on court of summary jurisdiction to take cognizance of certain actions***
> *17. A court of summary jurisdiction shall not take cognizance—*
> *"(a) of any action for any libel or slander, or for seduction, or malicious prosecution or false imprisonment; or*
> *(b) of any action wherein the title to any corporeal or incorporeal hereditaments, or wherein the validity of any devise, bequest or limitation under any will or settlement, may be disputed.*

24. The Appellant submits that the Learned Magistrate should not have dealt with the matter as he was aware that the possession and occupation of the Unit was not as a tenant but as of right due to his claim of an equitable interest in the Property which was set out in his affidavit of 2015 and of which the Learned Magistrate was aware. The Appellant relied on an article dated 19 November 2019 from the Australian website "*Lawpath*" on legal and equitable interests.

25. The Appellant submitted that the Order made in the Magistrates' Court usurped the authority of the Supreme Court and ignored his right to an equitable interest as he was treated as if he was a tenant with no other rights when in actuality he was in occupation due to his claim to an equitable interest. Further, the Learned Magistrate was aware of the claim by way of the letter to the Magistrates' Court dated 26 June 2019 and at the hearing on 28 June 2019. Therefore, the Learned Magistrate should not have made the Order, or having made the Order, he should have set it aside with a direction to the Respondent to address the matter in the Supreme Court. The Appellant relied on the contents of the letter dated 4 September 2018 to show that the Respondent was aware of the Appellant's claim and that it had to be settled in the Supreme Court and therefore should not have dealt with the eviction of the Appellant as if he was a simply a tenant.

26. The Appellant submitted that the Respondent has submitted that the Appellant could be compensated in damages if he is proven right. Therefore, this is an acknowledgment and acceptance by the Respondent that the possessor of an equitable interest is entitled to possession of the property. On this basis, the appeal should be allowed.

27. The Appellant submitted that he had a solid claim to an interest in the Property which should be determined in the Supreme Court taking into account various issues such as statements by Janette Smith, the true circumstances of the purported voluntary conveyance and the fact that the Respondent knew of the Appellant's claim to an interest in the Property. Further, the Appellant has every intention to pursue his claim within the limitation period of 20 years as set out in the case of *Simmons & Simmons v Frith Cartwright & Hill* [2008] SC (Bda) 34 Civ but that due to various circumstances, including ill health, criminal charges in respect of conduct at the property, and Covid-19 related restrictions affecting his ability to apply for Legal Aid, he has not been able to do so.

Ground 1 – Application of the Wrong Legal Test

28. The Appellant submitted that the Magistrate did not apply any test in determining whether to set aside the Possession Order other than to rely on the fact that the Appellant did not appear.

Ground 2– Bias/Apparent Bias

29. The Appellant submitted that Magistrate Chin did not like him and had only a few days earlier in June 2019 had him detained for contempt for his conduct when leaving the courtroom. On that basis, he submits that Magistrate Chin was biased against him.

Ground 4 – Natural Justice

30. The Appellant submitted that as he was not a tenant, the Learned Magistrate could not grant the Respondent's application to evict him, especially while the Supreme Court proceedings were alive. Ms. Chambers submitted that the Appellant did not proceed with the Supreme Court matters for various reasons. As a result of these circumstances, the Respondent should have brought his application to evict to the Supreme Court to be determined, noting that the Respondent had provided no reasons why he did not proceed in the Supreme Court. Further, she relied on the case of *Simmons & Simmons v Frith Cartwright & Hill* to submit that the Appellant was still in the timeframe of 20 years to proceed with his case. The Magistrate's order was a clear error of law.

31. The Appellant rejected the Respondent's submission that the crux of the Appellant's defence was based on a bare assertion that he had an entitlement claim to the Property. This again was on the basis that the Respondent and the Learned Magistrate treated the Appellant only as a tenant and not someone who held an equitable interest in the Property.

32. The Appellant submitted that the Respondent in his affidavit referred to the Voluntary Conveyance where it purported that Willis Smith wished to convey the property to Janette Smith out of his love and affection for her. However, in actual fact, the Respondent in his affidavit stated that the Property was conveyed to Janette Smith in return for her assistance to her father Willis Smith with his living expenses. These were all matters that should be determined by the Supreme Court.

The Respondent's Reply

33. The Respondent opposed the Appellant's appeal to set aside the Possession Order on various grounds.

34. First, the Respondent submits that the matter on appeal arises out of a landlord and tenant dispute between Willis Smith, his successors in title and the Appellant. Therefore, the Magistrates' Court pursuant to Section 30 of the Rent Increases (Domestic Premises) Control Act 1978 (the "**Rent Act**") has the statutory jurisdiction to hear and determine all

actions for possession upon termination of a tenancy. The Possession Order should not be set aside as based on the evidence the Appellant lacks a defence with a real or any prospect of success as the Appellant had entered into the Oral Lease with his father Willis Smith on or around January 2008 but has failed to pay rent since August 2018, therefore the tenancy terminated.

35. Second, the Appellant's alleged interest does not fall within the scope of the appeal, therefore there is no basis to disturb the Learned Magistrates' decision to grant the Possession Order.

36. Third, the proper approach is to regard the landlord and tenant action as separate and distinct from the Appellant's bare assertion of an entitlement claim to the Property.

37. Fourth, the Appellant, in contravention to the Order by Hellman J, has not progressed the 2015 Supreme Court Proceedings even to the pleading stage. Therefore, any right to a fair hearing in respect of his claim has been lost due to his failure to prosecute his claim in an efficient manner or at all.

38. Fifth, the legislative framework is concise: (i) a tenancy under the Rent Act terminates where the landlord determines the tenancy for failure to pay rent; (ii) The Magistrates' Court has the power to hear and determine all actions for possession upon the termination of the tenancy; (iii) the Magistrates' Court does not have the jurisdiction to hear actions where the validity of a devise, bequest or limitation under any settlement is disputed; (iv) all judgments of a Court of summary jurisdiction shall be stayed pending the hearing or abandonment of an appeal; and (v) an appeal should not succeed on the ground merely of improper reception or rejection of evidence unless the Court finds that there has been substantial wrong or miscarriage of justice in the Court of summary jurisdiction.

39. Sixth, the basis of an appeal in civil cases from a court of summary jurisdiction to the Supreme Court is limited by the rules to errors of law. The Respondent relied on the case of *Hill v Smith* [2017] Bda LR 2 at paragraph 11 where Kawaley J stated "*Every Appellant has two hurdles to overcome. Firstly, can the Appellant demonstrate an evidential error or*

misdirection of law has occurred? Secondly, can the Appellant demonstrate that the substantial ground of appeal has occasioned substantial 'substantial wrong or miscarriage of justice' (Civil Appeals CT 1971, Section 14(4).'' Therefore, the Appellant must be able to demonstrate to this Court that an error of law has occurred and as result, there has been a substantial wrong or miscarriage of justice. However, the Appellant has admitted that he entered into an Oral Lease with his father Willis Smith and that he failed to pay the monthly rent in breach of the Oral Lease. The Learned Magistrate applied the correct legal test not to set aside the Possession Order.

Ground 1 – Application of the Wrong Legal Test

40. The Respondent submitted that the Learned Magistrate applied the correct test in light of the admission by the Appellant of his non-payment of rent and in finding expressly or by implication that the Appellant's failure to pay rent in breach of the Oral Lease was justified in the absence of any defence. The Appellant failed to pursue the 2015 Supreme Court Proceedings which in any event are separate and distinct from the landlord and tenant matter.

41. The Respondent submitted that on the face of the Record of Appeal, the Appellant failed to demonstrate a real likelihood that he will succeed in proving a defence with real prospect of success as he accepts he entered into the Oral Lease with his father Willis Smith to pay rent and then he failed to pay the monthly rent. The Respondent submitted that the Learned Magistrate applied the correct test when he concluded "*Mr. Smith admitted to paying rent since 2008, but has not paid rent for the past 4-6 months. This gives credence and evidence that there is a landlord tenant relationship.*" Therefore the Learned Magistrate's Decision not to set aside the Possession Order is clear and sufficiently supported by the evidence. Even if the Court finds that insufficient reasons were given, in light of the undisputed facts, there was no substantial wrong or miscarriage of justice to justify setting aside the Possession Order.

Ground 2 – Bias/Apparent Bias

42. The Respondent submitted that no issue of bias was raised by the Appellant before or during the course of the hearing. It was only after the decision was made that he raised bias. Further, the Respondent submitted that in light of the Oral Lease and the admission of non-payment of rent there is sufficient evidence before the Court for a fair-minded observer to conclude that the possession Order was not the result of the Learned Magistrate's bias or apparent bias.

43. On the contrary, the Learned Magistrate, after the hearing giving rise to the contempt proceedings, stayed the eviction scheduled for 27 June 2019 and listed the matter for hearing on 28 June 2019. At that hearing, Mrs. Chambers and the Appellant were given the opportunity to provide a reason for the Appellant's non-appearance and to demonstrate a defence with a real prospect of success. Such circumstances would fail the test for apparent bias.

Ground 3 – Statutory Jurisdiction of the Magistrates' Court

44. The Respondent submitted that the Magistrates' Court is a statutory creature and is limited to hear matters expressly set out in the Magistrates Act 1948.

45. The Respondent submitted that the matter on appeal arises from a landlord and tenant dispute. Therefore under Section 30 of the Rent Act, the Magistrates' Court's jurisdiction extends to consideration of the evidence before the Court to determine whether to grant a Possession Order. The Respondent submitted that Section 17(b) of the Magistrates Act 1948 is not applicable in the present case as the Magistrates' Court does not have jurisdiction in any action where the validity of a devise, bequest or limitation under a will or settlement is disputed. Further, the Respondent submitted that the Appellant was wrong to argue that Section 17(b) applied in that: (a) the Property was lawfully conveyed to Janette Smith in 2002 subject to her father's life interest and when he died on 19 December 2012 the property did not form part of his estate; (b) Janette Smith died intestate without having disposed of her interest in the Property and as she was not survived by a husband, the estate was held on trust for her issue, that is the Respondent. As brother to Janette

Smith, the Appellant did not acquire an interest in the Property upon her death; and (c) the Caveat lodged by the Appellant was dismissed and letters of administration were granted to the Respondent. The Respondent argues that once the caveat was dismissed, there was no longer a dispute in regard to the estate of Janette Smith.

46. The Respondent submitted that the Appellant raised his alleged entitlement claim against Janette Smith's estate by his letter dated 26 June 2019. Therefore, the Appellant cannot argue that improper evidence was put before the Court to constitute a substantial wrong or miscarriage of justice when the Appellant was the first party to raise such evidence before the Court. Further, the Respondent submitted that if he was wrong on the application of Section 17(b), then following the principles set out in *Hill v Smith*, the reception of such evidence falls well short of a substantial wrong or miscarriage of justice where on the facts the Appellant does not have a defence with a real prospect of success.

Ground 4 – Natural Justice

47. The Respondent submitted that the Court is required to apply the Overriding Objective in particular ensuring that cases are tried expeditiously and fairly and bearing in mind that parties are legally obliged to assist the Court to achieve the Overriding Objective.

48. In respect of the Court exercising its discretion when balancing the Plaintiff's rights against the Defendant's rights in light of the Overriding objecting. The Respondent cited the case of *Kessell and Cedarberry (Bermuda) Ltd v Barritt & Sons Ltd and Russell* [2009] CS (Bda) 24 CIV at where Kawaley J stated:

> *"7. The process of civil litigation requires the Court to engage in a judicial juggling act, constantly seeking to keep the respective parties' constitutional fair trial rights balls in the air. And if the plaintiff does not advance his case with due diligence, his fair trial rights may fall to the ground, and his opponent will triumph on strikeout grounds. The Plaintiffs have a right of access to the Court and to a fair trial, but the Defendants have a corresponding right to a fair trial within a reasonable time. It is the task of balancing these potentially conflicting yet overlapping constitutional fair trial*

rights which underpins this Court's duty to manage cases justly under Order 1A of this Court's Rules ("the Overriding Objective")."

49. The Responded cited the case of *First Atlantic Commerce Ltd. v Bank of Bermuda Ltd.* [2007] Bda LR 4 where Kawaley J stated:

"12. Having regard to the Overriding Objective in Order 1A of the Rules, the Court is not constrained to resolve this controversy on the basis of the arguments advanced by the parties. This Court is under a positive duty to actively consider how this litigation should be managed with a view to saving time and costs. The parties do not have an unfettered right to have their day in Court; the right to a fair hearing implies a hearing that is fair to both sides and resolves serious issues in an efficient manner."

50. The Respondent cited the case of *Woods v Swan* [2014] Bda LR 76 where in dismissing an application to set aside a possession order on the ground of natural justice, that is fair trial rights, Kawaley J stated:

"The holistic nature of fair trial rights are reflected in Order 1A of this Court's Rules. The overriding objective of the Court in handling civil cases is to adjudicate them justly, and the parties are each required to assist the Court to achieve this goal. Managing cases justly includes, inter alia, "saving expense" while active case management entails, inter alia, "deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others". The right to pursue proceedings or applications to a full hearing or trial is not an absolute right triggered by the mere filing of an application. It is a right to a fair hearing of a meritorious claim, a right which may be lost by a litigant who fails to prosecute her claim it in an efficient manner, or who files a claim which is so unmeritorious that its very pursuit would constitute an abuse of the process of the Court."

51. The Respondent cited the case of *Shocked v Goldsmith [1998] 1 ALL ER* which was cited with approval in *Woods v Swan* where the Court of Appeal set out factors a court must consider in balancing the interests of the parties, relevant ones as follows:

> *"(2) Where judgment has been given after a trial it is the explanation for the absence which is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.*
> *(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.*
> *(6) In considering justice between the parties, the conduct of the person applying to set aside judgment has to be considered: where he has failed to comply with the orders of the court, the court will be less ready to exercise its discretion in his favour:*
> *(7) A material consideration is whether the successful party would be prejudiced by the judgment being set aide, especially if he cannot be protected against the financial consequences."*

52. The Respondent submitted that in balancing the Appellant's right to pursue proceeding against the prejudice to the Respondent, the Court should decline to interfere with the Learned Magistrates' exercise of discretion to refuse to set aside the Possession Order as the Learned Magistrate noted the following: (a) the Appellant did not give a satisfactory explanation for his failure to appear; (b) the Court heard from the Appellant about his alleged interest claims in the estate of Janette Smith but that claim was denied when the Caveat was dismissed; the Court granted the Appellant and Mrs. Chambers ample time to make submissions; and the Appellate admitted to paying rent since 2008 but had not paid rent for the past 4 – 6 months, which gave credence and evidence that there is a landlord tenant relationship.

53. The Respondent submitted as follows:
    a. In respect of the excuse for absence when the Possession Order was made, the Learned Magistrate found that no reasonable explanation was provided; however, the Appellant was afforded a further opportunity to be heard. His absence was not

a result of accident or mistake and there was no evidence to suggest that his medical condition was so serious that he was incapable of appearing or at least requesting an adjournment.

b. In respect of a defence to terminate his tenancy, the Appellant is silent and there is no suggestion that the Appellant would suffer substantial or any prejudice because he had been denied an opportunity to be heard. The Court had before it evidence that the Property was voluntarily conveyed to Janette Smith, the Appellant occupied the Unit and paid rent since 2008, the Appellant had not paid rent since 2018 and his Caveat against the estate of Janette Smith was dismissed. In light of these facts, the Appellant failed to demonstrate any defence.

c. In respect of prejudice the Appellant, he has failed to demonstrate any prejudice suffered as a result of the Learned Magistrate declining to set aside the Possession Order. He has secured alternate accommodation and he has not resided in the Unit since September 2018. The Appellant could still pursue the 2015 Supreme Court Proceedings to determine if he has an interest in the Property, although since it has been 4 years where the Appellant has not provided any credible evidence in support of his claims, the proceedings are subject to a strike-out on the grounds of abuse of process and want of prosecution. Any prejudice is because of his own failure to prosecute the 2015 Supreme Court Proceedings, not because of the decision of the Learned Magistrate.

d. In respect of prejudice to the Respondent, he would be prejudiced if the Possession Order was set aside as the Appellant has used the appellate process to stay proceedings and both Janette Smith and the Respondent have suffered financial consequences since 2012 without any resolution to the eviction proceedings. Further, if the Possession Order was set aside, the Respondent would suffer further financial consequence as the Appellant is not in a position to pay for the continued use of the Unit and the Appellant would likely not pursue his baseless claims as he has done since 2015 and remain in the Unit.

e. In light of the above, that balancing the parties rights the Court should not interfere with the Learned Magistrates' decision to not set aside the Possession Order.

Law on the Procedure of Civil Appeals

54. The Civil Appeals Act 1971 section 14 provides as follows:

> *"Determination of appeals*
>
> *14 (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part or may remit the case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.*
>
> *(2) All appeals to the Court shall be by way of re-hearing on the record, and shall be by notice of appeal, and no writ of error or other formal proceedings other than such notice of appeal shall be necessary.*
>
> *(3) The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.*
>
> *(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.*
>
> *(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition."*

55. Under the Civil Appeals Act 1971 the Court has broad powers in the conduct of an appeal. The appeal is a re-hearing on the record, the Court can draw all inferences of fact which might have been drawn in the court of summary jurisdiction and the Court has full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition.

56. In respect of the meaning of "appeal by re-hearing", in *Qamar v Bermuda Medical Council* [2021] SC (Bda) 9 App Subair Williams J stated as follows:

> *"67. Mr. Stevens pointed to the decision in Papps v Medical Board of South Australia* [2006] SASC 234 [32-34]:
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> "*32. Cox J in Wigg v Architects Board (1984 36 SASR 111 at 112-113 undertook an examination of the different types of appeal that may be created with respect to the decisions of judicial and administrative bodies. Martin J adopted this analysis in Thompkins v South Australian Health Commission [2001] SASC 147 at [28]-[31]:*
>
> > *His Honour identified three types of appeal. First, an appeal "strictly so called" in which the question is whether the judgment complained of was right when given and there is no issue of introducing fresh evidence in the appeal court. All that is decided is whether the court below came to the right decision on the material that was before it.*
> >
> > *The second type of appeal identified by Cox J is the appeal by way of rehearing. His Honour described this appeal as follows (p 111):*
> >
> > > *"This is a rehearing on the documents, but with a special power to receive further evidence on the appeal. The latter power is necessary, because the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in the light of the material before the appeal court at the time it hears the appeal."*
> >
> > *The third type identified is an appeal de novo in which the appeal court hears the matter afresh. Regardless of which party appeals, the appeal is conducted as an original cause and all the evidence is given afresh unless the parties agree to the material used before the original body being used on the appeal. The judge who hears such an appeal will determine the question upon the material presented*

before the judge and will not be limited in any way by the decision that has been made by the body appealed from.

As Cox J observed (p 113):

> *"Which type of appeal is given by a particular Act will depend upon its construction. The use of the word "rehearing" will not be decisive, because that is a word to which different meanings have been given…. It will be a matter of discerning Parliament's intention from an examination of the legislation as a whole." (footnotes omitted)*

33. Which of these three kinds of appeal is designated by a statutory provision will depend upon the legislative intention as disclosed by an examination of the legislation as a whole [foot note omitted]. *Both Cox J and Martin J observed that a statutory appeal procedure does not always fit easily into one of the three categories. It is open to the legislature to create any kind of appeal, including an appeal that combines features of one or more of the traditional categories.*

34. Ultimately, the nature of the appeal must depend on the terms of the statute conferring the right. [foot note omitted] *Section 66 of the Medical Practitioners Act confers wide powers upon a single judge of this Court. It provides that the hearing is to be a rehearing on the documents, but with the power to receive further evidence on the appeal*."

Law on Bias

57. In respect of a tribunal's independence and impartiality, in the case of *Davidson v Scottish Ministers* [2004 if] UKHL 34 at 6 Lord Bingham stated:

> *"6. The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be*

independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since "bias" suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."

58. In respect of the test of apparent bias, in *Porter v Magill* 2001 UKHL 67 adopted in the recent Bermuda case of *Dr. Gina Tucker v The Public Service Commission* [2020] SC (Bda) 8 Civ at 49 the test was set out as follows:

> *"49. The accepted test for determining bias is whether a fair minded reasonably informed observer would conclude that there was a real possibility of bias on the part of the decision maker."*

59. In respect of apparent bias and unconscious bias, in the case of *Hofstetter v The London Borough of Barnet* [2009] EWHC 3282, Charles J stated:

> *"104 I invited Counsel to comment on the test for apparent bias approved by the Court of Appeal in R (PD) v West Midlands and North West Mental Health Tribunal [2004] EWCA Civ 311 at paragraphs 6 and 8 of the judgment of Lord Phillips MR in the following terms:*
>
> > *"6. Silber J summarised the relevant principles to be deduced from recent authorities as follows:*

(a) in order to determine whether there was bias in a case where actual bias is not alleged "the question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was biased" (per Lord Hope of Craighead in Porter v Magill [2002] 2 AC 357 at 494 [103]). It follows that this exercise entails consideration of all the relevant facts as "the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased" (ibid [104]).

(b) "Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson [2000] 200 CLR 488, 509 at paragraph 53 by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"" (per Lord Steyn in Lawal v Northern Spirit Limited [2003] ICR 856, 862 [14]),

(c) in ascertaining whether there is a case of unconscious bias, the court must look at the matter by examining other similar analogous situations. "One does not come to the issue with a clean slate; on the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem" (per Lord Steyn in Lawal v Northern Spirit Limited (supra), 862 [15]),

(d) the approach of the court is that "one starts by identifying the circumstances which are said to give rise to bias – [a court] must concentrate on a systematic challenge and apply a principled approach to the facts on which it is called to rule" (per Lord Steyn in Lawal v Northern Spirit Limited (supra), 864-5 [20]),

(e) the need for a Tribunal to be impartial and independent means that "it must also be impartial for (sic) an objective viewpoint, that is it must

> *offer sufficient guarantees to exclude any legitimate doubt in this respect" (Findlay v United Kingdom (1997) 24 EHRR 221 at 224-5 and quoted with approval by Lord Bingham of Cornhill in R v Spear [2003] 1 AC 734 [8]."*
>
> *8. We would endorse the judge's summary of the relevant legal principles. We would add only this comment in relation to the judge's statement that one must consider a case where unconscious bias is alleged by examining "other similar analogous situations". Lord Steyn stated that these "may arguably throw light on the problem". The natural reaction of the lawyer to any problem is to look for case precedent and this is true even where the issue is essentially one of fact. In such circumstances precedent can be helpful in focusing the mind on the relevant issues and producing consistency of approach. In a case such as the present, however, the search is for the reaction of the fair-minded and informed observer. The court has to apply an objective assessment as to how such a person would react to the material facts. There is a danger when applying such a test that citation of authorities may cloud rather than clarify perception. The court must be careful when looking at case precedent not to permit it to drive common sense out of the window."*

Analysis of the Appeal

60. In light of the above, I consider this appeal to be of the second type as set out by Cox J in *Wigg v Architects Board* and where it was stated that the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in the light of the material before the appeal court at the time it hears the appeal.

61. In my view, the appeal should be dismissed for several reasons. First, I consider that this is a matter of a landlord tenant relationship. This is on the basis that I am satisfied on a balance of probabilities that there was an Oral Lease between Willis Smith and the Appellant. The Appellant agreed to and was obliged to pay $300 in rent which was later increased to $700. Further, the Appellant did in fact pay rent for a number of years, that

rent being actually paid by the DFA whilst Willis Smith was alive and whilst Janette Smith was alive and the owner of the Property. The Appellant was clearly a tenant during those times. Therefore, I do not agree with the Appellant that he was not a 'normal tenant'.

62. Second, the Appellant has admitted that he breached the tenancy agreement by failing to pay the monthly rent, no rent having been paid since 1 August 2018. Therefore, in my view, the Property having been vested in the Respondent on 26 February 2019, he was within his rights to apply for a possession order and eviction later in 2019.

Ground 1 – Application of the Wrong Legal Test

63. I disagree that the Learned Magistrate used no test or the wrong legal test in determining whether to grant the Possession Order and to set it aside. As a start point, on 7 June 2019 the Learned Magistrate, in the absence of the Appellant, heard submissions that he had failed to pay the monthly rent since August 2018. Therefore, he was entitled to grant the Possession Order for failure to pay the monthly rent.

64. Next, the Appellant's letter dated 26 June 2016 requested a hearing for the Possession Order and the eviction to be set aside. The Learned Magistrate stayed the eviction and expeditiously arranged to have the hearing on the 28 June 2019 for the application to set aside. At the hearing, the Learned Magistrate again recorded that the Appellant had failed to pay the rent that was due stating "*Mr. Smith admitted to paying rent since 2008, but has not paid rent for the past 4-6 months. This gives credence and evidence that there is a landlord tenant relationship.*"

65. The Learned Magistrate also noted the following: (a) the Defendant had not given a satisfactory explanation for his non-appearance on 7 June 2019 when the Possession Order was made; (b) the Caveat had been dismissed on 14 December 2018; (c) the Court had sight of the Voluntary Conveyance dated 14 May 2002 from Willis Smith to Janette Smith and the Vesting Deed dated 26 February 2019; (d) the Court had granted the Appellant ample time to answer the issues in the matter; and (e) that the Court confirmed the

Possession Order dated 7 June 2019 as it had not been swayed. In my view, this was all clearly in respect of the application to set aside the Possession Order.

66. Significantly, the Learned Magistrate had determined that on the evidence this was a landlord tenant relationship and there was a failure to pay the rent for the last 4 – 6 months. The applicable test for setting aside the Possession Order was whether there was a defence to the non-payment of the rent. In this case, the Appellant had admitted that he had not paid the rent. In light of the submissions made to the Learned Magistrate, he was not swayed to set aside the Possession Order. In my view, the Learned Magistrate had in mind the proper test that there was no defence to the non-payment of the monthly rent.

67. In any event, if I wrong on whether the Learned Magistrate used the correct test, in my view, the evidence shows that there was landlord tenant relationship and it also shows that there was no defence to the non-payment with any prospect of success. On that basis, I am not satisfied that there has been a substantial wrong or miscarriage of justice to justify setting aside the Possession Order.

68. Accordingly, I dismiss this ground of appeal.

Ground 2 – Bias/Apparent Bias

69. In my view, I find that a fair minded observer would not conclude that there was a real possibility of bias on the part of the Learned Magistrate for several reasons. The Learned Magistrate dealt with the Appellant as he saw fit on the occasion when he held him in contempt. He was doing his duty in respect of conduct in the courtroom.

70. At the hearing for the Possession Order on 7 June 2019 the Learned Magistrate dealt with the application before him. Again he was doing his duty. It seems to me that if the Learned Magistrate indeed held a bias against the Appellant he would not have stayed the eviction and scheduled an expedited hearing for the application to set aside the Possession Order. However, he did do so when he heard submissions from the parties even noting that he had given the Appellant and Mrs. Chambers ample time to make their submissions.

71. In my view there is no actual bias when applying *Davidson v Scottish Ministers* where Lord Bingham stated that '*the rule of law requires that judicial tribunals ……. should be independent and impartial*", and "*should decide such issues on their legal and factual merits as they appear to the tribunal uninfluenced by any interest, association or pressure extraneous to the case*". There is no basis to support a contention that the Learned Magistrate was influenced by any interest, association or pressure extraneous to the application for a possession order and the application to set it aside. In my judgment, the fair minded observer would not conclude that the Learned Magistrate was not impartial in determining the issue.

72. In respect of the Learned Magistrate and apparent bias I rely on the line of cases citing the test in *Porter v Magill*, namely *Dr. Gina Tucker v the Public Service Commission* and *Hofstetter v The London Borough of Barnet*. I am of the view that based on the same factual matrix in the present case, that the fair-minded and informed observer would not conclude that there was a real possibility of bias on the part of the Learned Magistrate once all the facts of the circumstances were considered.

73. Accordingly, I dismiss this ground of appeal.

Ground 3 – Statutory Jurisdiction of the Magistrates' Court

74. In my view, the Learned Magistrate, for the reasons already stated, determined that this was a matter about a landlord tenant relationship. Also, he recorded that he had heard submissions about the alleged interest claims in the estate of Janette Smith and that the Caveat had been dismissed on 14 December 2018. Further, he recorded that he had sight of the Voluntary Conveyance and the Vesting Deeds. Having heard these submissions, in my view, the Learned Magistrate still relied on the Oral Lease and the facts that rent was paid since 2008 but not for the last 4 – 6 months. In my view, the Learned Magistrate took a record of the submissions as was his duty to do, however, in determining whether to set aside the Possession Order he did so on the basis of a landlord tenant relationship. This was the correct approach.

75. There has been a significant amount of evidence placed before me in affidavit form by the Parties about the 2015 Supreme Court Proceedings. That evidence ranges from how those proceedings came about, how the Fresh Proceedings should have commenced, the fact that those proceedings have not progressed along with reasons why. The thrust of the Appellant's arguments is that those proceedings are still alive and the Learned Magistrate, having been informed of the 2015 Supreme Court Proceedings and the alleged equitable interest, should have declined to make the Possession Order or should have set it aside so that the Appellant could pursue the 2015 Supreme Court Proceedings. The Appellant argues that the Learned Magistrate should have heeded this information relying on Section 17(b) of the Magistrates' Act 1948, thus not usurping the authority of the Supreme Court in respect of possession and eviction.

76. However, I disagree with this approach for several reasons. First, the Learned Magistrate dealt with this matter as a landlord tenant relationship and a failure to pay the monthly rent. In those circumstances the appropriate order to make was the Possession Order.

77. Second, having treated the matter as landlord tenant relationship, it would not have been correct for the Learned Magistrate to deny making the Possession Order or setting it aside based on the existence of the 2015 Supreme Court Proceedings and/or the alleged equitable interest precisely because Section 17(b) of the Magistrates' Act 1948 mandated that the Magistrates Court shall not take cognizance of any such action which may be disputed. In my view, the Learned Magistrate was correct to put the 2015 Supreme Court Action to one side when he was dealing with the application for the Possession Order and the application to set it aside.

78. Third, in my view, there is a distinction between the Appellant's possession of the Unit and the Appellant's claim for an interest in the Property. The Learned Magistrate had the jurisdiction to deal with the application for possession of the Unit based on the landlord tenant relationship. The Supreme Court has the jurisdiction to deal with the claim of an equitable interest in the Property if and when the Appellant proceeds with that matter.

79. Fourth, if for some reason, the Learned Magistrate was entitled to take cognizance of the 2015 Supreme Court Proceeding and the alleged claim for equitable interest, and then set aside the Possession Order, he would have been wading into uncertain waters in that the Appellant could remain in possession and then do nothing to further the 2015 Supreme Court Proceedings causing prejudice to the Respondent, as set out below.

80. In any event, if I wrong on whether the Learned Magistrate took cognizance of the issues in respect of the estate of Janette Smith, again the evidence shows that there was landlord tenant relationship and it also shows that there was no defence to the non-payment with any prospect of success. On that basis, I am not satisfied that there has been a substantial wrong or miscarriage of justice to justify setting aside the Possession Order.

81. Accordingly, I dismiss this ground of appeal.

Ground 4 – Natural Justice

82. In my view, this ground of appeal fails for several reasons. First, I agree with the Respondent that the Appellant had the opportunity on 7 June 2019 to have his arguments heard before the Learned Magistrate. I rely on the cases cited by the Respondent, namely *Kessell and Cedarberry (Bermuda) Ltd v Barritt & Sons Ltd and Russell, Woods and Swan* and *First Atlantic Commerce Ltd. v Bank of Bermuda Ltd.*, in respect of the Court's duty to manage cases justly under the Overriding Objective and the right of a fair hearing that is fair to both sides. In any event, the Learned Magistrate granted an expedited hearing to the Appellant for an application to set aside the Possession Order.

83. Second, I rely on the case of *Shocked v Goldschmidt* where the Court set out the principles a Court must consider balancing the interests of the parties.

    a. In my view, the Learned Magistrate was entitled to find that in respect of the non-appearance of 7 June 2019, the Appellant did not provide a satisfactory explanation. It appears to me that the Appellant took a cavalier approach in not appearing for the hearing and not making an effort to inform the Court about his non-appearance.

b. In respect of a real prospect of success, I agree with the Respondent that the Learned Magistrate had before him evidence that the Property was conveyed to Janette Smith, the Caveat had been dismissed, the Appellant had occupied the Premises and paid rent since 2008 but that he had not paid rent since 1 August 2019. I agree that in light of these facts, the Appellant had failed to demonstrate a defence, thus he had no real prospect of success.

c. In respect of the conduct of the Appellant, he has found alternative accommodation and rarely visits the Property although he has left some possessions in the Unit. Further, he has not progressed the 2015 Supreme Court Proceedings. In my view, in light of these circumstances, it would not be fair to set aside the Possession Order. In particular, the ball has always been in the Appellant's Court to resolve any issues in order to proceed with the 2015 Supreme Court Proceedings, however he has done nothing to progress them or to even comply with the order for Fresh Proceedings.

d. In respect of the prejudice to the Respondent if the Possession Order was set aside, in my view I agree that the Respondent would be unduly prejudiced as: (a) these proceedings for possession have stumbled along for some years now causing financial consequences to the Respondent; (b) the Appellant could continue to not progress the 2015 Supreme Court Proceedings; and (c) ultimately the Respondent would not be able to renovate the Unit and use it as he sees fit as part of the whole Property.

84. Accordingly, I dismiss this ground of appeal.

85. In my view, in following the test cited by Kawaley J in *Hill v Smith,* the Appellant has failed on all grounds to demonstrate to this Court that an error of law has occurred and as result, there has been a substantial wrong or miscarriage of justice.

Conclusions

86. In light of the above reasons, I dismiss the Appellant's appeal against the orders of the Learned Magistrate to grant the Possession Order and to refuse to set it aside.

87. Unless either party files a Form 31TC to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Respondent on a standard basis, to be taxed by the Registrar if not agreed.

Dated 28 September 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT