

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2008 HCVO3548

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| BETWEEN | SAUNDRA BAILEY | 1 ST CLAIMANT |
| | BASIL BAILEY | 2 ND CLAIMANT |
| AND | DONOVAN LEWIS | 1 ST DEFENDANT |
| AND | LLOYD WINSTON WILSON | 2 ND DEFENDANT |

Mr. Rudolph Smellie instructed by Daly Thwaites & Company for Claimants

Mr. Ravil Golding instructed by Mr. Douglas Thompson for first Defendant

Second Defendant absent and unrepresented

Heard: November 10 and December 17, 2009

Licence - whether occupier obtained permission
Possessory title - whether lack of intention of the
predecessor in title to dispossess the title owner
defeats the claimants' claim for Possessory title

Sinclair-Haynes J

Sandra Bailey and her husband Basil Bailey (claimants) purchased lot 14, Town House No. 5, part of a parcel of land known as Kingswood in the parish of St Andrew from Monarch Investments Co. Ltd. (Monarch). The Town House was part of a complex. Mr. Winston Lewis was the owner and developer of the complex. The Baileys were placed in possession on September 1, 2005. A gazebo was on the property. Mr. James

Smith is the Managing Director of Monarch. Monarch had purchased the townhouse in 1993 from Mr. Doyen at which time the gazebo was on the said property. This gazebo/porch had been constructed by a previous owner.

In August 2005 a Surveyor's Identification (ID) Report was done for the purpose of the sale of the property to the Baileys by Monarch. It revealed that the gazebo was encroaching (built) on the common area of the complex, the property of the first defendant, Mr. Lewis.

In 2008, the Baileys deposited building materials in the vicinity of the porch with intention to renovate the gazebo. Mr. Lewis objected to any modification of the gazebo. Consequently, the Baileys instituted proceedings against Mr. Lewis in which they claimed Possessory right to the area of land on which the gazebo stands on the ground that they and their predecessors in title have been in open, undisputed and exclusive possession of the land on which the gazebo stands in excess of 12 years. The Baileys also applied to the court for an injunction to restrain Mr. Lewis from demolishing the construction on the encroached land.

Upon the notice of the said application coming on for hearing before the court, Anderson J. ordered that the issue of whether present or previous owners were notified by the defendant as to the status of the land encroached on and whether a licence was in place was to be tried as a preliminary issue.

The Claimants' case

It is Mrs. Bailey's evidence that a Surveyors ID Report was done as required by the mortgage company which they had approached to assist in financing the purchase of the property. They sent the report to their lawyers. In August 2005 they were informed

by their attorney of the encroachment problem which needed to be resolved. Her attorneys entered into discussions with the vendors and the mortgagee's attorneys. At no point did they discuss the encroachment with Mr. Lewis or were they ever notified by him that the gazebo was allowed to remain with his permission. They have been in quiet, open and undisturbed possession of the said area from September 1, 2005. It was only in June 2008 when they sought to modernize the gazebo that Mr. Lewis objected.

It is the claimants' case that at the time they first observed the gazebo, it was a partly wooden and partly concrete structure attached to the back of the house. The concrete section consisted of an area which was six feet wide by nine feet and eight inches high (6' x 9' x 8") which functioned as an outdoor bathroom. The wooden part was built on a concrete foundation. It is their contention that the area is partly concrete and is therefore not moveable.

In July 2005 before they took possession of the property, they were permitted by the owner to renovate the premises. Renovations were carried out to both the house and the gazebo.

Mr. James Smith's evidence

Mr. Smith testified on behalf of the claimants. It is his evidence that in 1993 the gazebo was an extension of the town house which he purchased. It was constructed partly of wood and partly of concrete. He assumed that it occupied a part of the land he was purchasing. According to him, he never interacted with Mr. Lewis except on one occasion when he sold him carpet. He was never advised by him that the gazebo was not on the land he purchased, nor did he inform him that it would remain by his licence. It was his attorneys who informed him of the encroachment. The lawyers representing the

parties to the sale explored possibilities of resolving the matter. They might have approached Mr. Lewis regarding a resolution. Mr. Lewis did not approach him about the encroachment. He never asked Mr. Lewis to transfer the property nor did he permit the gazebo to remain at his licence.

Under cross-examination by Mr. Ravil Golding it is his evidence that when he purchased the land, he felt that the gazebo was a part of the land he purchased. He never knew it was Mr. Lewis' land.

It is also his evidence that his lawyer approached Mr. Lewis concerning a resolution because he subsequently became aware that the area did not belong to him and his company. He states categorically that he was not claiming the land by capture as he had no intention to capture anybody's land. He frowns upon squatting. He agrees that when he entered into the sale agreement with the Baileys he had not been in possession for 12 years.

The Defendant's version

Mr. Lewis refutes the claimants' claim. He contends that a previous owner constructed a wooded porch which encroached on land which constituted the earmarked common area and which was registered in his name. He informed the owner of the encroachment and demanded its removal. A meeting was convened with the previous owner and the designer of the porch. They requested his permission for the porch to remain because the previous owner's father was ill and required its use. It was pointed out that as it was not a permanent structure and could be removed at any time. It was agreed that they would remove it if and when he demanded its removal. It was in those circumstances that he allowed the wooden porch to remain at his licence.

He informed all subsequent owners that the wooden porch did not constitute a part of the premises they acquired and that it was allowed to remain on the understanding that it would be removed whenever he demanded.

On August 16, 2008, he noticed that the occupants of lot number 14 had deposited building materials in the vicinity of the premises. He made enquiries about the purpose of the building materials. He forthwith informed the Baileys that they could not build any structure on the land because it did not belong to them. They acknowledged that the land was not a part of the land which was transferred to them. However, they told him that they were informed by their attorney that he had agreed to transfer the land to them. He ordered them to desist from doing any construction and to remove the entire encroachment including the porch.

The accounts are wholly different. Credibility is a serious issue.

Mr. Golding submits that Mr. Smith's testimony that he had no desire to dispossess Mr. Lewis has rendered unnecessary the need to visit the credibility issue. He submits that the salient issue now is whether the admitted absence of intention on his part to dispossess Mr. Lewis of the area affects the Baileys' claim for possession.

I will however, at this juncture, consider the preliminary issue: whether Mr. Lewis communicated to the owners that the porch encroached on the common area and whether the porch remained at the licence of Mr. Lewis.

Assessment of the Evidence

Was the gazebo an entirely wooden structure as testified by Mr. Lewis or was it partly concrete?

Mrs. Sandra Bailey in her witness statement stated that when she first saw the property, the gazebo was attached to the house. It consisted of a concrete section which was six feet wide by nine feet long and eight feet high which functioned as an outdoor bathroom. There was also a wooden part which was built on a concrete foundation.

Under cross-examination it is her evidence that at the time of purchase, the gazebo was wooden with a concrete bathroom, concrete floor, wooden frame and concrete foundation. The roof was made of the same material as the house. She testifies that the wash room for the house was on the gazebo. The steps were made of wood and the wash room on the gazebo consisted of a sink and fittings for a washing machine. She further described the gazebo at the time of purchase as having lattice work to the wooden area, no door and some rotting steps.

It is her evidence that before she took possession she was given permission to refurbish the gazebo and the house. They did major concrete work inside the house. The back door of the concrete wash room was split in two and they replaced it. Below the gazebo by the concrete foundation was open. They enclosed the cellar of the gazebo with ply wood, replaced the steps and rail, installed awnings around the gazebo and painted.

In his witness statement Mr. Smith stated that the gazebo was an extension of the house. It was constructed partly of wood and partly of concrete. Under cross-examination he described it as constructed of board on a concrete base with a little wash area in the gazebo. He makes no mention of a concrete bathroom.

On a balance of probabilities I do not believe that a bathroom, concrete or otherwise was in the area of the gazebo in 2005. I find that it was added in 2008. I also

reject the evidence of both Mr. Smith and Mrs. Bailey that a wash room was in the gazebo. I accept Mr. Lewis' evidence that in 2005 the gazebo was entirely wooden.

In her witness statement she stated that they would most likely not have purchased the premises if they had been told that the structure was subject to removal. However, it is her evidence under cross-examination that before she signed the agreement she became aware that the gazebo did not constitute a part of the land she was buying. Her attorneys entered into discussions with the vendor's attorney regarding the gazebo. Those discussions failed to fructify because the gazebo was not transferred to her. At that juncture Mr. Smith could not claim Possessory title because he had not occupied the area for the required period of twelve years. In the circumstances there was therefore no guarantee that the structure which she claims was concrete would have been allowed to remain. She nevertheless purchased the property being fully aware of those factors.

It is her evidence that upon discovering the encroachment she could have rescinded but she chose to continue with the sale knowing that the area was not a part of the land she was buying. Her evidence that she would most likely not have bought property is therefore not credible especially in light of her admission that she chose not to exercise the option to rescind. I find that her evidence that she would not have bought the property is tailored to lend credence to her evidence that in 2005 the gazebo was partly concrete.

Were they allowed to renovate before they were put in possession?

In her witness statement Mrs. Bailey stated that in July/August 2005 while the agreement was being completed they were put in possession and they refurbished the gazebo. Under cross-examination she testified that in June before they took possession

they began renovations. The house was vacant and the vendor gave her permission to do modifications to the house and gazebo while the mortgage was being processed. In fact she did major concrete work inside the house. If Mr. Smith permitted such extensive renovations, it could reasonably be deduced that his intention was to dispossess the paper owner after the discovery was made.

It was also Mrs. Bailey's evidence that she never interacted with Mr. Smith; it was the real estate agent who dealt with him.

Mr. James Smith testified under cross-examination that he gave them possession in September 2005. He then stated that the Company would not have given them possession before they signed the agreement. He did not know them before. The company would have charged them rent. He did not remember if they paid rent.

The agreement of sale stated that the completion of the agreement was subject to the purchaser obtaining a mortgage from Life of Jamaica. The vendor was at liberty to terminate the agreement if they did not receive a copy of the commitment letter or if alternative arrangements which were acceptable to the vendors were not made within the specified time. The claimants did not obtain a mortgage in June 2005. The agreement for sale was not yet signed. It was signed on the 20th July 2005 when the deposit was paid.

Mrs Bailey's evidence is that she was put in possession in September 2005 and that she began paying rent in September. The fact that rent was paid upon being placed into possession; together with Mr. Smith's evidence that he did not know them and if he had allowed the claimants to renovate they would have had to pay rent; clearly demonstrates that he had a strict business relationship with them.

On a balance of probabilities I do not believe that the Baileys were permitted to renovate the premises in June 2005 before the agreement was signed and before they obtained a mortgage, they being total strangers to Mr. Smith. This testimony is simply designed to bolster the Baileys' case.

Whether Mr. Smith attempted to purchase the property

Mr. Smith testified that when his company purchased the premises, a Surveyor's ID Report was not done. Mr. Lewis never told him that the gazebo was encroaching on his land. His only interaction with Mr. Smith was to sell him carpet on one occasion. He visited his house and they discussed that sale. He became aware of the encroachment through his attorney after the survey was done. His attorney and the claimants' attorney explored a resolution of the matter.

Initially it was his evidence that he could not remember whether the lawyers approached Mr. Lewis with a view to a resolution. Upon being pressed by Mr. Ravil Golding, he admitted that there was a problem which they were trying to resolve and they would have obtained his permission to enter discussions with Mr. Lewis. He eventually admitted that he permitted those discussions because he became aware that the area did not belong to his company.

Mr. Lewis' version

Mr. Lewis' evidence is that during the negotiations with Monarch to purchase the property he informed Mr. Smith about the encroachment. The transfer of the land was discussed in light of the breach. Mr. Smith informed him it was a cash purchase so he would not have to go through the regular channel.

After the acquisition of the property, Mr. Smith requested him to transfer the portion of land occupied by the gazebo to him. He refused and informed him that the gazebo/porch could remain as long as he understood that it did not constitute apart of lot 14. Mr. Smith accepted and asked him not to remove the porch.

He subsequently tried to convince him to transfer the said area to him. In his attempt to convince him, he had several conversations with him including telephone conversations. He refused and informed him that it was the common area. On one occasion Mr. Smith telephoned him and requested a meeting. Instead of attending himself, he sent his an attorney and a friend.

In 2005 Mr. Smith informed him that he was negotiating a sale of the premises and that the prospective purchasers desired to acquire the area which was occupied by the gazebo. He told him that he was not selling. Soon after Mr. Mark Golding, attorney-at-law, contacted him and requested on behalf of Mr. Smith that he transfer the said piece of land to the purchasers. He refused and informed him that the land on which it stood was the common area and the gazebo/porch was only allowed to remain on the understanding that the structure was not permanent and the occupants understood that it could only remain with his permission.

Mr. Lewis was unable to recall who initiated some of the conversations and the dates. Mr. Smellie submitted that Mr. Lewis' memory is faulty because he has fabricated the evidence.

Those conversations would have occurred many years ago and Mr. Lewis is not a young man. Having had the opportunity to hear and observe his demeanour as he testified in spite of his faulty memory regarding the dates of the conversations and who

initiated them, I find that he is a truthful witness. On the other hand, Mr. Smith has not impressed me as a reliable witness. I find that he lacks candour.

I accept on a balance of probabilities Mr. Lewis' evidence that in 1993 when Monarch acquired the property, Mr. Smith informed him that it was a cash sale and therefore the absence of a Surveyor's Report would not interfere with the sale. I accept Mr. Lewis' evidence also that Mr. Smith repeatedly asked him to transfer the property to facilitate the sale to the Baileys who required a mortgage and for which a survey report was necessary. On a balance of probabilities I find that he asked Mr. Lewis to transfer the property to the Baileys.

Whether the owners were notified by Mr. Lewis that the gazebo would remain at his licence

It is also my finding that Mr. Lewis had the conversations he testified to with Mr. Smith, his attorney and the claimants' attorney. I find that he did inform Mr. Smith that the gazebo could remain with his permission. It is also my finding that Mr. Smith agreed.

Whether the claimants are entitled to a Possessory title

In spite of my ruling on the existence of a licence, I will consider the effect of Mr. Smith's evidence that it was not his desire to deprive Mr. Lewis of the area, on the Baileys' claim to an entitlement for a Possessory title. It is Mr. Ravil Golding's submission that Mr. Smith' lack of intention defeats the claimants' claim.

The Law

Lord Browne-Wilkinson in **Pye (Oxford) Ltd v Graham** (2003) 1AC 149 defined possessions at Para 40 as follows:

“...there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control (‘factual possession’); (2) an intention to exercise such custody and control on one’s behalf and for one’s own benefit (‘intention to possess’). What is crucial is to understand that, without the requisite intention, in law there can be no possession ... But in any event there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary....”

He continues:

“There are cases in which judges have apparently treated it as being necessary that the squatter should have an intention to own the land in order to be in possession ... In **Moran** case (1988) 86LGR 472, 479 the trial judge (Hoffman) pointed out that what is required is:

‘Not an intention to own or even an intention to acquire ownership but an intention to possess. The Court of Appeal in that case (1990) Ch 623, 643 adopted his proposition which in my judgment is manifestly correct. Once it is accepted that in the Limitation Acts, the word “possession” has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the relevant question is whether the person in factual possession also has an intention to possess ... Slade J reformulated the requirement (to my mind correctly) as requiring “an intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.’”

Undoubtedly, the claimants have demonstrated the requisite *animus possidendi* in relation to the area on which the gazebo stands. They have renovated the area by transforming it into a concrete structure. They have also constructed a bathroom and are

now using the area in a manner which excludes the world at large. They, however, have only been in possession since September 2005. To acquire a good possessory title pursuant to Section 3 of the Limitation Act, the claimants must establish that they and/or their predecessors in title have been in uninterrupted adverse possession for a period of at least twelve years (See Section 3 of the Limitation Act).

The issue is whether the admitted absence of the *animus possedendi* by Mr. Smith, their predecessor in title, affects their acquisition of a possessory right to the property. It is significant that Mr. Smith discovered that the property was not his before the expiration of 12 years and has expressed that he had no desire to deprive Mr. Lewis of the land. Those factors, together with his efforts through his attorneys to acquire the property from Mr. Wilson, raise the crucial question whether at that juncture time stopped running against Mr. Lewis.

The pertinent question therefore is whether Mr. Smith, in light of his expressed lack of intention and his behaviour upon discovering the encroachment in August 2005 intended to exclude the world at large, including Mr. Lewis 'so far as is reasonably practicable and so far as the process of the law would allow'.

Walker LJ in **Myra Wills v Elma Roselina Willis** PC Appeal No. 500/2002 regarded as correct their lordship's opinion in **Pye** that:

'It is not the state of mind of the title owner but rather the mind of the person seeking to establish possessory title together with his actions which is decisive'

In **Kenneth McKinney v Higgs Leshel Maryas Investment Company Limited and Annamae Woodside** Privy Council Appeal No. 0012 of 2009 delivered on the 26th

November 2009, Lord Scott, on behalf of the Board confirmed the principle enunciated by Lord Browne-Wilkinson in **Pye**. At paragraph 57 he said:

*“The decision of the House of Lords in **Pye (Oxford) Ltd v Graham** [2003] 1 AC 419 established, or perhaps re-establish, that for possessory title purposes it is the intentions of the adverse possessor, not those of the documentary title holder, that are important.”*

At paragraph 56 he stated:

“The question is simply whether the defendant has disposed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper owner does not constitute dispossession or possession by the squatter for the purpose of the act.”

No credible evidence has been adduced that subsequent to the discovery, there was any act of exclusive possession of the area by Mr. Smith which could indicate an intention to possess. On the contrary, he has plainly stated that he had no intention to dispossess Mr. Lewis. He attempted to convince Mr. Lewis to transfer the property to the claimants. As already stated I do not believe the evidence of Mrs. Bailey that she was allowed by Monarch to renovate the gazebo before she took possession in September.

It is the courts view that had Mr Smith merely tried to convince Mr. Lewis to transfer the area to him without expressly stating his lack of intention to dispossess him, Mr. Lewis would have lost possession of the land since he would have failed to assert his ownership rights before the expiration of 12 years.

Had the knowledge of the encroachment come to Mr Smith’s attention after the 12 years had expired, even though he would have mistakenly felt that he owned the

property he would have gained possession of the area as he would have been in exclusive possession thereby dispossessing Mr. Lewis.

I find support in the following view expressed by the Right Hon. Mr. Michael de la Bastide P. and the Hon. Mr. Justice David Hayton in **Toolsie Persaud Ltd. V Andrew James Investments Ltd. Shivlochnie Singh (by order of court) and the Attorney General of Guyana** [2008] CCJ (AJ) at paras. 25 to 26:

“An intention to have exclusive control of the land, mistakenly believing oneself to be the true owner, suffices.”

*As Saville LJ (later Lord Saville of Newdigate) stated in **Hughes v Cork**:*

‘The learned Judge appears to have held that it is impossible for someone who believes himself to be the true owner to acquire title by adverse possession since such a person cannot, ex hypothesis, have an intention to exclude or oust the true owner. If this were the law then only those who knew they were trespassing, that is to say, doing something illegal could acquire such title, while those who did not realize that they were doing anything wrong would acquire no rights at all. I can see no reason why, as a matter of justice or common sense, the former not the latter should be able to acquire title in this way. What the law requires is factual possession i.e. an exclusive dealing with the land as an occupying owner might be expected to deal with it, together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else.’

“Why indeed, should a mala fide user of land to the exclusion of everyone else be better off than a bona fide user in the same circumstances? What is crucial is that it is obvious enough to the paper owner that if he does not take steps to stop this exclusionary user then he will lose his ownership after twelve years have expired...The possession of a mala fide user of the land is clearly ‘adverse’ possession, but where there is want of actual possession by the true owner, ordinary possession by another to the exclusion

*of the true owner, fits the modern notion of adverse possession, as made clear by Wooding CJ in **Richardson v Lawrence** and Crane JA in **Gobind v Cameron**.*"

Mr. Smith was notified of the encroachment before the limitation period expired. He stated that he did not intend to dispossess. In furtherance of not wanting to be a squatter, which he abhors; he commenced discussion with Mr. Lewis' attorneys. Time therefore stopped running against Mr. Lewis.

He has clearly by his admission to this court and his actions upon being made aware of the encroachment wiped out the years that would have run against the ownership of Mr. Lewis. The years that had accrued became irrelevant as at that material time since he had not yet dispossessed Mr. Lewis.

I find that Mr. Smith's statements and his actions of attempting to purchase the property and engaging his attorneys to resolve the matter are clear that he lacked the requisite intention. Accordingly, the Baileys cannot benefit from an occupation by Mr Smith which did not dispossess Mr Lewis.

Accordingly, the declaration sought by the claimants is refused. Order for possession of the disputed area to the Defendant.

The execution of the said judgment is to be stayed for eight weeks of the date hereof.

Costs to the first defendant are to be agreed or taxed.

Counsel's certificate is granted