IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO 2008 HCV 01773

BETWEEN	ZEPHANIAH BLAKE	1ST CLAIMANT
AND	INEZ BLAKE	2ND CLAIMANT
AND	ALMANDO HUNT	1ST DEFENDANT
AND	HAZEL CLAIR HUNT	2ND DEFENDANT
AND	THORNIA ELEANOR HUNT	3RD DEFENDANT
AND	CASHEL ROSELYN HUNT	4TH DEFENDANT

Mr Alexander Williams instructed by Usim, Williams & Company for the Claimants.

Ms Donna McIntosh Brice-Gayle and Ms Althea McBean instructed by Donna K. P. McIntosh Brice for the Defendant.

Land – Boundary Fence – Fence not placed along the registered boundary – Dispute as to the length of time that fence in place – Whether acquiescence as to location - Whether sufficient time had elapsed for fence to be declared the boundary – Whether possessory title secured as a result of incorrect placement – Limitation of Actions Act ss. 3 and 45

BROOKS J

6 and 18 JULY 2011

Mr Zephaniah Blake and his wife Inez have accused their immediate neighbours, Mr Almando Hunt and his family, of trespassing on their land. The trespass is by way of an encroachment caused by the incorrect placement of a boundary fence. The Blakes want the offending fence removed from their property and seek an order from this court, directing the Hunts to remove it. They also seek damages for trespass.

Mr Hunt, his wife Hazel, and their two daughters are all registered on the certificate of title as the proprietors of their property. They assert that they have

lived at that location before the Blakes came there to live. They say that the fence was in the location, complained of, before the Blakes arrived. The Hunts, by virtue of the expert evidence of surveyors, are obliged to admit that the fence is located on land which is comprised in the Blakes' registered title. They say however, that they have acquired, by way of a possessory title, the land which they have enclosed. Accordingly, they deny that the Blakes are entitled to the orders which they seek. The Hunts also claim a declaration that they are entitled to a beneficial interest in the disputed land.

The issues to be decided are both as to fact and as to law. In terms of the facts, the Court has to determine:

(a) when was the boundary fence first placed between these properties;

(b) whether that fence was replaced by another in the exact position or in another location, and

(c) what, if any, discussions took place between the parties concerning the fence.

The issues of law are:

(a) was there acquiescence to the fence being in the incorrect place, and

(b) whether the Hunts have acquired a possessory title to the property.

The Claimants' case

The evidence from the various witnesses raised a number of issues of fact. This was due in part to lapse of memory and regrettably, I find, dishonesty, on the part of some of them.

On the part of the claimants, the evidence was that Mr and Mrs. Blake had lived in England for some time. In or about 1989 they started the process of

purchasing the property lot 10 Clanhope Drive, Golden Spring, in the parish of St. Andrew. It was then a plot of land only.

They had intended to purchase the property with the assistance of mortgage-loan financing. Due, however, to an unspecified difficulty with the survey report, the Hunts were obliged to forego mortgage financing. Completion of the purchase was delayed to 1991.

According to Mr Blake he visited the island in 1991 and noticed that the relevant boundary fence, which he had seen in 1989, had been removed and that a different fence had been placed on the land. This new fence, he noticed, had enclosed trees, including an apple, two mango and two sour-sop trees, which he had previously seen on his lot.

On his evidence, he spoke to Mr Hunt and demanded that the fence be removed but Mr Hunt refused to remove it. He did nothing else about the matter and there was no development in respect of the fence until 2004. This was when Mr Blake saw Mr Hunt constructing a concrete wall as a new boundary fence. That new boundary fence, according to Mr Clinton Hannah, the man who did the construction of the wall, was six inches towards lot 11 Clanhope Drive, physically according more land to lot 10 than it had before.

It was not until 2007, however, that Mr Blake acted. He secured a surveyor's identification report, prepared by Mr Edward Chambers, commissioned land surveyor. The report identified that the fence, which traversed the entire length of the two lots, had enclosed, as part of the Hunts' lot, a triangular shaped strip which was comprised in the Blakes' certificate of title.

The strip was 10 feet wide at its widest point, at the rear of the premises and had its apex at the front of the premises.

Matters came to a head when Mr Blake attempted to knock down the new wall. At the behest of the Hunts, the police intervened, the demolition ceased and thereafter litigation ensued.

The Defendants' Case

Mr and Mrs. Hunt gave different accounts on a very significant aspect of the case. Whereas Mr Hunt, in my view, untruthfully stated that he was not aware of any difficulty with the fence until 2010, Mrs Hunt said she was aware, from as far back as 1967, that the fence had been incorrectly placed. Mrs Hunt was the more credible of the two.

On her account, they purchased lot 11 in 1967 but that after they had moved to live there, they had security problems. She says that, in addressing those security problems, they replaced an old wire boundary fence, which was between lots 10 and 11, with a new chain-link fence. At the time of the replacement, she says, it was agreed with the then owner of lot 10, Mr Brown, that although the chain-link fence was in the wrong location it should remain where it was. The rationale at the time was that placing it in the correct location would have required removing the water meter to lot 11, from its then location and such a removal would have been difficult.

Mrs Hunt says that when the Blakes took possession of lot 10, no permission was sought from them for the fence to remain where it was. She insisted that the chain-link fence was replaced in 2004 pursuant to a discussion between Mrs Blake and Mr Hunt. According to Mrs Hunt, Mrs Blake had agreed

to pay a half of the cost of replacing the chain-link fence but said that she did not then have the money to finance her half of the cost but would pay it later. They agreed, according to Mrs Hunt, to replace the chain-link fence with a concrete-block wall. Mrs. Hunt says that in 2007, Mr Hunt asked Mrs. Blake for her contribution to the cost and Mrs. Blake refused to pay; saying that the wall had taken in some of her (Mrs. Blake's) land. Thereafter, Mr Blake, it is said, threatened to knock down the wall.

Findings of fact

Despite the differences in the various accounts I find that there are a few particular aspects which I can rely on in arriving at the findings of fact. They are:

a. Mr Hunt was registered as the proprietor of lot 11 in 1969;
b. The Blakes were registered as the proprietors of lot 10 in 1991;
c. There was a survey report done in or about 1989;
d. Mrs Blake confirms that there was a discussion with the Hunts in 2004 concerning the construction of a replacement fence, although her explanation of the basis for the agreement is different from that of the Hunts.

I find that there was an agreement in or about 1969 between the Hunts and the person whom they had thought to be the owner of lot 10 at that time. That agreement, I find, concerned the location of the chain-link fence between the two lots. The fact that there is no person named Brown registered as the proprietor for lot 10, does not detract from my finding that the location of the boundary at that time was acquiesced in at the time. I am of that view because I find that whatever the location of the chain-link fence was in 1991, whether in the

same spot as 1989 or in a new place, that chain-link fence remained in that place until 2004. On my calculation, the chain-link fence was in that location for a period in excess of twelve years. During that time the Hunts did nothing to have it removed. This is despite the fact that they were of the opinion that its location was not consistent with the place where the registered boundary should be.

Whether or not the chain-link fence was removed, or built between 1989 and 1991, I find that Mr Hunt did have a discussion with Mr Blake in 1991 concerning the fence being in the incorrect place. I accept that each man had then had information from a surveyor which would have guided them in that discussion. I accept that Mr Hunt refused, in 1991 to remove the fence.

As far as the construction of the wall in 2004 is concerned, I am prepared to accept the evidence of Mr Hannah that he constructed the wall, on what he then regarded, as Mr Hunt's property. Despite the evidence to the contrary I accept his evidence that he constructed it six inches from the site of the chain-link fence which, up to then, had divided the lots. I have accepted Mr Hannah's evidence because he was the only witness to have testified, who did not have an obvious interest to serve. He had done work for each of those parties and no suggestion was made to him as to why he would not be speaking the truth concerning this bit of construction work.

The relevant law

A very important decision in this area of the law, emanating from this jurisdiction, is that of the Privy Council in the case of *Chisolm v Hall* (1956 – 1960) 7 JLR 164; (1959) 1 WIR 413. The headnote accurately outlines the facts

and the respective contentions of each of the contending parties who owned adjoining lots of land:

> "The dispute concerned the proper position of the boundary between the two lots. At the time of action brought there was and had for many years been in existence a physical boundary dividing the lots. The appellant's contention was that the physical boundary existing upon the land was rightly placed and was the true dividing line. The respondent's contention was that the physical boundary encroached a matter of seven feet on his lot along his entire northern boundary. The respondent's action was for a declaration that the disputed strip of land was comprised in his Certificate of Title, possession and mesne profits, and the appellant counterclaimed for a declaration that the boundaries as now existing were the true boundaries and for rectification of the Register."

The Privy Council ruled that although the disputed strip formed part of the land comprised in the respondent's certificate of title, the respondent's title to the strip had been ousted in favour of the appellant by virtue of section 3 of the Limitation of Actions Act (the Act). Unlike in the instant case, the question of the time that the fence was put in place was not an issue for their Lordships.

Section 3 of the Act addresses the ouster of the right of the owner of the paper title to claim recovery of land from the person who is in physical possession of that land. The applicable period for the operation of that section is twelve years. Their Lordships did, however, also consider the effect of sections 31 (now section 30) and 46 (now section 45) of the Act. The relevant sections are set out below:

> "3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

> "30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

It is to be noted that section 3 is one of the sections in the part of the Act to which section 30 refers. The two combine, not only bar the owner of the paper title from bringing an action but to oust the title vested in that person. Section 45 is in a separate part of the Act and addresses boundaries. The relevant part of section 45 states:

> 45. In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such lands, or the persons under whom such proprietors claim, **for the space of seven years together**, such reputed boundary shall **for ever be deemed and adjudged to be the true boundary between such proprietors**; and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding :…" (Emphasis supplied)

Chisolm v Hall recognized, which recognition has since been specifically incorporated in the Registration of Titles Act (the ROTA), that it was possible to acquire a possessory title in respect of registered land. The case is also important because their Lordships considered the impact that both sections 3 and 46 had in respect of incorrectly located boundary fences. They did so at pages 168-169:

> "…their Lordships accordingly propose to deal with the question of limitation on the footing that section 3 is available to the defendant as well as section 46.
>
> **It is common ground that if this was a case of common law, as distinct from registered titles, the defendant would be entitled to succeed under either section.**

> As regards section 3 the defendant can show over twelve years continuous possession of the disputed strip from the date of his purchase …down to the date of commencement of the present proceedings…
>
> As regards section 46, the defendant can show more than seven years of acquiescence in the position of the physical boundary from the date of his purchase…down to the commencement of the plaintiff's [claim]…" (Emphasis supplied)

Their Lordships concluded that the fact that the adjoining lands were each comprised in registered titles, did not affect the operation of the respective sections of the Act. My understanding of the decision, therefore, is that if the respective neighbours acquiesced in the location of the physical boundary, for a period in excess of seven years or more, that physical boundary, be it a fence or otherwise, is deemed the boundary for all purposes. The land "irregularly" enclosed by that physical boundary, cannot be recovered by the holder of the paper title thereof, although he is still both the legal and beneficial owner of the fee simple. Where the fence remains in place until the period of twelve years has elapsed, the holder of the paper title thereafter loses his beneficial interest in that enclosed land, although it remains comprised in his certificate of title. The person in physical possession of the land may, thereafter, acquire a registered title to the affected land by way of rectification of the register.

Section 45 of the Act

In order to succeed in proving that section 45 of the Act is applicable to their particular situation, the person in physical possession of land has to demonstrate that the boundary, whether or not it be represented by a fence, was acquiesced in by the several owners. The term "acquiescence" is defined in *The Dictionary of English Law* by Jowett, 2nd Ed., thus:

> "**Acquiescence**, assent to an infringement of rights, either express or implied from conduct, by which the right to equitable relief is normally lost. It takes place when a person, with full knowledge of his own rights and of any acts which infringe on them, has, either at the time of infringement or after infringement, by his conduct led the persons responsible for the infringement to believe that he has waived or abandoned his rights."

The term seems to require knowledge as a necessary element. It, however, does not seem to require consent. In *Weldon v Dicks* (1878) 10 Ch D 247 at page 262, Malins V-C said:

> "There can only be acquiescence where there is knowledge. This Court never binds parties by acquiescence where there is no knowledge."

That was one of the bases on which Wright J, as he then was, found that there was no acquiescence to a reputed boundary in *Lynch and another v Ennevor and another* (1978) 19 JLR 161. In that case, the owner of the paper title, being off the island for an extended period of time, and being unaware that a survey had been done in which his boundary was adjusted, was held not to have knowledge of the reputed boundary. Section 45 of the Act was therefore held not to be applicable to that boundary.

The term "acquiescence" was defined by Lord Cottenham LC in *Duke of Leeds v Earl of Amherst* (1846) 2 Ph. 117, said at page 124:

> If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain; this is the proper sense of the word "acquiescence".

While in *Bell v Alfred Franks & Bartlett Co Ltd* [1980] 1 All ER 356 at page 360, Shaw LJ said:

> "What is meant by acquiescence? It may involve no more than a merely passive attitude, doing nothing at all. It requires as an essential factor that there was knowledge of what was acquiesced in."

It would seem, therefore, that a mere initial objection to a breach may be deemed supplanted by acquiescence, if there is no effort to seek redress against the violation of one's right within the period of limitation.

Possessory titles

The law in respect of possessory titles has also been addressed at the highest level of our judicial hierarchy. This was done in the case of *Wills v Wills* (2004) 64 WIR 176; (2003) PCA 50 of 2002 (delivered 1 December 2003). In *Wills,* their Lordships in the Privy Council, in an appeal from this jurisdiction, made it clear that it is the intention of the person taking possession of land which must be examined to determine the question of whether a possessory title had been secured. Their Lordships, in doing so, approved of the decision of the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. The Privy Council also specifically stated that situations, such as that considered in the Jamaican case of *Archer v Georgiana Holdings Ltd* (1974) 21 WIR 431, (the facts of which bear some similarity to those in the instant case), should be considered in the light of the decision in *Pye.* Their Lordships said at paragraph 22:

> "…Their Lordships see no reason why the decision of the Court of Appeal of Jamaica in *Archer* ought not to be qualified, in future, by the clear guidance which the House of Lords has given in *Pye*."

In *Pye,* the House of Lords made it clear that there will be dispossession of the holder of the paper title in any case where the person taking possession does so with the intent to possess. There is, in their Lordships ruling, no need for

an ouster of the holder of the paper title, in order to constitute dispossession. Lord Browne-Wilkinson, with whom the other members of the House agreed, set out the elements required for possession thus:

> "…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 own behalf and for one's own benefit ("intention to possess")." (Paragraph 40)

His Lordship also accepted as correct, a statement that possession required 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" (paragraph 42).

It should also be stated that the possessor must also show that his possession was without violence, without secrecy and without permission.

It is, therefore, based on that understanding of the law, that I assess the facts in the instant case.

Analysis

Like their Lordships in *Chisolm v Hall*, I am of the view that on consideration of either section 3 or section 45 of the Act, the Hunts have established that the Blakes no longer are entitled to have possession of the land which is in dispute between them.

Insofar as the physical location of the boundary fence is concerned, I find that the Blakes acquiesced in the chain-link fence being located on their property. The chain-link fence being there for in excess of seven years meant that it

became the boundary for the purposes of section 45 of the Act. It became the reputed boundary.

In my view, the construction of the wall at a different location did not negate the location of the reputed boundary. In other words, it did not result in the registered boundary becoming, once again, the boundary for the purposes of the Act. It did, however, restart the clock, in terms of the wall becoming the new reputed boundary, for the purposes of section 45 of the Act.

Learned counsel for the Blakes, Mr Anthony Williams, submitted that the Hunts did not prove that they had had the requisite intention to possess the land and to exclude the Blakes therefrom. I however, do not agree. In my view, few things, if any, more emphatically demonstrate an intention to possess land and to dispossess others of that land, than the erection of a fence around that land. Their Lordships in *Wills* however, made it clear that fencing, "although significant, is not invariably either necessary or sufficient as evidence of possession". The intention associated with the act of fencing must be considered.

I find that when Mr Hunt erected the fence between his lot and lot 10, he intended to possess the lot (he was then the sole registered proprietor) for his own benefit, and to exclude the world at large. His refusal, when requested by Mr Blake to remove the encroaching fence, showed his intention to also deprive the Blakes of the land enclosed by the fence.

The Hunts were therefore in physical possession of the subject land and possessed the requisite intention to possess it. Because that possession lasted for a period in excess of twelve years, the Blakes have been deprived of the

beneficial interest in that land by the combined operation of sections 3 and 30 of the Act. The Blakes' claim must therefore fail.

Conclusion

The Blakes, by their inactivity for a period of over twelve years, despite being of the view that the Hunts had wrongly enclosed their property by placing a boundary fence in an incorrect position, failed to take any step to correct the situation. Their initial objection, upon discovering the encroachment in 1991, became, by 2004, acquiescence to the location of the boundary fence as being the boundary for the purposes of section 45 of the Act. That boundary remains the boundary despite the fact that a new boundary wall was constructed in another location. Because of the litigation, time has stopped running in respect of the location of the boundary wall for the purposes of section 45.

Not only has the boundary created by the operation of section 45 of the Act, deprived them of the benefit of the disputed land but the Blakes, have also been replaced as the beneficial owners of the disputed land. This has resulted from the fact that the Hunts have had physical possession of that land for in excess of twelve years before this claim was brought. The physical possession by the Hunts was accompanied by an intention to possess that land; that is, they intended to occupy the land as their own. They have acquired a possessory title to the land and are entitled to have the Register Book of Titles rectified to recognize their ownership.

It is therefore declared that:

1. the Defendants are the beneficial owners of all that parcel of land, hereinafter called "the property", comprising 123.312 square metres being the parcel of land identified as section 10A

on the survey plan prepared by Llewelyn Allen and Associates, commissioned land surveyors from a survey conducted on 27 March 2010 and being a part of the land comprised in Certificate of Title registered at Volume 1015 Folio 678 of the Register Book of Titles;

2. the Claimants hold their interest in the property on trust for the Defendants.

It is also ordered that:

1. judgment for the Defendants on the claim and the counter-claim;

2. the Claimants are hereby restrained, by themselves or by their servants and/or agents or in any manner howsoever, from removing, relocating, destroying or interfering in any manner with the boundary fence located between lots 10 and 11 Clanhope Drive, Golden Spring, in the parish of Saint Andrew;

3. The Registrar of Titles, shall rectify the Certificates of Title registered at Volume 1015 Folio 678 and Volume 1020 Folio 166 in accordance with the declarations herein contained;

4. Liberty to apply;

5. Costs to the Defendants to be taxed if not agreed.