[2012] JMSC Civ. 126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 04861

BETWEEN	**SHARON BURGHARDT**	**1ST CLAIMANT**
A N D	**HAROLD BURGHARDT**	**2ND CLAIMANT**
A N D	**TRACY TAYLOR**	**DEFENDANT**

IN CHAMBERS

Mr. Wilwood Adams instructed by Robertson, Smith, Legister & Co. for Claimants.

Mr. Debayo Adedipe for Defendant.

Heard: 2nd April and 28th September, 2012

ADVERSE POSSESSION – TENANCY AT WILL – BARE LICENSEE – REVOCATION OF LICENCE – BENEFICIARY GIVING PERMISSION TO OCCUPY LAND – ACCRUAL OF RIGHT TO BRING ACTION FOR RECOVERY OF POSSESSION – FAILURE TO DEMONSTRATE LIMITATION PERIOD – LIMITATION OF ACTIONS ACT SS. 3, 4, 9, 30

BROWN, EVAN J

[1] By Fixed Date Claim Form filed on the 4th October, 2010, the claimants sought an order declaring their interest in the parcel of land registered at Volume 953 Folio 250 in the Register Book of Titles and an order for possession of the said land against the defendant.

CASE FOR THE CLAIMANTS

[2] In May, 1996 the claimants purchased the land, at Three Chains, Manchester, which is the subject of this claim from Miss Joyce Cathleen Faulknor. The land was transferred to the claimants on the 29th June, 2006. At the time of the negotiations, the

claimants were told that the defendant was occupying the land as a tenant at will. The vendor also told the claimants that the defendant was informed that the property will be sold and she would have to "yield it up upon completion of the transaction." However, when the transaction was completed the defendant refused to vacate the property, claiming a right to be there.

[3] In their affidavit, the claimants said the vendor disputed the defendant's alleged right to be there. It was pointed out to the defendant that the property had been left to 'her' by will. Further, that the will had been probated and the land transferred to her on transmission. That transmission was entered on the Certificate of Title on the 28th June, 2006. The probated last Will and Testament of Nathaniel Falconer was exhibited. Probate was granted on the 3rd September, 1981, although the testator died on the 25th June, 1962. That document showed that the land, a quarter of an acre, had been bequeathed to Louise Falconer (Joyce), Gladys Facey nee Falconer, Bernice Falconer, Artha Falconer and Vernice Falconer, to be divided equally. The vendor was the sole executrix named in the will.

[4] Upon the defendant's refusal to vacate the property, the claimants' attorney-at-law 'sent' a notice to quit to the defendant in March, 2007. That was followed by an action for recovery of possession in the Resident Magistrate's Court, Manchester. The Resident Magistrate made an order in favour of the claimants which was overturned on appeal and the case remitted to the magistrate for re-trial. The claimants were absent at the re-hearing and the case was adjourned without a date.

[5] The claimants called Charles Williams in support of their case. In his affidavit evidence, he said he was sixty-six years old and the grandson of the testator. Mr. Williams said he grew up on the property, having been raised by his grandmother, Ellen Faulknor. He left the property in 1976 at the age of thirty to work in Kingston. He declared himself to be seized of "full knowledge of the circumstances surrounding the claim by Tracy Taylor to the property forming the estate of Nathaniel Faulknor

(deceased).” According to Williams, the defendant’s predecessor in occupation Gene Facey, her mother, came to be on the property through his facilitation.

[6] In his affidavit, he said he interceded on Gene Facey’s behalf after she was displaced in her shopkeeping activities on another property. He consulted with Joyce Cathleen Faulknor, and “explained the situation to her and she gave permission for Gene Facey to erect a temporary structure … to continue her business.” He even gave his assistance in erecting that structure. It was communicated to Gene Facey that the property was to be sold and the proceeds divided among the beneficiaries. He asserted in his affidavit that Gene Facey remained there until 1997 when she left to go to Canada.

[7] It was the evidence of Mr. Williams that upon the departure of Gene Facey, the defendant took possession of the shop. The defendant was advised, on several occasions, not to erect any permanent structure on the property as it was to be sold for the benefit of the beneficiaries. This advice came from him and other family members. According to Mr. Williams, this advice fell on deaf ears as “the defendant ignored the advice and counseling of all the family members including her own mother, and in a clandestine manner extended the shop then laid claim to the property.”

[8] In cross-examination Mr. Williams admitted that it was not true that he assisted in building the shop on the land for Gene Facey. He didn’t know that the shop had been built by Bruce Williams, Everton Taylor and Jeffrey Malcolm. It was suggested to him that he knew that it was Tracy Taylor who operated the shop and her mother was with her sometimes, but his evidence remained unchanged on the point.

[9] However, he retreated on the question of Gene Facey’s departure date. He said Gene Facey was coming and going from Canada and he didn’t know when she went to live there. Further, he was on the property in the 1990s. The latter admission came after he had earlier denied suggestions that he lived in Kingston in the 90s, returning only for

family funerals. He sought to contradict that position by asserting that he stayed in Kingston but returned to the property once every two weeks.

CASE FOR THE DEFENDANT

[10] Tracy Taylor contends in her affidavit that she has been in possession of the portion of the land since 1992, when she constructed a shop on the property. She admits to the filing of the action in the Magistrate's Court and the result thereto. Miss Taylor adverts to a special defence filed in response to that action, which was exhibited to her affidavit. She asserts that since 1992 she has maintained "unbroken and undisturbed possession of the land on which [the] shop is situated, to the exclusion of all others."

[11] The relevant portion of the defence is quoted below:

> *The Defendant has been in continuous, undisturbed possession of a part of the land subject of this action, certainly to the exclusion of the Plaintiffs and the executor (sic) of Nathaniel Faulknor's will, Cathleen, for upwards of 15 years, conducting business by herself and through her son Jeffrey Malcolm in a shop that she built … thereon more than fifteen years ago.*
>
> *The defendant by her said adverse possession of the land barred the title of the Plaintiffs' predecessor in title and, consequently, the Plaintiffs by virtue of the provisions of the Limitation of Actions Act.*

[12] In cross-examination Miss Taylor was asked to clarify what she meant by 'to the exclusion of all others'? She answered, 'from the shop, from the piece of land on which the shop is.' That 'piece of land' was estimated to be thirty feet by fifteen feet. Miss Taylor testified that it was her grandmother, Gladys Facey who put her in possession. It was her contention that Gladys Facey gave her the land, an oral gift witnessed by her boyfriend, mother, siblings and strangers. The defendant swore that when Gladys Facey was getting older she said the defendant could take her portion of the land. That was for the purpose of putting up a shop to help Gladys Facey survive. That the defendant said she did until Gladys Facey died and she buried her.

[13] The defendant admitted under cross-examination to having a grandaunt called Joyce Cathleen Faulknor. Joyce Cathleen Faulknor had been both to the defendant's shop and the recipient of items from the shop. The defendant maintained that at no time did Joyce Cathleen Faulknor mention to her that the entire property was to be sold. She knew that the will had been probated when Gladys Facey directed her to the parcel of land, having a copy of the probate from Gladys Facey. She didn't know who probated the will but knew that Joyce Cathleen Faulknor was the executrix.

[14] Jeffrey Malcolm testified on behalf of the defendant. In his affidavit, he said the defendant has been his common law wife since the beginning of 1992. Malcolm said that he built the shop, along with Bruce Williams and Everton Taylor. Malcolm swore in his affidavit that the shop was built with the encouragement of Gladys Facey. Further, Charles Williams was not there when the shop was built; he didn't even know Mr. Williams at the time.

[15] Under cross-examination he said the shop was built in a day; from board with concrete flooring. Initially, it was a little shop in which the wares were displayed during the day but removed at nights. Eventually, that structure was 'upgraded'. The building material was unchanged but now there was no longer any need to remove the goods in the nights, and somebody could stay there at nights. The upgrade was done about three months after the initial structure had been erected, all in 1992. Lastly, he said Gene Facey was 'around' when the shop was being built.

[16] In cross-examination Malcolm was asked how he knew Gladys Facey encouraged the defendant to build the shop. His answer was a lengthy explanation. In essence, Gladys Facey urged him to build the shop for the then unemployed Tracy Taylor to keep Tracy out of bad company. Gladys Facey took them to the property and "pointed out a little spot" which she said was hers'. Thereafter the land was cleared and he bought the material to build the shop.

DEFENDANT'S SUBMISSION

[17] Mr. Adedipe submitted that the issue for determination was whether the defendant has by the possession she sets out in her case effectively barred the claim of the claimants pursuant to Limitation of Actions Act. What then is evidence of possession? Dispute as to length of possession. Her evidence, supported by Jeffery Malcolm, is that her possession dates back to 1992. Only evidence of Williams seeks to contradict that. He asserts a knowledge of when shop was built, based in part that he helped to build it. However, he resiled from this in cross-examination: he neither helped to nor knew who built it. Even so, at paragraph 16 of Williams' affidavit he had her taking possession in 1997. Claim filed in October 4, 2010. Therefore on any date possession dates back more than 12 years.

[18] Counsel cited sections 3 and 4 Limitation of Actions Act. Probate was taken 1981 that is, eleven years before possession. The right accrued from 1992. Twelve years from 1992 takes us to 2004. Taking it from 1997, twelve years would take us to 2009. Section 30 Limitation of Actions Act set out the consequences of adverse possession. The land was transferred to claimants in 2006. Taking 1992 as the operative year, there was nothing to transfer as the title already extinguished.

[19] Counsel then cited **JA Pyre & Others v Graham's & Anor** (HL) paragraphs #30 and 32 and submitted that there was no question of physical possession on the evidence. He asserted that there was no evidence that the defendant was in possession with the permission of the registered proprietor. The submission continued, the affidavit evidence of Charles Williams stands in stark contrast to his evidence under cross-examination and should be rejected. In any event, that evidence points to Gladys Facey, not the defendant who maintained her shop from the beginning. On the other hand, Malcolm was unchallenged as to his participation in the erection of the shop. The upgrade of the structure showed an intention to remain in possession, the submission went, counsel concluded.

CLAIMANT'S SUBMISSION

[20] Mr. Adams submitted that Tracy Taylor's evidence is that she took possession by permission which destroys any claim that she was there adversely. In this submission, the first issue was whether title in the property in dispute was properly passed to claimants? That is the major issue and not the issue of adverse possession. Counsel relied on section 71 Registration of Titles Act. Mr. Adams submitted that this is anchored in the concept of overreaching which is instituted to protect a purchaser of registered land.

[21] Mr. Adams continued, the defendant having been put in possession by her grandmother who could not have gifted the land to her because of the four (4) unities: possession, time, title and interest, had a bare licence. This bare licence could be revoked with impugnity. That licence was revoked by the testatrix when she gave notice that the land was to be sold. Mr. Adams further submitted that the executrix by going to the defendant's shop was expressing continuance of ownership. Additionally, counsel said the acts of the defendant were equivocal and do not amount to positive assertion of ownership of property.

ISSUES

[22] The first issue to be resolved is what was the defendant's status in relation to the land when she was put in occupation thereof by Gladys Facey? If the defendant was a tenant at will, unless the tenancy was sooner determined, it would be deemed to be at an end at its one year anniversary.[1] On the other hand, if the defendant was a bare licensee, the licence is revocable by the will or death of the licensor.[2] Secondly, having decided the defendant's status on the land, was the defendant in adverse possession of the land for the requisite limitation period, that is, was the defendant in uninterrupted and undisturbed possession of the land for a period of twelve (12) years after the expiry of the permission given to the defendant? If the defendant was in adverse possession of the land for the appropriate period, then the title of the claimants' predecessor in title

[1] Limitations of Actions Act, section 9

[2] Infra, note 23

would have been extinguished[3], and there would have been nothing to vest in to them at the time of the purported transfer.

TENANCY AT WILL OR BARE LICENCE

[23] Attention is now turned to the first issue, when Gladys Facey permitted the defendant to erect the shop, what was the defendant's status in relation to the land? The defendant does not assert a tenancy agreement of any kind, in consequence of which she entered the land. There is no contention that any rental or other consideration was required of her for her occupation of the land. From her evidence, she came to be there as a result of the generosity of Gladys Facey. Therefore, it appears the defendant was on the property initially, either as a tenant at will or a licensee.

[24] Was the defendant a tenant at will? A tenancy at will is one in which the tenant is in possession and determinable at the will of either party, namely, the landlord or tenant.[4] In common with its specie, this tenancy proceeds from the harmonious chords of a contract, binding on both parties.[5] Whenever a person is in possession by the consent of the owner a tenancy at will is implied. That implication is vitiated if the person is at the same time the owner's servant or agent, a licensee holding under an irrevocable licence or by virtue of any freehold estate or of any tenancy of a certain duration. Finally, this tenancy is implied in all cases where occupation is by permission and no rental is charged.[6]

[25] The following are situations in which a tenancy at will may be implied. First, a tenancy at will may be implied where a tenant holds over after the expiry of his lease, with the consent of the landlord.[7] Secondly, where a tenant goes into possession under

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[3] Limitation of Actions Act, section 30

[4] Halsbury's Laws of England 3rd edition, para. 1150.

[5] Ibid. See also Ramnarace v Lutchman [2001] 1WLR 1651,1656

[6] Ibid. para. 1151

[7] Cheshire and Burn's Modern Law of Real Property 17th edition, p. 212

either a contract for a lease or a void lease, a tenancy at will may be implied.[8] Thirdly, a tenancy at will may be implied where the tenant is given possession during negotiations, or a prospective purchaser goes into possession before completion.[9] Outside of these cases, the courts are today loathed to infer a tenancy at will.[10] According to Scarman L.J.:

> *It may be that the tenancy at will can now serve only one legal purpose, and that is to protect the interest of an occupier during a period of transition. If one looks to the classic cases in which tenancies at will continue to be inferred, [see examples above] one sees that in each there is a transitional period during which negotiations are being conducted touching the estate or interest in the land that has to be protected, and the tenancy at will is an apt legal mechanism to protect the occupier during such a period of transition: he is there and can keep out trespassers: he is there with the consent of the landlord and can keep out the landlord as long as that consent is maintained. It may be, therefore, that, not under any change in the law, but under the impact of changing social circumstances, the tenancy at will has suffered a certain change, at any rate in its purpose and function.*[11]

[26] While it may be said that in all these examples the tenant has exclusive possession, that factor alone does not make it a tenancy at will. Exclusive possession for an uncertain duration has long been held not to be conclusive evidence of a tenancy at will.[12] Since the Rent Restriction Acts of 1914-1915, the concept of a contractual licence which gives the licensee exclusive possession, has been embedded in English law.[13] As Lord Millett said, citing Lord Templeman in an earlier case:

> *There can be no tenancy unless the occupier enjoys exclusive possession; but the converse is not necessarily true. An occupier who enjoys exclusive possession is not necessarily a tenant. He may be the freehold owner, a trespasser, a mortgagee in possession, an object of charity or a service occupier. Exclusive possession may be referable to a*

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[8] Cheshire and Burn's Modern Law of Real Property 17th edition, p. 212

[9] Ramnarace v Lutchman [2001] 1WLR 1651

[10] Heslop v Burns [1974] 1 W.L.R. 1241

[11] Ibid at p. 1253

[12] Cobb v Lane [1952] 1 All E.R. 1199; Heslop v Burns [1974] 1 W.L.R. 1241,1251

[13] Heslop v Burns [1974] 1 W.L.R. 1241, 1252

legal relationship other than a tenancy or to the absence of any legal relationship at all.[14]

So, exclusive possession by itself does not a tenancy at will create. The legal question has changed since the **Lynes v Snaith** was decided.[15] In that case an admission of exclusive possession was treated as dispositive of the question of whether the occupant was a tenant at will or a mere licensee.[16]

[27] Whether an occupier is a tenant at will or a licensee is a legal question to be resolved by discovering the intention of the parties.[17] To ascertain the intention of the parties, consideration must be given to the circumstances in which the occupant took up occupation of the property. Further, the conduct of the parties has to be examined to see whether it was intended that the occupier should have an interest in the land or merely a personal privilege.[18] For a tenancy at will to be inferred, the circumstances must show that the parties intended to create legal relations.[19] Since "a tenancy is a legal relationship, it cannot be created by a transaction which is not intended to create legal relations."[20] It appears that occupation arising out of "family arrangement, an act of friendship or generosity" tends to rebut any inference that the parties intended to create legal relations.[21]

[28] Indeed, the grant of exclusive possession in a family arrangement has been held to confer no more than a licence on the occupant.[22] An occupant in these circumstances cannot acquire title by adverse possession.[23] In **Cobb v Lane**[24] the owner allowed her

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[14] Ramnarace v Lutchman [2001] 1WLR 1651,1656

[15] [1899] 1 Q.B. 486

[16] Ibid, at p. 488

[17] Heslop v Burns [1974] 1 WLR 1241,1252; Booker v. Palmer [1942] 2 All E.R. 674 at p. 676-677

[18] Cobb v Lane [1952] 1 All E.R.1199

[19] Ramnarace v Lutchman [2001] 1 WLR 1651,1656

[20] Ibid

[21] Ibid, at p. 1657

[22] Errington v. Errington and Woods [1952] 1 K.B. 290

[23] Cobb v. Lane [1952] 1 All E.R. 1199

brother to occupy her house without the payment of rent. It was held that there was no intention to create any legal relationship and therefore a tenancy at will could not be implied. In other words, the brother was a mere licensee. A licence gives no more than permission to enter land, that is, a bare or gratuitous licence. It has been said that it makes lawful what would otherwise be unlawful.[25] Unless there are special circumstances, a licence is revocable at the will of the licensor[26]and by the death of either party.[27]

[29] In the instant case, the defendant's contention is that she was put into occupation of the land by her grandmother, one of the five beneficiaries. According to Jeffrey Malcolm the building of the shop was in fulfillment of the grandmother's desire to keep the defendant out of disreputable company. It is clear that this was a family arrangement. It was undocumented and attended by all the informality characteristic of such familial compacts.

[30] When the defendant was allowed onto the land, she was not given exclusive possession of the entire quarter acre. In fact, her claim is limited to the area on which the shop stands, that is 30x15 feet or 450 square feet. That area represents 1/25th or 4% of the 10,890 square feet in a quarter acre. Insofar as it is accepted that the shop occupied the grandmother's 'spot' on the land, the defendant was given exclusive possession of that area. So, the defendant was given exclusive possession of the small fraction of the land for an indefinite period without payment of rent. However, exclusive possession for an uncertain duration is not conclusive of a tenancy.[28]

[31] Against this background, can it be said that the parties intended to create legal relations when the defendant commenced occupying the 450 square feet of the quarter

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[24] Cobb v. Lane [1952] 1 All E.R. 1199

[25] Maudsley and Burn's Land Law Cases and Materials 5th edition p.478

[26] Ibid

[27] Halsbury's Laws of England 3rd edition para. 1026

[28] Cobb v. Lane, supra; Heslop v. Burn, supra. See note 9

acre? As Lord Millett said, there must be something in the circumstances to negative an intention to create legal relations where an occupier is in exclusive possession.[29] Among the negating things named is family arrangement. And of such is the genesis of the present case. The defendant's grandmother was moved by matriarchal bonds and duty to put the defendant in occupation of the land and not to enter into any kind of tenancy agreement with her. The law does not impute an intention to enter into legal relationships against the grain of the circumstances and conduct of the parties.[30] In as much as there can be no tenancy without the intention to create legal relations[31] the defendant cannot have been a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations.[32]

[32] Since the defendant was not a tenant at will, she was a mere licensee, as counsel for the claimants submitted. That licence would have been revoked either from the death of Gladys Facey, the licensor, or, when the defendant was advised by the executrix that possession of the land was required, whichever was the sooner. The date of the death of Gladys Facey was not given in evidence but from the description of the events, it appears she died before the land was sold to the claimants. Gladys Facey became inconspicuous in the narration of events at the time the dispute arose. It seems therefore a reasonable and inescapable inference to draw that Gladys Facey was dead at the time of the dispute. Accepting that as a fact, the licence to the defendant would have been revoked before the land was transferred to the claimants and that would have consequences for the claim of adverse possession.

ADVERSE POSSESSION

[33] So, the defendant having been put into occupation of the land by Gladys Facey, the defendant was on the land initially by the let and licence of Gladys Facey. However, when that licence was revoked upon the death of Gladys Facey, the defendant's

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[29] Ramnarace v. Lutchman, supra p.1657

[30] Booker v. Palmer [1942] 2 All ER 676

[31] See note 2 above

[32] Ramnarace v Lutchman, supra p. 1656

continued occupation of the land was that of a squatter. As was said in **Pye**,[33] there will be a "dispossession" of the paper owner where a squatter is in possession. The question now becomes, whether the defendant squatter has dispossessed the paper owner by continuing in ordinary possession of the land for the requisite period without the consent of the owner?

[34] Central to the understanding of land law in this jurisdiction is an appreciation of the concept of estate, developed by the English common law. According to this doctrine, an owner holds an estate in the land. That is, the right to possession of the land for a period.[34] This fee simple owner had the right to possession and was therefore entitled to exercise over the land all proprietary rights, including the right of alienation.[35] The doctrine of estate is intertwined with the right to possession of the land.[36] Under the common law, there was no distinction between the acquisition of possession of the land and having title to the land.[37]

[35] Hence the well known expression, 'possession is nine-tenths of the law.' Therefore, the person in possession of the land acquires a beneficial interest in the land from the first day of his possession.[38] This was however, only a relative title meaning, anyone who could show a better right to possession could recover the land.[39] This relativity of title led to the situation where the security of claims to land rested on the uncertain foundation of having a good title until someone with a better title made a claim. The answer to this was found in the principle of limitation.[40]

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[33] J A Pye (Oxford) Ltd & Ors v. Graham & Anr [2002] UKHL 30

[34] Cheshire and Burn's Modern Law of Real Property 17th edition, at pp. 114-115.

[35] Ibid

[36] Ibid

[37] Ibid

[38] Ibid

[39] Ibid; Commonwealth Caribbean Land Law p.267

[40] Elements of Land Law 4th Edition 6.28 and 6.29.

[36] It has been said that there is a certain commonality of purpose behind all statutes of limitation. In the words of Lord St Leonards: All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well-regulated countries the quieting of possession is held as an important point of policy.[41] Put another way, the law has removed the possibility of prosecution of dated claims "against an intruder whose possession has been open, continuous, notorious and exclusive."[42]

[37] The limitation period for land claims in Jamaica is twelve (12) years.[43] For ease of reference the section is quoted in full:

> *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 not have 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.*

[38] The circumstances in which "the right to make an entry or bring an action to recover any land" "shall be deemed to have first accrued," are set out in the Act.[44] At the expiration of the limitation period, "the right and title" of the 'original' owner "shall be extinguished".[45] It is against this background that Sampson Owusu said "the diligent is therefore rewarded at the expense of the indolent."[46] Owusu went on to quote a famous saying, those "who go to sleep on their claims should not be assisted by the courts in recovering their property."[47]

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[41] Cheshire and Burn's Modern Law of Real Property 17th Edition pp. 115-116

[42] Commonwealth Caribbean Land Law p.267

[43] Limitation of Actions Act, s. 3

[44] Limitations of Actions Act, s.4

[45] Limitation of Action Act, s.30

[46] Commonwealth Caribbean Land Law, p.268

[47] ibid

[39] At the very heart of the limitation law is establishing when the person entitled to claim the land was either dispossessed or discontinued her possession of the land. That is because time starts to run "at the time of such dispossession or discontinuance of possession."[48] Before that question can be settled, it must be understood what the law means by possession. Since the draftsman does not offer any interpretation, the meaning has to be gleaned from the decided cases.

[40] Slade J distilled four basic principles relevant to the present case[49]:

(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi*").

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. ….. Everything must depend on the particular circumstances, but broadly, … what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.

[48] Limitation of Actions Act, s.4(a)

[49] Powell v. McFarlane and Anr 38 P&CR 452,470-472

(4) The *animus possidendi*,… was defined by Lindley M.R., in **Littledale v. Liverpool College**,[50] as "the intention of excluding the owner as well as other people." What is really meant, … is that the *animus possedendi* involves the intention, in 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 the is reasonably practicable and so far as the processes of the law will allow.

[41] The definition of possession was refined by Lord Browne-Wilkinson[51]. He said legal possession has two elements. The first element is factual possession, meaning, "a sufficient degree of physical custody and control." The second element is the intention to possess. That is, "an intention to exercise such custody and control on one's behalf and for one's own benefit."

[42] The defendant said she had been in possession of the disputed land from 1992. Charles Williams dated the defendant's possession from 1997 when her mother migrated to Canada. The court agrees with counsel for the defendant that Williams was discredited on the point. The court accepts 1992 as the date the defendant commenced her occupation of the land. However, the court does not accept that date for the purposes of the **Limitation of Actions Act.**

[43] In that year when the defendant entered upon the land, she did so with the permission of Gladys Facey, one of the five beneficiaries. Importantly, that permission did not emanate from the executrix. That led her counsel to submit that the defendant was not on the land with the permission of the registered proprietor. In 1992 the registered proprietor was deceased. Although probate had been granted from 1981, transmission to the executrix did not take place until 1996. So, the paper owner was dead and his personal representative did not move to have the land transferred to her.

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[50] [1900] 1 Ch. 19, 23, C.A.

[51] J A Pye (Oxford) Ltd & Ors v. Graham & Anr, supra

[44] However, while counsel is absolutely correct, the results would be bizarre if that was the end of the matter. The result would be that the licensee of a beneficiary could dispossess that very beneficiary cum licensor, if not the other beneficiaries as well, with a claim to adverse possession from the very outset of the licensee's occupation. Indeed, merely to say there is no evidence that the defendant had the permission of the paper owner would be to ignore entirely the circumstances under which she came to be on the land.

[45] The inevitable conclusion of the argument that the defendant was not on the land with the permission of the registered owner is that she was there as an intruder from the very beginning. And if an intruder, then she was in adverse possession from 1992. The defendant did not go onto the land as an intruder. On the contrary, the defendant went on the land in full recognition of the interests of the beneficiaries, and in particular the interests of Gladys Facey. In other words, at the time the defendant went into occupation of the land, she recognized and acknowledged, at the very least, that Gladys Facey had a right to possession of the disputed land, while making no such claim herself.

[46] In fact, the substratum of the defendant's claim rests on an acknowledgement of the interests of all the beneficiaries. That is, the defendant knew that the land had been willed to her grandmother, Gladys Facey, and Facey's siblings; and Gladys Facey supposedly pointed out her "portion". With that acknowledgement, the defendant's possession was neither inconsistent with, nor in denial of the title of the true owner. Possession cannot be adverse if it enjoyed with the consent of the owner, whether the owner is beneficial or legal.[52]

[47] Having gone into occupation of the land, was the defendant in possession of the land in law? It was accepted on both sides that the defendant was neither given, nor did the defendant attempt to claim, the entire quarter acre of land. The evidence of factual possession at trial remained as it was three months after the shop was first erected.

[52] Ramnarace v. Lutchman [2001] 1 WLR 1651,1654; Willis v. Willis [2003] UKPC 84

That is, it increased in size but suffered no change in character. In other words, the shop remained a semi-permanent structure from the time permission was given to erect it in 1992, until 2012.

[48] It is certainly not unreasonable to have expected an owner to have upgraded the semi-permanent structure to one of permanence over these many years. Since the defendant contended for only the area on which the shop stands, would an owner have enclosed it? In essence, there was no evidence to demonstrate that the defendant had been dealing with the land as an occupying owner might have been expected to. In this regard the act of occupation falls short of the requirement of **Powell v. McFarlane**[53] and affirmed in **JA Pye (Oxford) Ltd & Ors v. Graham & Anor**[54].

[49] Even if the conclusion that the defendant's occupation of the land lacked the element of factual possession is wrong, can it truly be said that the defendant had the intention to possess the land? Learned counsel for the defendant submitted that the upgrade of the structure demonstrated the defendant's intention to remain in possession. However, the upgrading of the structure was at best equivocal. In its original form, the shop appears to have been a wholly insecure structure, evidenced by the necessity of having to remove the goods at nights. That the upgraded structure provided security is demonstrated by the cessation of the nocturnal removal of goods and the confidence of nightly habitation. It appears then, that the upgrade was done to facilitate the nightly security of goods and persons.

[50] Such an act, stained with the scarlet dye of equivocality, could never be transformed into evidence of intention to possess. It must be "demonstrably clear" that the defendant was in legal possession, inclusive of the element of intention to possess.[55] It appears, and the court so finds, that the so-called upgrade was carried out in order to make the defendant more effectively enjoy the permission she had been

[53] 38 P& CR 452

[54] [2002] UKHL 30

[55] Thomas Broadie & Donald Broadie v. Derrick Allen

given to erect the shop. According to Jeffrey Malcolm, when the shop was first built, “it wasn’t a perfect shop.” So, the upgrade was to transform the imperfect to perfect.

[51] Outside of this act of transformation nothing else was done to the shop. There is no evidence that the defendant even attempted to enclose the land on which the shop stands. Neither is there any evidence that the defendant did anything preparatory to having the land sub-divided, if that were possible, since she limited her claim to the area the shop occupies. There certainly is no evidence that the defendant paid or attempted to pay the property taxes. In short, there is no evidence that the defendant had the intention, in her own name and on her own behalf, to exclude the world at large, including the owner with the paper title, so far as was reasonably practicable and as far as the processes of the law will allow.[56]

[52] Provided the defendant was in legal possession of the land, that possession would have to date from the time the defendant may be said to have been in adverse possession of the land. The defendant’s adverse possession of the land must have been uninterrupted and undisturbed for a period of twelve (12) years.[57] The evidence is that the claimants’ predecessor in title brought an action for recovery of possession of the Three Chains property in 2010. Therefore, the twelve (12) years of quiet possession must originate in point of time before 2010. The question then is when did the right to bring that action first accrue?

[53] The right to bring the action for recovery of possession is coterminous with the date the defendant became a squatter on the land. It has already been determined that the defendant became a squatter on the land when her bare licence was revoked by the death of the licensor, Gladys Facey. The evidence does not disclose the date of death of Gladys Facey. Not even an approximation was given. That is unsurprising, having regard to how the case for the defendant was presented. Be that as it may, the result is that the state of the evidence does not inure to a positive finding as to date of death of

[56] Powell v. McFarlane, supra

[57] Limitations of Actions Act, section 3

Gladys Facey. Since the court is not able to say when the licence was revoked, it follows that the court is unable to compute the period the defendant was in adverse possession of the land.

[54] The crucial turning point in any claim that title has been acquired by adverse possession is the ability of the person so claiming to demonstrate quiet possession for the limitation period. Learned counsel for the defendant placed much reliance of **Pye**[58]. In that case the Grahams were permitted by **Pye** to occupy the disputed land, first by licence and later by a grazing agreement. When the grazing agreement expired the Grahams continued to occupy the disputed land, undisturbed for the required period. There was an identifiable point in time when the Grahams ceased occupying the disputed land with the permission of **Pye**.

[55] In the instant case, the defence contends that the possession was adverse from the very beginning, permission not having been obtained from the registered proprietor. For the reasons advanced the court finds that an untenable position. So, the claim for a possessory title founders at the first hurdle. That is, the defence has failed to show that there was possession of the disputed land for the limitation period. Even if that hurdle had been assailed, the claim could not avoid being still born for the failure to demonstrate that the defendant was in fact in legal possession of the disputed land.

[56] Therefore, when the executrix transferred the land to the claimants, she did so free of any interests of the defendant. With all due deference to counsel for the defendant, there could not have been any barring of the title transferred to the claimants. Simply put, there was no other title recognizable at law to bring that about.

GIFT

[57] During the cross-examination of the defendant, she sought to anchor her claim to the land upon which the shop stands by alleging a voluntary conveyance by the

[58] Supra, note 54

deceased beneficial owner, Gladys Facey. This found no expression either in her statement of case or her counsel's address to the court. In fact, although the gift was supposed made in the presence of Jeffrey Malcolm, among others, he was silent on the point. However, since it was raised on the evidence it ought to exercise the judicial mind.

[58] A non-testamentary gift has been defined as "the transfer of any property from one person to another gratuitously while the donor is alive and not in expectation of death."[59] There are three methods of making a gift. First, a gift may be made by deed or other instrument in writing.[60] Secondly, a gift admitting of delivery may be made by simply delivering it to the recipient.[61] Thirdly, a gift may be made by a declaration of trust.[62] Of these three modes of making a gift, only the first applies when making a gift of land.[63]

[59] There was no evidence in form of a deed or other instrument in writing to support the defendant's assertion of gift. Moreover, although there is no hard and fast rule that there should be corroboration,[64] since the gift was made in Malcolm's presence the court looked for, but found no support in his evidence for this gift. Finally, since Gladys Facey had passed from this world and consequently was no longer around to contradict the defendant, the court regarded this assertion with grave suspicion.

[60] Among the reasons the court looked askance at this bit of evidence was the clear impression that it was a fabrication and vain but barefaced effort to wrest ownership from the grasp of the claimants. That this was a recent concoction is evidenced by its absence from both the defendant's statement of case and her eminent counsel's

[59] Halsbury's Laws of England 4th ed volume 20 para. 1

[60] Ibid. para. 2

[61] Ibid.

[62] Ibid

[63] Ibid. para. 29

[64] Ibid. para. 15

address. Further, not one of the several persons said to be present at the making of the gift was called to speak to it. Additionally, he who was called spoke a lot but not one word about the gift.

CONCLUSION

[61] So, the defendant's claim of a gift fails. Equally, the contention that she acquired a possessory title must perish. Accordingly, judgment is given for the claimants. The claimants are declared to be registered proprietors of all that parcel of land registered at Volume 953 Folio 250 of the Register Book of Titles. The defendant is ordered to give up possession of the disputed section of the said land forthwith. Costs is awarded to the claimants, to be agreed or taxed.