[2015] JMSC Civ 83

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 00102

BETWEEN	**EDRICA SMITH**	**1ST CLAIMANT/APPLICANT**
AND	**VINCENT SMITH**	**2ND CLAIMANT/APPLICANT**
AND	**THE REGISTRAR OF TITLES**	**1ST DEFENDANT/RESPONDENT**
AND	**DESMOND DUVAL (personal representative and executor of the estates Mary Duval and Austin Duval deceased)**	**2ND DEFENDANT/RESPONDENT**

Donovan Malcolm instructed by Clough, Long & Co. for the Claimants/Applicants

Ms. Pauline Brown-Rose with Lonnette Lynch and Mrs. Denise Senior-Smith for the Defendants/Respondents

Heard: 23 January and 11 February 2015

Land Registration - Limitation of Action - Extinction of Title of Registered Owners - Limitation of Actions Act 1881 - Acts constituting sufficient degree of exclusive physical control-nature of disputed land

Oral Judgment

In Chambers

Laing J

[1] On 11 February 2015, I delivered this judgment orally. I now reduce it to writing.

The Claim

[2] By fixed date claim form filed on 13 January 2014, the Claimants sought the following relief:

> 1. *A declaration that the Claimants have been in open, exclusive and undisturbed possession and occupation against the 2nd Defendant of*

part of the premises at Enfield in the parish of Saint Andrew and registered at volume 1157 Folio 137 of the Register Book of Titles for a period of twelve years and upwards immediately prior to the commencement of this action.

2. *A declaration that by virtue of the Claimant's absolute possession and occupation of part of the premises for a period of twelve years and upwards immediately prior to the commencement of this action to the exclusion of the 2nd Defendant, the 2nd Defendant discontinued possession and/or was dispossessed of the said part for a period of twelve years and upwards immediately prior to the commencement of this action.*

3. *A declaration that the Claimants have been exclusive possession of part of the premises to the exclusion of the 2nd Defendant and the whole world.*

4. *An order that the Claimants having been in possession and occupation of part of the premises for upwards of twelve years immediately prior to the commencement of this action to exclusion of the 2nd Defendant, the 2nd Defendant is barred by virtue of section 30 of the Limitations of Action Act from reentering the sad part.*

5. *An order by section 3, 4 and 30 of the Limitations of Action Act 1881, that the Claimants having been possession and occupation of part of the premises for upwards of twelve years immediately prior to the commencement of this action have acquired an absolute title to the premises against the 2nd Defendant.*

6. *An order that the 2nd Defendant's title to part of the property at Enfield in the parish of Saint Andrew being land registered at Volume 1157 Folio 137 of the Registrar Book of Titles is hereby extinguished.*

7. *An order empowering the 1st Defendant to cancel part of the Certificate of Title registered at Volume 1157 Folio 137 in the Registrar Book of Titles in the name Austin Duval, the registered proprietor and on whose behalf the Second Defendant acts.*

8. *An order empowering the 1st Defendant to issue a new certificate of title in respect of the said part in the joint name of the Claimants.*

9. *Cost.*

10. *Such further and other relief as this honourable Court may deem just.*

[3] On 13 January 2014 Cole-Smith J granted an injunction restraining the Defendants from transferring, charging, entering upon or in any way interfering with the claimants' occupation of premises at Enfield in the parish of Saint Andrew registered at volume 1157 Folio 137 of the Register Book of Titles ("the Property"). By Order of Edwards, J on 10 February 2015, the claim was struck out as against the 1st Defendant, the Registrar of Titles.

[4] In summary, the Claimants asserted that in 1970 they entered into unmolested and undisturbed occupation of a part of the Property. In support of this assertion the Claimants sought to rely on acts such as the paving and de-bushing of a portion of the Property disposing of the garbage collected and generally keeping the land clean at their own expense. The Claimants led evidence to seek to convince the Court that they excluded other persons from the relevant portion of the disputed property and that since 1970 any user thereof was with their permission. There was also the production of evidence by the Claimants in the form of a receipt dated 10 October 2013 to support payment of property taxes in respect of the Property for the years 2007-2014.

[5] The 2nd Defendant (hereafter referred to simply as "**the Defendant**") challenged the Claimants on all the bases of their claim and disputed their version of the relevant facts. The Defendant asserted that the Property, or any portion thereof was never abandoned at any point and produced evidence to explain that since about 2006 there was an effort to sell the Property to Mr. Christopher Card, which explains why there were no tenants there since that time.

[6] There was no dispute between the parties as to the law which is applicable to the Claim. The contest was centered around the facts and the application of the law to the different versions of the facts which it was submitted should be found by the court.

The Law

[7] By section 3 of the **Limitations of Actions Act**, no person shall make an entry, or bring an action or suit to recover any land or rent after twelve (12) years of the time at which such right first accrued. It is now settled law that time does not begin to run

against an owner of land so as to extinguish his right to that land unless it has been established that:

(a) he has been dispossessed of the land;

(b) he has discontinued possession of the land; (and that in either event)

(c) some other person in whose favour the period of limitation (twelve years) can run is in adverse possession of the land.

[8] The person who can establish no paper title to possession who is claiming that the title of a paper owner had been extinguished has to establish that he has factual possession, in the sense of:

(a) occupation or physical control of the land in question; and
(b) the *animus possidendi* or intention to possess.

[9] In ***Powell v McFarlane*** **(1979) 38 P& CR 452** (**"Powell"**) Slade J described the correct approach to these requirements and it is worth reproducing in extenso as follows:

> "…(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. In the case of open land, absolute physical control is normally impractically, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimant": West Bank Estates Ltd. V. Arthur, per Lord Wilberforce*
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> *…everything must depend on the particular circumstances, but broadly, I think that must be shown as constitution 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.

(4) The animus possidendi, which is also necessary to constitute possession, was defined by Lindley M.R., in Luttkedake v, Liverpool College (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary, case the squatter on property such as agricultural land will realize that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the animus possidendi involves the 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.'

> *The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to posses, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he had intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner. A number of cases illustrate the principle just started and show how heavy an onus of proof falls on the person whose alleged possession originated in a trepass."*

[10] In ***Wills v Wills*** 64 WIR 176 the Court examined the decisions of the English Court of Appeal in ***Williams Brothers Direct Supply Ltd v Raftery*** [1958] 1 QB 159 and ***Wallis's Cayton Bay Holiday Camp Ltd v Shell Mex & BP Ltd*** [1975] QB 94 in which there was a strong dissent from Stamp LJ. The Privy Council also examined what it considered to be the most important decision in Jamaica which is the Court of Appeal case of ***Archer v Georgiana Holdings Ltd*** (1974) 21 WIR 431 (**"Archer"**). The Court

noted that all three decisions relied heavily on the well-known but now controversial decision of the Court of Appeal in ***Leigh v Jack*** (1879) 5 Ex D 264. Their Lordships made the following observations:

> *"...19. All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the Court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also rightly stated that the Court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably either necessary or sufficient as evidence of possession. Nevertheless, the decisions must now be read in the light of the important decision of the Court of Appeal in Buckinghamshire County Council v Moran [1990] Ch 623 and the even more important decision of the House of Lords in Pye.*
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> *20. In Moran each member of the Court approved the following passage from the dissenting judgment of Stamp LJ in Wallis's case [1975] QB 94, 109-110:*
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> > *"Reading the judgments in Leigh v Jack 5 Ex D 264 and Williams Brothers Direct Supply Limited v Raftery [1958] 1 QB 159, I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done upon it and the intention of the squatter fall to be considered. Where the land is wasteland and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the wasteland do not amount to dispossession of the owner. But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it, the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession."*
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> *21. In Pye Lord Browne-Wilkinson [2003] 1 AC 419, 438, para 45, after quoting from Bramwell LJ in Leigh v Jack (1879) 5 Ex D 264, 273, said this:*
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> > *"The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's heresy led directly to the heresy in the Wallis's Cayton Bay line of cases to which I have referred, which heresy was abolished by*

> *statute. It has been suggested that the heresy of Bramwell LJ survived this statutory review but in the Moran case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."*

[11] Their Lordships concluded that they see no reason why the decision of the Court of Appeal of Jamaica ought not to be qualified, in future, by the clear guidance which the House of Lords has given in ***JA Pye (Oxford) v Graham*** [2003] 1 AC 419. The Court reached this conclusion although there was no parallel legislation in Jamaica of section *15* and Schedule 1, para 8(4) of the Limitation Act 1980 [UK] which effected the statutory abolition mentioned by Lord Browne-Wilkinson.

Analysis and findings

[12] It is worth noting that the issue as to whether there was a special purpose for which the paper owner intended to use the land did not play a prominent feature in this case, the only mention being the assertion that after 2006 there were plans to sell the Property, including the disputed area, following the expression of interest by Mr Card. The Court did not find it necessary to place much importance on the existence or non-existence of this intention in the analysis of the claim. The guidance offered by the cases mentioned above was therefore primarily in relation to the principles laid down in assessing the conduct of the Claimants given the nature character of the disputed land, the nature of the acts done upon it and the intention of the Claimants.

[13] The disputed area in this matter is appropriately described and referred to as the "Turn and Park", and for convenience I will refer to the area by that name throughout this judgment. It is common ground between the parties that it was used by motorists visiting that area to turn and by persons to also park their motor vehicles. It was

explained by the Defendant that it was used as a turning area because the road in that area is narrow and leads to a cul-de-sac. He further explained that there is a precipice about 150 feet from the Turn and Park, and that if one reverses without utilizing the Turn and Park to turn around, one runs the risk of going over the precipice.

[14] In this case the Court does not find that the Defendant or his predecessors in title abandoned the Turn and Park. I accept the evidence that the Property at all times was occupied by the paper owners or their successors, or by persons with their consent, and since about 2006 there were plans put in train to sell the Property to Mr Christopher Card.

[15] The geography and character of the Turn and Park, the nature of the acts done upon it and the intention of the Claimants therefore fall to be considered. The character of the Turn and Park is consequently of tremendous importance in this matter. The Claimants are not asserting that they have occupied and transformed a piece of property such as an open field, to a manner of usage for which it was not previously utilised (i.e. turning and parking). What they are saying is that at some point they went into (a) factual/physical possession of the Turn and Park with its then established usage (b) with the intention to possess and actually possessed the Turn and Park to the exclusion of other members of the Public and the paper owners as well and their successors (while maintaining the area's previously established usage).

When did the possession which is being asserted begin

[16] The assessment of how, why and when the Claimants were able to take possession of the Turn and Park, which was then being utilized by relatives of the registered owners and by the community at large has to be assessed with an understanding of the Jamaican society and with the application of common sense.

[17] In answer to the Court Ms Smith indicated that she took possession of the [Turn and Park] lot when she got her first car and when she started de-bushing it. The reasonable inference to be drawn and which the Court has in fact drawn, is that any de-bushing that the Claimants might have done was subsequent to her acquisition of the motor car, since based on her evidence it does not seem logical that she would have

had a reason to de-bush the area if she did not own a car. In other words any de-bushing would not have been in a vacuum but would have been incidental to her using the Turn and Park to park her car.

[18] There is no evidence that the 2nd Claimant Mr. Vincent Smith had a car or if he did what might have motivated him to decide to assert ownership of the Turn and Park to the exclusion of the Duvals, (while they were alive) their visitors, tenants, licensees and the general public. Similarly there is no evidence to suggest what might have motivated him to assert ownership of the Turn and Park if he did not own a car.

[19] The foundation of the Claimants' case was that they took possession of the Turn and Park in 1970. Ms Smith claimed that when she took possession of the Turn and Park in 1970, Austin and Mary Duval were then in residence but that they didn't use the area to park, since they did not have a car.

[20] In cross examination when asked her age in 1970 Ms Smith initially said 25 years of age. She admitted that her year of birth was 1959 but was reluctant to resile from her position that she was 25 years of age in 1970 until I intervened and counted the years aloud from 1959 using my fingers as aids for the purposes of demonstration. It was only at that stage that she conceded that she was only 11 years of age and did not then own a car. Ms. Smith was then constrained to accept that she did not go into factual / physical possession by parking "her car" in the Turn and Park in 1970. She then proceeded to assert that it was nevertheless being used by her "to drop her off and so on".

[21] I do not accept that the Claimants sought to assert any kind of possession in respect of the Turn and Park in 1970 or that it was being used by the Claimants only at any material time. The misrepresentation by Ms Smith of her age in 1970 is significant and has negatively affected the Court's view of her credibility. The assertion by her that she took possession of the Turn and Park in 1970 is not a mere oversight or drafting error. It is consistently repeated in the Claimants' evidence affidavit. I find that it was a deliberate attempt by her to mislead the Court in an effort to bolster the claim that the Claimants and Ms Smith in particular took possession of the Turn and Park in 1970.

[22] In general, the demeanour of Ms Smith did not convey the impression of a witness who was being truthful. She was evasive and sometimes reluctant to accept suggestions as to facts which appeared to be clear (such as the fact that the Turn and Park was used by others and by the public at large) and facts which she conceded subsequently. I am well aware and remind myself that I can accept a portion of a witness' evidence and reject other portions (and vice versa) but I am of the opinion, having observed Ms Smith's demeanour and having weighed her evidence as to her obtaining possession in 1970, that the Court should carefully approach her evidence as it relates to the other facts which she has asserted in her affidavits and in cross examination.

If not 1970 when?

[23] Ms Smith's position is that possession was obtained when she acquired her first motor car, she had great difficulty remembering when she acquired her first car, which the Court finds difficult to accept given the significance of that accomplishment in the lives of most if not all Jamaicans who manage to achieve that milestone. It is a transformative event and ought to have been for someone living in Enfield. She eventually said she got it when she was "about 21" which would be about 1979/1980.

[24] I do not accept the evidence of Ms Smith that when she acquired her first car she took possession of the Turn and Park and began to exclude other users. I find it very difficult to accept and do not accept, that on becoming a motor vehicle owner Ms Smith then started to prevent other persons (who were then previously equally entitled to use it) from using the Turn and Park, simply because she was now a motor vehicle owner. It is also difficult to envisage her explaining to other persons who may have previously used the Turn and Park, including taxi operators, the basis of her new found authority and possession especially the fact that it was founded on her new status as a motor vehicle owner. It is even more difficult to accept that she would have sought to exclude any of the Duvals, their tenants, or visitors to the Defendant's Aunt, an Aunt who continues to live in that area.

[25] Having observed the Defendant under vigourous cross examination, and his calm, collected and helpful manner in giving logical responses, I accept that he is a witness of truth. I accept the evidence of the Defendant that there are members of the family who usually visited, who continue to visit his Aunt, and who use the Turn and Park. I also accept his evidence that there is no other entry to his Aunt's house which is at the end of the cul-de-sac except by using the road leading to the cul-de-sac. I accept his evidence that the Duvals have been turning at the Turn and Park for as long as he can remember since there is nowhere else in that area to turn.

[26] The responses of Ms Smith in cross examination did not cause me to conclude that I could accept her position that the Claimants took exclusive possession of the Turn and Park. She eventually admitted that sometimes other people used the Turn and Park along with her (although she sought to say it was with her permission). I do not accept her evidence that the public used the Turn and Park but only with her permission.

[27] I accept the evidence that the Turn and Park was also used as a washing/drying area by the tenants of the Duvals and I do not accept that the Claimants did anything to prevent the tenants from using the area for that purpose.

[28] I do not accept that the Claimant's did any significant de-bushing of the Turn and Park. I accept the evidence of Ms Rose Talbot, who is also a beneficiary under the Estate of Mary and Austin Duval, which is supported by the photographic evidence that there were no big trees or anything to prune in the Turn and Park. I am not swayed by the skeletal affidavits of persons who assert that they were employed by the Claimants to de-bush the Turn and Park, and accept the evidence on behalf of the Defendant that he hired persons to de-bush the Property. There is no reason why these persons would not also de-bush the Turn and Park if that was needed.

[29] As it relates to the Claimants assertion that they paved the Turn and Park, the photographic evidence shows that the area was not paved in the ordinary dictionary sense of being covered with stones, bricks, concrete, asphalt or some other similar material. As Ms Talbot explained and which I accept, she has not seen any distinct changes, over the years since she left Jamaica in 1961. She said that the ground is

clay and that the ground is therefore compacted by the wheels of the cars which use the Turn and Park. If the Claimants did do minor filing of holes or spreading of marl/aggregate for example, these would be acts which be associated with their usage of the Turn and Park to facilitate their own enjoyment of the facility. In such circumstances this cannot amount to acts sufficient to support exclusive possession.

[30] A similar situation obtains in respect of what was described as a concrete hump which was placed there by the Claimants. The photographs support the inference that (as the Defendant understood) it was put there by the Claimants to prevent water from coming onto the Turn and Park. It would clearly be in the interest of a user of the Turn and Park, especially one who is parking there and a person who may have to leave the area on work or business not to have the ground wet or muddy.

[31] I find that these acts to which I have referred above including any contribution by way of maintenance to the Turn and Park, singularly or collectively, are relatively trivial acts from which I cannot infer possession by the Claimants and they are insufficient to amount to acts by which the Claimants can rely as probative of their assertion of possession.

[32] The payment of taxes which is sought to be relied on was on 10 October 2013 and for this reason the Court does not find that fact to be of any assistance in determining what was the factual position as it relates to the possession of the Turn and Park in the years prior to that day.

[33] I accept the Defendant's evidence that there was never a dispute about the ownership of the Turn and Park and find this to be so because the Claimants or either of them never went into possession or purported to asserted control as they now claim.

Conclusion

[34] For the reasons outlined above, I do not find that the Claimants have established their claim brought by way of Fixed Date Claim Form filed 13th January 2014 on a balance of probabilities. The claim is dismissed and accordingly I make the following consequential orders:

1. The injunction granted on the 13th January, 2014 by Justice Cole-Smith is hereby discharged and the Defendant is at liberty to enforce undertaking in damages.

2. Caveat No. 1836814 lodged by the Claimants Volume 1157 Folio 137 on the 12th day of August, 2013 is to be withdrawn and the Defendants are permitted to continue with the registration of the transfer of the said property.

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

4. Defendants' Attorney-at-Law to prepare, file and serve Order on the Claimants and the Registrar of Titles.