SCJB

IN THE SUPREME COURT OF JUDICATURE
IN COMMON LAW

CLAIM NO. C.L. 1994/B446

BETWEEN	**VERA BENNETT (Executor of the Estate of Valda Ferrest Bennett)**	**FIRST CLAIMANT**
AND	**STANLEY BENNETT (Executor of the Estate of Valda Ferrest Bennett)**	**SECOND CLAIMANT**
AND	**VINCENT PEARSON (Executor of the Estate of Agnes May Pearson)**	**FIRST DEFENDANT**
AND	**ESTATE OF AGNES MAY PEARSON**	**SECOND DEFENDANT**

IN CHAMBERS

Dr. Lloyd Barnett and Mr. Keith Bishop instructed by Bishop and Fullerton for the claimants

Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Company for the first defendant

November 15 and November 25, 2004

Sykes J (Ag)

SECURITY FOR COSTS, ADVERSE POSSESSION, EQUITABLE INTEREST AND CONTRACT VOID FOR UNCERTAINTY

1. There are two applications before me. The first is an application by the first defendant for security for costs. There was a preliminary objection, which was upheld, and the application was dismissed with costs to the claimants to be agreed or taxed. Leave to appeal was granted. I have set out the reasons for my decision at paragraphs 21 – 22.

2. The second is an application by the first defendant for a declaration that the agreement for sale dated January 15, 1977 for the sale of property registered at Volume 429 Folio 4 of the Register Book of Titles is void for uncertainty and that judgment be entered for the first defendant. Second, he asks for an order of possession and that the first defendant pay to the claimants the sum of $200 with interest at 12% per annum from January 27, 1977.

3. The grounds for these applications are

a. that the claim for breach of contract arose seventeen years before the filing of the action and so is statute barred;
b. parol evidence is not admissible to resolve the uncertainty in the agreement for sale; and
c. the claim be struck out because the Limitation of Actions Act has guillotined this claim

4. I have not accepted any of the submissions made in support of these orders.

The root of the problem

5. This dispute has its roots way back in the year 1977 when Ms Valda Bennett, the original purchaser and Ms. Agnes May Pearson, the original seller, signed an agreement for sale of land. As the title of the action

indicates, the original parties to the contract are now deceased. The witness to the agreement is deceased as well.

6. The agreement for sale clearly was not the product of an attorney. The language of the document does however suggest some familiarity with transactions of this nature. In brief, the parties agreed on the purchase price; the deposit, with balance payable on completion; costs to be borne by the parties equally, taxes and insurance to be adjusted as of the date of possession. The big problem is this: no care was taken to describe properly the land that was being sold. The property was described in this way: *One only Lot Part of Land Premises No. 69 ½ Lady Musgrave Road, Kingston 10.* The estate of Ms Valda Bennett now seeks to enforce the agreement against the estate of Ms Agnes May Pearson. The executor of Ms Pearson's estate resists. He says the contract is not clear and therefore void. The courts cannot enforce such a contract. Is this correct?

The admissibility of parol evidence

7. Mr. Williams submits that since all the original parties to the contract and the witness to the agreement are all deceased there is no one available, in this life, who can speak with certainty to what part of the 69 ½ Lady Musgrave Road was to be sold. This he said meant that the contract could not now be enforced against the estate of Ms Pearson.

8. Mr. Williams displays a list of documents each clearly referring to the sale but none as specific as would be desired. In addition, he submits that the executor, Mr. Pearson, had a power of attorney from Ms Pearson at or around the time of the contract. The significance of that statement is that Mr. Pearson from as far back as April 7, 1977 told Ms Bennett, the

purchaser, that no part of the land was for sale and that she should come and retrieve her cheque that she had paid pursuant to the sale agreement. Ms. Bennett did not do so.

9. Mr. Williams' submission is based on half the story. The other half is this: Ms Bennett before she died had actually commenced this action against the executors of Ms Pearson's estate. She filed an affidavit setting out the history of the matter. She alleges that she had indeed bought the land at 69 ½ Lady Musgrave Road. Ms Bennett alleges that she became a tenant of Ms. Pearson from as far back as 1946. Ms. Bennett lived at the property until her death. The affidavit states that Ms. Pearson had subdivided the land and sold one of the parcels to her. Ms. Bennett also states that she built houses on the parcel. According to the affidavit, it was agreed that lot 6 would be sold to Ms. Bennett.

10. The propositions advanced by Mr. Williams presuppose that the rule against parol evidence is either an absolute rule with no known exceptions or if there are exceptions, none applies to this case. The exceptions to this rule are numerous. Courts of equity for well over one hundred years have held that parol evidence is admissible to identify the subject matter of a contract in suits for specific performance. The three cases that will be cited all involved the sale of land. In ***Auerbach v Nelson*** [1919] 2 Ch 383 the court held that parol evidence was admissible to identify the subject matter of an oral agreement for sale which was described in the receipt as "*Received from Mr. Auerback...on account of House being sold for £500 from Mr. M. Nelson*" . The court summarily rejected the submission that "the property was not sufficiently described". In ***Plant v Bourne*** [1897] 2 Ch 281, the Court of Appeal held that parol evidence was admissible to

identify the land referred to in this agreement: "*twenty four acres of land, freehold, at T., in the pariah of D. ... possession to be had on March 25 next. The vendor guaranteeing possession accordingly.*" Similarly, in ***Shardlow v Cotterell*** 20 Ch. D.90, none other than Sir George Jessel M.R. held that a receipt in these terms, "*Received from Mr. A. Shardlow the sum of £21 as deposit on property purchased at £420 at Sun Inn, on the above date. Mr. George Cotterel, Pinxton, owner*" was sufficient to satisfy the Statute of Frauds. The Master of the Rolls stated at page 94 that this was ample description. The Court of Appeal in this case was reversing the trial judge's decision not to admit parol evidence to identify the property.

11. In this case, the claimants are saying that there is evidence to identify the part of the property that is the subject matter of the sale agreement. The implication of Ms. Bennett's affidavit is that there were sufficient acts by her to identify the parcel; one of those acts being the act of building on the identified lot.

The Limitations of Actions Act

12. Mr. Williams' next salvo was the Limitation of Actions Act. He submitted that the claimants could not now enforce the contract because more than twelve years has passed since the cause of action accrued. Mr. Williams submits that the cause of action accrued at the very latest April 7, 1977 when the Mr. Pearson, who at the time had a power of attorney from Ms. Pearson, indicated that the transfer would not be done. This submission ignores other facts that may lead to a different conclusion. Ms Bennett in her affidavit filed before she died said at paragraph 20, that in June 1980, with full knowledge of Ms Pearson, she began constructing a dwelling

house. The construction was open. She alleged that trucks dumped construction material at the site. In 1982, according to the affidavit, a second house was built on the lot. She added that Ms Pearson and the executor, the first defendant in this case, visited the first house while it was under construction and they said not a mumbling word in protest.

13. Ms Bennett is saying, in addition, that she was never ever dispossessed by Ms. Pearson or anyone acting on her behalf. The implication of these assertions by claimant is that despite the assertions of Mr. Pearson, who was at best an agent of Ms. Pearson, that the contract was breached in 1977, Ms Pearson at no time behaved in manner consistent with any breach. The implication is that it might be that Mr. Pearson exceeded his authority. In other words, the agent cannot exercise greater powers that the principal. If the principal has acted in a manner consistent with a sale after the purported repudiation of the contract by the agent, which Ms. Bennett did not accept, then at the very least there is a triable issue of when did the cause of action really arise. It may be that the cause of action arose after the death of Ms. Pearson when the executor refused to complete the transaction. This is ultimately a matter for trial.

14. In ***Ramsden v Dyson*** (1866) L.R. 1 H.L. 129, 140 – 141 Lord Cranworth LC stated this general principle

> *If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. ...*

But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner...

15. This passage shows the probability of an equity arising in favour of the claimants. This again shows that the claimants' case is not hopeless. I am not saying that success is guaranteed but neither can I say that failure is assured.

16. My task at this stage is simply to determine whether the claimants' case is such that it "*has no real prospect of succeeding*" (see rule 15.2(1)(a) of the Civil Procedure Rules (CPR) 2002. I am not permitted to conduct a minitrial of the issues. I have said enough to indicate that some of the points of law cannot be dealt with unless there is a full exploration at the trial of all the relevant facts and circumstances. The summary judgment procedure is not a substitute for a trial. It is designed to cast out the most hopeless of cases. There are cases that even on the most benevolent view of the allegations the party relying on them simply cannot succeed (see Lord Woolf in ***Swain v Hillman*** [2001] 1 All ER 91). The Court of Appeal of England and Wales in ***Esprit Telecoms UK Ltd v Fashion Gossip Ltd*** [2000] All ER (D) 1090, warned against the dangers of resorting to summary judgment procedures where the case raises complex issues of law. I would adopt and adapt that principle by saying that summary judgment procedure is not appropriate where the ultimate resolution of the

matter depends upon a detailed examination of facts that cannot take place in this hearing. The facts here are not all one way in favour of the first defendant. I cannot conclude at this stage that the claimants' have no real prospect of success on either identifying the land through parol evidence or succeeding based upon an equitable interest in the land.

17. The matter is further complicated because the claimants have now raised the issue of adverse possession.

Adverse possession

18. I will briefly deal with the claim based upon adverse possession. Mr. Williams says that Mr. Pearson made it clear that the land was not for sale when he did not encash the cheque that was tendered as payment under the agreement for sale. However, this has not addressed the allegation of Ms. Bennett, the deceased, that she began construction of two houses and that Ms. Pearson and the first defendant visited the site. It may be said that this suggests that Ms. Bennett was there with the permission of Ms. Pearson and so no claim based on adverse possession can arise. My understanding of the law in this area is that much depends upon the intention of the adverse possessor and not the intention of the owner. Whether at some point Ms. Bennett was there without permission is ultimately a question of fact. The cases do not suggest that there must necessarily be a physical interruption of physical possession of the adverse possessor who might have initially entered into possession with permission before a claim based on adverse possession can arise. The cases are capable of supporting the view that if adverse possessor entered the land with permission and that permission is withdrawn but he continues to be in

custody and control of the land with an intention to possess it may be possible to establish title by adverse possession. This is important because the affidavit of Mr. Pearson does not say what was the status of Ms. Bennett after, on his version, the contract was breached. Was she still a tenant? Did she become a squatter? Was she given notice to leave?

19. The error in Mr. Williams' submission is that it focuses exclusively on the intention of the owner of the property or those claiming through the owner. The Judicial Committee of the Privy Council in ***Wills v Wills*** PCA 50 of 2002 (delivered December 1, 2003) has only recently pointed the way when considering title by adverse possession. Lord Walker approved the analysis of Lord Browne-Wilkinson in ***JA Pye (Oxford) Ltd. v Graham*** [2003] 1 AC 419. In that case, Lord Browne-Wilkinson stated that possession in the context of the Limitation Act 1980 (UK) had two elements: (a) an exercise control for one's benefit and (b) a sufficient degree of control and custody. Both elements have to coincide before there can be possession in law. To acquire title by possession, it is not necessary to have also an intention to own. The intention of the owner of the land is irrelevant. It has also been established that an intention to pay on the part of the person seeking to acquire title by possession is not inconsistent with an intention to possess (see ***Ocean Estates Ltd v Pinder*** [1969] 2 AC 19, 24).

20. Mr. Williams' submissions do not demonstrate a full appreciation of the effect of ***Wills v Wills***. One effect is that the Court of Appeal of Jamaica's decision in ***Archer v Georgiana Holdings Ltd*** (1974) 21 WIR 431, while it might have been correct on the facts, is no longer good law as far as it suggests that *"[t]o establish discontinuance it must be shown positively*

that the true ***owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it"*** (per Swaby JA at page 435) (my emphasis). This view has now been held by the Privy Council to be heretical because it is expressed in away that might reintroduce the technical doctrine of adverse possession that was abolished by statute both in the United Kingdom and Jamaica. Note as well that it places heavy reliance on the intention of the true owner.

21. When the expression *adverse possession* is used in statutes enacted after the reforms of 1833, the law is that the word *possession* should be given its ordinary meaning. There is now no special meaning to be given to *possession* merely because it is used in the context of title by possession. The adjective *adverse* does not change this situation. All that is meant by adverse is simply that the non-owner has the requisite degree of control of the land and an intention to exclude all others including the owner as far as the law permits and his possession is without the consent of the owner. This means that if the adverse possessor has the requisite intention coupled with the fact of physical control provided it is without the consent of the owner, without any further act, is by definition necessarily adverse to the possession of the true owner. This is not predicated upon any interruption of physical custody and control if the person initially entered with permission. Whether the person is occupying without permission does not depend on interruption of physical control but rather the withdrawal of permission. If this understanding is correct, then a minute examination of the status of Ms. Bennett on or around the period 1980/82 is necessary.

22. What the claimants' are saying is that in addition to the contract or in the event that they fail on the part of their case that rests upon the

contract or they fail in their claim in equity, they can still succeed because Ms. Bennett had both the fact of physical control and an intention to exercise control for her benefit. This is the kind of case where an inquiry into the facts surrounding the tenancy, the purchase, the role of Mr. Pearson before Ms. Pearson died and the conduct of Ms. Pearson before she died is needed. It may be that the claimants may have difficulty in establishing title by adverse possession. Difficult is not synonym for impossible.

23. The result is that I cannot say that there is no reasonable prospect of the claimants succeeding on any of the grounds on which they seek to rely to establish their title to the land. The application for dismissal of the claim and summary judgment for the first defendant is dismissed.

24. These are the reasons for my decision on the first application. Mr. Williams applied for security for costs against the claimants. Dr. Barnett raised a preliminary objection, which was that security for costs does not apply to persons suing in a representative capacity. Mr. Williams submitted that the claimants did not represent five or more persons with the same or similar interest and so they were not representatives for the purpose of rule 21.1 of the Civil Procedure Rules (CPR). The ultimate logic being that they could not take advantage of rule 24.3(d) of the CPR which provides that the while the court may make an order for security for costs under rule 24.2 if it is just, it may exempt claimants who are suing in a representative capacity under rule 21.

25. The flaw in Mr. Williams' analysis is this: rule 21.1(1) does not say that a representative action is permissible only if there are five or more persons with the same or similar interest. The rule is permissive not prescriptive. It

permits a representative action in the circumstances there described but it never said that the circumstances referred to were the only circumstances that could give rise to a representative action.

26. Further, rule 21.6 is so plain that trustees, executor or administrators are representatives that it really squeezes the life out of Mr. Williams' submission. Could it really be contended that trustees, executors or administrators could only be representatives if the beneficiaries numbered five or more?

Conclusion

27. The application to strike out the claim on the bases that the contract is void for uncertainty and that it is statute barred is dismissed. The claimants has three bases upon which they can pursue their action, namely, an action based on the contract, a claim in equity and adverse possession. These are questions of fact, which cannot be resolved satisfactorily on the material available.

28. The application for security for costs is dismissed on the basis that the claimants are suing in a representative capacity and are exempt under rule 24.3(d).

29. Leave to appeal granted in both applications and costs of both applications to the claimants to be agreed or taxed.