

3 of 2
at issue - ... of land ... of adverse possession
for possession in one title in fact
with property ... of land
3 separate ... to court claim
Conveyance
recomp

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1983 B.258

BETWEEN

LIONEL BURKE

PLAINTIFF

A N D

WHITTERS WORLDWIDE
PROPERTIES LTD.

DEFENDANT

SUIT NO. C.L. 1983 M. 187

BETWEEN

ALBERT MONTIQUE

PLAINTIFF

A N D

WHITTERS WORLDWIDE
PROPERTIES LTD.

DEFENDANT

SUIT NO. C.L. 1983 P.112

BETWEEN

RICHARD POWELL

PLAINTIFF

A N D

WHITTERS WORLDWIDE
PROPERTIES LTD.

DEFENDANT

SUIT NO. C.L. 1983 M.186

BETWEEN

GIFFORD MORRIS

PLAINTIFF

A N D

WHITTERS WORLDWIDE
PROPERTIES LTD.

DEFENDANT

Maurice Tenn instructed by Abe Dabdoub represent the Plaintiffs

Crafton Miller, Misses N. Anderson and Richardson instructed by

Crafton Miller and Company represent the Defendants.

HEARD: September 17, 18, 19, 21, 1991
September 21, 22, 23, 24, 25, 1992
January 22, 1993.

CORAM: LANGRIN J.

In these consolidated actions, the Plaintiffs seek inter alia declaration of adverse possession of land now registered in the name of the defendant.

The first Plaintiff has died since the action begun. The material facts can be shortly stated. Ian Kerr Jarret was the registered proprietor of all that parcel of land part of Ironshore and Hatfield Estate in the parish of St. James, containing by survey 22 acres, 33 perches and being all the lands comprised in Certificate of Title, registered at Volume 772 Folio 17 of the Register Book of Titles.

A second lot, part of Coral Gardens in the parish of St. James, and comprised in Certificate of Title, registered at Volume 889 Folio 73 of the Register Book of Titles is also owned by Mr. Kerr Jarret. At the end of the argument on behalf of the Plaintiffs the claim was limited to several acres of the first lot and in respect of the second lot the whole claim was abandoned.

By the end of the hearing the subject of the claim was reduced to one acre of fenced land, on which a structure was erected and described as a taxi stand.

Both these lots of land were leased by the said Ian Kerr Jarret on the 12th June, 1969 to Rose Hall Development Ltd. for a term of 20 years from the 1st day of January, 1969, at a rent of \$18000.00 per year.

Rose Hall Development Ltd. constructed the Holiday Inn Hotel, the largest Resort Hotel in Jamaica. It is unclear as to the precise dates of the commencement and completion of the construction but the hotel was opened in June 1970.

The Plaintiffs along with others went in occupation of the land contiguous to the Holiday Inn Hotel sometime in 1968. There is however contradictory evidence in respect of the time when these Plaintiffs entered the land, since a declaration made by them pursuant to a caveat which they lodged with the Registrar of Titles gave the date of possession as sometime in June 1970. I will deal with this aspect of the evidence later.

Pursuant to an application under Sec. 99 of the Registrar of Titles Act for determination of the lease, a declaration was made by Attorneys on behalf of Ian Kerr Jarret, that in addition to non-payment of rent Rose Hall Development had breached covenant numbered 3(e) of the said lease forbidding parting with possession of the said parcels of land, other than in the manner permitted by the lease.

As a consequence of the aforementioned breaches of the covenants in the lease on the 31st August, 1982 Ian Kerr Jarret re-entered the said lands and re-took possession. The defendant became the registered proprietor of these lands on the 2nd May, 1983, having purchased them from Ian Kerr Jarret.

A writ was filed by the Plaintiffs on the 20th June, 1983 seeking a

declaration of adverse possession and the defendant counter claimed on September 25, 1984 in opposition to that declaration.

Two questions are relevant to the determination of the matter before me:-

- (1) Did the Plaintiffs gain adverse possession of the land in question?
- (2) Assuming there was adverse possession did it affect the true owner during the period of the lease?

The first question: Did the Plaintiffs gain adverse possession of the land in question?

The submissions in Mr. Tenn's well presented arguments on behalf of the Plaintiffs are briefly stated as follows:-

- (1) The area dispossessed is an open site of land and the owner knew or ought to have known that the breach was taking place because the physical area was open and not in the backwoods. The real issue is whether possession was nec vi, nec clam precario.
- (2) Adverse possession can defeat the consequence of registration.
- (3) Mere formal re-entry is not enough once adverse possession has taken place. The effect of the entry must be to dispossess the trespasser. There is an assertion of right when owner takes legal proceedings.
- (4) The acts of fencing, building, paving and using land as taxi stand since 1968 are totally inconsistent with the rights of the registered owner.
- (5) Time begins to run against registered proprietor since 1970 because of the clause in the lease which forbids entering on the land without leaseholder's permission. The Limitation Act says time begins 'to run' when right of action accrues to registered proprietor. Therefore the relevant time ^{is} between 1970 and 1983 when ^a counterclaim was filed by defendant.

There can be no challenge to the propositions set forth in submissions 2 and 3.

Mr. Crafton Miller for the Defendant equally, succinctly and attractively submits that:-

- (1) There was no adverse possession for 12 years since the Plaintiffs' were licencees of Rose Hall Development Ltd., lessee of land since 1969 until Ian Kerr-Jarret re-entered the land.
- (2) Individual claims cannot succeed because the evidence shows occupation by several persons and associations.

The relevant statutory provision is the Limitation Act and Sec. 3 provides:-

"No person shall made 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."

Further Section 30 states:

"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."

The Plaintiffs are seeking to show sole and undisturbed user and enjoyment of land for 12 years during which the Defendant and any prior owner or possessor had laid no claim whatsoever to the land in question, that is to say the one acre of land on which the taxi stand was built.

What therefore must be clear from the evidence is that the manner in which the possessor occupies or makes use of the land must demonstrate openly, that they are treating the land as their own to the exclusion of all other persons. What is in dispute between the Plaintiffs and Defendant on the evidence is whether the Plaintiffs entered in occupation of the land in the year 1968 or 1970 and whether they did so with the permission of Rose Hall Development Ltd?

As demonstrated in the case George Beckford vs. Gloria Cumper Supreme Court Civil Appeal No. 30/86 delivered June 12, 1987, Wright J.A. had this to say at page 26:

"He who challenges the registered owner must show:

- (1) Actual possession by such person
- (2) Clear evidence of an intention on his part to dispossess the registered proprietor and assert actual ownership rights over the property.
- (3) Affirmatively and unequivocally discontinuance of ownership by the registered proprietor."

The Learned Judge in his judgment referred to the authority of Archer vs. Georgian Holdings Ltd. (1974) 21 W.L.R. 431, and underscored these

two principles taken from the headnote:

- "(1) That an owner of land did not necessarily discontinue possession of it merely by not using it, but that each case depended upon the nature of the land in question and the circumstances under which it was held;
- (2) That a finding of adverse possession required some affirmative, unequivocal evidence going beyond mere evidence of the discontinuance and consistent with an attempt to exclude the true owner's possession, the nature of the property being again relevant."

As indicated above, Rose Hall Development Ltd. gave paternal existence to Holiday Inn Hotel. Since transportation forms an integral part of the hotel industry, it is reasonable to expect an harmonious relationship between taxi drivers and the management of the hotel.

Dermot Martin, Architectural Draughtman was employed by Rose Hall to draw plans for a taxi stand. The taxi stand was completed in 1972. It is common ground that the taxi-men formed the Holiday Inn Taxi Association comprising of about 27 persons including the Plaintiffs. It is also common ground that the members of the Association spoke to the Management of Holiday Inn Hotel and as a consequence the Taxi Stand was constructed by Rose Hall Development. Indeed, Mr. Whitter, Managing Director of the Defendant deposed that the Plaintiffs had told him on occasions when he visited the land that it was Mr. Rollins, Managing Director of Rose Hall Development Ltd. who had put them on the land.

Albert Montique, a Plaintiff in the action deposed as follows:-

"I worked with the Hotel and the Hotel assisted me to set up proper arrangements for taxi."

There is a conflict of evidence as to the date when the Plaintiffs entered the land. While the plaintiffs said in their evidence before me that it was sometime in November 1968 they entered the land, in their declarations sworn before a Justice of the Peace on 28th June, 1983 relating to caveats lodged by them, they declared that they entered the land on June, 1970. No reason was given by any of them for this inconsistency. In my view the credibility of the witnesses concerned is in question, and I am constrained to

bear this in mind in determining the relevant issues in the case.

The acts of the Plaintiffs such as fencing, installing telephone, electric lights and water are not necessarily incompatible with the ownership of someone other than the possessor and so do not amount to the assertion of a right of exclusive possession. The weight of any such evidence depends on rules of common sense. A simple fence maybe erected by one occupier to enclose himself or keep others out. To that extent the fencing of the land does not lead to an inescapable inference that the fence was constructed by the Plaintiffs to keep the true owners out.

The following passage in the speech of Lord O'Hagan in Lord Advocate v. Lovat 1830 5 A.C. 273 H.L. is apt:

"Possession must be considered in every case with reference to the peculiar circumstances The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests - All these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession."

Accordingly, after careful consideration of the evidence in the case I consider that the true conclusion on the evidence is that the Plaintiffs took possession of the land by permission of Rosa Hall Development Ltd. in June 1970 and I so find. Consequently where a person takes possession under a licence or permission time cannot begin to run until the licence or permission has been terminated.

The Plaintiffs have failed to show that they had dispossessed the owner or the lessee and were in adverse possession of the disputed land. Further, the Plaintiffs shared occupancy with the defendant, demonstrated that they did not exercise exclusive possession. On that basis alone the claim would fail.

It follows therefore that my answer to the first question is in the negative.

The Second Question:

Assuming there was adverse possession did it affect the true owner during the period of the lease?

I have already, I think, said enough to justify my dismissal of

the claim of the Plaintiffs on the ground that it was a matter of licence and that their presence on the land was by the permission of the lessee in order to successfully carry out their business operations.

Mr. Tenn submitted as follows:-

- (1) That the person in adverse possession has transmissible interest and an unbroken period can only be defeated by entry of rightful owner. There can be a succession of interest for whole period as long as all the interests add up to twelve years.
- (2) Time begins to run against registered proprietor since 1970 because there was clearly a breach of clause 3(e) of the Lease. Therefore the right of action accrued to the registered proprietor.

The law is to be supported by the following statement to be found in Cheshire Modern Law of Real Property 11th Edition p. 894.

"Time which has begun to run under the Act is stopped either when the owner asserts his right, or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land A person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry or sue for the recovery of the land."

A reference must be made to Clause 3(e) of the lease, which specifically prohibits the tenant from parting with possession of the leased premises whether by licence or otherwise without the previous written consent of the Landlord.

It is instructive to set out the relevant clause.

Clause 3(e):

"The Tenant hereby covenants with the Landlord as follows:-

- (a)
- (e) Not to assign, transfer, underlet or part with the possession or the right to the possession of the Premises or any part thereof (whether by licence, trust or otherwise howsoever) without the previous written consent of the Landlord except to the majority shareholder of the Tenant or to another company, the shares of which

are wholly or substantially owned by the shareholder or shareholders of the Tenant."

The mere fact that a breach of covenant takes place cannot by itself give rise to adverse possession. The parties to the lease are free to pursue their remedies under the lease. A third party cannot take advantage of the breach by saying that because there was a breach of covenant then no permission to occupy the land could have been given. In my judgment this is not a matter on which the Plaintiffs can rely.

As a result of the breaches of covenant there was a re-entry on 31st August, 1982 by Ian Kerr-Jarret who retook possession of the said lands.

In the famous case of Fairweather vs. St. Marybone Property Co. Ltd. (1962) 2 WLR 1020 H.L. in which the whole question of whether a squatter's title against a lessee was effective against the freeholder was considered.

It was held among other things as follows:-

"That for present purposes the effect of the 'extinguishment' sections of the Limitation Acts, was that when a squatter dispossessed a lessee for the statutory period, it was the lessee's right and title as against the squatter that was finally destroyed, and not his right or title, as against persons who were not or did not take through the adverse possessor. The lessee's estate as between himself and the lessor was not destroyed"

It would therefore be a false approach to the provisions of the Act to regard the extinguishment of title as extinguishing more than the title of the lessee as against the lessor. Were it otherwise, a situation would be produced which would be manifestly unjust. The correct view is that the freehold is an estate in reversion within the meaning of the Limitation Act and time does not run against the freeholder until the determination of the lease.

It follows therefore that time begins to run on 31st August, 1982 when the lessor re-entered the land, thereby terminating the lease. The land in question was sold to the Defendant Company which became the registered proprietor on May 2, 1983. A counterclaim was filed by the defendant on September 25, 1984 bringing time to an end.

The conclusion therefore is that even if there was adverse possession it did not affect the true owner or lesser during the period of the lease. Time would only start to run from May 2, 1983 until September 25, 1984 a total period of just over one year. Against that background I reject Mr. Tenn's submissions on this point. My answer to the second question is also in the negative.

I now turn to the Counterclaim.

The defendant in his counterclaim has stated that since May 2, 1983 the Plaintiffs have wrongfully remained in occupation of the land and has deprived it of the use and enjoyment of the land thereby causing it to suffer damage. The Managing Director of the Defendant Company stated in evidence that he had acquired the land to put up two hundred condominiums as well as a shopping centre. Due to the presence of the squatters he was unsuccessful in obtaining approval for the development. The cost of the development has moved from \$35 million in 1983 to approximately \$300 million in 1992. If he were renting the land to the taximen in 1983 the rental would have been between \$15,000.00 to \$20,000.00 per month. However, it is observed that in the pleadings the Defendant counterclaimed for mesne profits at the rate of \$5,000.00 per month until possession is delivered. The evidence relating to general damages is definitely insufficient to support an award. However, I do not have any difficulty in accepting the defendant's claim of \$5,000.00 per month as mesne profits from September 25, 1984 to the present time.

For the reasons stated above the actions by the Plaintiffs fail and the relief sought is refused.

The relief granted on the counterclaim is as follows:-

- (1) Possession of the one acre of land.
- (2) Mesne profits of \$5,000.00 per month rental from September 25, 1984 until date of judgment. The total sum being \$500,000.00
- (3) An injunction restraining the Plaintiffs whether by themselves or by their servants or agents or otherwise howsoever from using the said land.

Judgment is entered for the defendant both on the claim and counterclaim with costs to be agreed or taxed.

Cases referred to
① George Bechford v Gloria Cunniff SCCA 38/86 - 2/6/87
② Archib v Georgian Holdings Ltd (1974) 21 W.L.R. 431
③ Lord Advocate v Lord 1830 S.A.C. 273 JR
④ Fairweather v St Marylebone Property Co Ltd (1963) 2 W.L.R. 1020 H.L.