Privy Council Appeal No 13 of 2005

Bryan Clarke *Appellant*

v.

Alton Swaby *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 17th January 2007

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

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*[Delivered by **Lord Walker of Gestingthorpe**]*

1. This appeal is concerned with a claim for possession of a dwelling house and land at Darliston, Westmoreland. The claim was made by Mr Alton Swaby (the respondent before the Board, sometimes mistakenly referred to in documents as "Celton Swaby") against his stepfather, Mr Bryan (or Byron) Clarke (the appellant before the Board).

2. The claim was heard in a summary way before the resident magistrate (Mr George Burton) and some of his findings of fact are rather lacking in detail. Nevertheless most of the basic facts which he found are reasonably clear. Where there are deficiencies they may result from the way in which Mr Clarke's case was put at trial.

3. The property in question belonged to Mr Swaby's aunt, Mrs Ellen Watt, who had owned it for many years before her formal registration as freehold proprietor in 1968. It is common ground that towards the end of her life Mrs Watt left Jamaica and settled in England, although there is some uncertainty as to when she did so. The statement of facts and issues prepared by the appellant's solicitors states that she moved in 1978; the transcript of Mr Swaby's evidence shows that he first put her move in 1978 but then corrected this to 1968. The earlier date is more consistent with the evidence as a whole, but ultimately nothing turns on this point.

4. Mrs Watt died in England on 26 December 1981. By her will she appointed Mr Swaby as her executor and devised the property to him beneficially. On 9 July 1993 he was registered as the proprietor of the property. Mr Swaby had himself left Jamaica in 1960. He has for many years lived and worked in Germany, visiting Jamaica from time to time.

5. During the last years of her life Mrs Watt permitted her sister, Mrs Winnifred Clarke (Mr Swaby's mother) to reside rent-free at the property. This permitted residence ran (at the very latest) from Mrs Watt's departure for England, but seems to have begun before then. In 1964 Mr Clarke married Mrs Clarke (who had been married before) and his evidence (which the magistrate accepted on this point) was that he was living with her at the property before his marriage. But again, ultimately nothing turns on the date when Mr and Mrs Clarke started to live at the property. The legal issues before the Board depend on events after the death of Mrs Clarke, which occurred on 4 April 1983. It is reasonably clear that until then Mrs Clarke and her husband were occupying the property as gratuitous licensees, first of Mrs Watt and then of Mr Swaby, who was after his aunt's death entitled to the property both as executor and as beneficiary (although not yet registered as proprietor).

6. Mr Swaby's evidence was that as well as visiting Jamaica while his aunt and his mother were still alive (and meeting his stepfather during those visits) he went to Jamaica after his aunt's death and (in the words of the notes of evidence):

> "I told Mr Clarke that the land belonged to my aunt, not to my mother. I told him he could continue living there if he agreed to purchase the property. His answer was, 'OK, I will go and see the bank and see what they say about it. I will get back to you on this matter.' That was late March 1983. No, Mr Clarke did not get back to me on the matter. Not one word."

If this conversation did take place in late March 1983 it would have been just before Mrs Clarke's death. Earlier in his evidence Mr Swaby said that the conversation was two days after her burial. Mr Clarke in his evidence denied all of this. He said that he had never met Mr Swaby until after Mrs Clarke's death. The magistrate did not in terms reject Mr Clarke's evidence on these points, but it is clear that he preferred Mr Swaby's evidence. In particular he found that Mr Swaby had acted as agent for Mrs Watt during her lifetime, seeing to the payment of property tax, and that

> "on one occasion in 1979 the Defendant received a sum of money from the Plaintiff to do some repairs to the roof, install a water closet and build a room to the house."

7. The magistrate also made the following findings:

> "The Defendant remained a licensee at all times along with his wife. He obtained no proprietary rights in the property while living there with the permission of the owner or the Plaintiff, her successor in interest."

8. These findings seem to have been intended to relate to the whole period of Mr Clarke's occupation, and not simply the period down to the death of Mrs Clarke in 1983. If so they cannot be reconciled with Mr Swaby's evidence that he instructed attorneys to give Mr Clarke formal notice to quit "sometime in the middle to the end of the 80s." That oral evidence (given potentially against his interest) was partially corroborated by copies of two notices to quit, one dated 11 November 1998 (for 31 December 1998) and the other dated 10 February 2000 (for 31 March 2000), sent to Mr Clarke by Ms Dawn Gray, an attorney acting on behalf of Mr Swaby. The last notice was put to Mr Clarke in cross-examination but he denied receiving it. He did not give evidence of receiving any other notice to quit at any time.

9. Mr Swaby did not appear and was not represented before the Board. In a written case which Mr Swaby signed and submitted to the Registrar of the Board he stated that his first notice to quit was sent to Mr Clarke by his attorneys on 4 August 1989. That statement, if regarded as an admission, would be broadly consistent with his oral evidence referring to "sometime in the middle to the end of the 80s." But it cannot technically amount to an admission against interest, since Mr Swaby commenced proceedings on 10 April 2000, that is less than 11 years after the notice to quit mentioned in his written case (and so within the 12 year limitation period mentioned below).

10. The other material facts found by the magistrate were that between 1964 and 1968 Mr Clarke spent the equivalent of a little under J$12,000 on materials for improvement of the property, and a little under J$8,000 between 1979 and 1993. The magistrate set a value of J$25,000 on Mr Clarke's labour.

11. After Mr Swaby had taken proceedings for possession of the property Mr Clarke gave notice of a special defence under section 3 of the Limitation of Actions Act 1881 (as amended), which prescribes for proceedings to recover land a limitation period of twelve years "next after the right . . . to bring such action or suit, shall have first accrued to the person . . . bringing the same." Section 4 of the Act explains when the claimant's cause of action arises. It is expressed in terms of "dispossession" and "discontinuance", and does not use the term "adverse possession" (an expression reintroduced into English law, but without its old technicalities, by the Limitation Act 1939, and now used in the Limitation Act 1980). However it is perfectly clear that under the law of Jamaica, as under the law of England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence, and not to an adverse claim: see the opinion of the Board in *Wills v Wills* [2003] UK PC 84, citing the Board's earlier opinion (delivered by Lord Millett) in *Ramnarace v Lutchman* [2001] 1 WLR 1651, 1654:

> "Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner."

That was an appeal from Trinidad and Tobago but the relevant legislation was in substantially similar terms.

12. At the hearing before the magistrate the issues seem to have become confused since counsel then appearing for Mr Clarke emphatically denied that he was relying on adverse possession. Counsel is also recorded as having said that there was no evidence that Mr Swaby took any steps (including, as the context indicates, service of a notice to quit) before March 2000. Mr Henriques QC (who appeared in the Court of Appeal and before the Board, but not before the magistrate) submitted that his predecessor's remark had been taken out of context. Their Lordships cannot accept that. Before the magistrate Mr Clarke's case seems to have been conducted on the basis of a fundamental misunderstanding of the relevant principles. Adverse possession by a squatter for at least twelve years, and the lawful owner's loss of both remedy and title (see section 30 of the 1881 Act as amended) after the running of that period, are two indivisible sides of the same coin. On the case apparently put before the magistrate on behalf of Mr Clarke, there was no assertion of a valid notice to quit having been given at any time (rather the reverse) and whether there was a notice to quit before March 2000 was regarded as irrelevant.

13. The magistrate made an order for possession in favour of Mr Swaby but (acceding to Mr Clarke's secondary case based on proprietary estoppel) made the order conditional on Mr Swaby paying J$45,000 in reimbursement of Mr Clarke's expenditure on the property, that being the rounded-up total of the figures for materials and labour already mentioned.

14. Mr Clarke appealed to the Court of Appeal which unanimously dismissed his appeal. There was a single judgment of Panton JA with which Forte P and Smith JA agreed. On the primary issue it was argued on behalf of Mr Clarke that he was never a licensee, and that there was no evidence to support that finding; and that (contrary to the case put before the magistrate) Mr Clarke had been in adverse possession of the property. On the secondary issue it was argued that Mr Clarke, having spent money on the property, was entitled to remain in possession under a proprietary estoppel.

15. On the primary issue Panton JA, after carefully analysing the evidence given below, concluded that a licence "if not explicit, is implicit in the circumstances." Like the magistrate, he did not refer to the possibility of any notice terminating the licence having been given before March 2000; this is not particularly surprising since the appellant's case was that there had never been any licence at any time. In considering the new argument on adverse possession, Panton JA seems to have thought that time could not

start running against Mr Swaby until he became registered proprietor in 1993. That was in their Lordships' view an error, since from 1983 Mr Swaby (as the executor of Mrs Watt and as beneficial owner of the property) had been in a position to give notice to quit to Mr Clarke, and the formality of registration did not start time running again. But (even if it is right to take account of Mr Swaby's statement that the first notice to quit was given in 1989) there was no finding by the magistrate that Mr Clarke's licence was terminated before the beginning of the relevant limitation period (10 April 1988).

16. Before their Lordships Mr Henriques argued that there should have been such a finding. He submitted that Mr Swaby's conduct and statements at the time of his mother's death made it clear that Mr Clarke must either buy the property (if he wished to remain there) or vacate it – a sort of conditional notice to quit. Their Lordships acknowledge that the magistrate's findings on this point are rather sparse. But the magistrate had been presented with violently conflicting testimony, with Mr Clarke denying almost every salient point in Mr Swaby's evidence. In particular, Mr Clarke denied that Mr Swaby had offered to sell him the property in 1983. The absence of such an offer was put to Mr Swaby, no doubt on instructions, in Mr Swaby's cross-examination. The notion that there was an offer which amounted to a conditional notice to quit was simply not part of Mr Clarke's case.

17. The evidence as a whole suggests that Mr Swaby, living and working as he was in Germany, was not in a strong bargaining position. The likelihood is that in 1983 he had to leave Jamaica with the possibility of Mr Clarke's purchasing the property still in the air. Mr Swaby's evidence was that it remained in the air for a long time, being revisited on his periodic visits to Jamaica (even, as his written case indicates, after his attorneys had given the first notice to quit). Mr Swaby said in chief, as recorded in the magistrate's notes,

> "The last time I visited the land was in 1996. Clarke was not there. I visited the land before that in 1995 and I saw Clarke on the land. I asked about buying but he did not answer."

In short the magistrate was not asked to find that Mr Swaby's conduct and statements in 1983 amounted to a conditional notice to quit, and there was no evidence on which he could have made such a finding.

18. For these reasons their Lordships consider that the Court of Appeal was right to dismiss the appeal on the appellant's primary case. They consider that the Court was also right to dismiss the appellant's secondary case. It is questionable whether Mr Clarke had any right whatsoever by way of proprietary estoppel, since as Panton JA observed,

> "The expenditure by the appellant, it should be added, was not as a result of his being encouraged by the registered owner, nor was it due to any promise of a compensating stake or interest in the property. The expenditure appears to have been done by him with his personal comfort in mind."

There was however no cross-appeal by Mr Swaby. But assuming in Mr Clarke's favour that his expenditure gave him some equitable right, it is clear that the Court had a wide (though not uncontrolled) discretion to fashion a remedy providing (in the words of Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179, 198) "the minimum equity to do justice to the plaintiff" (or in this case the defendant, who was in substance counterclaiming). Often the equity can best be satisfied by a monetary award. Sometimes even a monetary award is inappropriate where (as here) the claimant's expenditure on improvements to a dwelling has been accompanied and followed by years of rent-free accommodation in the dwelling in such a way as to satisfy the equity and leave it exhausted: see the judgment of Hobhouse LJ in *Sledmore v Dalby* (1996) 72 P&CR 196, noted in Bright & McFarlane, Proprietary Estoppel and Property Rights [2005] CLJ 449, 476-477.

19. Mr Clarke can therefore consider himself fortunate to have been awarded J$45,000 as a condition of giving up possession. He has not asked for interest on that sum and it would inappropriate to direct its payment with interest, since Mr Clarke is still in rent-free occupation of the property.

20. For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.