

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G087 of 1992

BETWEEN

SAMUEL GORDON

PLAINTIFFS

AND

WALTER GORDON

A N D

WILLIAM HOGG

DEFENDANT

Donald Scharschmidt Q.C. and John Graham instructed
by Hector Robinson of Broderick & Graham for the
Plaintiffs

Crafton Miller and Mrs. Kim St. Rose instructed
by Crafton S. Miller & Company for the Defendant

July 26 - 29, 1994; January 9 - 13, 16, 17
and April 28, 1995

CLARKE, J.

This is an action of trespass to land brought by the plaintiffs, Samuel Gordon and Walter Gordon against the defendant, William Hogg. It is common ground that since before September, 1991 when the alleged acts of trespass commenced, the defendant has occupied the disputed land comprising some 100 acres known as Westcliffe situate in the parish of Westmoreland and which is the land registered at Volume 695 Folio 36 of the Register Book of Titles.

The plaintiffs' case

The plaintiffs plead that at all material times they have owned the land and have been entitled to possess it. They further plead that "in or about the month of September 1991 the [d]efendant wrongfully entered the said land and premises and has cut down trees growing thereon, removed top soil and marl from the said land and has cultivated the land with crops and the [d]efendant continues to commit the said acts and continues to trespass thereon". They also aver that although they repeatedly requested the defendant to cease trespassing upon the land he has wrongfully refused to do so.

Mr. Graham contends that the action is maintainable against the defendant. He urges me to hold that the evidence and the applicable law show, if I may condense his submissions, the following:

- (1) that at all material times the plaintiffs were invested with the immediate right to the possession of the land;
- (2) that that right was converted into actual possession on the basis of entry made by the plaintiffs before action brought, that is to say, before the writ was filed on 1st May, 1992;
- (3) that the plaintiffs were thereby deemed to have been in possession from the date when their right of entry accrued, namely on the accrual of their title on the execution of a sale of land agreement between Lois Mooney and Katherine Coleman, as vendors, and the plaintiffs, as purchasers, dated 24th August 1991;
- (4) that the defendant accordingly became a trespasser by reason of his continued occupation after the accrual of the plaintiffs' title.

The foundation for the submission that the plaintiffs were at all material times invested with the right to immediate possession of the land rests on the aforesaid written agreement for sale according to which Lois Mooney and Katherine Coleman agreed to sell, and the plaintiffs agreed to buy, the land for the Jamaican dollar equivalent of US\$100,000.00, the plaintiffs having the right to possession on execution of the agreement. It is not in dispute that at the time of the alleged execution of the sale of land agreement the Register Book of Titles showed that the registered proprietors of the fee simple absolute title to the land were Raymond Edward Coleman and Lois Mooney holding as tenants in common as to three quarter share to the said Raymond Edward Coleman and one quarter share to the said Lois Mooney. Nor is it in dispute that (a) Raymond Edward Coleman died on 18th August, 1985 in the United States of America, testate, (b) that probate of his will was granted in that jurisdiction to his executrix and sole beneficiary, Katherine Coleman and (c) that on 31st October 1989 Letters of Administration with the said will annexed of all his estate devolving and vesting in his personal representative were granted by the Supreme Court of Jamaica to Frederick Hamaty, Katherine Coleman's lawfully appointed attorney.

Testifying on behalf of the plaintiffs, Katherine Coleman said that Lois Mooney and herself contracted to sell the land to the plaintiffs in the terms of the said agreement for sale. Mrs. Coleman admitted that when that document was executed she was not then a registered proprietor of the land, having only been registered on transmission on 26th August 1992 as the proprietor of Raymond Edward Coleman's 3/4 share of the tenancy in common with Lois Mooney.

It is as well to note at this stage that section 130 of the Registration of Titles Act provides as follows:

- "130 (1) When registered land shall have been acquired by transmission the person claiming to have acquired the same shall apply in writing to the Registrar to be registered as the proprietor thereof ... Upon such entry being made the person so entitled shall become the transferee of such land ... and be deemed to be the proprietor thereof ...
- (2) The title of every person becoming a transferee under this section shall, upon such entry being made, relate back and be deemed to have arisen upon the happening of the event upon which the registered land ... shall have been acquired by transmission as if there had been no interval of time between the happening of such event and such entry."

Having regard, therefore, to that deeming provision, Mrs. Coleman would clearly have had the capacity in the interval of time between the date of Raymond Coleman's death and the entry of her name as transferee, to join with Lois Mooney to contract on or about 24th August 1991 to sell the fee simple absolute estate in the land registered at Volume 695, Folio 36, provided, of course, (a) there had been no disposition, or at all events, no specifically enforceable contract to dispose of the respective interests in the land or (b) there was no prior acquisition thereof by adverse possession.

Consideration of defendant's plea of purchaser in possession or alternatively plea of possessory title

Denying that the plaintiffs owned the land or was entitled to possess it as alleged, the defendant pleads that he is a purchaser in possession of the land, having purchased same under an oral agreement for sale in 1983 between himself and Raymond Edward Coleman, then the owner of three quarter share of the land. Concerning that alleged agreement the defendant pleads the following particulars:

- "(a) That Mr. Raymond Coleman, deceased, and the Defendant, William Hogg entered into an oral agreement whereby Mr. Coleman offered the property for sale on the condition that, Mr. Hogg would treat the money, then owing to him, Mr. Hogg by Mr Coleman as part of the purchase price of the property.
- (b) It was further agreed that the purchase price would have been US\$75,000.00.
- (c) Both Mr. Coleman and Mr. Hogg agreed to put it in writing.
- (d) Mr. Hogg then drew up the Agreement in writing and executed it and gave it to Mr. Coleman.
- (e) At that stage, it was further agreed by Mr. Hogg and Mr. Coleman that Mr. Hogg would take possession as purchaser, he having been in possession of the property before and continue in possession."

In the alternative the defendant pleads that "he has obtained a possessory title over the said land in Volume 695 Folio 36 by way of long use and the whole of the said property since 1971." So he is here asserting that by reason of his being in possession since 1971 (albeit not as a purchaser) he has acquired a possessory title to the land. If that is correct, Mrs. Coleman and Mrs. Mooney would not be competent to contract to sell the land to the plaintiffs. Yet, for the defendant to acquire such a title his possession must be shown to have been adverse to the ownership of the then registered proprietors of the land.

Although the defendant abandoned his counterclaim and called no evidence at trial I am satisfied by the evidence called by the plaintiffs that the defendant began occupying the land in 1973. This he did with Raymond Coleman's permission. Raymond Coleman acquired his interest in the land in or about 1968. He and his wife, Katherine, lived in the United States and although they would sometimes come to Jamaica they needed someone to oversee the property. I accept Mrs. Coleman's evidence that with her husband's approval the defendant occupied the land on this basis: that the defendant would keep an eye on the property and in return he would depasture his cattle on it. I find that not only did the defendant depasture his cattle on the land but he would conduct other activities thereon, such as operating a marl pit. For instance, in 1983 when the Colemans paid one of their infrequent visits to Jamaica, Mrs. Coleman noticed that the defendant was still operating a marl pit on the land, an activity she saw

him doing ten years earlier. By 1983 he had cut a road on the property and had made other improvements. I also find that on that same visit in 1983 Raymond Coleman and the defendant entered into an oral agreement for sale whereby Coleman agreed to sell, and the defendant agreed to buy, Coleman's interest in the land on condition that the defendant would treat the money owing to him by Coleman for work and improvements done on the land as the purchase price of the land. Plainly, up to the time of that agreement the defendant's occupation of the land could not have been adverse to the ownership of the registered proprietors of the land. Time, therefore, had not begun to run under the Limitation of Actions Act against the registered proprietors. The defendant was not on the land as a squatter but as a licensee of Raymond Coleman. The licence conferred on the defendant only a personal right and not an equitable interest binding on third parties. But even if, contrary to my view, time began to run from the date of Raymond Coleman's death in 1985, the defendant could not have acquired a possessory title to the land by the date of the writ, viz 1st May 1992, because such possession would have been less than the 12 year limitation period under the Limitation of Actions Act.

Although he has not acquired title to the land by adverse possession it is important to note that he has occupied the land since 1973. Accordingly, for the plaintiffs to succeed they must prove that they nevertheless have been entitled to immediate possession of the land since September 1991 and have made entry on the land or made a claim to it in its immediate neighbourhood before the action commenced on 1st May, 1992. If they have met those requirements (a question I will determine shortly) then the legal position would in no wise be affected by the fact (if such be the case) that another who, without title, was previously in possession persists in remaining upon the land concurrently with them. The law in this connection was, in my view, amply expressed by Maule, J. almost 150 years ago when he said this:

"As soon as a person is entitled to possession and enters in assertion of that possession ... the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has title is in actual possession

and the other person is a trespasser":
see Jones v. Chapman (1847) 2 Exch. 803,
821, approved by Lord Selborne in Lowes v.
Telford (1876) 1 App. Cas. 414, 426.

The defendant seeks to justify his continuance in possession by setting up the oral agreement of 1983 made between Raymond Coleman and himself for the sale and purchase of Coleman's three quarter share of the tenancy in common of the fee simple. But does that agreement transfer Coleman's interest in the land to the defendant? That depends on whether the contract is specifically enforceable, for in equity a specifically enforceable contract for the sale of land transfers the equitable interest to the purchaser, the vendor holding the legal title in constructive trust until completion. Equity regards as done that which ought to be done. In other words where there is a specifically enforceable obligation equity regards the parties as already in the position which they would be in after performance of the obligation: see Hanbury & Maudsley, Modern Equity 12th ed. at page 29 where that correct statement of principle is stated.

There is, however, no admissible evidence in the case before me that the oral agreement was reduced into writing or that a note or memorandum thereof was signed by Raymond Coleman or by anyone authorised by him. In this context I accept Mrs. Coleman's evidence that although she was present when the oral sale agreement was made she did not see, as was suggested, the defendant reduce same into writing. She said her husband subsequently told her that although the defendant had put the oral agreement in writing same was not signed but was handed over to her husband's lawyer, Mr. Frederick Hamaty. Again, the defendant having occupied the land prior to the making of the oral agreement, his continued occupation thereafter clearly does not constitute part performance, for that occupation is plainly not referable to the oral agreement. Accordingly, the agreement for the sale of Coleman's share has never been specifically enforceable, there being no evidence of writing or part performance.

Had the defendant come as a plaintiff seeking specific performance by Raymond Coleman or by his executrix, Mrs. Katherine Coleman, he could clearly have been defeated by the Statute of Frauds which makes a contract for the sale of an interest in land unenforceable unless the contract or a note or memorandum of it is in writing signed by the party to be charged or by his lawfully authorised agent. So in the absence of any special ground for equitable relief, such as part performance, such a suit by the present defendant would be defeasible in a court of equity. Since the oral agreement is not specifically enforceable no equitable interest in the land has been transferred to the defendant.

Equally, the oral agreement is incapable of creating any legal estate or other legal right in rem. It is a mere contract operating at common law purely in personam. So, at the most, an action by the defendant for breach of contract sounding only in damages would lie against, and only against, Mrs. Coleman in her representative capacity as the executrix of the estate of Raymond Coleman, deceased. It therefore follows that Mrs. Coleman qua executrix and Lois Mooney were nevertheless competent to contract to sell the fee simple estate in the land to the plaintiffs, as, indeed, Mrs. Coleman and the first plaintiff, Samuel Gordon testified was done.

Question of the enforceability of the written agreement for sale relied on by the plaintiffs

Did Mrs. Coleman, Lois Mooney and the plaintiffs enter into the written agreement for sale admitted in evidence? If they did, is that agreement specifically enforceable?

The plaintiffs are brothers. They come from Orange Hill, Westmoreland about 1½ miles from the land in question. The second plaintiff, Walter Gordon has always resided in Jamaica. The first plaintiff, Samuel Gordon, resides in the United States since migrating there some 31 years ago. During that time he bought land from the defendant, who is himself a landowner residing in Westmoreland in close proximity to the land in dispute. Having finally decided to return to live in Jamaica Samuel Gordon made enquiries with a view of purchasing additional lands. When he visited Jamaica in July 1991, his enquiries led him to speak with attorney-at-law Frederick Hamaty. Mr. Hamaty was then, be

it remembered, the lawfully appointed attorney of Mrs. Coleman in her role as personal representative of her deceased husband's estate in Jamaica. Having spoken to Mr. Hamaty, Samuel Gordon met and spoke with Mrs. Coleman in the United States. This he did in August 1991. Later that month, together with Lois Mooney and Mrs. Coleman he met in New York with Mr. Dennis Tomlinson, an attorney-at-law then practising both in New York and Jamaica. They discussed the question of the sale of the land. All that I accept.

I further find that Lois Mooney, Mrs. Coleman and the first plaintiff, Samuel Gordon, subsequently executed on or about 24th August 1991 a sale of land agreement in writing drawn up by Mr. Tomlinson according to which Lois Mooney and Mrs. Coleman agreed to sell and the plaintiffs agreed to purchase the said land for the consideration money therein stated which the plaintiffs duly paid. That agreement, admitted in evidence, reads as follows:

"AGREEMENT FOR SALE made this 24th day of August 1991, whereby it is agreed that the VENDOR shall sell and the PURCHASER shall purchase ALL THAT parcel of land more particularly described herein upon the terms set out as follows:-

VENDOR	:	LOIS MOONEY and KATHERINE COLEMAN, of and respectively,
PURCHASER	:	SAMUEL FRANCIS GORDON and WALTER GORDON, both of Orange Hill, Mount Airey, P.O. Westmoreland
DESCRIPTION OF PROPERTY	:	ALL THAT parcel of land part of Pitkelleny also known as Westcliffe, situate in the Parish of Westmoreland and being the land composed of Volume 695, Folio 36 of the Register Book of Titles.
PURCHASE MONEY	:	A deposit of the Jamaican Dollar equivalent of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) (UNITED STATES CURRENCY)
HOW PAYABLE	:	A deposit of the Jamaican Dollar equivalent of FIFTEEN THOUSAND DOLLARS (\$15,000.00) (UNITED STATES CURRENCY), on signing of this Agreement. Balance on Completion.
COMPLETION	:	On the payment of all moneys payable by the purchaser hereunder in exchange for a registrable Transfer to the Purchasers and the Duplicate Certificate of Title for the said premises.

POSSESSION : On execution of this Agreement

**TAXES, WATER RATES
RENT & OUTGOINGS** : To be apportioned as of the date of
possession.

**TITLE AND COSTS OF
TRANSFER** : Registered Title, Stamp Duty,
Registration Fee and Vendor's
Attorney's fees in accordance with
the scale of charges of the Jamaica
Bar Association to be borne by the
Vendor and Purchaser's equally.

**INCUMBRANCES
RESERVATIONS
RESTRICTIONS &
EASEMENTS** : Free from all incumbrances other
than the restrictive covenants and
easements (if any) endorsed on the
Title and such easements as are
obvious and apparent.

CARRIAGE OF SALE : DENNIS TOMLINSON & CO.
Attorney-at-law
25 Dominica Drive
Kingston 5.

SPECIAL CONDITIONS

1. It is understood and agreed that the Vendor's
Attorneys-at-law shall be entitled to stamp
this Agreement For Sale with Stamp Duty and
Transfer Tax from the deposit paid and that if
for any reason whatsoever the deposit has to
be returned to the Purchaser, the Purchaser
shall to the extent of such duty and or and
impressed, be deemed to have refunded same by
delivery up to him of the original Transfer
Tax receipt and stamped Agreement of Sale duly
noted by the Vendor as cancelled.
2. The Attorney's costs for preparing this
Agreement for Sale fixed at the sum of Two
Thousand Dollars \$2,000.00, shall be borne
by the Vendor and Purchaser equally and each
party shall pay their share thereof on the
signing of this Agreement.

SIGNED BY the said LOIS MOONEY)

in the presence of:-)
Dennis Tomlinson)

Sgd. LOIS MOONEY

SIGNED BY the said)
KATHERINE COLEMAN)

in the presence of:-)
Dennis Tomlinson)

Sgd. KATHERINE COLEMAN

SIGNED BY the said)
SAMUEL FRANCIS GORDON)
)
in the presence of:-)
Dennis Tomlinson) Sgd. SAMUEL FRANCIS GORDON

SIGNED BY the said WALTER GORDON)
)
in the presence of: -)
Dennis Tomlinson) Sgd. WALTER GORDON "

Whilst the vendors signed the agreement in their respective names I accept Samuel Gordon's evidence that he signed the agreement both in his name and on his own behalf as well as in the name and on behalf of his brother, Walter Gordon, as purchasers. I also find that when Samuel Gordon signed the name, Walter Gordon, neither Samuel Gordon, nor the vendors nor Mr. Tomlinson, who witnessed all the signatures to the agreement, intended to deceive or defraud.

As I have already found, the defendant never acquired a title to the land by possession nor at any time held any legal or equitable title to, or interest in, the land. So, although he has pleaded fraud, the question of him being deprived of the land by fraud as against the persons registered as proprietors thereof allegedly through fraud, does not in the result arise. In any case I find that there was nothing in the conduct of the plaintiffs prior to, or at the time of, or subsequent to, the execution of the said agreement for sale that would make it inequitable for that agreement to be specifically enforced. And the defendant, who be it noted, abandoned his counter-claim and called no evidence, has failed to prove any of his pleaded allegations of fraud by the vendors or the plaintiffs in the process by which the plaintiffs came to be registered as proprietors of the land subsequent to the filing of the writ on 1st May 1992.

Upon its execution the said agreement for sale became, in my judgment specifically enforceable. Accordingly, it transferred the entire equitable interest in the land to the plaintiffs. To that extent, therefore, they became owners and were, contrary to Mr. Miller's submission, entitled to plead, as they did, that they were at all material times owners of the land. As equitable owners of the land they had the right to immediate possession as stipulated for in the agreement for sale itself.

Question of entry on the land before action brought

Before the action commenced on the 1st May 1992, was the plaintiffs' right to immediate possession converted into actual possession by entry upon any part of it? The slightest acts by a person having title to land indicating his intention to take possession are sufficient to enable him to bring an action for trespass against a defendant in occupation of that land without title.

Armed with a letter dated 23rd September 1991 from Mr. Tomlinson declaring their right to immediate possession of the land, the plaintiffs first attempted to take possession of the land in December 1991. They then went on to the land but could do nothing on it, for they met with opposition. The police were called but the matter was not resolved. In March 1992 the plaintiffs tried to do some work on the land but were locked out. The defendant was called to the property. He came. The parties thereupon respectively claimed ownership of the property. It therefore seems abundantly clear to me - indeed I draw the reasonable and inescapable inference from the facts set forth in this paragraph - that the plaintiffs made entry upon the land in December 1991 and March 1992.

This therefore means that the plaintiffs upon entry were deemed to have been in possession from the date when their right of entry accrued, that is, from the accrual of their title on or about 24th August 1991. Although the defendant has been in occupation of the land since before then, he has no title to the land either at law or in equity. The plaintiffs' action, brought against him for trespass in or about September 1991 and continuing up to the filing of the writ on 1st May 1992, is therefore maintainable.

Extent of plaintiffs' entitlement to relief

The plaintiffs' claim (a) damages for the acts of trespass (b) an injunction to restrain the defendant whether by his servants or agents from continuing the trespass and (c) an account of all income derived from the land from September, 1991.

The defendant by wrongfully occupying the land since September 1991 (at the latest) has deprived the plaintiffs of the use and enjoyment of the land since then. Yet the plaintiffs have failed to prove their averments that the defendant

"has cut down trees growing thereon, [or] removed the top soil [or] marl from the land with crops." But in spite of that failure the plaintiffs would be entitled to be awarded a sum (if proved) representing the value of the occupation since September 1991 down to the present time. The measure of damages would be the market rental value (if proved) of the land for the period of the wrongful occupation even though there is no evidence that the plaintiffs would have let out the land (agricultural as well as residential property) during the period of occupation or user. As was said in one case, "[where residential property has been occupied wrongfully the plaintiff] is entitled without bringing evidence that he could or would have let the property to ~~someone~~ else, in the absence of the trespassing defendant, to have as damages for trespass the value of the property as it would fairly be calculated, that is, the ordinary letting value": Swordheath Properties v. Tabet [1979] 1 All. E.R. 240, 242 per Megaw L.J.

Evidence of market value or letting value is, however, lacking in the instant case. So, in the absence of such evidence only nominal damages are awardable to the plaintiffs. Their right to immediate possession of the land which has been invaded by the defendant gives them judgment for "a sum of money that may be spoken of, but has no existence in point of quantity": Beaumont v. Greathead (1846) C.B. 494, 499. I accordingly, award the plaintiffs the token sum of \$200.00.

I also grant them an injunction restraining the defendant whether by himself, his servants or agents from remaining on or continuing in occupation of the said land.

However, the claim for an account states no facts showing that the plaintiffs are entitled to the account which they claim. In any case there is no evidence that the defendant is an accounting party or that he has derived any income from the land from September, 1991. Accordingly that claim fails.

Nevertheless, having regard to the judgment pronounced in favour of the plaintiffs with respect to their claim in trespass, the defendant must pay the plaintiffs' costs which are to be taxed if not agreed.

Costs referred to

① Town v. Chapin (1847) 2 Exch 503

② Lowrey v. Telford (1876) 1 App. Cas 414

③ Swordheath v. Tabet [1979] 1 All. E.R. 240

④ Beaumont v. Greathead (1846) C.B. 494