IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. CL 2002/H054

BETWEEN	ERIC HAMILTON	CLAIMANT
AND	ALRIC BROWN	DEFENDANT

HEARD ON THE 1ST OF OCTOBER, 2003

Mrs. Andrea Bickhoff-Benjamin	Instructed by Grant, Stewart, Phillips and Company for the Claimant
Mr. Rudolph Francis	For the Defendant instructed by Glen Cruickshank

Sinclair-Haynes, J. (Ag.)

The claimant Eric Hamilton and his cousin Fitzroy Hamilton, now deceased, acquired the Legal Fee Simple as tenants in common in property situate at Blackstonege in the parish of St. Ann and registered at Volume 1185, Folio 888, for the purpose of cultivating same.

The claimant has deponed that there was an oral agreement between them that the said property should be split down the centre for such purpose. This evidence is unchallenged.

In 1996 the deceased, Fitzroy Hamilton purportedly sold two and a

half (2½) squares of the said property to the defendant. Indeed, he purportedly sold several other parcels to other persons.

In 1997 the defendant entered into possession of the said property and attempted, through his attorney to acquire a registered Title. As a consequence, his attorney invited the claimant to a meeting in her office. At that meeting, the claimant expressed his ignorance of the said sale and requested certain details of the sale, for example, price, from the said Fitzroy Hamilton, now deceased.

The claimant agreed to have the property surveyed. Upon survey, it was discovered that the parcel purportedly sold to the defendant encroached upon the claimant's section. Efforts to resolve the matter failed and the said Fitzroy Hamilton decided to refund the purchasers but the defendant refused to remove.

The defendant knew that the claimant was a co-tenant of the said property, because at the time he entered into the agreement of sale, he was shown the title to the said property which title bore the name of the claimant as co-tenant.

Fitzroy Hamilton died in 2001. He shall hereinafter be referred to as the deceased.

The claimant instituted proceedings against the defendant on the

2nd May, 2002 for the following:

a. Possession

b. Damages for trespass

c. An injunction restraining the defendant whether by himself, his servant or agents or otherwise, however from creating any structure, permanent or otherwise on the said land.

The defendant filed his defence to the said claim in which he stated that he purchased the said two and a half (2 ½) squares of land from the deceased. He denied entering wrongfully upon the claimant's land and that the claimant suffered any loss.

On the 11th November 2002, the claimant filed a summons to strike out the defence and for leave to enter judgment. This was supported by affidavit.

The defendant has resisted this application by way of affidavit dated 6th November, 2002, in which he reiterated that he purchased the said land from the said Fitzroy Hamilton.

Submissions by Mr. Rudolph Francis

Counsel for the defendant, Mr. Rudolph Francis has submitted that the omission of the word "Summary" from the summons precludes the judge

from entertaining an application for summary judgment. He has argued that the matter ought to be tried and viva voce evidence adduced because the defendant has raised substantially triable issues. He cited the case of Wenlock v Moloney and others.

The omission of the word "Summary" is immaterial because now the judge may on his or her own initiative grant Summary Judgment.

Wenlock v Moloney (1965) 2 All ER 871 and others is no longer good authority. Judge Kennedy QC in the case Biguzzi v Rank Leisure 1999 4 All ER 934 said,

> "I doubt very much whether any of the authorities can assist, although it is perfectly true, as Counsel both pointed out to me that in some of the later striking out cases ... there were some foreshadowing and expressions of views as to how things might be under the new order.
> I have to say that this court's view after extensive training and a good deal of discussion and thought, is that the new order will look after itself and develop its own ethos ...reference to the old decisions and the old rules are distracting."

Part 15.2 of the Supreme Court of Jamaica Civil Procedure Rule states:

> The Court may give summary judgment on the claim or on a particular issue if it considers the defendant has no real prospect of successfully defending the claim or issue.

Lord Justice Woolf, in considering the English provision under the English Civil Procedure Rules which is in every respect identical to ours,

had this to say in the case of Swain v Hamilton (1999) The Times 2001 1 All ER 91.

> "Under part 24.2 the Court now has a very Salutary power, both to be exercised in a claimant's favour or where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding," do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or as Mr. Bidder submits, they direct the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success."

The court may give summary judgment on the claim or on a particular issue if it considers the defendant has no real prospect of successfully defending the claim or issue.

A claim which is really hopeless should not be allowed to continue (See Harris (Elizabeth) v Bolt Bowder (a firm) 2000 Lawtel 2nd February. In order for an application for summary judgment to succeed three conditions must be satisfied.

(1) All substantial facts relevant to the claimant's case which are reasonably capable of being before the court must be before the court.

(2) Those facts must be undisputed or there must be no reasonable prospect of successfully disputing them.

(3) There must be no real prospect of oral evidence affecting the

court's assessments of the facts.

(See S v Gloucestershire County Council and L v Tower S Hamlets London Borough Council (2000). The Independent 24th March CA.

Indeed the application will be "inappropriate where there are vital disputes of facts." Having read the affidavits of the claimant, Rodney Nelson, Jimna Wilson, the defendant, and the defendant's attorney, Mrs. Jennifer Martin, the above criteria are all satisfied since there are no differences as regards the basic facts.

The issue therefore is whether the defendant has a realistic prospect of success. The claimant and the deceased were co-owners of the Legal Fee Simple. There was therefore unity of possession.

A division of the property is repugnant to the nature of a tenancy in common for it is an essential characteristic of a tenancy in common that each of the tenants has the right to occupy the whole of the property in common with the others.

Unity of possession exists. Each co-owner is as much entitled to possession of any part of the land as the others. One co-owner cannot point to any part of the land as his own to the exclusion of the others.

If he could, there would be separate ownership and not co-ownership.

The share or interest which a co-tenant has in land is an undivided share, that is to say a distinct share in a property which has not yet been divided among the co-tenants. (Megarry and Wade).

In the case of Leiba v Thompson 31 JLR. 183 it was held that each co-tenant may contract to sell his undivided share without the consent of the co-tenant but where the interest of the vendor is an undivided share of the entire property he may not contract to sell three-quarters (¾) of an acre for he has no interest in the property which may be quantified as three-quarters (¾) of an acre. Had he contracted to sell his undivided share, then the sale would be valid.

In the instant case the deceased and the claimant held the Legal Fee Simple at Blackstonege as co-tenants. The unchallenged evidence is that at no time the claimant was a party to the agreement of sale dated 14th March, 1996, purporting to convey the said two and a half (2½) squares to the defendant.

Indeed he was only made aware of this in 1997 when the defendant attempted to obtain a registered title for the said land and in furtherance of this caused his attorney to invite him to her office.

It is true that the claimant agreed with the deceased as to where his section of the land was. However, the claimant was not privy to the sale of

the land and did not acquiesce in the said sale. Upon discovering the purported sale, the claimant agreed in the presence of all relevant parties that an imaginary line had been drawn down the centre and he agreed for a survey to be done, no doubt to determine whether persons were sold any of his portion and no doubt to resolve the matter amicably. The survey, however, revealed that the defendant was encroaching on the claimant's side of the property. The deceased had no authority to enter into such sale.

In as much as there was an agreement to divide the property for the purpose of occupation and cultivation, there was never any agreement or even discussion between the claimant and the deceased to sell.

The deceased attempted unilaterally to sell the said two and a half (2½) squares. Assuming the claimant is found to be estopped from denying the property was divided, the defendant's two and a half (2½) squares of land is encroaching on the claimant's section. The deceased could not sell that which he did not possess. Nemo dat no quod habet.

The dictum of Wolfe J A as he then was in the matter of Leiba v Thompson is instructive.

"The tenants in common's interest in an estate is an undivided share. He can dispose of that undivided share, but he has no interest in land which can be quantified as three-quarters (¾) of an acre. The term undivided is self explanatory.
What it means is that the interest of the parties has not been allocated in terms of acreage. The interest is an undivided share in the entire estate, so when Herbert Lester Thompson purported to sell three-quarters (¾) of an

acre without the consent of the other tenant in common, he was virtually selling an estate he did not possess."

So too, when the deceased purported to sell to the defendant 2 ½ squares he was selling that which he did not possess.

Re: Submission that Claimant is guilty of Laches

Mr. Rudolph Francis submitted that the Claimant is guilty of Laches.

Lord Camdent's statement in Smith v Clay (1767) 3 Bro CC, 639 encapsulates the true meaning of the principle of Laches. "Equity aids the vigilant and not the indolent."

A plaintiff is bound to prosecute his claim without delay. A court of equity refuses its aid to stale demands where the plaintiff has slept on his right and acquiesced for a great length of time. He is then barred by his Laches. Halsbury's Laws of England, Third Edition, Volume 14, page 641.

The defence of Laches is only allowed where there is no statutory bar. This matter concerns land, hence the Statute of Limitation is applicable. No application for interlocutory relief has been sought. In the circumstances, the defence of Laches cannot succeed

In any event, the claimant in this matter cannot be said to have stood by while he was violated.

The defendant entered upon his property in 1997 and he became aware of his presence in 1997. He attended the lawyer's office and agreed

to a survey being done. The survey revealed that the defendant was encroaching on his section.

An offer was made by the deceased to the purchasers to refund their monies. This was rejected by the defendant. Fitzroy Hamilton died in 2001.

On the 2nd May 2002, the claimant instituted proceedings against the defendant.

Re: submission that the defendant is a bona fide purchaser for value without notice

Mr. Rudolph Francis also submitted that the defendant purchased the property as a bona fide purchaser for value without notice.

Was he really?

Paragraph 3 of his affidavit dated 6th November, 2002 he deponed. "I told him I was interested in buying a piece of the land... Mr. Fitzroy Hamilton who showed me a title which indicated that he and Eric Hamilton owned land in the area."

In paragraph 10 of the said affidavit he stated ... "I entered into the agreement with Mr. Alric Brown and I did so having been shown a copy of a title which indicated that Mr. Alric Brown was a co-owner of the premises and without advice of attorney-at-law and was of the view that I was entitled to enter into a contract of sale with him for sale of land to me."

From the very inception therefore the defendant knew that the deceased was not the sole owner. In fact he had actual notice. He cannot be said to be a bona fide purchaser for value of the Legal Fee Simple without notice. The fact that he felt he was entitled to enter into the contract cannot erase the duty he had to enquire into the title. He cannot now pray in aid the shield be of bona fide purchaser for value without notice.

The claimant as co-owner, not having provided the deceased with the requisite consent to sell meant the deceased had no power to sell any portion of the land. As a consequence, the purported sale was ineffective and unenforceable.

Conclusion

All substantial facts, relevant and pertinent to the matter have been placed before the court in the form of affidavits. It is quite evident that the defendant's defence must fail.

This is clearly not a "mere trigger happy and over enthusiastic application," but rather an eminently appropriate application in which summary judgement can be granted.

I therefore conclude with the very pertinent remarks of Lord Woolf. in the case of Swain v Hillman.

"It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In so doing he or she gives effect to the

overriding objectives contained in Part 1. It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and I would add, generally that it is in the interest of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interest to know as soon as possible that that is the position, likewise, if a claim is bound to succeed, a claimant should know as soon as possible."

Accordingly, Summary judgment is granted on the ground that the defendant has no real prospect of successfully defending the claim.

The defendant is to deliver up possession of land known as Lot 5 Blackstonege in the parish of St. Ann, registered at Volume 1185 Folio 888 in the Register Book of Titles or any part of the said land that the defendant now occupies.

The defendant is hereby restrained whether by himself, his servants or agents or otherwise howsoever from erecting a structure permanent or otherwise on the land.

The defendant is directed to demolish any structure already erected on the said land.

Cost of the application to the plaintiff to be taxed if not agreed.

Leave to appeal granted. Stay of execution for three (3) months.