

*Sup. Ct. - Interlocutory Mandatory Injunction - Annulment for-
Sent for Treachery - Injunction - Test to be announced
whether plaintiff case strong and clear - Balance of convenience
in defendant's favour. Annulment dismissed.
Case referred to (p. 9 (at end))*

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

*comp
Conveyancing
Remedies*

SUIT NO. C.L. 1992/H034

BETWEEN	CLIFFORD LEOPOLD HAMMOND	PLAINTIFF
A N D	HERMINE DARBY	FIRST DEFENDANT
A N D	CHARLES DARBY	SECOND DEFENDANT

Mr. Lawton Heywood instructed by Daley, Walker & Lee Hing for plaintiff.

Mr. Scharsmidst Q.C. and Mr. Givans instructed by Dunn Cox & Orrett
for both defendants.

HEARD: February 11 & 12, 1993
& October 8, 1993

LANGRIN, J.

I have before me a summons seeking an Interlocutory Mandatory
Injunction as under:-

"That the Defendants be restrained
by themselves their servants agents
or otherwise howsoever from remaining
and continuing in occupation of that
parcel of land registered at Volume
1227 Folio 833 of the Registered Book
of titles."

The plaintiff is the registered proprietor in fee simple of
all that parcel of land part of Hope Pen in the parish of Clarendon
being the parcel of land registered at Volume 1227 Folio 833 of the
Register Book of Titles and containing by Survey 178 acres. According
to the plaintiff on or about 21st January, 1992 the defendants
wrongfully entered upon the said land and notwithstanding repeated
requests by him to vacate and deliver up the land, they have wrong-
fully refused to do so.

On 20th February, 1992 a writ was issued against the defendants
to restrain them from remaining in occupation of the land as well
as seeking damages for trespass.

On the same date a summons for mandatory Injunction was issued.
Since that time pleadings as well as affidavits had been filed
before the matter came up before me.

The First defendant is executrix and widow of her late

husband, Louis Darby. The second defendant is the father of Louis Darby.

Hope Estates Limited sold two parcels of land comprising 20 acres and 9 acres on the 19th August, 1967 and 6th August, 1971 respectively to the Defendants. Transfers in respect of these parcels of land were duly executed.

After the sale to the Darbys, Hope Estates Limited sold the remaining portion of its land to Ernest Rose by an agreement for sale dated 1st August, 1973. The said agreement for sale expressly provided for the sale of not less than 148 acres. There was a special condition in this agreement which is as follows:-

- "3. Approximately 29 acres part of the property has been agreed to be sold to Charles and Louis Darby by the Vendor and this area is excluded from the property agreed to be sold. The purchaser will transfer the said 29 acres at the sole cost of the Vendor to the said Charles and Louis Darby upon the Vendor obtaining all necessary plans and approvals for the transfer."

Ernest Rose transferred the land to Three Acres Limited. Jamaica Development Bank became the owner of the said lands by virtue of powers of sale under a mortgage given by Three Acres Limited on 28th December 1974. Jamaica Development Bank subsequently sold the remaining portion of land to the plaintiff, Clifford Hammond under powers of sale of the mortgage and transferred the land to the plaintiff on October 28, 1986.

In a letter written by the Director of Legal Services of the Jamaica Development Bank on the 2nd April, 1979 to the Chairman, Land Development and Utilization Commission concerning the lands in question it stated inter alia as under:-

"Please note that the Agreement for sale by virtue of which Three Acres Limited purchased the lands show that twenty nine (29) acres of the above lands were previously sold to Charles and Louis Darby."

It is of interest to note that the mortgage instrument between Three Acres Limited and Jamaica Development Bank under Item 3 dealing with 'Securities' makes reference to Happie Farm of 148 acres Registered at Volume 995, Folio 449. It is difficult to understand why Jamaica Development Bank in exercising its power of sale under the mortgage between itself and Three Acres Limited transferred the entire 178 acres instead of the 148 acres which was the land owned by Three Acres Limited and reflected in the mortgage instrument. What clearly transpired is that Jamaica Development Bank sold to the plaintiff 30 acres of land in which it did not have an interest. The principle of 'Nemo dat quod non habet' readily comes to mind.

The question which arises is whether the error of this transaction was known to the plaintiff. If indeed, the plaintiff was unaware of it and I refrain from making a finding at this stage, Jamaica Development Bank appears blameworthy.

Naturally, if the plaintiff was unaware of the lack of ownership of the land by these defendants then some amount of sympathy would have to be extended to him. However, sympathy undoubtedly would not be an adequate basis for making an order in these proceedings.

The defendant Bernine Darby in June, 1987 took steps to have the land subdivided and a survey diagram prepared by the Commissioned Land Surveyor, Mr. M. W. Irvine indicated that notices were served on Clifford Hammon. He has in a later affidavit denied receiving any such notice.

It appears from the affidavits that the evidence is uncontrovertible that the defendants have been in occupation of the said land since 1968 and their right to occupation has never been disturbed. Since their occupation the defendants have used the said two parcels of land for farming - cultivating such crops as sugar cane, tobacco and rearing of cattle. Concrete structures including a house for a headman was built by the defendants in the late sixties. Additionally, permanent fencing has been placed

around some of this property.

In dealing first with the question of the test which is to applied it is correctly stated in 24 Halsbury's Laws (4th edition) para. 948 in a passage headed 'Mandatory injunction on interlocutory applications'. That passage reads:-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear, and one which the Court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff..... a mandatory injunction will be granted on an interlocutory application."

In *Shepherd Holmes Limited vs. Sandham* (1970) 3 AER. 402 Megarry J. at page 412 in the course of his judgment said:-

"Third, on motion, as contrasted with the trial, the Court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case, the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

(Underlining mine)

The above principles were adapted in a judgment of the Court of Appeal in Jamaica: Esso Standard Oil S.A. Limited v. Lloyd Chan delivered on March 14, 1988 by Campbell J.A.

The plaintiff must therefore satisfy the Court consistent with his claim that the defendants entered and remained on the land unlawfully so that the Court will 'feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted'. Put another way, the plaintiff's case must be unusually strong and clear' before a mandatory injunction will be granted.

Mr. Heywood on behalf of the plaintiff submits that the plaintiff is the registered fee simple owner of all the land comprising by survey 178 acres and since registration defeats all prior rights except rights under the Statute of Limitation, the plaintiff holds the land absolutely. This is so, he submits, because the period of limitation stops running when title is transferred. In any event, he argues the defendants entered the land on the 21st January, 1992 so they could not derive the benefit of the limitation period.

The only authority upon which the plaintiff relies apart from the Registration of Titles Act is Archer et ux v. Georgiana Holdings Limited 12 JLR 1421. In that case, according to the facts recited, an action was brought seeking a declaration inter alia that the plaintiffs were owners in fee simple of a portion of an adjoining lot of land of which the defendant was the registered proprietor. The plaintiff had built a house and a garage on their land but the buildings became endangered by the erosion of the banks of a gully which passed through the defendants land and near to the boundary of the plaintiffs' land. Complying with a mortgages requirement, the plaintiff created land by pushing the gully course back from their buildings. By a number of acts the plaintiffs were said to be occupying approximately twice as much of the defendant's land as previously. The plaintiffs admitted the defendant's title to the disputed area but asserted a possessory title by virtue of adverse possession over a continuous period of 12 years. The matters relied on by the plaintiffs as constituting adverse possession were that they had fenced the disputed land, refilled the depressions or eroded portions, and cultivated the reclaimed land.

The Court of Appeal in dismissing the plaintiff's appeal, Swaby J.A. said inter alia at p.1426:

"Under the Limitation of Actions
.... time does not begin to run
against the owner of land so as

to extinguish his right thereto unless it has been established that:

- (a) he has been dispossessed of land; or
- (b) he has discontinued his possession of land; and that in either event
- (c) some other person in whose favour the period of limitation (twelve years) can run is in adverse possession of land. Time then runs against the true owner at the time adverse possession is taken of the land."

It is significant to observe that time continues to run in favour of a succession of persons each claiming through the original dispossessor since the interest of such a dispossessor is good against the whole world other than the true owner and is transmissible and inheritable. See Perry v. Clissold (1907) AC. 73.

The Archer case was readily distinguishable from the case before the Court because the matters relied upon by the plaintiff were all equivocal in that they provided an equal balance between an intent to exclude the true owner from possession, and an intent merely to derive some enjoyment from the land wholly consistent with such use as the true owner might wish to make of it. In the instant case because the defendants thought they owned the twenty-nine acres they had every intent to exclude the plaintiff.

Reliance was placed on Section 70 of the Registration of Titles Act. In so far as it is relevant it provided:

- "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, the proprietor of land or of any estate or interest in land ... shall except in case of fraud, hold the same as may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted

constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor, claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may be wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions,, and to any rights acquired over such land since the same was brought under the operation of this law under any statute of limitation instrument."

(underlining mine)

Relying upon this Section, Mr. Schardsmidt for the defendants skilfully submitted that Jamaica Development Bank having made it clear that Three Acres Limited had comprised no more than 148 acres but nevertheless transferred 178 acres to the plaintiff it was a "wrong description of parcels". The force of this submission is readily apparent.

Secondly the evidence further indicates conclusive continuous and undisturbed possession of the land for a period exceeding twenty years.

The strength of the second point relates to the principle or authority enunciated in the Jamaican locus classicus Chisholm v. Hall (1959) 7 JLR. 164.

The headnote reads as follows:-

"The appellant and the respondent were the registered proprietors of adjoining plots of land in Kingston, Jamaica. The appellant was registered as proprietor on April 16, 1928. The respondent was registered as proprietor on October 30, 1941 having purchased from the Administrator General for Jamaica, the legal personal representative of the former owner."

The Administrator General had been registered on transmission and a new certificate of title issued in his name on May 7, 1919. The certificate of title became lost and another new certificate of title dated October 16, 1941 was issued to the Administrator General in place of the lost certificate of title, which was cancelled.

The dispute concerned the proper position of the boundary between the two lots. At the time of action there was and had for many years been in existence a physical boundary dividing the lots. The appellant's contention was that the physical boundary existing upon the land was rightly placed and was the true dividing line. The respondents' contention was that the physical boundary encroached a matter of seven feet on his lot along his entire northern boundary. The Respondents' action was for a declaration that the disputed strip of land was comprised in his certificate of title, possession and mesne profits, and the appellant counterclaimed for a declaration that the boundaries as now existing were the true boundaries and for rectification of the Register".

The Judicial Committee of the Privy Council held inter alia that the disputed strip formed part of the land comprised in the Respondents' Certificate of Title but the appellant having shown over 12 years 'continuous possession of the disputed strip from the date of his purchase to the commencement of the proceedings had gained a possessory title. The effect of Section 70 of the Act is that it places upon a purchaser of registered land the onus of going behind the Register and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than twelve years have elapsed since the title was first registered.' The privy Council also held that "whenever a duplicate certificate of title or special certificate of title is lost or destroyed and a new Certificate of Title registered in place of the former certificate, such new certificate is merely a substitute for the lost or destroyed certificate and merely has the effect of placing the proprietor in the same position as if the former certificate

ificate had not been lost or destroyed, and does not bring about any alteration of rights."

In the light of the disputed questions of fact and the considerable doubt which I entertain that the plaintiff's right of ownership is violated, the instant case falls considerably short of any standard on which, in my judgment, it would be safe to grant the injunction at this interlocutory stage.

The plaintiff has failed to put before me any evidence with sufficient cogency to satisfy me that there is a strong and clear case and a high degree of assurance that the plaintiff will succeed at the trial in establishing that he is entitled to a mandatory injunction.

The plaintiff may indeed be able with a considerable degree of skill and effort at the trial to make out a formidable case in support of its contention just as the defendant may be able to make out a formidable case in reply. With the full procedure of the trial coupled with the advantage of seeing and hearing the witness and the testing process of cross-examination the Court will be able to reach a firm conclusion one way or the other. Because I lack these advantages in dealing with the disputed questions of fact it is my judgment that the plaintiff has not made out a case for the injunction that it seeks. Indeed, I am inclined to the view that there is no real prospect of the plaintiff succeeding in his action for a permanent injunction.

In addition to the balance of convenience which I consider is in the defendants' favour I am not satisfied that irreparable injury may ensue to the plaintiff's property.

For these reasons I do not think that any injunction should be granted.

Accordingly, the application fails, and I dismiss it.

Costs to the defendants to be agreed or taxed. Certificate for Queen's Counsel granted.

Cases referred to
① *Esso Standard Oil S.A. Limited v Lloyd Charr (14/3/88)*
② *Archer at ux v Georgiana Holdings Limited 12 JLR '82*
③ *Perry v Chissold (1907) 1 KC 73* → *men*