IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006/HCV 01720

BETWEEN	**AUSTIN WILBERFORCE LEVY**	**CLAIMANT**
AND	**CECIL JULY**	**DEFENDANT**

Ms. Judith Clarke for claimant.

Ms. Janet Taylor instructed by Taylor Deacon and James for defendant.

Heard 12th June, 23rd, 24th, 25th, 29th and 30th October 2007 and 6th June 2008

Campbell, J.

(1) In 1979, Mr. John Glanville requested the claimant, Austin Levy, to purchase his farm at Thatchfield. The reason for the request was soon obvious. The Jamaican Development Bank held a mortgage on the property, sale of which was soon to be exercised under the Bank's powers of sale. The purchase price was $120,000.00.

(3) The property, part of Thatchfield in St. Elizabeth, consists of 731 acres and had been previously operated as a cattle farm. It has vast marshland and sand deposits. These deposits were not contiguous. There were also acreages of deposits of rocks.

(2) Austin Levy, then a 51 year old cattle farmer of Barbary Hall, St. Elizabeth, contacted two local men, Mr. Reginald Bennett, a businessman, and the defendant, an attorney-at-law. The three men were to each take a one-third share in the property, commensurate with their contribution towards the purchase-price. Reginald invited his brother Stanford to join him and together they acquired a one-third share. All four persons had known the property before. Levy purchased the vendor's stock of cattle of about 200 heads.

(4) The men took up possession of the property the same year. The defendant occupied one lot, as did the Bennett brothers, the claimant occupied three lots. There is a common area, consisting of marshland and sand on the lot of the Bennetts, which the parties agree

is jointly owned. Sand is currently being mined from this area. The defendant asserts that this sand-bed which is approximately 20 acres is almost depleted. However, there are sizeable deposits estimated at 40 acres of sand deposits primarily on the claimant's and Reginald's portion of the Bennetts' allotment. The lands in the exclusive possession of July and Sandford Bennett have no deposits of sand.

(5) The defendant describes himself as the Mining Manager and the Managing Partner of the now lucrative sand-mining business. A one-third share of this business nets approximately $300,000.00 per month for the co-owners. In addition, Mr. July earns a management fee of $100,000.00 per month. The alliances in the matter before the Court appear to be determined by whether the party is possessed of sand. The rift between the two camps is deep and wide. Thus brothers, Sanford and Reginald are no longer on speaking terms. The defendant in his written submissions alleges at para 28, "Reginald Bennett and the claimant will still control the mounds of sand. They are friends."

(6) On the 10th May 2006, the claimant filed a fixed date claim form seeking the following reliefs

1) An order that the land, part of Thatchfield in the parish of St. Elizabeth registered at Volume 749 Folio 90 of the Register Book of Titles in the names of Cecil Roy July, Austin Wilberforce Levy, Reginald Robert Bennett and Sandford Bennett as tenants-in-common be portioned and subdivided in accordance with the approved subdivision plan approved by the St. Elizabeth parish council on 12th July 2005 subject to the conditions and or requirements of the said Parish Council and or other relevant authority.

2) A declaration that the applicant has an exclusive right and is the sole equitable owner of the portion of the land identified as lots numbered 1, 2 and 4 on the said subdivision plan.

3) An order that there be a further subdivision of the Lot numbered five to delineate the boundaries of the area of the subject land which had been reserved for sand-mining by and with he consent of and for the benefit of all registered owners of the land registered at Volume 794 Folio 90 of the Register Book of Titles.

4) A declaration that the applicant is entitled to two undivided one sixth share in the area within the lot numbered five which was reserved for sand-mining by and with the mutual agreement of all the registered owners of the said land.

5) Such further or other relief.

The claimant's case

(7) That shortly after the land was purchased, the co-owners agreed to divide the land. July said he wanted his land in one piece. Mr. Desmond Rowe, land surveyor, was instructed by July on behalf of the co-owners. Rowe made a division on the ground. There was no discussion about sand mining. The Bennetts did some sand mining. Rowe did a survey reflecting the agreed allocations. Levy remained in possession of Lot 1, 2 and 4. July remained in possession of Lot 3; the Bennetts in Lot 5. Some years after taking possession, they all agreed that the substantial deposits on Lot 5 should be mined and the proceeds shared proportionate to their interest. A sand-mining licence was applied for by July.

(8) Cecil July complained of the quality of his land and it was agreed that 16 acres should be cut-off from the claimant's lot and added to his lot. It was also agreed that an area of 5 acres around the old house would be cut-off from Lot 4 and held as joint property. The claimant was to be compensated for the acreage from Lot 4 by being given lands from Lot 5. The claimant denies knowledge of the documents on which the defendant relies to show an agreement between the parties.

The defendant's case

(9) The approved subdivision plan on which the claimant relied before the Court is not a true copy, changes having been made to it after its approval. Pre–check plan 251820 (Lot 4) represents the agreement of August 1990, which the claimant has denied. Pre-check plan could not be used to get splinter title because of margin of error. See Land Surveyor Act, s16 (c) (11).

In respect of Lot 2, there is a discrepancy with pre-check plan 258368 and the approved subdivision plan. The memorandum inserted on the approved sub-division plan omits to advise that there are co-owners and it misrepresents the type of subdivision as agricultural, when there are two mining licences in place. The subdivision plan records

the allotment to each party as follows: the claimant 238 acres; the Bennetts 270 acres; the defendant 215 acres.

(10) The defendant's case that the sand-bed consists of 60 acres is more probable. The claimant deducted less land than agreed from the old house. He should have deducted 10 acres instead of 5 acres. The sub division approval is not reflective of the agreements reached by the joint owners. The orders sought are contrary to the manner the parties have been conducting business. The claimant failed to disclose the August 1990 Agreement, and the 1997 Declaration of Understanding. The claimant's denial of the 2003 court case in which he sought and obtained injunctive relief from Stanford Bennett is a contempt of court.

(11) The defendant contends that after having been put in possession, the services of S.O. Hemmings, a Commissioned Land Surveyor was retained and he was instructed to divide the sand bed and the arable land into equal acreages and that was the basis on which possession was taken. That the 16 acres of land swap was to give effect to the 1990 Agreement.

(12) The issues for determination;

(a) Whether the sub-division plan approved by the St. Elizabeth Parish Council in 2005 mirrors the agreement reached by the joint owners in respect of ownership of the property.

(b) Is each co-owner in occupation of the portion he was intended to occupy at the very outset, bearing in mind the agreed variations?

(c) What was the agreement /understanding as to what portion of land should represent common sand bed having regard to the agreement and conduct of the parties over the years.

Issue 1 –

(a) Whether the sub-division plan approved by the St. Elizabeth Parish Council in 2005 mirrors the agreement reached by the joint owners in respect of ownership of the property.

(13) The claimant, in his affidavit in support of his application, states that shortly after being put in position, the co-owners decided among themselves to divide up the land and to delineate the respective boundaries. Levy testified "Everybody got together and decide where our portion of land would be". Mr. July agrees with the claimant on this point, he says in cross-examination, "After we bought the land, we employed the services of a Commissioned Land Surveyor to carry out the arrangements that we the owners had agreed."

(14) It is clear therefore that there was an agreement between the parties that the surveyor was instructed to formalize this agreement. Mr. Desmond Rowe, Commission Land Surveyor, said he came there on or about 1988. It is clear that the co-owners were in occupation before that date. Levy evidence was to the effect that the actual occupation of lots was arrived at "by our mutual agreement" and in accordance with the percentage entitlements. Reginald Bennett testified that he choose Lot 5 because it was close to property he had. The claimant evidence says that it was discovered that much of the property consisted of swamps with large deposits of sand. The claimant said that the defendant requested, Lot 3, which was comprised mostly of arable land on which was a deep well, a 3000 gallon tank and a vast area of guinea grass. He states that they all agreed that the defendant should have Lot 3. The agreed positions that the co-owners took are substantially the lots they are presently occupy.

(15) It was submitted on behalf of the respondent that the court ought not to believe that July was given the most arable land, when it was the claimant, an established cattle farmer, on his initiative and that of Reginald that had secured the property from the Jamaican Development Bank. The respondent submit that more reasonable proposition is that Hemmings was instructed to divide the sand bed and the arable land into equal acreage for the purchasers, and it was on that basis that the division was made Mr. Levy says that because July was the co-owners' attorney in the transaction they decided to grant his request. No evidence has been adduced to demonstrate any change in the lot allocation, which was arrived at by mutual agreement. I find that the evidence is

unchallenged that July's lot is the "most arable" and did not contain "one inch" of swamp, as Levy has testified.

(16) The evidence is that sand was not a point of importance in the purchase of the property. This is a property that was being sold under a powers of a mortgage. Was a commercial sand mining business being operated there by the previous owner? Mr. Levy testified that Mr. Glanville never did sand mining on that property. Mr July testimony is that "the owner had run away from the property with sand-mining as a going concern." The claimant credits Mr. Hemmings as the surveyor who assisted in marking off the land. There was no section marked off for sand-mining. He denied in cross-examination that Hemmings surveyed the sand bed Levy testified that Hemmings did not even know where the sand bed was and that sand mining was not a commercial activity until years later. In those circumstances, I would not expect that sand-mining would play any significant part or any part at all in the initial allocation of lots on that property. The claimant estimates the development of sand mining came almost 10 years after acquisition of the property. I find that the substantial reason for the acquisition of the property was the rearing of cattle. The respective lots were fenced immediately, Reginald, who had a front-end loader testified that its acquisition and use was to clear the land for his cattle farm.

Issue 2 –

(b) Is each co-owner in occupation of the portion he was intended to occupy at the very outset, bearing in mind the agreed variations?

(17) There is no serious challenge raised that lots initially occupied by the four co-owners are the lots that they occupy today. The sub-division plan accurately reflects the lot allocations. It shows that Levy occupies Lot 1, 2 and 4, whilst July occupies Lot 3 and the Bennetts occupy Lot 5. According to Levy, July instructed Rowe on behalf of all the co-owners. July has denied this. It is clear from the evidence of July, Reginald and Rowe that no instructions were given to Rowe in relation to the sand mine and variations to the land around the old heritage house on Lot 4 before the preparation of the sub–divisional plan.

(18) After the completion of the survey plan, Mr. Levy requested 16 acres from Lot 4, complaining that his original allocation contained too much hillsides. An additional 16 acres were taken from Levy's Lot 4, and added to July's Lot 3. The added area was incorporated into the July lands by being enclosed with a fence. Mr. Levy said that out of respect for July being our lawyer, he agreed to his demand. Compensation to Levy for the 16 acres so subtracted from his holding would be from Lot 5. Mr. July has testified that the 16 acres was in keeping with the oral agreement amongst the co-owners. If in fact the 16 acres to July was in pursuant to the oral agreement, why was not that acreage marked off on the plan, bearing in mind those instructions would have been given quite early in the relationship of the co-owners?

(18) The sub-division plan would not therefore reflect the changes on the ground made by the accommodation of July's request and the grant to him of the 16 acres. Neither would the sub-division plan reflect the compensation to Levy of Lot 2, Rowe testifies that it is defined by a reserved road which separates July from Levy. Lot 4 is also fenced. Lot 5 is defined by known boundary fences and has more land than the Bennetts are entitled to occupy. Reginald testifies that between his brother and himself they have 231 acres for their exclusive possession.

Issue 3 –

(c) What was the agreement /understanding as to what portion of land should represent common sand bed having regard to the agreement and conduct of the parties over the years.

(19) The main area of divergence between the parties concerned the agreements for the ownership and size of the sand-beds. Mr Levy testified that sand-mining did not start immediately, but about 10 years later. Levy said in cross-examination, "When I just bought the land, sand was not in my head I just bought it for cattle." However, he said from time to time buckets of sand would be sold. He said that the Bennetts started selling without any benefit accruing to himself and July. In his cross-examination Levy admits that sand mining has emerged as the more lucrative operation at the property. All the parties share the proceeds of the sand mining proportionally to their interest in the land. There is no dispute concerning that common usage.

(20) That sand bed that is being mined in common is located in an area of approximately 20 acres on Lot 5. However, Rowe fixes the acreage of sand deposit on the lands between Reginald and Levy, at "some 54 acres of sand and morass." All the parties are agreed that July has no sand deposits on his lot.

Mr Levy, in his affidavit in response to Cecil July, said that he agrees with Rowe that the area of sand and morass on lot 5 was about 54 acres, however, the sand deposit itself was specifically estimated by July at 21 acres. Levy testified that the sand in that area is almost depleted. He said they all agreed that the sand on lot 5 would "be exploited and mined for the benefit of all of us". He insists that this was the only area agreed to be mined collectively. Levy, like Reginald, says he was not aware that anyone wanted to do sand-mining on any significant scale at the time of acquisition of the property.

(21) Mr. July and Sandford on the other hand, have maintained that from the outset there was only one factor that influenced their decision to acquire the property and that factor was sand mining.
At paragraph 17 of his affidavit, Mr. July states:-

> "My sole reason for investing in the property was because of the sand deposit thereon and the possibility of continuing the mining of same and as the property was already being mined at the time of its purchase, there was no need for us to construct roads or to make allocations for the construction of same."

If sand was his sole reason for the acquisition of the property, it is reasonable to expect that the investor would have made arrangements for the allocation of the sand deposits from the beginning. The respondent says that the service of Mr. Hemmings was obtained to survey and divide the arable lands and the sand bed in three equal parts. Why would July retain possession of Lot 3 on which there was no sand when sand was the sole reason for his acquisition of the property? What was the reason for clearing the land, fencing it and planting grass when the sole object was sand mining? I accept Reginald Bennett's testimony that July raised cattle from day 1.

(22) Mr July in his affidavit in response to Wilberforce Levy depones "the sand bed covers sixty acres which was divided into 3 equal lots of 20 acres each by mutual agreement. We subsequently varied this agreement to hold the property, all sixty acres, for us to sell sand therefore and to share the proceeds therefrom equally". Having surveyed the property, it was divided into eight lots, which each co-owner allocated a Lot with arable land, and another with sand bed. According to July, he took possession of Lot 2 and 6 (with a sand bed). He said he made application for a Quarry Licence, to operate a quarry on Lot 6, that application would have been made in early 1980, between 1979 and 1982. He was not granted that licence. He testified that because there was a road already existing which lead directly to his lot, it was agreed by all parties that only one quarry should operate because to operate three quarries would pose a logistical problem.

(23) Mr. July asserts that it was agreed by all that the proceeds of sale would be shared in the proportions of each part owners entitlement. He therefore gave up his entitlement to Lot 6 for it to be held in common by all the co-owners. Similarly Lots 5 and 6, sand bearing lots, in possession of the Bennetts and Levy respectively, would be held in common by all of the co-owners in shares proportionate to their entitlement in the property. Levy's lot and Lot 5 have sand deposit. Why would July fail to retain Lot 6 but share the interest in the sand as both Levy and Reginald Bennett have done. I find it difficult to accept that July entered into an arrangement that caused him to surrender his legal estate in Lot 6 for the right to mine sand collectively, whilst the other persons (except Sandford) retained their interest in the land but earned the right to mine sand collectively.

The Agreement

(24) In cross-examination, Mr. July says that Hemmings never produced a plan. All the lots were pointed out to him on the ground by Hemmings. Mr. Levy states that Hemmings never completed his assignment. Rowe replaced him. Mr. July contends that to compensate for his lost of Lot 6, he was given 16 acres by Levy from what was Lot 1. He describes his present rights as the rights to 1/3 proceeds of sale of sand from the property. He said his rights to the land he ceded just before the case was filed. He

exhibits a handwritten agreement dated 19th August 1990 as evidence of his being given the 16 acres by Levy. July has said that the transformation of his rights from exclusive ownership of the area allocated to one-third of proceeds of the sand was done shortly before this case was filed. In cross-examination, he says' "Sometimes before this Court case, I decided to cease my rights to the land and to keep my rights to the one-third proceeds of all sand sold in the land." July gives as his reason that, "It does not make sense to have land there."

(25) July asserts that the oral agreement struck in 1979 was formalized on the 30th December 1997 by a Declaration of Understanding. Cross-examined about the documents, he said he never advised the co-owners, he being an attorney-at-law that they should take independent legal advice. He never felt it necessary because he was only writing up a document that they had asked him to draft. It was not being drafted in capacity as an attorney-at-law, but as a co-owner. He admits that he has overwritten figures appearing in the 2nd paragraph without those being initialled by the signatories.

(26) The document was written just how it was dictated to him. He said they considered the Bennett brothers as one, that is the reason the number 3 appears in paragraph 2, although there were four persons present. When reminded that he had called it a mistake, he said it would be if he put 3 when they were four persons.

The handwritten Agreement of 19th August 1990

(27) Mr July says he penned the document which was dictated to him by the parties while they were at the old house at Thatchfield. He said the other co-owners were the ones who told him what to write. He testified that he wrote it and read what they had written. He said they in turn read it and he inquired of them if what was written is what they wanted. They responded in the affirmative. Stanford, in his further affidavit, depones that the agreement was signed in July's office and contradicts himself on this point during cross-examination. July says he believes that the document "speaks for itself and reflects exactly what it was intended to convey".

(28) According to Mr. July, the oral agreement that was reached in 1979 concerned 60 acres of sand bed which had been equally divided into three lots of 20 acres. The 1990 agreement makes no reference to the 60 acres. When asked in cross-examination why he had not put 60 acres instead of 20, his response was "all my land in the sand bed is 20 acres". July says that paragraph 3 of the Agreement is a reference to his exclusive sand bed of 20 acres being given up to be owned in common. If that is the construction to be placed on the document, why is the contribution of the other co-owners of their sand bed not being mentioned? In order to obtain the construction that the defendant is urging on the Court, it is necessary to add, "July gives up". The two other paragraphs are clear as to who the grantor is as well as grantee. In the first paragraph, the 16 acres of land is expressly stated to move to July from Levy. Similarly, in paragraph 4, it is Reggie/Domingo to give Levy land.

(29) Where the land was not originally allocated to anyone, as at paragraph 2, the only person who is mentioned is the recipient of the land, "all three of us". What is expressed in paragraph 3 is what the claimant is contending is the true situation. The construction being urged by Mr. July becomes even more difficult to accept, when it is considered that the draft is being dictated by the other co-owners. On the final day of his cross-examination, July describes his handwritten agreement as inadequate and incomplete "and it should be expanded to say that the others were giving up their rights too, should have been stated just as it was in 1997. Mr. July agreed that on the construction he was urging, the document was ambiguous. Sandford, his witnesses' understanding is similar to what the claimant and Reginald's understanding of the document. Levy says that the signature on the document looked like his. The claimant has denied that he signed the Agreement. I find that on a true construction of paragraph, 3 reflects the parties' intention that "20 acres of sand land for all of us." Or that 20 acres were to be held for all the parties. Not sixty acres as is being urged by the defendant.

Memorandum of understanding

(30) The respondent contends that this document was to formalize the oral Agreement arrived at in 1979. The document is described by him that it "adequately captures all that

it should reflect and supersedes the 1990 Agreement". There is nothing in the document to show that the portion of sand mentioned herein is of any specific amount. The words in paragraph 3 "A portion of the said property which has sand on it", is vague, imprecise and ambiguous. This declaration of understanding does not, to my mind, reflect the oral agreement of 1979, which according to July is enshrined in the August 1990 agreement.

(31) The 1990 agreement provides for "acres of sand-bed, being for all of us". The latter agreement provides for "the sale of the sand being divided proportionate to each party's entitlement in the property. The distinction being the 1990 agreement at paragraph 3, provides for joint ownership in the land, whereas the later agreement purports to entitle the co-owner to a proportionate division in the sale of sand. The term "sale of sand" is unclear, is it that each co-owner should be entitled to sell or his own a specified amount in his own right, or does it refer to an entitlement to the proceeds of sale. The agreement makes no attempt to define essential terms, e.g., sand bed plot. The claimant is emphatic that he did not sign this document, he recalls signing a paper with just the co-owners names. The respondent does not offer this Memorandum of Understanding as a new arrangement between the parties, but as a document that was intended to make more formal, the oral agreement enshrined in the earlier written agreement of 1990. I find that the Memorandum does not reflect the agreement that was reached between the co-owners.

Mr. Rowe's Evidence

Mr. Rowe's testimony was pivotal the determination of the issues in this matter. The witnesses had their respective interest to serve, bearing in mind whether they were possessed of sand or not. Mr. Levy at 81 years, the eldest of the witnesses, I find to be forthright frank, who perhaps understandably experience the occasional difficulty in recalling certain events. Mr. Levy has admitted, and I accept that he indulged July because July was an attorney-at-law, and was perceived by the group as their attorney-at-law. I accept, Levy as a creditable witness when he says, in respect of document headed Re Thatchfield Property – (pg. 37 of Bundle) and the subsequent affidavit produced from

it, that he signed it when it was presented to him by July, who he thought was acting to protect his interest. He had read the document in a cursory manner. I attach no weight to the contents of the documents, in so far as it is inconsistent with Mr. Levy's evidence.

Mr. Desmond Rowe, commissioned land surveyor, in practice for upwards of forty years. Appeared highly professional and knowledgeable. Remained unshaken throughout a strenuous cross-examination. I was impressed. There was no suggestion of reasons for partiality or bias on the part of Mr. Rowe. I accept his testimony that he was instructed by July, in respect of his preparation of the subdivision plan. He says he understood July to be the solicitor and part owner of the property. I reject the testimony of July that he did not so instruct Mr. Rowe. I find that July and Levy instructed him to cut off the acres of land from Lot 4 to be added to July's lot. I find that Rowe produced a second diagram to accord to Mr. July's wishes for 16 acres to be added to his land. I find that Rowe surveyed the area of morass and sand, a part of Lot 5 and that area is 54 acres. I find that July and Levy gave those instructions to cut off 5 acres around the old house.

Judgment for the claimant and I make the following orders:

1. That the claimant is entitled to exclusive possession and occupation of the lots numbered 1, 2 and 4 as identified by the pre checked plans bearing Survey Department examination numbers **206742 ("AL/DR 2"), 258368 ("AL/DR 3) and 251828 ("AL/DR 4).**

2. That the Defendant, Cecil July has no mining rights or other rights over the said lots.

3. That subject to the requirements of the relevant authorities, the approved subdivision plan bearing approval date **2005-12-07** be amended so that the lots numbered 1, 2 and 4 are shown and demarcated as they appear on the pre checked plans mentioned in paragraph 2 above.

4. That the area around the old house reserved as common property be and is hereby determined to be approximately **five acres**.

5. That there be a survey of this area to determine the precise boundaries and acreage thereof. The said survey is to be done on the basis that the boundaries of **lot 4** as demarcated on the **pre checked plan numbered 251828** are correct.

6. That there be a further survey of the lot numbered **five on the approved subdivision plan** to delineate the boundaries of the land which has been allocated to Reginald and Stanford Bennett and the said survey shall be along such lines as they now occupy and shall have regard for and accept the boundary lines previously erected by Reginald Bennett to separate his allocation from the common sand mining area.

7. That the said further survey of the lot numbered five is to be done on the basis that the boundaries of **lot 2** as demarcated on the **pre checked plan numbered 258368 ("AL/DR 3")** are correct.

8. That in delineating the boundaries of the land which has been allocated to Reginald and Stanford Bennett, the acreages ascribed to the jointly shall not be less than 232 acres.

9. **or any land remaining after the survey of the lands to be held by Reginald and Stanford Bennett shall be held in common ownership as tenants in common by all the co-owners in the proportions of their entitlements as reflected on the duplicate certificate of title registered at volume 794 folio 90 of the Register Book of Titles.????**

10. That the cost of the further surveys and or subdivision herein shall be borne by all the parties in equal shares.

11. That the surveys shall be conducted by Mr. Desmond Rowe, commissioned land surveyor.

12. That subject to the requirements of the relevant authorities, the claimant shall be entitled to apply for titles to his said lots.

13. That all the orders herein shall be subject to the requirements of the relevant planning authorities and other relevant authorities.

14. That the costs of this action be borne by the defendant.

15. Liberty to apply.