



Notes

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1998/M137

<i>BETWEEN</i>	<i>WINSTON VAUGHAN MILLER</i>	<i>PLAINTIFF</i>
<i>A N D</i>	<i>PHYLLIS BOLTON</i>	<i>1ST DEFENDANT</i>
<i>A N D</i>	<i>DELROY COMPASS</i>	<i>2ND DEFENDANT</i>
<i>A N D</i>	<i>BYRON DALEY</i>	<i>3RD DEFENDANT</i>
<i>A N D</i>	<i>GWENDOLYN GENAS</i>	<i>4TH DEFENDANT</i>
<i>A N D</i>	<i>LEVA MONTAQUE</i>	<i>5TH DEFENDANT</i>
<i>A N D</i>	<i>GLENFORD RICKETTS</i>	<i>6TH DEFENDANT</i>
<i>A N D</i>	<i>WINSTON RICKETTS</i>	<i>7TH DEFENDANT</i>
<i>A N D</i>	<i>JACOB ROBINSON</i>	<i>8TH DEFENDANT</i>
<i>A N D</i>	<i>ERIC SCOTT</i>	<i>9TH DEFENDANT</i>
<i>A N D</i>	<i>DELMAN WHITE</i>	<i>10TH DEFENDANT</i>
<i>A N D</i>	<i>ALBERT WRIGHT</i>	<i>11TH DEFENDANT</i>
<i>A N D</i>	<i>JOHANNA DIXON</i>	<i>12TH DEFENDANT</i>
<i>A N D</i>	<i>KINGSLEY VERNON</i>	<i>13TH DEFENDANT</i>
<i>A N D</i>	<i>LLOYD VERNON</i>	<i>14TH DEFENDANT</i>

*D. Adepide instructed by Owen Crosbie and Company
for 12th defendant/applicant.*

*Miss Gillian Mullings instructed by Patrick Bailey & Co.
for Plaintiff/Respondents.*

*Heard: November 6,
January 24 and March 24, 2001.*

HARRIS, J.

This is an application by the 12th defendant for an injunction to restrain the plaintiffs from entering upon or recovering possession of property at Monrovia Road, Christiania in the parish of Manchester, comprised in Certificate of Title registered at Volume 299 Folio 36.

The property was sold to the plaintiff by the 13th and 14th defendants who are the executors of the estate of James Vernon. At the time of sale James Vernon was the registered proprietor of the lands.

The 1st – 11th defendants occupied the property as tenants of the 12th defendant. An action was brought by the plaintiff's against the 1st – 11th defendants for recovery of possession of the property. An order was subsequently sought and obtained by the 12th defendant to be joined as a defendant.

A defence and counterclaim was filed by her in which she alleges fraud on the part of the plaintiff's and claims that she is entitled to the fee

simple absolute in the property having been in open, quiet and undisturbed possession thereof since 1971.

In granting an injunction the principles by which a court is guided has been clearly enunciated in *American Cyanamid Co. v Ethicon 1975 A .C. 396*. In adherence to these principles the following must be determined:-

- (a) Whether there is a serious question to be tried.
- (b) Whether damages would be adequate compensation for the party who seeks the injunction were he or she to succeed at the trial if an interlocutory injunction is refused.
- (c) If the matter is in doubt as to who would be the successful party an assessment is required as to where the balance of convenience lies and as to the relative strength of each parties' case as disclosed by affidavit evidence.

The first question to be settled is whether there are any serious issues to be resolved by way of a trial. In order to do so, reference will first be made to the pleadings.

The plaintiff/respondents, by their claim, assert that they are registered proprietors of the land which forms the subject matter of the dispute, they having been so registered in April 1994 consequent on the purchase of same from the duly appointed executors of the estate of the

previous owner of the land. James Vernon the 12th defendant/applicant does not only claim a right to possession but also alleges its acquisition was fraudulent. The averments with respect to allegations of fraud are outlined in paragraphs 1(a) – 1(f) and 2 of the defence and counter-claim in the following terms.

- “1(a) There was a mortgage No. 179622 dated the 8th and registered on the 22nd of March, 1965 from the above named Herbert George Feurtado all his estate in the land comprised in this Certificate to Ian Woodburn Heron of Manchester, School-Teacher, Cassandra Eastwood and Inez Hare both of Balaclava Saint Elizabeth, Gentlewoman secure Six Hundred and Seventy-five Pounds of which the sum of Four Hundred Seventy-five Pounds is lent by the said Ian Woodburn Heron and the sum of Two Hundred Pounds by the said Cassandra Eastwood and Inez Hare out of moneys belonging to them on a joint account with interest.**
- (b) That transfer No. 484106 was registered pursuant to a forged Instrument of Transfer No. 484106 dated 28th July, 1989 in that: (a) the said transferee died form as far back as 16th November, 1986; (b) (2 years and over 8 months before Transfer was purported to have been executed). None of the persons purported to be transferor, Ian Woodburn Heron, Cassandra Eastwood and Inez Hare signed or otherwise executed the said Instrument purporting to be transfer by them to James Vernon.**
- (c) Transmission No. 916420 entered the 1st day of February, 1996 all estate and interest of James Vernon to Lloyd Vernon in care of Janice A. P. Henry, attorney-at-law of Mandeville; Manchester on the 16th day of November, 1986 under a grant of Probate was a perpetuation of the fraud herein.**

- (d) **And the Defendant, Johanna Dixon says that the Title with the fraudulently registered Transfer was in the custody of Donald Allen, Attorney-at-Law practicing as Messrs. Delapenha and Iver and was delivered to Ms. Janice Henry, Attorney-at-law by the said Messrs. Delapenha and Iver and all relevant documents in or having been in their possession shall be subpoenaed and referred to for their full terms and effects.**
 - (e) **And that the said fraud was reported by the Defendant, Johanna Dixon through Det. Sgt. Fenton of the Area 3 Fraud Squad on Monday 23rd November, 1998, which Detective is conducting investigation and through the Defendant's Attorney, Owen Crosbie to the Director of Public Prosecutions on 2nd December, 12998 for necessary action.**
 - (f) **The said Winston Vaughn Miller and Ann-Marie Miller were not bonafied purchasers for value without notice, having contracted and completed payments and taking Transfer knowing of the incumbrance by the Defendant, Johanna Dixon a third party having possession of the premises through her tenants, maintaining same and paying taxes therefore.**
- 2. That the said Winston Vaughn Miller and his wife Ann-Marie has been aware of actions pending in the Resident Magistrate's COURT, Christiana touching and concerning the said property of which the said Johanna Dixon had been joined as a defendant having interest and in particular, the right to possession in fee simple under and by virtue of the Limitation of actions Act in equity and all other powers enabling; and at all material times had actual or constructive knowledge of the fraud and so gave no permission for disbursements of the net proceed of sale, which remains in the possession of the Attorney carrying the sale."**

Paragraphs 1 (f) – 2 of the pleading may be considered illustrative of acts of fraud on the part of the plaintiff /respondents. As purchasers they will be obliged to prove that they were bona fide purchasers for value without notice of the 12th defendant/applicant's interest.

More than 12 years have elapsed since the first registration for the title. It will therefore be incumbent on them to show that they had gone behind the Register Book of Titles to ensure that no adverse interest by limitation had been acquired.

In *Chisholm v Hall* 7 JLR 164 it was held, inter alia, that sections 67 and 68 of the Registration of Titles Act must be read conjunctively, and so far as possible reconciled with each other and in every case where more than 12 years have elapsed since a title was first registered, a purchaser of registered lands has a duty to go behind the register to satisfy himself that no adverse interest by limitation has been acquired.

I will now turn to that limb of the 12th defendant/applicant's contention that she is entitled to the lands by virtue of the Limitation of Actions Act.

Section 3 of the Limitation of Actions Act provides:

“No person shall make an entry, or bring an action or suit to recover an land or rent, but within twelve years next

after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”

Section 30 states:

“At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.”

If a defendant can establish dispossession of, or abandonment of land by its registered owner for a period of 12 years, he may be successful in the acquisition of possession of the land against the registered owner, or his successors in title.

In paragraph 4 of her defence and counterclaim, the Applicant avers that she entered into possession of the land in 1971, has continued in possession, has been paying taxes, has been letting, collecting rental and maintaining the property. She further stated that she had enjoyed open, peaceful and quiet possession up to the time when actions for recovery of

possession had been brought against her, one by the 13th Defendant and the other by the plaintiff respondents.

A reply has been filed by the Plaintiff/Respondents but the issue of the 12th defendant/applicant's averment of being in undisturbed, quiet and open possession continuously since 1971 had not been addressed, as no defence to the counterclaim had been filed.

The foregoing notwithstanding, the Plaintiff/Respondent's averment that they are entitled to possession of the property has been traversed by the 12th defendant/applicants allegation that she has acquired possessory rights to the land by adverse possession. It follows that it would be necessary to establish whether or not James Vernon had gone out of possession of the land and had the intention of abandoning it.

Therefore, it must be determined at a trial whether the 12th defendant/applicant had enjoyed continuous, peaceful and undisturbed possession of the disputed property in excess of 12 years; whether there was an intention by James Vernon to be dispossessed of the land and whether the 12th defendant/applicant would be entitled to the land by reason that the title obtained by the Plaintiff/Respondent has been barred, as, the right to possession of their predecessor in title had been extinguished. These clearly give rise to substantial matters in dispute which ought to be tried.

Although there are serious questions to be determined, if the 12th defendant/applicant can be adequately compensated in damages should she be successful at the trial, an injunction ought not be granted save and except in exceptional circumstances.

The 12th defendant/applicant has been in possession of the property since 1971. She asserts ownership thereof by way of adverse possession. Her need for protection by injunction must be weighed against the need of the plaintiff/respondents to be protected against any injury which may arise from their being restrained from exercising their legal rights.

Where does the balance of convenience lie? On one hand, the 12th defendant/applicant has been exercising acts of ownership of the land since 1971. An attempt was made to disturb her being in possession in 1986, when, a letter dated November 27, 1986 was sent to her by the attorneys-at-law for the executors informing her that she was being appointed their agent for collection of rental from the premises. This date would have been 3 years in excess of the 12 year statutory limitation period of her being in possession of the property.

On the other hand, the plaintiff respondents had provided valuable consideration for the property. This is a commercial property. They had not been able to have used or benefited from it since purchase.

There is however, not only an issue as to ownership but also an issue as to whether they were aware of the 12th defendant/applicant's interest before they purchased the property. If it is established that the 12th defendant/applicant had dispossessed James Vernon or that he had discontinued and abandoned possession of the land, then the executors' title to the land would have been barred and the plaintiff/respondents' title would also be barred.

There is also the possibility that it could be adjudged that the beneficial interest in the property had been properly vested in the plaintiff/respondents.

Now what is the relative strength of the parties' case as disclosed by the affidavits? In paragraphs 4,5, 6, and 7 of the affidavit of the 12th defendant \applicant dated November 1998 she states as follows:

- “4. That we became friends in the year 1970 and he was in possession of lands later known to be registered at Volume299 Folio 36 in the Register Book of Titles.***

- 5. That no building whatsoever was on the lands when we became friends.***

6. *That sometime in the year 1971, I became pregnant with Blossom Vernon for him and in anticipation of us making a family we commenced construction of a commercial building upon the said lands from our joint resources and certain retable portions were completed during the same year. He was living by himself at Williamsfield, Manchester at that time having been separated from his wife for many years to the best of my knowledge, information and belief and as he told me.*
7. *That during the said 1971 after the premises became retable, he told me to take exclusive possession of the premises for myself, but I should pay him peppercorn rent of \$100.00 per year. I took possession and paid him for the first year but paid him no more. After I paid him, I immediately began letting the premises for myself up to the present and continuing.*

In paragraph 7 of the affidavit she outlined that she paid rent for 1 year and thereafter ceased doing so. Miss Mullings urged that in this circumstance, she was a statutory tenant and would be estopped from

denying her landlord's title, as her occupation of the property could not be adverse to her landlord's title. In support of this proposition, she sought to rely on *Crampad International Marketing Company Ltd. & Anor. v. Thomas 1980 37 WIR 315* among other cases.

If the 12th defendant/applicant ought to be classified as a statutory tenant, then time could not run against the landlord. This is an issue for the court to decide. *Crampad International Marketing Co., Ltd. & Anor v. Thomas (supra)* must be distinguished from the present case. In that case the tenant remained on the property after the expiration of a fixed term. The landlord was precluded from recovering possession unless he resorted to the process of the court. In the present case there was no fixed period of tenancy. The 12th defendant/applicant declares she was placed on the property, paid rent for a period, remained on the property after she ceased paying rent. Such a tenant as the 12th defendant\applicant may bar his landlord's title.

Where a defendant, as a tenant, ceases to pay rent for 12 years after it is due, then the landlord's right to the land ceases unless he carries out acts to effectually retain possession of the land. See *Bent v Williams 1976 14 J.L.R pg. 122*.

Further, if a tenant fails to pay rent, the right of the landlord to recover the property or rental runs against the landlord from the last date of receipt of rental. I am fortified in this pronouncement by S10 of the Limitation of Actions Act, which provides:

“ When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant, from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry, or bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).”

The 12th defendant/applicant stated that she was last into possession in 1971. She paid rental for a year. An attempt was made in 1986 to disturb her possession of the property, that would have been 14 years since she stopped paying rental. Time for the recovery of rental or the property would have begun to run from the time the last rental was paid, which would have been in 1972, over 12 years after the 12th defendant\applicant's went into occupation of the property. It follows therefore, that if it is established that James Vernon's title was barred then the plaintiff /respondent title would similarly be barred.

The plaintiff/respondent states in an affidavit filed on the 17th December 1998 that in January 1994 they were invited to purchase the

premises by a brother of the executors. On or about February 18 of the same year they executed a contract for the purchase of the premises, duly paid the purchases price and executed the relevant instrument of transfer.

They further stated that in December 1996 they became aware that a caveat had been lodged against the title on or about March 1996. This caveat expired and the transfer was lodged.

Further in paragraph 6 of the affidavit they recited that at the time of the contract they were ignorant of any claim the 12th defendant Respondent might have had to the lands. As a matter of law, they would have been under a duty to have investigated whether there were any adverse claims with respect to the land, the title of which being over 12 years in existence. There is nothing stated by them to show that, before the purchases, they had satisfied themselves that there were no claims to any possessory right to the land.

There is evidence by affidavit that the defendant/applicant had been in possession of the land in excess of 12 years before any steps were taken to disturb her. There is a threat to her retaining an interest in the property. In light of this threat, the status quo ought to be preserved and the injunctive relief sought by her granted.

Ordered that the plaintiff/respondents by themselves, their servants or agents be restrained from entering upon or remaining or trespassing on premises at Monrovia Road, Christiana, registered at Volume 299 Folio 36 until the trial of this action. The costs of this application shall be in the cause.