[2014] JMCA Civ 49

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 14/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MS JUSTICE LAWRENCE – BESWICK JA (Ag)

BETWEEN	**MENDOZA NEMBHARD**	**APPELLANT**
AND	**RAFEL LEVY**	**RESPONDENT**

Debayo A Adedipe for the appellant

Samuel Smith for the respondent

27, 28 February and 19 December 2014

PHILLIPS JA

[1] I have read in draft the judgment of McIntosh JA. I agree with her reasoning and conclusion and have nothing to add.

MCINTOSH JA

Introduction

[2] Charles Sellers, allegedly deceased, was said to be the owner of land located in Berlin in the parish of Saint Elizabeth (hereafter 'the land'). Estelle Louise Brown nee Sellers who died in 2004 (hereafter referred to as 'Estelle' for ease of reference and with no disrespect intended) was said to be his daughter and the beneficiary of his estate. Harold Nembhard was his brother and was the designated caretaker of the land when, according to the evidence, Charles Sellers left Jamaica for Cuba during Estelle's childhood years. Harold Nembhard was also the father of the appellant.

[3] On the respondent's case, at some point during his involvement with the land Harold Nembhard became caretaker of the land on behalf of Estelle until his death in February 1989. (This is challenged by the appellant.) There is evidence that while Harold Nembhard was caretaker he permitted the appellant to farm the land and, after his death, the appellant continued to do so. The appellant paid taxes on the land as did the respondent and claimed that he had acquired ownership of the land by virtue of his continuous possession since about 1972 when he entered on the land on his own accord or in 1989 at the very least, when his father died and he continued to occupy and cultivate it. Up to 2007, the land was still occupied by him.

[4] In 2007 the respondent claimed recovery of possession of the land on behalf of Estelle's estate and the appellant resisted this claim asserting not only that Estelle had no right to possession but also that he was its rightful owner. His challenge to the

respondent's claim inevitably resulted in the matter being brought before the learned Resident Magistrate for the parish of St Elizabeth, who, after hearing evidence from both sides, decided in the respondent's favour and granted the order for possession, as prayed.

The findings of the learned Resident Magistrate

[5] En route to arriving at the aforementioned decision the learned Resident Magistrate made the following important findings:

a. The land was owned by Charles Sellers who departed for Cuba and never returned.

b. He left behind his only child, Estelle.

c. On the death of Charles Sellers the land would pass on an intestacy, according to the Intestates Estates and Property Charges Act, to his daughter, Estelle.

d. The legal estate would vest in the applicant for Letters of Administration or in the Administrator General if no one applied but no grant in the estate was produced to the court and in fact the death of Charles Sellers had not been proven.

e. Estelle died in 2004 and a grant of probate with the will annexed in her estate was produced and tendered into evidence during the course of the trial.

f. Estelle's estate is entitled to claim an interest in the land owned by Charles Sellers.

[6] Thereafter, the learned Resident Magistrate veered away from considerations of entitlement via the succession route and concentrated on the contending possessory rights of the parties. She reasoned that it was for the plaintiff (now respondent) to prove, *inter alia*, actual possession on the date of the defendant's (now appellant's) entry on the land; acts indicating possession; and an intention to possess the property and assert actual ownership rights over it (*animus possidendi*). The learned Resident Magistrate found that Estelle was in possession through Harold Nembhard until his death in 1989 and this possession was continued through the respondent who acted as her agent during her lifetime and any acts performed by him in respect of the land were done with a view to establishing her possession.

[7] Another important finding of the learned Resident Magistrate pertained to a letter which according to the evidence was written to the appellant at the behest of Estelle by an attorney-at-law, Mr Cecil July. The letter was not disclosed to the court but the appellant acknowledged its receipt though his evidence was that he had discarded it as he was not on the land illegally. The learned Resident Magistrate found that it was open to her to conclude on the facts before her that the letter was a notice to quit. Accordingly, the letter would demonstrate the *animus possidendi* in Estelle, as required by law, she reasoned. On the other hand, the letter dated 29 June 1989 which the appellant caused to be written in response to the letter from Mr July was before the court and its wording indicated to the learned Resident Magistrate that the appellant did

not have the necessary *animus possidendi.* Therefore, she reasoned, the appellant cannot show possession in his own right.

[8] She found of significance the view expressed in his letter that "I am not the one you are to write the letter to. It should have been Mr Vivian Miller. He is the person in charge of my father's will". Those words demonstrated that the appellant regarded Mr Vivian Miller, the executor of his father's estate, as the person in possession, the learned Resident Magistrate concluded. She said that although he did not write the letter himself it could be inferred that he dictated it and by admittedly signing it, he gave his assent to those significant words.

[9] The learned Resident Magistrate further found that any acts done on the land such as planting crops were not done for the appellant's own benefit while his father was alive, so he could only make a claim to possession in his own right after 1989. She found the evidence of the appellant to be fraught with contradictions and inconsistencies. The learned Resident Magistrate described his evidence as "inherently unreliable and lacking in the *bona fides* expected by a tribunal of fact". Based on all the contradictions in his evidence and that of his witness coupled with the letter in response to Mr July's letter, the learned Resident Magistrate reasoned that it was open to her on the facts to find that the appellant was merely permitted by his father to go on to the land of Charles Sellers. He could not have been in continuous, undisturbed occupation of the land since the 1970s as he asserted, because his evidence was that he occupied the land for two years, from 1970-1972, while his father was ill. This was with his

father's permission, she said. Further, the learned Resident Magistrate found, there was no credible evidence that the appellant claimed the land in his own right between 1972 and 1989 while his father was alive.

[10] On the basis of all of the above, the learned Resident Magistrate entered judgment for the respondent, ordering the appellant to quit and deliver up possession of the land to the respondent forthwith. This decision is the subject of the appellant's appeal.

Notice and grounds of appeal

[11] Notice and six grounds of appeal were filed on 24 April 2013 by the appellant but with a change in his representation came an application on 24 February 2014 to argue eight supplemental grounds and by leave of the court those were the grounds which were argued before us. They are as follows:

> "1. The learned Resident Magistrate erred in law in finding that Estelle Louise Brown was entitled to the land or an interest in the land or that on the death of Charles Sellers the land would pass to her because:
>
> i. There was on her own finding no evidence that Charles Sellers had died.
>
> ii. If Charles Sellers had died before 1976 when the Status of Children Act came into force Estelle Louise Brown would not have been a beneficiary of his estate, she at best having been an illegitimate child.
>
> iii. If Charles Sellers had died after the coming into force of the Status of Children Act there is no or no admissible or satisfactory evidence that he had

acknowledged the said Estelle Louise Brown as his child.

iv. There is no evidence that the estate of Charles Sellers had ever been administered.

v. There is no evidence that Estelle Louise Brown ever even entered into possession of the land.

vi. There is no evidence to support the learned Resident Magistrate's conclusion that the interest in land (supposedly) acquired by Estelle Louise Brown nee Sellers was established through occupation by Harold Nembhard and was affirmed by his continuous possession.

2. The learned Resident Magistrate erred in finding [sic] failing to find that the Appellant was in possession of the land in his own right occupying and cultivating it as an owner would from 1972 to the time of the trial, and at the very least from 1989 when his father died.

3. The learned Resident Magistrate erred in law and on the facts in finding hat [sic] Estelle Louise Brown was in possession of the subject land through Harold Nembhard up until 1989.

4. The learned Resident Magistrate erred in interpreting the Appellant's response to the letter from Mr Cecil July as demonstrating that he was not in possession of the land.

5. The learned Resident Magistrate erred in finding hat [sic] the Appellant was not seeking possession in his own right whilst his father was alive.

6. The learned Resident Magistrate erred in failing to recognise that even if the Appellant had been in possession with his 'father's' permission during his lifetime (which is not admitted) that licence would have expired on his father's death.

7. The learned Resident Magistrate erred in that she failed to find that the Appellant had been in possession of the land

for longer than the limitation period and that any title of or through Charles Sellers would have been extinguished.

8. The learned Resident Magistrate failed to recognise and find that as between the parties the Appellant, in any event, had the better right to possession."

The appellant's submissions

[12] Mr Adedipe, counsel for the appellant, submitted that the principal issue in this appeal was entitlement to possession based on ownership, the respondent asserting ownership and entitlement to possession as the personal representative of Estelle and the appellant asserting that he was in possession and had become the owner of the land having extinguished any prior fee simple entitlement by virtue of his long possession. He rightly submitted that the ultimate question for determination would therefore be who had the better title to possession.

[13] According to the respondent, Mr Adedipe submitted, he had the better title as the personal representative of Estelle whose entitlement was based on succession, thus enabling him to recover possession by virtue of the provisions of section 89 of the Judicature (Resident Magistrates) Act, on the ground that the appellant was a squatter. However, counsel argued, in the defence filed by the appellant and in his submissions before this court the appellant maintained that:

i. He had title pursuant to the Limitation of Actions Act.

ii. Estelle was at no time the fee simple owner of the land.

iii. He was entitled to remain in possession of the land as owner.

Even a squatter can maintain an action for trespass, Mr Adedipe submitted, so that as the appellant was factually in possession, it was for the respondent to prove that his entitlement was better than the appellant's.

[14] Counsel referred to the learned Resident Magistrate's finding that there was no evidence to prove that Charles Sellers was dead and submitted that in that event it cannot be said that Estelle is entitled to possession by succession. Further, counsel argued, there were only slender assertions that Estelle was the daughter of Charles Sellers and no evidence of acknowledgement of paternity by him. It was therefore erroneous for the learned Resident Magistrate to conclude that the respondent had proven the title he asserted as the evidence did not support such a finding, counsel argued and, on that basis alone, the appellant is entitled to succeed on this appeal.

[15] Mr Adedipe conceded that there were areas of the appellant's evidence that were riddled with uncertainty and may have provided justification for the learned Resident Magistrate's unfavourable view of him. His evidence was that his father Harold Nembhard was caretaker of the land for Charles Sellers. His father fell seriously ill in about 1970 and the property grew up into bushes. Counsel submitted that the sense of his evidence was that he took over the land in 1972 and cultivated it up to 2007, the time of the suit. However, it was submitted, the appellant's possession for the purposes of this matter would have had to start in 1989 when his father died. Counsel contended that Harold Nembhard had no interest in the land to give to the appellant so

that the appellant was on the land after his father's death on his own accord. Mr Adedipe further contended that if his father had given him a licence to be there, that licence would have expired on his father's death. The appellant's possession would thereafter be against the owner and time would run from 1989, counsel submitted.

[16] It is admitted that the appellant signed the letter but, counsel pointed out that the letter did say that he did not recognize Estelle as the owner of the land and asserted that if Charles Sellers came he would deal with him, acknowledging Charles Sellers as the owner. Counsel submitted that an occupier does not have to deny ownership of the owner to be in possession. The appellant asserted in his response his intention to remain on the land subject to the claim of the owner, Mr Adedipe argued, but the learned Resident Magistrate erroneously interpreted his letter to be an assertion of his intention not to possess. She was concerned with the mental element required to establish possession and based on his letter of response she concluded that he did not intend to possess in his own right and so did not have the required *animus possessendi* but it was counsel's contention that that conclusion was unfair to the appellant. She was clearly concerned with his intention and not with his presence on the land, counsel argued, but, if the learned Resident Magistrate had found that there was a period that the appellant said he was on the land and he was not, then one would have expected her to say so because if there was such a break in his presence there between 1989 and 2004 the limitation period would have been broken. However, she made no such finding. Mr Adedipe submitted that as unfavourable as the learned Resident

Magistrate's view was of the appellant, at no time did she find that he was not in possession.

[17] The critical issue for the court's consideration was his intention to be there, counsel contended and he relied on cases such as **J A Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30; **Wills v Wills** [2003] UKPC 84 and **Pottinger v Raffone** [2007] UKPC 22, to support his submission. Additionally, Mr Adedepi submitted, there must be possession to the exclusion of the owner. The respondent's evidence that he went on the land with a surveyor and was driven away by the appellant is a clear indication of the appellant's intention to possess to the exclusion of the owner. On the totality of the evidence and the issues as they developed, the unfavourable view which the learned Resident Magistrate expressed of the appellant's credibility ought not to have been fatal to his case, counsel submitted and the learned Resident Magistrate ought not to have arrived at a verdict adverse to him.

[18] Consequent upon the judgment of the learned Resident Magistrate the respondent has entered into possession, Mr Adedipe submitted and he therefore urged the court to set aside the judgment and restore possession to the appellant.

The respondent's submissions

[19] Mr Smith submitted on behalf of the respondent that the learned Resident Magistrate debunked the idea that Estelle acquired her interest by succession. Counsel

contended that the learned Resident Magistrate made general statements on the law relating to succession then, on the totality of the evidence, found that Estelle had acquired her interest in the land through possession and not through succession as there was no evidence to that effect. Having set out what the respondent had to prove in that regard, Mr Smith submitted, the learned Resident Magistrate found that Estelle's possession had been established through the continuous occupation of Harold Nembhard which continued through to the respondent, to the exclusion of the appellant. In counsel's view, the evidence supported the learned Resident Magistrate's conclusion that Estelle's possessory right had been established.

[20] Counsel contended that it was clear from the evidence that although Estelle was not present on the land, in person, in the sense of working the land, she was present through Harold Nembhard's action, working on it, on her behalf. No issue was taken with this, said counsel, save and except where the appellant said at one point that his father was caretaker for the land (disingenuously confining his stewardship to Charles Sellers only and not extending it to include Estelle), then at another point, when taxed in cross-examination, saying that his father was never caretaker, contradicting his earlier evidence and at yet another point saying his father owned the land.

[21] Mr Smith highlighted the actions upon which Estelle's possessory right was grounded. Firstly, he submitted, the respondent paid the taxes on the land on Estelle's behalf and tax receipts were exhibited to support this. (Counsel noted however that the appellant also claimed to be paying taxes and said he paid on behalf of his father. According to him, his father was paying on behalf of the owner and all he did was to

continue what his father was doing.) Secondly, the respondent would visit the land on her behalf, inspect it and report to her, counsel said and this was done up to 2003/2004 when the appellant went on the land. Thirdly, counsel contended, notice of amendment to the tax roll was sent to the respondent as he was recognised on the roll as the person in possession.

[22] Counsel submitted that the appellant showed himself to be generally unreliable and lacking in credibility as he sought to base his alleged possessory title on a number of acts of possession including payment of taxes and fencing the property to keep people out but the evidence showed that not all the tax receipts he produced related to the land and his assertions about fencing were ill conceived and misleading. Counsel said the appellant testified that he first went on the land by himself and not with his father's permission, occupying it between 1970-1972 and fencing it in the 1970s. However, there is evidence that there was no fencing until after Estelle died in 2004, Mr Smith submitted and the appellant later conceded that it was not the entire land that was fenced as he first sought to have the court believe.

[23] Mr Smith referred to the two cogent facts which must be proved to establish possession as a matter of law, namely, actual open continuous possession for the relevant period accompanied by the necessary mental element which is intention to possess. As supported by the cases cited (eg **Pye**) the intention must be to possess not to own, Mr Smith submitted and in **Pye** and, other cases, it is clear that where a person has entered lawfully on to property, whether the possession was acquired by licence or

by lease/tenancy that would militate against him acquiring by possession unless that licence had been revoked or, if a tenant, the tenancy was determined.

[24] In addition, Mr Smith submitted, there is no legal basis to suggest that the appellant gained possessory rights up to 1989 when he was on the land with his father's permission because up to that time he would have been claiming through his father as licencee/agent. Since his father's possession was not possession in itself but, as agent of Estelle, counsel argued, the appellant's possession could only also be as Estelle's agent.

[25] After the death of his father the appellant insisted on remaining on the land, counsel submitted and, consequently, a letter was generated to him by Mr July. It was Mr Smith's further submission that it can be deduced from the appellant's letter in response, coupled with his evidence in general that Mr July's letter was a notice to quit. Counsel contended that the appellant seemed to be asserting in his reply that the land belonged to his father (as he said at one point in his evidence) and that it was to be devised by his father under his will. Further, it was submitted, the appellant would seem to be of the view that on the death of his father, Vivian Miller as executor of his father's will was the person responsible for the land. In addition, counsel contended, the appellant was asserting that the land was not given to Estelle under the will but that it was possibly given to him. It would therefore seem that to his mind, Mr Miller, as the man in charge of his father's will is the one who has given him permission to be on the land, Mr Smith submitted and that would be the basis for his response to Mr

July, that "I am not the one you are to write the letter to it should have been Mr Vivian Miller".

[26] Counsel submitted that up to 1989 the appellant was not a trespasser as one cannot be a trespasser if one thinks there is a licence and the appellant did not see himself as a trespasser even after 1989 (or at all). Counsel argued that since one who seeks to assert title to land by possession has to start as a trespasser, it is questionable whether in law that person has the necessary intention to acquire title. Counsel further argued that a person who is on the land under the view that he is the owner of the land cannot acquire title by possession over a 12 year period. For this view he drew the court's attention to the case of **Thomas Farrington v Henry Bush** (1974) 12 JLR 1492 and to the evidence of the appellant throughout the case that as early as 1970 he went on the land and fenced it as owner. It was submitted that if, as he asserted, he was on the land legally he could not have acquired a possessory title.

[27] Finally, counsel contended, there was no evidence of acts of possession by the appellant between 1989 and 2003/2004. According to the evidence of the respondent, the appellant had left the land after he received Mr July's letter and returned in about 2003/2004 which would mean that the appellant could not sustain a claim to title by adverse possession since the period of possession would have been reduced to a mere four years to the time of the suit in 2007 instead of the required period of 12 years undisturbed possession for the purposes of the Limitation of Actions Act, counsel submitted. Accordingly, Mr Smith urged the court to dismiss the appeal, affirming the judgment in the court below.

[28] Mr Adedipe pointed out in reply that the case of **Farrington v Bush** relied on by the respondent along with a line of cases in similar vein were directly or indirectly overruled by **Wills v Wills**. What is required, counsel submitted, is possession as an occupying owner would, so the intention does not have to be to use it in a way inconsistent with ownership. It was his contention that the question to be answered is, when does the right to take possession arise? Intention to possess trumps all, he submitted. It does not have to be an intention to own but only an intention to possess on one's own behalf and to exercise the rights that an occupying owner would have, so that the authority of **Farrington v Bush** is overruled by **Wills v Wills**, Mr Adedipe argued.

Analysis

[29] It is evident from the above review of the submissions that neither counsel addressed the grounds of appeal separately but, instead, addressed the issues which emerged from them and in this analysis I propose to adopt a similar approach. Accordingly, the two questions for determination as I see them are:

(i) whether the respondent's interest in the land as personal representative of Estelle's estate was based on a right of succession or on a possessory right to title; and

(ii) whether the appellant established that he has a right to possession of the land which extinguished Estelle's right by virtue of the Limitation of Actions Act.

The right of succession and the possessory right to title

[30] The findings of the learned Resident Magistrate make it clear that her decision was not based on Estelle's right of succession to the estate of Charles Sellers. It is true that evidence was led by the respondent in an effort to establish that Estelle was the daughter of Charles Sellers, the fee simple owner of the land and as such was a beneficiary under his estate. However, the learned Resident Magistrate outlined the deficiencies in the evidence if the succession route was the aim of the respondent and found that such evidence as there was in that regard did not establish a right of succession but established Estelle's possessory right to the land. At page 4 of her reasons she wrote, "Her estate is entitled to claim an interest in the land which belonged to Charles Sellers. This claim asserts possessory rights thereto". It seems to me, therefore, that submissions concerning proof of Charles Sellers' death, his acceptance of paternity or the legitimacy or otherwise of Estelle's birth are, in the final analysis, unhelpful to a determination of this matter.

[31] The respondent's claim in the court below was based on an allegation that the appellant was a squatter entitling Estelle's estate to recover possession of the land by virtue of the provisions of section 89 of the Judicature (Resident Magistrates) Act which read as follows:

> "89 When any person shall be in possession of any lands or tenements without any title thereto from the Crown, or from any reputed owner, or any right of possession, prescriptive or otherwise, the person legally or equitably entitled to the said lands or tenements may lodge a plaint in

> the Court for the recovery of the same and thereupon a summons shall issue to such first mentioned person; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then on proof of his still neglecting or refusing to deliver up possession of the premises, and on proof of the title of the plaintiff, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the Magistrate shall think fit to name; and if such land be not given up, the Clerk of the Courts, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant authorizing and requiring the Bailiff of the Court to give possession of such premises to the plaintiff."

Therefore, it was for the respondent to establish that Estelle had a possessory title to the land and that he was thereby entitled to bring a claim for recovery of possession against the appellant who was a squatter on the property.

[32] At page 135 of the record the learned Resident Magistrate had this to say:

> "[T]he interest in land **acquired** by Estelle Louise Brown nee Sellers was established through occupation by Harold Nembhard and was affirmed by his continuous possession. This continuous possession on her behalf was continued through to the [plaintiff] to the exclusion of the [defendant] ..." (emphasis supplied)

But, how did Estelle acquire this interest in the land? It certainly was not by succession since the learned Resident Magistrate found that there was no proof that Charles Sellers was dead or if dead, that his estate had been administered. The learned Resident Magistrate therefore turned to the requirements necessary to establish a possessory right to title (see page 134 of the record) and found that Estelle had met those

requirements through Harold Nembhard's continuous occupation of the land and the acts indicating possession done on her behalf by the respondent. Additionally, she had before her evidence that during his lifetime Harold Nembhard had behaved in a manner that was consistent with a recognition that Estelle was to be regarded as owner of the land as he would give her a share of its produce or cash in lieu thereof. The land was agricultural land and it was the unchallenged evidence of Thelma Foster that she knew Harold Nembhard to be its caretaker and that "He always work on the land, he did it for himself, he gave food for Louise when he make a money off it and he gave her money, that's it" (page 18).

[33] In cross-examination there was a suggestion made to Miss Foster that Harold Nembhard was not the caretaker for Louise (that is, Estelle), to which she responded "Mr Harold Nembhard was the caretaker", though she was unable to say "from when to when" (page 24), but there was no challenge to her evidence that Harold Nembhard would make some form of returns to Louise, in cash or kind. It must be borne in mind that these persons are related. Harold Nembhard was the brother of Charles Sellers and may well have known if Charles Sellers was still to be counted among the living. In any event, there came a point when it seems that Charles Sellers' ownership had been discontinued (whether by death or otherwise) and he perceived that Estelle was the owner of the land and the person to whom he was accountable. He thereafter continued in his capacity as caretaker until his death, never once asserting any rights of owner over the land.

[34] The actions of the respondent were also consistent with an acknowledgement that Estelle was the owner or had become the owner of the land as he was paying the taxes on the land on her behalf. He it was who was advised of the amendment to the tax roll indicating an acknowledgment that he was the person responsible for the payment of the property tax on the land and it is unchallenged that he was making these payments on Estelle's behalf. He was overseeing the land on her behalf before her death, making reports to her about his observations and continued in that capacity after her death, as her personal representative. The learned Resident Magistrate was careful to note that, like Harold Nembhard, the respondent also made no claim to the land in his own right. Accordingly, she found that there was evidence of Estelle's possessory entitlement to the land through Harold Nembhard and the respondent and that their actions were done with a view to establishing her entitlement.

[35] Apart from her acceptance of the evidence that Estelle had established a possessory right to the land through Harold Nembhard and the respondent, it was open to the learned Resident Magistrate, in my view, to find that the letter which Estelle caused to be written to the appellant by Mr July, was in the nature of a notice to quit and to further find that it demonstrated the necessary *animus possidendi* in Estelle as required by law (see paras [5] and [6] above). The appellant admitted to having received it but testified that he had discarded it as he was not on the land illegally. He had caused a letter in response to be addressed to Mr July stating *inter alia* that:

> "I received a letter from you on behalf of Mrs Louise Brown about a piece of land she claims belongs to her, and that I am trespassing on it."

He denied that he was a trespasser and that she owned the land. After his response, however, the evidence from the respondent disclosed that notwithstanding his denial of Estelle's rights the appellant withdrew from the fray which could well be seen as an acknowledgment of that which he denied. More will be said about the significance of this letter below.

[36] Therefore, it is my opinion, that on the totality of the evidence before her, the learned Resident Magistrate was entitled to conclude that Estelle had established a possessory right to the land and as such her personal representative was entitled, by virtue of the provisions of section 89, to claim recovery of possession of the land.

The competing claims to possession and the application of the Limitation of Actions Act to the appellant's claim

[37] Counsel for the appellant contended that the evidence before the learned Resident Magistrate demonstrated that the appellant was undoubtedly in possession of the land and had been from about 1972 (when he entered on his own account) or 1989, at the very least (when his father died), cultivating it and using it as pasture to the exclusion of all others. Counsel placed reliance on **Pye** and **Wills v Wills** to support his argument that the conduct of the appellant sufficed to demonstrate that he was asserting rights of an owner. Reliance on those cases is well founded and, for my part, I am content to seek to determine the issues in the instant case within the context

of the principles to be distilled from **Pye**, founded as they are upon a comprehensive review of the authorities relating to legal possession of land. Below is a brief summary of the facts and circumstances in that case.

[38] The plaintiff Pye had the paper title to agricultural land to which vehicular traffic was controlled by the defendant and neighbouring farmer, Graham. At first the defendant had had a licence to use the land for its grass but when the licence expired the defendant had continued to farm the land for about 14 years without the plaintiff's permission. The plaintiff had told him to leave the land but he did not and treated the farm as his own. Furthermore, the plaintiff had done nothing on the land for the entire 14 years and did not bring the claim for 14 years. On the principles which constitute dispossession of a paper owner of land Lord Browne-Wilkinson said at paragraph 38 of the judgment:

> "There will be a 'dispossession' of the paper owner in any case where **(there being no discontinuance of possession by the paper owner)** a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is single and exclusive. Therefore, **if the squatter is in possession the paper owner cannot be**." (Emphasis supplied)

[39] Before the law attributes possession of land to a person who can establish no paper title to possession, that person must be shown to have **both** factual possession, (that is, a sufficient degree of custody and control) and an intention to possess (that is, an intention to exercise such custody and control on one's own behalf and for one's own benefit – the *animus possidendi*). The intention to possess is critical as, in law, there can be no possession without it. According to Lord Browne-Wilkinson, in **Pye** "[i]t

is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession" (see para 40).

[40] Expounding on the two elements necessary for establishing legal possession of land, Lord Browne-Wilkinson quoted with approval the words of Slade J extracted from **Powell v McFarlane** (1977) 38 P & CR 452 at pages 470-471 as follows:

> "(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. **Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time.** The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed… **Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."**
> (Emphasis supplied)

His Lordship held that in **Pye** the Grahams were in occupation of the land which was in their exclusive physical control and the paper owner Pye was excluded from the land by the hedges and the lack of any key to the road gate. They farmed the land in the way that the owner would and were plainly in factual possession before the date relevant to the facts of that case.

[41] There were some misconceptions which his Lordship sought to lay to rest clearing the way for the emergence of the correct principles. It was wrong, Lord

Browne-Wilkinson said, to treat it as necessary for a squatter to have an intention to own the land in order to be in possession and he referred to the case of **Moran** (1988) 86 LQR 472, 479 where the trial judge (Hoffmann J) got it right when he pointed out that what is required is "not an intention to own or even an intention to acquire ownership but an intention to possess". Once it was accepted that in the Limitation Act the word possession had its ordinary meaning (being the same as in the law of trespass or conversion,) it is clear, said Lord Browne-Wilkinson, that at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess.

Applying the principles to the instant case

[42] I turn now to examine the facts and circumstances of the instant case, within the context of the principles to be distilled from **Pye**, with a view to determining (i) whether the appellant was in factual possession of the land, (ii) if so, whether his possession was accompanied by the necessary mental element and (iii) whether the duration of that possession, extended over the requisite period for the purposes of the Limitation of Actions Act.

Factual possession - physical control of the land or its occupation without the owner's consent

[43] In the years prior to the death of his father the appellant's presence on the land was plainly, from the evidence, with his father's consent. This eventually seemed to have become the generally accepted position by both sides and certainly this was a

clear and, in my view, correct finding of the learned Resident Magistrate. Therefore, the question of dispossession (that is, possession taken from another without consent beginning at the moment of possession) could not have applied to the pre-1989 years (and the learned Resident Magistrate did find that any contention that he was in possession without consent could only have related to the period after 1989). However, at some point, the appellant claimed to have been in physical control of the land occupying it without the owner's consent and dealing with it as the owner would. But the challenge which the appellant faced in the circumstances of this case was to show that in remaining in possession after his father's death he had dispossessed the owner and was enjoying quiet, undisturbed possession, having custody and physical control over the land with the intention to exercise that custody and control on his own behalf and for his own benefit.

[44] In **Powell** at page 472 Slade J had this to say:

> "The question of *animus possidendi,* is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession."

In the instant case Estelle's continued possession had been made clear after the death of her agent in the letter which she caused to be addressed to the appellant and although that letter was not produced to the court, in all the circumstances, including his response to the letter, I agree with the conclusion reached by the learned Resident

Magistrate that that letter must have been in the nature of a notice to quit. That letter would certainly negative any contention that he was in quiet, undisturbed possession at that time. Estelle was thereby maintaining her possessory title to the land and her personal representative had continued to oversee the land on behalf of her estate so that if Estelle's possession was not discontinued it followed that the appellant could not be in factual possession. As Slade J put it in **Powell** "an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time". It therefore seems to me that there was no need for the learned Resident Magistrate to comment in her judgment about the appellant's presence on the land if, on her findings, it could not have amounted to factual possession. It was not in dispute that he was in occupation of the land up until the time of trial but she clearly did not accept that that occupation amounted to factual possession.

[45] Additionally, the learned Resident Magistrate was not convinced that the acts of possession and control upon which the appellant sought to place reliance were genuine and of any assistance in establishing the requisite custody and control. For instance, he claimed to have fenced the land, but the learned Resident Magistrate found that there was no fencing of the land as the appellant claimed and that visible fencing, which was to one side of the land only, was done after Estelle's death. He also claimed to have paid property taxes but there was some doubt as to exactly what period the payments related to and the receipts he tendered were not all relevant to the land in question. And the evidence that he had chased away the surveyor, whom the respondent had caused to attempt a survey of the land, related to 2006 while the relevant period for

actions on his part showing that he was asserting rights of owner would have had to commence well before 2006 if it was to be of any assistance to him in that regard.

[46] Furthermore, the learned Resident Magistrate found that based upon his response to the letter from Mr July, the appellant seemed to have formed the view that it was the executor of his father's will who had possession of the land. It was not unreasonable, it seems to me, for the learned Resident Magistrate to infer that, in that letter, the appellant was regarding the executor as having replaced his father who was the person in possession and with whose consent he had previously had possession. The appellant was certain, it seems, that his father had not willed the land to Estelle and it appears that in his mind his father had possibly willed it to him. As stated in his letter of response, "It was from I was a boy my father put me on that piece of land." This seemingly would mean that his father owned the land (which accorded with his evidence at one point), and, as owner, his personal representative/executor would be able to give consent for his continued occupation of the land. So he was there with his father's consent prior to his father's death and thereafter with the consent of the executor of his father's will in which event, he would still not be in factual possession.

[47] But, even if his occupation of the land after his father's demise in February 1989 could be viewed as factual possession showing that he was dealing with the land as an occupying owner might have been expected to deal with it, without any interference from the owner, it being in his exclusive physical control (and it is at least arguable that his letter to Mr July dated 12 June 1989, showed that he was, at the date of the letter,

in physical possession of the land and was refusing to accede to the request that he vacate the property), the law requires that this possession must be accompanied by the requisite intention to possess the land in his own right in order to amount to legal possession. The only relevant question, said Lord Browne-Wilkinson, is whether the person in factual possession also has an intention to possess.

Intention to possess – the *animus possidendi*

[48] In **Powell** the court held (as gleaned from the headnote) that for legal possession of land:

> "the *animus possidendi* was also necessary to constitute possession and involved the intention in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title, so far as was reasonably practicable and so far as the processes of the law would allow; and that the courts would require clear and affirmative evidence that the intruder, claiming that he had acquired possession, not only had the requisite *animus possidendi* but made such intention clear to the world."

It was further held that:

> "it was consistent with principle as well as authority that a person who originally entered another's land as a trespasser but later sought to show that he had dispossessed the owner, should be required to adduce compelling evidence that he had the requisite *animus possidendi…"*

The learned Resident Magistrate did find that the words used in his letter showed that he did not have the necessary *animus possidendi* but in stating that "[T]he only time I will come off the piece of land is when Charles Sellers turn up, the rightful owner of the land" (and bearing in mind that Charles Sellers was alleged to be deceased, was that an

expression of intention never to leave?), he could thereby be said to be showing an intention to possess in his own right. At the end of the day, however, the learned Resident Magistrate inferred that his conduct and actions indicated an interest in maintaining or continuing the possession enjoyed by Charles Sellers and his descendants. Therefore, he would have failed to demonstrate any compelling evidence of the requisite *animus possidendi* necessary for establishing a possessory right to the land.

[49] It is true that the learned Resident Magistrate expressed certain views which are not supported by current authorities. When she wrote "[H]e never used the words 'I own the land' to describe his being on the land while his father was ill" and further reasoned that "the defendant never expressed any interest in acquiring the land" the learned Resident Magistrate may well have been influenced by the thinking in those line of cases which Lord Browne-Wilkinson said in **Pye** had been wrongly decided. There was no need for him to claim ownership to establish his possessory right as what is required is "not an intention to own or even an intention to acquire ownership but an intention to possess" (see **Moran** (per Hoffmann J)). But in the final analysis, it seems to me that this matter falls to be determined on a consideration of the applicable period over which his possession extended and it therefore remains to be seen whether this error impacted her ultimate decision. This will be addressed anon.

[50] The question which now remains to be determined, in my judgment, is, on an acceptance of the appellant's contention that the two elements necessary for legal possession of land were established, when did this possession commence?

The relevant period of possession and the Limitation of Actions Act

[51] One of the appellant's complaints was that the learned Resident Magistrate erred in that she failed to find that he had been in possession of the land for longer than the limitation period of 12 years and that any title of or through Charles Sellers would have been extinguished by virtue of section 3 of the Limitation of Actions Act which states:

> "No person shall make an entry, or bring an action or suit to recover any 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."

[52] Section 4 makes provisions for when that right of entry shall be deemed to have accrued and section 30 sets out the consequence of the determination of the limitation period prescribed by section 3. Under the rubric "Extinguishment of Rights" section 30 reads as follows:

> "At the determination of the period limited by this Part to any person for making an entry or bringing an 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."

Accordingly, the question which ultimately would remain to be answered is whether Estelle's right and therefore the right of her estate to possession of the land had been extinguished by the appellant's continuous occupation.

[53] The learned Resident Magistrate clearly did not see the necessity to deal with the appellant's contention that he had acquired title by possession for the limitation period. She found that his evidence on the period of possession was riddled with discrepancies and inconsistencies and was inherently unreliable. As Mr Adedipe himself conceded, there were areas of uncertainty in the appellant's evidence and it seems to me that the starting point of his possession of the land in his own right would be one of those areas. Furthermore, the learned Resident Magistrate found that Estelle's possession was continuous and uninterrupted and since they both could not be in legal possession at the same time (see **Pye**) then it followed that in her view, he had no claim that could extinguish Estelle's claim. Hence, there was no need to speak specifically to that contention.

[54] In any event, there was evidence before her that he had left the land in 1989, returning only in 2003/2004, shortly before Estelle's death. Whereas in **Pye**, the appellant had been told to leave the land but did not, in the instant case, the evidence showed that after receiving the letter (which as stated above, the learned Resident Magistrate regarded as a notice to quit), the appellant had left the land. There was no evidence of the respondent taking any further steps to secure the possessory rights of Estelle's estate until 2006 when the survey was attempted. This, in my view would tend

to support the respondent's evidence that the appellant was not on the land and, seemingly, the respondent only felt it necessary to take some action again when he returned to the land.

[55] The learned Resident Magistrate had clearly rejected the appellant's evidence, finding him to be an untruthful and unreliable witness so that the respondent's evidence that the appellant had left the land would clearly be accepted over his denial in his evidence in cross examination that he had never left the land. Indeed in her judgment she made specific mention of the evidence that "the defendant Mendoza Nembhard now occupies the land and has been there since 2003 … That this was the defendant's second entry upon the land, the first being in the 1980s". Therefore this evidence was clearly within the contemplation of the learned Resident Magistrate and would have informed her decision that the appellant had failed to establish a possessory title to the land which had remained in the continuous possession of Estelle right through to the respondent as personal representative of her estate. After his return in 2003/2004, having attempted in 2006 to show an intention to possess the land by chasing away the surveyor, the evidence showed that suit was filed in the Resident Magistrate's Court in 2007. The relevant period of his possession would therefore have been from 2003/2004 to 2007, well within the 12 year limitation period.

[56] The appellant's counsel was of the view that any such evidence of a break in his possession could not have factored into the learned Resident Magistrate's judgment as she made no mention of this in her findings. It is well settled, however and now hardly needs reference to any authority that a Resident Magistrate is not obliged to set out *in*

extenso all the findings upon which a decision is based but that it is sufficient if the reasons disclose that the magistrate must have had in mind the relevant principles applicable to the matter at hand. Accepting that he had left the land after the 1989 letter, returning in 2003/2004, the subsequent period of possession during which he relied on his action in preventing the survey to show his intention to possess the land in his own name to the exclusion of the world, would have amounted to no more than about four years by 2007 when the respondent brought the suit and so would not have sufficed for the purposes of the Limitation of Actions Act.

Conclusion

[57] I have given this matter lengthy and mature consideration and I can find no basis for disturbing the learned Resident Magistrate's judgment. Charles Sellers was accepted as the owner of the land even by the appellant (see his letter of response to Mr July) and, in the absence of proof of his death, Harold Nembard would have remained his agent until 1989 when the latter died. The learned Resident Magistrate's finding was therefore correct that the appellant could only claim possession in his own right after his father's death in 1989. But that possession was disturbed by the notice to quit from Estelle who, rightly or wrongly, claimed an interest which pre-dated his (see paras 31 -34 above) and in quitting the land after receiving her notice he interrupted the period of his possession which would have been very brief since his departure was said to have been in 1989 after his letter dated 29 June 1989 and the time of his return (2003/2004) to the date of the respondent's claim would not have amounted to the 12 years required to establish adverse possession under the Limitation

of Actions Act. The significance of his departure cannot be overstated as, in my view, it signified an acknowledgment of Estelle's interest in the land notwithstanding his assertions in his letter. I am therefore unable to agree with Mr Adedipe that the evidence disclosed that the appellant was in possession for well in excess of the limitation period. In my opinion, the evidence did not support the appellant's contention that he had acquired title to the land pursuant to the Limitation of Actions Act and had extinguished the title of Charles Sellers and his descendants. I would therefore dismiss this appeal and affirm the decision of the learned Resident Magistrate with costs to the respondent.

LAWRENCE-BESWICK JA (Ag)

[58] I too have read the draft judgment of McIntosh JA and agree with the reasoning and conclusion. I have nothing further to add.

PHILLIPS JA

ORDER

Appeal dismissed. Decision of the Resident Magistrate affirmed. Costs to the respondent.