IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV03937

IN THE MATTER of ALL THAT parcel of land part of CUMBERLAND PEN in the parish of SAINT ANDREW, Strata Lot numbered 22 together with one undivided 8/500th share in the common property and being all of the land comprised in Certificate of Title registered at Volume 1514 Folio 872 of the Register Book of Titles.

BETWEEN PROPRIETORS STRATA PLAN 253 CLAIMANT

A N D ANNMARIE LOGAN DEFENDANT

IN CHAMBERS (VIA ZOOM)

Mr. Demetrie Adams instructed by Messrs Tavares, Finson, Adams for the Claimant

Mr. Clive Munroe Jr. instructed by Munroe & Munroe for the Defendant

HEARD: February 19 and March 4, and 13 2024

Civil Practice and Procedure – Application to Strike Out – Whether Claim Discloses Reasonable Grounds for Bringing the Claim.

Civil Practice and Procedure – Whether the present Claim is an abuse of Process of the Court.

Registration of (Strata)Titles Act – Sections 3A, 3B, 15A.

Limitation of Actions Act – Sections 3, 4(a), and 30 – Whether or Not the Claimant's Title to the disputed section of the Common Property was Extinguished – Whether the Claimant Retained Jurisdiction over the disputed portion of the Common Property at the time of commencing the Complaint before the Commission of Strata Corporations.

D. STAPLE J

BACKGROUND

[1] Simply because one can do something does not mean one should. It is an interesting adage that is apropos to this particular claim between the Claimant Strata Corporation and the Defendant, a Proprietor of the said Corporation.

[2] The Defendant is the owner of Lot 22 and one undivided 8/500th share in that property registered at Volume 1514 Folio 872 of the Register Book of Title. It is known by its civil address as La Morne Apartments, Plantation Heights in the parish of St. Andrew.

[3] The said property is registered with the Commission of Strata Corporations as a strata under the **Registration (Strata Titles) Act**. The property is registered at Proprietors Strata Plan No. 253. Pursuant to section 4(1) of the **Registration (Strata Titles) Act**, the Claimant is a body corporate. The Claimant is a separate person from the individual proprietors that comprise it and can take various enforcement steps against the individual proprietors or bring claims against the individual proprietors in certain instances[1].

[4] The Defendant says that she has owned her lot since 1998. She says that sometime in 2004 she commenced construction of an extension of her lot that became a garage. On top of this garage she built an office space and a game room. She asserts that she paid the sum of $25,000.00 to the Claimant for this construction and she was to have completed the upper floor with a slab roof. She said she never received any receipt for this payment. This payment was denied by the Claimant in their Affidavit filed on the 7th March 2023 (see paragraph 6).

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[1] See for example ss. 5A (enforcement proceedings for outstanding maintenance); or s. 3B(1)(c) (resolution of disputes between the Corporation and the Proprietors).

[5] The Claimant, at paragraph 5 of their Affidavit filed on the 12th December 2022, said that the Defendant communicated this intention to the Executive Committee of the Claimant by letter dated February 21, 2005. They assert that by letter dated April 4, 2005, the developers of the property, wrote to the Defendant advising her that the construction would encroach on the common area and asked her to cease and desist and remedy the encroachment.

[6] According to the Claimant, many letters passed between the Claimant and the Defendant through their Attorneys-at-Law concerning the disputed construction. However, what is clear to me is that there was no dispute that the Defendant had actually built something from 2004 and that it remained in situ despite written opposition.

[7] Years passed and in 2021, the Defendant said she attempted to close off the upper floor by adding the roof. This was confirmed by the Claimant when they noted in their first affidavit that in March of 2022, they noticed materials being dumped on the Defendant's property and that construction work was imminent.

[8] The Claimant took action and issued what they called a cease and desist notice by email to the Defendant advising that any extension needed the approval of the executive committee. The Claimant said they received no response to this letter and sent another missive in April 2022, reminding the Defendant of the need for approval and upping the ante by giving a warning that action would be taken if she did not stop her construction works.

[9] The Claimant asserts that the Defendant wrote to them on the 18th April 2022 advising that she was in the process of amending her building plans and hoped to receive them within 10 days of that date and no construction would take place.

[10] Thereafter the Claimant brought the Defendant before the Commission of Strata Corporations (hereinafter the CSC) on a complaint and a first hearing was set for the 6th October 2022. This fact was noticeably absent from any of the earlier affidavits of the Claimant when it sought the injunction against the Defendant.

[11] The hearing commenced before one Ms. Mercede Scott of the Commission of Strata Corporations and remains part heard to this day. Indeed, a site visit was carried out by the Commission, but there was no report of that site visit to date. In fact, those proceedings have been stayed, in effect, pending the outcome of this matter before the Court.

[12] It was long after the initiation of the complaint before the CSC that the Claimant filed the instant claim in December of 2022. It appears to me that the primary aim of the claim, at first, was to secure an injunction to stop the Defendant continuing her building process.

[13] The interim injunction was granted on the 3rd January 2023. Following an inter-partes hearing, the injunction was discharged on the 21st March 2023 and then on the 9th May 2023, the Defendant applied to strike out the Claimant claim which is the present application before the Court.

ISSUES

[14] The above are the essential background facts to this matter. They are largely undisputed concerning what happened leading up to this point.

[15] Counsel for both parties made submissions which I have read and considered carefully.

[16] A brief summary of the position of the Defendant, as far as I understand it, is that:

a) **The Claimant has already engaged the statutory process for the resolution of disputes between the Strata Corporation and a Proprietor;**
b) **The injunction issue is now resolved, the only issue remaining is the question of the declaratory relief and the demolition of the structure;**
c) **The essential remedy being sought by the Strata Corporation is the demolition of the structure. Such a remedy can only be granted by the CSC and not the Court and so the Court is not the appropriate forum to resolve the dispute.**
d) **It is not reasonable for the Claimant to have brought and/or to continue the action in the Court as the same dispute is before the CSC.**

[17] The Claimant's position, as I understand it, is as follows:

a) **The Court still retains jurisdiction to entertain and resolve disputes at first instance between the Strata Corporation and a proprietor and so the creation of the CSC by Parliament has not ousted the jurisdiction of the Supreme Court.**
b) **The Claimant still has standing to bring the instant claim despite having initiated a claim before the CSC.**
c) **The Claim should not, in the circumstances, be struck out.**

[18] I have identified the core issue of this Application to be an "is" versus "ought" issue. Meaning that the true question is not whether or not the Claimant can bring the claim in the Supreme Court against the Defendant, but rather was it reasonable for the Claim to have been brought in the first place and should it persist now?

[19] However, during the course of argument, the question arose of whether the Claimant even had title over the disputed portion of the common property in order to retain jurisdiction to administer same and to bring the complaint. If the Claimant had lost title to the disputed portion of the common property, then they would have no legal right to bring either the complaint to the CSC or this claim in Court.

THE LAW ON STRIKING OUT

[20] Now striking out is one of the most draconian actions a court may take in relation to the statement of case of a party to a claim. It should therefore be used sparingly and only in the most obvious of cases.

[21] Borrowing from the dicta of my sister judge Jackson-Haisley J in the case of ***Lozane v Beckford***,[2]

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[2] [2020] JMSC Civ 106 at paras 30 and 31

> ***"[30] … in S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance SCCA 112/04 delivered 31st July, 2007, in which Harris, J.A. stated at page 29: - "The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases."***
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> ***[31] Similarly, in the case of Drummond Jackson v British Medical Association and Others [1970] 1 WLR 688, Lord Pearson opined at page 695 that: - "Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases." [my emphasis]"***

[22] In deciding whether to strike out a statement of case on the basis that it discloses no reasonable ground for bringing a claim, the court must consider whether or not the Claimant has pleaded facts supportive of the cause of action he seeks to establish. So it is not enough for the Claimant to plead the cause of action, there must be a factual basis established on the face of the pleaded case to support the cause of action. There must be a factual basis for going to trial.

[23] I agree with the authority of ***City Properties Limited v New Era Finance Limited***[3] and the statement of the principle of Batts J at paragraphs 9-11 of the judgment.

[24] As Batts J said, what is required is an examination of the statements of case to ensure that the facts as alleged support the cause of action the Claimant seeks to establish.

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[3] [2013] JMSC Civ 23

[25] However, Sykes J (as he then was) went further. In the case of ***Sebol Limited et al v Ken Tomlinson et al***[4], he interpreted Rule 26.3(1)(c) as follows:

> *"24, Let us look at what rule 26.3 (l) (c) actually says. The rule does not speak of a reasonable claim. It speaks of reasonable grounds for bringing the claim. It would seem to me that simply as a matter of syntax the instances in which a claim can be struck out against a defendant are wider than under the old rules. The rule contemplates that the claim itself may be reasonable, that is to say, it is not frivolous, unknown to law or vexatious, but the grounds for bringing it may not be reasonable. Clearly the greater includes the lesser. Thus if the claim pleaded is unknown to law then obviously there can be no reasonable grounds for bringing the claim. It does not necessarily follow, however, that merely because the claim is known to law the grounds for bringing it are reasonable. The rule focuses on the grounds for bringing the claim and not on just whether the pleadings disclose a reasonable cause of action. In this case the Claim for rectification is known to law but the grounds are not reasonable in light of Pan Caribbean's assignment of all its right to NIBJ."*

[26] This interpretation was approved by the Court of Appeal in the same ***Sebol Limited*** decision when it went to the Court of Appeal[5]. Dukharan JA (with whom K. Harrison JA agreed, though Panton P expressed that Sykes J need not have gone into a discussion on the interpretation of rule 26.3(1)(c)) said that the above interpretation of the rule by Sykes J was correct. Therefore, this is the interpretation of the rule that is now applicable.

[27] From this interpretation one can get two circumstances in which a case can be struck out:

a) When the case discloses no cause of action at all; or
b) In a case where, though a cause of action is disclosed, there is no reasonable ground for it to have been brought.

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[4] (Unreported) Supreme Court, Jamaica, Claim No. 2004 HCV 02526, October 9, 2007 at [24].
[5] *Sebol Limited et al v Ken Tomlinson et al* (Unreported) Court of Appeal, Jamaica, SCCA 115/2007, December 12, 2008 at para 32.

[28] The circumstances in which category (b) cases may arise are quite varied and I will not make any prescriptions here.

HAS THE COURT'S JURISDICTION BEEN OUSTED?

[29] Counsel for the Defendant argued that Parliament, in the creation of the CSC and giving it powers to (among other things) resolve disputes between the Strata Corporation and proprietors, has ousted the jurisdiction of the Supreme Court to carry out its dispute resolution function as between litigants in these matters.

[30] Section 3A of the **Registration (Strata Titles) Act** establishes the CSC. I will set it out below.

> 3A.--(1) There is hereby established for the purposes of this Act, a body to be known as the Commission of Strata Corporations which shall be a body corporate for the purposes of section 28 of the Interpretation Act.

[31] Among the powers of this entity is the power to, "facilitate the resolution of disputes, in particular, those between a corporation and a proprietor arising from any matter to which this Act relates…[6]"

[32] Section 3B(2) goes on to give the CSC the power to order, by notice to the Corporation or the Proprietor or both, among other things, "the demolition of any extension to the external wall of any strata lot or the removal from the relevant parcel of any structures. Vehicles or other things. where the extension or the presence of the structure. vehicle or other thing is contrary to the by-laws.[7]"

[33] Indeed, failure to comply with the Order in the notice under s. 3B(2)(a)(i) can result in the Corporation carrying out the demolition order pursuant to section 3B(3).

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[6] See section 3B (1)(c)
[7] See section 3B(2)(a)(i)

[34] There is also an appeal mechanism where either the Corporation or Proprietor are dissatisfied with a ruling from the CSC. Section 3B(5) provides for the appeal of the decision, but provides that the Order of the CSC remains binding on the parties pending the appeal. Section 3B(6) provides for a stay of the implementation of the order pending the outcome of a properly filed appeal, but this is subject to the provision in s. 3B(8) which says that the order must be implemented forthwith if continuation of the action or thing complained of relating to the decision would likely result in a nuisance or health hazard.

[35] Section 15A establishes the Strata Appeals Tribunal. This is the body tasked with hearing appeals of any person aggrieved by a decision of the Corporation or the CSC. I will set out the exact provision under s. 15A(2) here as it bears examining carefully.

(2) Any person aggrieved by a decision of-

(a) the corporation, in the case of the aggrieved person being a proprietor of a strata lot; or

(b) the Commission

may appeal to the Tribunal in the prescribed manner, upon payment of any prescribed fee.

[36] This section has been the subject of judicial consideration by the Court of Appeal in the case of ***Strata Appeals Tribunal v Douglas Campbell***[8]. At paragraph 50 of the judgment, Phillips JA (as she then was), gave a proper interpretation of the section. I can do no better than to reproduce the section from the eminent jurist.

> ***"[50] In this case, in my opinion, for the purposes of the resolution of the competing issues in the application, it is only necessary to examine section 15A of the Act. It seems clear to me that this section established the Tribunal for the purpose of***

[8] [2016] JMCA App 15.

> ***hearing appeals. It is also pellucid, as found by the learned judge and endorsed by counsel for the respondent in submissions in the application before us, that any person aggrieved by the decision of the corporation, being a proprietor of the strata lot, or by a decision of the Commission, may appeal to the Tribunal, in the prescribed manner, having paid the prescribed fee. So, on the basis of those clear words, in this case, the respondent, being a proprietor of a strata lot could appeal to the Tribunal, if aggrieved by a decision of the corporation or by a decision of the Commission."***

[37] Therefore, the entire scheme of the legislation has been to create a discrete dispute resolution mechanism for strata title residents. Indeed, Phillips JA in the same ***Strata Appeals Tribunal*** decision, highlighted the fact that the creation of the CSC and the SAT by amendment resulted in a "new regime" being born[9].

[38] Despite this, however, in my view it does not oust the jurisdiction of the Supreme Court to hear and determine disputes between Corporations and their proprietors in **common law claims**. However, what the statute now does, after 2009, is create a discrete set of circumstances in which the CSC is to exercise jurisdiction to, among other things, resolve disputes[10] and enforce the bylaws[11].

[39] The case of ***Barraclough v Brown***[12] was submitted by the Defendant as being authority for the proposal that where statute gave jurisdiction to an entity, it intended to exclude the jurisdiction of other entities.

[40] In that case, by s. 47 of the Aire and Calder Navigation Act 1889 the following enactments are made with respect to the removal of sunken vessels: "If any boat, barge, or vessel shall be sunk in any part of the navigation, cuts, canals, docks, basins, or locks of the undertakers, or in the River Ouse within the limits of

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[9] Id at para 48.
[10] Registration (Strata Titles) Act s. 3B(1)(c)
[11] ibid s. 3B(1)(e)
[12] [1897] AC 615

improvement defined by the Act of 1884, and the owner or person in charge of such boat, barge, or vessel, shall not forthwith weigh, draw up, or remove the same, it shall be lawful for the undertakers, by their agents or servants, to weigh, draw up, or remove such boat, barge, or vessel, and to detain and keep the same with her tackle and loading until payment be made of all the expenses relating thereto, or to sell such boat, barge, or vessel, and the tackle or loading thereof, or a sufficient part thereof, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the surplus, if any, on demand, or *the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction*."

[41] The Claimant undertakers had sought to recover the expenses in the High Court. It was held at first instance and in the Court of Appeal that the High Court did not have jurisdiction to entertain the claim for the expenses as the express words of the statute stated that those expenses were to be recovered in a court of summary jurisdiction.

[42] Lord Watson opined as follows, "As already indicated, I am of opinion that the claim founded upon s. 47 of the Act of 1889 was not competently brought before the Court in this suit, the only right which the undertakers have to recover from an owner is conferred by these words: "Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel in a court of summary jurisdiction." The right and the remedy are given *uno flatu* [simultaneously], and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has

therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters[13]."

[43] So counsel's point seems to me to be that as Parliament has set out a mechanism by which disputes are to be resolved between the Corporation and the Proprietors, then they have removed the Court as an avenue for the resolution of the disputes between the Corporation and Proprietors.

[44] The above case does not assist the Defendant's contention in my view. That statute is entirely different and the wording crystal clear as to the venue for the recovery of the expenses. In the case at bar, there is no such clear and explicit wording which confers any exclusive jurisdiction in the CSC.

[45] Section 3B does not confer any sort of exclusive jurisdiction for the resolution of **all** (emphasis mine) disputes of **all kinds** (emphasis mine) between the Corporation and Proprietors on the CSC. The words of creation in 3A(1) do not do so. Nor does s. 3B(1)(c) confer such exclusive power on the CSC. For example, whilst it does give the CSC the power to order the demolition of extensions, there is no power given to the CSC in the nature of injunctive relief to pause the extension pending a hearing between disputants.

[46] The specific word used in s. 3B(1)(c) is "facilitate". The word facilitate means to make something easier[14]. In other words, one of the functions of the CSC is to make the resolution of disputes between a Corporation and its Proprietors or between Proprietors easier. This is only in the circumstances and in the areas as specifically set out in the statute. So in my view, to the extent that the claim made and dispute engaged is one governed by the statute, then the Court would not

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[13] Id at pp 621-622

[14] https://www.merriam-webster.com/dictionary/facilitate

have jurisdiction to resolve that dispute. Indeed, the concept of the demolition order can properly be considered a "new remedy" and not known to common law. The common law equivalent would be a form of injunctive relief (whether it be mandatory in nature or otherwise).

[47] In my view, this is similar to the provisions for alternate remedies for employees under the **Labour Relations and Industrial Disputes Act.** The Act creates the Industrial Disputes Tribunal to resolve disputes between workers and employers such as a claim for unfair dismissal. However, the employee may still bring a claim in the Supreme Court for various common law claims such as unlawful or wrongful dismissal[15]. Indeed, in the same case of ***Village Resorts Limited***, Rattray P opined as follows on behalf of the panel[16]:

> *"The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal "unjustifiable' is the provision of remedies unknown to the common law."*

[48] The same language of "new regime" was adopted by Phillps JA in the case of ***Strata Appeals Tribunal v Douglas Campbell***[17].

[49] What it means then, in my view, is that concerning the jurisdictional relationship between the CSC, the SAT and the Court, where the statute has conferred jurisdiction on the CSC, the Court is excluded. The rulings and determinations of the CSC are appealable to the SAT. However, the Court still retains jurisdiction

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[15] See the decision of *Village Resorts Limited v Industrial Disputes Tribunal et al* (Unreported) Court of Appeal Jamaica SCCA 66/97 delivered June 30, 1998.
[16] Id at page 12-13
[17] N. 8

over any common law or other statutory claim that may arise in disputes between the parties outside of those expressly conferred on the CSC.

[50] Any errors in fact, law or procedure by the CSC are within the competence of the SAT to determine. The Court will not intervene to address issues relating to the rulings by and processes and procedures of the CSC as there is this other statutory remedy to address those matters.

[51] Where the statute confers jurisdiction on the SAT, then it is the SAT that is to rule and the rulings are binding on the parties. However, the processes and procedures of the SAT are amenable to judicial review by the Supreme Court in exercise of its inherent powers to supervise the processes and procedures of inferior tribunals.

[52] In this case, the claim being brought was for:

a) Declaratory Relief
b) An injunction (seems a permanent injunction)
c) A demolition Order.
d) Interest on Damages (but no express claim for damages was made and no cause of action to support a remedy in damages was pleaded).

[53] The CSC has no power to grant declaratory relief nor to grant injunctive relief. It also has no power to award damages. However, I have grave doubts concerning a claim for damages as no underlying cause of action was pleaded for there to be an award of damages.

[54] Based on the relief claimed, I am satisfied that it is likely that the Court will have jurisdiction in this matter as the CSC cannot grant declarations nor can it grant injunctions.

HAS THE CLAIMANT LOST THE RIGHT TO BRING THE CLAIM?

[55] The Court raised this question with the parties as the authority of a Corporation to bring a claim (whether before the Court or the CSC) concerning enforcement of

the bylaws relating to the common property is contingent upon their having supervisory authority over the common property of a strata plan.

[56] The common property is defined, in relation to a strata plan, as so much of the land to which such plan relates as is for the time being not included in any strata lot contained in such plan[18].

[57] Section 10 defines the ownership of the common property. It says at s. 10 that the common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlement of their respective strata lots.

[58] Insofar as enforcement is concerned, the Corporation only has jurisdiction over the common property[19]. Thus if the section being occupied by the Defendant's expansion no longer forms part of the common property of the strata plan, then the Corporation has no authority to "control, manage and administer" that section[20].

[59] In those circumstances, the CSC would have no authority to hear any such complaint.

[60] Counsel for the Defendant rightly pointed out in his supplemental submissions requested by the Court on this point, that in the supplemental affidavit sworn on the 21st February 2024 at paragraph 9(j) the Defendant was challenging the right and title of the Claimant over the disputed section due to limitation.

[61] I am grateful to the promptness of both counsel in their presenting submissions on this point. I have read them carefully.

[62] It is my finding though that the Claimant no longer has the right to bring any form of ejectment proceedings against the Defendant as they have lost the title over

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[18] See section 2 R(ST)A
[19] See Schedule 1, s. 2(a).
[20] See *Fullwood v Curchar* [2015] JMCA Civ 37 at para 41.

that portion of the common property on which the Defendant now has her extension.

[63] It starts with section 3 of the **Limitation of Actions Act**. Section 3 says as follows:

> *"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****."*

[64] Section 3 is essentially a shield from an action by an owner of land for ejectment of an occupier if the owner takes too long to bring the action. Too long being if the owner does not bring the action for ejectment or make entry onto the land within 12 years **from the date his right to re-enter or take the action first accrues to him** (emphasis mine).

[65] Along with section 3, is section 4. Section 4 sets out the deemed date on which the right to re-enter or bring the action accrues in several circumstances.

[66] Sections 4(a), the relevant section to this claim, states as follows:

> **4.** The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-
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> ***(a)*** when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall **while entitled thereto have been dispossessed, or have discontinued such possession or receipt**, then such right shall be deemed to have **first accrued at the time of such dispossession or discontinuance of possession**, or at the last time at which any such profits or rent were or **was** so received;

[67] On this score is the decision from the Caribbean Court of Justice in ***Toolsie Persaud Ltd v Andrew James Investment Limited***[21]. In this case the appellant sought a declaration that under the Title to Land (Prescription and Limitation) Act, Ch 60:02 of the Laws of Guyana, it had acquired prescriptive title to a tract of land on the east coast of Demerara, Georgetown, by undisturbed adverse possession for over 12 years, adding its own adverse possession of the land to earlier adverse possession of the Republic of Guyana. The tract comprised areas owned respectively by the first respondent, the second respondent and the State. The tract had been the subject of a compulsory acquisition order (CAO) in 1977 and in 1987 the State had contracted to sell the whole tract to the appellant. The appellant delayed taking possession until 1988. In 1989, both the first and second respondents filed constitutional motions to have the CAO and the State's acquisition of title under it declared invalid. In 1990, in the first respondent's case, a High Court judge so declared and an appeal of that order was dismissed by the Court of Appeal. In 1995 the second respondent obtained a consent order from a High Court judge declaring the CAO to be of no effect and enabling her to have title back in her name. At first instance, the judge dismissed the appellant's petition; the dismissal was upheld by the Court of Appeal on different grounds; and the appellant appealed from the Court of Appeal to the Caribbean Court of Justice. Three issues arose for the Court:

> (1) whether the State had the necessary intention for its possession to be adverse when that possession was based on the belief that it was the owner under a CAO which was subsequently declared invalid;
>
> (2) whether it was possible for the State to acquire land by adverse possession; and
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> (3) whether a landowner's right of action to recover land acquired from him by the State under an invalid CAO only arose when the CAO was declared to be invalid by a court upon a constitutional motion brought by the landowner.

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[21] 72 WIR 292

[68] The CCJ found as follows (among other things):

(1) A claimant to land by adverse possession had to show that for the requisite period he (and any necessary predecessor) had:

> (i) a sufficient degree of physical custody and control of the claimed land in the light of the land's circumstances (factual possession); and
>
> (ii) an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land (intention to possess).

The factual possessor was not merely the landowner's licensee or tenant or trustee or co-owner but was independently in possession, so that it was obvious to any dispossessed true owner (or any true owner who had discontinued possession of his land) that he needed to assert his ownership rights in good time if he was not to lose them. **Intention to possess thus extended to a person intending to make full use of the land in the way in which an owner would, whether he knew he was not the owner or mistakenly believed himself to be the owner** e.g. due to a misleading plan or a forged document or **a compulsory acquisition order subsequently held to be ineffective to vest the land in the State**, as in the instant case.; *JA Pye* (*Oxford*) *Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865 applied.

…

(3)

(i) If a dispossessed landowner was to stop time running in favour of the person in undisturbed possession of the land he had to bring proceedings against that person (or physically enter the land and take possession thereof). It followed that the proceedings brought by the first and second respondents against the State in 1989, not being actions against the appellant for the recovery of possession from it, did not stop the 12-year limitation period running against those respondents. **That period began to run from the time the State's possession of the land was based on the ownership thought to have been conferred by the 1977 CAO (emphasis mine).** No action to recover possession from the appellant had ever been initiated by those respondents before the appellant's instant petition in 1993; and even if the second respondent's 1989 action had sufficed to stop the limitation clock, the 12-year period would already have expired by that time.

[69] **When the appellant had taken possession in 1988 it had taken possession as of right in pursuance of its 1987 contract with the State, having delayed enforcing its express right to take possession upon the signing of the contract and payment of one-third of the purchase price. Possession in such circumstances counted as possession of the appellant and was adverse to the first and second respondents' rights** (emphasis mine)**.** It followed that the appellant could rely upon having established in 1989 the 12 years of seamless undisturbed adverse possession of the State and itself needed to extinguish the first and the second respondent's paper titles. In 1989 the State was barred by its contract from claiming possession of the lands from the appellant. Therefore the appellant could claim at that time that it had satisfied s 3 of the Limitation Act and positively acquired a prescriptive title based on the sole and undisturbed possession of the State followed by the sole and undisturbed possession of itself through the instrumentality of the contract with the State. Once the true owner's title had been extinguished and the undisturbed adverse possessor had positively acquired title under s 3 of the Limitation Act, the latter could apply to the court under s 4 for a declaration confirming acquisition of title, and an order that the Registrar do register the title in his name, as in the instant case in respect of those specified parts of the tract. The State remained the lawful owner of specified areas of the tract as no action had been brought by any of the previous owners to challenge the CAO and possession was never adverse if it could be referred to a lawful title.

[70] Section 30 of the LAA provides that once the 12 year time period has run, the title and right of the titular owner to bring an action for ejectment ends. Section 30 says as follows:

At the determination of the period limited by this Part to any person for making an entry, or brining 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.

[71] It is for the Claimant to prove that they still have title over that portion of the common property now occupied by the Defendant. The decision in ***Fullwood v Curchar***[22] makes the point plainly.

[72] The same case also confirms that owners in possession of property as tenants in common can lose possession of a part of the property to the other occupant of the property.

The Evidence

[73] It is not disputed between the parties that on the Claimant's case the Defendant took possession of the portion of the common property by expanding into same in or around 2005. The construction started, the 1st phase was completed and was clearly there for all to see. It is not disputed by the parties that the Claimant strenuously objected to this expansion into the common property.

[74] As such, the Defendant was a trespasser and had exercised possession and control over that portion of the common property.

[75] It is true that the Defendant stopped construction on her expansion, but it was there and she was there utilising same for over 12 years since she built the expansion. So possession cannot be disputed.

[76] The Claimant, in their submissions dated March 8, 2024, essentially argued that the Defendant had no intention to possess the area which she now occupies. But I reject that submission as being entirely against the weight of the evidence before the Court now. All of the actions of the Defendant suggest that she fully intended to expand into the area and to possess it for herself. She resisted repeated requests to tear down the construction; she was trying to get post construction approval of the construction from the Municipal Corporation; she then resumed

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construction of the expansion over and above the objections of the Claimant in 2022. This took place over a period of 17 years.

[77] The Claimant then argued (at paragraph 15 of their supplemental submissions) that the letter of objection is a sufficient act to stop time running. However, the ***Toolsie Persaud*** authority from the CCJ, cited above, makes it plain that nothing less than actual physical re-entry **or** the filing of an action, would be sufficient as an act of re-entry.

[78] In my view then, the Defendant, having raised the limitation point, has thrown the onus on the Claimant to demonstrate that the section on which the expansion now exists still forms part of the common area. In my view, for the reasons stated above, the Claimant has not so done. In my view, on the evidence presented, the Claimant took possession in 2005 over the objection of the Claimant and has remained in possession since then. She took possession clearly with intent to occupy for herself to the exclusion of all others. Her possession was open and there was no disturbance within the true meaning of disturbance – that is – the Claimant neither re-took physical possession nor took court action during the period to affect the Defendant's possession.

[79] By the time the formal lodging of the complaint before the CSC took place in 2022, the 12 year time period had already expired. In that regard, that portion of the property on which the Defendant's expansion now subsists no longer forms part of the common property of the strata plan and the Claimant has no administrative authority over same. As they no longer have such administrative authority, they cannot bring this action or any action at all to the CSC in relation to this expansion.

BUT WAS BRINGING THE CLAIM IN THE SUPREME COURT REASONABLE?

[80] If I am wrong on the question concerning the loss of title of the Claimant over the section of the common property occupied by the Defendant, the next phase of my enquiry takes me into the "ought section". It is my finding that the Claimant had the right to bring an action in the Supreme Court. But should it have brought the claim

in the Supreme Court in circumstances where it had already instituted a complaint before the CSC concerning the exact same subject matter seeking the same or similar remedy?

[81] In my view the claim for the declaratory relief is superfluous and therefore unreasonable. I say that as the Claimant is seeking demolition of the extensions. It is inherent in any order for demolition that the CSC would have to make a finding that the extensions were in breach of the by laws rendering the extensions liable to be demolished. There was therefore no need to seek a declaration of such in the Supreme Court.

[82] The Defendant argued, rightly, that the injunction has been discharged. But, in my view, it was also a superfluous remedy and therefore unreasonable in light of the demolition remedy being sought.

[83] Concerning the claim for interest on damages, no such interest could be awarded as there is no cause of action pleaded that could support a claim in damages. So they are seeking a remedy without first establishing a wrong. That is putting the cart before the horse.

[84] So all that would have been left from the Fixed Date Claim is the demolition remedy. This is the exact same remedy they sought when they lodged the complaint with the CSC. The Claimant therefore invoked the statutory dispute resolution process, that process actually started and is now part heard for resolution.

[85] In these circumstances, I am quite prepared to hold that there were no reasonable grounds for bringing this claim and this claim should properly be struck out.

CONCLUSION

[86] In conclusion, the Claimant had no authority to bring this claim as that portion of the property on which the Defendant's expansion now subsists no longer forms part of the common property of the strata plan.

[87] In the alternative, it is my finding that the Court did have jurisdiction to adjudicate over some of the claims and had jurisdiction to grant the remedies of the injunction and the declarations sought.

[88] However, it is my finding that it was not reasonable for the claim to have been brought in the circumstances of this particular case.

DISPOSITION

1 The Claimant's claim is struck out as disclosing no reasonable grounds for having been brought.

2 Costs to the Defendant to be taxed if not agreed.

3 Leave to appeal is refused.

4 Claimant's Attorneys-at-Law to prepare, file and serve this Order on or before the 22nd March 2024 by 4:00 pm.

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D. Staple, J