NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. 1999/ P-127

BETWEEN	PROPRIETORS STRATA PLAN NO. 461	CLAIMANT
AND	INTERNATIONAL HOTELS (JAMAICA) LIMITED	DEFENDANT

Mr. Terrence Ballantyne and Mr. Paul Beswick instructed by Ballantyne and Beswick for Claimant

Dr. Lloyd Barnett, O.J., Mr. Walter Scott and Mr. Weiden Daley instructed by Hart Muirhead Fatta for the Defendant

Land – Boundary Fence in incorrect position -Whether possessory title acquired thereby–Whether fence location acquiesced to by Claimant - Sections 3 and 45 of the Limitations of Actions Act

22nd, 23rd, 24th October, 24th November and 4th December 2008

BROOKS, J.

This claim primarily concerns a boundary dispute. The Proprietors of Strata Plan No. 461 (PSP 461) wish International Hotels (Jamaica) Limited (IHJL) to remove incorrectly placed boundary fences and to place them along the registered boundaries between their respective lands.

IHJL, on the other hand, states that the fences were put in their respective positions by agreement and have been in place for so long that PSP 461 is barred from having them removed. IHJL counterclaims a possessory title to the disputed lands as well as the benefit of the provisions of the Limitation of Actions Act.

The resolution of the dispute lies in determining whether the provisions of section 3 (providing for barring claims for recovery of land) and/or section 45 (providing for the enforcement of reputed boundaries) of the Limitation of Actions Act (the Act), apply. A brief outline of the history of the relevant parcels of land, a description of their respective physical boundaries and the application of the relevant law will assist in ascertaining whether PSP 461 is entitled to the remedy claimed.

The Lands Involved

Identification of the lands

It will be necessary to refer, during the course of this judgment to four separate parcels of land. They are:

a. IHJL's land ("the hotel land") which was first registered to Rutland Point Hotels Ltd. (RPHL).

b. A strip of land (the intermediate strip) to the West of the hotel land and between the hotel land and PSP 461's land ("the Point"). The intermediate strip was first registered to Urban Development Corporation (UDC) and later transferred to RPHL to be held along with the hotel land.

c. The Point, which was first registered to UDC. The title for the Point was cancelled in July 1991 for the purposes of

creating a strata plan. All the strata titles were originally in the name of Rutland Point Beach Resorts Limited (a different company from RPHL). The Strata Corporation is PSP 461.

d. A plot of land ("the disputed land") which lies to the south of the intermediate strip. It comprises part of the Point but was enclosed within a boundary fence along with the hotel land.

I shall now outline the history of the relevant properties.

Chronology of Events affecting ownership

1. 1975 – Hotel land transferred by UDC to RPHL;
2. 1978 – The intermediate strip, along with what would eventually become a portion of the Point, were severed as a single holding, by UDC, from its single title - UDC maintained ownership of the resultant splinter title;
3. 1981 – Hotel land leased by RPHL to Village Resorts Limited (VRL);
4. 1988 – UDC transferred the intermediate strip from the splinter title, to RPHL to be held with the hotel land;
5. 7th February 1989 – UDC coupled land from the splinter title with other lands to form the Point;

(It may be observed that as at this latter date there are only two owners of all the lands mentioned thus far; UDC for the Point and RPHL for the hotel land and the intermediate strip. VRL is but a lessee of the lands owned by RPHL.)

6. 7th April 1989 – UDC transferred the Point to Rutland Point Beach Resorts Ltd;
7. 4th December 1989 – RPHL transferred the hotel land and the intermediate strip to Linval Ltd.;
8. 22nd December 1989 – Linval Ltd. changed its name to International Hotels Ltd. (IHL);
9. 24th July 1991 – The Point was registered as a strata plan (PSP 461) and Rutland Point Beach Resorts Ltd. remained the registered proprietor for all 260 titles created by the strata plan.

It should be noted that December 1989 was the first time that a non-UDC entity became an owner of any of the relevant properties, after 1975.

The Physical Boundaries

A brief history of the physical boundaries between the hotel land and the Point would also assist the assessment of this case. The unchallenged evidence is that originally there was an earth berm which formed the physical boundaries of the hotel land. These included its northern and

western boundaries which divided the hotel land from the Point. The berm was about 4-5 feet high and 6-7 feet wide at its base.

There are two fences which are the subjects of this dispute. The first is a chain link fence near to the northern registered boundary of the hotel land. It was erected sometime before 1981, according to IHJL's witness Mr. Lenford Mason, at the outer part (from the hotel's perspective) of the base of the berm. On all accounts that chain link fence has remained in place since that time to the present.

The second fence involved was erected in 1981. Mr. Mason testified that this occurred when VRL leased the hotel. It was a barbed wire fence. It also, was erected at the outer base of the berm but toward the West.

In 1989 or 1990, and in the absence of precise evidence, I shall presume the later year, the barbed wire fence was removed. A new physical boundary was put in place. It was a chain link fence. It was not at the same location as the barbed wire fence but was instead 10-15 feet closer to the hotel, thereby making the hotel land (more accurately the intermediate strip) physically, smaller.

It appears that the dispute concerning this fence had its origin in this exercise. The exercise was undertaken by agreement between hotel officials and UDC officials (the latter acting on behalf of Rutland Point Beach

Resorts Ltd). The problem was caused when the replacement fence, which was placed along the western boundary of the intermediate strip, extended further south than it ought to have, thereby enclosing with the hotel land, some of the Point land. The improperly enclosed land is the disputed land.

The Law

A few principles of law will also assist in clarifying the issues to be determined. Firstly, it is accepted that a possessory title will only be acquired after 12 years of continuous occupation which is associated with the requisite intention to possess. This is supported by section 3 of the Limitation of Actions Act which bars claims for recovery of land, being made by the owner of the paper title, after 12 years of first being entitled to recover same.

The second principle is that, after a boundary fence between two parcels of land has been acceded to for a period of 7 years, its position may not then be disputed and thereafter and it becomes the legal boundary. (See section 45 of the Limitation of Actions Act.)

A third principle of law is that the filing of a claim, in respect of a reputed trespass to land, prevents the limitation period from running, for the purposes of the Act. See Vol. 28 *Halsbury's Laws of England* 4th Ed. (Reissue) at paragraphs 830 and 835.

A fourth principle to be considered is that a person placing a fence to divide one portion of his land from another portion does not create any rights in favour of one parcel versus the other. The owner is entitled to remove or relocate that fence at his pleasure regardless of the number of years which have passed. It is also clear that the integrity of his title is not affected by the erection, relocation or removal. Section 45 of the Act speaks to "where the lands of **several proprietors** bind or have bound upon each other" (emphasis supplied). That section does not apply to a single proprietor.

Application of the law to the facts

Possessory Title

From the principles stated above, it may be determined that, up to 1989, the physical boundary between the hotel land and the Point, could not cause time to start running for the purposes of the Act. They were ultimately owned by the same entity; the UDC.

Dr. Barnett, in answering this point as raised by the court, submitted that the companies, that is, RPHL and the UDC, are two separate legal entities. Therefore, counsel submits, the subsidiary, RPHL, could obtain adverse possession against the parent; UDC. Counsel cited *JA Pye (Oxford) Ltd. v Graham* [2002] 3 All E.R. 865 and *Wills v Wills* PCA 50 of 2002 (delivered 1/12/03) as authority for his submission.

I cannot accept that submission as being valid. The evidence is that RPHL acted through the employees of other UDC subsidiaries. It is to be noted that Mr. Cameron Burnett, a former employee of National Hotels and Properties Ltd. (NHP) gave unchallenged evidence that "[RPHL]...is a subsidiary of NHP, and NHP is a subsidiary of ...UDC". He testified that RPHL's transactions and general affairs were carried out by the staff of UDC's subsidiaries, including NHP.

There is no evidence of any intention by RPHL to possess UDC's land to the exclusion of the UDC. *JA Pye* is cited by the IHJL's attorneys (at paragraph 26 of their written submissions) as authority for the principle that occupation together with an "intention to continue in possession indefinitely for their own benefit is sufficient", to create the possessory title. I find that the factual situation concerning the connection between UDC and RPHL contradicts any presumption of such an intention. All that was done was done for the eventual benefit of the UDC. To find that a UDC subsidiary, intended to hold land to the detriment of the UDC, is untenable.

Although there may be different statutes applicable to the European Economic Community, it may be noted that in *Halsbury's Laws of England* 4th Ed. Reissue Volume 7 at paragraph 813, the learned editors opine:

> "...for the purposes of the European Economic Community Treaty...**the conduct of a subsidiary can be imputed to its parent company** whether or not it has its

> own separate legal personality, and whether or not the parent wholly owns the subsidiary." (Emphasis supplied)

I also find that it cannot be ignored, that the UDC is a statutory corporation established to carry out the business of the State in the areas assigned to it by The Urban Development Corporation Act. All its subsidiaries must be presumed to be formed to carry out its mandate. They all manage the assets which they have on account of the people of Jamaica. Certainly, normal commercial adversarial intentions cannot be imputed to them, as between themselves. It is of significance, in my view, that both of the directors of Rutland Point Beach Resorts Ltd. in the years 1989 and 2004 respectively, are officers of the UDC. (Exhibits 21A and 21B)

I now turn from the ownership of the hotel land, to the hotel's management. The management of the hotel prior to the lease to VRL, vested in National Hotels and Properties Ltd. (NHP). Exhibit 12 (at page 2 of the notes to the financial statements of NHP), indicates that it is a "wholly-owned subsidiary of the [UDC]". Based on the view which I have taken, it is, in my opinion, clear that as there would be no intention on the part of RPHL, the owner of the hotel land, to take possession of the adjoining UDC land, to the exclusion of the UDC, neither would there be any such intention on the part of NHP, the hotel's manager. In light of the factual situation, the possession would at least be with the permission of the UDC. Such

permission would be fatal to any claim to a possessory title. (*Hughes v Griffin* [1969] 1 All E.R. 460)

What then, of the lease to VRL? The fact that the hotel lands were physically occupied by VRL would make no difference to the conclusion to which I have arrived; that time would not begin to run for the purposes of the Act. VRL's occupation is presumed to be as lessee. Any rights of adverse possession which it may have acquired during the term of the lease, against any other property inures to the benefit of the landlord. Authority for this principle may be found in the cases of *Long v Tower Hamlets London Borough Council* [1996] 2 All E.R. 683 at 687-688 and *Smirk v Lyndale Dev. Ltd.* [1975] Ch. 317. The principle is also set out in Vol. 28 *Halsbury's Laws of England* 4th Ed. (Reissue) at paragraph 992. The presumption may "be rebutted by circumstances indicating that the tenant intended to acquire the property for himself" and not for the benefit of his landlord. See Hunt's *Boundaries and Fences* 4th Ed. (1896) page 179 and *Commonwealth Caribbean Land Law* by Osuwu at page 319.

There is no evidence that VRL had any intention to possess the lands which it occupied, in any capacity separate and apart from that given to it by its lessor. The lessor RPHL, was then, of course, acting on behalf of the ultimate owner of both holdings. An excerpt from *Long v Tower Hamlets*, in

my respectful view, is applicable to the instant case. There, James Munby Q.C., presiding in the Chancery Division, said at page 688 b-f:

> "In *Smirk* v *Lyndale Developments Ltd* [*supra*]...Pennycuick V-C considered all the relevant authorities...and concluded...that the law had been correctly stated by Alderson and Parke BB in *Kingsmill* v *Millard* (1855) 11 Exch 313. His decision on the point was ... accepted as correct by the Court of Appeal: [1975] Ch 317, at pp337G, 340E, 341H. The law as laid down in those two cases...show that the principle applies whether or not the land encroached upon is waste. They show, moreover, that the principle is based on a presumption, albeit a rebuttable presumption, which, although it may be considered to operate in a manner akin to an estoppel, is not dependent upon proof...of any active representation to the landlords by the tenant. On the contrary, the presumption is treated as applying unless the tenant, during the term, communicates with the landlords in such a way as to show that he is asserting his own title as against the landlords or, as Alderson B put it, that he is setting the landlords at defiance. **There is nothing in the evidence before me in the present case which even begins to suggest that Mr Long, in his dealings with the GLC and the council, ever sought to distinguish between the shop and the maisonette or ever sought to assert that, while he occupied the shop as tenant, his occupation of the maisonette was in some different character.** Accordingly, in my judgment...on the evidence as it stands, the presumption is wholly unrebutted and that the principle as laid down in *Smirk* v *Lyndale Developments Ltd* applies." (Emphasis supplied)

The term "waste" as used in the above quotation, I interpret to mean, "unoccupied land". (See Hunt *supra* at page 179)

Based on the reasoning set out above, time would not begin to run for the purposes of the Act, until 4th December, 1989, when IHL became the registered proprietor of the hotel land. This claim was filed on 17th September 1999. It means that the calculation of time was paused, with the filing of this action, at less than ten years from the date of occupation. The result is that no possessory title could have been acquired by IHL or its successor in title.

Boundary Fences

The boundary fences demand a slightly different consideration. It is again my finding (applying the reasoning used above), that, with a single ultimate proprietor, time does not begin to run for the purposes of the Act, until December 1989. Starting calculation at December 1989 means that seven years would have passed before the commencement of this claim. This would be in respect of both the fence to the north as well as that to the west. The next question to be answered is, whether PSP 461 or its predecessor Rutland Point Beach Resorts Limited, acquiesced to the position of the boundary fence so that it became the reputed boundary, for a period of seven years or more.

The answer, in respect of the chain link fence to the north, is clear. There is no evidence of any issue being raised, within that seven-year period, as to the location of that fence. No complaint was made in respect of it. Its position was acquiesced to by PSP 461 and it became the reputed boundary. Section 45 of the Act applies to the northern fence and IHJL is entitled to have it remain in its place.

In respect of the western chain link fence, IHJL advances the argument that the re-location of the fence was agreed to by the then new owner, of the hotel land and the representative of the owners of the Point.

There is unchallenged evidence from Mr. Gary Williams, in his witness statement, that the cost of erecting the fence was shared equally between "Point Village Resort and Hedonism II". Point Village Resort would then have been acting on behalf of Rutland Point Beach Resorts Ltd. (the owner of the Point). Hedonism II would then have been acting on behalf of IHL (assuming, as I have, a 1990 relocation).

The implication of IHJL's submission is that the position of the fence having been initially agreed, bound the parties permanently. I, however, do not accept that submission as being valid. For IHJL to secure the benefit of Section 45, it must show that the acquiescence continued for seven years. It cannot. The evidence is that, by letter dated September 3, 1992, IHL's attorneys-at-law wrote to the UDC pointing out that the western fence had not been placed in complete conformity with the registered boundary and requesting the UDC to have the situation corrected. (The fact that the lawyers wrote to the UDC is perhaps, more than mere irony, considering Dr. Barnett's submission concerning separate legal identities.) The position of that fence, thereafter, proved contentious.

Counsel for IHJL cited the case of *Glover v Coleman* (1874) L.R. 10 C.P. 108 as authority for a definition of the term "submitted to and acquiesced in" as used in section 45 of the Act. In my view the case does

not assist counsel's cause. Indeed, it makes it clear that there was neither submission, in the sense of a lack of opposition, nor acquiescence, by way of tacit or silent agreement, on the part of PSP 461 or its predecessors. A recounting of the facts surrounding this issue will demonstrate my finding.

What had occurred is that the fence was erected in a straight line from its Northern extremity, south to the high water mark on the beach. It however should have stopped at a point short of the high water mark, moved toward the East for some distance and then proceeded South down to the high water mark at another point, further east along the beach. The failure to follow the registered boundary meant that the disputed land was enclosed within the boundary fence. It has been described as "Section 2" on the plan prepared by one of the surveyors who testified in this matter. The hotel has built on the disputed land and has otherwise utilized it.

By letter dated September 3, 1992, (Exhibit 1) IHL's attorneys-at-law wrote to the UDC asking for the disputed land to be transferred to IHL, on the basis that the sale transaction should have included it. UDC didn't agree. It replied by letter dated 16th September, 1992 (Exhibit 5) stating that the agreement was that the boundary fence should have followed the registered boundary and required it to be relocated.

Other correspondence passed between the parties. The Court was not permitted access to the contents because they were protected by privilege. However, by letter dated May 16, 1996 (Exhibit 6), UDC wrote to the hotel's attorneys-at-law requiring that the encroaching fence be removed. Though the letter does not specifically mention the Western fence, I find that in the context of the previous correspondence, it is the Western fence only to which reference was made. A similar complaint about the Western boundary was made by the chairman of the Property Committee of PSP 461 Mr. Richard Brandon. This was by letter dated 20th May 1996 (Exhibit 3). The attorneys-at-law responded, claiming the benefit of Section 45 and threatening legal action both in the civil and criminal arenas, if any attempt were made to remove the fence. (Exhibit 19)

This history demonstrates that although there was initial agreement concerning the location of the fence, there was no seven-year acquiescence of its position. It did not become a reputed boundary for the purposes of Section 45. PSP 461 is therefore entitled to have the hotel's western boundary fence removed to conform to the registered boundary.

For completeness, I also wish to observe that there is nothing in the Dividing Fences Act which implies that an agreement between holders of adjoining lands, as to the construction and cost of a dividing fence, affects

the respective titles of each landholder. Indeed, the tenor is the opposite. Section 6(3) of the Dividing Fences Act makes it clear that where a Resident Magistrate decides (for reasons of practicality) upon the location for a boundary fence at a place other than at the actual boundary, that decision, "shall not alter or affect the actual boundary, of either holding otherwise than for the purposes of [the Dividing Fences] Act".

I should not part with this aspect of the matter without dealing with a submission that Mr. Beswick, for PSP 461, made during closing arguments. Counsel argued that regardless of the location of the physical boundaries and the time, for which they have been in place, an acknowledgement by an adjoining proprietor, as to his neighbour's ownership of the title for the adjoining lands, automatically renders the physical boundaries irrelevant.

That submission flies in the face of both sections 68 and 70 of the Registration of Titles Act which recognize the operation of limitation periods as adversely affecting the rights of a registered proprietor of lands. It is inconceivable that a mere statement that someone holds a particular title (which statement would be true in almost every case of a boundary dispute) could have the result that Mr. Beswick advocates. I reject counsel's contention to that effect.

Letter of 25th March 1987 by Mr. Sam James

There is a further matter which I should deal with, only because Mr. Beswick has spent a significant amount of time on it and regards it as critical. This is a letter by Mr. Sam James written in his capacity of General Manger of Hedonism II (the hotel) on 25th March 1987. According to Mr. Beswick, this letter categorically demonstrates RPHL and VRL's acknowledgment of UDC's ownership of the disputed land. The letter would therefore break the time for the accrual of any possessory title in favour of RPHL and/or VRL as against UDC. Based on my findings above, the point would be merely academic, but out of respect for counsel's industry, I shall examine it briefly.

In the letter Mr. James asks UDC for permission to clean and use "the vacant section of the beach adjacent to our present Nude Beach". Mr. Beswick submitted that the letter could only be referring to the disputed land. Mr. James insists that it is land further to the west.

Mr. Beswick is only partially correct. It must be remembered then that the fence, in 1987, was 10 to 15 feet further west than it currently is. The surveyor Mr. Llewelyn Allen has measured the width of the disputed strip to be 9.23 metres (almost 30 feet). If the word "adjacent" is given its usual meaning of "beside", it means that a portion of the disputed land

would have been within Mr. James' contemplation. In my view he clearly could not have intended a portion of land, nearby the hotel land, but separated from it by land which would not be under the control of the hotel. Some of the disputed land would therefore have already been within the hotel's physical boundary in 1987. It would, at least, be the rest of the disputed land to which Mr. James referred in his letter.

Estoppel

Counsel for IHJL also raised the matter of estoppel. The essence of the point is that, in 1990, the agreement concerning the relocation of the fence was an assertion by Rutland Point Beach Resorts Ltd. to IHL that it would not insist on its legal rights concerning the boundary. The submission continues that IHL, relying on that assertion, incurred expense in respect of the disputed land. Counsel concluded that the court should not allow Rutland Point Beach Resorts Ltd's. successor, PSP 461 to resile from that assurance. The remedy, Counsel submitted, is to have the land transferred to IHJL. It is essentially, a claim for an equitable estoppel to be applied.

Counsel relied on *Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.* [1981] 1 All E.R. 897 for the submission. That case is authority for the principle that it would be unconscionable for a party to rely on its strict

legal rights, where that party, "knowingly **or unknowingly**...had allowed or encouraged another to assume", a particular position to his detriment.

The difficulty with the submission is that equitable estoppel, in the present context, is based on the principle of a party, acting unconscionably in taking advantage of a mistake. I accept that the situation concerning the disputed land has resulted from a mutual mistake. In this case however, UDC and PSP 461 have consistently, since discovering the mistake, insisted that it be corrected.

What therefore has been the situation since the mistake was made? Mr. Richard Bourke gave evidence concerning construction on the disputed land since 1990. He stated at paragraph of his witness statement that the "moving of [the western] fence was after the Hotel's nude beach Jacuzzi was built, but prior to the construction of the nude beach pool and grille. He does not say when the nude beach pool and grille were constructed. Mr. Gary Williams in cross-examination said that the buildings now in place on the disputed land "were not there when the fence was moved". It would have been for IHJL to prove that the construction took place before the first protest by UDC as to the location of the boundary, that is, in reliance on the promise. It has not. I find that IHJL has not proved that it would be

unconscionable for PSP 461 to rely on its legal rights in respect of the disputed land.

Damages

Although PSP 461 claimed damages or *mesne* profits for the loss of use of the affected land to be assessed, no effort was made to provide any evidence to support that claim. Counsel submitted that a separate assessment of damages ought to be ordered. I find, however, that this was the appropriate time to provide that evidence. There must be an end to litigation. No award will therefore be made in that regard.

Costs

In light of the fact that both parties have had some measure of success, it is perhaps just, that each should bear its own costs.

Conclusion

Time began to run for the purposes of the Act, in December 1989 when the hotel land was acquired by IHL. IHL is IHJL's predecessor in title. Prior to that date, the lands on both sides of the fence were ultimately owned by the same entity and thus there could be no application of the concept of adverse possession. A lessee, occupying one of those properties prior to 1989, could not claim to be occupying property in a manner adverse to its acknowledged landlord's interest.

Twelve years not having expired, before this claim was filed by PSP 461, means that IHJL cannot secure a possessory title for the land on which it has encroached. Seven years did, however, pass before the claim was filed. During those seven years IHJL enjoyed the undisputed location of its northern boundary fence. That fence therefore became and is the reputed boundary, between the hotel land and the Point and IHJL is entitled to the benefit of the provisions of Section 45 of the Act.

In the case of the western boundary fence, PSP 461 and its predecessor Rutland Point Beach Resorts Ltd. did initially agree to the placing of the fence. UDC, as Rutland Point Beach Resorts Ltd's. parent company, however, did not continue to accept that the location was correct. Within two years of the fence having been erected, UDC protested the location and demanded its removal. Its successor, PSP 461 proposed to remove the offending fence and was threatened with legal action by IHJL's attorneys-at-law. That boundary fence did not become the reputed boundary. IHJL cannot claim the benefit of Section 45 of the Act for it.

It is therefore ordered that:

1. The Claimant is entitled to possession of all that parcel of land being 194.38 square meters, more or less and being part of the lands comprised in the common area of Strata Plan No. 461 and part of the lands comprised in the Certificate of Title formerly registered at Volume 1217 Folio 223 of the Register Book of Titles, being the lands

identified as Section 2 on the plan of The Point Village and Hedonism II Rutland Pen in the Parish of Hanover prepared by Llewelyn Allen and Associates Commissioned Land Surveyors from a survey done by them on October 5, October 9 and November 9, 2006;

2. The Defendant shall deliver up the said land to the Claimant on or before 4th February 2009;

3. The Defendant is entitled to possession of all that parcel of land being 351.06 square meters, more or less and being part of the lands comprised in the common area of Strata Plan No. 461 and part of the lands comprised in the Certificate of Title formerly registered at Volume 1217 Folio 223 of the Register Book of Titles, being the lands identified as Section 1 on the plan of The Point Village and Hedonism II Rutland Pen in the Parish of Hanover prepared by Llewelyn Allen and Associates Commissioned Land Surveyors from a survey done by them on October 5, October 9 and November 9, 2006;

4. Each party shall bear its own costs.