[2024] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00109

BETWEEN	**MILTON HUGH TAYLOR**	**APPELLANT**
AND	**WINSTON THOMPSON**	**RESPONDENT**

Christopher Dunkley and Miss Rochelle Mills instructed by Phillipson Partners for the appellant

Sean Kinghorn instructed by Kinghorn & Kinghorn for the respondent

24 January and 6 February 2024

Conveyancing – Limitation of Actions – Tenants in common – acknowledgement of title - Whether a co-owner can claim a possessory title after the sale of the property - Sections 3, 14, 16 and 30 of the Limitation of Actions Act

ORAL JUDGMENT

V HARRIS JA

[1] The appellant, Mr Milton Hugh Taylor, appeals against the decision of Carr J ('the learned judge') made on 24 November 2021, whereby she refused a claim brought by him seeking declarations that by obtaining a possessory title, he had acquired the respondent's, Mr Winston Thompson, one-third interest in property located at Lot 270 Portmore Pines, Greater Portmore, in the parish of Saint Catherine, registered at Volume

1314 Folio 380 in the Register Book of Titles ('the property'), and that Mr Thompson, as a result, was not entitled to any proceeds of the sale of the property.

Background

[2] The property, purchased in 1998, was registered in the names of Mr Taylor, his wife, Mrs Sharon Taylor, and Mr Thompson on 6 September 2000 as tenants-in-common in equal shares. Mr and Mrs Taylor had initially intended to purchase the property by themselves, but due to insufficient funds, Mr Taylor sought the assistance of his nephew, Mr Thompson. Mr Thompson agreed to provide his National Housing Trust ('NHT') benefits to cover the shortfall. With Mr Thompson's consent and the parties' agreement, although Mr Taylor, Mrs Taylor and Mr Thompson were registered as co-owners on the certificate of title for the property, only Mr and Mrs Taylor resided there. An unresolved factual dispute on the evidence was that Mr Taylor was to have refunded Mr Thompson the amount he contributed to the acquisition of the property.

[3] In 2001, Mr Taylor's wife emigrated to the United States of America and did not return. From then on, Mr Taylor continued in sole occupation of the property until he decided to sell it in 2019. Mr Taylor made all the necessary preparations for the sale of the property. He arranged for Mrs Taylor and Mr Thompson to sign the agreement for sale and instrument of transfer as co-owners of the property, transferring their respective interests to a purchaser. After the completion of the sale, Mr Taylor sought to have the entire net proceeds of the sale of the property ('the proceeds') paid out to him exclusively. His attorney-at-law advised him that he was obliged to pay each vendor/co-owner their one-third share of the proceeds. That being so, Mr Taylor obtained an authorisation from Mrs Taylor to pay him her share of the proceeds. Mr Thompson, however, refused to authorise the allocation of his share to Mr Taylor, and he retained the services of an attorney-at-law to demand payment.

[4] In response, Mr Taylor filed a fixed date claim form and affidavit in support on 20 December 2019, seeking declarations that, by the time the property was sold, he had dispossessed Mr Thompson, and so Mr Thompson is not lawfully entitled to any portion

of the proceeds. Further to a trial that commenced on 22 November 2021, the learned judge made the following orders:

> "1. The orders sought on the Fixed Date Claim Form filed on the 20th of December 2019 are refused.
>
> 2. The [respondent] is entitled to a 1/3rd share in the proceeds of sale received from the sale of the property being all that parcel of land part of Half Way Tree Plantation now called Portmore Pines, Greater Portmore in the parish of Saint Catherine being the lot numbered two hundred and seventy on the plan of part of Half Way Tree Plantation now called Portmore Pines, Greater Portmore aforesaid and being all that land comprised in certificate of title registered at Volume 1314 Folio 380 of the register book of titles.
>
> 3. The [appellant]/and or [appellant's] Attorney-at-law is to pay over the share of the [respondent's] proceeds of sale within 14 days of the date of this order.
>
> 4. Costs to the [respondent] to be agreed or taxed."

[5] From the outset, the learned judge observed that it was not in dispute that Mr Thompson had never resided at the property and that the understanding between the parties was that the property was acquired for the use and occupation of Mr and Mrs Taylor. She considered whether Mr Taylor had dispossessed Mr Thompson and acquired his one-third interest in the property. Ultimately, she found that Mr Taylor's assertion that he had dispossessed Mr Thompson runs contrary to the agreement for sale and instrument of transfer since both documents were signed by Mr Thompson as co-owner on Mr Taylor's request. The learned judge held that Mr Taylor is seeking a declaration for property they no longer own, and in her judgment, he could not, at this point, oust Mr Thompson as an owner. Of importance also is her statement on the law that the operation of sections 3 and 30 of the Limitation of Actions Act ('LAA') (upon which Mr Taylor relied for his application) does not automatically give title to the possessor, and, therefore, it is incumbent on the possessor to make an application for title. She concluded that since Mr Taylor did not apply to be registered as the sole proprietor of the property prior to its sale, Mr Thompson was entitled to a one-third share in the proceeds.

[6] Dissatisfied with the learned judge's determination of the matter, the appellant has sought to appeal her decision. An application was also made to this court for a stay of the execution of that order, which was granted by consent on 21 June 2022. The amended notice of appeal, which was filed on 25 March 2022, outlined seven grounds of appeal from which we have distilled the singular issue to be whether the learned judge, having regard to the evidence as a whole, erred in finding that Mr Taylor was not entitled to Mr Thompson's one-third share of the proceeds. We thank counsel for their industry in providing the court with submissions and authorities that were helpful in the determination of this appeal and assure them that despite the brevity of this judgment, they have all been duly considered.

Submissions on behalf of Mr Taylor

[7] It was the position of counsel, Mr Dunkley, that Mr Taylor is entitled to the one-third share of the proceeds reserved for Mr Thompson because he had dispossessed him of his interest in the property by 2013. Mr Taylor gave evidence that he did not regard Mr Thompson as an owner of the property, even though he was so registered on the certificate of title. Also, Mr Taylor lived at the property alone for 18 years, from 2001 to 2019, without interference or referring to Mr Thompson. Accordingly, counsel contended that the elements outlined in **Recreational Holdings (Jamaica) Limited v Lazarus and Anor** [2014] JMCA Civ 34 ('**Recreational Holdings**') had been satisfied. He also relied on the case of **Wills v Wills** [2003] UKPC 84 for the submission that one registered owner can dispossess the other. The learned judge, it was argued, erred when she failed to appreciate that Mr Taylor's pleadings expressly referred to sections 3 and 30 of the LAA. Her reflection on the law was also criticised. It was contended that the learned judge incorrectly conflated the concepts of acquiring title by possession and obtaining a certificate of title. This was especially so since the Registration of Titles Act does not mandate a possessor to apply for a certificate of title. In that vein, the argument continued, she did not consider whether the evidence regarding Mr Taylor's sole possession and use of the property was sufficient to prove that he had obtained title. Reliance was also placed on the cases of **J A Pye (Oxford) Ltd and another v Graham**

and another [2003] 1 AC 419 ('**J A Pye (Oxford) Ltd**') and **Paradise Beach and Transportation Co Ltd and others v Price-Robinson and others** [1968] AC 1072.

[8] Mr Dunkley further submitted that an acknowledgement by Mr Taylor of Mr Thompson's title was of no moment once 12 years had elapsed and Mr Thompson had been dispossessed by him because, in those circumstances, the limitation period could not begin to run afresh. He cited **Chisholm v Hall** [1959] AC 719 to support that proposition.

Submissions on behalf of Mr Thompson

[9] On the other hand, counsel Mr Kinghorn has contended that the learned judge was entitled to refuse to exercise her discretion in favour of Mr Taylor because he was seeking a declaration of a right to property they no longer owned or occupied. Counsel acknowledged that the learned judge mistakenly stated that Mr Taylor had failed to expressly plead sections 3 and 30 of the LAA but argued that, nevertheless, she addressed those provisions and made findings on them. Therefore, this contention was inconsequential. Mr Kinghorn further submitted that since Mr Taylor received a benefit at Mr Thompson's expense, it would be unjust to allow him to retain the one-third share of the proceeds allocated to Mr Thompson's prior interest in the property.

Discussion

[10] It is well settled that the role of an appellate court in an appeal against the findings of fact by a trial judge is to consider whether, bearing in mind the evidence as a whole, it was permissible for the judge at first instance to conclude as she did. To interfere with that decision, this court would need to identify a mistake in the trial judge's evaluation of the evidence that is sufficiently material to undermine her conclusions (**Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21).

[11] The claim was filed pursuant to sections 3 and 30 of the LAA. Together, they provide that upon the accrual of the right to make an entry or bring an action or suit to recover any land or rent, time will begin to run against the title of the person who holds

that right, and on the expiration of a period not being less than 12 years, that right and their title will be extinguished. The operation of those provisions also extends to property owned by more than one person since possession by a co-owner is not deemed to be the possession of the other(s) (section 14 of the LAA). Consequently, registration as co-owners does not preclude a possessory claim so that a co-owner of registered property can dispossess another co-owner of his or her legal interest (**Wills v Wills**).

[12] To establish a possessory title, two elements must exist. There must be a sufficient degree of physical custody and control of the property ('factual possession') and an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess' or '*animus possidendi* ') (per the House of Lords in **J A Pye (Oxford) Ltd**). Furthermore, the intention is simply to possess, not to own or acquire ownership (**Buckinghamshire County Council v Moran** [1989] 2 All ER 225).

[13] At first blush, it would seem as if Mr Taylor has sufficiently demonstrated that he had factual possession and the intention to possess the property for in excess of 12 years. However, the circumstances of this case compel further consideration, as it is substantially different from most cases of this nature.

[14] The case for Mr Taylor has placed great reliance on **Wills v Wills**. On the other hand, Mr Kinghorn has contended that that authority can be distinguished on its facts from the case at bar. We agree with Mr Kinghorn's observation that both cases have significant distinguishing features. However, given the reasons for our decision in this appeal, it is unnecessary to analyse them in the usual detailed manner, except to point out that the undisputed facts of this case are that Mr Taylor requested Mr Thompson's NHT benefits to assist him and Mrs Taylor in purchasing the property they could not otherwise afford. Mr Thompson complied, and irrespective of whether his name was only entered on the title as a co-owner on account of NHT's requirement, the parties not only agreed to him being a co-owner, he was endorsed as a tenant-in-common in equal shares. Mr Taylor has maintained that this was merely administrative, but it was Mr

Thompson's evidence that even if he was not compensated for his NHT benefits, at least his interest in the property would be secured.

[15] The nuanced facts of this case, specifically applicable to our jurisdiction, are that it is not uncommon for family members to pool their NHT benefits to acquire a home as first-time owners. Once this is done, the NHT requires that each co-owner's interest is registered on the title. As a matter of law, every Jamaican is mandated to pay a percentage of their earnings to the NHT monthly. The monthly statutory deduction of a NHT mortgagor is then computed annually and applied to the outstanding mortgage until liquidation. As has happened in this matter, it is also commonplace in this country that, by agreement, not all co-owners will occupy or go into possession of the home they have purchased together.

[16] As of 2001, Mr Taylor remained the only proprietor of the property in occupation. It was his evidence that he alone paid the mortgage, property taxes, and utilities and maintained and improved the property without assistance from or reference to Mr Thompson. However, although most of those assertions may be true, the evidence demonstrates that Mr Thompson made payments towards the reduction of the mortgage. A document entitled "Statement of Contributions Refund as at September 25, 2019", which was issued by the NHT and named Mr Thompson as the contributor, listed several payments towards the mortgage by him. As required by law, Mr Thompson's monthly statutory deductions for NHT, which amounted annually to approximately $60,000.00, were applied to reduce the outstanding NHT mortgage on the property. This amounted to $484,954.56 in total for the period 1992 to 2011.

[17] The evidence reveals that the property was purchased for $420,000.00, and the total amount paid for the NHT mortgage was $1,423,118.55 with interest. This means that Mr Thompson (having contributed $484,954.56), as one of the three co-owners, would have paid more than one-third of the total NHT mortgage, the only mortgage registered on the property when the parties owned it. Although the property was purchased in 1998, Mr Thompson's NHT contributions from 1992 to 1998 were applied

to reduce the mortgage. His NHT contributions were also applied to the outstanding mortgage during the years that would be counted towards the limitation period (from 1999 to 2011, a total of 12 years). Additionally, at all material times, Mr Taylor was aware of the continued application of Mr Thompson's NHT contributions to the mortgage. Therefore, Mr Thompson's assertion in support of his claim for possession that he alone made the mortgage payments was not entirely accurate.

[18] The learned judge, however, did not resolve the issue before her as to whether Mr Taylor had dispossessed Mr Thompson based on those facts, but instead on the premise that by requesting Mr Thompson to execute the agreement for sale and instrument of transfer as a co-owner of the property, Mr Taylor had acknowledged his entitlement and effectively defeated any possible claim to a possessory title. Furthermore, in circumstances where the property had already been sold, Mr Taylor could not belatedly lay a claim to the one-third share of the proceeds reserved for Mr Thompson. As such, we have examined whether the learned judge erred in law when she concluded that Mr Taylor could not successfully oust Mr Thompson as a co-owner of the property subsequent to its sale.

[19] As indicated previously, counsel Mr Dunkley sought to challenge the learned judge's finding that Mr Taylor acknowledged Mr Thompson as a co-owner of the property for the sale. On the contrary, he submitted, Mr Thompson's involvement in the sale was merely for administrative convenience. In any event, it was submitted that, even if Mr Taylor did acknowledge Mr Thompson as a co-owner of the property at the time of the sale of the property in 2019, it would not impact or in any way alter the expiration of Mr Thompson's title by 2013. By virtue of section 30 of LAA, the argument continued, once the statutory period of 12 years passed during which Mr Taylor had factual possession with the intention to possess, Mr Thompson's title would be extinguished. As a consequence, Mr Thompson's signing of the agreement for sale did not amount to a recognition by Mr Taylor of his interest, nor would it interfere with the rights that had already accrued in Mr Taylor's favour. Citing **Chisholm v Hall**, counsel contended that an acknowledgement of co-ownership after the expiration of the 12 years could not

restart the limitation clock. Mr Kinghorn, on the other hand, argued that the learned judge considered the evidence and correctly found that Mr Taylor's claim ran contrary to the agreement for sale and the instrument of transfer signed by Mr Thompson as a co-owner of the property. We agree.

[20] On account of the divergent facts, we do not find the case of **Chisholm v Hall** to be helpful. In that case, the Privy Council found that a new certificate of title that was issued to the registered proprietor to replace a lost certificate of title was merely a substitute and did not restart the period of dispossession. Additionally, the subsequent sale of that land after 12 years of possession had passed could not defeat the possessory title. One of the principles derived from that case is that the registration of a transfer of land to a purchaser for value is subject to a possessory title. However, the transfer of the property in this case is against the background of three co-owners conveying their respective titles to a purchaser for value. It is not the divesting of the title being challenged but rather the entitlement to the proceeds.

[21] Having decided to sell the property, Mr Taylor called upon his two co-owners to facilitate the sale. It is his evidence that he did so in an effort to ease the process of transferring the legal interest. Accordingly, his attorney-at-law provided Mr Thompson with the agreement for sale to sign as a vendor and the instrument of transfer, which he signed as a transferor of his interest in the property. Mr Taylor admitted under cross-examination that he, at no time prior to the execution of the sale agreement, informed Mr Thompson that he did not consider him to be an owner of the property. Additionally, upon being advised by his attorney-at-law that one-third of the proceeds of the sale would need to be paid out to each co-owner, Mr Taylor sought permission from his co-owners for the entire proceeds of sale to be paid out to him.

[22] Section 16 of the LAA provides that when acknowledgement of the title of the person entitled to any land or rent is given to him or his agent in writing, signed by the person in possession, then such possession is deemed to be the possession of the person entitled, whose right to make an entry or bring an action to recover the land or rent is

deemed to begin to accrue at the time of the acknowledgement (or the last of the acknowledgements, if there is more than one). The effect of that section is that once the possessor acknowledges the title holder's interest in writing endorsed with his signature, then his prior possession is regarded as the possession of the title holder. The application of that section does not seem to be restricted to circumstances where the limitation period of 12 years has not yet passed, and no authority that would tend to support Mr Dunkley's submissions on this point has been presented to the court.

[23] In the light of that provision, we are satisfied that the agreement for sale and instrument of transfer, which Mr Taylor signed, would constitute written acknowledgement of Mr Thompson's interest. That finding would mean that, even if Mr Taylor had successfully demonstrated that he had factual possession of the property with the intention to possess it for a period exceeding 12 years, once he acknowledged Mr Thompson's title upon their signing of the agreement for sale, the accrual of the rights vis-à-vis sections 3 and 30 of the LAA would recommence.

[24] However, if the legislators did not intend such an application, to our minds, such an acknowledgement would, at the very least, speak to the state of mind of the possessor. That acknowledgement is not only implicit in the execution of the sale agreement but also in the instrument of transfer, both of which Mr Thompson signed at Mr Taylor's request. At this juncture, Mr Taylor would certainly assert that he had never considered Mr Thompson as his co-owner, which, in our view, appears to be a convenient afterthought, as that would be in his best interest in furthering his claim. Nevertheless, as observed by the learned judge, Mr Taylor invited Mr Thompson to discharge responsibilities as a co-owner in relation to the property. By so doing, his assertions that he intended to possess the property in his own name and on his own behalf seem less than credible.

[25] Mr Dunkley was correct that failing to apply for title by adverse possession after being in undisturbed possession for 12 years does not affect the possessor's rights, as established in **Recreational Holdings**. However, where the property was registered in

the names of three tenants-in-common, it would have been prudent for Mr Taylor to seek the intervention of the court or the Registrar of Titles before the sale, as indicated by the learned judge. Consequently, on the peculiar facts of this case, we are constrained to find, as the learned judge did, that Mr Taylor is now estopped from claiming entitlement to the one-third share of the net proceeds of the sale set aside for Mr Thompson.

[26] For all of the above reasons, it is our judgment that the evidence in its entirety is wholly consistent with the learned judge's conclusion, and there is no basis to impugn her order. Therefore, the order of the court is as follows:

1. The appeal is dismissed.

2. The stay of execution pending appeal granted on 21 June 2022 is discharged.

3. Costs to the respondent to be taxed if not agreed.