[2024] JMSC Civ 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00263

BETWEEN	**GWENDOLYN WILLIS**	**CLAIMANT**
A N D	**KERVIN BRITTON**	**1ST DEFENDANT**
A N D	**OCTAVIA CLOUGH**	**2ND DEFENDANT**
A N D	**HECTOR GEORGE ST. ANTHONY CLOUGH**	**3RD DEFENDANT**

IN CHAMBERS

Ms. Sue-Ann Williams with Mr. Christopher Townsend for the Claimant.

Mrs. Rose Marie Duncan-Ellis with Ms. Abbigail Pinnock for the Defendants (x3)

HEARD: February 5, 2024 and February 27, 2024

Civil Practice and Procedure – Judgment After Striking Out – Rule 26.5 – Whether the Claimant is entitled to Judgment on Terms Against the 1st Defendant on the Facts Pleaded.

Limitation of Actions – Whether Claimant's Right to Recover Possession was Extinguished in Relation to the 1st Defendant.

D. STAPLE J

BACKGROUND

[1] The Claimant and the 1st Defendant have a torrid history. Unfortunately for the 1st Defendant, due to his non-compliance with an Unless Order imposed by Carr J,

his case stood struck out and he is now facing the prospect of a judgment being entered in terms as a consequence of his case being struck out.

[2] However, is the Claimant able to get a judgment against him on her case as pleaded?

[3] The Claimant brought this Amended Fixed Date Claim against all three Defendants. It concerns what the Claimant contends is the 1st Defendant's unlawful occupation of a portion of her land that she says she allowed him to occupy initially on the basis that he had been booted from his former rented premises and had no where else to go.

[4] According to the Claimant, she gave the 1st Defendant terms of occupation of the section of the land, including that he was not to erect a permanent structure.

[5] The Claimant pleaded that she subsequently left the island and, upon her return, discovered that the 1st Defendant had far exceeded the terms of his occupation and had erected a permanent block and steel structure. Her case is that she immediately told him to leave from her property, but he has refused and remains in occupation of same to this day.

[6] To this end, she filed this action in 2019 to recover possession against the 1st Defendant.

[7] Upon perusing the totality of the pleadings, including her Reply to the 1st Defendant's Defence, I pointed out to the Claimant that her own pleaded case may raise a limitation defence for the 1st Defendant. That is, she has not, on her pleadings, established that she still has a valid title to that portion of the land which the 1st Defendant occupies so as to allow her to bring the action for recovery of possession against him.

[8] To that end, I invited submissions from counsel to show why it is that her client should receive judgment against the 1st Defendant on her pleadings. Counsel

made submissions in writing and I am grateful for them. They were duly considered.

ISSUES:

[9] I consider the issues to be resolved to be the following:

> **(i) Does the Claimant still have a valid title for that portion of the property which the 1st Defendant occupies?**
> **(ii) If not, can she bring the claim for recovery of possession as against him?**
> **(iii) Is she entitled to judgment against him on his case being struck out?**

Limitation of Actions for Recovery of Possession of Land

[10] 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****."*

[11] 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).

[12] 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.

[13] 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-
>
> ***(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;

[14] On this score is the decision from the Caribbean Court of Justice in ***Toolsie Persaud Ltd v Andrew James Investment Limited***[1]. 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;

[1] 72 WIR 292

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
>
> (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.

[15] 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.

[16] 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.

[17] 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."***

[18] It is important to note that as the Claimant is suing for recovery of possession the legal and evidential burden are upon her to establish that her title is still a good and valid one thus enabling her to bring the action[2]. If her title was extinguished, then her claim must fail.

[19] So the questions that arise here are:

a) **whether or not the Claimant was dispossessed;**
b) **If so, when; and**
c) **whether she took any action thereafter to reassert her right of re-entry before the 12 years had expired.**

Was the Claimant Dispossessed and if so, When?

[20] In my view the Claimant was dispossessed and this occurred by the latest 2003. Counsel for the Claimant has submitted in her written submissions that as the Defendant was a licensee, he could not have dispossessed the Claimant as he was there with the permission of the titular owner. His possession was through the titled owner and not of his own.

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[2] See the decision of the Court of Appeal of *Fullwood v Curchar* [2015] JMCA Civ 37

[21] She cited as authority the Privy Council decision of ***Ramnarace v Lutchman***[3] as well as a decision of this Court in ***Sarju v Sarju et al***[4] in support of the positions that a licensee cannot acquire title by adverse possession.

[22] In this case in her Reply to the Defence of the 1st Defendant filed on the 21st December 2021 at paragraph 8, the Claimant pleaded that she had given the 1st Defendant permission to build a temporary board structure on a part of the land. Indeed, the terms, as pleaded in the Reply, were very specific. I will set them out here:

8. The Claimant advised the 1st Defendant that after consultation with her family she would permit him to construct a temporary make shift board structure behind the second building on the subject property. The Claimant advised the 1st Defendant that the area on which he was permitted to temporarily occupy as a licensee belongs to her only son who intends to construct his permanent house on the said house spot for himself and his family. The Claimant advised the 1st Defendant that his temporary occupation of her property has the following conditions:

   i. That he is only permitted to built/construct an inexpensive make shift board structure which must be easily pulled down at his own expense whenever his permission is revoked;
   ii. That he is not permitted to construct a permanent structure on her property;
   iii. That she is only granting him permission to occupy that portion of the subject property which her son intends to construct his house;
   iv. At no time she is giving him permission to own, take control of, act as owner of, has any proprietary right over or to construct a permanent structure on the subject property;
   v. As his permission was temporary he did not have access to water and light from the utility companies;
   vi. That the 1st Defendant must not do anything to change the shape and dimensions of the subject property;
   vii. That the 1st Defendant must not take any steps to create any right(s) or interest in the subject property and must act within the permission of the Claimant.

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[3] (2001) 59 WIR 511
[4] [2022] JMSC Civ 126

[23] She then pleads, at paragraph 11 of the said Reply, that when she returned in 2003, the board structure was replaced by a permanent concrete structure. In fact, she specifically said that the 1st Defendant had not followed her instructions **and she told him to remove himself and the structure** (emphasis mine) from the property. On this pleading therefore, the Claimant would have clearly and unequivocally given verbal notice of the revocation of the 1st Defendant's license and so her right of re-entry accrued then.

[24] The Claimant has therefore explicitly pleaded that she did not give the 1st Defendant any permission to build the permanent concrete structure. In those circumstances, the 1st Defendant would have, in my view, breached the terms of his license and clearly built a structure with intent to take permanent possession of that portion of the property.

[25] The license given by the Claimant was clearly breached and so she was also dispossessed within the meaning of s. 4(a) of the **Limitation of Actions Act**. This was at the latest in 2003 when she returned and saw the permanent structure. Further, the pleading in the Reply is clearly indicating that the Claimant purported to give him verbal notice of the revocation of the license from as early as 2003. Such a notice is effectual to revoke a license[5].

[26] The Claimant's right to re-enter the land therefore accrued from the earliest 2003, the moment she saw that the permanent structure was there contrary to the very detailed pleadings delineating her instructions and terms of the license to the 1st Defendant. She was dispossessed by the Defendant breaching his license and erecting a permanent structure on the land. She then, on her own pleading, gave

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[5] See the case of *Lowe v Adams* [1901] 2 Ch 598 where it was held that a verbal notice given in early March for March 25 to terminate a year to year license to shoot pheasants for a fee was valid to terminate the license as March was the end of the current year.

him verbal notice of revocation of his license. He refused to leave on her own pleading.

[27] In the case of ***Ramnarace v Lutchman*** itself, the circumstances were that the Appellant, Ramnarace, had entered into possession of her aunt and uncle's property with their consent in or around 1974. She was told by her uncle that she could stay there until she was in a position to purchase the said property. Eventually in or around 1985, the son of the Uncle and Aunt (the present Respondent) sought to evict the Appellant from the property. The Appellant filed a claim seeking (eventually) a declaration that the titles of the Aunt and Uncle (both deceased at this time) had expired. The Respondent filed a counterclaim that the title was still a valid one.

[28] At first instance, the trial judge held that the Appellant had entered the property as a tenant at will and that tenancy had expired by law in July of 1975. Thereafter, as she remained in sole exclusive undisturbed possession for the next 16 years, the title for the Aunt and Uncle had expired. This was reversed on appeal to the Court of Appeal. The Privy Council, however, allowed the appeal of the Appellant.

[29] Their holding was that the Court of Appeal, in reversing the decision of the judge at first instance, had given too little weight to the fact that the appellant had been in exclusive possession of the disputed land and the fact that her possession was attributable, not merely to her uncle's generosity, but to the intention of the parties that she should, in due course, purchase the land. Having entered the disputed land in July 1974, the appellant's tenancy at will automatically came to an end for limitation purposes one year later (s 8 of the Ordinance). Thereafter the service of notices to quit by the respondent without more was insufficient to stop time running in favour of the appellant, and the respondent's title was extinguished some sixteen years later in July 1991 (s 3 of the Ordinance), before he made his claim to recover the land.

[30] So what they expressly found was that the Appellant was not a licensee, but a tenant at will. This tenancy at will was terminated, by statute, one year after the Appellant entered into possession.

[31] But the question in the case at bar concerns the consequences when a license is breached. If a license is breached, then it gives to the licensor an immediate right of re-entry to the property. A licensee who exceeds their license is a trespasser[6]. In the case of ***Wilcox v Kettell***[7], the plaintiff and the defendant owned adjoining properties. The defendant, wanted to rebuild his property and received permission from the plaintiff to underpin the plaintiff's wall which abutted upon the defendant's building. The defendant's new building was to have girders upon a steel cage, and to support this steel framework it was necessary to place stanchions at intervals along the boundary. Where these stanchions were placed, the defendant extended the concrete foundations some 20 ins beyond the plaintiff's wall into the plaintiff's land. It was held at trial that this extension amounted to a trespass as it went beyond the scope of the permission given to the Defendant.

[32] The licensor may or may not exercise that right to re-enter, but the right still arises. What it is, in effect is an indication that the 1st Defendant has now taken on a different stance in relation to his occupation. He is no longer occupying in recognition of the title of his licensor. He is clearly now put down permanent roots.

Did the Claimant Exercise her Right of Re-Entry Before the 12 Year Period?

[33] According to the same decision of *Toolsie Persaud*[8], the only two correct methods of reasserting one's right to possession is physical re-entry and/or an action in Court. The writing of a letter or giving notice to quit are not sufficient acts of assertion of the right of possession by the titular owner.

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[6] Clerk & Lindsell on Torts 20 ed. para 19-46.
[7] [1937] 1 All ER 222
[8] See n1 above at p 308 per de la Bastide P and Hayton J

[34] The Claimant did not sue the first Defendant until the 30th January 2019. This would have been more than 12 years after he first built the permanent structure and certainly more than 12 years after the verbal notice of revocation of his license by the Claimant in 2003.

[35] In those circumstances, the Claimant's pleaded case actually makes out, quite expressly and in great detail, the fact that she was disposed by the 1st Defendant from 2003 and that remained the case for the next 12 years without her re-entering or taking an action to recover possession. If any doubt remained about this intention on the part of the 1st Defendant, it was fully confirmed when he chased away the surveyor sent by the Claimant in 2009 when she was attempting to fix up her retirement home on the said property. So not only had he set up the permanent structure by the latest 2003, he was defending his territory. Again, this is on the Claimant's pleadings.

[36] It is my finding therefore, that on her pleaded case, she lost her title to that portion of the land which the 1st Defendant now occupies.

DISPOSITION

1. **It is declared that the Claimant is not entitled to any of the relief sought as against the 1st Defendant as her title to the section of the property occupied by him is now extinguished.**
2. **A Case Management Conference for the Claim against the 2nd and 3rd Defendants is set for the 18th June 2024 at 3:00 pm for 1 hour.**
3. **Leave to Appeal is refused.**
4. **No order as to costs as against the Claimant.**
5. **Claimant's Attorneys-at-Law are to prepare, file and serve this Order on or before the 8th March 2024 by 4:00 pm.**

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D. Staple, J