[2023] JMSC Civ. 202

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU2023CV01937

BETWEEN	**CHRISTOPHER WOOD**	**CLAIMANT**
A N D	**MARIA GREY GRANT**	**DEFENDANT**
A N D	**DENNIS LAWSON**	**1ST INTERESTED PARTY**
A N D	**LAWSON FARMS LIMITED**	**2ND INTERESTED PARTY**

IN CHAMBERS

Ms. Tavia Dunn with Ms. Allyandra Thompson instructed by Messrs Nunes, Scholefield, DeLeon & Co. Attorneys-at-Law for the Claimant/Applicant

Mr. Roderick Gordon with Ms. Kereene Smith instructed by Messrs. Gordon McGrath Attorneys-at-Law for the Defendant/Respondent.

Mr. Jalil Dabdoub instructed by Messrs Dabdoub, Dabdoub & Co for the Interested Parties.

HEARD: October 3, 2023 and October 18, 2023

Injunction – Application for Injunction – Whether or not there is a serious issue to be tried – Adverse Possession – Limitation of Actions Act – Whether or not the Claimant has shown a case with a real prospect of success that his title was not defeated – Whether or not a purchaser in possession can be an adverse possessor.

STAPLE J (Ag)

BACKGROUND

[1] So precious a commodity is land, let alone in the highly sought after area of Kingston 19 in St. Andrew Jamaica, that once obtained, the fight to retain

possession is often engaged with a measure of desperation reserved only for the preservation of life.

[2] The Defendant had lost a previous battle for the retention of a property known as Townhouse #43, G, Britney Manor, 11 Watervale Avenue, Kingston 19 in the parish of St. Andrew. That battle was fought in Claim No. 2014 HCV 03290 between herself (as Claimant in that suit) and the present Claimant (the Defendant in that suit) and another. The result of that case was encapsulated in the judgment of Evan Brown J (as he then was) which was delivered on the 25th September 2020[1].

[3] Undaunted by the obstacle of a judgment of the Supreme Court, the Defendant then proceeded to lodge Application No. 24323130 with the Registrar of Titles for title to the land to be given her by possession.

[4] The Claimant has filed this Application to restrain the Registrar from proceeding with and granting such application pending the outcome of the substantive claim filed in this matter on the 16th June 2023 seeking a declaration, inter alia, that the Defendant has absolutely no share in the said property.

[5] The Defendant has filed a Defence on the 2nd October 2023 to the effect that the Claimant has lost any right of re-entry to the said land by operation of the **Limitation of Actions Act** and so cannot bar her from obtaining the said title.

[6] The task for this Court is to determine whether or not to grant the Claimant's application for the injunction pending the final determination of the substantive issues between the parties.

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[1] [2020] JMSC Civ 188

THE EVIDENCE

[7] Much of the background facts are actually now confirmed as facts as a result of the findings from the previous trial before E. Brown J (as he then was). As such, I adopt the summary of the facts from paragraphs 3-6 of the Judgment of Evan Brown J (as he then was). I will set them out below for ease of reference.

> *[3] The dispute between the parties arose from the following admitted and/or undisputed facts. The claimant's father, Hershell Tasman Grey, died possessed of, among other properties, two parcels of land registered at Volume 1103 Folio 990 (Kembert Lodge) and Volume 644 Folio 52 (Innswood). Her father's estate fell to be administered by the Administrator-General of Jamaica. On or about 21 December 2005, the claimant contracted with the Administrator-General to purchase these two parcels of land, the former for $6m and the latter for $28.5m (the Administrator-General Agreements).*
>
> *[4] On or about 26 January 2006, the claimant entered into an Agreement for Sale with the 1st defendant (the registered proprietor) to purchase townhouse G2, block - 3 - G, lot 43 on the subdivision plan of part of Swollowfield Estate, St. Andrew and being part of land registered at Volume 2377 Folio 152, later registered at Volume 1418 Folio 126 (the disputed property) for the consideration of $2m. Contemporaneously, the claimant entered into an Agreement for Construction of townhouse G2 with the 2nd defendant (of which the 1st defendant is a director) for the consideration of $11m. Clause 11 of this agreement stipulated that "the Builder shall in respect of the said townhouse credit the sum of … [$11m] against the indebtedness on a loan due and owing by the Builder to the Owner". Under clause 12 the builder agreed that "the individual Certificate of Title for the 3bedroom townhouse shall be duly issued under the Registration of Titles Act, in accordance with the Subdivision Approval of the Kingston & St. Andrew Corporation and same shall be duly transferred to the Owner".*
>
> *[5] The claimant also executed a Nomination Agreement with the Administrator General in which she nominated the 1st defendant as the person entitled to receive the lands she contracted to purchase from the Administrator-General. Item three of the Schedule to the Nomination Agreement stated the contract price as $34.5m, the sum of the contract price for both parcels of land. Although the Nomination Agreement provided for the payment of the contract price to the claimant, it was accepted at the trial that the sums were paid directly*

> *to the Administrator-General. The lands were subsequently transferred into the name of the 1st defendant.*
>
> *[6] Both the Agreements were properly executed by the parties. The townhouse was constructed and the claimant has been in possession. However, the claimant is yet to receive title.*

[8] The findings of fact from my learned brother in the above judgment were quite telling. He found, after hearing all the evidence in the case, that there was, as a matter of fact, no valid contract capable of enforcement because the Agreements for Sale were unstamped and stamp duty could not be assessed by the Court as the consideration was incapable of being ascertained. The chief reason (among other findings) as to why the Court could not calculate the stamp duty was the fact that the parties had actually not exchanged any cash, despite what was expressly stated in the unstamped Agreement for Sale.

[9] The result therefore is that the Agreement for Sale were now void from inception. The Agreement for Sale exhibited at CW2 of the Affidavit of the Claimant filed on the 16th June 2023 states at special condition 1 that it was a condition precedent to the coming into effect of the Agreement that it was to be (a) signed by the parties; and (b) the cash deposit and further payment on account of purchase paid.

[10] Since neither of those things were found as a matter of fact to have occurred, then it stands to reason that there was never any Agreement for Sale in effect. I make that as my own finding as well.

The Evidence Since the Judgment?

[11] Since the judgment, the Defendant has vacated the property. The tenants that she had put in possession there had been given notice to leave by the Claimant in 2021 and they obeyed the notice and left.

[12] Following this, the Defendant removed a caveat she had lodged against the title on the 9th July 2013 seeking to protect her interest as a ***purchaser in possession*****.** She removed the caveat on the 3rd June 2022.

[13] But before so doing, she had actually served, through her former Attorneys-at-Law, on the Claimant's Attorneys-at-Law a Notice to Complete the said transaction. The Claimant's Attorneys-at-Law sharply rebuked her and refused to give cognizance to the Notice to Complete citing the judgment of Evan Brown J (as he then was).

[14] The Defendant then lodged an Application with the Registrar of Titles to be declared the owner of the said property by adverse possession.

[15] These are the essential facts of the case up to this point. They are not in dispute by the parties.

[16] What is in dispute is the legal consequences that flow from these facts.

THE LAW ON INJUNCTIONS

[17] Both counsel in their submissions have admirably set out the law on injunctions. I also wish to thank all counsel for their helpful submissions and authorities provided. If I do not make detailed reference to the submissions, it is not to be taken as though they were not read or heard. I have read the authorities and taken the submissions into consideration.

[18] As this is an application for an interim injunction, the Court had regard to the well-established guidelines from the celebrated cases of ***American Cyanamid Co v Ethicon Limited***[2] and the judgment of Lord Diplock. This was further affirmed in the local Privy Council decision of ***NCB Limited v Olint Corporation***[3] (hereinafter *Olint*). These considerations are:

> *(i) Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?*
> *(ii) If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.*

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[2] [1975] 1 All ER 504
[3] Privy Council Appeal No. 61/2008, April 28, 2009.

(iii) If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the Plaintiff or the Defendant, then I will go on to examine the balance of convenience generally;

(iv) If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.

[19] In the case of ***Tapper v Watkis-Porter***[4] Phillps JA stated that, "An analysis of the balance of convenience entails an examination of the actual or perceived risk of injustice to each party by the grant or refusal of the injunction"

[20] Earlier in the said judgment at paragraph 36, she adumbrated and distilled the principles on the concept of the balance of convenience from the ***American Cyanamid*** **and the** ***Olint*** cases. I can do no better than to quote from the eminent jurist:

> *In considering where the balance of convenience lies, the court must have regard to the following:*
>
> *(i) Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.*
>
> *(ii) If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party's case.*

[4] [2016] JMCA Civ 11 at para 37

[21] At the end of the day though, the Court should try to take the course that will result in the least irremediable prejudice to either party[5].

[22] This case concerns questions on the concept of adverse possession. As such, in determining whether to grant an injunction, I must consider the question of whether there is a serious issue to be tried in the context of the strength or weaknesses of the positions of the respective parties.

[23] If it is that there is a clear case, on the face of it, that the Claimant's title was more than likely defeated, then there would be no serious issue to be tried and the injunction would be refused.

[24] If, however, after examining the respective cases of the parties, there is sufficient material to show that the Claimant has a real chance of success at trial, then I would find that a serious issue has been established.

[25] As counsel for the Claimant at paragraph 16 of the submissions posits, the Court is not to embark on a trial of the case or seek to resolve conflicts of evidence or difficult questions of law as those are more appropriate for a trial. However, in deference to the Defendant's position, where it is clear and obvious, that the Claimant's case is incurably weak and unlikely to succeed at trial, it would be open to the Court to find that there is no serious issue to be find.

Is There a Serious Issue to be Tried?

[26] The Court finds that there is no serious issue to be tried in this case. Based on the evidence before the Court and the applicable law, the Court is not satisfied that the

[5] Id

Claimant will be able to establish that his title was not defeated by the Defendant to enable him to exercise his right to re-enter the property.

Claimant's Submissions

[27] Ms. Dunn, on behalf of the Claimant, pitched her submissions with the asking of a question: Was the Defendant in adverse possession of the property? She then identified the following as salient facts to suggest that she was not, in fact, in possession adverse to the Claimant during the 12 year period for which she was in possession of the property.

a. **The Defendant identified herself as a purchaser in possession by virtue of the Caveat lodged in 2013;**
b. **Paragraph 28 of the submissions shows that as a purchaser in possession, her entry into the property was pursuant to a contract for sale.**
c. **The Defendant, by lodging the caveat as a purchaser in possession has not exhibited the intention to dispossess the Claimant so as to be able to meet the test for adverse possession.**

[28] I enquired of Ms. Dunn and Ms. Thompson about when the Claimant's right to re-enter the property would have arisen. This is important as time starts to run for the Claimant to take action only when his **right to re-enter the property has accrued to him under the Limitation of Actions Act** and not before. According to Counsel, it was only **after** the decision of Evan Brown J (as he then was) in September of 2020 that time could be said to run. In other words, that judgment would have declared that the agreement was unenforceable. So his right to re-enter would have only arisen at that point. Prior to this, the Defendant was still occupying as a purchaser in possession.

[29] Ms. Dunn called in aid two cases; one from the Court of Appeal of England and Wales and the other from the Privy Council for Fiji. These were ***Hyde v Pearce***[6]

[6] [1982] 1 All ER 1029

and ***Lakshmijit s/o Bhai Schit v Faiz Mohammaed Sherani***[7] respectively. These cases essentially held that a purchaser in possession, was in possession pursuant to an agreement between the title holder and himself and as such, his possession was not adverse to the title holder as he was relying on the title holder's permission to remain in the property. Indeed, the Privy Council in the ***Lakshmijit*** case indicated that in the situation of early possession in an agreement for sale, the time does not begin to run until the right of re-entry for the title holder arises. This right to re-enter, under the equivalent in Fiji of our **Limitation of Actions Act** would not arise until the breach of the condition and the vendor exercises the right to rescind. It would be after this right to rescind has arisen and the possession continues, that it becomes adverse to the title holder.

[30] On the question concerning when time would start to run against the Claimant, Ms. Dunn argued that the absence of the payment of stamp duty does not make the agreement void *ab initio*. As such, the time wouldn't have started to run against the Claimant until the Court pronounced the contract unenforceable in September 25, 2020. Twelve years would not have run since then and the Claimant had exercised his right of re-entry by removing the Defendant's tenants from the property in 2021.

The Defendant's Arguments

[31] Mr. Gordon's thrust is that the Defendant's actions have demonstrated clearly, her intention to possess the property for her own benefit or on her own behalf. The only intention that matters is the intention of the possessor to occupy and use the land as their own.

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[7] [1974] AC 605

[32] He relied on the Jamaican Privy Council decision of ***Recreational Holdings 1 (Jamaica) Ltd v Lazarus***[8]; ***Ramnarace v Lutchman***[9]*;* ***Pye (JA) Oxford Ltd v Graham***[10] and other in support of his position.

[33] The large thrust of his argument, in response to Ms. Dunn, was that the modern approach to the question of adverse possession was to concentrate on the intent of the possessor and the only intent for which we should look was an intent to possess the land for themselves for their own benefit to the exclusion of all others including the title owner.

[34] He argued that regardless of how the Defendant would have described herself (as purchaser in possession or otherwise) and whatever legal action she may have taken, she was in possession of the property and her possession was with the requisite intent. This possession started in 2006 and continued for over 12 years undisturbed by the Claimant.

Adverse Possession

[35] 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****."*

[36] 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

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[8] [2016] UKPC 22
[9] (2001) 59 WIR 511
[10] [2002] UKHL 30

12 years **from the date his right to re-enter or take the action first accrues to him** (emphasis mine).

[37] 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.

[38] A key question in resolving whether or not there is a serious issue to be tried in this case is when it was that the Claimant's right to re-entry accrued to him. If Ms. Dunn's position is correct, that it accrued at the point when the Court declared the contract unenforceable and non-existent, then his right of re-entry would not have arisen until that point. The alternative to this is that the right to re-entry arose from the very date that the Claimant was put in possession as there was never any contract to begin with and, more importantly, her possession was always with the intention to occupy the property as her own to the exclusion of everyone else.

[39] Ms. Dunn is relying on the ***Lakshmijit*** case as authority for the principle that in cases where there is an agreement for sale and the vendor puts the purchaser in possession, the possession of the purchaser is by consent and not adverse to the vendor. The vendor's right of re-entry does not arise unless and until there is a breach of a term which explicitly gives rise to the right of re-entry and the vendor chooses to exercise that right, or the vendor rescinds the contract for sale and thereby his right to sue for re-entry arises.

[40] In the ***Lakshmijit*** case, the Privy Council was contending with section 1 of the Real Property Limitation Act 1874 (which was applicable in Fiji by virtue of the Statue of Limitations Declaration Ordinance c. 137 of the Laws of Fiji 1955). That statute is similar in terms and effect to sections 3 and 4 of our **Limitations of Actions Act**. In particular section 4(e) concerning when the right of re-entry accrues by reason of forfeiture or breach of a condition.

[41] The Privy Council held (by majority with one dissenter) that under the terms of the agreements, the purchasers were only under an obligation to pay the whole purchase price on default in payment of the instalments if the vendor elected to

demand such payment, and likewise, the right to possession only accrued to the vendor if he elected to rescind the contract. Therefore, the purchasers' possession of the land was not adverse to the vendor until he exercised the right to rescind and so the action was not statute barred.

[42] Viscount Dilhorne's dissent was simply that the right to re-enter accrued to the vendor when there was default under the agreement and not when the vendor elected to rescind. This would give him an earlier timeline and would have resulted in the action to re-enter by the vendor being statute barred.

[43] The problem with Ms. Dunn's line of argument is that there was, as a matter of fact, no agreement for sale between the parties. Among the reasons for this is the fact, as E. Brown J (as he then was) found, that no money was exchanged between the parties at the time of their purportedly entering the contract. This is a fact that was known to both the parties **from day one** (emphasis mine). This raises very serious questions about the *bona fides* of the very agreement the Claimant seeks to rely on as his basis for putting the Defendant in possession as a purchaser in possession. That aside, since no cash was exchanged, then there was never a deposit or monies paid on account of purchase which, according to special condition 1 of the Agreement, made it that the condition precedent to the contract coming into existence never occurred in fact. Again, this was known to the parties.

[44] This state of affairs is distinguishable from the ***Lakshmijit*** case where there was a valid and enforceable Agreement for Sale. So that case is of no assistance to the Claimant here. He and the Defendant are not, in my view and it is my finding, in the same position as the parties in the ***Lakshmijit*** case.

[45] So in my view, the Claimant has not demonstrated a case with a real prospect of success that time in the case at bar would not start to run from the moment the Claimant **discontinued possession or was dispossessed by the Defendant** in 2006 when he let her into possession of the property as opposed to the date of breach of the agreement**.** It is my view that this case is based on section 4(a) and

not section 4(e). Ms. Dunn was seeking to rely on the time in section 4(e), but it is my finding that as there was no contract, section 4(e) of the LOAA would not be the applicable section on which we could determine the starting point, but rather section 4(a).

When did the Claimant Discontinue Possession or was Dispossessed by the Defendant?

[46] In my view, the Claimant would be extremely hard pressed to establish that he had not discontinued possession of the property the moment he let the Defendant into possession and ceded to her all authority over the user of the property as an owner. The law is quite settled that it is for the titular owner to prove that his title was not extinguished. So he has the ultimate legal and evidential burden to prove that he did not discontinue possession or that he was not dispossessed.

[47] For the purposes of this application, he must show that he has a case with a real prospect of success that he did not discontinue possession or was not dispossessed by the Defendant.

[48] There is no dispute between the parties that the Claimant let the Defendant into possession and that the Defendant did works on the property, paid taxes, paid utilities, rented out the premises and generally performed all acts as an owner. She did all of these actions without any reference to or reliance on the Claimant or his title. She did them, in my view, as an owner with the clear intent to do these things for her own benefit. She did them openly and without any disturbance from the Claimant for over 12 years since 2006.

[49] The Claimant sought to rely on ***Hyde v Pearce*** to make the point that the Claimant could not assert herself as a purchaser in possession and maintain a claim in adverse possession. In that case in March 1958 the plaintiff agreed at auction to purchase a house and a parcel of adjoining land for £255. Completion was to take place on 14 April 1958 and the sale was subject to the Law Society's Conditions of Sale 1953. The plaintiff went into occupation of the property without informing

the vendors, and the auctioneers offered to lend him the keys to the house provided he returned them on demand. The plaintiff agreed in writing to that arrangement. In May the vendors realised that they had previously conveyed to a third party a small piece of the adjoining land measuring about 60 sq ft. They wrote to the plaintiff's solicitors offering to abate the purchase price by £10, but the plaintiff demanded a larger sum. A dispute then arose between the plaintiff and the third party concerning the ownership of the land. The vendors, asserting that the land belonged to the third party, asked the plaintiff to return the keys in accordance with his undertaking to return them on demand. The plaintiff refused to give up possession, although the vendors continued to press for the keys to be returned. In July the vendors again asked for the keys, reminding the plaintiff that he was not the owner of the property as the conveyance had not been completed. The plaintiff did not reply, but neither did he repudiate the contract, the issue continuing to be as to the amount of the abatement. In September the vendors wrote to the plaintiff saying that they wished to have the dispute settled by arbitration. Thereafter, however, the vendors took no further steps towards completion of the contract or arbitration of the dispute, and the plaintiff continued to live in the house. At no stage did the plaintiff seek the return of his deposit, nor did the vendors seek to repay the deposit or rescind the contract. The contract of sale was never registered as a land charge. In August 1972 the vendors agreed to sell the property, except for the disputed piece of land, to the defendant. In October the property was transferred to the defendant, the transfer overreaching any contractual rights of the plaintiff because they had not been registered as a land charge. At about the same time the plaintiff was imprisoned following a dispute with the rating authorities. The defendant then entered the property, and demolished and reconstructed the house. In January 1974, following his release from prison, the plaintiff brought an action against the defendant for possession.

[50] The plaintiff relied on the contract of March 1958 and continuous occupation until dispossessed by the defendant. The plaintiff contended that the vendors had discontinued possession or been dispossessed by him, and that, by reason of his

continuous possession for 14 years, the vendors' title had been extinguished by the Limitation Act 1939. By further particulars of claim in 1977 the plaintiff claimed that his right of occupation was as a purchaser under a contract for sale, and by further particulars in 1979 that he was in occupation first as a squatter and then under a contract for sale, having continued in possession after ignoring a demand for the return of the keys.

[51] The defendant alleged that the plaintiff was in occupation as a licensee of the vendors, and that accordingly the plaintiff was not in adverse possession of the property so as to allow time to run under ss 4(3)a[1] and 10b[2] of the 1939 Act.

[52] The judge held (i) that, where a purchaser entered into possession prior to completion of a contract of sale of land, then, irrespective of the provisions of condition 6 of the 1953 conditions, by necessary implication, even though the contract had not been rescinded or otherwise brought to an end, the vendor could always gain possession before completion by determining the purchaser's license by notice, (ii) that the vendors' demand in 1958 for the return of the keys had effectively determined the plaintiff's licence, and (iii) that accordingly the plaintiff had been in adverse possession since 1958 so that by 1972, when the defendant dispossessed the plaintiff, the plaintiff had gained a possessory title by virtue of the 1939 Act. The defendant appealed.

[53] The Court of Appeal held that:

> *"(1) A vendor was not bound by condition 6 of the 1953 conditions to let a purchaser into possession, but if he did so the purchaser was entitled to remain until the contract was rescinded or became void. The effect of the plaintiff's undertaking to return the keys on demand was to vary condition 6 by agreement so as to make the plaintiff's occupation determinable on demand.* ***It followed that the plaintiff was a licensee whose licence could be determined by notice at any time****; and*
>
> *(2) However, since the plaintiff, in bringing his action against the defendant, had relied on the existence of the contract of sale to support his continued occupation of the property, and since he could have set up the contract as a valid defence to any proceedings brought against him for possession, he*

could not thereafter assert that he had obtained a title by adverse possession, that he had been squatting unlawfully on the property or that he had a right to remain on the property other than by virtue of the contract to purchase. It followed therefore that, notwithstanding that more than 12 years had elapsed since the plaintiff had entered into possession of the property, his possession was not adverse possession within s 10 of the 1939 Act. The appeal would accordingly be allowed."

[54] Again, this case is distinguishable from the case at bar as the parties in this present case were never under such an arrangement because there was never any valid and enforceable contract as (among other things) the Agreement for Sale never came into existence.

[55] Another point to be made about ***Hyde v Pearce*** is that the facts of that case clearly show that an express license was created. The Plaintiff and the auctioneers agreed to terms that they would lend the Plaintiff the keys for the property **provided that he returned the key on demand**. In those circumstances, a clear license was created as the Plaintiff would have agreed to surrender possession (the keys) when required by the owner so to do.

[56] In the case at bar, there were never any such terms and conditions. The Defendant had entered the property with no limitations on her ownership and she operated as though she had no such limitation.

[57] It is also noteworthy that ***Hyde v Pearce***, was decided before *Pye (JA) Oxford Limited* which finally and decisively clarified the rules relating to adverse possession. In that regard therefore, I doubt whether ***Hyde v Pearce*** remains good law.

[58] Mr. Gordon, on behalf of the Defendant, relied on the decision of B. Morrison J in ***Dixon v Runte et al***[11]*.* In that case Morrison J opined at paragraph 154 that for

[11] [2017] JMSC Civ 114

the Claimant to succeed in her claim for adverse possession on behalf of the estate of the deceased Dr. Barrington Dixon, it was irrelevant that he was first let into possession under some agreement with the owner. Morrison J then went on to rely on the leading case of ***Pye (JA) Oxford Limited***. He then went on to find that Dr. Dixon had full control and possession of the property in dispute.

[59] Mr. Gordon also cited the well-known case of ***Ramnarace v Lutchman*** (supra) to make the point that the modern approach is to consider what the intent of the possessor was at the time of entering into possession of the property.

[60] Finally, on this score is the decision from the Caribbean Court of Justice in ***Toolsie Persaud Ltd v Andrew James Investment Limited***[12]. 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

[12] 72 WIR 292

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.*

[61] 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).*

[62] 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.*

(ii) ***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.*

[63] The Court invited counsel to file further submissions on this authority and it is grateful to them for their responses.

[64] The Claimant/Applicant stated at paragraph 2 of their submissions on the authority that the CCJ had found as crucial that it must be obvious to the owner that unless they intervene, they will lose their ownership after the 12 years expires. They went

on to submit in the same paragraph that in the case at bar the parties were operating under what ***was at the time [of entry by the Defendant] a valid and enforceable agreement*** (emphasis mine).

[65] But, it is my position that that is where counsel has erred. It was the finding of the trial judge in the previous trial between these parties over this property, that the parties well knew at the time of the Defendant's entry into the property that no monies had passed under the Agreement for Sale; that no deposit was in fact paid; and that no further payment on account of purchase was paid. As a consequence, the agreement **never came into force**. That this should have been plain and obvious to the parties is buttressed by the fact that this agreement was done by a person who was (at the time) a seasoned conveyancing practitioner.

[66] The submission from counsel also ignores the explicit finding of the CCJ that the intention to possess is established even if the person **knows** they are not the owner, once they possess with intent to do so for their own benefit in the way an owner would. A purchaser of land given early possession, in my view, doing the acts that this Defendant did would have clearly made plain to the titular owner their intent.

[67] What is even more painfully obvious is that as they went along, it became clear that the consideration was **never** settled between them. This was one of the major reasons why E. Brown J (As he then was) could not have done the assessment for the stamp duty himself as possible under the **Stamp Duty Act**.

[68] There is therefore, to my mind, no distinction between the CCJ decision and the case at bar. In both instances, the effect was the same. Consequently, once the Defendant had entered into possession in 2006 and began her occupation with the clear intent to possess same as owner to the exclusion of all others, she would have dispossessed the Claimant or the Claimant would have discontinued his possession. It does not matter whether the entry was pursuant to an agreement

for her to get early possession. What matters is her intent when she entered possession.

[69] I find that it is highly likely that a reasonable court would find that time would therefore have start to run from the moment of the Defendant's possession and not at the time when the Court would have pronounced on the contract in September 2020. I find that the Claimant has not shown a case with real prospect of success to refute this strong position of the Defendant at trial.

CONCLUSION

[70] I am not satisfied, for the reasons outlined above, that the Claimant has, at this stage, established that he has a case with a real chance of success at trial. Therefore, I am not satisfied that there is a serious issue to be tried.

DISPOSITION

1. The Application filed on the 16th June 2023 is refused.
2. The Interim Injunction granted on the 26th June 2023 and extended is now discharged.
3. Costs in the Application reserved to the 26th October 2023 at 9:30 am.
4. Leave to appeal is granted.
5. An injunction is granted in terms of the injunction granted and extended on the 26th June 2023 to the 2nd November 2023 pending the filing of an appeal and any further injunction that may be granted by the Court of Appeal.
6. The Case Management Conference in this matter is set down for the 11th December 2023 at 10:00 am before Staple J (Ag) for 1 hour.
7. Claimant's Attorneys-at-Law are to prepare, file and serve this Order on or before the 27th October 2023.

……..
Dale Staple
Puisne Judge (Ag)