

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2005/HCV 00159

BETWEEN	ALMARIE BAKER	CLAIMANT
AND	DAVID RANCE	1 <sup>ST</sup> DEFENDANT
AND	CARGILL BROWN	2 <sup>ND</sup> DEFENDANT

Raphael Codlin and Kay Franklyn instructed by Raphael Codlin & Co. for the Claimant.

Hilary Phillips Q.C., Herbert Grant and Kevin Williams instructed by Grant, Stewart, Phillips & Co. for the 1<sup>ST</sup> Defendant.

Patrick Bailey and Audre Reynolds instructed by Patrick Bailey & Co. for the 2<sup>nd</sup> Defendant.

Heard: 20<sup>th</sup> September 2006 and 7<sup>th</sup> August 2007

Campbell, J.

(1) On the 25<sup>th</sup> April 2005 the Claimant, Almarie Baker, filed an Amended Claim Form seeking the following declarations:

- (a) That whether by virtue of Sections 3, 4, 9 and 14 of the Limitations of Actions Act, she having been in possession of the disputed lands has acquired an absolute title against the Defendants.
- (b) Whether the rents she collected and her absolute possession for her use and benefit has the effect by virtue of section 4 (a) of the Limitations Act, as a discontinuance of possession or in the alternative a dispossession of the Defendant.
- (c) Whether the non-occupation and non-possession of the said property by the said David Rance and Cargill Brown for upwards of twelve (12) years, entitles the Claimant to claim absolute title against the Defendants.
- (d) Whether the Claimant having been in possession and occupation of the aforesaid properties for upwards of twelve (12) years to the exclusion of David Rance and Cargill Brown they and any beneficiaries, personal representatives

and or otherwise are debarred by virtue of section 9 of the Limitations of Actions Act from possessing the said properties.

(2) There are two applications before the Court:

(a) 1<sup>st</sup> Defendant's application;

that the claim herein be struck out against the 1<sup>st</sup> Defendant as showing no cause of action, on the basis that:

- (a) It discloses no reasonable cause of action against the 1<sup>st</sup> Defendant;
- (b) Is frivolous and vexatious;
- (c) Is an abuse of the process of the court.

(b) The 2<sup>nd</sup> Defendant's application is inter alia;

That Summary Judgment granted to the Applicant pursuant to CPR 15(A)

- (a) Alternatively, that the claim against the Applicant, 2<sup>nd</sup> Defendant be struck out or dismissed pursuant to the following subsections of CPR 26.3 (1), as being;
- (b) an abuse of the process of the court; and/or
- (c) discloses no reasonable grounds for bringing or defending the claim.

### Background

(3) The Claimant, Almarie Baker is the granddaughter of the registered proprietor of the disputed lands. Ms. Baker resides on the lands with her husband and children and she claims to have lived there for a period of twenty two years prior to her filing the claim.

(4) The Claimant's grandfather Mr. Ernest Smith, is the registered proprietor of the disputed lands; he died on the 8<sup>th</sup> March 1995 at the age of 98 years. In 1981, he had his sight but was blind at the time of his death.

(5) The lands in dispute were comprised in a title registered at Vol. 186 Folio 76. This title was cancelled and the current title is registered at Vol. 1154 Fol. 992. It is situated at New Port, St. Ann and consisting of 8 acres of land, with commercial building and a frontage of 450 feet

along the main road in Ocho Rios in the parish of St. Ann, which is regarded as the mecca of North Coast tourism.

(6) On the 25<sup>th</sup> August 1981 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into a Sales Agreement (Agreement) for the disputed lands between themselves and the Claimant's grandfather for a purchase price of \$150,000. The agreement did not include a dwelling-house, which was occupied by the Vendor, along with its surrounding land of approximately half an acre. The Agreement gave the Defendants an option to purchase the house with its adjoining lands for a sum not exceeding \$100,000.

(7) On the 28<sup>th</sup> November 1997, Mr. Justice Orr ordered specific performance of the Agreement. Evidence received at the trial before Orr J. was to the effect that at the time the Agreement for Sale was entered into, the land would have been worth \$150,000 to \$160,000 per acre. The valuation of the total acreage of the property in 1994 was \$20,908,800; and that of the commercial structure was \$2,658,600.00. Mr. Justice Orr said of the Agreement, in his written judgment, that "the Defendant having made an unfortunate bargain then sought to evade its consequences".

#### **Claimant/Respondent's Preliminary Submission**

(8) Mr. Codlin argued on a preliminary point that on the admission of the Defendants themselves, the house and an acre of the surrounding property is not a part of the land in respect of which specific performance was decreed. This admission, he says, is a clear indication that there is a serious issue to be tried, because what is in dispute is the entirety of the land in the title.

(9) He further argued that the Claimant has been in undisturbed possession from 1981 to 2004. Even if the Defendants were registered owners and were ever in possession between 1981 and 2004, the Claimant could acquire an interest adverse to the Defendants' possession. The

Defendants having filed defences to the claim, it is inappropriate to apply for summary judgment.

### Defendants'/Applicant's Response

(10) Ms. Hilary Phillips Q. C. answered that Part 14 of the Civil Procedure Rules 2002 allows the Defendant to make an admission. What is required of the Defendant/Applicant is to show that the Claimant's case has "no realistic prospect of succeeding". She says that the Court can exercise several of its case management powers, see Rule 15.6. The Agreement does not include as a part of the purchase, the house on the property and a half acre around it.

(11) The time runs from 1997, that was when the right would have accrued to them. Paragraph 6 of Claimant's Particulars of Claim expresses that the Claimant hopes that the property would be settled on her after Smith's death. Claimant cannot claim possessory title against Smith or exclusive possession in respect of him. The fact of Smith being present is fatal to the claim for adverse possession; it has to be exclusive to the Claimant. Smith's evidence is that he has been living there since 1965.

### The Claimant's/Respondent's case

(12) When did the right of entry first accrue? As soon as the contract had been signed, the Defendants had a right to enforce it. Section 3 of **The Limitation Act** mentions two things makes (a) such entry or (b) bring an action. Section 3 is speaking of 12 years after the contract was made. The Claimant is not bound by the action before Orr J. Court cannot grant summary judgment because of the diverse nature of the two proceedings.

(13) That the totality of the evidence of the Privy Council decision in **Myra Wills v Elma Roselina Wills** [2003] UK-PC 84 is if a person is in adverse possession of land owned by

another and the period of that possession falls within **The Limitation of Actions Acts**, the consent is irrelevant. In **Wills** case, the Privy Council has said that Jamaican cases that said otherwise was overruled by **JA Pye (Oxford) Ltd v Graham(2003) 1A.C. 419**. Principle that adverse position could only be without the consent of the registered owner was overturned.

(14) In relation to possessory right, it is against the Defendant for two reasons.

(I) **S.3 of The Limitation of Action Act.**

The fact that the Defendant was never in physical “possession” means the absence of exercise of any form of control over the property.

(II) The meaning of the judgment in **WILLS** case is that the consent of the paper owner is irrelevant.

(15) In order for an adverse possessor to show he has dispossessed the paper owner, he would have to demonstrate exclusive possession to the exclusion of the rightful owner. Must be shown that paper owner had not exercised any possessory right over the property. It must also be shown that the exclusive possession was not being exercised on behalf of the Defendants.

(16) The Claimants being there with the consent of Mr. Ernest Smith is no bar to the acquisition of adverse possession against the Defendants claiming the land from 1981, (and when the right to re-entry pursuant to 3 of the Limitation of Actions Act) commenced to 1997. See paragraph 25, consider how long after the Agreement would Defendants be entitled to enforce it.

**Issues for determination are:**

(17) Firstly, when did the rights of entry of the Defendants first accrue for the purposes of Section 3 of the Limitation of Actions Act.

Secondly, can the Claimant show exclusive and undisturbed possession against the Defendants for a period of 12 years immediately prior to the commencement of this action.

### Accrual of the right of entry

(18) Section 3 of **The Limitation of Actions Act**, provides;

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 bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right 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 bring such, action or suit shall have first accrued to the person making or bringing the same.

(19) Mr. Codlin contends on behalf of the Claimant that the right of entry of the Defendants accrued as of the 25<sup>th</sup> August 1981. On the other hand, Ms. Hilary Phillips Q.C., argues that the right of entry accrued as of the date of Mr. Justice Orr's order for specific performance, that is, 28<sup>th</sup> November 1997. If Ms. Phillips contention is correct, the claim in this matter having been filed on the 25<sup>th</sup> April 2005, the Claimant would not have satisfied the Limitations of Actions Act. A period of twelve years would not have transpired. This is unchallenged.

(20) The Agreement obliged the vendor to provide vacant possession on or before the 31<sup>st</sup> December 1981. It appears as between the parties it was contemplated that the Defendants would have vacant possession by that date subject to the Parish Council approval of the sub-division plans. The Claimant alleged in her Particulars of Claim dated the 14<sup>th</sup> April 2005 that she had gone to live on the premises 22 years before, i.e. about 1983. In order to determine the date from which the Defendants' right of reentry accrued, there needs to be identified, the date from which the Defendants discontinued or was dispossessed of their interest in the lands.

(21) Section 4 of the **Limitation of Actions**

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

shall in respect of the interest claimed, have been in possession .....of such land, and shall while entitled thereto have been dispossessed, or have discontinued such possession ...then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession ...

(22) An adverse possession of the land which causes time to run in favour of the adverse possessor will result in the paper owners' right of action accruing. Lord Hope of Craighead, in **JA Pye (Oxford) Ltd v Graham(2003) 1A.C. 419**, in explaining the use of the word "adverse" in the context of the United Kingdoms' Limitation of Action Act 1980, illustrated the relationship of an adverse possession with the accrual of the paper owners' right of action. He said at paragraph 69;

"The context is that of a person bringing an action to recover land who has been in possession of land but dispossessed or has discontinued his possession; paragraph 8 of Schedule 1 to the 1980 Act. **His right of action is treated as accruing as soon as the land is in possession of some other person in whose favour the limitation period can run.** In that sense, and for that purpose, the other person's possession is adverse to his but the question whether that other person is in fact in possession of the land is a separate question on which the word "adverse" casts no light."(emphasis mine)

(23) If we assume as Mr. Codlin contends, that the Defendants' right of action started on the 25<sup>th</sup> August 1981 and the Claimant came on the property in 1983, the question then is, "Did the Defendants discontinue possession or were they dispossessed of the disputed land?" If so, "Did the Claimant remain in possession thereafter for a period of twelve years?"

(24) The Claimant has not alleged that the Defendants have discontinued possession. The Defendants never entered the land, but they did initiate an action for specific performance in 1984 or one year after the Claimant said she entered the disputed land. That action culminated in the Order for specific performance of the Agreement by Mr. Justice Orr. The Defendants have since that order, commenced actions for recovery of possession and non-payment of rent. The

2<sup>nd</sup> Defendant, in his affidavit in support of this application, contests the Claimant's right to

assert that "she has been in open and undisturbed possession" when the claim for specific performance has been before the Court from sometime in 1984.

### Specific Performance

(25) Having assumed that the Claimant's pleadings are correct as to the date when the Defendants' right of entry first accrued, it is my view that the Agreement Sale does not, as Mr. Codlin contends, bring about the right of the Defendants to enter the disputed property.

(26) Under the Agreement, the remedies that are available to the Defendants would be (i) an action for damages; (ii) an action for specific performance; (iii) action for Rescission or a Vendor and Purchaser's Summons under S. 49 of the Law of Property Act, 1925. (See page 652, Modern Law of Property 10 Ed).

(27) Only damages are recoverable at law for non-performance of the contract. The most effective remedy available to either party is to sue for specific performance. One of the general principles established by equity is that this relief should be given only where damages do not afford an adequate remedy.

The learned authors of the **Modern Law of Real Property, 10 Ed**, page 654 says:

"It is clear that damages do not adequately compensate a purchaser, since in most cases he desires the land itself, and although it is equally clear that a vendor is adequately re-compensable by a money payment, yet equity grants specific performance to a vendor as well as to a purchaser."

I find that the time started to run on the grant of the order by Orr J.

(28) I find that the Defendants did not discontinue their possession. It falls now to determine whether the Claimant dispossessed the paper owner. Lord Browne-Wilkinson in his speech in **JA Pye (Oxford) Ltd. v Graham [2003] 1 AC 419** at page 435 letter a, says;



“There will be a dispossession of the paper owner in any case where (there being no discontinuance of possession of the paper owner) a squatter assumes possession in the ordinary sense of the word. **Except in the case of joint possessors, possession is single and exclusive.**”(Emphasis mine)

(29) In the circumstances of this case a threshold consideration is, was the possession single and exclusive. In the Particulars of Claim at paragraph 3, the Claimants allege that she occupied along with her children, the disputed property exclusively without interference. Mr. Rance in his affidavit in support of the application says at paragraph 6:

“That up to the time of his death on 8<sup>th</sup> March 1995, Mr. Ernest Smith was still living on the land.... That permission was sought of and or obtained from this Honourable Court to take Mr. Smith’s evidence at his home in 1995 and to cross-examine him at that location at that time.”

Mr. Rance’s statement that Mr. Smith lived on those premises up until his death is unchallenged, has not been contradicted by any other evidence. Dispossession occurs when one person has been in possession and another takes it to the exclusion of all others.

(30) Lord Hope of Craighead, in his judgment in *Pye* (supra), at page 445 said;

“The general rule, which English law has derived from the Roman Law is that only one person can be in possession at any one time. Exclusivity is of the essence of possession.”

Paragraph 6, of the Claimant’s Particulars of Claim, which provides;—

“That for all the years that the Claimant spoke to her grandfather, Ernest Smith, as well as for the time she lived on the property undisturbed, the Claimant verily believed that the property belonged to Ernest Smith and would on his death pass to the Claimant.”

When the said paragraph is considered in light of Rance’s assertion that Ernest Smith lived on the disputed land, negates any real prospect of the Claimant successfully contending that she had single and exclusive possession of the lands.

(31) I find that the Claimant was never in single and exclusive possession. Such a finding would lead to a determination that the Claimant has no real prospect of success. However, if I

am wrong, I shall proceed to examine the claim for possession against the requirements of the law.

Lord Browne-Wilkinson in the case of *Pye*, defines "possession" at page 435, where at paragraph 40 he says;

"What then constitutes 'possession' in the ordinary sense of the word?"

In *Powell v McFarlane and Anor.* 38 P & CR 470 Slade J said at p 470:

It will be convenient to begin by restating a few basic principles relating to the concept of possession under English law:

"(I) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(II) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both **factual possession** and the requisite intention to possess ('**animus possidendi**')."

### **Factual possession**

(32) As have been indicated, the Claimant asserts to have been on the property for approximately twenty two years and claims to have enjoyed undisturbed possession. She further claims that "the entire proceeds of rentals were always used by the Claimant's husband for their exclusive use and benefit. She claims to have paid all the rates and utility bills. It is clear that such bills are referable to the dwelling-house she occupies, which along with about half-acre of land around it is not a part of the "disputed land".

(33) The payments of utility bills are equivocal acts that do not necessarily lead to the conclusion that the Claimant is an occupying owner. It appears that the almost eight acres of ~~disputed land support livestock and crops. I ask myself in these circumstances, are there any~~

actions on the part of the Claimant that may objectively be used to demonstrate that the Claimant exercised a level of physical control and custody of the disputed land which leads to the conclusion that she was an occupying owner.

(34) Slade J. says at page 470 of **Taylor v McFarlane and Another 38 Property and Compensation Reports (1979)** at page 452:

“The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner which land of that nature is commonly used or employed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to resources or status of the Claimants. **West Bank Estates Ltd v Arthur**, (1967) A.C. 656 at 678. Per Lord Wilberforce.”

(35) Such an act which could have demonstrated a degree of control was the sale of a portion of the property to the government for a roadway for a sum of \$1,550,000. However, that sale has been the subject of a counterclaim. On the 14<sup>th</sup> August 2006, an interlocutory judgment in default of defence to that counterclaim was entered in the sum of one million six hundred and ninety three thousand three hundred and forty four dollars and ninety cents (\$1,693,344.90) with interest at the rate of 6% from 14<sup>th</sup> August 2006 to the date of payment.

(36) There is no evidence to support any claim of an exercise of control commensurate with that of an occupying owner. On the other hand the clear allegation by the Claimant that all the time she lived on the property she believed that the property belonged to her grandfather and it would pass to her on his death, is strong countervailing evidence to the contrary. There is no evidence on which one could say that the Claimant was in physical control of the land or behaved as if she was the occupying owner.

### Intention to Possess (animus possidendi)

(37) The requirement of an intention to possess the disputed land has been expressed in *Pye*, where Lord Browne-Wilkinson, after referring to cases in which judicial opinion required an intention that the squatter should have *an intention to own* the land in order to be in possession of it, said at paragraph 43.

“ Slade J reformulated the requirement (to my mind correctly) as requiring ‘intention, in ones own name and on ones own behalf to exclude the world at large, including the owner with the paper title if he be not himself the possessor, soon as reasonable practicable and so far as the processes of the law will allow’.”

(38) Again, the Claimant has failed to establish this requisite intention. She has failed to defend the 1<sup>st</sup> Defendant’s counterclaim. No steps have been taken to appeal the order of specific performance. The evidence of the Claimant’s ailing grandfather was taken at the disputed premises. Although her husband gave evidence in that matter before Orr J, there was no evidence or suggestion of the Claimant having acquired an interest adverse to that of the Defendant’s interest. The Claimant has not denied knowledge of that hearing in which her husband participated. Her actions of paying the bills is equivocal and is not inconsistent with a tenancy, or a licensee. The Claimant has failed to establish any evidence of the requisite intention.

### Real Prospect of Succeeding

(39) Has the Claimant real prospect of succeeding at trial? Lord Hope in the case of **Three Rivers District Council v Governor and Company of the Bank of England (No. 3) [2003] 2 A.C. 1**, in explaining the scope of the inquiry to be undertaken by the Court, in determining that question, says at paragraph 95:

“After the normal processes of discussions and interrogatories are completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in light of that evidence. To that rule, there are some well recognized exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks.

In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The swifter the case, the easier it is likely to be to take that view and resort to what is properly called summary judgment.”

(40) To my mind, this case falls into the first category so outlined by Lord Hope. That even if the Claimant proves all that is alleged in the Particulars of Claim, she will not be entitled to the remedy sought. I so conclude because she would be unable to prove ‘factual possession’ and that she has the intention to possess the disputed lands.

(41) Assuming that all the Claimant had pleaded to be correct, that is, she had been in possession since 1984, and that the payments of utilities to which she refers were acts consistent with her occupation as owner. The presence of the registered owner on the property up to the time of his death in 1994 would prevent her from proving that she enjoyed single and exclusive control and that she dealt with it as an occupying owner might have been expected to deal with it, and that no one else had done so. (See *Powell, Slade J.* at pg 470 - 471.)

(42) The Claimant’s “possession” was neither single nor exclusive. See paragraph 6 of her Particulars of Claim. The Claimant cannot demonstrate at trial that she dealt with it as an occupying owner might have been expected to deal with it. She cannot also demonstrate that no one else has behaved as an occupying owner. Not in face of her admission that she believed that the property belonged to Ernest Smith and would pass to her on his death.

(43) The Claimant would also be unable to prove that if the paper owners were present on the land, he would appreciate that the Claimant was dispossessing them. Slade J at page 480 says,

“In view of the drastic results of a change of possession, however, a person seeking to dispossess an owner must, in my judgment, at least make his intention sufficiently clear so that the owner if present at the land, would clearly appreciate that the Claimant is not merely a persistent trespasser, but is actually seeking to dispossess him.”

(44) What is the proper procedure to be employed to this case? Is it pursuant to CPR 15.2 or 26 (3) (1)?

**Swain v Hillman** [2001] 1 All ER 91, 92 Lord Wolf MR said:

“Under Rule 24.2, the court now has a very salutary Power; both to be exercised in a Claimant’s favour, or where applicable in a Defendant’s favour. It enables the court to dispose summarily of both claim or defence which have no real prospect of being successful. The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or as Mr. Bidder Q.C submits, they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”

(45) Under rule 26 (1), unlike 15.2, the Court is concerned with the Statement of Case which it is alleged discloses no reasonable grounds for bringing or defending the claim. Civil Procedure Rule 15.2 appears to give wider scope for dismissal of an action.

(46) In **Three Rivers**, Lord Hope of Graighead similar in considering the English rules at para 92, page 260 said:

“While the difference between the Two Tests is elusive, in many cases, the practical effect will be the same.”

The Court is enjoined to give effect to the overriding objective when it exercises powers given to it by the Rules.

(47) I find that in the circumstances of this case where a defence and counterclaim has been filed and there is unlikely to be any new emergent facts that could make a substantial difference, summary judgment may well be the proposed course.

### Conclusion

(48) The Claimant's action has no real prospect of being successful. On the evidence presented the Claimant is bound to fail. There are no outstanding issues which a trial would help to resolve. It is hereby ordered:

- (i) Judgment for the 1<sup>st</sup> Defendant, on the application for Court Orders dated 21<sup>st</sup> March 2006, the Claimants case is struck out, as showing no reasonable cause of action against the 1<sup>st</sup> Defendant.
- (ii) Summary Judgment for the 2<sup>nd</sup> Defendant.
- (iii) The Claim herein be struck out against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- (iv) The Claimant forthwith quit and deliver up possession to the Defendants of property registered at Volume 1154 Folio 992 save and except the dwelling house situated on the said property and the one-half ( $\frac{1}{2}$ ) acre of land on which the said dwelling house is located.
- (v) That within fourteen (14) days of the date hereof the Claimant do deliver to the Defendants' Attorneys-at-Law the duplicate Certificate of Title registered at Volume 1154 Folio 992.
- (vi) Within twenty-one (21) days of the date hereof the Claimant to give a full and true account of all rents collected by the Claimant and/or her agents and/or servants from the tenants of the property since the 14<sup>th</sup> August 2006 to the date of the rendering of the accounts. Within fourteen (14) days of the rendering of the account herein the Claimant to pay over to the Defendants the full and true amount collected by the Claimant with interest thereon at twelve percent (12%) per annum from the 14<sup>th</sup> day of August 2006 to the date of payment.
- (vii) The Claimant shall immediately cease and desist from collecting any rents or other payments from any tenants of the property registered at Volume 1154 Folio 992.

(viii) The costs of this Application and all other costs herein be that of the Defendants to be taxed if not agreed.

(ix) Attorneys-at-Law for the 1<sup>st</sup> Defendant to prepare, file and serve the Order herein.