

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: E 620 OF 2002

BETWEEN	KENNETH SPENCER	CLAIMANT
AND	ELAINE SIMPSON	1ST DEFENDANT
AND	LORNA SIMPSON	2ND DEFENDANT
AND	LINTON SIMPSON	3RD DEFENDANT

Mr. Debayo Adedipe for the Claimant; Mrs. Janet Taylor and Ms. Kadia Wilson instructed by Taylor Deacon and James for the Defendants.

Heard March 9 and 10, and October 28, 2010.

Whether claimant may mount successful challenge to validity of registered title in name of defendants; Conduct which may amount to fraud in relation to grant of registered title; whether claimant can establish title to the said land by reason of adverse possession; nature of the evidence necessary for the claimant to establish adverse possession and the appropriate time.

CORAM: ANDERSON J.

1. Kenneth Spencer, ("Spencer") is a seventy-six (76) year old Jamaican who has spent almost all his working life in the Dominion of Canada. His evidence, however, indicates that he has never regarded that country as his home. His regular visits to Jamaica as well as his strident evidence of ownership of land in the Parish of St. Elizabeth spanning more than thirty (30) years, make it clear that the land of his birth has remained his domicile up to this time. He has latterly returned to live in the land he loves, in a place with the exotic sounding name of

Melksham, Carlisle District, Rose Hall P.O. in the "bread basket" Parish of St. Elizabeth. He is now being obliged to mount a challenge to the legitimacy of the title to land registered in the names of the defendants, ("the Simpsons") claiming that that title purports to relate to the said land which he has owned for many years. In addition, he claims that in any event he has acquired an indefeasible title by operation of law, having been in possession for more than thirty (30) years.

2. The defendants, on the other hand, challenge his asserted right to the land in question and say that the Claimant is the owner of only a quarter acre of land, acknowledged to be a part of the land contained in the registered title, on which he has constructed a house.
3. In this action Spencer seeks declarations that he had obtained title to the disputed real estate in the district of Melksham in St. Elizabeth by adverse possession and a further order that the Registrar of Titles cancel Certificates of Title registered at Volume 1237 folios 928 and 929 and issue a title to him in relation to the subject land, presently registered in the names of the defendants. The defendants, for their part deny that the claimant is only entitled to any such declaration and further dispute the evidence on which he purports to base his claim.

4. **The Evidence of the Claimant**

According to the witness statement of Simpson, he was the owner in possession of land "comprised in that parcel of land

being part of Melksham in the Parish of St. Elizabeth being the lot numbered Twenty-Two on the Plan of Melksham deposited in the Office of Titles on June 22, 1962, and registered at Volume 1327 Folio 929 of the Register Book of Titles", consisting of one (1) acre, three (3) roods and 38.46 perches. He had acquired the land he presently occupies by way of two separate (2) purchases of the land. The first was a purchase from Charles Berry.

5. According to Spencer, Berry had himself previously purchased this $\frac{3}{4}$ acre plot from Wilfred Simpson, the father of the defendants. In support of his assertion, he produced a duly stamped conveyance from Wilfred Simpson "to Charles Berry, his heirs and assigns" and dated July 23, 1969. The indenture described the land by reference to the respective boundaries. The indenture was witnessed by one Gerald Powell who, on the same day, appeared before a Justice of the Peace, S.E. DeLeon, to swear that, as the subscribing witness he had seen the said Wilfred Simpson sign the indenture conveying the within land to Charles Berry. This was accepted into evidence as Exhibit 1.
6. He also produced another conveyance dated August 16, 1976 which indicated that he had purchased the said land from Berry. This latter indenture was witnessed by Winston Martin who himself later appeared before Justice of the Peace for St. Elizabeth, D.B. Evans, to indicate that as the subscribing witness he had seen the vendor Charles Berry sign the said indenture transferring the said land to Spencer. This letter conveyance was accepted into evidence as Exhibit 2.

7. Spencer said he had also acquired two parcels of land from a Phillip Elliott who had also previously purchased land from the said Wilfred Simpson, aforementioned. According to Spencer, the two pieces bought from Phillip Elliot were a quarter acre and one-eighth of an acre respectively. He said he had acquired all the several parcels of land from since 1976, had built a house thereon and had fenced it in its entirety in 1978. He, his servants and/or agents, have consistently occupied the said property ever since then. Indeed his daughter and his nephews lived in the house when he was away and he always stayed there on his regular visits to Jamaica. Further, since he retired and returned to Jamaica in 1996, he has continued to live there. He insists that the land he occupies is comprised of the land he had purchased.

8. The claimant also tendered into evidence as exhibits 3A and 3B, two (2) indentures which purported to provide evidence of the transfers of other parcels of land from the late Wilfred Simpson to Phillip Elliot. These indentures were dated the 17th March and the 7th November, 1970, respectively and in the claimant's case, represented the land the claimant said he had bought from Mr. Elliot. In addition to the foregoing, the claimant also tendered into evidence loan documentation/Certificate of Compliance, which was introduced to indicate that he had secured a loan from a People's Co-operative Bank under the Facilities for Title Law secured by the land which he purportedly owned. This document dated April 18, 1978 was tendered as Exhibit 4.

9. Finally, the claimant tendered as Exhibit 5 the report of a Commissioned Land Surveyor, Mr. Ainsworth Dick, who had done a survey and identified the land being claimed by the claimant and produced a survey diagram. The surveyor also identified the fencing referred to by the claimant and stated that it had been "well-established" for "a period of twenty (20) years or more". Under cross examination, Spencer indicated that at the time of purchase of the properties he had physically "walked" the land in the company of his daughter. He also knew that Wilfred Simpson had been alive at the time and was living nearby at the spot presently occupied by the third defendant, Linton Simpson. He rejected the suggestion that he had not bought three-quarter acres of land and he had not got any papers from Charles Berry and that, accordingly, such papers as he presented to the court, were bogus.

10. The claimant re-iterated that he had brought the land in 1976 while he was still living in Canada, had had it fenced in 1977 and commenced construction of a house in 1978. Under cross examination, he asserted that at the time he was fencing the land he had advised his neighbours, Pauline Rowe and Linton Simpson. He rejected the suggestion of the defendants' counsel that at the time he was constructing the fence, Linton's father had died and his mother was very ill and so he, Spencer, had sought to take advantage of the situation where only small children stood in the way of him claiming more land than he was entitled to. He also rejected the suggestion

11. **The evidence for the Defendants**

The only *viva voce* evidence given for and on behalf of the defendants was given by Linton Simpson, the third defendant and a son of Wilfred Simpson. At the time of giving his evidence he was a forty two year old farmer, having been born on July 7, 1967. Although he had provided a witness statement which was admitted into evidence as his evidence in chief, subject to deletion of certain parts which were clearly hearsay, he was unable to assist the court as to ownership of the land as he had no personal knowledge of the transactions between his father and either Charles Berry or Phillip Elliot. He is certainly in no position to give evidence from his personal knowledge to contradict the evidence of Spencer. As he agreed, in 1976 when Spencer alleges the events giving rise to his ownership of the subject property arose, he would have been less than ten (10) years old.

12. Pursuant to an order of this Court, an "Examiner" was ordered to take the evidence of Phillip Elliot (referred to above), at his home and this was done. Elliot, it will be recalled, was the alleged vendor of the last two (2) pieces of land purportedly acquired by Spencer. The "evidence" provided by Mr. Elliot through his examination, really provided little assistance for the Court in relation to the issues which are at stake in this matter. Indeed, there is little in the way of evidence provided by the defendants to support the averments in the defence pleaded.

13. Pursuant to an order of this Court, a survey of the property was carried out by Ainsworth Dick, a qualified Land Surveyor, and his

report contained in a statutory declaration, has been made available to the Court. It is the evidence of the surveyor that he surveyed the existing boundaries on the ground and these were superimposed on the registered boundary and an overall plan prepared showing various occupancy (sic). He deponed that lot twenty-two being claimed by Spencer is part of the land, along with lot twenty-one, contained in the title registered at Volume 1327 Folios 928 and 929, now in the name of the defendants. The acreage of the land contained in lot twenty two is 1 acre, 3 roods and 38 perches, which is the amount of the land being claimed and is presently occupied by Spencer. He also commented upon the fencing around the said section of the property and found that the fence was well established probably for twenty years. The land in lot twenty-one is presently occupied by the defendants. Both lots were previously part of title registered at Volume 982 Folio 616.

14. **Reliefs Sought by the Claimant**

In his amended claim form filed on October 24, 2007, the claimant, Spencer, sought the following reliefs.

1. That this Honourable Court will declare that the interest of Kaiser Bauxite Company reflected in Certificate of Title registered at Volume 982 Folio 616 has been extinguished pursuant to the operation of the Limitation of Actions Act from the year 1988 or such other time as the Court finds that it was extinguished.
2. That this Honourable court will declare that the Certificates of Title registered at Volume 1327 Folio

928 and Volume 1327 Folio 929 were issued in respect of an interest that had already been extinguished.

3. That this Honourable Court will declare that the mortgage interest endorsed on the certificate of title registered at Volume 1327 Folio 929 is ineffective as against the claimant's land.
 4. That this Honourable court will order that the certificates of title registered at Volume 1327 Folio 928 and Volume 1327 Folio 929 be cancelled .
 5. That this Honourable court will order that a survey of the land occupied by the claimant be conducted and a certificate of title be issued to the claimant in respect of land comprised in that survey.
 6. Such further or other relief as to the Court seems fit.
15. Not surprisingly, given that there is a registered title in the name of the defendants, in his Particulars of Claim, Spencer raises an alternative basis on which the court should find in his favour. This was that the Certificate of title which had been issued to the defendants by their purported predecessor in title, Kaiser Bauxite Company, was obtained by fraud on the part of the defendants. The fraud alleged is that the defendants deliberately concealed from and/or failed to disclose to "Alumina Partners of Jamaica or its predecessors in title, the fact and nature of possession exercised by the claimant as hereinbefore detailed, of which possession the defendants had express knowledge". It was also alleged that the defendants deliberately concealed and/or failed to disclose to the claimant that Alumina Partners of Jamaica "were contemplating negotiating or had

agreed to transfer to them, the defendants', land including the premises with the house built by and occupied by or on behalf of the claimant". A further allegation of fraud was that the defendants had "knowingly received and accepted from Alumina Partners of Jamaica or its predecessors in title a transfer of land including part thereof being the premises known or which ought reasonably to have been known by the defendants to be in the possession of the claimant". In this regard it should be noted, as submitted by Spencer's counsel, the defendants acknowledge that the claimant is, in fact, the owner of a quarter acre of land contained in the land covered by the registered title, including the part on which the claimant's house sits.

Interestingly, at the end of his particulars of claim, the claimant sets out a further prayer for reliefs which lists a further set of reliefs which he was seeking, and which are not co-terminous with those set out in the "Amended Claim Form".

16. **Submissions for the Claimant**

Mr. Adedipe urged the Court to come to the view that Spencer should be granted the relief that he was seeking. He submitted that it is not disputed by the defendants that the land on which the claimant had built his house is part of the land contained in the registered title presently in the name of the defendants, although it was their claim that he only was entitled to a quarter acre and not the total area he was purporting to claim. He also submitted that it could not be disputed that the claimant had occupied the land, either personally or by his representatives, continuously since 1977 and has built a house thereon since

1978. The defendants only became registered proprietors in 2000 when the land, previously part of land purportedly owned by Kaiser Bauxite Company in certificate of title, Volume 982 Folio 616, was transferred to them as tenants in common. He also urged the Court to consider the evidence of the commissioned land surveyor, Mr. Dick, and his view about the age of the fence. That report supported the claimant's assertion that he had fenced his property when he bought the land and built his house.

17. It was his further submission that by virtue of the provisions of section 3 of the Limitations of Actions Act, the claimant had established for himself by possession, an indefeasible title even before the issue of registered title to the defendant in 2000/2001. That section states that no action may be brought for the recovery of any land twelve (12) years or more after the right to enter or bring an action to recover the land or rent arose. Section 3 is in the following terms:

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 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.

18. He also cited section 30 of the said Act which was also relevant to the question of extinguishment of entitlement to real property. That section is set out herewith:

At the determination of the period limited by this part to any person for making an entry, or bringing 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.

19. The consequence of these provisions, he argued, was that once the period of twelve (12) years from the time at which the right to make entry or bring action to recover the land or rent has elapsed without any attempt to effect recovery of the land or rent therefor, the title of the "owner" of the land is forever extinguished.

20. Mr. Adedipe also called in aid of his submissions, the provisions set out in section 68 of the Registration of Titles Act. He submitted that the effect of that section was that a registered proprietor holds his land subject to the operation of the Limitation of Actions Act after the land is first brought under the operation of the Registration of Actions Act. The result, he submitted, is that once a title has been defeated by virtue of the operation of the Limitation of Actions Act, the registered proprietor would not be able to pass good title even to a purported bona fide purchaser for value as there would be no valid title to transmit. Section 68 is in the following terms:

No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the

particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate **as** the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.

21. He submitted that authority for this view of section 68 was to be found in the case of **James Clinton Chisholm v James Hall** [1959] 1 W.I.R. 413, a decision of the Judicial Committee of the Privy Council on an appeal from the Court of Appeal of Jamaica.
22. It was submitted that the claimant had established that he had had exclusive possession as owner and with intent to own as against the World, for a period of over thirty three (33) years. Further, that the nature and extent of his possession met the standard established to be necessary by the authorities. He cited the case of J.A. **Pye (Oxford) Ltd v Graham** [2002] UKHL 30 (July 4, 2002) where the UK House of Lords held that the two elements necessary for legal possession are
 1. a sufficient degree of physical custody and control (factual possession)
 2. An intention to exercise such custody and control on one's own behalf and for one's own benefit.
23. Counsel submitted that the Pye case had been applied to Jamaica by the Privy Council in **Wills v Wills** [2003] UKPC 84, and **Pottinger v Raffone** [2007] UKPC 22. These cases support the submission that the claimant has been in possession so as to establish that the title of Kaiser Bauxite Company/Alumina

Partners of Jamaica Ltd. from whom the defendants received the title at Volume 1327 Folio 928 and 929, has been extinguished.

24. **Defendants' Submissions**

It was submitted for the defendants that the claimant's evidence should not be believed and that the court should accept the "evidence" of Phillip Elliot. The evidence of Elliot was not subject to cross examination and is in my view far from compelling. The defendants' counsel, for example, states that Elliot says he only sold a quarter acre of land to "Vecus Spencer, the father of the claimant". I should note straightaway that there is, in fact, nothing in the evidence to connect any such sale of such land, if it did occur, with the property at issue in this case.

25. It was also submitted that the evidence of the third defendant should be preferred to the evidence of the claimant. That evidence, as noted elsewhere, is contained in the witness statement and cross examination of the third defendant and the examination of Phillip Elliot which was not subject to cross examination.

26. It was further submitted on behalf of the defendants that the claimant's claim for title by virtue of adverse possession should be rejected. The submission was made that in order to succeed in such a claim, the claimant had to prove:

- a) actual possession
- b) clear evidence of an intention to dispossess the registered owner and assert ownership rights; and

- c) affirmative and an unequivocal discontinuance of the ownership by the registered proprietor.

27. In support of this proposition, counsel cited the case of **Green Valley Estates Ltd. v Carl Lazarus and Registrar of Titles** (1991) 28 J.L.R. 399. In that case, the learned judge cited the cases of **Leigh v Jack** and the Jamaican Court of Appeal decision **Archer v Georgiana Holdings Limited**, the usefulness of which may now be doubted in light of **Wills** and **Pottinger** cited elsewhere herein and dealt with below.

28. The defendants also rely on the authority of Pye cited by the claimant as well as the case of **Clowes Development (UK) Ltd. v Walters and Others** Ch.D. [2005] EWHC 669. It should be noted that in this latter, the narrow issue was whether the possession was with the licence of the paper owner. In that regard, it is useful to note the dictum of Lord Millett in **Ramnarace v Lutchman** [2001] 1 WLR 1651 in which he said, at para 10

"Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title, or with the consent of the true owner."

In that regard, it is not clear to me that that case is helpful, except to the extent that it adopts the principles articulated by Pye.

29. The defendants also submit that the defendants used a "track" over the disputed land, reaped fruits thereon, broke down fences "thousand times" and prevented the claimant from having a

survey done. These acts, it is asserted, were evidence that the claimant did not have "continuous, undisturbed and exclusive occupation" of the said land and the court ought to find that a claim to adverse possession had not been made out.

30. **Ruling of the Court**

Having reviewed the evidence presented by the parties hereto, I have come to the view that there is, little in the way of objective evidence to contradict the evidence of the claimant. The witness statement of the third defendant really provides little support for the defence being put forward by the defendants as he can offer no personal knowledge of the history of the disputed land. He avers that the land was given to his father by Alumina Partners of Jamaica (Alpart) in 1969 and that in that year his father moved "my mother, sisters and I to the lands in about 1969". He says: "My sisters and I were all children at the time but we were often told how we came to be owners of lands at Melksham by our parents". It should be noted that at the time the witness was about two (2) to three (3) years old and he makes it clear that the statement is hearsay. He could not say from his own knowledge whether his father had sold any land to Charles Berry. His evidence about his discussions with representatives of Alpart also contains much hearsay and no one from that company, the predecessor in title to the defendants, came to give evidence. He also gives the evidence about the defendants preventing the claimant from carrying out a survey, breaking down fences, picking fruits on the land and using a track across the land. But these do not on my reading of the authorities

amount to a denial of the possession being asserted by the claimant.

31. The examination of Mr. Elliot is of equally little. There is in fact no independent evidence of a sale from Mr. Elliot to Vecus Spencer and the averments come from a person who the court was unable to see so as to assess his credibility. Moreover, there is no evidence that the alleged "Vecus Spencer" was in fact the father of the claimant. But even if he were, there is no evidence linking any such sale of land to the land at issue. Notwithstanding that, however, it is the claimant who is alleging that he is the owner of the land and he who alleges must prove, on a balance of probabilities.

32. In that regard, having viewed the claimant as he was cross-examined, I was impressed by his demeanour and, I believe, his candour in relation to his account of his acquiring the land. I am forced to the view that the averments by the claimant are to be believed over those of the defendants. In particular, on a balance of probabilities, I reject the evidence of the third defendant as unreliable. Indeed, there is no credible contradiction of any averments of the claimant as to how he came into possession of the property.

33. I also was impressed by the evidence contained in the report of the surveyor, Ainsworth Dick. The report contained in the surveyor's statutory declaration indicated that he acted on the instructions of the attorneys at law for the defendants. He was provided with the certificates of title for Volume 1327, Folios 928 and 929 and he personally carried out the survey of the disputed

land. He says that the existing boundaries on ground were surveyed and superimposed on the registered boundary and an overall plan prepared showing the various occupancy. He depones that the land occupied by Kenneth Spencer is "totally contained in the land registered at Volume 1327 Folio 929 while a separate section was identified as being occupied by the Simpsons. He also identified other occupants of the surveyed area and observed that the fence along the Southern boundary of lot 22 encroaches upon lot 32 to its south. It seems to the court that, on a balance of probabilities, he has properly identified the claimant's land by reference to the survey carried out and having superimposed the survey on the registered boundary.

34. The consequence of this view of the evidence is that I would hold that the claimant is the rightful owner of the land in question by virtue of having purchased it and that the title now held by the defendants has been secured by fraud of the defendants in willfully concealing from Kaiser Bauxite/Alpart Alumina the fact that the land had been occupied by the claimant at all material times.

35. Nevertheless, in the event that I am wrong, I also hold that the claimant has established title by reason of adverse possession and the operation of the Limitation of Actions Act. In that regard, I refer to the provisions of the Limitations of Actions Act cited by the claimant's counsel and in particular sections 3 and 30. I accept the submission from Mr. Adedipe that the question

of what would constitute adverse possession for purposes of Jamaican real property law is correctly set out in Pye.

36. **The Law of Adverse Possession**

In **J.A. Pye (Oxford) Ltd v Graham** [2002] UKHL 30 (July 4, 2002) there was a grazing agreement made in February 1983 that had come to an end at the end of that year. Graham, the defendant, had asked to renew the agreement, but the owners refused his request and asked him to vacate. Notwithstanding the requirement to vacate, Graham remained in occupation and eventually made no further attempt to obtain a new licence. In 1997 Graham, relying on section 15 of the Limitation Act 1990, claimed title to the land. In April 1998 Pye brought proceedings against the personal representatives of the now deceased Graham.

37. However, it was only in 1999 that the owners brought possession proceedings. There was no issue as to an implied licence to remain, on the contrary such an inference could hardly be asserted in the face of the owner's express refusals to renew the grazing agreement.

38. Pye lost the initial case, but succeeded in the Court of Appeal, which held that Graham did not at any material time have the necessary intention to dispossess Pye. Graham's estate appealed to the House of Lords.

39. The appeal was allowed and Lord Browne-Wilkinson held that although the term 'adverse' is used in the Limitation Act 1980, it is used simply as a shorthand term to describe the nature of the

possession. The true position is simply whether the paper owners are 'dispossessed' by virtue of the squatter going into ordinary possession of the land. There is no requirement for the legal owner to be ousted from the land.

40. The learned law lord also confirmed that 'possession' constitutes two elements namely factual possession and intention to possess. The facts clearly demonstrated the appropriate degree of physical control by Graham. Pye was physically excluded from the land by the hedges which surrounded it (at all material times tended by Graham) and the lack of any key to the road gate (held at all material times by Mrs. Graham). Regarding the intention to possess, the Lords held that this could be inferred where land was occupied and made full use of by the squatter in the way in which an owner would. There did not have to be an intention to own the land, merely to possess. Nor was requisite intention displaced where, as with Graham, the squatter would, if asked, have been willing to pay for his occupation.
41. The case makes it clear that, in order to succeed in a claim to adverse possession, the occupier must prove:
 - (a) uninterrupted possession of the land; and
 - (b) an intention to possess.

Possession requires a sufficient degree of physical custody and control. The occupiers, the Grahams, had been farming the land without consent for 15 years. It did not matter that they had not 'physically excluded' Pye from the land. There was no requirement to 'oust' the Grahams from the land. The activities carried on by the Grahams thus amounted to 'possession'. An

intention to possess is an intention to exercise that custody and control on behalf of oneself and for one's own benefit – the Grahams had that intention.

42. In the Jamaican case of **Wills v Wills**, the Privy Council rejected a submission by counsel Mr. Raphael Codlin that the principle articulated in *Pye* should not be treated as applicable to Jamaica. Lord Walker of Gestingthorpe, delivering the advice of the Board reviewed the relevant cases and noted that no similar amendment to the Limitations of Actions Act as had been done in England, had been effected in Jamaica. Nevertheless, he opined that the decision in *Pye* would have had the same effect on previous authorities as such amendments.
43. I hope I will be forgiven for citing, *in extensu*, from the judgment of His Lordship. He reviewed a line of cases dealing with the issue of "adverse possession" and the proper interpretation which the courts had put on the term over many years, and he observed that the amendments in England had brought back the "label but not the substance" of the old doctrine of adverse possession. Referring to *Pye*, he said:

In that case Lord Browne-Wilkinson observed [2003] 1 AC 419, 434, para 35 that the reintroduction of that phrase was unfortunate, but that

"the references to 'adverse possession' in the 1939 and 1980 Acts did not reintroduce by a side wind after over 100 years the old notions of adverse possession in force before 1833."

In *Pye* Lord Browne-Wilkinson [2003] 1 AC 419, 438, para 45, after quoting from Bramwell LJ in **Leigh v Jack** (1879) 5 Ex D 264, 273, said this:

"The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's heresy led directly to the heresy in the **Wallis's Cayton Bay** line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory review but in the **Moran** case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."

The statutory abolition mentioned by Lord Browne-Wilkinson was effected by section 15 of and Schedule 1, para 8(4) to the Limitation Act 1980. There was no parallel legislation in Jamaica. But it seems clear that the heresy, if not abolished by statute, would not have survived the House of Lords' decision in *Pye*.

The facts of all the cases considered in the last few paragraphs were a very long way away from those of this appeal. Their Lordships have thought it right to deal with them at some length because of a far-reaching submission made by Mr. Codlin (appearing for Elma). Mr. Codlin submitted that the principles stated by the House of Lords in *Pye* should not be extended to Jamaica because of the different social conditions in Jamaica. *Their Lordships cannot accept that submission. The decision of the Court of Appeal of Jamaica in Archer was based entirely on a careful analysis of eleven English authorities, the earliest*

decided in 1846 and the most recent in 1966. These authorities included Leigh v Jack and Williams Brothers Direct Supply Ltd v Raftery. They would no doubt have included Wallis's case if it had been decided shortly before Archer, rather than shortly afterwards. As to geographical factors, Jamaica still contains much undeveloped land (such as the woodland on the slopes of the Blue Mountain considered in Green Valley Estates Ltd v Lazarus (1991) 28 JLR 399, and areas of marginal land which are intermittently grazed or cultivated in an informal manner); but so, still, does England and Wales. Equally both contain many highly-developed urban areas. Their Lordships see no reason why the decision of the Court of Appeal of Jamaica in Archer ought not to be qualified, in future, by the clear guidance which the House of Lords has given in Pye. (Emphasis mine)

44. Lord Walker's views on the concept of possession as expressed in **Wills v Wills**, were also cited with approval in **Pottinger v Raffone** by Lord Rodger of Earlsferry where he stated his doubt that in Jamaica, the old approach to possession could have survived the decision in **Pye**. Indeed, in that regard, it should be noted that the Privy Council in **Wills**, clearly stated that the Jamaican Court of Appeal decision in **Archer** cited by the defendants' counsel, ought now to be qualified by the ruling in **Pye**.
45. It will also be recalled that counsel for the claimant had called in aid section 68 of the Registration of Titles Act and cited the case of **James Clinton Chisholm v James Hall** [1959] 1 W.I.R. 413, the head note of which states:

The appellant and the respondent were the registered proprietors of adjoining plots of land in Kingston, Jamaica. The appellant was registered as proprietor on April 16, 1928. The respondent was registered as proprietor on October 30, 1941, having

purchased from the Administrator General for Jamaica, the legal personal representative of the former owner. The Administrator General had been registered on transmission and a new certificate of title issued in his name on May 7, 1919. This certificate of title became lost and another new certificate of title dated October 16, 1941, was issued to the Administrator General in place of the lost certificate of title, which was cancelled.

The dispute concerned the proper position of the boundary between the two lots. At the time of action brought there was and had for many years been in existence a physical boundary dividing the lots. The appellant's contention was that the physical boundary existing upon the land was rightly placed and was the true dividing line. The respondent's contention was that the physical boundary encroached a matter of seven feet on his lot along his entire northern boundary. The respondent's action was for a declaration that the disputed strip of land was comprised in his certificate of title, possession and mesne profits, and the appellant counter-claimed for a declaration that the boundaries as now existing were the true boundaries and for rectification of the Register. It was Held:

1. (affirming the judgment of the Court of Appeal of Jamaica) that the disputed strip formed part of the land comprised in the respondent's certificate of title.
2. (reversing the judgment of the Court of Appeal of Jamaica)
 - i. that the respondent's registered title had by the time of action brought been ousted in favour of the appellant *quoad* the disputed strip of land by the operation of s.3 of the Limitation of Actions Law (Cap. 395) of the 1938 Edition of the Revised Laws Of Jamaica), the appellant having shown over twelve years' continuous possession of the disputed strip from the date of his purchase on April 12, 1928, down to the commencement of these proceedings on January 31, 1951, and by virtue of s. 46 of

the same Law having shown more than seven years of acquiescence in the position of the physical boundary.

- ii. Sections 67 and 69 of the Registration of Titles Law, Cap. 353 [J.}, must be read together and so far as possible reconciled with each other, and the combined effect thereof is that it places upon a purchaser of registered land the onus of going behind the Register and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than twelve years have elapsed since the title was first registered.
- iii. Whenever a duplicate certificate of title or special certificate of title is lost or destroyed and a new certificate of title registered in place of the former certificate, such new certificate is merely a substitute for the lost or destroyed certificate and merely has the effect of placing the proprietor in the same position as if the former certificate had not been lost or destroyed, and does not bring about any alteration of rights.

46. In **Chisholm**, cited by the claimant as support for the submission that the registered title could be extinguished by the operation of a statute of limitations, the court considered the question of the applicability of the Limitations of Actions Act to the relevant provisions of the Registration of Titles act. Lord Jenkins in the course of his judgment at page 419 of the report stated:

Many other sections of the Law were referred to in the course of the argument, but the question at issue in the end turns upon the true construction of ss. 67 and 69, which contain the only references to limitation to be found in the Law.

Section 67 provides that:

"...every certificate of title... shall be received in all Courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in... the land therein described is seised or possessed of such estate or interest..."

47. That provision if it stood alone might well lead to the conclusion that "subsequent" must mean "subsequent to the issue of the certificate in question" and that on the principle of *expressio unius exclusion alterius* any interest in the land in question acquired by the prior operation of any statute of limitations is defeated by the issue of a certificate of title under any of the provisions of the Law, the distinction being between rights so acquired before the issue of the certificate which are extinguished and rights so acquired after the issue of the certificate, which are preserved. But s. 69 contains a positive provision to the effect that "the land which shall be included in any certificate of title or registered instrument" (which by definition includes a transfer) "shall be deemed to be subject...to any rights acquired over such land since the same was brought under the operation of this Law under any statute of limitations notwithstanding the same...may not be specially notified as incumbrances in such certificate or instrument."

48. The construction which it might be proper to place on s. 67 construed in isolation is in flat contradiction of the express provisions of s. 69. The two sections must clearly be read together and so far as possible reconciled with each other. If the words "subject to the subsequent operation of any statute of limitations" had been omitted from s. 67 it would have been reasonably plain that s. 67 must be understood as taking effect subject to the provisions of s. 69 regarding rights acquired over the land in question since first registration under any statute of limitations, and it can hardly be right to hold that the inclusion in s. 67 of the words "subject to the subsequent operation of any statute of limitations" should by implication abrogate the express saving accorded by s. 69 to all rights of this description

acquired since first registration, whether before or after the date of the certificate of title for the time being in force.

49. Even if the word "subsequent" in s. 67 should be constructed as meaning "subsequent to the issue of the certificate in question", the two sections in their Lordships' opinion can and should be reconciled by treating as applicable to s. 67 the "deeming" provision enjoined by s. 69. There is, so far as their Lordships can see, no reason why that provision, which is expressed in perfectly general terms, should not be so applicable. The result of applying it *quoad* limitation to s. 67 is that the part of that section under which the certificate is to be conclusive evidence that the person therein named as proprietor of or having any estate or interest in the land therein described is seised or possessed of such estate or interest must be read as if it was followed by a proviso in terms conforming to the language of s. 69, i.e., a proviso to the effect that the land described in the certificate is to be deemed to be subject to any rights acquired over it since first registration under any statute of limitations, notwithstanding that they are not notified as incumbrances in the certificate. If it is objected that this construction of s. 67 makes the words "subject to the subsequent operation of any statute of limitations" mere surplusage, the answer is that even if that is so the anomalous and indeed absurd results ensuing from excluding all certificates *quoad* the effect of limitation from the "deeming" provision in s. 69, so far as rights acquired prior to their issue are concerned, are in their Lordships' view so extreme as to justify the construction so far placed on the two sections notwithstanding that the words above quoted may be said to be rendered otiose by that construction. But it does not appear to their Lordships that the construction so far placed on the two sections does necessarily render wholly otiose the words "subject to the subsequent operation of any statute of limitations" in s. 67. Let a case be supposed in which some part of the land described in a given certificate had prior to its date been acquired from the registered proprietor by virtue of twelve years' possession since the date of the first registration of the land so described. Then under ss. 67 and 69, as their Lordships have so far construed them, the certificate would be

conclusive evidence that the person named in the certificate as proprietor of or having any estate or interest in the land therein described was seised or possessed of such estate or interest subject to the rights acquired over a part of such land by virtue of twelve years' possession between the date of the first registration and the date of the certificate, those rights falling to be regarded by virtue of s. 69 as if they had been notified as incumbrances in the certificate. But in the absence of any provision to the contrary it might be argued that s. 67 made the certificate conclusive evidence that the land was held as described in the certificate subject only to rights acquired by limitations between the date of the first registration of the land and the date of the certificate and therefore ranking as registered incumbrances at the date, and not to say rights so acquired after the date of the certificate. The words "subject to the subject operation of any statute of limitations" might thus be regarded as having been put into s. 67 *ex abundante cautela* to meet any argument of this kind.

50. But the same conclusion can in their Lordships' view be reached by another route. The critical words in s. 67 – "subject to the subsequent operation of any statute of limitations" – contain the first of the only two references to limitation to be found in the law. The reader is thus invited to look further to see what provision is made later in the Law in regard to the operation of any statute of limitations, the brief reference to limitation in s. 67 being in itself of doubtful import. Looking further, the reader comes to s. 69 and he there finds a provision to the effect that the land included in any certificate is to be deemed to be subject to any rights acquired over such land since the same was brought under the operation of the Law under any statute of limitation, notwithstanding that such rights may not be specially notified as incumbrances in such certificate. Having reached this point, is he not justified in concluding that the reference to limitation in s. 67 is a mere reference forward to the provision in regard to limitation contained in s. 69, and that "subsequent" in s. 67 is no more than a short way of saying what is said by s. 69 in the words "since the same [i.e., the land] was brought under the operation of this Law"? In their Lordships' view this construction, which can be

compendiously described as making the word "subsequent" in s. 67 mean subsequent to the date of issue of the first certificate issued in respect of the land in question, can legitimately be adopted for the purpose of reconciling the provisions of the two sections.

51. Accordingly, their Lordships hold that on one or other of the methods of construction which they have propounded the defendant's contention as to the effect of ss. 67 and 69 should prevail. The scheme of s. 69 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any right of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfers s. 84 which provides that the transferee shall be "subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor". This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor; and although the words used are not particularly apt to describe rights acquired by limitation, a transfer is in any case one of the instruments to which the "deeming" provision of s. 69 is applicable.
52. The combined effect their Lordships would attribute to ss. 67 and 69 may perhaps be criticized as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than twelve years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the law of preserving rights

acquired by limitation notwithstanding that they are not noted in the register.

53. Section 69 of the Registration of Titles Act referred to above is in the following terms:

"Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Law might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Law shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards and portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Law under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit-rents or taxes, that have accrued due since the land was brought under the operation of this Law, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same

respectively may not be specially notified as incumbrances in such certificate of instrument"

54. It seems clear from the foregoing dicta from **Wills** that a registered title is therefore susceptible to being defeated in circumstances of "adverse possession" as defined in Pye and by the operation of the Limitations of Actions Act.
55. I also am of the view that the case of **Clowes Development (UK) Ltd. v Walters** [2005] EWHC 669, cited by the Defendants' counsel does not assist the defendants.
56. In that case, the owner of the registered title transferred the property and the new owner (the claimant in the case) became the registered owner. The defendants were the persons who had succeeded the previous occupiers of the land. The previous occupier had been a licensee of the person who transferred the land to the claimant. The new occupiers argued that the transfer by the previous owner to the claimant brought the original licence granted by the original to an end so that adverse possession then started. It was held that the defendants did not suddenly acquire an intention to possess when the transfer took place. They still believed that their possession was with the consent of the paper owner. Thus, adverse possession did not arise. To acquire adverse possession it is necessarily to show factual possession and intention to possess. Hart J at paragraphs 40 and 41:

"It is .. in my judgment clear that a person who is in factual possession and who intends to remain in possession (and to use that factual possession for his own benefit) so long as the true owner continues to permit him

to do so does not have the necessary intention to possess for the purpose of starting a period of limitation running in his favour. Thus if .. As response to an inquiry as to how he happens to be in occupation and control of the locked house is that he is there with the permission of the true owner, it is not open to him to say that by being there he intends to dispossess the true owner. He does not have the necessary intention, and that is so whether or not he is correct in his belief that he does have that permission and whether or not he is correct in his belief as to the identity of the true owner.

That position must (and can) be distinguished from the case where the squatter, knowing he has no permission, has the intention to possess until such time as the true owner chooses to evict him.

If that approach is correct it is, in my judgment, sufficient to dispose of this case. Both Claire and Nigel believed that they were in possession of the property as a result of the permission which Mrs. Walters had from Mayfair and as a result of Mrs. Walters having been content for them to stay on at the property notwithstanding her own departure. They may not have known of, or attached any significance to, the change of the ownership from Mayfair to Clowes Developments. They believed throughout that their factual possession of the property was the result of some arrangement reached with Mrs. Walters."

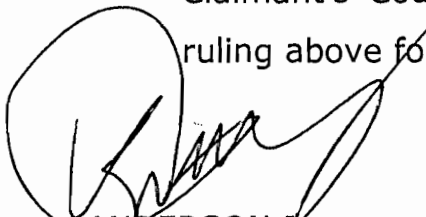
57. In the instant case, there was clearly possession by the claimant of the property in respect of which Kaiser/Alpart had previously been the registered owner. The claimant clearly exercised his possession in a manner which was antithetical to the rights of the true owner and with an intention to possess. The period of possession was in excess of the twelve (12) year period which would have been the qualifying period under the Limitation of Actions Act. In fact, the period was over thirty (30) years by the time the property was transferred to the defendants by their predecessors in title.

58. In light of the authorities rehearsed above, I am satisfied that the claimant had established adverse possession as against the defendants' predecessors in title and had done so for more than the twelve (12) year period required by the Limitation Act. There was no consent by the holder of the registered title and the claimant was in possession with the intent to possess against all the world. It seems to me that since the test is possession, then even if the claimant was claiming ownership, it would not have affected his right to assert "adverse possession". Accordingly, the claimant is entitled to the declarations he seeks as they are set out in his amended Claim Form, paragraphs 1 through 5.

59. With respect to the relief sought, and in particular that concerning the mortgage obtained by the defendants and registered against the title, little evidence was led. However, it is clear that the defendants have obtained a mortgage against property when the person from whom they took transfer of the title, had already had that title extinguished by operation of the Limitation of Actions Act.

60. I accordingly award judgment for the claimant against the defendants in terms of the reliefs sought. The claimant shall have his costs, to be taxed if not agreed.

Claimant's Counsel is to provide a draft order in terms of the ruling above for my perusal and, if appropriate, signature.



ANDERSON J
PUISNE JUDGE
OCTOBER 28, 2010.