IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2007 HCV 4141

BETWEEN	WINSTON CHRISTIE	1ST CLAIMANT
AND	ALLISON CHRISTIE	2ND CLAIMANT
AND	OSWALD HARDING	1ST DEFENDANT
AND	O.G. HARDING & CO.	2ND DEFENDANT
AND	CAROLE SPENCE-BROWN	3RD DEFENDANT
AND	VALERIE BENT	4TH DEFENDANT
AND	THE REGISTRAR OF THE SUPREME COURT	5TH DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	6TH DEFENDANT

CONSOLIDATED WITH CLAIM NO. 2008 HCV 03213

BETWEEN	VALERIE BENT (by her Attorney Roy Bent)	CLAIMANT
AND	WINSTON CHRISTIE	1ST DEFENDANT
AND	ALLISON CHRISTIE	2ND DEFENDANT

Mrs. M. Georgia Gibson-Henlin and Ms. Sherian MacDonald instructed by Henlin, Gibson-Henlin for Winston Christie and Allison Christie

Mr. Keith D. Knight Q.C. and Miss Audré L. Reynolds instructed by Patrick Bailey & Co. for Oswald Harding and O.G. Harding & Co.

Carole Spence-Brown not appearing or being represented

Dr. Lloyd Barnett and Mrs. Janet Taylor instructed by Ms. Kadia Wilson of Taylor, Deacon and James for Valerie Bent

Miss Stephany Orr and Mrs. Trudi-Ann Dixon-Frith instructed by the Director of State Proceedings for the Registrar of the Supreme Court and The Attorney General of Jamaica.

Land – Occupation of land with permission of registered proprietor – Occupier agreeing to purchase an interest from the proprietor – Completion of agreement thwarted -Whether possessory title may be acquired in those circumstances

Land – Sale of Registered Land by way of Order for Sale by court– whether any obligation placed on purchaser to make enquiries – whether purchaser bound by notice

Civil Procedure – Order for Sale of Land – Effect of – Whether affected by lapse of time provided for by s. 134 of Registration of Titles Act

Civil Procedure – Judgment creditor a corporate entity – Company liquidated before execution of judgment – Whether validity of execution affected thereby

2nd, 3rd, 4th, 5th, November 2009 and 10th February 2010

BROOKS, J.

In 1991 Mrs. Carole Spence-Brown contracted with Fairfield Development Ltd. for Fairfield to build a dwelling house on land for which she eventually became the registered proprietor. The house was built but Mrs. Spence-Brown failed to pay the full cost of construction. Fairfield sued on the debt and in 1996, secured a judgment for $5,319,153.00 with interest.

Approximately eleven years elapsed before the judgment was executed by way of the sale of the said property. By that time Mr. Winston Christie and his wife Allison had come to occupy the property. They assert that they had, by then, acquired an interest in the property. A notice to quit issued to them by the purchaser of the property, Mrs. Valerie Bent, has therefore, severely aggrieved them. Consequently they have filed the present claim against the attorneys-at-law handling the sale, Mrs. Spence-Brown, Mrs. Bent and also The Registrar of the Supreme Court (RSC).

Some of the assertions made by the Christies are as follows:

(a) the order for sale which was issued by this court was improperly secured. That is because Fairfield was not a legal entity at that time; it having been previously liquidated;

(b) Fairfield's attorneys-at-law, O.G. Harding & Co. and the principal of that firm, Dr. Oswald G. Harding (together referred to hereafter as "OGH"), acted improperly in pursuing the order of sale in the face of an agreement between the Christies and Mrs. Spence-Brown, of which

OGH were aware. The Christies say that the agreement was to the effect that they would pay the debt owed by Mrs. Spence-Brown, in exchange for an interest in the property. They say that they paid monies to OGH pursuant to that agreement;

(c) the RSC failed to bring the Christies' interest to the notice of the court;

(d) Mrs. Bent was aware of their interest. They contend that she is, therefore, not a *bona fide* purchaser for value without notice and so the sale to her should be set aside.

For her part, Mrs. Bent has claimed possession of the property and payment for use and occupation for the time that the Christies have occupied it in disobedience of the notice to quit. The Christies have denied liability and say that in the event that they are found liable, OGH, and the RSC should indemnify them; this, on the bases mentioned above.

Both claims have been consolidated and were heard together.

The issues for the court to resolve are many, but primary among them is the credibility of Mr. Christie, who testified on behalf of his wife and himself. Also to be assessed are:

1. Whether the Christies have acquired a possessory title adverse to Mrs. Spence-Brown's interest;
2. The effect, if any, of the liquidation of Fairfield prior to the grant of the order for sale;
3. The effect, if any, of the failure of Fairfield to previously register the order for sale, on the transfer registered pursuant to that order;

4. The validity of the transfer instrument which was signed by the RSC;

5. The obligation, if any, placed on the RSC by the existence of the Christies' caveat noted on the certificate of title for the property;

6. The obligation, if any, placed on the purchaser of registered land pursuant to an order for sale;

Mr. Christie's Testimony

Mr. Christie's testimony may be dissected in accordance with distinct aspects of the case.

The agreement with Mrs. Spence-Brown

He testified that he and his family have resided at the premises since 1995. They moved in with the permission of Mrs. Spence-Brown, who is his wife's cousin. He said that he became aware of Mrs. Spence-Brown having difficulty meeting her obligations to Fairfield. According to him, in 1998 he and Mrs. Christie agreed with Mrs. Spence-Brown, that the Christies would discharge her obligation to Fairfield. In return she would transfer an interest in the property to them. Under the agreement, the Christies were also to remain in, and maintain, the property.

The Christies originally claimed that they were entitled, on the agreement, to a one-half interest in the property. Fairly late in the day, the claim was adjusted to be a two-thirds interest on the basis that Mr. Christie did not originally remember the exact size of the interest that the Christies were to have obtained. He relies, for his later position, on the contents of a letter from Mr. Gawaine Forbes, who was the attorney-at-law, then acting on behalf of both the Christies and Mrs. Spence-Brown. The letter is

dated November 21, 2002 and is addressed to Mrs. Spence-Brown. It mentions a two-thirds interest and will be referred to below.

According to Mr. Christie, he and his wife performed their end of the bargain. He says that they paid $990,000.00 to OGH, either directly or through intermediaries, toward settling Mrs. Spence-Brown's debt. He says that they also paid the property taxes, erected a boundary fence and maintained the property; giving the house an annual paint-job, and keeping the grounds in good condition.

Mr. Christie provided no documentary evidence to support most of this testimony. He did not produce an agreement for sale and he produced no receipts for any of his claimed expenditure on the property. He said that his documents had either been lost or stolen over the years and he no longer had them. He however relied on correspondence involving Mr. Forbes.

That correspondence from Mr. Forbes indicates, however, that there were fundamental differences in the approach to the transaction, by Mrs. Spence-Brown on the one hand and the Christies on the other. By a letter dated September 27, 2002 Mr. Forbes sent an instrument of transfer for Mrs. Spence-Brown to execute. His explanation for doing so is set out in the letter and it is worthwhile quoting from it.

> "The new Title and Mortgage are now ready for registration. Due to the time delays however we have to re-execute the Instrument of Transfer, which puts Allison and Winston Christies' names on the title. Both the mortgage and the names will be endorsed on the title at the same time and the mortgage proceeds disbursed immediately to attorneys acting for Fairfield Development & Company.
>
> Please...sign the instrument of transfer again and...forward it to me by courier."

Although the letter intimates that there was a previous instrument of transfer, the proposed approach, apparently, was unacceptable to Mrs. Spence-Brown. Mr. Forbes'

letter to her, dated November 21, 2002 and mentioned above, explains to her the Christies' position:

> "We are still trying to get the government to finalize the assessment of the duties to be paid on the transfer of **two-thirds** interests in the property to the Christies, i.e. one third each.
>
> The issue of ownership was discussed with the Christies who feel that their ownership should not be a trust. **They wish an actual share in the property by tenancy in common instead of joint tenancy**. This means that on death the deceased's portion does not go to the survivors but can be willed or sold by the estate.
>
> Please call to discuss this as soon as possible." (Emphasis supplied)

A letter, apparently written on January 13, 2003 (although stating the year as 2002), by Mr. Forbes and addressed to Mrs. Spence-Brown, attempts to resolve the divergence in approach and to save the transaction:

> "We refer to ours of November 21, **2002**...
>
> We wish to confirm the details of our conversation and **your instructions not to proceed any further with this transaction on your behalf if the Christies insist on an ownership interest in the premises** at Fairfield Estate.
>
> Please note that Victoria Mutual Building Society have (sic) advised that the Christies must be noted on the Title as owners...for the Mortgage proceeds to be advanced. **It is quite possible (and advisable if the Christies agree) to note them as tenants in common with half interest between them and have a Declaration of Trust done subsequently**.
>
> The Declaration of Trust would serve as **some protection for your sole ownership of the entire premises**. However you need to consider that **as Mortgagors on the Title, the Christies are fully liable for the loan throughout its existence**, whether or not the Declaration of Trust is done subsequently. **This I gather is their reason for requiring a more secure interest in the premises**." (Emphasis supplied)

It will have been noticed that the November 2002 proposal for a two-thirds interest to be transferred to the Christies, had, by the following January, been decreased to a one-half interest. The concept of a trust was also introduced.

Mr. Forbes was unable to reconcile the conflicting stances and by letter dated March 13, 2003, he wrote, resigning. He said, in part:

> "You indicated in our conversation that you were determined not to proceed with the transfer of the property to yourself and the Christies and not to proceed with the registration of the mortgage.
> We now confirm that you do not wish the undersigned to proceed any further...The undersigned therefore has to advise that...I must now withdraw from this matter as your attorney.
>
> By copy of this letter I am also advising the Christies that effective immediately I can no longer act for them."

The letters of November 2002, and January 200[3] were also said to have been copied to Mrs. Christie. Mr. Christie testified that he does not remember seeing them.

The instrument of transfer, which was eventually signed by the Christies and Mrs. Spence-Brown and sent for stamping, revealed that the property was being transferred by her to all three, as joint tenants and not in specific shares as Mr. Christie had testified.

The interface with OGH

Mr. Christie testified that OGH were aware of the arrangements between Mrs. Spence-Brown and the Christies. At paragraph 5 of his witness statement he said:

> "Mr. Harding and his firm...are aware of the arrangement [with Mrs. Spence-Brown] because my wife and I have paid money **directly** to them. My wife and I also paid money to the Hardings through Victor Hamilton an accountant who is now dead..." (Emphasis supplied)

Mr. Christie also alluded to the fact that OGH also had had communication with Mr. Forbes and the attorneys-at-law acting for the building society.

He, however, produced no receipts which showed that the Christies had made any payments to OGH. Receipts issued by OGH were admitted into evidence showing that payments totalling $1,000,000.00 were made respectively by Mrs. Spence-Brown, Mr. Forbes or Mr. Victor Hamilton. Mr. Christie testified that when he and his wife paid

money to OGH. Miss Shaw of that firm told them that the receipt had to be issued in Mrs. Spence-Brown's name.

There is evidence suggesting that Mrs. Spence-Brown was seeking to secure assistance in paying her debt. After having made some instalment payments, Mrs. Spence-Brown should have secured a mortgage loan for the balance. In that regard, Mr. Forbes, in a letter dated September 12, 2001, to the Victoria Mutual Building Society, said in part, "The trustees are endeavouring to procure the $99,000.00 and the balance [of the debt] will be applied for as a mortgage with your institution". The use of the term "trustees", indicates Mrs. Spence-Brown's view of the course to be taken, or at least Mr. Forbes' understanding of that view. As mentioned before, however, there is no document which shows payment by the Christies.

Mrs. Spence-Brown, in a letter dated July 17, 2000, introducing the Christies to OGH referred to the Christies as her representatives. They also signed a letter on July 25, 2000, addressed to OGH, agreeing to accept information and documents on her behalf in that capacity.

OGH were apparently advised very late in the day that the Christies were to have had an interest. In a letter of September 26, 2001 Mr. Forbes advised OGH that "Our client's agents have been preparing all the required documentation for the mortgage application with the Victoria Mutual Building Society, Montego Bay". It was not until June 26, 2002 that OGH indicated that they were aware that other parties may be involved apart from Mrs. Spence-Brown. In a letter bearing that date, they said in part, "We had hoped to register the Mortgage and Transfer simultaneously when the New Title is being prepared". No transfer instrument would have been required if Mrs. Spence-

Brown were to have remained the sole registered proprietor. The letter, however, did not mention the Christies.

Curiously though, OGH seemed to have been surprised by the documentation which they received from the attorneys-at-law acting for Victoria Mutual Building Society. They said to Mr. Forbes in a letter dated August 26, 2002:

> "...On perusing the [mortgage] document, we note that the parties to the Deed are CAROLE SPENCE BROWN, WINSTON CHRISTIE AND ALLISON CHRISTIE, whereas the Title reflects the name Carole Spence Brown, only....
>
> Kindly let us have the instrument of Transfer, stamped, along with a Certified Cheque for the registration fee as a matter of urgency in order that we can be in a position to effect these transactions on the Title."

Concerning contact with Dr. Harding, Mr. Christie admitted that he did not meet personally with Dr. Harding. This was contrary to his earlier assertions.

The interface with Mrs. Bent

Mr. Christie testified that he met Mrs. Bent when she came to the premises in the late 1990's. He said that this was when the property was first advertised for sale. He said that he and his wife denied her entry and told her that they were in the process of purchasing the property and that they had an interest in it.

Mrs. Bent denied going to the property at that time. She testified that the first time that she went to the premises was in 2004 when she came to the island to attend her father's funeral. She denied meeting with Mr. Christie at that time. Mrs. Bent accepted that she had a sister who lived in the Fairfield subdivision but stated that her sister's house was at a different part of the subdivision. It was, however, of similar configuration to the Christies' and so when Mrs. Bent first visited the property, a peek through the front door was sufficient to convince her to make an offer to purchase the property.

She accepted that she had been told by someone at the property (not either of the Christies) that the sale to her was illegal. That, however, was in 2007, on her second visit to the premises and after she had received letters of possession, although her name was not yet registered on the title.

The interface with the Registrar of the Supreme Court (RSC)

The RSC conducted an enquiry in respect of the Certificate of Title for the property. This was for the purpose of determining "the exact amount due by [Mrs. Spence-Brown] to [Fairfield] in respect of the judgment debt, interest and costs at the time of payment of the judgment" (paragraph 5 of the witness statement of Miss Rosemarie Harris, RSC).

Mr. Christie said that he never received the notice concerning the enquiry. He said that he never attended any such enquiry. He indicated, in cross-examination by Miss Orr for the RSC, that Mr. Bishop, of the law firm of Bishop and Fullerton, was his attorney-at-law at the time and said that he had left it to his attorney-at-law to deal with the matter of the enquiry.

The court's records for the Fairfield claim show that the enquiry was held on the 27th February, 2006 and that Messrs. Bishop and Fullerton were served on 16th February, 2006, with the notice for that hearing. They however did not attend. Neither did Mr. Ripton MacPherson, the attorney-at-law on the record for Mrs. Spence-Brown.

The interface with the Registrar of Titles (ROT)

Mr. Christie, at paragraph 8 of his witness statement, spoke about the caveat which the Christies lodged against Mrs. Spence-Brown's title. He complained that the

transfer to Mrs. Bent was registered despite the caveat being in place. He explained, from his point of view, what had happened:

> "The caveat was warned and we applied to the Court for an injunction to restrain the sale [to Mrs. Bent] but that injunction was not granted because there was no connection between my wife and I and Fairfield. The judge also said that my wife and I knew that the property "subject to mortgage" was put up for sale pursuant to Court (sic) granting order for sale..."

In cross-examination, Mr. Christie said, however, that he did not get the notice, issued by the ROT, warning the caveat. He said he was not aware of the notice being issued to him. In answer to the court he said that he did not at any time attend court to try and get an order to stop the ROT from registering a sale to Mrs. Bent.

Credibility

Mr. Christie was ill-suited for his role as claimant. Whereas the claim was a technical one, based on his alleged interest in land and the manner by which it was achieved, Mr. Christie was not a learned man and his reading skills were very limited. He was also faced some expert cross-examination.

There were a number of instances where the documentary evidence did not support Mr. Christie's assertions. Some of those have been mentioned above; particularly that concerning the nature of the agreement which he said had been settled with Mrs. Spence-Brown in 1998. Another example lies in a declaration which the Christies lodged with the ROT in support of a caveat against Mrs. Spence-Brown's title to the property. In that declaration, they stated that it was in the year 2000 that the arrangement was made with Mrs. Spence-Brown about their securing an interest in the property. That declaration was made in 2004.

Further, where the documents consisted of letters which he ought to have received, Mr. Christie denied all previous knowledge of the contents.

Mr. Christie contradicted himself on occasion. He, at one stage in cross-examination, said that he had retrieved, from the Stamp Office, the instrument of transfer which he, Mrs. Christie and Mrs. Spence-Brown had signed. Shortly thereafter, he denied having done so. When pressed by learned Queen's Counsel, Mr. Knight, the following exchange took place:

> Q. Do you recall telling me that you did [retrieve it from the Stamp Office]?
> A. No, I don't recall that.

Another instance was, whereas he said that he had not received the notice warning the caveat, he said in his witness statement that he sought an order of the court to prevent the registration of the transfer to Mrs. Bent. It would most likely have been a notice which would have alerted him of the intended registration.

Considering his testimony as a whole, I was not impressed with Mr. Christie as a witness. His demeanour did not communicate that he was someone who was speaking the truth. I have taken into account that he was on unfamiliar ground in a technical area of law but that should not have so greatly affected his recounting of the facts. I find that he was unconvincing in that regard. When it seemed that he was on ground where he was not confident, he spoke softly. That happened often.

I do not believe that the Christies, in 1998 or any time prior to that, had any agreement with Mrs. Spence-Brown concerning a sale of any interest in the property to them. I find that any agreement which they might have later concluded with her was not performed and that they did not obtain any interest in the property.

I do not believe that the Christies paid any money to OGH directly, in respect of the effort to clear the debt to Fairfield. It is curious indeed, that Mr. Christie was unable to secure any receipt from OGH which indicated that he or his wife had paid monies to that firm, yet OGH gave receipts to Mr. Forbes and to Mr. Hamilton in their respective names for payments made by them on Mrs. Spence-Brown's behalf.

Finally, I do not believe that Mr. Christie had any encounter with Mrs. Bent prior to 2004.

Whether the Christies may properly secure a possessory title adverse to Mrs. Spence-Brown's interest

Although it was not in their Claim Form or their oft amended Particulars of Claim, Mr. Christie, in his witness statement, asked this court to declare that he had obtained a title to the property by way of adverse possession. This aspect of the claim may be assessed on two bases; the Christies' intention to possess the property and the date from which time began to run, if at all, against Mrs. Spence-Brown, in favour of the Christies.

The Christies' intention to possess the property

Mr. Knight, in his first two questions in cross-examination, totally decimated any hope that the Christies may have had in establishing a possessory title. Mr. Christie accepted in his answers to those questions that he was never a squatter and that his family, at all times, were in possession with the permission of Mrs. Christie. The basic law concerning the acquisition of a possessory title is that possession must be achieved without violence, without secrecy and without **permission**.

It is accepted that Mr. Christie was responding from a layman's point of view to questions which had technical and far-reaching implications for his case, but I find that

those answers are supported by the other evidence elicited, both from Mr. Christie and the documents exhibited.

The Christies said in their declaration in support of their application for the caveat earlier mentioned:

> "4. That in or about May 1996, we were asked by the owner of the premises, Carole Spence-Brown, to stay at the premises and take care of the premises and her four year old child who was living with us, on and off, since her birth.
> 5. That in taking care of the premises, we repaired door jams, fence the premises, refit plumbing and electrical fixture (sic) among other things...

Those paragraphs confirm Mr. Christie's answers in those initial questions in cross-examination. The Christies were not intending to possess the property on their own behalf; they were performing their end of a bargain with Mrs. Spence-Brown.

I have already made reference to the Christies' letter of July 25, 2000 addressed to OGH. The letter said:

> "RE: LOT 28, FAIRFIELD ESTATE
>
> This is to advise that we the undersigned are willing to accept all information and documents pertinent to the sale of the property mentioned at caption and to act in the capacity of representatives of Miss Carol C. Spence-Brown."

In my view, that letter is an acknowledgment by the Christies of Mrs. Spence-Brown's title to the property. That is in clear contradiction to any claim of a title adverse to hers.

Mrs. Gibson-Henlin, on behalf of the Christies, submitted that the Christies exercised the requisite intention to possess the property and to treat it as their own, upon Mrs. Spence-Brown's departure from the island. The evidence, as set out above, and as I find, does not support that submission.

I find that the Christies have consistently occupied the property with the express permission of Mrs. Spence-Brown and have always recognized her superior title to the property. Their attempts to purchase an interest in the property for the entire period for which they were in contact with Mr. Forbes as their representative, jointly with Mrs. Spence-Brown, is evidence, though I accept not conclusive evidence, of their recognition of Mrs. Spence-Brown's title. Similarly, the attempts to have the instrument of transfer stamped and produced to OGH even after Mr. Forbes' exit from the transaction demonstrates the Christies' recognition of Mrs. Spence-Brown's sole legal interest in the property.

Section 16 of the Limitation of Actions act stipulates that where a person in possession of land, acknowledges in writing, the title of the person holding the paper title to that land, then the possession by the person on the land is deemed to be possession by the person holding the paper title. The section further states that the limitation period does not begin to run, against the holder of the paper title, prior to the date of that acknowledgment. That letter of July 25, 2000 indicates that time would not have begun to run against Mrs. Spence-Brown before that date.

JA Pye (Oxford) and Anor. v Graham and Anor. [2003] A.C. 419 is a watershed case in the area of adverse possession, or more accurately for our jurisdiction, the acquisition of a possessory title. *Pye* has been endorsed as relevant to our jurisdiction in the Privy Council case of *Wills v Wills* PCA 50 of 2002 (delivered 1st December 2003). *Wills* is a decision on appeal from this jurisdiction and is therefore binding on this court.

Lord Browne-Wilkinson at paragraph 46 of *Pye* said:

> "An admission of [the paper title holder's title] by the squatter is not inconsistent with the squatter being in possession in the meantime."

It is difficult to reconcile that statement with the provisions of section 16, as I understand them. It could perhaps be said, however, that the sentence just quoted was at the end of a paragraph in which Lord Browne-Wilkinson addressed the question of a squatter's willingness to pay if asked. He concluded that such willingness would not be inconsistent with an intention to possess. In my view, it is where that willingness is elevated to an acknowledgement in writing, given to the holder of the paper title, that the provisions of the statute would apply.

Insofar as the date from which time would begin to run is concerned, Mr. Christie's answer to Mr. Knight's third and fourth questions are also critical and equally devastating to the Christie's case. Mr. Christie asserted "I was there [at the premises] with an agreement made about 1997". He then said "I agree it was in 1998". As mentioned in the previous section of this judgment the declaration asserted that the discussions about the Christies purchasing an interest in the property commenced in the year 2000. The relevant part of the declaration said:

> "6. That in the year 2000, the (sic) Carole Spence-Brown told us and we verily believe that she wanted to borrow some money to finish pay-off the mortgage on the premises but she was unable to secure a second mortgage due to her age and the fact that she was not in good health.
> 7. That the arrangement was for us to open an account at Victoria Mutual Building Society (VMBS) in order to secure the mortgage and in return we would receive a half share in the premises...."

On any of these accounts the Christies have not established possession, in their own right, for twelve years, to the date of filing this claim in 2007. With negotiations still being conducted in 2002, as to the portion of the legal interest which they would hold on registration of the transfer, it is clear that up to 2002, they were in possession of the property with Mrs. Spence-Brown's consent.

Lord Browne-Wilkinson, at paragraphs 36 and 37 of *Pye* said:

> "36. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land **for the requisite period** without the consent of the owner.
> 37. **It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter** for the purposes of the Act." (Emphasis supplied)

Applying those principles, the Christies must fail on the issue of a claim for a possessory title.

The fact situation in *Pye* is very different from the instant case. In *Pye*, the holder of the paper title was excluded from the property by hedges and gates. Another difference is that whereas that squatter, whose initial right to possession had expired, was willing to enter into a new arrangement, no communication took place between the parties for the requisite period.

In the instant case the Christies have not shown that Mrs. Spence-Brown was excluded from the property. Additionally, up to at least 2002, they were on the property pursuant to an agreement with her.

The effect of those findings of fact on the Christies' claim

The findings expressed in addressing the previous two issues are sufficient to bring an end to the Christies' claim and to their ancillary claim in Mrs. Bent's claim. If they have no interest in the property then they have no standing to bring any claim in respect of it. None of the defendants would owe them any duty of care or any obligation whatsoever.

Mrs. Spence-Brown, although she has not defended the claim, should not have a judgment entered against her. There is no proof that the Christies paid the monies which

they were supposed to pay under their agreement with her. The Christies have occupied her property up to the time of the transfer to Mrs. Bent. It is clear that their compensation to Mrs. Spence-Brown for that occupation was not at the level which Mr. Christie said it should have been.

A concise answer to any claim that the Christies may have in respect of title to the property, is that Mrs. Bent has now been registered on the Certificate of Title. The Christies have not proved any fraud on her part, or indeed on the part of any of these parties. The result is that the provisions of the Registration of Titles Act (ROTA) grant Mrs. Bent an indefeasible title. This is by virtue of her becoming the registered proprietor of the property. Section 68 of the ROTA has been, quite rightly, cited in respect of this principle. See also the judgment of Campbell, J.A. in *Nunes and Appleton Hall Ltd. v Williams and others* (1985) 22 J.L.R. 239 in support of this point.

In the event that I am wrong in finding that the Christies had no interest in the property, I shall examine the other issues raised in the claim. Some unusual points fall for assessment. I also have to adjudicate on Mrs. Bent's claim.

The effect, if any, of the liquidation of Fairfield prior to the grant of the order for sale

There is no dispute that Fairfield had been liquidated prior to the approval of the sale to Mrs. Bent. The liquidation was finalized on 10th August, 2004. It was a creditors' voluntary winding up. There is no indication as to who were the creditors, but there is evidence that Fairfield, as a subsidiary of Eagle Merchant Bank, was a part of the Crown Eagle and the Eagle group of companies, at varying stages, and that those groups were taken over by the Financial Sector Adjustment Co. Ltd (Finsac). A letter of November 16, 2007, from Finsac, asking OGH about the progress of the case was put in evidence.

Dr. Harding, in his testimony, indicated that once he had received his initial instructions to recover the money due on the debt, he did not need to get any further instructions prior to recovering the sum due. That is a matter of contract between OGH and their client. Certainly, there is evidence of OGH taking instructions, from time to time, from Eagle Merchant Bank on aspects of the agreements with Mrs. Spence-Brown. What, however, is the situation if the client has been liquidated and no longer has any legal status?

Section 229 of the Companies Act 2004 stipulates that once an order for winding up has been made or a provisional liquidator appointed, no claim may be commenced or continued in the name of the company except with the permission of the court. That, however, does not mean that the company's assets disappear. Firstly, section 230 of the Companies Act states that an order for winding up operates in favour of all the creditors and of all the contributors of the company. Secondly, in the event of dissolution, the assets go to the Crown, initially on trust for the members of the company and generally speaking, after 20 years, *bona vacantia* to the Crown (See Section 337 (5) (b) of the Companies Act). An application may, however, be made by the liquidator to recover them.

The judgment is such an asset. I need not decide if pursuing execution is a continuation of the claim. If, in breach of the provisions just quoted, the judgment is executed, it is entirely within the jurisdiction of this court to order it set to be aside. The execution, however, remains valid until an order is made setting it aside. See *Chuck v. Cremer* (1846) 1 Coop. temp Cott. 342 and the unreported decision of *Bastion Holdings Ltd. v. Bardi Ltd. and Anor.* SCCA 14/2003 (delivered 29/7/05).

I think, however, that it would be untenable for the judgment debtor, Mrs. Spence-Brown, to apply for such an order and say that she should have back the proceeds of execution. She has no proper claim to those proceeds. It is true that the company is not in a position to claim them, but some other person has a better claim than the judgment debtor does. I rely, by way of analogy, on the case of *Singh v Ali* [1960] 1 All E.R. 269, in respect of this point. Lord Denning, in considering a case involving an illegal contract found that the buyer could successfully resist a claim by the vendor of goods despite the illegality. He stated the legal position as follows:

> "When two persons agree together in a conspiracy to effect a fraudulent or illegal purpose-and one of them transfers property to the other in pursuance of the conspiracy- then so soon as the contract is executed and the fraudulent or illegal purpose is achieved, **the property...which has been transferred...remains vested in the transferee, notwithstanding its illegal origin**...The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it - he cannot throw over the transfer. **And the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it**....The parties to the fraud are, of course, liable to be punished for the part they played in the illegal transaction, but nevertheless the property passes to the transferee." (Pages 272H – 273A) (Emphasis supplied)

The circumstances are not on all fours with the instant case and those facts involve a situation far graver than that in the instant case, but I am of the view that the principle is still applicable. I do not say that the order cannot be set aside. I say that Mrs. Spence-Brown would be precluded from making such an application.

On my earlier finding, the Christies, who claim through Mrs. Spence-Brown, would have no standing to apply to set aside the execution.

Mrs. Bent's being registered on the title as the proprietor thereof is also a complete answer to the complaint. Campbell, J.A. in his judgment in *Nunes and*

Appleton Hall cited above, made it clear that despite irregularities in the procurement of the registration of the transfer, "once the transfer is registered...it confers in the absence of fraud, an immediate indefeasible title in favour of the transferee". (See page 349 H)

The complaint against the RSC in respect of Fairfield's status

The Christies have complained that the RSC failed to enquire as to the status of Fairfield. In my view the RSC had no such obligation. The court ordered the RSC to make such enquiries as were necessary to allow for the order for sale to be effected. An application having been made on behalf of Fairfield, the RSC had no reason to enquire if it were still a valid entity. The complaint has no merit.

The effect, if any, of the failure of Fairfield to previously register the order for sale, on the transfer registered pursuant to that order

Mrs. Gibson-Henlin complained that the fact that the order for sale was not registered meant that the transfer was ineffective. In learned counsel's submission, the failure to register a charge in accordance with section 134 of the ROTA meant that no interest passed to the judgment creditor. Counsel's plain implication is that the judgment creditor must first secure the interest which is passed to the purchaser. Counsel submitted: "It is important to note that in order for an Order for Sale to be given effect under the ROTA, it must be registered". She relied on the case of *Gibbs v Messer* [1891] A.C. 248 in support of the submission.

I cannot accept learned counsel's conclusion. In my view section 134 has two aspects to it. The first aspect deals with the registration of the order. The section states that unless an order for sale is registered, it is ineffective in invalidating any prior transfer effected by the registered proprietor. That aspect of the section is intended, in part, to prevent any dealing with the land while a charge is in force. It is true to say that

registration of the Order for Sale does (as confirmed by Lord Scott in the judgment of the Privy Council in *Beverley Levy v Ken Sales Ltd.* PCA 87/2006 (delivered 24/1/08)) create an interest in the land in favour of a judgment creditor. At paragraph 17, the Board said, in part:

> "It is common ground that a mere order for sale of land under section 134 does not vest in the judgment creditor who has applied for the order any interest in the land. **An interest in land is acquired when the Registrar, having been served with a copy of the order for sale, enters the order in the Register Book.** The interest acquired by the judgment creditor at that point is an equitable interest subject to other interests already on the Register." (Emphasis supplied)

The registration of the order for sale is, however, a step distinct from the registration of a certificate of sale. The registration of the certificate of sale is the second aspect.

Where a sale is effected pursuant to an order for sale, the Registrar is obliged by section 134 to enter the resultant certificate in the Register Book. The section specifies that the purchaser, upon such entry being made, "shall become the transferee and be deemed the proprietor of such land".

Mrs. Gibson-Henlin's submission fails to appreciate that the section is only, in part, aimed at preventing any transaction which would prejudice the interest of a judgment creditor. Failure to register the order for sale before it is effected cannot, by itself, invalidate the sale. The result of such failure is that the judgment creditor runs the risk of his efforts being thwarted by the judgment debtor, who may charge or even sell the property.

The life of a writ of execution is longer than the three months allowed by section 134 for the validity of a charge pursuant to an order for sale. In my view, that fact supports the conclusion that if the three-month period had expired, or even if the charge

had never been registered, the order of the court, made manifest in the certificate for sale, must be given effect. Lord Scott went on to say, later in paragraph 17, of *Levy v Ken Sales Ltd.* that where the period expires, the judgment creditor "will become simply an unsecured creditor". He continued:

> "The order of sale will remain and the land in question may still be sold under the order of sale but other proprietary interests that have been registered will have priority."

In my view, the situation where the charge expires is materially indistinguishable from that where the order was never registered.

The fact that it is a order of the court which gives rise to the transfer, distinguishes the instant situation from that in *Gibbs v Messer*, where the court emphasized that the "protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is on the register". In the instant case Mrs. Bent is obtaining her interest from the previous proprietor but by a sale made pursuant to an order of the court.

The validity of the transfer instrument which was signed by the Registrar of this Court

Complaint was also made on behalf of the Christies that a provision, part of section 134 of the ROTA, was not complied with and therefore the property has not been validly transferred to Mrs. Bent. The basis of the complaint is that what was lodged with the Office of Titles was not a certificate of sale but was an instrument of transfer. The relevant part of section 134 stipulates that "the Registrar shall, on receiving a certificate of the sale...in such one of the Forms A, B, or C in the Twelfth Schedule...as the case requires...enter such certificate in the Register Book".

There is no contest that it was an instrument of transfer which was utilized. The ROT testified that, in practice, an instrument of transfer signed by the appropriate authority is accepted in place of a certificate of sale. This, she said, was because all the information required for the certificate of sale is contained in the instrument of transfer.

I accept the explanation as reasonable for two reasons. Firstly, section 134 stipulates that a certificate of sale "shall have the same effect as a transfer made by the proprietor". Secondly, section 172 of the ROTA permits variations in forms, which variations are not a matter of substance. The section states:

> "The forms contained in the several Schedules, and the forms for the time being in force under this Act, may be modified or altered in expression to suit the circumstances of every case; and any variation from such forms, respectively in any respect, not being a matter of substance, shall not affect their validity or regularity."

In the instant case the instrument of transfer correctly named the Transferor as Carole Spence-Brown and that the RSC was acting for and on behalf of the Transferor pursuant to an order of the Court. A perusal of the forms prescribed by section 134 demonstrates that the critical aspect is the reference to the authority of the court. This reference is clearly set out in the present transfer.

There is, however, just above the RSC's signature at the end of the document, a memorandum repeating the authority by which the RSC signs, but incorrectly stating that she does so, on behalf of "the Transferor Fairfield Development Ltd.". This is plainly an error. I also find that the memorandum was unnecessary at that point and the error is not fatal to the validity of the document.

Counsel for the RSC cited the case of *Morelle LD. V Wakeling and Another* [1955] 2 Q.B. 379, which I find helpful. The English Court of Appeal in considering a

complaint that the prescribed form was not used to register a transfer, held that the Land Registration Rules, 1925 (in particular rules 74 and 123) allowed the forms prescribed by those rules, to be altered and supplemented to the extent that it is necessary or desired and as the registrar allowed. Their Lordships were of the view that "[t]he registrar is thus given a wide discretion as to the forms to be used and his discretion extends to authorizing a departure from the general rules if satisfied that he can properly do so".

Our legislation, in my view, gives less latitude to our ROT. Section 21 of the Act allows the ROT to make alterations to the forms but only with the consent of the Minister. The provisions of sections 134 and 172 combine, however, to give the ROT the discretion which she did exercise in the instant case. The use of the transfer in these circumstances is, in my view, not fatal to the subject transaction. Adherence to the provisions of the Act would have, it must be said, avoided this complaint.

Rule 55.7 of the Civil Procedure Rules 2002 (CPR) also stipulates a form of certificate which must be used to have the purchaser registered as the proprietor of the property. The relevant form (Form 22A) was also not used, but again I am of the view that this is not a fatal flaw. The court has issued a form of transfer and the ROT has acted on it, as in my view, she was obliged to do.

Although none of the parties have addressed the issue, it appears that there was non-compliance with the order for sale made by Ellis, J. That order specified that the sale was to have been executed by public auction.

The evidence of Dr. Harding and the documents setting out the sequence of events show that no bids were made at the auction held on April 23, 1998. When the auctioneers informed Fairfield's attorneys-at-law, conducting the litigation, of the

development, the response was to "try to sell the [property] by private treaty for the best price obtainable". Those attorneys-at-law then indicated that, on a sale being secured, they would "proceed to get confirmation from the court".

No formal variation of the order of Ellis, J. was specifically secured. The application to approve the sale to Mrs. Bent was, however, attached to the affidavit in support of the application and the order approving the report of the RSC was made in that context.

On the bases of the principles set out above in respect of the complaint about the status of Fairfield, I find that the transfer to Mrs. Bent is not invalidated by the non-compliance with the order of Ellis, J.

The obligation, if any, placed on the RSC by the existence of the Christies' caveat noted on the certificate of title for the property

The Christies complain that the RSC was negligent in failing to bring to the attention of the court the fact that they had an interest in the property. They say that that interest had been brought to the attention of the RSC by a caveat which they had lodged against the registered title. In fact, the RSC in her "Amended Registrar's Report" given to the court, did note that the Christie's had an outstanding caveat lodged against the title. The report exhibited a copy of the caveat.

In applying for the approval of the report of the RSC, OGH brought it clearly to the attention of the court that the Christies had lodged a caveat against the title. They asked that the caveat be warned. There was an affidavit in support of that application showing that notice of the same had been served by registered post on the Christies. The court would have had ample notice of the interest claimed by the Christies. This complaint against the RSC is without merit.

The obligation, if any, placed on the purchaser of registered land pursuant to an order for sale

I now turn my attention to the status of Mrs. Bent. She purchased this property by private treaty when she responded to an advertisement in a nationally circulated newspaper. Section 71 of the ROTA protects a person who takes, in the absence of fraud, a transfer from the proprietor of any registered land. The transferee is not obliged to make any enquiries about the registration of the previous proprietor. Nor is the transferee affected by any notice of any trust or unregistered interest.

In this case Mrs. Bent takes her title from Mrs. Spence-Brown, on whose behalf the RSC signed an instrument of transfer. If a purchaser taking from the registered proprietor in ordinary circumstances is protected by the ROTA, that protection is, in my view, even more secure when the transfer is carried out pursuant to an order of this court.

Mrs. Bent's entitlement to possession and to *mesne profits*

In her claim, Mrs. Bent seeks compensation for the use and occupation of the property by the Christies for the time which they have deprived her of possession of same. The Amended Fixed Date Claim Form states that she claims the sum of $180,000.00 per month from October 3, 2007 to the date of possession.

Evidence was presented by way of an opinion rendered by Mr. Connel Steer of Allison Pitter & Co. who are said to be Chartered (Valuation) Surveyors. The opinion, which was allowed into evidence by agreement, was that the "Rental Value" for the property "is in the order of Fifty Thousand Dollars ($50,000.00) per month, gross". That opinion is uncontested and I do not find it unreasonable. Mrs. Bent is entitled to have judgment awarded to her on that basis. The calculation to February 3, 2009, is 28 months

at $50,000.00 per month. The product is $1,400,000.00. The monthly figure converts to a daily rate of $1,666.67.

Conclusion

The Christies have not established that they have an interest in the property which is the subject of this claim. The evidence of Mr. Christie, that there was a binding agreement, which was brought to the attention of all concerned, is not credible. His evidence was, in critical respects, inconsistent and was also contradicted by the documentary evidence. The Christies, therefore, have no standing to bring any claim in respect of the property. None of the defendants would owe them any duty of care or any obligation whatsoever.

Some other important points were raised during the trial. One concerned the validity of an order of this court which was secured after a corporate judgment creditor had been wound up. Another concerned the validity of the registration of a transfer of registered land where there were defects in the procedure leading to that registration. Not only are the Christies without any standing to take issue with those matters but those things, having been done pursuant to an order of the court, must remain in place until the court orders otherwise. No proper party has made any application to set aside the order of the court or any of the acts done pursuant thereto.

Mrs. Bent, the purchaser of the property, is entitled to possession of the property and to compensation for the Christies' use and occupation thereof from the time Mrs. Bent first became so entitled, to the time that possession is actually delivered to her.

I cannot conclude this judgment without expressing my gratitude to counsel in this matter. They have all made diligent, scholarly and thorough presentations, of which I have had the benefit.

The judgment of the court is therefore:

That Winston and Allison Christie do not have any estate or interest in any of the land and building thereon known as lot 28 Fairfield Estate, Saint James, being all the land comprised in Certificate of Title registered at Volume 1352 Folio 282, of the Register Book of Titles and formerly registered at Volume 124 Folio 594 of the Register Book of Titles (hereinafter called the property);

Further, it is ordered that:

1. Judgment for the Defendants in Claim 2007 HCV 4141;

2. The Ancillary Claim in Claim 2007 HCV 4141 does not fall to be decided and is therefore dismissed;

3. Judgment for the Claimant in Claim 2008 HCV 3213 in the sum of $1,413,333.36;

4. Winston Christie and Allison Christie shall quit and deliver up the property on or before the 28th day of February 2010, to Valerie Bent or her attorney-in-fact;

5. Winston Christie and Allison Christie shall pay to the said Valerie Bent the sum of $1,666.67, as use and occupation, for each day which they shall remain in the property after the 10th February 2010;

6. Judgment for the Ancillary Defendants on the Ancillary Claim in Claim 2008 HCV 3213;

7. Costs of the Defendants in Claim 2007HCV 4141 and those of the Claimant and the Ancillary Defendants in Claim 2008 HCV 3213 are to be paid by Winston and Allison Christie, such costs to be taxed if not agreed.

Apr 17 2011