[2018] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 8/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**PETER PERRY**	**APPELLANT**
AND	**CAROL BAUGH**	**1ST RESPONDENT**
AND	**NOVADO WILSON**	**2ND RESPONDENT**
AND	**ANN MARIE HIBBERT**	**3RD RESPONDENT**
AND	**ELAINE BAUGH**	**4TH RESPONDENT**
AND	**SOPHIA CAMPBELL**	**5TH RESPONDENT**
AND	**ANETTA FOSTER**	**6TH RESPONDENT**

Shane Dalling and Ms Trishann Brown instructed by Dalling & Dalling for the appellant

Mrs Lilieth Lambie-Thomas and Miss Jamilla Thomas instructed by Lambie-Thomas & Co for the respondents

1, 2 February and 23 March 2018

BROOKS JA

[1] The appellant, Mr Peter Perry, is the registered proprietor of premises known as 27 Jobs Lane (the premises) in the parish of Saint Catherine. The respondents are

Mesdames Carol Baugh, Ann Marie Hibbert, Elaine Baugh, Sophia Campbell and Anetta Foster and Mr Novado Wilson. They each have houses, either partly or completely, constructed on the premises. Mr Perry seeks to evict the respondents from the premises.

[2] His action in the Parish Court for the parish of Saint Catherine, against the respondents, for recovery of possession, failed. The learned Parish Court Judge, Mrs Tara Carr, accepted that the respondents were each in possession of the respective areas of the premises that they occupied, for in excess of 12 years. She also found that they each had the requisite intention to possess those areas. Accordingly, their respective defences, in reliance on the provisions of the Limitation of Actions Act (Limitations Act), succeeded. The learned Parish Court Judge gave judgment for the respondents on 16 December 2016. Mr Perry has appealed from that decision.

[3] His grounds of appeal will be listed later in this judgment, but the main issues arising from Mr Perry's appeal are as follows:

1. Whether the creation of various mortgages during the tenure of Mr Perry's predecessor in title, Mr Sylvester Hill, would, with each mortgage created, interrupt the elapsing of time for the purposes of the Limitations Act.

2. Whether the fact that Mr Hill continuously occupied a portion of the premises, despite the

presence of the respondents on various other portions, would prevent time from running for the purposes of the Limitations Act.

3. Whether the fact that some of the respondents' occupation of the premises was by way of straddling the boundary with adjoining premises would have affected their respective intentions to occupy the premises.

4. Whether this court should disturb findings of fact made by the learned Parish Court Judge.

[4] In order to better understand the analysis of these issues, it is necessary to first give an outline of the facts of the case.

The factual background

[5] Mr Perry's immediate predecessor in title, Mr Hill, was registered, on 16 May 1994, as the proprietor of the premises. It is apparent, however, that he was in occupation of the premises before that time. One of the respondents, Ms Carol Baugh testified that when she started building her house on a piece of vacant land in 1991, Mr Hill already occupied a house nearby. Mr Hill's house, she said, was behind hers.

[6] The various respondents testified that they identified vacant land and entered on the land between 1991 and 1998. The land was swampy and they reclaimed it. They

each constructed their respective dwellings on that land. The majority of the structures straddled the boundary between the premises and land adjoining the premises. There is no indication that any of them had any permission from the owner of the adjoining land to occupy that land. The respondents were, therefore, all squatters.

[7] Mr Hill, it appears from the evidence, occupied a house to the front of the premises, as it faces Jobs Lane, while the respondents lived more to the rear. Whereas his entrance to the premises was by way of Jobs Lane, the respondents accessed their holdings by way of the Spanish Town Bypass road. It appears that the frontage for their respective holdings is the Bypass road.

[8] Mr Hill removed some time before he sold the premises to Mr Perry, but had rented the section that he had occupied, to a Mr Russell. During the time of his occupation, Mr Hill mortgaged the premises several times. He did so in 1995, 2000, 2001, 2002 and 2006. All the mortgages were granted to the Bank of Nova Scotia Jamaica Limited.

[9] Mr Perry didn't become acquainted with the premises until about 2007. His acquaintance was only by way of passing by and seeing them. He started visiting the premises in or about 2013 because he was friendly with one of the respondents, Mr Novado Wilson. It was in 2014 that he contacted Mr Hill about acquiring the premises. Mr Hill sold the premises to Mr Perry in or about December 2014.

[10] Having purchased the premises, Mr Perry commissioned a surveyor's identification report which revealed that the respondents' structures had encroached on

the premises. Mr Perry entered into occupation of the portion of the premises that Mr Russell had occupied. Mr Perry also took over other portions that had been occupied by persons, whom he had convinced to leave.

[11] Mr Hill had issued notices to quit to the respondents in 2013. When they failed to remove from the premises, Mr Hill filed actions against them on 30 July 2013. Having purchased the premises, Mr Perry received permission to have his name added as a claimant to the actions. It is those actions on which the learned Parish Court Judge made her decision, which is the subject of this appeal.

The appeal

[12] Mr Dalling, on behalf of Mr Perry, argued the following grounds of appeal:

> "(i) The Learned Judge failed and/or refused to consider [Mr Perry's] position that no successive 12 years had run against the mortgagee.
>
> (ii) The Learned Judge failed and/or refused to consider [Mr Perry's] position that no successive 12 years had run against the owner nor his successor in title, as the owner was always in possession.
>
> (iii) The Learned Judge failed and/or refused to have sufficient or any regard for the evidence given by [Mr Perry] and which was supported by the Respondents, that Mr. Hill was at all times in possession of the property.
>
> (iv) The Learned Judge erred in failing to consider section 45 of the Limitation of Actions Act and its impact/relevance on the [respondents'] defence, in:
>
> a. Failing to consider that the evidence of [Mr Perry] that the Respondents did not occupy his land for the requisite 12 years but rather had encroached on it.

(v) The Learned Judge erred in law as findings of fact and/or law, is inconsistent with the evidence which was before the court."

The relevant law

[13] Three sections of the Limitations Act are relevant to this case. They are sections 3, 30 and 45. Section 45 will be set out in the assessment of ground iv. Section 3 bars an action by the paper title holder of land from removing a person who is in actual possession of the land for at least 12 years. It states:

> "No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

[14] Section 30 stipulates that at the end of the limitation period the rights and title of the holder of the paper title, is extinguished. It states:

> "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."

[15] These sections of the Limitations Act allow for persons who, without permission, occupy land (squat), to which other persons hold the paper title, to not only resist efforts to remove them from the land, but also to become the legal owners of the

property in place of the holder of the paper title. Unfortunately, there are numerous incidents of squatting in this country. The result of successful resistance by a squatter cannot be but regretted by right thinking people, as usually the holder of the paper title had secured it by much effort and sacrifice.

[16] In **Wills v Wills** [2003] UKPC 84, their Lordships in the Privy Council provided much guidance in this area of the law. Their Lordships explained that what a successful squatter obtains is a possessory title. They stated, at paragraph [17] of the judgment, that the term "adverse possession" is "a convenient shorthand for the sort of possession which can with the passage of years mature into a valid title". Their Lordships endorsed the statement used in **Ramnarace v Lutchman** [2001] 1 WLR 1651, which explained the term "adverse possession". In **Ramnarace v Lutchman**, Lord Millett said, at paragraph 10 of the judgment:

> "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…."

[17] A person who wishes to rely on sections 3 and 30 of the Limitations Act must show that they have been in open undisturbed possession of the land for the period of 12 years and that they intended to occupy land for their own use. Their Lordships, in **Wills v Wills**, went on to state, at paragraph [19], "that the Court should not be ready to infer possession from relatively trivial acts". It is in the context of that learning that the grounds of appeal shall be considered.

Ground (i) - the effect of the creation of the mortgages on the running of time

[18] Mr Dalling argued that each acquisition of a mortgage of the premises created an interest in favour of the mortgagee and reset the clock for the purposes of the acquisition of a possessory title. He argued that since no period of 12 years elapsed between the times that any of the mortgages were granted by Mr Hill, no possessory title could have been acquired by anyone. The essence of the argument is that each grant of mortgage authorised the mortgagee to enter the property. That entitlement meant time started afresh in respect of the rights of the respondents to secure a possessory title. Learned counsel relied on two cases in support of his submissions on this point they are **Dagor Limited v MSB Limited and National Commercial Bank Jamaica Limited** [2015] JMSC Civ 242 and **National Westminster Bank plc v Ashe (trustee in bankruptcy for Babai)** [2008] EWCA Civ 55.

[19] Mr Dalling is not on good ground with this submission. The Registration of Titles Act (ROTA) has been interpreted as stipulating that the registration of an interest in land does not affect any possessory title which may have accrued prior to that registration or may be accruing at that time. The relevant portions of section 70 of the ROTA state:

> "…the proprietor of…any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to…[recorded] incumbrances…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…

> Provided always that the land which shall be included in any certificate of title…**shall be deemed to be subject to…any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations**, and to any public rights of way…and to any unpaid rates…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…" (Emphasis supplied)

[20] Their Lordships in the Privy Council, in **Recreational Holdings 1 (Jamaica) Limited v Lazarus** [2016] UKPC 22 reiterated this principle, which had been established in **Chisholm v Hall** [1959] AC 719. In **Chisholm v Hall**, it was held that the registration of a transfer of land to a purchaser, for value, was subject to the possessory title that had been acquired by a third party. The principle would be equally applicable to the registration of a mortgage.

[21] Their Lordships in **Recreational Holdings** also referred with approval to a judgment of the Court of Appeal of Trinidad and Tobago where a possessory title was found to prevail over the rights of *bona fide* purchasers for value and their mortgagee. Their Lordships said, in part, at paragraph 29 of their judgment:

> "…In *Republic Bank Ltd v Seepersad*, S268 of 2014, the Court of Appeal of Trinidad and Tobago, by judgments delivered as recently as 27 April 2015, held that, were the respondent able to establish his claim of adverse possession of land since 1965, his as yet unregistered rights would prevail over the registered rights of bona fide purchasers for value of the land in 2011 and over those of their mortgagee…."

[22] It was entirely possible, therefore, for the respondents to acquire a possessory title despite Mr Hill granting mortgages of the property from time to time. It was for the

bank to investigate whether there was any possessory title or other interest being created which would have affected its interest.

[23] The **Dagor** case does not assist Mr Dalling's submissions. That case concerned the effect of the Limitations Act on the right of a mortgagee to secure payment of the mortgage debt. It therefore dealt with the rights of the mortgagee as opposed to those of the mortgagor. It did not concern a person who claimed a possessory title as against the mortgagor. The case of **National Westminster Bank** is also unhelpful. The interest of a mortgagee under the Torrens system is entirely different from that under the law, operative in England.

[24] The mere creation of a mortgage could not assist Mr Hill or his mortgagee in causing time to stop running against a person claiming a possessory title, any more than a purported sale of the title for the registered property would have done. This ground fails.

Grounds (ii) and (iii) - the effect of Mr Hill's concurrent and continuous occupation of the premises

[25] Mr Dalling argued, in respect of these grounds, that the fact that Mr Hill was in continuous occupation of the premises, either personally or by way of his tenant, Mr Russell, rendered a bar to time running against him for the purposes of the Limitations Act. Learned counsel submitted that as Mr Hill had not been dispossessed time could not begin to run for the purposes of the Limitations Act.

[26] Factual possession, learned counsel submitted, is indivisible. He relied on an extract from **Powell v McFarlane** (1977) 38 P & CR 452, in which Slade J opined that the owner of the paper title and a person intruding on the land "cannot both be in possession of the land at the same time". That statement, Mr Dalling pointed out, was expressly approved by their Lordships in **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30. He relied on the case of **Buckinghamshire County Council v Moran** [1989] 2 All ER 225, which also endorsed **Powell v McFarlane**, for these submissions.

[27] Again Mr Dalling is not on good ground with these submissions. Slade J pointed out in **Powell v McFarlane** that the question of what constitutes exclusive control depends on the circumstances of each case. He said, in part, at page 472:

> "…**The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances**, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. 'What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants': *West Bank Estates Ltd. v. Arthur*, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. **Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree.** It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession…." (Emphasis supplied)

[28] The clear evidence in this case is that each of the respondents was in occupation of portions of the premises for which Mr Hill was the registered proprietor, but of which he was not in possession. The premises were not very large, only about two-thirds of an acre. Yet Mr Hill did not exercise control over it all. He failed to have the respondents removed from the portions that they occupied. They had no permission from him to be in occupation, and they did so openly and without disturbance from him or anyone else. Mr Hill had been dispossessed of the respective portions of the premises, which were occupied by these respondents. This was a case where he was in exclusive occupation of a portion of the premises while each of the respondents were in exclusive possession of other portions.

[29] In both the cases of **Chisholm v Hall** and **Recreational Holdings**, the possessory titles were acquired despite the fact that the paper title holder was in possession of the rest of the land. There is no material distinction between those cases and this on this issue. Mr Dalling's attempt to distinguish those cases on the basis that the person claiming a possessory title was an adjoining owner cannot be supported. It is the possession and the accompanying intent which are important, not the qualifications that the occupier may otherwise have.

[30] These grounds fail.

Ground iv - the effect of the straddling of the boundary line by the respondents' buildings

[31] Mr Dalling's submission on this point was that because the respondents' buildings straddled the registered boundary, there was a failure to show an intention to possess the respective portions of the premises and therefore a possessory title could not be acquired. He submitted that the learned Parish Court Judge was in error to have ignored the provisions of section 45 of the Limitations Act for these purposes.

[32] Mr Dalling did eventually submit that, as the respondents were not owners of the adjoining land, they could not benefit from the provisions of section 45.

[33] Section 45 of the Limitations Act deals with boundaries. It stipulates that a boundary shall be established after acquiescence of its positon for seven years or more.

> "In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such lands, or the persons under whom such proprietors claim, for the space of seven years together, such reputed boundary shall for ever be deemed and adjudged to be the true boundary between such proprietors; and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding:
>
> Provided always, that nothing herein contained shall extend to preclude minors under the age of twenty-one years, or persons of unsound memory, from contesting and disputing at law the truth of any boundaries set up or established during the minority, or insanity of the said respective persons:
>
> Provided such persons shall contest and dispute the same within five years after such person under age shall

> attain the age of twenty-one years, or person of unsound memory shall become *compos mentis*."

[34] The learned Parish Court Judge, at page 88 of the record of appeal, said on this aspect of the case:

> "The court holds no view as it relates to Section 45 of the Limitations Act. The fact that [the respondents] have built property in breach of the law is a question for the parish council and not this court at this time."

[35] The evidence did not suggest that any of the respondents had erected any physical boundary around their respective holdings. One of the respondents did, however, testify to having a fence and gate to the front of her premises. At best, it would have been the boundary created by each of the respondents' buildings that would have established a "boundary" for the purposes of section 45 of the Limitations Act.

[36] The limitation period of seven years, stipulated by section 45 of the Limitations Act, was, however, not relied upon at all by the respondents. They relied on the 12 year limitation period set out in section 3 of the Limitations Act.

[37] The absence of a physical boundary fence cannot affect the issue of the intention to occupy and possess land. Each of the respondents spoke to their intention to hold the land that they occupied. Each of them testified to reclaiming the swampy area and building their respective structures on the reclaimed land. They were heedless as to who, if anyone, was the holder of a paper title. The evidence of each of them, if accepted, would be sufficient to ground a finding in favour of a possessory title.

[38] The learned Parish Court Judge was correct to ignore the provisions of section 45 of the Limitations Act. Accordingly, this ground fails.

Ground v – the findings of fact

[39] Part of Mr Dalling's submission on this point is that the respondents did not give any evidence as to how long they were in occupation of the portion of the premises that they occupied. On Mr Dalling's submissions, whereas the respondents each said that they entered on the adjoining land in the 1990's they did not say when they extended that occupation into the premises. The learned Parish Court Judge, he argued, should not have made the finding of fact that the respondents were each in physical possession for in excess of 12 years.

[40] Miss Thomas, for the respondents, pointed out that on questions of fact, as arose in this case, this court has consistently held that it will not lightly disturb the findings of the tribunal in the court below. She cited **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 305 in support of her submission, in this regard.

[41] Miss Thomas is correct in this regard. In this court, findings of fact in the court below, are not disturbed unless they were plainly made in error. This has been stated in a number of cases including **Watt or Thomas v Thomas** [1947] AC 484; [1947] 1 All ER 582, **Industrial Chemical Co (Ja) Limited v Owen Ellis** (1986) 23 JLR 35 and **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21.

[42] The learned Parish Court Judge heard evidence as to the entry of each respondent on the land. Each said their respective entry was in the 1990's. There was evidence by 2000 all construction had been completed. Ms Sophia Campbell is recorded at page 62 of the record of appeal as saying that "[s]ome of us living there early 90's, some late 90's. Them start house and finish it before 2000. No addition took place in 2000 only Mr. Wilson who add on to the side no one else". Mr Wilson also testified that his last construction, which was by way of an addition to the rear of his building, was over 10 years before the trial. In his words, "[l]onger than [10 years] long time" (page 53 of the record).

[43] The learned Parish Court Judge was entitled to rely on that, and similar evidence, to accept the respondents' cases that they had each been in possession of their respective portions of the premises for in excess of 12 years. Mr Perry was unable to refute that testimony himself and called no evidence to attempt to do so.

[44] The learned Parish Court Judge made two significant findings of fact. They are both set out at page 88 of the record of appeal. The first states:

> "Therefore the court finds on a balance of probabilities that the [respondents] would have met and in fact exceeded the requirement of twelve years."

The second states:

> "All the [respondents] have satisfied the court on a balance of probabilities that they were in physical possession of the property in excess of twelve years and that they had the required intention in law."

[45] The learned Parish Court Judge's finding that the respondents were each in possession of their respective portions of the premises for in excess of 12 years cannot be faulted.

[46] This ground also fails.

Conclusion

[47] The learned Parish Court Judge must be commended for a pithy judgment that addressed all the salient issues in the case. She found that time began to run against the holder of the paper title from the date of registration in 1994. She was in error in that regard as that was not the date of first registration but instead the date on which Mr Hill acquired his paper title by way of an instrument of transfer. The error is, however, not material for these purposes.

[48] The calculation done by the learned Parish Court Judge showed that by the time an attempt was made by Messrs Hill and Perry, in 2013, to recover possession of the respective portions of the premises from each of the respondents, they had already been in possession of those portions for in excess of 12 years. She went on to find that each of the respondents had the necessary intention to possess the portion that they occupied and therefore acquired a possessory title for all the purposes of sections 3 and 30 of the Limitations Act.

[49] Her reasoning cannot be faulted and the appeal must be dismissed.

[50] The result is not the happiest, bearing in mind that Mr Perry has purchased the premises for a not insignificant sum. It is perhaps time for the legislature to consider the matter.

F WILLIAMS JA

[51] I have read in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA

[52] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion.

BROOKS JA

ORDER

(a) The appeal is dismissed.

(b) The judgment and order of the learned Parish Court Judge handed down on 16 December 2016 is affirmed.

(c) Costs of the appeal to the respondents to be agreed or taxed.