JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' COURT CIVIL APPEAL NO: 18/2004

BEFORE: **THE HON. MR. JUSTICE HARRISON, J.A.**
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (AG.)

BETWEEN	**LORETTA BLAKE**	**APPELLANT**
AND	**NOEL PALMER**	**RESPONDENT**

Delano Harrison, Q.C. instructed by Robinson, Phillips & Whitehorne for the appellant

Mrs. J. Samuels-Brown instructed by Ms.Yvonne D. Ridguard for the respondent

21st, 22nd, 23rd, June 2005 & 28th, July 2006

HARRISON, P:

This is an appeal from the judgment of Her Honour Miss Andrea Collins, Resident Magistrate for the parish of Portland on the 1st day of November 2002 entering judgment for the respondent in the sum of $10,000.00 with costs.

We heard the arguments of counsel in this appeal and on 23rd June 2005 we dismissed the appeal and ordered that costs of $15,000.00 be paid to the respondent. These are our reasons in writing.

The relevant facts are that one Eric Blake, the husband of the appellant was the owner of lot 9 registered at Volume 1327 Folio 466 (formerly Vol. 717 Fol. 45) and lot 10, registered at Volume 464 Folio 109 at Boundbrook in the parish of Portland, both of which lots he occupied as his residence without the benefit of a survey. He erected a boundary of "growing stakes" separating the said lots. The stakes were incorrectly placed within lot 9.

The appellant, who had a visiting relationship with Blake, got married to him in 1982 and commenced living with him on the said lots.

On 27th April 1981 Blake sold lot 9 to Elton Powell who on 8th March 1985 sold it to Arthur Hylton and his wife, who both on 21st November 1988 sold it to Noel Palmer, the respondent. The latter saw a wire fence with "growing stakes" as the boundary fence put up by Hylton in 1985.

On 15th June 1989 at the request of the respondent, Mr. Frank G. Nembhard, a commissioned land surveyor, did a boundary identification in respect of lots 9 and 10 and reported that the boundaries were not in conformity with the respective plans. He found that the wire fence boundary of lot 10 (Volume 464 Folio 109) encroached onto lot 9 (Volume 1327 Folio 466) (Exhibit 8).

On about 18th June 1989 the respondent spoke to Mr. Blake and told him that the said boundary was incorrect. The respondent said in evidence:

> "Mr. Blake says he is unable to get the place surveyed because of his illness and I said I am not satisfied with the fence and he said he'll see what he can do."

The respondent thereafter went to the United States of America. In his absence Mr. Blake died on 18th October 1990. The respondent returned to Jamaica and on 23rd January 1996 caused Mr. Nembhard to do a second boundary identification at which the appellant was present. Mr. Nembhard found "the same encroachment as in 1989" (exhibit IV). The learned Resident Magistrate found that the appellant said she was going to get another survey done.

On 20th July 2001 at the request of the respondent Mr. Lemonious, a commissioned land surveyor, did another survey and report. The appellant was present. This confirmed the former report that the boundary between Lots 9 and 10 was incorrect, as Mr. Nembhard had earlier found.

She said in examination in chief:

> "I stand and watch the surveyor survey the land."

The appellant thereafter went to Lemonious' office and got him to return to the land to do the boundary identification.

On 13th September 2001 the respondent filed a plaint against the appellant claiming damages for trespass, in that "the Defendant is encroaching on approximately 18.71 ft of the plaintiff's land along the north-western boundary." The learned Resident Magistrate entered judgment for the respondent.

The grounds of appeal were:

> "1. THAT the verdict of the Learned Trial Judge in finding that the Defendant/Appellant

committed an act of trespass was unreasonable and cannot be supported by either the law or evidence in relation to the case.

2. THAT the Learned Resident Magistrate erred in Law when she found that time started to run against the land in the possession of the Plaintiff/Respondent from 1985 but that she did not find that the statutory period of seven years under the Statue (sic) of Limitation had been established.

3. THAT the Learned Trial Judge erred in law when she found that time started to run against the land in the possession of the Plaintiff/Respondent in 1985 and not 1981 as was clearly established by the evidence.

4. THAT the Learned Trial Judge erred when having found that time started to run in 1985 failed to appreciate that the Plaintiff/Respondent Laches caused the Statutory Period to expire in 1992, whilst the Plaintiff/Respondent was abroad and who by his own admission took no step in protecting any of his rights until he returned to Jamaica in or about 1996."

(4) (sic) Additional ground:

"4 **THAT** the learned Resident Magistrate erred in law in her finding that the Appellant had committed an act of trespass on the land, the subject of the Respondent's suit, for, it is submitted, a trespass to land may only be committed against a party in possession of that land, whereas, in the case at Bar, the area of land in dispute had been in the lawful possession of Appellant's husband for some considerable period before their marriage **in 1982**: at all events, for several years before Respondent first came into possession of the land in issue **in 1998**. (See **Clerk and**

> **Lindsell on Torts** – 14th ed. – page 758: 'the Nature of Trespass'; **Phillips v. Bisnott** [1965] 9 J.L.R. 116, 118F-H)."

The respondent filed a counter-notice of appeal. It reads:

> "**TAKE NOTICE** that the Respondent (being the Plaintiff in the Court below) will contend that the decision of the Learned Resident Magistrate should be affirmed on the following additional ground:
>
> > The evidence revealed that the Appellant occupied the premises up to 1990 by marital licence and was therefore not in possession of the land. Accordingly, she could not establish possession or a possessory title to the said land. In the circumstances, the Learned Resident Magistrate correctly held that the appellant was a trespasser to the disputed portion of the premises."

At the trial the appellant had filed a notice of statutory defence on 26th April 2002. At the trial which begun on 29th August 2002 the appellant's attorney-at-law who repeated the reliance on section 45 of the Limitation of Actions Act in stating his defence to the claim, said:

> "In accordance with section 45 of the Limitation of Actions Act. Boundary has been accepted as the boundary for more than seven (7) years and any right that the Plaintiff had over those lands would have been extinguished by the Limitation of Action (sic) Act."

Mr. Harrison, Q.C., for the appellant argued that under the provisions of section 45 of the Limitation of Actions Act ("the Act"), and in reliance on the finding of the learned Resident Magistrate time had begun in 1985 to run against the respondent "when there was acquiescence in the existing boundary (created)

by the Hyltons". The respondent sat on his rights from 1989 when he failed to have the boundary re-set in accordance with the findings of the surveyor Nembhard. The statutory period of seven years would therefore have been satisfied in 1992 making "such ... boundary ... for ever ... deemed and adjudged to be the true boundary ..." The respondent has not proven that the said period had not run without stop against his claim or that of his predecessors in title. Furthermore, no trespass had been committed by the appellant because the area of land in dispute had been in possession of the appellant's husband before 1982 and thereafter before "respondent first came into possession of the land in issue in 1988."

Mrs. Samuels-Brown for the respondent argued that from 1981 the appellant's husband in possession of lot 10 encroached on lot 9, without an intention to possess it, and was thereby a trespasser. No adverse possession arose because there was no intention to possess, as the learned Resident Magistrate found. Neither was there for a period of seven years, any acquiescence in or submission to the boundary claimed by the appellant to cause the respondent to be bound by it as "the true boundary" in accordance with the provisions of section 45 of the Act. The appellant occupied the land by marital licence only, no possession in the land could therefore arise. The learned Resident Magistrate correctly found time could only begin from 1985, when Hylton became aware of growing stakes. The learned Resident Magistrate correctly held that the appellant was a trespasser on the disputed area of land.

Possession of land signifies physical control of the land with an intention to possess the said land. Any unlawful intrusion onto the land without the consent of the person in possession, even to a small degree amounts to an act of trespass to the land.

A dispute which arises in respect of the correctness of a boundary between adjoining owners does not give rise to an issue of possession of land. This is so, because there is no intention to possess the land, it arises from an uncertainty as to where the true boundary lies. An act of trespass may also arise incidentally.

Section 97 of the Judicature (Resident Magistrates) Act was specifically enacted to deal with such disputes and permitted a Resident Magistrate to refer the matter to a commissioned land surveyor, without the consent of the parties, in order that he would do a survey and lay down the boundary line and file his report. Section 97 reads:

> "**97.** – (1) Whenever a dispute shall arise between the occupiers of adjoining lands or hereditaments respecting the boundary line between the same, either of the parties may lodge a plaint in the Court, and thereupon a summons shall issue to the other party; and if the defendant shall not, on a day to be named in such summons, show cause to the contrary, then on proof of the respective occupation of the plaintiff and defendant, and of the dispute, and of the service of the summons, if the defendant shall not appear thereto, the Magistrate may hear and determine the matter in dispute.
>
> (2) The jurisdiction of the Magistrate shall not be ousted by reason of the fact that either party shall at the hearing raise a question of title to the

> land involved in the dispute and in the case of title to the lands being involved the Magistrate shall take all the evidence offered; and shall have power if he thinks desirable and without the consent of the parties to refer the matter to a surveyor or surveyors to make such survey or surveys and lay down such boundary line as the evidence and the law shall justify and in his final judgment shall lay down and determine the boundary in settlement of such dispute." (Emphasis added)

(Section 101 also authorises a reference to surveyor in boundary disputes albeit, usually with the consent of the parties).

In ***Cox v. Shields*** [1909] Stephen's Report 352, with the consent of the parties, the Court made an order of reference to a surveyor who surveyed the land and made his report to the Court. The defendant objected to the confirmation of the report on the ground that he occupied the land for 19 years and so acquired title under the Statute of Limitation. The Court of Appeal held that no evidence of defendant's possession was admissible after the report was filed.

Disputes involving boundaries of land arise frequently in Jamaica because of the practice of persons taking possession of land, both as beneficiaries or as purchasers, without a prior survey of the said land and at times without a registered title. The statutory procedure contained in section 97, supra, is therefore peculiar to such situations concerned with boundary disputes.

Delay, however, on the part of a party to a boundary dispute may, in certain circumstances, affect his ultimate right. Section 45 of the Limitation of Actions Act reads:

> "**45.** 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; ..." (emphasis added)

Where therefore a party has "acquiesced in or submitted to" the positioning, of a particular boundary line for "the space of seven years he shall for ever be deemed" to have accepted it and liable to have such boundary adjudged as the true boundary.

The issue in this case is whether or not the respondent and his predecessors in title had accepted the boundary as it existed when the respondent bought lot 9 in 1988, for a sufficiently long enough period to make it in law "the true boundary," in accordance with section 45 of the Act.

In the instant case time began to run in favour of the owner of lot 10, in respect of the boundary between it and lot 9, from 1985, when a permanent boundary was sought to be established by the then owner Hylton. The learned Resident Magistrate found, at page 59 of the record:

> "I agree with the Plaintiff's contention that time began to run against the Plaintiff's cause of action in 1985 - because, whilst it is true as counsel for the defence suggests, that there is no evidence to the contrary that Mr. Powell accepted the growing stake fence as the boundary between both lots, it is also true that there is no evidence that he acquiesced in the boundary as it existed. I find that Mr. Hylton's act of running wire fence along the existing boundary amounted to acquiescence in the boundary as it

> existed. It is the undisputed evidence of the defence that in 1985 Mr. Hylton ran a wire fence along the existing boundary, which I find consisted at the time of growing stake rather than burr wire as the Defendant said in her evidence." (Emphasis added)

This finding of the learned Resident Magistrate is correct. There was no evidence that prior to 1985 there was any fence, either pointed out to the occupier of lot 9, or accepted by such latter occupier as the boundary between the said lots. The unresolved conflict in the appellant's case was highlighted in the finding of the said learned Resident Magistrate. She said, at page 57 of the record:

> "The Plaintiff's Attorney is asking the Court to say that that which was set up as the defence namely: that there was a growing stake fence in place since the 1970's and that Mr. Blake parted with possession of lot 9 in 1981 and consequently time would begin to run against the Plaintiff's action in 1981 must be seen in light of the Defendant's vive voce evidence that a burr wire fence formed the boundary and the fact that the defence has not been amended to accord with the evidence. She says further that a permanent boundary was established in 1985 when Mr. Hylton ran the wire fence along the boundary."

In order to establish the claim to the "true boundary" under section 45 of the Act, the appellant would need to show that time ran without interruption for seven years from 1985. Any interruption or acknowledgment by the occupier of lot 10 of the right of the respondent or doubt expressed by the occupier of lot 10 as to the correct boundary would cause time to cease to run. Time would have to start to run afresh thereafter.

On the evidence in the court below, the respondent bought lot 9 in 1988. Time would have run, in respect of the boundary, for three years from 1985, in accordance with the provisions of section 45 of the Limitation of Actions Act.

In 1989 the respondent received a report from the land surveyor that the boundary between the said lots was incorrect. The respondent spoke to Mr. Blake, the owner of lot 10 and the husband of the appellant and told him that the said boundary was incorrect. The learned Resident Magistrate in her reasons, at page 58, referring to the respondent said:

> "He said he spoke to Mr. Blake in 1989 after the survey was done. Mr. Blake said he was unable to get the place surveyed because of his illness and he the Plaintiff said he was not satisfied with the fence whereupon Mr. Blake said he would see what he could do. He said thereafter he left the jurisdiction."

Of this evidence the learned Resident Magistrate found the respondent "... to be a forthright and particularly honest witness ... who spoke the truth ..."

The respondent cannot be said to have acquiesced in the boundary and "the dispute", strictly, arose not before 1989.

The statement attributed to the deceased Mr. Blake, was a declaration against his proprietary interest and therefore admissible. He was thereby making no claim to the correctness of the said boundary and expressing an intention to do something about it. His disclaimer as to its correctness would cause any time that had begun to run since 1985 to cease to run in 1989. In any event it is a declaration by the deceased Blake that he was laying no claim to the correctness of the boundary, nor to that area of land part of lot 9.

Blake died in 1990. It was reasonable to assume that up to the time of his death Blake did not contradict the fact of the incorrect boundary line.

When in 1996, on his return to Jamaica, the respondent had another survey done by Mr. Nembhard again identifying the incorrect boundary, he spoke to the appellant claiming that the boundary was incorrect. The finding by the learned Resident Magistrate that the appellant said that she would get her own surveyor is evidence that the appellant was not challenging the fact of the incorrect boundary, and neither was the appellant asserting any definitive claim. Again time had ceased to run in 1996.

In 2001, after a survey by Mr. Lemonious he confirmed the two previous surveys by Mr. Nembhard. The appellant, having been told this went to Mr. Lemonious' office.

The respondent filed his suit against the appellant in 2001. No time had then run sufficiently to satisfy the statutory provisions of section 45 of the Act, to create any "true boundary" to the prejudice of the respondent.

There was no uninterrupted period of seven years from 1985, nor from 1990, nor from 1996 up to 2001 when the current suit was field.

The respondent, since his purchase of lot 9 in 1988, consistently asserted his title to and possession of the land contained in his registered title registered at Volume 1327 Folio 466.

In ***Powell v McFarlane*** [1977] 38 P & CR 452, the plaintiff failed to establish a claim to 3 acres of land by way of a possessory title acquired by adverse possession. Slade, J inter alia at page 470, said:

> "In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession ..."

and in respect of the true owner's acts to assert his possession and negative time running to support adverse possession, continuing he said:

> "... the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession."

In the instant case the respondent had the legal title to lot 9 at Volume 1327 Folio 466 and was in possession. Accordingly, by encroaching onto lot 9 and seeking to claim possession thereof, even after successive surveys identifying the correct boundary, the appellant committed a trespass to the respondent's land lot 9.

In any event, the suit was defended by the appellant, not in support of a claim to an area of land by adverse possession, but purely as a boundary dispute with the provisions of section 45.

For all the above reasons we came to the decision stated earlier.