JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO. 10/2008

BEFORE: **THE HON. MRS. JUSTICE HARRIS, J.A.**
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN:	**THOMAS BROADIE**	**1ST APPELLANT**
AND	**DONALD BROADIE**	**2ND APPELLANT**
AND	**DERRICK ALLEN**	**RESPONDENT**

Mrs. Janet Taylor, instructed by Taylor, Deacon & James for the Appellants.

Ewan Thompson for the Respondent

24th November, 2008 and 3rd April, 2009.

HARRIS, J.A.

1. This is an appeal from a decision of His Honour Mr. Stanley Clarke in which he ordered that the appellants deliver up possession of land at East Road, Black River to the respondent on or before June 30, 2007.

2. The respondent is the registered proprietor of three acres ten perches of land at East Road, Black River registered at Volume 521 Folio 16 of the Register

Book of Titles. This land he has owned since 1948. His father Henry Allen lived on adjoining lands. The 1st appellant is the father of the 2nd appellant. They have been in occupation on a part of the respondent's land for a number of years.

3. It was the respondent's evidence that he migrated to England in 1956 and left the land in his father's care. His father died in 1981. He returned on visits to Jamaica on several occasions. On each occasion he visited the land. He spoke to the 1st appellant on two occasions requesting him to vacate the property. This he did in 1986 and in 1992. In 1992 he told the 1st appellant to vacate the land as he needed to build on it. In 1994 he returned in order to take up permanent residence here, at which time he told him that he should either purchase the land or leave.

4. Following discussions between the 1st appellant and himself in 1994, that portion of the land which was occupied by the appellants was surveyed. Thereafter, the 1st appellant and the respondent attended on an attorney-at law to whom the sum of five thousand dollars was paid by the 1st appellant. The object of the visit was for the sale of the surveyed portion of the land to the 1st appellant. The respondent said that a sale price of one hundred and fifty thousand dollars was agreed but a written contract for the sale of the land was not prepared.

5. The evidence of the appellants essentially emanated from the 1st appellant. Their evidence was that the 1st appellant cleared off a quarter acre of the land which he had occupied continuously and undisturbed, for fifty years and had built a house thereon. The area of which he is in occupation was enclosed by his fencing it off. He gave the 2nd appellant a spot on which he, the 2nd appellant has also built a house. No permission to occupy the land was given to him by the respondent's father. He arranged for the land to be surveyed and he has paid taxes for it. He denied that there was an agreement for the sale of the land to him and asserted that the object of the payment of the five thousand dollars to the attorney-at-law was for the purpose of his obtaining a title for that portion of the land contained in the survey plan.

6. The appellants remained on the land. A Notice to Quit was served on them on January 16, 2001. On June 12, 2001 the respondent commenced legal proceedings against them for recovery of possession of the land. They raised the defence of the Limitation of Actions Act.

7. The following Grounds of Appeal were filed:-

1. "The verdict is unreasonable and cannot be supported by the evidence

2. That there is no evidence that when the Plaintiff/Respondent left for England in 1956, his father Henry Allen whose property adjoined that of the Plaintiff/Respondent was left to act as his agent.

3. That there is absolutely no evidence that the Plaintiff's/Respondent's father Mr. Henry Allen gave permission for the Defendants/Appellants to occupy the land.

4. There is no evidence that the Defendants/ Appellants occupation of the land was a service occupancy attached to terms of employment with the Plaintiff's/Respondent's father Mr. Henry Allen."

5. That at the end of the Plaintiff/Respondent case they had not negated the doctrine of adverse possession, that is, the Plaintiff/ Respondent did not show that the Defendants/ Appellants was not in possession for twelve (12) years.

7. It is trite law that there would be 'dispossession' of the paper owner in any case where a squatter assumes possession in the ordinary sense of the word and as such the paper owner would not therefore be in possession if the squatter was in possession. See ***JA Pye (Oxford) Ltd and another v Graham and another*** [2002] 3 All ER 865, para. H.

8. It is also trite law that even if the Defendants/ Appellants enter into discussion with the Plaintiff/Respondent for the sale of land after laying claim to the said land, adverse possession has not been defeated. See Privy Council Appeal No. 64 of 2005 ***Alaric Astor Pottinger v Traute Raffone,*** *decided April 17, 2007."*

8. It was submitted by Mrs. Taylor that there is no evidence to show that the respondent's father had given permission to the 1st appellant to occupy the land nor was there evidence that the 1st appellant was permitted to use the land

by reason of his employment to the respondent's father. She further argued that the father had not prevented him from erecting the building on the land nor had he prevented him from paying taxes on it.

9. It was her further submission that the claim seeking recovery of possession of the land was not brought until after the expiration of twelve years. Time, she argued, begun to run against the respondent and his father in 1958 when the appellants first entered the land and they had continued in possession of it to the exclusion of the respondent and his father. She further argued that the appellants having acquired adverse possession of the land by their entry on it and occupation of it for over fifty years shows their intention of taking possession of it.

10. Mr. Thompson argued that the evidence revealed that the respondent's father acted as his agent and that there was also evidential material before the Learned Resident Magistrate on which he could have found on the balance of probabilities that the appellants were on the land as a result of a service occupancy arrangement by virtue of the 1st appellant's employment with the respondent's father.

11. He also argued that for the purpose of adverse possession , time could only begin to run where it is shown that the respondent had been dispossessed or discontinued possession of the land and that there is no evidence that the

respondent had been dispossessed of or had discontinued his possession of the land up to June 2001 when this action commenced.

The issues arising are:

(a) Whether there was evidence to prove the existence of an agency between the respondent and his father with respect to the land, during the father's lifetime.

(b) Whether the 1st appellant was in possession of the land with the consent of the respondent's father by reason of his employment to him.

(c) Whether the appellants had been in continuous undisturbed possession of the land for any period in excess of 12 years.

(d) Whether there are any acts on the part of the appellants establishing that they had dispossessed the respondent of the property for the statutory period within the meaning of the Limitation of Actions Act.

12. The Learned Resident Magistrate found that the respondent's father, Henry, had acted as his agent after he migrated to England and that the appellants were on the property with Henry's consent. Is there evidence demonstrating the existence of an agency between the respondent and his father, Henry during the period the 1st appellant went into occupation of the land and up until the time of Henry's death?

13. The evidence from the respondent discloses that when he left Jamaica in 1958 he gave his father supervisory powers over the land. His father cultivated sugar cane on the land. This was not denied by the 1st appellant, as in cross

examination, he also admitted that Henry did not only plant sugar cane on a part of the land but also raised a few heads of cattle on it. It was further admitted by him that when he cleared the land to build on it, Henry "was in charge of the whole land". The foregoing provided ample evidentiary material on which the Learned Resident Magistrate could have found and did find that, during his life time, Henry acted as the respondent's agent for the land. It is obvious that Henry was in charge of the land after the respondent left Jamaica.

14. There is no evidence that any taxes were paid by the 1st appellant during Henry's life time. A tax receipt was tendered into evidence showing the payment of taxes by the 1st appellant for the quarter acre of land for the period 2001 to 2002. Interestingly, this payment was made on February 2, 2001. The obvious inference is that it was done as a consequence of a Notice to Quit dated January 16, 2001 which was sent to the appellants by registered mail on the same date.

15. A further matter to be considered is whether the appellants had been in possession of the land as a result of the 1st appellant's employment to Henry and had been there with his full knowledge and approval. Henry used the land to farm and to raise a few heads of cattle. During that time the 1st appellant cleared a part of the land and built a house on it. The 1st appellant stated that he is a fisherman and admitted in cross examination that he had worked periodically for Henry. The learned Resident Magistrate found that he had

worked for Henry full time who had allowed the appellants to be in possession of the land, and to remain on it up until his death.

16. I will now direct my attention to the question as to whether the appellants' possession of the land shows that they have acquired a possessory title. It is a settled principle of law that a claimant is barred from commencing an action for recovery of possession of land more than twelve years after his right of action has accrued. The statutory provisions governing the limitation period for the recovery of possession of land are enshrined in the Limitation of Actions Act. The relevant provisions of the Act for the purpose of this appeal are sections 3, 4 (a) and 30. They read as follows:

Section 3:-

> "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.

Section 4:-

> The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say—
>
> (a) When the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or

> interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received.

Section 30:-

> 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."

17. For the purposes of sections 3 and 4 of the Act, it must be shown that an owner had been dispossessed of his land or had discontinued possession of it and on the occurrence of either event, on the expiration of twelve years, time had ran against the true owner from the time the land was occupied .

18. Over the years there have been a line of authorities which shows that to satisfy the requirements of the Act, a squatter had to prove that he had acquired adverse possession of land by demonstrating that he had taken possession of the land with the intention to possess it, and thereby to exclude everyone including the true owner and his (the squatter's) use of the land is inconsistent with its use by the owner. See **Powell v McFarlane** (1977) 38 P & CR 452; **Leigh v. Jack** (1879) 5 Ex. D. 264; **Williams Brothers Direct Supply Stores Ltd. v**

Raftery [1957] 3 All E R 593; [1958] 1 Q.B. 159; **Archer Et. Ux. v. Georgiana Holdings Ltd.** (1974) 21 WIR 431; **George Wimpey & Sons v. Sohn** [1967] Ch. 487.

19. Lord Browne-Wilkinson in the case of **JA Pye (Oxford) Ltd. v. Graham** [2003] 1 A.C. 419, acknowledged that the use of the term 'adverse possession' within the context of the Act has caused much perplexity over the years. It was his view that as far as practicable, the use of the term should be avoided, as the critical question is whether a defendant squatter, without the consent of the true owner, had dispossessed the owner by entering into ordinary possession of the land for the period prescribed by the Act. He made it clear that a squatter's assuming or being in continuous possession of land with the true owner's permission does not amount to dispossession and at page 435, he went on to say "beyond that, as Slade J. said, the words possess and dispossess are to be given their ordinary meaning".

20. It was his view that two elements are required for effective possession and in considering the meaning of possession as used in the ordinary sense of the word, at page 436, he said:

> "In Powell's case (1977) 38 P & CR 452 at 470-471 Slade J said:
>
> > (1) 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. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."

Continuing, he stated that there are two requisite factors in establishing legal possession, namely:

> "(1) a sufficient degree of physical custody and control (factual possession);
>
> (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess'). What is crucial is to understand that **without the requisite intention, in law there can be no possession**." (Emphasis mine).

21. He went on to consider the question of factual possession and cited with approval a statement of the law on possession in facto, as propounded by Slade J., in the case of **Powell v McFarlane** (supra).

At page 436 he said:

> "In Powell's case Slade J said at page 470-471:
>
> > Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that

> land without his consent cannot both be in possession of the land at the same time. 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... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so"

22. He then embarked on a review of the question of intention to possess. At pages 437 and 438 he said:

> "There are cases in which judges have apparently treated it as being necessary that the squatter should have an intention to own the land in order to be in possession. In **Littledale v. Liverpool College** [1900] 1 Ch. 19, 24, Sir Nathaniel Lindley MR referred to the plaintiff relying on "acts of ownership": see also **George Wimpey & Co Ltd. v Sohn** [1967] Ch 487 at 510. Even Slade J in **Powell**, at pp 476 and 478, referred to the necessary intention as being an "intention to own". In the **Moran** case (1988) 86 LGR 472, 479 the trial judge (Hoffmann J) had pointed out that what is required is "not an intention to own or even an intention to acquire ownership but an intention to possess". The Court of Appeal in that case [1990] Ch 623, 643 adopted this proposition which in my judgment is manifestly correct. Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that at any given moment, the only relevant question

> is whether the person in factual possession also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title."

23. Reference was made by him to a pronouncement by Lord Bramwell in **Leigh v. Jack** (supra) in which Lord Bramwell stated that in order to defeat a title by dispossessing the true owner, acts must be done which are inconsistent with the true owner's enjoyment of the land for the purposes for which the owner intended to use it. Acts of user, Lord Bramwell declared, were insufficient to vest a possessory title in a user. This Lord Browne Wilkinson regarded as heretical and wrong as this implies that the sufficiency of possession is dependent on the intention of the true owner and not on the intention of the squatter and at page 438 he said:

> "The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's (dissent) led directly to the heresy in the **Wallis's Cayton Bay** line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory reversal but in the **Moran** case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special

> purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."

24. In **Wills v Wills** PCA 50/2002 delivered on December 1 2003, Lord Walker of Gestingthorpe, in delivering the speech of the Privy Council, cited the foregoing extract and thereafter, at paragraph 21 said:

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

25. The matter of a squatter's willingness to purchase disputed land was also considered by Lord Browne-Wilkinson. He regarded such an act as offering cogent evidence of a squatter's intention to own the land. In citing with approval Lord Denning's decision in **Ocean Estates Ltd. v. Pinder** [1969] 2 A.C 19 & 24 that an admission by a squatter to pay for the land is not an

indication of an intention on his part of his desire to possess the land, at page 439 he said:

> "Once it is accepted that the necessary intent is an intent to possess not to own and an intention to exclude the paper owner only so far as is reasonably possible, there is no inconsistency between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession. An admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime."

I adopt the statement of law as propounded by Lord Browne-Wilkinson.

26. The case of **Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP** [1975] QB 94 was cited by Mr. Thompson in support of his contention that the respondent had not been dispossessed of the land by the appellants. In referring to that case, Lord Browne-Wilkinson was of the view that it was wrongly decided, as, the case appears to hold that the use of the land by a squatter was insufficient to amount to possession in the ordinary sense of the word unless the squatter's use of the land was incompatible with the true owner's intended use of the land.

27. By operation of law, the occupation of land by a squatter amounts to possession. Mrs. Taylor contended that if a squatter is in possession, the true owner cannot be in possession and that the squatter would be entitled to possession. It is perfectly true that a squatter and an owner cannot be in

possession simultaneously but this does not mean that a squatter is entitled to possession of the land merely by his occupation of it. Possession, within the context of the Act, carries with it a distinctive and restrictive meaning. There can be no effective possession unless there is factual possession and an intention to possess. The occupation of land by a squatter which ordinarily constitutes possession does not necessarily amount to possession adverse to the true owner's interest in the land unless or until it is proved that he had dispossessed the true owner by exhibiting an intention to possess it. In fulfilling the possessory requirement under the Act, as shown in **JA Pye (Oxford) Ltd. v. Graham** (supra), there must be evidence disclosing that a squatter had enjoyed peaceful, undisturbed possession of disputed land for the requisite period, had the intention to possess it and utilized it in the manner in which the true owner would be expected to use it.

28. Therefore, to acquire possession of property by adverse means there must be evidence not only to show that the squatter had done so by occupying the land for the period prescribed by the statute but also that he had done so with the intention of holding it "in one's own name and on one's behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of law will allow" per Slade J, in **Powell v. McFarlane** (supra). It follows therefore, that possession can only be assigned to a squatter where it is

demonstrably clear that he has legal possession of the disputed property coupled with the intention to possess it.

29. An important feature in deciding whether the requisite statutory period has expired before the right of action by a true owner has accrued, is that of the running of time against the owner. The initial date on which time begins to run is paramount in considering whether a squatter has been in possession of the land for the period prescribed by the Act.

30. As I have earlier stated, the appellants were in occupation of the land between 1958 and 1981 with Henry's consent. It follows therefore that the respondent would have retained possession up to the time of Henry's death in 1981. As a consequence, it will only be necessary for me to confine my deliberations to the matter of the running of time after 1981 and up to 2001 when the respondent commenced the action for recovery of possession of the property. In dealing with the issue of the running of time, the learned Resident Magistrate stated that between 1981 and 2001 the respondent sought re-entry on the land. He then went on to conclude that: "There is no appreciable time between that date (1981) and the time of the suit where a period of adverse possession could justifiable begin to run". These findings in my view are erroneous. On the evidence, it could not be said that there had been an effective re-entry by the respondent. The appellants had been occupying the land for more than twelve years. Their occupation of the land and the question

of their intention to possess it are inextricably bound together. The learned Resident Magistrate ought to have considered whether there were any acts on the part of the appellants which could have shown the requisite animus to exercise exclusive control over the land.

31. The paper title is vested in the respondent. The appellants are in possession of the land, having remained on it after 1981. Accordingly, the decisive question is whether there is evidence on which it could be found that by 2001 when the respondent commenced his action for recovery of possession, the appellants could be said to have dispossessed him of that part of the property which they have occupied. Did the appellants enjoy an uninterrupted and undisturbed possession of the property after 1981 and up to 2001 with an intention to possess the land? Since there is no evidence of the precise date of Henry's death in 1981, in my view, it would be reasonable to reckon the running of time as beginning in January 1, 1982.

32. The respondent said that on a visit to Jamaica in 1986 he went to the land and told the 1st appellant to vacate it. On a further visit to the land in 1992 he informed the appellants of his desire to build on it. It was his evidence that he intended to return to reside permanently in Jamaica. It is the intention of the appellants which is of import, not the intention of the respondent. See **J A Pye (Oxford) Ltd. v. Graham** (supra). Neither the respondent's entry on the land, nor his informing the appellants to vacate it, nor his advising them that it was his

intention to build his home on it could be viewed as sufficient to cause the running of time to cease. These acts would not have prevented time from running against the respondent as the learned Resident Magistrate found.

33. The quarter acre of land occupied by the appellants is part of the three acre ten perches owned by the respondent. The appellants acted as owners of the quarter of an acre. The 1st appellant had built a house and the appellants had been living on it. By this act, they had done the very thing that the respondent had intended to do on the land, that is, to build a house and reside there. These things clearly show an intention by the appellants to assume possessory title to the land.

34. There is also evidence of the fencing of the land. This is strong evidence of the appellants' intention to own the land. The enclosure of disputed land may constitute cogent evidence of adverse possession. See **Marshall v.Taylor** (1895) 1 Ch. 641; 64 L.J. Ch 416. In **Archer Et Ux. v. Georgiana Holding Ltd**. (supra) Swaby J. A. said:

> "Of course, if a person enclosed land of his neighbour within his own land so as to exclude his neighbour altogether, and the properties were of the *same kind and nature*, and in a *similar state of development*, a court may find that the clear intention of the person enclosing was to preclude altogether the owner from exploiting that portion of his land which had been enclosed, and that therefore the act of of enclosure was sufficient to establish dispossession."

35. In my opinion, the fencing of the property provides satisfactory proof that it was done with the intention of excluding from the land, the respondent as well as the public at large. This is sufficient to show that it was done with the intention of dispossessing the respondent of the land.

36. Another factor which is of manifest significance is the discussions between the 1st appellant and the respondent touching the sale of the land to the 1st appellant and the subsequent survey of it in 1994. The learned Resident Magistrate found that the survey was done as a consequence of the respondent's willingness to sell the quarter of an acre to the 1st appellant and he also found that the respondent, having not objected to the survey, had at that time asserted his proprietary right over the land. With the latter finding, I am constrained to disagree.

37. The fact that the survey was carried out as a result of the proposed sale and that there was no objection from the respondent to it, could not be interpreted to mean that the respondent intended to assert a right to possession of the property. The 1st appellant signified a willingness to purchase. He sought and obtained the respondent's permission to carry out a survey. The respondent was present at the survey. The 1st appellant and the respondent attended on an attorney-at-law after it was done for the purpose of the sale of the land to the 1st appellant. Although a written contract of sale had not been

prepared and the evidence is silent as to why it had not been done, the 1st appellant paid the sum of five thousand dollars to the attorney-at-law. It is reasonable to infer that the visit to the attorney-at-law and the payment of the sum of money was for the purpose of the sale of the land to the 1st appellant. When the evidence is looked at as a whole, it is obvious that the appellants intended to have a possessory right over the land. They have carried out substantial acts demonstrating their intention to assume exclusive physical control over the land. This would be consistent with an intention on their part to possess the land.

38. In my judgment, it is reasonable to conclude that there is sufficient evidence demonstrating that the degree of possession enjoyed by the appellants has the effect of excluding the respondent from the land. The appellants used and occupied the land for a period in excess of twelve years before the action was commenced by the respondent and had done acts which manifested the requisite intention to possess it. They had acquired a possessory title to the disputed land. The respondent had ceased to exercise dominance over the land, having abandoned possession of it. His title has been extinguished by the effluxion of time thus barring him from possession of the land.

39. I would allow the appeal and order costs to the appellant in the sum of $15,000.00.

MORRISON, J.A.

I agree.

DUKHARAN, J.A.

I agree.

HARRIS, J.A.

ORDER:

The appeal is allowed. The order of the learned Resident Magistrate is set aside. Costs awarded to the appellant in the sum of $15,000.00.