

CvA. No. 59 of 2001

IN THE COURT OF APPEAL

BETWEEN

JOSEPHINE JORDAN

APPELLANT/DEFENDANT

AND

PHILLIP LUCAS

RESPONDENT/PLAINTIFF

CORAM:

**R. Hamel-Smith, J.A.
J. Permanand, J.A.
M. Warner, J.A.**

APPEARANCES:

**Mr. A. Manwah for the Appellant
Mr. K. Garcia for the Respondent**

Date of Delivery

30th April, 2002

I have read in draft the Judgment of Warner J.A. I agree with it and do not wish to add anything.

**R. Hamel-Smith
Justice of Appeal**

I also agree.

**J. Permanand,
Justice of Appeal**

Delivered by Warner J.A.

JUDGMENT

This is an appeal from a judgment of the High Court in which the learned trial judge ordered the appellant/defendant to deliver up to the respondent/plaintiff, possession of premises comprising a dwelling house standing on a lot of land at #34, St. Cecelia Road, El Dorado, hereinafter referred to as ***'the premises.'***

The facts which were not in dispute are as follows –

The appellant/defendant and the respondent/plaintiff are first cousins. One Christopher Harewood was the yearly tenant of Trinidad Sugar Estates Ltd. of the lot of land on which the dwelling house stands. Christopher died in the year 1951.

His wife Anna Harewood died in 1963. She was the grandmother of the parties to this action. It is also not in dispute that when the deceased Christopher Harewood died, he left his wife Anna and her children and grandchildren living in the dwelling house. The appellant/defendant was born there in 1944 and she has never lived anywhere else. Her brother and sister, who at one time lived on the premises, both moved away.

Martin Lucas was the father of the respondent/plaintiff and he was the appellant/defendant's uncle. Martin died in 1992. Prior to his death, by Deed dated the 22nd April 1969, and registered as No. 5061 of 1969, Martin purchased the freehold interest in the parcel of land on which the dwelling house stands, from International Property Development Ltd., formerly Trinidad Sugar Estates Ltd. (the Company) for the sum of \$784.48. The Deed recited that the Company was seised in fee simple of the piece or parcel land, described in the Schedule to

the Deed shown as Lot 453, on the general plan annexed to Deed 15506 of 1960, **'subject to the exception and reservation in favour of the Company' and 'subject to the yearly tenancy of Christopher Harewood.'** Probate of Martin's will, by which he appointed the respondent/plaintiff sole executor and the beneficiary of his estate was granted to the respondent/plaintiff in 1993.

By Deed of Assent dated 14th December 1994 and registered as No. 5403 of 1994, the respondent/ plaintiff as legal personal representative of Martin's estate conveyed the premises to himself. There was no recital in the Deed of Assent in relation to the **"yearly tenancy of Christopher Harewood,"** although there was a recital in favour of the vendor in relation to the exception and reservation mentioned in the 1969 Deed.

By his specially endorsed writ and statement of claim, the respondent/plaintiff averred that he was entitled to possession of the premises by virtue of the Deed of Assent; that the appellant/ defendant was in occupation as a gratuitous licensee; and that by a notice dated 9th May 1994 he had terminated the licence. He claimed possession and mesne profits from the appellant/defendant, who it was pleaded, remained on the premises as a trespasser.

The appellant/defendant by her defence claimed to have an interest in the premises. She pleaded as follows –

- "1. The defendant does not admit paragraph 1 of the statement of claim.**
- 2. Save that the defendant is in occupation of a portion of the said premises, paragraph 2 of the statement of claim is denied.**
- 3. The defendant has an interest and/or estate in the said premises.**

4. ***Save that defendant was served a notice dated the 9th May, 1994 by the plaintiff the defendant denies paragraph 3 of the statement of claim.***
5. ***The defendant denies paragraph 4 of the statement of claim.***
6. ***Save as is hereinbefore specifically admitted or not admitted, the defendant denies each and every allegation contained in the statement of claim as though the same were herein set forth and traversed seriatim.”***

Particulars of that interest by way of further, better particulars were delivered to the plaintiff/respondent on March 10, 2001 in the following terms:

- “1. ***The said premises had belonged to the defendant’s maternal grandparents Christopher and Anna Yearwood.***
2. ***The defendant was born and has lived all her life on the said premises.***
3. ***Anna Yearwood had orally given the said premises to the defendant.***
4. ***After the death of Anna Yearwood, Martin Lucas the defendant’s mother’s brother, orally confirmed that the said premises was that of the defendant and encouraged the defendant to repair the house on the premises and to build a parlour thereon, which the defendant did on the premise that the said premises were hers.***
5. ***Rates and taxes for the said premises were paid by Martin Lucas with the money provided by the defendant, from the tenants of a portion of the said premises.”***

The short point in this appeal however, is whether or not the yearly tenancy was extinguished; if the tenancy still subsisted whether the respondent/plaintiff was entitled to possession. This issue forms the basis of the appellant/defendant’s only remaining ground of appeal, in that the appellant/defendant maintains that there has been no determination of the annual tenancy.

The respondent/plaintiff testified that he was born in the year 1950 at No. 35 St. Cecelia Road, opposite to the premises. He lived in the United States of America during the period 1970 to 1980 and has been living there from 1990 and up to the present time. He however, used to return to Trinidad from time to time.

The appellant/defendant testified that Anna Harewood had told her that she could have the premises, and that Martin Lucas gave her permission to repair the house and encouraged her to build a *'parlour'* on the premises. The trial judge accepted her evidence that she contributed to the payment of land taxes and water rates, but rejected her claim that Martin had encouraged any belief which she held, that the premises belonged to her. There was no evidence that she paid any rent to anyone.

The learned trial judge resolved the issues by his acceptance as a matter of law that the respondent/plaintiff had sufficiently proven his title and that the appellant/defendant had not pleaded any positive case with respect to any defect in the respondent/plaintiff's title or otherwise.

It appears however, that in the course of the trial, it was the learned trial judge who invited counsel to address him as to whether the annual tenancy had been extinguished. Counsel for the appellant/defendant submitted that it had not, and he relied on the recital in the 1969 deed of conveyance that the fee simple was conveyed *'subject to the tenancy.'* Counsel for the respondent/plaintiff argued that since no one had come forward to claim to the tenancy, the right had become barred by virtue of Section 4 (b) of the Real Property Limitation Ordinance which provides as follows –

“4. The right to make an entry or distress or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as is hereinafter mentioned, that is to say –

(a)

(b) when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death.”

Section 4(b) is in the same terms as Section 3 of the English Real Property Limitation Act 1833 (now repealed) In England, Section 3 was substantially reproduced in Section 5(2) of the Limitation Act 1939. Although the scope of that provision was somewhat wider, the section related, as it did before, to situations where the claimant failed **“to take possession on a death.”** (See **Preston and Newsom on Limitation of Actions, 3^d Edition at page 96**). It was further amended by the Limitation Act 1980 (Section 15 (b) and Part I Schedule I para. 2). This reads as follows:

“2. Where any person brings an action to recover any land of a deceased person (whether under a will or on intestacy) and the deceased person –

a. was on the date of his death in possession of the land or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged; and

b. was the last person entitled to the land to be in possession of it;

the right of action shall be treated as having accrued on the date of his death.”

Despite the amendments, it is clear that both in England and in this jurisdiction, the Section relates essentially to actions to recover land where a stranger seizes possession after the death of a person entitled to land. (See **Cheshire and Burn's Modern Law of Real Property 15th Edition at page 897**).

The respondent/plaintiff's argument is therefore flawed because the appellant/defendant has been in possession of the premises. Any question of ***"her right to make entry or to recover land"*** does not arise because she has not brought an action to enter or recover possession of the premises. (See Section 4 (b)).

In my view, Section 4(b) would apply if, for example, an heir of a deceased person were on the latter's death, out of possession and a stranger was in possession, or the heir was put out of possession by a stranger, and was attempting to recover possession. But then, only if the deceased was in possession at the date of death. Accordingly, in calculating time, the date of death would be the relevant date. The salient point to be made here is that time does not begin to run from the date of the wrongful seizure, but from the date of death.

The learned judge was influenced by the fact that although the appellant/defendant had resided in the property for some thirty-eight years, the only defence which she raised in this action was her plea of proprietary estoppel; she had not made a claim ***"under the annual tenancy,"*** and it was in those circumstances that he concluded that the annual tenancy had been extinguished. The trial judge held that she had failed to establish proprietary estoppel. Further,

that she was not a tenant at will, but a mere licensee who occupied the premises by virtue of “***something in the nature of a family arrangement.***”

It is a well-established principle of the common law that a person who is out of possession can recover the land on the strength of his own title without any regard to the weakness of the title of the person in possession.

It is not in dispute that the respondent/plaintiff had not put the appellant in possession: In any event, the respondent was required to prove his title in full detail in his pleading, deducing it step by step “***through various mesne assignments.***”

The principle is clearly summarised in the case of **Phillips v Phillips 1878 QBD 127** where it was held that in an action for the recovery of land of which the plaintiff has never been in possession, the statement of claim must allege the nature of the deeds and documents upon which he relies in deducing his title from the person under whom he claims: and further, that a general statement that by assurances, wills and documents and Crown grants in the possession of the defendants without further describing them, the plaintiff is entitled to the land is embarrassing and liable to be struck out. (See also **Charles v Harrichand Singh CvA. 50 of 1960 (unreported).**)

The plaintiff/respondent in the present case ought therefore to have set out in his pleading the 1969 Deed of Conveyance to his father Martin Lucas. The appellant/defendant, on the other hand, because she was in possession, did not offend the rules of pleading by simply denying the plaintiff/respondent’s title. (See Franks on Limitation of Actions 1959 Edition at page 265). Be that as it

may, the conveyance was tendered and admitted in evidence and it was from an examination of that Deed that the issue arose as to whether the annual tenancy had been determined.

It seems to me that in his extensive analysis of the facts and law, particularly in the application of Section 4 (b), the trial judge overlooked what in my respectful view, was the nub of the case - that is, that in 1969 the freeholder (the vendor), International Property Development and (the purchaser) Martin Lucas both recognised that the annual tenancy still subsisted. There was nothing ambiguous about the recital. Neither party to the Deed had taken any steps to '**clear off**' the tenancy. It may very well have proven difficult to do so, because of the operation of the Rent Restriction Act Chap. 59:50.

I now pass to consider the person on whom a notice ought to have been served in order to determine that tenancy. One must first look to Section 10 (4) of the Administration of Estates Act Chap. 8:01 which provides –

“On the death of any person all his estate real and personal whatever within the Colony shall vest in law in the Administrator General until the same is divested by the grant of probate or letters of administration to some other person or persons; provided that the Administrator general shall not, pending the grant of such probate or letters of administration, take possession of or interfere in the administration of any estate save as in this Ordinance and in the Wills and Probate Ordinance provided.”

From the dicta in the case of **Dom Maurus Maingot v The Administrator General (Vol. XV Trinidad & Tobago Reports at page 77)**, and an analysis of the relevant English authorities, it is clear the appropriate procedure was that service ought to have been effected on the Administrator General since it

appeared that Christopher died intestate. In the case of Wirral Borough Council v Smith and Another Vol. 43 [1982] Property And Compensation

Reports 312, the facts as set out in the head note were as follows –

“In July 1973 the local council as freeholders of certain property let it to H. In September 1980 she was admitted to hospital and never returned to live at the premises. Soon after H went into hospital the first defendant moved into the property. On December 26 H died intestate. Some time later the second defendant moved in to live with the first defendant. On April 13, 1981, the council started proceedings in the county court for possession under the summary procedure within Ord. 26 r. 1 (2) of the County Court Rules on the grounds that the council was entitled to possession and that the persons in occupation of the premises were in occupation without licence or consent. The judge concluded that the defendants were both trespassers on the property, and made the order.

On appeal by the defendants it was held; allowing the appeal, that on the facts of the case, the council did not have a right to immediate possession which they must have to maintain an action for trespass, because under section 9 of the Administration of Estates Act 1925 on the death of a tenant intestate the tenancy vested in the President of the Family Division and did not come to an end in law; that the council never terminated the tenancy by notice to quit which they could have done by serving notice on the President, or on the appropriate person as set out in Practice Direction (Service of Notice to Quit)[1965] 1 W.L.R. 1237 in which case they could automatically have brought the tenancy to an end; and that, accordingly, technically the council had not got a right to immediate possession to maintain an action for trespass.”

In the result, in the instant case, as in the Wirral case, the essence of the respondent/plaintiff's case was that he was entitled to possession. (My emphasis). The tenancy did not however, automatically come to an end but there ought to have been service on the Administrator General- that was indeed the

first step to be taken. The respondent/plaintiff had not therefore satisfied the evidential burden of proving his entitlement to possession.

As regards the present character of that tenancy, it may well have been caught by Land Tenants (Security of Tenure Act) 1981 which would have converted the then existing tenancy into a statutory lease for thirty-years, or on the other hand, the appellant/plaintiff may well have acquired a possessory title. (See Privy Council Appeal 8 of 2000 **Goombi Ramnarace v Harrypersad Lutchman** **(unreported)**). These issues however, do not fall for determination by this Court.

In the result, I hold that the trial judge erred in law when he found that the respondent/defendant was entitled to possession of the premises. I would therefore allow the appeal and set aside the order of the learned trial judge, with costs to the appellant/defendant, both here and in the court below.

M. Warner,
Justice of Appeal