

JUDGMENT

IN THE PARISH COURT
FOR THE PARISH OF MANCHESTER
HOLDEN AT: MANDEVILLE
PLAINT NO. 1260/13

BETWEEN	REGINALD TARDIEL	1 ST PLAINTIFF
A N D	GERALDINE TARDIEL	2 ND PLAINTIFF
A N D	EVAN ELLIS	1 ST DEFENDANT
A N D	OLEEN ELLIS	2 ND DEFENDANT

Dates:

1st Plaintiff: Mr. Maurice Smith
2nd Plaintiff: Unrepresented)
1st and 2nd Defendants: Mr. Donald Gittens

BACKGROUND

- 1 As a young law student, I learnt early 2 latin maxims as part of my legal training:

“Nemo dat quod non habet” and “Caveat Emptor”
- 2 Loosely translated, the phrases mean, “You cannot give what you do not have” and “Buyer beware” respectively. Together, these phrases encapsulated many concepts in contract law and real property transactions in particular.
- 3 And so it is that we come to the present claim. The Plaintiffs and the Defendants are husbands and wives who own properties in the town of Mandeville in the parish of Manchester that butt and bound each other. They are neighbours sharing two common borders.
- 4 They are both holders of registered titles to their respective parcels of land. The 1st Plaintiff came into the property sometime in May 1977 having properly purchased same from his predecessors in title. The 1st Plaintiff built his house thereon in or around 1978. The 1st Plaintiff says that when he took the land, he saw a barbed wire fence to the southern boundary. That fence, he said, was there since he bought the property in 1977. The registered title at Volume 1330 Folio 358 was put into evidence as exhibit 1. It shows that this title was issued to the Plaintiffs as joint tenants in the year 2000, however, transactions related to this property had been taking place since as far back as 1987. There was no explanation as to how this situation arose. But no issue was taken with the fact that the Plaintiffs had their property since the date stated by the 1st Plaintiff.
- 5 The Defendant came into possession of his property sometime in the mid 2000's. There was no exact date given and no title was put into evidence on their behalf, despite there being a registered title.
- 6 The Plaintiff contends that on or about the 26th September 2013, the Defendants began to do some construction work on the southern boundary of his property (the Defendant's northern boundary). This construction work

damaged the barbed wire fence that had served as the boundary between the properties. The Plaintiff sought and obtained an injunction to restrain the Defendants from continuing the construction work and sued the Defendants to recover Damages for Trespass to property to the tune of \$1,000,000.00.

- 7 The Defendants filed a defence and counterclaim to that action contending that the Plaintiff erected the wire fence encroaching on 107 square meters of the Plaintiff's property and that the Plaintiff's actions in stopping the construction of the fence has caused him loss and damage.
- 8 Both parties relied on their respective Defences to the Claims and Counterclaims respectively as their stated defences.

ISSUES ARISING

- 9 The case raised a number of interesting issues:
 - (i) Did the Plaintiffs acquire the disputed portion of land by adverse possession?
 - (ii) Did the Defendants acquire title to the disputed area of land when they purportedly purchased their property from their predecessors in title?
 - (iii) If the Plaintiff is successful in his claim for trespass to property, can he recover damages for the losses to his block making business?
 - (iv) If the Defendants are successful in their counterclaim, what if any, is their quantum of damages?

THE LAW ON ADVERSE POSSESSION

- 10 The dispute in this case pits two areas of law against each other. The submissions by Mr. Smith and Mr. Gittens bear this out. If I might summarise the positions of both attorneys (apologies if any violence be done to their submissions in the summary), Mr. Smith's argument is essentially that the Defendants have no claim to the disputed area as the Plaintiffs' have acquired title to same by adverse possession. Mr. Smith relied heavily on the Court of Appeal decision of *International Hotels (Jamaica) Limited v Proprietors Strata Plan 461*¹. He also cited the later decision of *Zephaniah Blake et al v Almando Hunt et al*².
- 11 Mr. Smith argued that taken together, ss. 3 and 30 of the **Limitations of Actions Act** have made it impossible for the Defendants to seek to recover damages for trespass of the disputed area of land, as their title to same has been extinguished by the possession of the Plaintiff for the period of 12 years or more. Therefore, the Defendants, by their actions in destroying the barbed wire fence, have committed an act of trespass on what is now the Plaintiffs' property.
- 12 The Plaintiffs, as a supplementary argument, also placed reliance on s. 45 of the **Limitation of Actions Act** to say that the Defendants had acquiesced to the position of the barbed wire fence for in excess of 7 years. Therefore, pursuant to that section, the barbed wire fence is now the boundary between the two properties irregardless of whatever might be revealed on the surveyor's report.
- 13 The surveyors reports put into evidence as exhibits 3 and 4 both confirm, in the large part (despite discrepancies in the size of the disputed area), that the

¹ [2013] JMCA Civ 45

² [2014] JMCA Civ 25

disputed area had indeed formed part of the Defendants' original property. This is not in dispute.

14 Mr. Gittens' contention, on behalf of the Defendants is that the concept of adverse possession does not and cannot apply to what is essentially a boundary dispute. He also contended that the Defendants had acquiesced to nothing as neither they nor the Plaintiffs were aware that there was a discrepancy with the boundary. So if neither party was aware of the issue, there could be nothing to which the Defendants could acquiesce.

15 Mr. Gittens cited no legal authority for his position, however, an authority from the Court of Appeal of Jamaica speaks to the very issue raised by Mr. Gittens. That decision is *Loretta Blake v Noel Palmer*³.

16 I will start by setting out the relevant sections of the Limitations of Actions Act:

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** (emphasis mine), 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.

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.

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; 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:

17 Section 4 of the same Act sets out the relevant date on which the time will start to run for the persons who wish to bring an action under s. 3 to recover land or rent. In this particular case, the relevant section would be section 4(a). So time in this case would start to run from the date on which the person through whom the Defendants claimed their right to possession of the disputed area was dispossessed of the disputed area by the actions of the Plaintiffs or their predecessors in title in fencing off the disputed area.

18 The authorities make it plain that the concept of adverse possession applies not only to the entire property, but even to a portion of a bigger lot. In the case of *Chisolm v Hall*⁴, the Privy Council decided that the concept of adverse possession applied to the disputed strip of land between the appellant's land and the respondent's land. The decision was recently affirmed by the Privy Council in the case of *Recreational Holdings Limited v Lazarus*⁵.

19 In the *Lazarus* case, the opening paragraph sums up the issue quite nicely and I will quote it here:

A is the registered proprietor of land in Jamaica. Without A's permission, B takes possession of the land and remains in open and undisturbed possession of it for more than 12 years. Thereafter A sells (or purports to sell) the land to C. C provides

³ (Unreported) RMCA 18/04 decided July 28, 2006

⁴ (1959) 1 WIR 41

⁵ [2016] UKPC 22

valuable consideration and has no notice of B's possession of the land. Who owns the land ... B or C?

- 20 The *Lazarus* case was an appeal from a decision of the Court of Appeal of Jamaica. The Court of Appeal had dismissed the appeal of the Appellant company from an order from Anderson J who gave summary judgment to the Respondent on the issue of whether the company still owned land in dispute between themselves and the Respondent.
- 21 The facts are quite interesting. One Mr. McGann owned over 300 acres of land in St. Thomas. In 1985, the Defendant became the owner of 27 acres. Eighteen of those acres were adjoining the lots owned by Mr. McGann to the east. The remaining 9 represented the disputed area. In 1987, the Registrar of Titles registered the Respondent as the owner of the entire 27.
- 22 The Respondent thereafter fenced in his land, built a shed on it, then built a concrete structure on same, farmed it, reaped crops and so forth over the years. In 1999, the Respondent and Mr. McGann realised that there had been an error in the registration and that they both owned the disputed area. The Respondent sought to have the registrar correct the error by sending the Registrar a letter pointing out the mistake. However, there is no evidence of what, if any, action the Registrar took.
- 23 Nevertheless, the Respondent continued in undisturbed occupation of the entire 27 acres until 2011 when Mr. McGann sold the land to the Appellant company. Of course the Appellant then proceeded to erect its own fence around the disputed land and then proceedings were instituted by both parties to resolve the issue of ownership.
- 24 The Privy Council, in affirming their earlier ruling in the *Chisholm v Hall* decision, came to the following conclusions⁶:

34. So the Board rejects each of the company's contentions. It concludes as follows:

(a) the Board's Opinion in the *Chisholm* case was correct;

(b) the proviso to section 70 of the Act explicitly subordinates the title of the registered proprietor to such unregistered rights under the Limitation Act as have begun to accrue since the first registration under the Act; and no exception is made, as it is elsewhere in the Act, for the registered proprietor who can claim to have been a *bona fide* purchaser for value;

(c) section 68 of the Act does not (to borrow the word from Mr Knox) trump the proviso to section 70 because, as was held in the *Chisholm* case, the word "subsequent" in section 68 means "subsequent to the first registration", with the result that section 68 is complementary to the proviso;

(d) notwithstanding the near paramountcy under it of the registered title and the often favoured status under it of the *bona fide* purchaser for value, the Act does nothing to disturb this obvious conclusion: that, if the vendor's title has been "extinguished" under section 30 of the Limitation Act, there remains no title for the vendor to pass...and none for his purchaser to receive; and

(e) the decision of the Court of Appeal, explained in a judgment of Morrison JA to the clarity of which the Board pays respectful tribute, was correct.

25 So the authorities make it plain that adverse possession applies even to a small portion of a bigger lot. In addition, a person who is a *bona fide* purchaser for value, takes the land subject to whatever rights might have accrued, or are accruing to a person in possession under the **Limitation of Actions Act**.

26 I will refer to paragraph 34(d) of the judgment in the *Lazarus* case set out above. If a vendor's title to a portion of his land has been extinguished by the

⁶ n 5 paragraph 34

operation of s. 30 of the Limitation of Actions Act, then he has no title to pass and none for the purchaser to receive to that portion of the land.

What is meant by Adverse Possession?

27 It is no longer correct to refer to the concept of possession by title and extinguishing of title by possession as "adverse possession"⁷. The question to ask is whether the squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.

28 The authorities make the following principles clear⁸:

- a. The two elements necessary for legal possession are
 - i. A sufficient degree of physical custody and control (or factual possession); and
 - ii. An intention to exercise such custody and control for one's own benefit and on one's own behalf (the intention to possess);
- b. It is no longer necessary to prove that the squatter intended to exclude the whole world including the owner and that his use of the land must be inconsistent with any present or future use of the paper owner. The intention that must be shown is an intention to possess in the squatter;
- c. The sufficiency of the squatter's possession depends on the intention of the squatter and not that of the paper owner;
- d. Where a series of trespassers have taken possession of land in succession without any interruption for periods which total the statutory limitation period of 12 years, the paper owner's action for recovery will be barred in favour of the squatter in possession⁹.
- e. A person who wrongly believes he is a tenant can occupy property in such a way that he has possession just as much as a squatter.¹⁰
- f. A person who wrongly believes he is the titular holder of a particular parcel of land can also occupy that parcel in such a way that he has possession just as much as a squatter¹¹.

Have the Plaintiff's Established their Claim of Possessory Title Over the Disputed Strip?

29 I am of the view that the Plaintiffs have established their possessory title over the disputed strip on the balance of probabilities.

30 The Plaintiff gave evidence. He said he is Reginald Tardiel, a retired civil servant. He said he has lived at 3 Caledonia Boulevard for over 36 years. He bought the property in May 1977 and built his house there in 1978.

⁷ Per Lord Browne-Wilkinson in *JA Pye (Oxford) Ltd et al v Graham et al* [2003] 1 AC 419 at 434. The principles in *JA Pye* were incorporated into our law by the Privy Council decision in *Wills v Wills* [2003] UKPC 84.

⁸ I will borrow some elements from the judgment of Morrison JA (as he then was) in the case of *International Hotels (Jamaica) Limited v PSP 461* [2013] JMCA Civ 45 para 81 et seq.

⁹ *Fleet and Fleet v Silverstein et al* [1963] 1 OR 153 at 155; see also *Mount Carmel Investments Limited v Peter Thurlow Limited et al* [1988] 3 ALL ER 129

¹⁰ *Ofulue v Bossert* [2008] WLR 1253

¹¹ See the decision in *Recreational Holdings Limited v Lazarus* ibid n.5

- 31 As part of the title, there is a diagram attached. The registered title itself, in the recital, makes reference to this attached plan. The plan shows that he has to his southern boundary a lot numbered 31. To his east is what he called Caledonia Boulevard. His Lot is numbered 32.
- 32 He says his southern boundary is marked by a barbed wire fence. According to him, when he bought the land in 1977, that fence was present. He said he could not say who built that fence. On the other side of that fence is the property owned by the Defendants. He believed that this boundary fence signified the boundary between his property and that of the Defendants.
- 33 In looking at the plan attached to the Plaintiff's title, some other things emerge. Firstly, it purports that it was "tape checked" in 1951 and was found satisfactory. So this means, in my view, that that was a depiction of what was on the ground on the 5th February 1951.
- 34 When one compares that diagram to the ones put into evidence as exhibits 3 and 4, the difference in the dimensions is quite clear. It is therefore more likely than not that at some point between 1951 and when the Plaintiff came into possession of the property, the barbed wire fence was put in place and the encroachment began.
- 35 No evidence was called by either party to show when or how this fence came to be. However, the Defendants did not put to the 1st Plaintiff that he was either lying or mistaken when he said he came and saw the fence there in 1977 when he bought the property. I myself found that there was nothing incredible about this statement and I accept it as the truth. I found that the Plaintiff was a credible witness and was not shaken in his cross-examination. So I find that when the Plaintiff first bought the property in 1977, the barbed wire fence was where he found it and where it remained at the time of the surveys in 2013. In fact, the surveyor's reports concerning the relevant boundary both indicate that it has been well established and of long standing.
- 36 The upshot of this, in my view, is that though the disputed section of land was being occupied by the 1st Plaintiff since 1977, he was not the titular owner of same as it never formed part of the land that had been transferred to him in 1977. It was not possession under a title. He was, for all intents and purposes, a squatter on the disputed section of the land.
- 37 There was also no evidence that the Plaintiffs were occupying this disputed area with the consent of any particular paper owner of the disputed area.
- 38 The evidence shows that the Plaintiff treated this disputed area as part of his property. He mortgaged the entire property, several times over the years based on the title. The evidence from the 1st Defendant is that he saw the Plaintiff cut that lawn in the disputed area, reap fruits from the trees in that area and carry out other acts of maintenance in the area. The evidence is that when the Defendant attempted to assert control over the disputed area by knocking down the fence, the Plaintiff opposed it by litigation. The Surveyor's report of Mr. Christopher Grant tendered as exhibit 3 shows that the Plaintiff built a gate to access his property through the disputed area as well.
- 39 Even though the 1st Defendant said in his chief that the gate was recently constructed, the fact of its construction at all shows clearly that the Plaintiffs were doing acts in the disputed area which were acts of possession and ownership. So these acts clearly demonstrate that the Plaintiff exercised a sufficient degree of control consistent with the use of a person who owns the land.

- 40 I am also satisfied that the Plaintiffs intended to possess same for themselves and their own use. The evidence of the gate being built etc clearly show that the Plaintiff was occupying the disputed area with an intention to possess it as his own.
- 41 There is no evidence that the Defendants challenged the Plaintiff's occupation of the property at anytime before 2013 when the 1st Defendant first queried the boundary. There is no evidence that there was any challenge whatsoever to the Plaintiff's occupation of the disputed section of the land at anytime after 1977 when the 1st Plaintiff took possession of same.
- 42 The fact that the Plaintiffs' title was registered in both their names in 2000 does not impact my finding that the Plaintiffs had established their title to the disputed land by possession. This is so as, even if we were to start to calculate the time from the date in November 2000 that the title was registered, they would still have had possession of same for the 12 year period under the Limitation of Actions Act.
- 43 However, I find that since the 1st Plaintiff would have been in possession of the disputed land since 1977 when he first occupied same. By the time he came to have the title registered in his and his wife's name, he already had title to the disputed land by possession. The Defendants' predecessor in title, would have already lost any claim to that portion of the land to the first Plaintiff. Thus, the 1st Plaintiff was essentially transferring what was already his, to himself and his wife.
- 44 A fortiori, since the Defendants' predecessor in title had already lost his title to the disputed land to the 1st Plaintiff, by the time he came to sell the property at Lot 31 to the Defendants, the disputed portion no longer formed part of his certificate of title. Therefore, title in the disputed portion of the land never passed to the Defendants at all. Rather, by that time, it had already vested in possession (and in title by the year 2000) in the Plaintiffs.
- 45 With respect to Mr. Gittens' argument concerning whether adverse possession can apply to a boundary dispute, the law is quite clear on the point. From *Chisolm v Hall* to *Recreational Holdings Limited v Lazarus* the Privy Council has put the issue beyond doubt. In fact, it could be argued that adverse possession overrides the boundary dispute issue as, once it is determined that the adverse possession question is resolved in favour of the squatter, the boundaries will have to be redrawn as the paper owner would have lost his title to the disputed area.
- 46 Since it is that I have found that the Defendants did not have title to the disputed area, including the fence, I will have to find that their counterclaim for the trespass would also fail.
- 47 The law on Trespass to Property makes it clear that a Plaintiff seeking to sue another for trespass must prove that he is in possession lawfully and that the Defendant has done an act that infringes upon his lawful possession or that he has a greater right to possession than the person in actual possession.
- 48 Given that, as I have found, the Defendants were not in actual possession of the disputed area, they would have had to prove that they had a greater right to possession of the disputed area than the Plaintiffs. This they sought to establish through the surveyors report (but curiously they did not seek to put their title into evidence). As it turns out, both surveyors agree that the Plaintiffs did indeed occupy the disputed area contrary to the plans on their title. However, by virtue of the law of acquisition of title by possession, the

Defendants never received title to the disputed area at the time they purchased their parcel of land.

49 As I have found, by at least 1985 the Defendants predecessors in title had lost their title to that particular section of their land. Therefore, they could not have passed this on to the Defendants.

QUANTUM OF DAMAGES TO BE AWARDED THE PLAINTIFF

50 The Plaintiff has sued for damages for loss of profits from his block making business that he carried out on the premises. The Plaintiff's argument is that the Defendants actions have effectively blocked off the access and egress from his property resulting in financial losses to his block making business.

51 The Defendants mounted a challenge to this claim on largely one front; the block making business was an illegal venture and so the Plaintiffs ought not to recover damages from the illegal activity. It is a defence founded upon the maxim *ex turpi causa non oritur actio* (a right of action does not arise out of an illegal act).

52 However, this was not part of the defence pleaded to the counterclaim filed by the Plaintiff and on which the Defendants stood when asked to state their defence. However, exercising my broad powers of amendment under s. 190 and s. 151 of the **Judicature (Parish Court) Act**, and since the Plaintiff was not taken by surprise by this line of questioning during the cross-examination by counsel for the Defendants, I was prepared to amend the Defence to address the issue raised on whether or not the Plaintiff should be awarded damages at all.

53 There was no evidence, and Mr. Gittens' cross-examination of the 1st Plaintiff was quite effective in bringing this out, that the Plaintiff had permission from the relevant authorities to have his block making business on the property.

54 The title to the Plaintiffs' property contains certain restrictive covenants which point to zoning restrictions on the nature of the user of the property. Restrictive covenant 1 is particularly instructive. I will set it out in full here:

"No building to be erected on the land above described (hereinafter called "the said land") shall be of a value of less than Two Thousand Pounds and no building other than a dwelling house shall be erected on any part of the said land in particular no shop, factory or other business premises of any kind whatsoever shall be erected on the said land or any part thereof."

55 There is no evidence that there was any modification or discharge of this covenant. There is no evidence that there was any application for modification or discharge of this covenant.

56 So in the absence of such permission from the relevant authorities for him to have his block making business and in the absence of any modification of the restrictive covenant on his title, the Plaintiff's block making business would be unlawful and liable to a cease and desist order from the Parish Council and even destruction if it was so warranted.

57 What is more, in their amended Particulars of Claim filed on the 14th August 2014, the Plaintiffs merely state that they are asking for Damages in the amount of \$1,000,000.00. There are no particulars of loss pleaded. As this is a financial claim, one would have expected there to be particulars of loss

pleaded and proved. It is trite that these types of losses must be specifically pleaded and proved.

58 In addition, there is no separate claim made for the damage to the fence and the losses suffered to put those losses right. The Court was left to wonder if it was all lumped into the \$1,000,000.00 claim. Though this is not a court of pleadings, if pleadings are filed, it needs to be properly set out and needs to be supported by evidence.

59 However, to return to the question of the economic loss, Mr. Gittens advanced, with force, that the Court ought not to award any sum of money for the loss of profits as the venture was not lawful. Mr. Smith, on behalf of the Plaintiff, did his best to advance his claim. He sought to rely on a provision under the **Factories Act** which allows for a business to remain in operation once an application to be registered as a factory under the said Act has been made.

60 But there were two issues which confronted Mr. Smith; one was that there was no evidence from Mr. Tardiel that he had made any such application under the **Factories Act**; the other was that Mr. Smith was faced with the restrictive covenant 1 on his client's title.

61 In recent times, the Supreme Court of England and Wales has had to grapple with the question of illegality and recovering monies under an illegal contract (or a contract tainted with illegality). In the case of *Patel v Mirza*¹² the Supreme Court, sitting *en banc*, set out some landmark principles and overruled the previous decision of the House of Lords in *Tinsley v Milligan*¹³ in certain respects.

62 The issue in the *Patel* case was whether the principle of illegal contracts prevents party to a contract tainted by illegality from recovering money paid under the contract from the other party under the law of unjust enrichment. On one side it is argued that the maxim applies as much to such a claim as to a claim in contract, and that the court must give no assistance to a party which has engaged in any form of illegality. On the other side it is argued that such an approach would not advance the public policy which underlies Lord Mansfield's maxim, once the underlying policy is properly understood¹⁴.

63 I will set out the summary of the facts in the *Patel* case from paragraphs 11-12 of the judgment:

Mr Patel transferred sums totalling £620,000 to Mr Mirza for the purpose of betting on the price of RBS shares, using advance insider information which Mr Mirza expected to obtain from RBS contacts regarding an anticipated government announcement which would affect the price of the shares. Mr Mirza's expectation of a government announcement proved to be mistaken, and so the intended betting did not take place, but Mr Mirza failed to repay the money to Mr Patel despite promises to do so. Mr Patel thereupon brought this claim for the recovery of the sums which he had paid. The claim was put on various bases including contract and unjust enrichment. A fuller account of the facts is given in the judgments of the courts below and in the judgment of Lord Neuberger. The agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit an offence of insider dealing under sec 52 of the Criminal Justice Act 1993. In order to establish his claim to the return of his money, it was necessary for Mr Patel to explain the nature of the agreement.

64 In the end, their Lordships ruled that they would not award judgment for the Appellant. However, it was on the grounds of public policy as to do so would be rewarding the Appellant for what was a clearly criminal agreement.

¹² [2016] UKSC 42

¹³ [1994] 1 AC 340

¹⁴ Paraphrased from [2016] UKSC 42, para 9

- 65 However, Lord Toulson, in particular, with whom a majority agreed, outlined 3 criteria for determining whether relief could be granted under a contract tainted with illegality¹⁵. I will set out the two paragraphs here:

Lord Goff observed in the Spycatcher case, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 286, that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case". In *Hall v Hebert* [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view (at 175-176) that, as a rationale, the statement that a plaintiff will not be allowed to profit from his or her own wrongdoing does not fully explain why particular claims have been rejected, and that it may have the undesirable effect of tempting judges to focus on whether the plaintiff is "getting something" out of the wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system.

That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

- 66 Whilst this case did not involve a contract tainted with illegality, as Lord Toulson himself observed at paragraph 2 of his judgment in the *Mirza* case, illegality is a defence to many a civil claim, not just breach of contract. Therefore, the principles are applicable in the instant case to the Defendants' answer to the question of damages.
- 67 The purpose of building and zoning restrictions is to preserve the state of a community or a particular area so that it retains its aesthetic and/or commercial value. The purpose of applications to authorities such as the Parish Council, National Environment and Planning Agency, Factories Corporation etc, is to ensure that whatever business is being set up is in conformity with the law and regulations and meets certain established safety and other criteria.
- 68 To set up a factory in breach of building and zoning restrictions and without being compliant with the procedure for setting up such a venture would lead to many environmental and safety risks being unaccounted for and expose the surrounding citizens, employees and operators of the business to harm. It also has the potential to undo the aesthetic of a residential community and serve to devalue properties that surround such an operation as a factory.
- 69 To allow a claim for loss of profits from such a venture would only serve to encourage persons not to bother with going through the rigours of properly establishing such a venture. Many and more such "mini factories" would proliferate in communities.
- 70 Contrast that with a business such as a corner shop or a seamstress or tailor operating out of a home. These home enterprises are as ubiquitous in Jamaica (and the wider Caribbean) as chattel houses in Barbados. In most

¹⁵ [2016] UKSC 42 at paras 100-101

cases such shops and businesses are integral parts of communities. So while, strictly speaking, they may offend the restrictive covenant on a title for operating a shop, the public policy position may bend in favour of allowing a claim for loss of profit from such a business.

71 In the circumstances of this particular case therefore, I am constrained to disallow the Plaintiffs' claim for loss of profits from his business as he had not proven that it was a lawfully established business venture.

CONCLUSION

72 I am satisfied on the balance of probabilities that the Defendant has committed trespass to the Plaintiff's property by destroying the fence erected on what is now the Plaintiff's property and causing material to go onto the Plaintiff's property. I am satisfied that the Plaintiff has established that he has now acquired title to the disputed area by possession. I am satisfied on the balance of probabilities that the Defendant never held title to the disputed area.

73 But even if I am wrong that the Defendant never had title, I am satisfied that he would have lost title to the disputed area because the Plaintiffs would have been in continuous undisturbed possession of the disputed area since the year 2000 when the 2nd Plaintiff came on the title for at least 12 years.

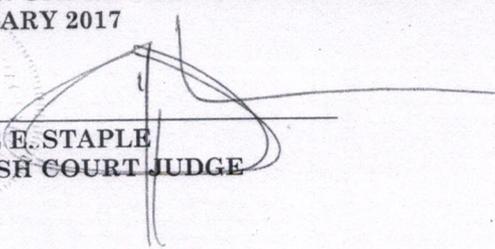
74 The Defendant never disputed their possession until 2013 and by this stage, the Plaintiffs would have met and surpassed the statutory 12 year period at least.

75 However, I am not satisfied, on the evidence, that the Plaintiffs are entitled to recover damages as claimed. They have failed to establish any claim for the damage to the fence itself and they are not entitled to loss of profits from the business as it was not being carried out lawfully.

DISPOSAL

- 1 Judgment for the Plaintiffs on the claim. No award as to Damages.
- 2 Judgment for the Plaintiffs on the Counterclaim.
- 3 Costs to the Plaintiffs on the Claim and Counterclaim.

GIVEN UNDER THE HAND AND SEAL OF THE COURT THIS 17TH DAY OF
JANUARY 2017


DALE E. STAPLE
PARISH COURT JUDGE