JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No.54 of 1975

BEFORE: The Hon. Mr. Justice Graham-Perkins, J.A.(Presiding).
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Watkins, J.A.(Ag.).

VIDA BOWES)
PEARL TAYLOR) - Appellants

vs.

ALLAN SPENCER - Respondent

Owen S. Crosbie for Appellants.

H.G. Edwards Q.C. for Respondent.

April 30, June 16, 1976

WATKINS, J.A.(Ag.):

This is an appeal from the judgment dated June 6, 1975 of Her Hon. Miss A.S. McKain, resident magistrate for the parish of Manchester, in favour of the defendant/respondent, Allan Spencer, in an action in which the plaintiffs/appellants Vida Bowes and Pearl Taylor sought (i) to recover damages occasioned by the stoppage by the respondent of a survey being carried out on June 13, 1973 at the instance of the first-named appellant on lands known as Sophie in Manchester, (ii) to recover damages for trespass by the respondent on the said lands on the said date, and (iii) to obtain an injunction to restrain further trespasses on the said lands by the respondent.

Having heard arguments from both parties to the appeal on April 30, 1976, the Court took time for consideration.

Clifford Turner, the immediate predecessor in title to the lands in issue died on July 8, 1958. His will, admitted to probate in March 1963, named the respondent Allan Spencer as executor. By clause 3 of this will the testator gave and devised the lands known as Sophie to his executor "upon trust to sell same and divide their net proceeds equally between my natural daughters Vida and Pearl Turner and my natural son Shirley Turner". The appellants are two of the three beneficiaries under this testamentary trust for sale. The evidence discloses that Vida Bowes (nee Turner) with the financial assistance of her sister and brother had placed Sophie,

which was some $6\frac{1}{2}$ acres in size, under cultivation a year before their father's death and that she continued in actual occupation and farming of these lands uninterruptedly down to the trial of this suit, herself paying all the outgoings of the property, including property tax. In June 1973 Vida Bowes engaged a surveyor to undertake a survey of the property, but this was stopped by the respondent on the ground that "I am the executor for Estate Clifford T. Turner and I have sold said land to satisfy conditions of the will". Vida Bowes testified that she had all along thought that her father had died intestate and that the stoppage of the survey was the occasion on which she heard for the first time that her father had indeed died leaving a will. The respondent however testified that he had come to know of the existence of the will between the years 1959 and 1960, that in 1963 he informed the first appellant of the existence of the will, that he had obtained probate thereof, and that in virtue of his capacity as executor and trustee he was allowing her to continue in possession of Sophie "until it ready to sell". He himself at no time at all had reduced Sophie into his possession. He visited the property in all on three occasions, the last of which was subsequent to March 1973 when he signed an agreement with two brothers for sale of the property and had received a deposit thereon. At no time at all did he personally incur or undertake any expenditure whatever in connection with the trust property.

In her reasons for judgment the learned resident magistrate found that the respondent in right of his executorship of the Estate of Clifford Turner was vested with the legal title to Sophie and had full legal power and authority to sell the same when in March 1973 he sought to do so. She found also that the appellant, Vida Bowes' continued possession of the property was with the leave and licence of the respondent. As to a purported termination of the respondent's trusteeship, this she found occurred subsequent to the agreement for sale and was accordingly of no relevance thereto. The purported conferment of general powers of attorney upon the first appellant by her brother and sister the learned resident magistrate also found to have occurred after the date of execution of the agreement for sale.

On the strength of these findings she concluded that the stoppage by the respondent of the survey proceeded from lawful authority vested in the respondent, that there was no trespass and she accordingly gave judgment in his favour on the entire claim.

Before us Counsel for the appellants contended that the possession by the first appellant of the lands known as Sophie was adverse to the respondent in his capacity as trustee, that such possession was not determined by his purported permission to her to continue in possession "until it ready to sell", and that upon the completion in the year 1970 of twelve years of continuous and uninterrupted possession of the property, the right and title thereto of the respondent was barred and accordingly the agreement to sell the lands three years later was ineffectual in law and in the result the stopping of the survey and the entry upon the lands were tortious. Counsel for the respondent on his part urged that in law the possession by a beneficiary of trust property cannot be adverse to the trustee and he relied heavily upon Garrard v. Tuck (1849) 8 C.B. 231 and Bridges v. Mees (1957) 2 All E.R.577. Additionally Counsel for the respondent argued that in any event the entry upon the land by his client arose in pursuance of an invitation contained in a notice sent to him by the appellants' attorney-at-law and on the authority of Rodgers and Perry v. Senior (1970) 15 WIR 127 entry in such circumstances was not unlawful. Before turning to the main issue in this appeal, this latter contention of Counsel for the respondent may at this stage be conveniently disposed of. Under our Land Surveyors Act, where a survey of any land is to be undertaken by appointment of the owner of such land, it is the statutory duty of the appointed surveyor, before entry upon the land for purposes of the survey, to serve within a prescribed time a notice in a prescribed form upon the owners and occupiers of all adjoining lands which may be affected by the survey. The prescribed form of notice as well as the Act empower persons so served with notices to attend at the prescribed time and place with a view to their serving notices of objection to the survey, if they deem it fit to do so. In Rodgers and Perry v. Senior it was held that an entry upon land admittedly lawful in its inception by virtue of the surveyor's notice given under statutory provision is not rendered unlawful by relation back by a frivolous or a bona fide

though erroneous objection being made resulting in the survey not being proceeded with. In the instant case the respondent did not receive a notice from the surveyor pursuant to the Act and indeed none could lawfully have been sent to him as he was neither the owner nor the occupier of lands adjoining to Sophie. Further, in the words of the respondent himself, the notice which he received from the appellants' attorney-at-law was "that the land would be surveyed" and not one inviting him to enter upon the land for purposes of the survey. In the circumstances the entry of the respondent upon the lands and his stopping of the survey cannot be sustained in law either upon the authority of Rodgers and Perry v. Senior or upon the strength of the notice forwarded to him by the appellants' attorney-at-law, and if sustainable at all, must be so sustainable on other grounds.

I turn now to the main question in issue, which, framed in brief terms, may be thus stated: Can the possession of trust property by a cestui que trust ever be adverse in law to the title of his trustee, and, if so, in what circumstances? The Real Property Limitation Act 1833 of England (3 & 4 Wm IV C 27) of which the Limitation of Actions Act (first enacted in 1881) is the local counterpart serves as an important watershed in the history of this branch of the law and a consideration of the law as it stood before this Act and thereafter will cast some light on the question posed.
Prior to 1833. It was a rule of ancient law that a possession which began rightfully could not be considered as having become wrongful, that is, adverse as against the rightful owner, by being merely continued after the right of the party in possession had determined. This was known as the doctrine of non-adverse possession and it applied as well to the case of cestui que trust and trustee as it did to a tenant at will and his lessor. Translated into relevant modern terminology it meant that neither a tenant at will nor a cestui que trust could acquire a title against his lessor or trustee. There were always however, as the authorities demonstrate, circumstances in which, exceptionally, the possession of a cestui que trust might become adverse to the title of his trustee. Thus, for example, if he disseised the trustee, this would put an end to the constructive

tenancy at will and made the possession adverse - Pomfret v. Windsor (1752) 2 Ves. sen. at p.481. Again long continued possession might, in certain circumstances, give rise to a presumption of disseisin, and thus show that the title of the cestui que trust had become adverse to the trustee - Portsmouth v. Effingham (1750) 1 Ves. sen. at p.435 and Hammond v. Oglander 8 Ves. at p.129. Still further where a cestui que trust held the trustee at defiance and denied his title to be trustee, this made the possession of the cestui que trust adverse - Fausset v. Carpenter (1831) 2 Dow & C at p.243. (See also 30 LQR p.158 et seq.). These examples which are not exhaustive by any means demonstrate that even under the ancient law the rule of non-adverse possession vis a vis cestui que trust and trustee was not universally applicable to all circumstances in this relationship.

1833 and after. The doctrine of non-adverse possession proved inconvenient at times and radical changes were introduced by the Real Property Limitation Act. Section 2 (section 3 in the local Act) provided that the period of limitation after which no entry, distress, or action could be made or brought to recover land should be 20 years (now twelve). Next it provided in part by section 3 (section 4 of the local Act) that where a person had discontinued his possession of land or had been dispossessed time should begin to run against him from the date of such discontinuance or dispossession and that in the case of every future estate or interest in land, where no person had been in possession in respect of such estate or interest, time should begin to run against the owner from the date when his estate or interest fell into possession. These sections in effect worked the abolition of non-adverse possession - Nepean v. Dol d. Knight (1837) 2 M & W p.894 at p.911. Special provisions were however reserved for tenancies at will. Section 7 (section 9 of the local Act) provided that

> "When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement

> of such tenancy, at which time such tenancy shall be deemed to have determined. Provided always that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee".

The meaning and scope of this section was the subject of judicial interpretation in the case of Garrard v. Tuck, on which Counsel for the respondent so heavily relied, and which itself was commented upon in the two later cases of Melling v. Leak (1855) 16 C B 652 and Drummond v. Sant (1871) LR 6 QB 763. Garrard's case was one in which a term had been assigned to a trustee to attend the inheritance. The cestui que trust had been in possession for more than 20 years and it was contended by a demandant in dower that the term was extinguished by force of the Real Property Limitation Act 1833. "The object of section 7" said Wilde Ch J. "appears to be to fix a definite period, at the end of which the right of entry of the lessor, as against his tenant at will shall be deemed to have accrued: and it provides that no cestui que trust shall be deemed to be a tenant at will within the meaning of that clause, which is equivalent to saying that the right of entry of a trustee against his cestui que trust shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by a trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time". The effect of the decision in Garrard v. Tuck was thus stated in Melling v. Leak: "The case of Garrard v. Tuck ..... certainly supports the doctrine that a cestui que trust who is let into possession of the trust estate by the trustee, becomes his tenant at will, and the right of entry under the 2nd section of the statute 3 & 4 Wm IV C 27 accrues only on the determination of such tenancy at will". (p.669). In Drummond v. Sant a strong court observed "Where the possession is that of a cestui que trust, though his relation to his trustee may at law be that of tenant at will, the trustee's estate is not destroyed by mere lapse of time". (p.767). "Mere lapse of time" refers of course to the innovation introduced by section 7 of the Real Property Limitation Act whereby by mere effluxion of time over a period of 13 years the estate of every lessor would be

barred as against his tenant at will unless in the interim active steps had been taken by him to prevent time running against him. Garrard v. Tuck and the cases referred to in which that case has been commented upon are authority for the view that the doctrine of non-adverse possession as between cestui que trust and trustee pursuant to section 7 of the Real Property Limitation Act applies to express trusts under which the cestui que trust is let into possession by his trustee. In such a case the right of the trustee to the trust property is not barred by mere lapse of time. In short the period of limitation does not begin until the tenancy at will is determined. Limitations on the operations of the section on the other hand are illustrated by In re Cussons (1904) 73 LJ Ch D 296 and Bolling v. Hobday (1882-3) 31 WR 9. In the former case real estate was in 1887 conveyed by C to himself and seven partners as part of joint-stock assets of the partnership. The partnership was shortly afterwards converted into a limited liability company and a certificate of incorporation was issued. There was no deed of conveyance of the property to the incorporated company, but in 1891 the company conveyed it by deed to a new company which agreed in 1902 to sell it to a purchaser. Upon the purchaser's contention that the legal estate was outstanding in the eight grantees it was held inter alia that the legal estate in the grantees as such trustee was, in view of the undisturbed possession of the new company since 1891 barred and extinguished by operation of the Real Property Limitation Acts 1833 and 1874 (which reduced the period from 20 to 12 years) and that the vendors had therefore shown a good title. In the course of his judgment Kekewich J. observed:

> "Here twelve years have elapsed since the incorporated company have been in possession and the trustees have not interfered as trustees. This seems to me to be a new application of the Act, that a person who is a bare trustee without duties may lose his trust estate at the end of twelve years if he does not interfere. But I do not see why he does not come within the section, and I think that this contention on behalf of the vendors is right. One can see cases where a trustee might keep alive the right that he has by bringing an action of ejectment; but if he allows the cestui que trust to remain in possession, the statute must run against him

> and by virtue of the Act of 1874 and the earlier Act the title is gone."

In Bolling v. Hobday a testatrix by her will devised real estate to trustees their heirs and assigns, in trust for her daughter for life, and after her death to sell and divide the proceeds between four persons M, S, T and J share and share alike. On the death of the testatrix in 1816 the tenant for life entered and occupied until her own death in 1857. On her own death T and J entered and remained in possession until the death of the latter in 1874. T remained in possession until his death in 1880. The trustees never in any way acted, so far as the real estate was concerned and the property was enjoyed by T and J and after the death of J by T without interruption and acknowledgment. Holding that the legal estate in fee of the trustees was extinguished by the expiration of twenty years from the death of the tenant for life, and with it the trusts by which it was affected Chitty J. said:

> "On J's death T remained in possession until his death which occurred on the 8th of March 1880. The trustees never in any way acted so far as relates to the real estate. During the possession of T and J they enjoyed without interruption and without acknowledgment, and after J's death T also enjoyed without any interruption and without any acknowledgment ..... It is clear that the estate of the trustees was barred by the expiration of twenty years from the death of the testator .... and that was the point decided in Burroughs v. M'Creight; indeed, counsel for the representatives of the daughter very properly declined to argue the question."

In re Cussons and Bolling v. Hobday are therefore authority for the statement that the rule as regards non-adverse possession as between cestui que trust and trustee pursuant to section 7 of the Real Property Limitation Act does not apply (a) to bare trusts (Cusson's Case) nor even to an express trust where the cestui que trust entered into possession independent of a trustee who throughout the period of limitation never in any way acted so far as relates to the trust property. (Bolling v. Hobday). The headnote to Bridges v. Mees discloses the following facts. "In April 1936, the plaintiff being then the registered proprietor of No.6 Priory Road, Surbiton, contracted with a company to purchase from it a strip of land at the back of No.6 and of the adjoining

property, No.8 Priory Road, of which the defendant was the registered proprietor. The plaintiff paid a deposit of £2, obtained a written memorandum of receipt for the deposit and his purchase, entered into occupation of the strip of land and thereafter retained possession of it without any interference by the company. He completed payment of the purchase price (£7) in 1937, but the land was never transferred to him, nor was any entry made on the register at the Land Registry to protect his rights. In 1955 the company went into liquidation, and in that year the defendant offered to buy the strip of land and the liquidator agreed to sell to the defendant for £5 such rights in the land as the company had. The company by its liquidator conveyed (as trustee) the strip of land to the defendant and on April 13, 1956 the defendant was entered on the register as proprietor with absolute title. The plaintiff claimed to be beneficial owner of the strip of land and claimed rectification of the register". In the course of his judgment which vindicated the plaintiff's claim Harman J. said:

> "Now in this case the vendor became a trustee of the legal estate in 1936, and from 1937 a bare trustee, and no beneficiary had any right of action to recover. It seems to me to follow that from that date the period of limitation could and therefore did run in favour of the beneficial owner and that thus (but for the provisions as to registered land) the trustee's title would have been extinguished."

In re Cussons was also referred to by the learned judge with approval. Bridges' Case is therefore another example of the line of authorities which establish that in the case of a bare trust, a cestui que trust may by adverse possession bar the title of his trustee. In continuance of his judgment, however, Harman J. went on to observe:

> "Before I leave this part of the case, I ought perhaps to refer to the change in the law brought about by the Limitation Act 1939, in the relations of trustee and cestui que trust. Before 1939, the cestui que trust, having regard to a proviso attached to the Real Property Limitation Act 1833 s.7 could not acquire a title against the trustee."

It seems clear that this dictum was unnecessary to the determination of the case and must therefore be treated as obiter. Next it is equally

clearly in conflict with the decision in Cussons' Case cited with approval by Harman J. himself, and, if it is to be taken as a comprehensive statement on the law, it stands alone and is not supported by eminent textwriters on the subject who uniformly recognise the existence of exceptions to the general rule. (See Cheshire's Modern Real Property 8th ed. p.795 and Preston and Newsome - Limitation of Actions 3rd ed. p.147).

Returning now to the facts of the instant case, the material evidence is that the first appellant Vida Bowes was already in actual occupation of the trust property when her father died and that she continued so to be without interruption or acknowledgment down to 1963 when, in accordance with the finding of the learned resident magistrate, she was advised by the respondent of the existence and contents of the will of her father and was given permission by the respondent to continue such possession until he was ready to sell the trust property. Her original possession, then, was clearly independent of the trustee of whom she was not even aware, and equally clearly dehors the will. Time therefore began to run in her favour from the moment of death of her father in 1958 (See Section 4(b) of the Limitation of Actions Act), and once time has begun to run, it may, under the Limitation of Actions Act, be stopped only by the trustee taking legal proceedings, or making an effective entry on the land, or if the cestui que trust acknowledges in writing the title of the trustee (See Sections 3 and 16 of the Limitation of Actions Act) and Cheshire's Modern Real Property 8th ed. p. 803). The purported authority to continue in possession extended by the trustee in the instant case to the cestui que trust did not therefore have the effect of terminating the possession which had begun in 1958. At no time at all did the trustee act in any way inconsistent with the possession in the first appellant during the entire period of twelve years immediately succeeding the death of the testator. In these respects the instant case appears to be on all fours with Bolling v. Hobday. It seems clear therefore that the estate of the trustee was barred after the expiration of twelve years from the death of the testator and that when three or four years later he purported to sell the trust property his title thereto was already extinguished and so

his stopping the survey was without any legal authority whatever.

In the event the judgment of the court below must be set aside and the matter remitted to the resident magistrate to make such awards and order, if necessary, under the three heads of claim in favour of the plaintiffs/appellants. There will be costs of appeal to the appellants in the sum of $50. (fifty dollars).

ROBINSON, J.A.:

I have had the opportunity of reading the judgment of Watkins J.A.(ag.). I agree with it.

Graham-Perkins J.A.

The order of the Court is that proposed by Watkins J.A.