

**CHANGING THE LAW ON ADVERSE
POSSESSION- THE EUGSTER'S CASE**

Claim No. HCV 0144 of 2003 – McFarlane & others vs. Eugster & others

Consolidated with Claim No. HCV 1470 of 2003 - Clarke & others v Eugster & others

Consolidated with Claim No. HCV 2864 of 2006 – Chung & others v Eugster & others

Consolidated with Claim No. HCV 00037 of 2006 – Brown & others v Eugster & others

Mrs. Antoinette Haughton-Cardenas who originally appeared for the Claimants, except for Ms. Ashley Yonker, up to the close of the presentation of their case, and until the 11th September 2009. Mr. Terrence Ballantyne assumed conduct of the matter for the Claimants except for Ms. Ashley Yonker, as of the 14th December 2009.

Ms. Althea Grant for Ms. Ashley Yonker.

Mr. Kent Gammon for the Defendants.

Heard 20th of July 2009 to 28th of January 2011

Judgment by Hon. Ms. Justice Ingrid Mangatal handed down on the 28th of January 2011

1. The claim is based upon the law of adverse possession in respect of two properties at Old Hope / Little Bay, and at Brighton, in the parish of Westmoreland.

1. The Defendants, John and Kathleen Eugster are the registered owners of all that parcel of land part of Old Hope in the parish of Westmoreland, registered at Volume 1352 Folio 183.
1. The Defendants are also the registered owners of all that parcel of land part of Brighton in the parish of Westmoreland, registered at Volume 1081 Folio 693.

1. The Transfer of the two properties to the Defendants as joint tenants was registered on the 14th day of May 2002.
1. Each of the Claimants say that they have occupied separate parcels of land located within these vast properties for varying periods of time in excess of twelve years. They say that they have been in sole, exclusive, open and undisturbed possession of the respective plots of land. They rely upon **section 3 of the Limitation of Actions Act 1881.**

1. **The First Issue – Whether the Claimants have a right to claim an interest based upon Adverse Possession Against the Defendants, the Defendants having become the Registered Owners in May 2002 – Would the 12 year time period begin to run again after the Defendants became the registered owners – Or are the Claimants entitled to calculate the periods of possession alleged by them against the previous owner George Barber.**
1. Jamaica operates a land registration system known as the Torrens system and this is embodied in the Registration of Titles Act. This system decrees that save with very limited exceptions, notably fraud, the registered title is indefeasible and conclusive evidence of ownership.

1. a) The combined effect of sections 3 and 30 of the Limitation of Actions Act 1881 is that a registered proprietor may lose the right to recover his land if someone else has been in possession of it in a particular way for 12 years, a concept we refer to as adverse possession. Under section 85 of the Registration of Titles Act any person who claims that he has acquired a title by possession to land which is under the operation of that Act may apply to the Registrar to be registered as proprietor of the land in fee simple. If the steps set out are successfully completed, then under section 87 of the Registration of Titles Act the Registrar will cancel the existing certificate of title and issue a new certificate of title in the name of the applicant.

- b) **In the present case, none of the Claimants have made an application under section 85 in order to be registered as proprietors.**
 1. As pointed out in the Privy Council's decision in **Rottinger v Raffone**, Privy Council Appeal No. 64 of 2005, delivered 17th April 2007, at paragraph 20, per Lord Roger of Earlsferry:
20....The basic rule is that, if any proceedings are brought to recover land from the person registered as proprietor, then the production of the certificate of title in his name is an absolute bar and estoppel to those proceedings, any rule of law or equity to the contrary notwithstanding. The only situations where a certificate is not a complete bar to proceedings are those listed in paragraphs (a) to (f).
 1. a) In the present case there is no proper allegation or evidence against the Defendants that the Claimants have been deprived of any land by fraud on the part of the Defendants, or indeed of

their predecessor in the title George Barber, or that the Defendants have been registered as the proprietors of the land through fraud.

b) The real question therefore is what is the effect of the interplay between the relevant provisions of the Limitations of Actions Act, and the Registration of Titles Act? To the learned judge, the crux of the question is whether the meaning of section 3 of the Limitation of Actions Act is that these Defendants, are claiming a right of entry through George Barber, or did their right to make entry arise independently of him, and at a later time than did his own right to make entry? This is where the learned judge has found the decision in **Clarke v. Swaby** very helpful.

c) In **Clarke v. Swaby** a claim was made by Swaby against his stepfather Clarke for recovery of possession of a property in the Parish of Westmoreland. Mr. Swaby's Aunt was the owner for many years and her formal registration as proprietor occurred in 1968. The Aunt died in December 1981. By her will she appointed Swaby as her executor and devised the property to him beneficially. In July 1993 Swaby was registered as the proprietor of the property. Before her death the Aunt had allowed her sister, Swaby's mother, to reside rent-free on the property. Swaby's mother at some point married Clarke and they, Mr. and Mrs. Clarke, lived on the property for many years. Swaby commenced proceedings against Clarke in April 2000 for recovery of possession in a Resident Magistrate's Court for the Parish of Westmoreland. Clarke relied upon a special defence under section 3 of the Limitation of Actions Act. The Resident Magistrate found that Clarke occupied as a licensee and had obtained no proprietary rights. The Court of Appeal dismissed Clarke's Appeal, as did the Privy Council. The Privy Council's essential basis for rejecting Clarke's claim was that under the law in Jamaica, as is the case in England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his license has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence and not to an adverse claim (Paragraph 11).

d) The Privy Council as per Lord Walker of Gestingthorpe, in delivering the Judgment stated in paragraph 15:

15...since from 1983 Mr. Swaby (as executor of (the Aunt) and as beneficial owner of the property) had been in a position to give a notice to quit to Mr. Clarke, and the formality of registration did not start time running again. (Learned judge's emphasis)

e) In the learned judge's view, this is a very important aspect of the judgment as it relates to the instant case. The reason time did not start to run again or to run anew in Swaby's case when he became registered proprietor, was because he already in 1983 had acquired the right to give Clarke notice to quit both as his Aunt's executor and as beneficial owner of the property. The obvious implication seems to the learned judge to be that had Swaby been registered as proprietor in 1991, without any other prior connection as executor or beneficiary, irrespective of whatever length of time had already run in Clarke's favour against the Aunt and her estate, time would have begun to run again from the date of the Swaby's registration as the proprietor in counting the twelve year period. The Privy Council in the learned judge's judgment have helped to make it crystal clear that only a time period of adverse possession subsequent to a particular registration can be counted against that particular registered proprietor. Such a person has a right to make entry and to give Notice to Quit in his own right, and is not a person making a claim through the previous registered proprietor. This is because of the paramountcy of the registration accorded by the Torrens Title system and the scheme established by Jamaica's Registration of Titles Act.

1. It seems arguable that in Jamaica whilst an unregistered title may be extinguished under Section 30 of the Limitation of Actions Act, a registered title is not.

1. The registration of the Eugsters as proprietors of the lands is paramount under the Torrens system, any rule of law or equity to the contrary notwithstanding, as fraud was not in issue in the instant case.

1. In the learned judge's judgment, the Claimants' adverse possession claims, they not having applied and become under section 85 of the Registration of Titles Act, registered as proprietors, have no validity and are not made out against these Defendants because the Defendants did not become the registered proprietors until May 2002.

1. The learned judge opined in her conclusion of her judgment that Jamaica's legislators ought to re-examine the law of adverse possession to effect legislative changes similar to those which have occurred in England. These changes being for an adversor to compensate the adversee in those cases where the adversor has acquired a title by the law of adverse possession.

Kent P. Gammon, LL.M.