

Mr and Mrs Benjamin Patrick - - - - - *Appellants*

v.

Beverley Gardens Development Company Ltd. - - *Respondents*  
and Another

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 28TH NOVEMBER 1977

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*Present at the Hearing :*

LORD SALMON  
LORD EDMUND-DAVIES  
LORD RUSSELL OF KILLOWEN  
LORD SCARMAN  
SIR HARRY GIBBS

[*Delivered by* LORD RUSSELL OF KILLOWEN]

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These consolidated appeals concern a plethora of suits, judgments and orders. The question is whether Mr. & Mrs. Patrick can no longer continue in occupation of a site some 5 acres in extent which they have occupied as their home since the early 1940's, on which they have twice built and which they have cultivated. They have asserted ownership, by virtue of an alleged agreement for sale to them under which the purchase price was paid, or by virtue of a possessory title.

The freehold of the land belonged to Ann Brown, who was registered as owner thereof in 1904: Ann Brown had two daughters, Rebecca Lyons and Fredericka Goode. Ann Brown and F. Goode went to live in the U.S.A.; R. Lyons stayed in Jamaica. It seems probable that R. Lyons held a power of attorney from A. Brown. According to Patrick she granted in 1942 a 5 year tenancy of the land to Patrick, with an option to purchase the land for £250 on giving 6 months notice or 6 months rent in lieu. The rent was £6 p.a. According to Patrick in July 1944 he exercised the option by payment of a half year's rent in lieu of notice and paid the price of £250 by three payments of £125, £100 and £25 in July 1944, August 1945 and January 1946 for which he was given receipts by R. Lyons which disappeared in 1951 in a hurricane which blew his house apart. R. Lyons had a daughter F. Walker, also in Jamaica. To complete the family F. Goode had a daughter F. Joseph, also in U.S.A. Ann Brown died in 1946. It would seem that any right to the land which may have remained in her may have devolved on F. Goode but the situation is perhaps obscure. R. Lyons also died in 1946 in April. F. Walker was then given a power of attorney by F. Goode.

In 1962 F. Walker as attorney for F. Goode instituted proceedings before the Resident Magistrate by laying an Information seeking possession of the land under the statutory provision for recovery of small tenements. In December 1960 the same Magistrate had made a vesting order for the purposes of registration of the fee simple title in favour of F. Goode, probably on the application of F. Walker. To complete the registered title F. Goode died in 1967 appointing F. Joseph as her executrix. F. Joseph was registered as proprietor in 1969 and the respondent Beverley Gardens Development Company Ltd. ("Beverley") was so registered on the same day, on the basis apparently of a transfer from F. Joseph, F. Walker apparently acting for F. Joseph.

Their Lordships will return to the impact on this case of three registrations of title. But for the present the crucial question is whether the Resident Magistrate having on that Information ordered possession of the land in favour of F. Goode, Patrick was thereafter estopped *per rem judicatam* from asserting in subsequent litigation either that he had purchased the fee simple in equity from Ann Brown acting through R. Lyons, or alternatively had acquired a possessory title as having (as Patrick alleges and F. Walker denies) been in possession without paying rent since 1944.

At the hearing in 1962 before the Resident Magistrate evidence was given on affidavit and orally. Patrick told his story of the option to purchase, its exercise, the payments of purchase price to R. Lyons and the hurricane explanation for the absence of the three receipts given by R. Lyons. Another witness supported his story of payments to R. Lyons. Patrick said that the final instalment of £25 was handed to F. Walker to give to her mother. F. Walker denied this, and said that in the 1950's and as late as 1960 Patrick had paid to her rent for the land for the period up to 1957, and produced a book of counterfoils of receipts given by her purporting to support that version of events. Patrick denied paying any such rent to her. There were other points of dispute which need not be rehearsed. The Resident Magistrate accepted F. Walker's version of events, and not that of Patrick and his witness: and he made an order for possession, to be executed not earlier than 21 days nor later than 28 days thereafter. In the event that order was not enforced. Then started the actions in which Patrick has failed throughout on the footing that the decision of the Resident Magistrate on the Information laid in 1962 precluded Patrick from asserting ownership as constituting against him *res judicata* on that question in favour of F. Goode and those claiming through her—i.e. F. Joseph and the respondent Beverley. On the basis of *res judicata* all contentions of Patrick have been struck down as frivolous and vexatious and an abuse of process. The question where lies the truth between Patrick and F. Walker has thus never since the 1962 hearing by the Resident Magistrate been tried. For Patrick it is contended that (to state it shortly) it is erroneous in law to find here a case of *res judicata*, since under the jurisdiction of the Resident Magistrate which was invoked in 1962 he had plainly no jurisdiction to determine a question of *title* to land: he could do no more than decide whether to make an order for possession. Before examining further that point of law it will be convenient to trace the history of the subsequent litigation. But it is to be observed that it is not relevant to the question of *res judicata* that Patrick opposed the order on the Information laid, or that he gave evidence, or that his evidence was not accepted and that of F. Walker preferred. The question would have been the same if he had taken no part and the possession order had been made. This their Lordships find an important point to bear in mind.

The Resident Magistrate having made his order for possession—which as observed was not enforced—Patrick might have appealed from it: but an alternative course was available, and he took it. He issued on 29 January 1963 a writ against F. Walker claiming entitlement to the fee simple of the land on the basis of purchase from R. Lyons presumably as attorney for Ann Brown: these proceedings were E11 of 1963. On 12 February 1963 F. Walker issued a summons to strike out the action, on the ground that it disclosed no reasonable cause of action, was frivolous and vexatious, and raised a question already decided between the same parties by a court of competent jurisdiction—meaning thereby the Resident Magistrate on the Information. This summons came before Fox J. He decided on 29 October 1963 against Patrick on the ground that the question in issue had been conclusively decided by the Resident Magistrate, and gave judgment for F. Walker without considering the merits. An appeal by Patrick (C.A. 33 of 1963) was dismissed, also without consideration of the merits. That action is not the subject of this appeal: but the merits not having been considered it cannot itself form a basis for *res judicata*.

Patrick remained in possession and occupation of the land. There seem to have been some other proceedings in 1967 with Patrick as plaintiff and F. Walker as defendant which reached the Court of Appeal on appeal (C.A. No. 5 of 1967) from some order of a Judge in Chambers dated 10 January 1967: an application to the Court of Appeal was dismissed on 11 July 1969. Nothing appears in the record to throw light on these proceedings.

Beverley was entered in the Register in August 1969 as entitled to the land by transfer from F. Joseph the personal representative of F. Goode. On 23 March 1972 Beverley issued a writ against the Patricks (CL 371 of 1972) seeking possession, an injunction restraining building on the land (which Beverley hoped to subdivide) and a mandatory order on the Patricks to pull down existing buildings. Beverley applied by summons for an interlocutory order restraining further building by Patrick. On 26 April Parnell J. ordered a preliminary point as to ownership of the land to be tried. On 6 June 1972 notice was given by Beverley's solicitors of the hearing of the preliminary point as being

“the question of whether the ownership of the land . . . has been finally decided as between the Plaintiffs' predecessor in title and the Defendant in the following actions, viz:

1. Information No. 4479/62 in the Resident Magistrate's Court holden at May Pen . . . .
2. Suit No. E11 of 1963 in this Honourable Court.”

After lengthy arguments Chambers J. on 16 November 1972 decided that the question of ownership had been conclusively determined by a court of competent jurisdiction and entered judgment for Beverley for possession, a final injunction against building, and a mandatory order to pull down existing buildings within two weeks. This decision and these orders plainly were based upon the decision of the Resident Magistrate on the Information. An application for a stay pending appeal was refused. In November 1972 the Patricks appealed from this order (C.A. 36 of 1972). They applied to the Court of Appeal for a stay of execution: this application came on to be heard on 15 December 1972 and was subsequently on 18 December granted. On or about the same day (the 14th or 15th) persons acting for Beverley moved on to the land and pulled down the buildings thereon without taking the

precaution of obtaining a warrant for possession, an event which gave rise to yet another suit, with the Patricks as plaintiffs and Beverley and one Mignott (who conducted the operations for Beverley) as defendants. This was suit CLP 005 of 1974, the writ being issued on 24 January 1974. In this suit damages were claimed for damage to the buildings and goods therein and trespass. After the order of the Court of Appeal staying the execution of the order of Chambers J., Patrick doggedly began to erect yet a third house on the land.

In suit CLP 005 of 1974 the defendants Beverley and Mignott on 20 March 1974 issued a summons to strike out the action as disclosing no reasonable cause of action and as frivolous, vexatious and an abuse. This summons was heard by Vanderpump J. on 21 and 24 May 1974. He held that though the Statement of Claim *per se* disclosed a reasonable cause of action (as taken on its face it plainly did) it should be struck out as an abuse. He based his decision on the fact that ownership of this land had been already decided against Patrick in the Information proceedings before the Resident Magistrate in 1962/63 and the proceedings in E11. Once more the merits of the case of Patrick as to ownership were not considered.

The Patricks appealed also from this decision (C.A.21 of 1974). That appeal and the appeal No. 36 of 1972 (in suit CL 371) were consolidated and from the adverse decisions in both appeals of a majority of the Court of Appeal the Patricks now appeal to this Board by leave of the Court of Appeal.

Edun J.A. dissented. His ground was that on the facts in evidence before the Resident Magistrate on the Information the Resident Magistrate ought to have held his hand and not ordered possession because there was a *bona fide* dispute as to title. Before this Board a broader approach has been offered for the Patricks. That was that the Resident Magistrate on the Information had no jurisdiction to decide a question of title so that there could be no question of *res judicata* on that. Moreover the subsequent rulings in suit E11 of 1963 could not constitute *res judicata* since they depended upon the Resident Magistrate's decision without enquiry into the merits.

In their Lordships' opinion it is clear that the proceedings on the Information laid in 1962 and the order for possession made thereon in early 1963 by the Resident Magistrate cannot constitute a basis for *res judicata* on the question of title, and their Lordships refer hereunder to the second proviso to section 54 of the Landlord and Tenants Law (Cap.206), under which section the Resident Magistrate acted. That second proviso reads as follows:

"Provided also, that nothing herein contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession where such person had not at the time of granting the same lawful right to the possession of the premises."

The decision in suit E11 of 1963 (Fox J.) cannot constitute *res judicata* since the merits of the title issue were not considered, the court relying on *res judicata* before the Resident Magistrate in 1963. In so far as the decisions of Chambers J., Vanderpump J. and the Court of Appeal were based upon the decisions of the Resident Magistrate on the Information and of Fox J. as constituting *res judicata* they were in their Lordships' opinion erroneous: and in their Lordships' opinion they were so based.

Counsel for the respondents to these appeals found himself unable to support these decisions insofar as they were so based. However he sought to argue that they could be supported on the basis of *res judicata* arising from the vesting order in December 1960 vesting the proprietorship in F. Goode, and suggested from passages in the judgments that indeed the decisions rested upon, or alternatively upon, that vesting order. Their Lordships cannot accept that contention. The notice of the hearing of the preliminary point before Chambers J. has already been quoted, and it contains no mention of the vesting order of 1960. They cannot indeed find any trace of that argument in the case for the respondents. In particular if the present respondents had put forward a contention that the 1960 vesting order solved the question of title their Lordships cannot think that it would have escaped mention in the dissenting judgment of Edun J.A. Counsel for the respondents made some attempt to persuade their Lordships that in truth the vesting order of 1960 was the key to the case: but quite apart from the point not being taken in the respondents' Case their Lordships decline to investigate what may be a most technical question of local law without the advantage of any views thereon of the courts below.

In their Lordships' opinion the orders of the Court of Appeal in both appeals must be set aside. So also must the orders of Chambers J. dated 16 November 1972 in the one action and of Vanderpump J. dated 24 May 1974 in the other action. Both actions are remitted to the Court of Appeal with a direction that they be tried at first instance. In their Lordships' opinion the parties should be given leave to amend as they may be advised, and the present respondents are not to be regarded as disabled by the result of this appeal from seeking to rely upon the vesting order of 1960 or upon any other entry on the register of title. The appellants are likewise not to be barred from raising a claim to a possessory title. The respondent Beverley must pay the costs of the appellants of the hearing of the preliminary issue tried by Chambers J. and of the appeal C.A.36 of 1972 in the Court of Appeal and before this Board: both respondents must pay the costs of the appellants of the summons before Vanderpump J. and of the appeal C.A.21 of 1974 in the Court of Appeal and before this Board. Their Lordships will humbly advise Her Majesty accordingly.

In the Privy Council

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Mr and Mrs BENJAMIN PATRICK

v.

BEVERLEY GARDENS  
DEVELOPMENT COMPANY LTD.  
AND ANOTHER

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DELIVERED BY  
LORD RUSSELL OF KILLOWEN