

# UNIVERSITY OF THE WEST INDIES FACULTY OF LAW REAL PROPERTY I

## Worksheet 8

2018-2019

### Adverse Possession

#### LEARNING OBJECTIVES

By the end of this lesson, you should be able to:-

- Define adverse possession
- Explain how adverse possession is established
- Explain *factum possessionis* or factual possession
- Explain what is meant by the intention to possess or *animus possidendi*
- Apply the principles which establish adverse possession

#### Required readings:

- Owusu, Commonwealth Caribbean Land Law, London, Taylor and Francis Chapter 8, pp. 267- 319.
- Kodilinye, Commonwealth Caribbean Property Law, 4<sup>th</sup> ed., Chap. 12
- Megarry & Wade, The Law of Real Property, 6<sup>th</sup> ed., pp.1303-1332

#### Additional (optional) readings:

- Cheshire & Burn's Modern Law of Real Property, 16<sup>th</sup> ed., pp. 961-987
- Gray, Elements of Land Law, pp. 365-378, 399-425

#### Cases (listed below and throughout the worksheet):

- **\*\*Pye (Oxford) Ltd and Ano. v. Graham and Ano.** [2003] 1 A.C. 419
- **Pottinger v. Raffone** (PC case) [2007] UKPC 22 (17 April 2007)
- **Recreational Homes Ltd. v. Carl Lazarus [2014] JMCA Civ. 34**
- **Willis v. Earl Howe** [1893] 2 Ch. 545
- **Leigh v. Jack** (1879) 5 Ex. D.264,272
- **Li v. Walker** (1968) 12 W.I.R. 195, 206
- **Powell v. McFarlane** (1977) 38 P. & C.R. 452, 470-471, *per* Slade J.,
- **Seddon v Smith** (1877) 36 L.T. 168, 169
- **Cadija Umma v. S. Don Manis Appu** [1966] 3 W.L.R. 750.
- **West Bank Estates Ltd. v. Shakespeare Cornelius Arthur & Ors.** [1966] 3 All E.R. 750, 757-758.
- **Toolsie Persaud** [2008] CCJ 5 (AJ)
- **Ramnarace v Lutchman** [2001] UKPC 25
- **Wills v Wills** [2003] UKPC 84

Adverse possession means “possession inconsistent with the title of the true owner.” Therefore possession as a licensee does not give rise to adverse possession. There is a strong presumption

that the true owner or the owner with paper title is in possession. The adverse possessor is establishing a title that seeks to oust or defeat the title of the true owner.

To establish adverse possession, a squatter must show that he has:

- (i) Factual possession and
- (ii) An intention to possess or *animus possidendi*.

See **Buckinghamshire County Council v Moran** [1990] Ch. 623, 636 and **Pye (Oxford) Ltd. v. Graham** [2003] 1 A.C. 419

### THE LENGTH OF LIMITATION PERIOD

10 years - Limitation of Actions Act, No.11 of 1997 (**Barbados**) s.25(1) -

20 years - Limitation Act, 1984, No.54 (**Bermuda**), s.16(1)

12 years - Limitation Act, 1961, Cap.68 (**Anguilla**), s.; Limitation Act, No.8 of 1997(**Antigua**), s.17(1); Limitation Act, 2000, Ch.83 (**Bahamas**), s.16(3); Limitation Act, 1990, Cap.132 (**Belize**), s.12(2); Limitation Act, 1991, Cap.43 (**British Virgin Islands**), s.19(1); Real Property Limitation Act, 1991, Chap.54:07 (**Dominica**), s.2; Limitation of Actions Act, 1990, Cap.173 (**Grenada**), s.4; Title to Land (Prescription and Limitation), 1973, Cap.60:02 (**Guyana**), s.5; Limitation of Actions Act, 1973, Cap.222 (**Jamaica**), s.3; Limitation Act, 1962, Cap.45 (**Montserrat**), s.6(3); Limitation Act, 1961, Cap.45 (**St. Kitts and Nevis**), s.6(3); Limitation Act, 1990, Cap.90 (**St. Vincent and The Grenadines**), s.17(1); Limitation Act, No. 22 of 1981 (**Trinidad and Tobago**), s.13(3).

### Acquiring the fee simple

See also ss. 85 -88 Registration of Titles Act (ROTA), Jamaica and s. 3 Quieting of Titles Act 1959, Bahamas

- **Pottinger v Raffone**
- **Re O'Brien Loans Ltd.** (1987) Supreme Court, Bahamas, No. 21 of 1986 (unreported)
- **Re Knowles** (2010) Supreme Court, The Bahamas No. 1353 of 2008 (unreported); Carilaw BS 2010 SC 95

### Tacking of the Periods of Trespasses

In **Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd** [1974] 3 All E.R. 575, 585, Stamp L.J. held:

that if a squatter who has been in possession for less than the full statutory period transfers the land, he can give the transferee a right to the land which is as good as his own and the latter can add the former's period of possession to his own.

In **Willis v. Earl Howe** [1893] 2 Ch.545, 553, Kay L.J. observed:

A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner.

Kay L.J. sought to illustrate a point with a hypothetical scenario **Willis v. Earl Howe** [1893] 2

Ch.545, 553:

The effect of that would be that if a series of occupiers, not claiming under one another, kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am opinion that is not the law

See also:

- Cheshire and Burn Modern Law of Real Property, 16<sup>th</sup> ed., p.966-7 for the same view.
- Megarry and Wade, Modern Law of Real Property, 6<sup>th</sup> ed., p.1311, para.21-022.

**cf:** A contrary decision on the point had been given by Romilly L.J. in Dixon v. Gayfere (1853) E.R. 1097:

adverse possession by a succession of independent trespassers, for a period exceeding twenty years, confers no right on any one of them who has not himself had twenty years' uninterrupted possession, ....

If the stranger has acquired a right by his possession, he may enforce that right; but if his possession has not been sufficiently long to create such a right, he, in my opinion gets nothing, he is entitled to nothing.

But see the following as discussed in the Kodilinye at p.224:

- Trustees, Executors and Agency Co. Ltd. v. Short (1883) 13 App Cas. 793, 798 per Lord Macnaghten
- Ocean Estates Ltd. v. Pinder [1969] 2 AC 19, per Lord Diplock (PC case)
- Perry v Woodfarm Homes Ltd. [1975] IR 104 and
- Asher v Whitlock (1865) LR 1 QB 1

**When does time start running against the paper owner?**

Time begins to run only where there is **ADVERSE POSSESSION**. This implies two conditions:

**1. Absence of possession**

*Dispossession – owner has been driven out of possession*

*Discontinuance of possession – the owner has given up or abandoned possession of the premises. Mere non-user is not enough – Tecbild Ltd. v Chamberlain (1969) 20 P. & C.R. 633.<sup>1</sup>*

**2. Adverse possession**

- Leigh v. Jack (1879) 5 Ex. D.264, 272
- Li v. Walker (1968) 12 W.I.R. 195, 206

**(i) Factual possession (*factum possessionis*)**

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<sup>1</sup> Megarry and Wade The Law of Real Property at p. 1307, para. 21-015

There must be evidence of sufficient exclusive physical control on the part of the adverse possessor. It must be *nec clam* (open and unconcealed) and *nec presario* (not by consent or permission).

- **Ambrister v. Lightbourn** [2013] 1 P. & C.R. 17
- **Pye (Oxford) Ltd and Ano. v. Graham and Ano.** [2003] 1 A.C. 419
- **Powell v. McFarlane** (1977) 38 P. & C.R. 452, 470-471, *per* Slade J.,
- **Seddon v Smith** (1877) 36 L.T. 168, 169
- **McDonell v. Giblin** [1904] NZLR 660
- **Murphy v Murphy** [1990] IR 183

In **Li v. Walker** (1968) 12 W.I.R. 195, 206, the Guyana Court of Appeal said that the facts should point to sole and undisturbed possession, user and enjoyment deliberately, adversely and exclusively exercised.

It was said in **Lord Advocate v. Lord Lovat** (1879-80) L.R. 5 App. Cas. 273, 288 that the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest... are to be taken into account in determining the sufficiency of a possession.

- **Red House Farms (Thorndon) Ltd. v. Catchpole** [1977] 2 EGLR 125
- **Cadija Umma v. S. Don Manis Appu** [1966] 3 W.L.R. 750.
- **West Bank Estates Ltd. v. Shakespeare Cornelius Arthur & Ors.** [1966] 3 All E.R. 750, 757-8.

#### ***Grazing***

**Re MacEachern and Maclsaac** (1977) 81 D.L.R. (3<sup>rd</sup>) 20: pasturing of cattle was not considered sufficient to keep the statute running in favour of the petitioner. "There was no evidence of any cropping of the land, fencing of land or any other acts which might give a possessory title", at p.28.).

#### ***Fencing***

- **Marshall v. Taylor** [1895] 1 Ch. 641, 645.
- **Williams Brothers, Ltd. v. Raftery** [1957] 3 All E.R. 593
- **Littledale v. Liverpool College** [1900] 1 Ch. 19
- **Tecbild Ltd. v. Chamberlain**

#### **(ii) Intention to possess or *animus possidendi***

**Pye v. Graham** [2003] 1 A.C. 419, 435-436, *per* Browne-Wilkinson L.J.:

But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary.

There should be, according to Slade J. in *Powell v. McFarlane* (1977) 38 P & CR 452, 471: intention, in one's own name and on one's own behalf, to exclude the world at

large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.

**Basildon v. Charge** [1996] C.L.Y.4929

***Enclosure, placing of locks and gates***

- **Buckinghamshire County Council v. Moran** [1990] Ch. 623

**Intention or future plans of the owner (the test of inconsistent future use)**

- **Leigh v Jack** (1879) 5 Ex. D. 264 (**now overruled in most jurisdictions**)
- **Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd.** [1974] 3 All E.R. 575

In **Leigh v. Jack** Cockburn C.J. said:

I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated.

Bramwell L.J. said:

In order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intends to use it: that is not the case here where the intention of the plaintiff and her predecessor in title was not either to build upon or to cultivate the land but to devote it at some future time to public purposes.

Lord Denning in **Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd.** [1974] 3 All E.R. 575, [1974] 3 All E.R. 575, 580 held:

When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more:.... The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission. And it has been held many times in this court that acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939. They do not amount to adverse possession...

**cf:** *Leigh v. Jack* was disapproved in **London Borough of Hounslow v Minchinton** (1997) 74

P. & C.R. 221. and was condemned in the English Court of Appeal: **Buckinghamshire County Council v. Moran** [1990] 1 Ch. 623, 646, *per* Nurse L.J., and in the House of Lords **Pye v**

**Graham** [2003] 1 A.C. 419, 438, *per* Browne-Wilkinson, L.J. where it was castigated by Lord Browne-Wilkinson as a heresy in **Pye v Graham** [2003] 1 A.C. 419, 438:

**if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner.**

In the Caribbean, there is a line of cases in the Eastern Caribbean Supreme Court that follows *Leigh v Jack*. These started with *Pollard v Dick*. It was held by the EC Court of Appeal that a person who believed himself to be owner could not claim an adverse title since he would not have had any intention of displacing the true owner.

However, the Caribbean Court of Justice in *Toolsie Persaud* [2008] CCJ 5 (AJ), has denounced this reasoning.

[25] This last clause has raised problems in some minds where the factual possessor has mistakenly believed himself to be the owner with the paper title, because he cannot have the intention to exclude himself. However, the cited passage is not part of an Act of Parliament. The intention to exclude the world at large (including the true owner if other than the factual possessor) is what is required. An intention to have exclusive control of the land, mistakenly believing oneself to be the true owner, suffices.

[26] As Saville LJ (later Lord Saville of Newdigate) stated in *Hughes v Cork*[FN5],

"The learned Judge appears to have held that it is impossible for someone who believes himself to be the true owner to acquire title by adverse possession since such a person cannot, *ex hypothesi*, have an intention to exclude or oust the true owner. If this were the law then only those who knew they were trespassing, that is to say, doing something illegal, could acquire such a title, while those who did not realize that they were doing anything wrong would acquire no rights at all. I can see no reason why, as a matter of justice or common sense, the former but not the latter should be able to acquire title in this way. What the law requires is factual possession i.e. an exclusive dealing with the land as an occupying owner might be expected to deal with it, together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else."

Why indeed, should a mala fide user of land to the exclusion of everyone else be better off than a bona fide user in the same circumstances? What is crucial is that it is obvious enough to the paper owner that if he does not take steps to stop this exclusionary user then he will lose his ownership after twelve years have expired (or thirty years if the owner is the State or the Government). The possession of a mala fide user of the land is clearly "adverse" possession, but where there is want of actual possession by the true owner, ordinary possession by another to the exclusion of the true owner fits the modern notion of adverse possession, as made clear by Wooding CJ in *Richardson v Lawrence*[FN6] and Crane JA in *Gobind v Cameron*[FN7].

[27] We endorse the following remarks of Lord Browne-Wilkinson in the leading case, *JA Pye (Oxford) Ltd v Graham*[FN8].

"Much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Act[FN9]. The question is simply whether the defendant

squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner... Except in the case of joint possessors, possession is single and exclusive. Therefore if the squatter is in possession the paper owner cannot be.

...there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."

### ***POSSESSION AFTER EXPIRATION OF TENANCY***

Where a tenant holds over a tenancy, after one year he or she becomes a trespasser. This is when the time starts to run for adverse possession.

For a tenant-at-will, adverse possession starts after one-year of the tenancy-at-will. In **Ramnarace v Lutchman**, an uncle agreed to sell some land to his niece. She moved in as intending purchaser and therefore tenant at will. The uncle died, and his heirs tried to remove the niece, claiming that she had a mere licence. The Court held that she was initially a tenant-at-will, and that after a year she became an adverse possessor. As the limitation period had passed by the time of filing court proceedings, she was entitled to the land.

### ***TITLE BY POSSESSION ADVERSE TO A CO-TENANT (TENANT IN COMMON OR JOINT TENANT)***

"The possession of one tenant in common,.... as tenant in common, can never bar his companion because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share he acknowledges him co-tenant; nor indeed is refusal to pay of itself sufficient, without denying his title. But if, upon demand by the co-tenant of his moiety, the other refuses to pay, and denies his title, saying, he claims the whole, and will not pay, and continues in possession, such possession is adverse, and ouster enough. And in the same case it was held, that a jury might presume actual ouster from an undisturbed and quiet possession for a great length of time ...." **Reading v. Royston** per Lord Mansfield. *Vide* Espinasse 456. 1 Atk.493. 1 Bl. Rep677. 2Bl.Rep.690. 1 Salk.391.

### ***Bahamas, Barbados, Bermuda, Grenada and Jamaica***

The Jamaican statute, which is not substantially different from the enactment in the Bahamas, Barbados and Grenada, provides:

"When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them".<sup>2</sup>

As a condition precedent, the co-tenant should have been in:

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<sup>2</sup> S. 19 Limitation Act, Bahamas; s. 32(2) Limitation Act, Barbados and s. 14 Limitations of Actions Act, Jamaica

- (a) possession of the whole property<sup>3</sup> or in receipt of rent and profits of the entirety,
- (b) for his own benefit. Paradise Beach and Transportation co. Ltd. & Ors. v. Price-Robinson & Ors. [1968] 1 All E.R. 530.

In delivering the opinion of the Board in this case, Upjohn L.J. said, "The 'separate possessions' ... obviously only start when the occupation is 'for his or their own benefit'".<sup>4</sup>

\*\*Wills v. Wills, (2003) 64 WIR 176 - Langrin JA said:

"Breach of a fiduciary obligation in equity's eyes strikes against the very nature of equity itself. If the law were otherwise a number of families in Jamaica would lose their co-ownership in lands unfairly. A dishonest spouse who remains on the property while the other spouse goes abroad to increase the family welfare could easily claim an interest under the Limitation Act after a lapse of 12 years".<sup>5</sup>

Lord Walker, delivering the opinion of the Board, said:

"Elma no doubt wished to maintain her claim to co-ownership, not least because she expected to outlive George and hoped to take by survivorship. But such an intention, however amply documented, cannot prevail over the plain fact of her total exclusion from the properties. After 1976 at the latest George occupied and used the former matrimonial home and enjoyed the rents from the rented properties as if he were the sole owner, except so far as he chose to share his occupation and enjoyment with Myra."<sup>6</sup>

The case turned on its peculiar facts:

"Their Lordships think it right (especially in view of the observations at the end of the judgment of Langrin JA (Ag)) to emphasise that this appeal turns ultimately on its own facts; and although separation and divorce are sadly commonplace, the facts of this case are quite unusual. ... ***Elma seems, from some of the evidence, to have been an independent-minded and forceful lady. So it is an exceptional case.***

[32] Their Lordships do not therefore see the outcome of this appeal as likely to cause trouble for the large number of Jamaican citizens who work overseas and contribute to their families' welfare and the island's economy. Most of them will come home on a fairly regular basis, will retain the bulk of their possessions at home, and will not (on coming home) be treated as guests in their own houses. But if (as must sometimes happen) a Jamaican working overseas forms new attachments and starts a new life, and entirely abandons the former matrimonial home, he or she will (within the ample period of 12 years) have to consider the legal consequences of that choice.<sup>7</sup>

In Re Strong and Colby et al (1978) 87 D.L.R. (3<sup>rd</sup>) 589 Robins J. said:

"But where, as here, possession was acquired during a marital relationship it seems to me that the spouse claiming possessory title of the matrimonial home finds greater difficulty in discharging the onus of establishing the requisite animus possidendi from the fact of possession alone than does a claimant in most other circumstances. A departing spouse may for a variety of readily imaginable reasons, and without any intention to abandon ownership in the matrimonial property,

<sup>3</sup> Ex parte Hassell, In the Matter of Manchester Act (1839) 3 Y. & C. Ex. 617, 619

<sup>4</sup> Paradise Beach and Transportation Co. Ltd. case at p. 534

<sup>5</sup> Wills v Wills (2003) WIR 176 at p.187

<sup>6</sup> Ibid at p. 198

<sup>7</sup> Ibid at p.190



permit the other spouse to remain there for an indeterminate time, and, by the same token, the remaining spouse's possession is not necessarily referable to **an intention to deprive the other of title.**"

See also **Recreational Holdings Jamaica Limited vs Carl Lazarus and The Registrar of Titles** [2014] JMCA Civ 34.

## TUTORIAL QUESTIONS

### Dec 2013, q5

Answer both (a) and (b).

(a) "A co-owner cannot claim absolute fee simple title to the entire co-owned property by adverse possession as against his or her co-tenants".

Critically analyze this statement.

(b) Mike is the fee simple owner of Yellowacre, a large lot of land, which he intends to develop as a housing estate. In November, 1999, Nat, the fee simple owner of Blueacre, an adjacent lot, started to graze his cow on a portion of Yellowacre, which was a vacant lot. One year later, Nat erected a fence around the portion he used for grazing his cow so as to prevent his cow from straying onto the nearby street.

In December, 2007, Nat sold his cow. Soon thereafter, Olson, who resided in a property opposite to Yellowacre, started to use the portion which Nat had used for grazing his cow, to grow vegetables. In 2008, Olson installed a gate with a lock in the fence which was previously erected by Nat, to protect his vegetable garden from intruders.

Mike enquired as to what Olson was doing, and he was told that he was looking after Yellowacre until such time as it would be used for the housing estate.

Late last week, Olson received a notice to vacate Yellowacre from the solicitors of Mike. Olson claims that he is entitled to the whole of Yellowacre, which, in his view, has been abandoned for more than 20 years.

Advise.

### Dec 2014, q2

Explain the significance of the opinion of the Privy Council in the Jamaican case of *Wills v Wills* [2003].

### Dec 2016, q4

Garland is the fee simple owner of Blueacre, a large plot of land in a suburban area in Barbados. In December 1998, Bill, the proprietor of Yellowacre, an adjacent lot, began grazing his cattle on a small portion of Blueacre. In January 2000, Bill erected a fence around the portion of Blueacre on which his cattle grazed and installed a lock and gate in the fence.

In December 1998, Garland granted Nora, another neighbour, a one-year lease of a strip of land on Blueacre, known as "the Grove". Nora subsequently erected a small play park on "the Grove" with swings, a see-saw and a portable swimming pool for her children. Upon expiration of the lease in December 1999, Nora sought a renewal of the lease for a further term. Garland refused to renew the lease, advising that he intended to develop the property.

Nora and her children continued to use “the Grove” without disturbance from Garland until December, 2013.

In January 2002, Garland also granted Jack, a mechanic, and the tenant of neighbouring Yellowacre, permission park cars on Blueacre.

In December 2013, Garland gave Bill, Jack and Nora notices to vacate the respective portions of Blueacre, and threatened to commence ejectment proceedings if they failed to vacate Blueacre.

Advise Bill, Jack and Nora.

#### Dec 2017, q2

Jacob is the fee simple owner of Redland, a large lot in a suburban area. In December 2004, Patrick, the proprietor of Greenland, an adjacent lot, believing that Redland had been abandoned, started to cultivate corn on a small portion of Redland. In November 2005, Patrick erected a flimsy make-shift fence around the cultivated portion of Redland to keep out intruders.

In January 2005, Jacob gave Arthur, another neighbouring lot owner, permission to graze his goats on a strip of Redland for two years under a Grazing Agreement. During those two years, Arthur erected a wire fence around the strip of Redland on which his goats grazed to keep the goats from roaming. The strip was enclosed at each end by padlocked gates for which only Arthur had keys. When the permission to graze under the Grazing Agreement expired in January 2007, Arthur sought to renew the permission to graze with Jacob. Jacob refused, saying he intended to start building on Redland in the near future. Arthur nevertheless continued to graze his goats on Redland without disturbance from Jacob until October 2017.

In October 2017, Jacob gave both Patrick and Arthur notice to vacate the portions of Redland being used by them, and threatened legal proceedings if the notices were not complied with. Advise Patrick and Arthur.