

(2)

ANTIGUA & BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 20 OF 1988

BETWEEN:

1. NOEL GRESON GRAHAM DAVIS
2. CECILE INEZ GRAHAM DAVIS

Appellants

and

1. HENRY STRICKLAND CHARLES
2. SAMUEL JOSEPH SR.
3. JOHANA CHARLES
4. PAGET JOSEPH
5. RONALD MICHAEL
6. STEADMAN SCOTLAND

Respondents

Before: The Honourable Mr. Justice V.F. Floissac - Chief Justice
The Honourable Miss Justice M. Joseph, J.A. (Ag.)
The Honourable Mr. Justice S. Singh, J.A. (Ag.)

Appearances: Dr. F. Ramsahoye Q.C. and Mr. Collin Derrick for the Appellants.
Mr. J. Simon for the second, fourth, fifth and sixth Respondents and holding for Mr. W.A. Archibald for the first and third Respondents.

1991: November 25th, 26th, '
1992: February 24th.

JUDGMENT

FLOISSAC, C.J.

The central issue in this appeal against the judgment which Byron J. delivered on the 6th September 1988 is the ownership and right to recovery of possession of 10.29 acres of the Patterson and Horsfords Estate situate in the Falmouth area in the Parish of Saint Paul in the island of Antigua. The land in dispute is known as "The Buff" and will hereinafter be referred to as the disputed land.

On the one hand, the appellants claim to be the owners and to be entitled to possession of the disputed land by virtue of the facts that there was an adjudication in their favour under the Land Adjudication Act No. 16 of 1975 and that as a result thereof they were registered or entitled to be registered under the Registered Land Act No. 17 of 1975 as the proprietors of the disputed land

with absolute title thereto. On the other hand, the respondents claim to be the owners and to be entitled to separate portions of the disputed land by virtue of individual sales to each of them by Charles (the late John D. Charles) who at the time of the sales had a possessory title to the disputed land under the Real Property Limitation Act 1883 (Cap 290).

Accordingly, the resultant issues in this appeal are (1) whether the adjudication operates as an estoppel per rem judicatam which precludes the respondents from disputing the appellants' ownership of the disputed land (2) whether the registration of the appellants as the proprietors with absolute title of the disputed land was subject or without prejudice to the possessory rights (if any) which the respondents may have purchased from Charles and which may have subsisted at the time of the registration and (3) whether Charles had a possessory title to the disputed land at the time of his sales thereof to the respondents.

(1) The issue of estoppel

Section 15(2) of the Land Adjudication Act No.16 of 1975 provides that:

"The Adjudication Officer shall adjudicate upon and determine any dispute referred to him under subsection (1) having regard to any law which may be applicable, and shall make and sign a record of the proceedings:

Provided that nothing in this section shall empower the Adjudication Officer to vary any interest in land registered under the Title by Registration Act."

Section 23 of the said Land Adjudication Act provides that:

"After the expiry of ninety days from the date of publication of the notice of completion of the adjudication Record.....the adjudication Record shall, subject to the provisions of the Registered Land Act 1975 become final and the adjudication Officer shall

sign a certificate to that effect....."

The Adjudication Officer, Mr. I.E. Sleep (purporting to act under the said Section 15) purported to adjudicate upon and to determine the dispute between the appellants and the respondents as to the ownership of the disputed land. On the 6th March 1978, the Adjudication Officer issued the following statement:

"The powers conferred in me by the Land Adjudication Act 1975 do not empower me to vary any interest in land registered under the Title by Registration Act Cap 293. I shall however record the evidence as submitted by claimants and their witnesses and this will be available to the Court in the event of an appeal under Sec 24(1) of the Land Adjudication Act 1975, or to the Registrar in the event of an application under Sec 127 of the Registered Land Act 1975 (RLA) to lodge a caution, under Sec 132 RLA for a restriction to be made or under Sec 135 RLA for registration as proprietor of land acquired by prescription."

On the 14th April 1978, the Adjudication Officer decided as follows:

"This dispute concerns land known as "The Buff" at Pattersons Estate, near Falmouth.

The claim of Party A is based on a Certificate of Title: the claims of all other parties based on duly registered Deeds of Conveyance covering the same area.

Counsel for Party A submitted that the Certificate of Title was indefeasible and that the Adjudication Officer had no power to upset it. Further that if the other Parties wish to contest the title, on any grounds whatsoever, they must do so through the Courts. The recording of evidence by the Adjudication Officer would, he submitted, be futile. Counsel for Parties B & C and Counsel for Party G concurred.

My decision is that ownership shall be recorded as vested in Party A as the registered proprietor by virtue of their Certificate of Title. The existence of the counterclaims by the other parties in this dispute shall be recorded by means of a Note to the Registrar at Para 12 of the Adjudication record."

It is evident from the statement which the Adjudication Officer issued on the 6th March 1978 that the respondents had raised the issue of possessory title to the disputed land. It is also evident from that statement and from the decision which the Adjudication Officer gave on the 14th April 1978 that he declined to adjudicate the issue of possessory title on the ground that he had no authority to do so. He expressly left that issue to the Courts. He was content to determine the issue of ownership of the disputed land solely by reference to the appellants' Certificate of Title thereto. He therefore did not adjudicate the issue of ownership with plenitude.

The question therefore arises as to whether such an adjudication is capable of engendering an estoppel *per rem judicatam* against the respondents.

In **New Brunswick Railway Co. v British & French Trust Corporation Ltd (1938) 4 AER 747** Lord Maugham L.C. said at p756:

"The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily and with complete precision, decided by the previous judgment."

In this case, the Adjudication Officer refused to decide the issue of possessory title and therefore cannot be said to have decided the issue of ownership with complete precision. In my judgment, *estoppel per rem judicatam* does not apply to a composite

issue a component of which was specifically raised but deliberately not decided. I therefore conclude that the Adjudication Officer's ostensible adjudication does not estop the respondents from litigating the component issue of possessory title or from relitigating the composite issue of ownership of the disputed land.

(2) The effect of registration

Section 23 of the Registered Land Act No. 17 of 1975 provides as follows:

"Subject to the provisions of Section 27 the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject.....(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register"

Section 28 of the said Registered Land Act provides as follows:

"Unless the contrary is expressed, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register(f) rights acquired or in the process of being acquired by virtue of any law relating to the limitation of actions or by prescription;

(g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed;"

Sections 23 and 28 of the Registered Land Act therefore

explicitly provide that the registration of a person as the proprietor with absolute title of a parcel of land is subject or without prejudice to overriding interests (including possessory rights) which affect that parcel and which are not required to be noted on the register. Accordingly, the registration of the appellants as the proprietors with absolute title of the disputed land was subject or without prejudice to the possessory rights (if any) which the respondents may have purchased from Charles and which may have subsisted at the time of the registration.

(3) The issue of possessory title

Section 2 of the Real Property Limitation Act 1883 (Cap 290) provides that:

"...no person shall ... bring an action ... to recover any land ... but ... within twelve years next after the time at which the right ... to bring such action ... shall have first accrued to the person ... bringing the same."

Section 2 has since been fortified by Section 135(1) of the Registered Land Act No. 17 of 1975 which provides that:

"The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twelve years: ..."

Accordingly, the ultimate issue in this appeal is whether Charles acquired a possessory title to the disputed land and held that title at the time when he purported to sell separate portions thereof to each of the respondents.

It is common ground that Herd (the late David St. John Herd) was the owner of the disputed land from 1926 to 1935 and that on the 8th February 1935, Herd died leaving Pigott (the late James Albert Pigott) as his executor and leaving all his properties in

trust for his daughter Mrs. Ellie Joyal. It is also common ground that on the 10th December 1956, Pigott transferred the Patterson and Horsford Estate to Mrs. Joyal who in turn transferred to the Government of Antigua the whole of that estate less the disputed land.

The respondents sought to prove that the reason for the exclusion of the disputed land from the sale to Government was the fact that Pigott had previously sold the disputed land to Charles in satisfaction of a debt owed to Charles by the Herd Estate or succession. No evidence in writing of that sale could be adduced. However, the respondents adduced other evidence which the learned trial judge believed and which lent probability to that sale. That evidence included the testimony of McChesney George and various acts of ownership and adverse possession which Charles performed during the fifteen years between the year 1956 (when Charles is alleged to have purchased the disputed land) and the year 1971 (when Charles purported to sell the disputed land to the respondents).

The testimony of McChesney George was to the effect that before the sale to the Government, Pigott had told him that the disputed land would not be included in the sale because Pigott intended to transfer the disputed land to Charles. That testimony is evidence which illuminates the character of the acts of ownership and adverse possession which Charles is alleged to have performed.

Before examining those acts, it is necessary to consider one of the submissions of counsel for the appellant. The submission is to the effect that having originally entered into occupation of the disputed land in the capacity of overseer, caretaker or manager thereof, Charles could not unilaterally thereafter divest himself of that capacity or alter the character of his occupation so as to claim ownership of the disputed land by prescription. The answer

to that submission is that if the learned Judge believed and there was ample evidence for the belief that Pigott did in fact sell the disputed land to Charles, the alteration of Charles' capacity from overseer, caretaker or manager to purchaser or adverse possessor was not a unilateral act but was the bilateral act of Pigott (qua the owner's representative) and Charles (qua adverse possessor).

The crucial question therefore is whether during the fifteen year period (1956 to 1971), Charles performed unequivocal acts of ownership and adverse possessor by virtue of which he had acquired a possessory title to the disputed land at the time of and before the sales to the respondents.

Firstly, there was evidence contained in a letter from the Accountant General and an admission by the appellants that from 1956 to 1974 (the year of Charles' death), the property taxes on the disputed land were paid by Charles in his own name. Such payments by an occupier or possessor of land have always been regarded as unequivocal acts of ownership. Secondly, in 1971 and before the sales to the respondents, Charles sold the disputed land to his brother Henry Strickland-Charles who resold the land to Charles shortly thereafter. The sale and resale appear to be simulated acts designed to produce a documentary title for the purposes of the subsequent sales to the respondents. Nevertheless, Charles' sale to his brother and Charles' sale to the respondents were unequivocal acts of ownership or acts which unequivocally evinced an intention to assert ownership of the disputed land. Thirdly, there was evidence that Charles cultivated the disputed land during the said fifteen years without accountability to or demand for accountability by Pigott or Mrs. Joyal or any other person claiming ownership of the disputed land.

By contrast, there was no evidence that Pigott or Mrs. Joyal or anyone purporting to act on behalf of either of them ever performed any act of ownership or possession between the year 1957

and the 7th July 1975 when Mrs. Joyal purported to sell the disputed land to the appellants. The evidence was that on and before the 7th July, 1975, the respondents were in occupation of the disputed land and no enquiry was then or therebefore ever made by Mrs. Joyal or the appellants as to the character of that occupation. The result is that the occupational rights of the respondents must be deemed to have been overriding interests protected by section 28(g) of the Registered Land Act No.17 of 1975.

For these reasons, I agree with the learned Judge that the respondents should be declared to be the owners of the separate portions of the disputed land which they purchased from John D.Charles.

I would therefore dismiss the appeal with costs to be taxed if not agreed.

(Sgd.) V.F.Floissac, Q.C.
Chief Justice

I concur. (Sgd.) M. Joseph
Justice of Appeal (Ag.)

I concur. (Sgd.) Satrohan Singh
Justice of Appeal (Ag.)