

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 4 of 1989

BETWEEN:

ZEPHANIAH DONOVAN - Defendant/Appellant
and

IVAN DARTLY STEVENS - Plaintiff/Respondent

Before: The Honourable Mr. Justice Bishop - Chief Justice (Acting)
The Honourable Mr. Justice Moe
The Honourable Mr. Justice Byron (Acting)

Appearances: Dr. Ramsohoye, Q.C., and Mr. E. Hewlette for
the Appellant/Defendant
Mr. Farara for the Respondent/Plaintiff

1990: Jan. 17,
June 25

JUDGMENT

BYRON, J.A. (Acting):

The subject matter put in dispute between the parties by the Appellant is the location of their common boundary to adjoining parcels of land in their undisputed ownership and an area of land containing approximately 1.92 acres which they both claim falls within their respective ownership.

On 26th June, 1985, the Respondent commenced the proceedings for a Trespass that he alleged the Appellant committed in January 1985, to the eleven (11) acres of land of which he was the Registered proprietor, by the tearing down of fencing between their adjoining properties and the erection of another fence that encroached on his said land.

The Appellant in his defence and Counterclaim (as amended) denied the alleged encroachment and counter-claimed for a Declaration that in common with other children of Ernest Donovan he is entitled to approximately four (4) acres of land under Deed 26 of 1934 and other ancillary relief. He also specifically pleaded that Ernest Donovan and his heirs have been in possession of the said land as owners "nec vi, nec clam and nec precario since the 5th June, 1934"; and that

"any claim which the Plaintiff may have
had is barred by effluxion of time "

/under the....

under the relevant statutory provisions with regard to limitation of actions:

In his defence to the Amended Counterclaim the Respondent pleaded that the issue of the correct position of the common boundary between their land and of the ownership of the disputed parcel of land, is res judicata.

When the matter came on for trial a number of documents were admitted into evidence by consent of the parties, and the Government Surveyor surveyed the area of land in dispute in accordance with an order made by the trial Judge. The respondent was being cross-examined when Counsel argued the question whether the boundary dispute between the parties had been judicially settled, on the basis of the facts admitted by them on the documentary evidence and plans before the Court at that time.

The learned trial Judge ruled that it had and that the Court could not try the issue of long possession since the boundary dispute was already dealt with, with regard to long possession by Glasgow J. Counsel for the Appellant decided not to adduce any further evidence because his whole case turned on the question of possession. Judgment was accordingly entered for the Respondent for trespass and dismissing the Appellant's Counterclaim.

This appeal is brought on the ground that the learned trial Judge erred in law in holding that the principle of res judicata applied. The background facts are that in 1934 a parcel of land at Purcell's Mountain "containing by estimation four (4) acres more or less" was conveyed by Deed No. 26 of 1934 to the late Ernest Donovan the Appellant's father and predecessor in title. A plan dated 3rd June 1969 drawn by J.A. Story & Partners showed the land claimed by the Appellant under this deed to contain 4.3 acres.

In 1954, 1957 and 1958 legal proceedings in the Summary Court and Magistrate's Court were issued between the late Ernest Donovan and the late John Joseph Stevens the father and predecessor in title of the Respondent. These legal proceedings had to do with allegations of trespass by each against the other. There was no indication that any of these proceedings resulted in judgment.

On 6th March 1970, John Joseph Stevens died and probate of his will was granted to the Respondent. The said will devised

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all the deceased's "14 acres more or less" at Purcell to the Respondent. A plan dated 13th December 1969 to 9th March 1970 drawn by H.E. Anker, Licenced Surveyor showed the land claimed by the Respondent under the said will to contain 11.12 acres.

The plans of the parties and the plan of the Government Surveyor showed that the parties were adjoining land owners with an area of about 1.92 acres which both claimed to be within their respective boundary. This resulted in the dispute as to the location of their respective boundaries and the ownership of the said parcel of land.

In 1970 Ernest Donovan applied for the issue of a first Certificate of Title in respect of the said 4.3 acres of land he claimed to own and the Respondent issued a Caveat forbidding the issue of the first certificate of title for which the Appellant had applied. The matter came on as Suit No. 2 of 1970 in the High Court of Justice. Glasgow J., gave a written judgment on 22nd March 1970.

The relevant rulings that he made are as follows:

"It was made clear at the hearing, however that the Caveator does not claim to be owner of the whole of the 4.3 acres in respect of which the certificate of title is sought, but only a part of the northern portion of the said land....."

The plan of survey submitted by the applicant shows a cluster of large rocks as being on the applicant's land. If the applicant's northern boundary is what the Caveator says it is, the cluster of large rocks with nearly two acres of land would be included in the Caveator's land.

To discover the boundary between the Caveator's land and that of the applicant, I have had to rely entirely on the evidence of witnesses. The Caveator, William Cline and James Smith gave evidence on behalf of the Caveator, while Zephaniah Donovan (the applicant's son), and Alvin Hodge gave evidence on behalf of the Caveatee. Zephaniah Donovan explained that his father, whose age he gave as 98 years was not so well. The applicant/caveatee did not attend the hearing.

After very careful consideration of all the evidence, I accepted the evidence of the Caveator and his witnesses and rejected the evidence of the Caveatee's witness Zephaniah Donovan on the question of the position of the boundary between

/the land.....

the land of the applicant/caveatee and that of the caveator. I found the evidence of William Cline particularly helpful and reliable. The evidence of Alvin Hodge was of no assistance at all, because all he said was that more than 23 years ago his father used to rent from its then owner the land now owned by the applicant and that he (Alvin Hodge) used to take his father's breakfast to him in the morning. Alvin Hodge said he never returned to the land since then.

In view of the foregoing, the Caveat is sustained....."

There was no appeal against that judgment of the Court.

In 1973 the Respondent and Ernest Donovan both made claims to become Registered as Proprietors under the Land Registration Ordinance 1970. Ernest Donovan again claimed that he was entitled to be Registered as owner of the 4.3 acres delineated in the plan of J.A. Story & Partners and the Respondent claimed the 11.12 acres delineated in the plan of H.E. Anker.

These claims involved a dispute over the location of the boundary between their parcels of land and to the area of approximately 1.92 acres which both claimed to be part of their respective parcels of land. The subject matter of this dispute was identical with the matter which Glasgow J. had before him in 1970.

Section 15 of the Land Adjudication Ordinance 1970 conferred jurisdiction upon the Adjudication Officer to adjudicate upon and determine these disputes having regard to any law that may be applicable. This dispute was referred to the Adjudication Officer in accordance with the provisions of the Statutory provisions.

On 13th May 1974 P.G. Owen the Adjudication Officer gave the following decision:

"This dispute had been aired in full before Mr. Justice Glasgow who had access to the documents and heard the evidence in High Court Suit No. 2 of 1970.

The last paragraph on page 2 of that judgment shows clearly that the learned Judge had gone into the dispute fully and had given judgment on a matter of fact. It would be presumptuous of me to re-hear the dispute having read Mr. Justice Glasgow's judgment (dated 23.3.71).

Zephaniah Donovan was unable to introduce any new evidence and by confining himself to abuse of the Stevens and members of the

/ legal profession....

legal profession did nothing to further his case. He also stated the plans were wrong. He was told that the evidence given by both parties had been recorded and that if he wished to take the dispute to the Court of Appeal the record would be made available. Also that Ivan Dартly Stevens was the proprietor with absolute title to all the land he claimed under claim 75/1983."

By Section 23 of the said Land Adjudication Ordinance 1970 appeals against this decision lay to the Court of Appeal by any party dissatisfied thereby. But there was no appeal against that decision.

On 25th September 1975, consequent upon the decision the Appellant was registered as proprietor on the land Register with absolute title to approximately two and a quarter acres (2 1/4) of land in the Mount Sage Registration Section Block 2436B parcel 8 and on that same day the Respondent was registered as proprietor with Absolute Title to approximately 11 acres of land in the said Mount Sage Registration Section Block 2436B Parcel 7.

There was no appeal against or challenge to these entries on the land Register.

On the 26th November 1984, Letters of Administration in the Estate of the said Ernest Donovan, deceased, who had died on 15th January 1978 were granted to the Appellant and his mother, Malvina Donovan.

Counsel for the Appellant submitted that:

- (1) The trial Judge ought to have enquired into the possession as claimed by the Defendant/Appellant irrespective of where the paper title lies and depending on her finding consideration should be given as to whether the Limitation Acts apply.
- (2) Neither Glasgow J. nor the Adjudication officer adjudicated upon the issue of possession so that the Court was not bound by any finding on that issue.

The legal principle applicable is stated in 4th Halsbury Laws of England Vol. 16 para. 1526 as:

"The most usual manner in which questions of estoppel have arisen on judgments inter partes has been where the defendant in an action raised a defence of res judicata, which he could do where former proceedings for the same cause of action by the same plaintiff had

/resulted....

resulted in the Defendant's favour, by pleading the former judgment by way of estoppel. In order to support that defence it was necessary to show that the subject matter in dispute was the same (namely that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit), that it came in question before a Court of competent jurisdiction, and that the result was conclusive so as to bind every other Court."

The Appellant's submissions amount to a contention that the decisions of Glasgow J., and the Adjudication Officer were not based on the issue of long possession and that consequently the Court was not estopped from adjudicating on the issue of possession. No issue was taken with the competency of the jurisdiction.

These submissions required an analysis of the judgment of Glasgow J. and the Adjudication Officer to determine whether the issue of possession raised by the Defendant in these proceedings had been already judicially determined.

In the proceedings before Glasgow J., the Adjudication Officer and in this trial the parties were claiming entitlement to exactly the same parcels of land. The Appellant was claiming 4.3 acres and the Respondent approximately 11.12 acres. Of these claims nearly 1.92 acres overlapped and as a result the issue for determination was the location of the boundary line and the ownership of the 1.92 acres of land. On the face of the record it is apparent that the issue which the Defendant raised as to his ownership of the disputed parcel of land was identical with that determined by Glasgow J., and the Adjudication Officer.

When Glasgow J. heard the matter it was his judgment that the documentary title on which the Appellant relied was incapable of establishing the boundary between the parties, and he decided that he had to rely entirely on the evidence of the parties. On my reading of his judgment it is apparent that the basis of his finding on the issue of the location of the common boundary and consequently of the ownership of the disputed area of land was based on his finding as to who occupied the disputed area. He rejected the evidence that the Appellant was in possession of the disputed portion of land and found that the large cluster of rocks with nearly two acres of land which the Appellant claimed, was in fact on land of the Respondent. His findings on the facts necessarily include a finding that it was the Respondent and not the Appellant who was in possession of the disputed parcel of land.

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When the matter came before the Adjudication Officer he ruled that he was bound by the decision of Glasgow J. in accordance with the doctrine of res judicata. His decision also went on to indicate that at that time the Appellant was unable to introduce any new evidence. This decision also necessarily includes a finding that it was the Respondent and not the Appellant who was in possession of the disputed parcel of land.

As a matter of fact therefore, the decisions which were before the Court indicated that the location of the common boundary was as delineated on the plan of H.E. Anker and ownership of the disputed area was vested in the Respondent, and further that the basis for that ruling was the finding that it was the Respondent and not the Appellant who had been in possession of the disputed area of land.

One of the Appellant's arguments was that the issue of long possession between 1972 and 1985 (a period of more than 12 years) was not adjudicated upon by Glasgow J., and that the Appellant was entitled to have the trial Judge consider whether the Respondent's title was barred by effluxion of time.

In considering the application of the Limitation Acts the operative date from which time starts to run is the date when the cause of action accrued.

4th Halsbury's Laws of England Vol. 28 para. 723:

"If a person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has, while entitled to it, been dispossessed or has discontinued his possession, the right of action is deemed to have accrued on the date of the dispossession or discontinuance."

In the Plaintiff's Statement of Claim he alleged that the Defendant trespassed on his land by entering on it and tearing down his fences in January 1985. In the Defence the Defendant pleaded at paragraph 9 as follows:

"The Defendant further says that the Plaintiff trespassed on the said land on or about March 1971, and broke down the Defendant's fence on the Northern boundary. Thereafter the Plaintiff put up the fence in a different place on the said Northern boundary and the Defendant pulled it down and re-erected his own fence in its correct place. The Defendant last re-erected the said fence in January 1985."

The Defendant's pleadings in this case show that the
/The pleadings.....

The pleadings of both parties in this case show that the Plaintiff's cause of action was the trespass that occurred in January 1985. The writ which commenced the proceedings was issued in June 1985 within six (6) months of the date on which the cause of action arose. In these circumstances, consideration of that question is irrelevant and futile.

In my view the Appellant has failed to show that the learned trial Judge was wrong in finding that the doctrine of Res Judicata estopped her from adjudicating upon the issue of long possession.

I would dismiss the Appeal with costs to be taxed.



E.M.D. BYRON,
Justice of Appeal (Acting)

BISHOP, C.J. (Acting)

I have had the opportunity to read the judgment of Byron J.A. (Acting) earlier. He has set out what went before Glasgow J. in 1970 in the High Court, and the relevant rulings. There was no appeal against the decision.

Byron J.A. also set out in his judgment what went before the Adjudication Officer in 1973 and what was decided.

It is clear, in my view, that the land with which Glasgow J. dealt was the same land with which the Adjudication Officer was invited to deal.

The Adjudication Officer studied the decision of the learned Judge and indicated in his own decision that there was no additional evidence adduced before him. The Adjudication Officer regarded the judgment of Glasgow J. as binding in all the circumstances. He therefore held that Ivan Stevens was the owner, with absolute title to all the land he claimed. There was no appeal against that decision, and in 1975 Zephaniah Donovan was registered as proprietor with absolute title to approximately 2 1/4 acres of land. His claim to a further 1.92 acres had been refused; he no longer had any right, title or interest in it. Ivan Stevens owned it.

/It was.....

It was contended before us that the question of long possession of the land by the Appellant was not dealt with by the trial Judge (in 1970) or the Adjudication Officer (in 1973); and therefore a further action could be brought between the same parties involving the same subject matter, and the Court asked to decide the issue of ownership on the basis of alleged long possession by the appellant.

In order to support a defence of res judicata there must be proof that the subject matter in dispute was the same; that is to say, that everything that was in controversy in the second case as the foundation of the claim was also in controversy OR OPEN TO CONTROVERSY in the first claim. It must be shown that the Court was a court of competent jurisdiction and that the result was conclusive so as to bind every other Court.

In my view Glasgow J. came to the conclusion, based upon the testimony before him, that Ivan Stevens, the respondent before us was in possession of the disputed area of land. The Adjudication Officer did not have any different evidence from that on which Glasgow J. decided, and he considered that earlier decision as binding on him. There has been no quarrel with the view that the decision of Glasgow J. was binding on the Adjudication Officer. Nor has there been any quarrel with the finding that the same land was in issue before the Judge and the Adjudication Officer. If it is correct to say - which I do not say - that the learned Judge did not deal with the issue of long possession, then was it not open to the party now seeking to rely on it to appeal against his decision? Surely the answer must be in the affirmative. Can one party, in several separate actions against another party, on the same subject matter raise several separate questions on several separate occasions for answers from the same or a different Court? In my view all the issues open to dispute must be raised and decided in a single action or there could be a series of actions leading to protracted and expensive litigation.

I agree that the appeal ought to be dismissed since the Appellant has failed to establish that the doctrine of res judicata was erroneously applied in the circumstances of this case. I agree also that the respondent should have his costs - here and below.

/E.H.A.....

E.H.A. BISHOP,
Chief Justice (Acting)

MOE, J.A.:

I have had the opportunity of reading the Judgment of
Byron, J.A. (Acting) with which I respectfully agree and I have
nothing further to add.



G.C.R. MOE,
Justice of Appeal.