

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2017/0012

BETWEEN:

NELLIE FORDE

Appellant

and

BERTILLE DA SILVA

Respondent

Before:

The Hon. Mr. Gerard St. C. Farara
The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Sydney A. Bennett

Justice of Appeal [Ag.]
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Joseph A. Delves for the Appellant
Ms. Paula E. David for the Respondent

2022: July 23;
2024: May 2.

Civil appeal – Land law – Possessory title to land – Trial judge’s reliance on material not before the court – Whether the learned trial judge had erred in law by first seeking and then relying on material and documents which were not before the court in the trial

The appellant, Nellie Forde made an application claiming possessory title to land shown as lot number 7 on Plan 0639 situate at Ratho Mill on the island of Saint Vincent (“Lot 7”). In her application she asserted that she had been in exclusive and undisturbed possession of Lot 7 for an uninterrupted period of over 20 years from and since 1994. Her evidence was that she had purchased a parcel of land, known as lot 6, from Carib Isle Enterprise Ltd. Adjacent to lot 6 on which she maintained a residence, was Lot 7 a vacant parcel of land that had also been originally owned by Carib Isle Enterprises Ltd. During her occupation of Lot 7, the appellant claimed to have maintained and cultivated the land and constructed a road at the southern end of it for open access. She also claimed that no one had attempted

to interfere with her occupation until April 2016 when one Mr. Casper Da Silva demanded that her gardener cease working on Lot 7 because he claimed to be the owner of the land. About a month later a crew of workmen and trucks came to the land, removed a fence that the appellant had previously erected thereon, and replaced it with a wall made from concrete blocks.

The respondent Bertille Da Silva opposed the application, claiming to have purchased Lot 7 from Carib Isles Enterprises Limited in or about the year 1972 and to have been in possession of those lands since 1992. He claimed to have been in possession of the land since 1992 and that he had not ceded title, ownership, or possession of the land to anyone. He proffered no specific evidence of his own possession but explained that his brother Caspar Da Silva was his agent and so acted on his behalf in his dealings with the land. He also exhibited evidence of a discontinued action between himself and Carib Isles Enterprises Limited ("Discontinuance Proceedings"), inviting the court to infer that the discontinuance of the action by Carib Isles Enterprises Limited amounted to evidence that it, as owner of the paper title, had conceded Bertille Da Silva's ownership of the land, presumably on the basis that he had purchased the same from them.

The matter was heard by the learned judge who, after considering the evidence of the parties found that the appellant had failed to prove on a balance of probabilities that she had been in exclusive possession of the land for the requisite period of twelve years with the necessary *animus possidendi*, and her claim failed on the facts. In arriving at this decision, the learned judge also considered an affidavit of Graham Wagenseil ("the Wagenseil Affidavit"), an affidavit that had been filed in the Discontinuance Proceedings, but which had not been exhibited before the learned judge in the present proceedings.

Dissatisfied, the appellant has appealed against the decision of the learned judge relying on two grounds of appeal, being: (i) the learned judge had misapprehended the facts in that he had failed to consider that the evidence of ownership by the respondent; and (ii) the learned trial judge had erred in law by first seeking and then relying on material and documents which were not before the court in the trial, were not relied on by the respondent to the application below, had not been disclosed to the appellant, and to which the appellant did not have an opportunity to respond.

Held: allowing the appeal; setting aside the decision of the learned judge in its entirety; awarding the appellant costs of the appeal such costs to not exceed two-thirds of the costs awarded in the court below; and ordering that if the parties or either of them wishes further to pursue their respective applications, the matter will be remitted to the High Court for trial before a different judge, that:

1. Where the judge sits as an arbiter between two parties, he need consider only what they put before him. If one or other omits something material and suffers from the omission, he must blame himself and not the judge. Where the judge sits purely as an arbiter and relies on the parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing.

Official Solicitor v K and Another [1963] 3 All ER 191 applied.

2. With respect to the Respondent's claim for a declaration that he is the true owner of the parcel of land, having acquired it by purchase in or about 1972 from Carib Isle Enterprise Ltd to whom it had belonged at the time, the learned judge sought and then relied on the Wagenseil Affidavit which was not before him at trial, carrying out an evidence-gathering exercise in the absence of the parties. Moreover, the learned judge had expressly confirmed that this evidence, which he regarded as "crucial to the claim of Bertille Da Silva" had been the determining factor in his decision. Clearly, the decision had been arrived at in reliance on evidence which had not been before the court and in relation to which the appellant had not been given an opportunity to be heard. Moreover, and in any event, justice was not seen to be done.
3. With respect to the Appellant's claim for title for possessory title to the land the Learned Judge found that she had failed to prove on a balance of probabilities that she had been in exclusive possession of the land for the requisite period of twelve years with the necessary animus possidendi, and that her claim failed on the facts. Nonetheless in the reasons given for this conclusion, the learned judge alluded to the evidence in the affidavit of Wagenseil in case No 292 of 1992. While it is not possible to discover whether the learned judge's decision on the appellant's claim would have been the same had he not taken the Wagenseil Affidavit into account or had the appellant been afforded the opportunity to be heard in relation to it, there is a risk that the contents of the Wagenseil Affidavit did work to the prejudice of the appellant in her application for possessory title to the land.

R v Leicester City Justices ex parte Barrow [1991] 2 QB 260 applied; **R v Chief Constable of the Thames Valley Police ex parte Cotton** [1990] IRLR 344 applied.

JUDGMENT

- [1] **BENNETT JA [Ag.]** This is an appeal brought by the appellant Nellie Forde, against the judgment of Roberts J (Ag.) refusing an application by her for possessory title to a parcel of land; declaring the respondent Bertille Da Silva to be the owner of that parcel of land and authorising the Registrar to register a deed of title to the respondent Bertille Da Silva for the same. The land which comprises some 9,236 square feet in area and is situate in the locality of Ratho Mill was shown on Plan G60/69 drawn by Ivo Providence, licensed surveyor, dated 30th May 2016.

Background

- [2] Mrs. Forde claimed possessory title to the land based on her assertion that she had been in exclusive and undisturbed possession of the same for an uninterrupted period of over 20 years from and since 1994. Her evidence was that she had been living in the United States but had returned to Saint Vincent in 1991. Shortly thereafter her daughter Jacqueline Forde and herself had purchased a parcel of land from a company named Carib Isle Enterprise Ltd. Carib Isle Enterprise Ltd was at the time the owner of a number of parcels of land at Ratho Mill which it had laid out in lots numbered 1-19 as shown on a plan drawn by E. Stinson Campbell, Licensed Land Surveyor, and approved and lodged in the Lands and Surveys Department of Saint Vincent and the Grenadines on the 21st day of June 1969 bearing number 0639 ("Plan 0639"). The land that her daughter and herself had purchased from the company had been shown as lot 6 on that plan.
- [3] Mrs. Forde's testimony was that she built a dwelling house on her parcel and had lived there ever since. Adjacent to her lot 6 on which she maintained a residence, was a vacant parcel of land which "had been overgrown with bushes including large cedar and mango trees." That vacant parcel had also originally been owned by Carib Isle Enterprises Limited., the company from which her daughter and she had purchased lot 6. It is shown as lot number 7 on plan 0639.
- [4] Mrs. Forde claimed to have entered into occupation of lot 7 in 1994. During her occupation of that land, she claimed to have had the large trees previously growing there cut down, removed, and made into lumber. She claimed to have subsequently cultivated the land, planting various fruit trees and other agricultural crops such as okras, corn, peas, sorrel, sweet potatoes, and cassava, and to have kept for herself all the proceeds derived from those activities. She claimed to have constructed a road at the southern end of the land to open up access to it, and that many years prior to her application she had fenced the eastern side of the land to prevent animals from entering upon it and destroying the crops being grown there. No one had attempted to interfere with her occupation until April 2016 when one Mr. Casper

Da Silva demanded that a gardener working for her on the land cease working there because he claimed to be the owner of the land. About a month later a crew of workmen and trucks came to the land, removed a fence that Mrs. Forde had previously erected thereon, and replaced it with a wall made from concrete blocks.

- [5] Her application was supported by the affidavits of Utan Horne and Bobby Speedwell. Those deponents did not attend court to be cross-examined on their affidavits. Messrs. Cornelius de Bique, Harold M. Burgin, Liston Sutherland, and Samuel Thomas also filed affidavits in support of Mrs. Forde's application and attended court and gave viva voce testimony.
- [6] Mrs. Forde's application was opposed by the respondent Bertille Da Silva who claimed to have purchased the land claimed by Mrs. Forde from Carib Isles Enterprises Limited in or about the year 1972 and to have been in possession of those lands since 1992. Mr. Da Silva's case was based on two contentions; firstly, he asserted that Ms. Forde had no paper title to the claimed land, nor had she been in occupation of the land for the requisite period of twelve years as she had claimed. He presented testimony from Tamara Owen-Brackin who lived in a house on a neighboring lot, Hazel Ryan who worked for Mrs. Owen-Bracken as a domestic worker, and Mrs. Margaret Ferrari, a former diplomat who lived in a house nearby, to the effect that Mrs. Forde had not been seen to have entered upon or to have carried out any activities on the land for any period longer than 4 years prior to her application for domestic title.
- [7] Secondly, Mr. Da Silva claimed to be the titular owner of the land having purchased it in or about 1972 from Carib Isle Enterprise Ltd to whom it had belonged at the time. He was unable to produce any deed, receipt, or other documentation having the semblance of a paper title to the land. His testimony was to the effect that the solicitor who had been retained to prepare the deed recording the purchase of and title to the land had apparently failed to register the deed. He claimed to have been in possession of the land since 1992 and that he had not ceded title, ownership, or

possession of the land to anyone. He proffered no specific evidence of his own possession but explained that his brother Caspar Da Silva was his agent and so acted on his behalf in his dealings with the land.

[8] Essentially, Mr. Da Silva's most substantive evidence in support of his claim to have purchased the land was his assertion that his ownership had been the subject of litigation between himself and the owner of the paper title Carib Isles Enterprises Limited. He exhibited the filings in the court action **Carib Isles Enterprises Limited vs Bertille Da Silva, Keith Brereton and Casper Da Silva**.¹ The documents disclosed to the court for that purpose comprised: the writ of summons and statement of claim filed by the plaintiff in that action; the defences, the reply filed on behalf of Carib Isles Enterprises Limited, a consent order and two letters between the parties' lawyers.

[9] In that action, Carib Isles Enterprises Limited had sought a declaration that Bertille Da Silva and Keith Brereton had no interest in any of its land and an injunction to stop the defendants from trespassing on its land. Carib Isles Enterprises Limited had also sought damages for trespass against Bertille and Casper Da Silva however, ultimately discontinued the action. No reason for the discontinuance had been stated on the relevant order or placed in evidence before the court in the present case. Nonetheless, the court was invited to infer that the fact of discontinuance amounted to evidence that the company, as owner of the paper title, had conceded Bertille Da Silva's ownership of the land, presumably on the basis that he had purchased the same from them.

[10] With regard to the documents and evidence presented by Mr. Da Silva concerning **Carib Isles Enterprises Limited vs Bertille Da Silva, Keith Brereton and Casper Da Silva**, Mrs. Forde did not accept that Bertille Da Silva had purchased parcel 7 or any land from Carib Isles Enterprises Limited. Her position was that in any case Carib Isles Enterprises Limited in that suit had in its reply identified the land claimed

¹ No. 219 of 1992.

to have been purchased by Mr. DaSilva as lot number 15 on Plan 0639 drawn by Licensed Land Surveyor. E. Stinson Campbell, whereas the lot for which Mrs. Forde sought possessory title in the instant action was shown as lot 7 on that plan. In summary, her defence amounted to a denial that the claims which were the subject matter of **Carib Isles Enterprises Limited vs Bertille Da Silva , Keith Brereton and Casper Da Sliva**, or the disposition of such claims had any relevance to the matters in the instant suit.

[11] The matter was heard by the judge who, after hearing evidence delivered judgment on 23rd March 2017. The learned judge found that the witnesses who had given testimony in support of Mrs. Forde's claim for possession were very vague in their time and contradicted each other. He preferred the evidence given by the witnesses for the respondent opposing the application and found as a fact that the applicant Mrs. Forde had started planting crops on the land no more than 4 years prior to her application for title. In his judgment, Mrs. Forde had failed to prove on a balance of probabilities that she had been in exclusive possession of the land for the requisite period of twelve years with the necessary *animus possidendi*, and her claim failed on the facts.

[12] In considering the claim by the respondent for a declaration that he is the true owner of the parcel of land and for a further order that the Registrar be authorized to execute a title deed for that land in favour of Bertille DaSilva, the Learned Judge noted that the defence filed on behalf of the respondent in **Carib Isles Enterprises Limited vs Bertille Da Silva , Keith Brereton and Casper Da Sliva** was essentially that he had purchased the land from Carib Isles Enterprises Limited during the period that one Gerry Palmer and one William Carter managed its affairs. He further noted that that case had been discontinued at the instance of Carib Isles Enterprises Limited, and that the order for discontinuance had been made after the judge read a summons dated September 1996 and an affidavit in support filed on 4th September, 1996. At paragraph 24 of the judgment the learned judge stated:

“...The summons and affidavit in support that seemed to have triggered the discontinuance were not exhibited. The Court therefore requested the court

file and found that the summons was taken out by the plaintiff company. Supporting the summons was the affidavit of Graham Wagenseil of Brookfield, Connecticut 06804,USA.”

[13] The learned judge then went on to recite the affidavit in full “..because it is so crucial to the claim of Bertille Da Silva.”

[14] At paragraphs 25 and 26 of the judgment his Lordship concluded :

“[25] The Wagenseil affidavit supports the assertion of the Da Silva Brothers that, "Each claim was stoutly defended and the matter eventually came to rest in my favour as the matter was discontinued by the claimant's company"; and again, "they later abandoned the claim to the land. This was a clear indication that they were admitting that I bought the land. I retained possession of the land". Though the applicant strenuously denied that Bertille Da Silva "purchased two parcels of land or any land from Carib Isles Enterprises Ltd", she was not in a position to support her position by any evidence. On the other hand, Bertille Da Silva in his 3rd affidavit deposed that he dealt with one Carter." Wagenseil swore that one William G. Carter was secretary of the company at the time". Their statement that they had cleaned the land appears to be supported by the claim for trespass by the company against them and Wagenseil's affidavit..

[26] I therefore find as fact that Bertille Da Silva did purchase the land from the company and that the company conceded that fact through their managing director and principal shareholder. I have to agree with counsel for ... Bertille Da Silva that the evidence is clear that Bertille Da Silva is the owner of the land. I find as fact that he did purchase the land from the company”

The Appeal

[15] Mrs. Forde appealed against the decision of the learned judge on grounds, *inter alia*, that:

- (a) the learned judge had misapprehended the facts in that he had failed to consider that the evidence of ownership by the respondent, which is denied by the appellant, was in relation to lot 15 and lot 8 and not the subject land which was lot 7 and further that the evidence of possession by the Respondent came largely from a worker who said he had not been on the subject land since 1994. This meant that the respondent's possession had

a gap of 22 years between 1994 and 2016 when the respondent alleged he built a wall 'fence' around the subject land; and

- (b) the learned trial judge had erred in law by first seeking and then relying on material and documents which were not before the Court in the trial, were not relied on by the respondent to the application below, had not been disclosed to the appellant, and to which the appellant did not have an opportunity to respond. This error had led him to conclude as he did that the Respondent was the owner of the subject land. Further it was asserted that the learned trial judge wrongly used this material as a reason to disbelieve the Appellant's case.

Discussion

- [16] It can be seen from the reasoning in the judgment that the learned judge purported to carry out his own inquiry and come to his decision after relying on material and documents which had not been before the court in the trial, had not been relied on by Mr. Da Silva in his claim, which had not been disclosed to Mrs. Forde, and in relation to which she had not been given an opportunity to be heard.

- [17] In **Official Solicitor v K and Another**² Lord Devlin referred at page 209 and stated:

“...Rules... which Upjohn LJ in the Court of Appeal rightly called ([1962] 3 All ER at p 1008) “the ordinary principles of a judicial inquiry”. They include the rules that all justice shall be done openly and that it shall be done only after a fair hearing; and also the rule that is in point here, namely, that judgment shall be given only on evidence that is made known to all parties. Some of these principles are so fundamental that they must be observed by everyone who is acting judicially, whether he is sitting in a court of law or not; and these are called the principles of natural justice.”

With regard to a person who is under an obligation to act judicially he referred to “some judicial principles which he must observe. He may not, for example, investigate on his own, seek out his own sources of information and refuse to listen to what anyone else has to say.”³

² [1963] 3 All ER 191.

³ Ibid at 209.

At page 210 he posited:

“Where the judge sits as an arbiter between two parties, he need consider only what they put before him. If one or other omits something material and suffers from the omission, he must blame himself and not the judge. Where the judge sits purely as an arbiter and relies on the parties for his information, the parties have a correlative right that he should act only on information which they have had the opportunity of testing.”

[18] Ms. David, Counsel for the respondent conceded that the learned judge had erred in seeking out and referring to the affidavit of Graham Wagenseil ("the Wagenseil Affidavit"). She argued however that this judicial error affected only the decision of the judge regarding Mr. Da Silva's application for a declaration that he is the true owner of the parcel of land and for a further order that the Registrar be authorised to execute a title deed for that land in his favor. Her position was that while the judge ought not to have made reference to the Wagenseil Affidavit in finding that Mrs. Forde was unable to prove her assertion that Mr. DaSilva had not purchased the subject land, the Affidavit was not the only evidence to which he referred to in arriving at this finding of fact. The learned judge had made specific reference to the evidence of Bertille Da Silva and Casper Da Silva. He also made reference to the fact that the Carib Isles Enterprises Limited claim was founded in trespass and that that fact corroborated the evidence of the respondent and his brother Casper Da Silva "that they had cleaned the land". Counsel urged that the decision be upheld notwithstanding the error of the judge in taking into account the contents of the Wagenseil Affidavit in his assessment of Mr. Da Silva's claim to have purchased the land.

[19] I have no hesitation in rejecting this submission. In the court below the learned judge carried out an evidence gathering exercise in the absence of the parties. Moreover, the learned judge had expressly confirmed that this evidence, which he regarded as "crucial to the claim of Bertille Da Silva" had been the determining factor in his decision. Clearly, the decision had been arrived at in reliance on evidence which had not been before the court and in relation to which the appellant had not been given an opportunity to be heard. Moreover, and in any event, justice was not seen

to be done. In **R v Chief Constable of the Thames Valley Police ex parte Cotton**⁴

Bingham LJ stated:

“While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity ... This is a field in which appearances are generally thought to matter.”

[20] With regard to Mrs. Forde’s claim for possessory title, Ms. David for the respondent urges that the application failed because Mrs. Forde was unable to satisfy the requirements of the **Possessory Titles Act**⁵ (the Act”). Mrs. Forde needed to persuade the Court that she had been in “factual possession of an exclusive and undisturbed nature of the claimed land for a continuous period of twelve years or more accompanied by the requisite intention to possess the said land as the owner.” The learned judge had found that the evidence of Mrs. Forde’s neighbours as to the nature and duration of her occupation of the land was more reliable than the evidence adduced by her and the witnesses testifying on her behalf. He had further found as a primary fact that she “... had “started planting crops on the land no more than 4 years ago”, a period well short of the statutory requirement of twelve years. This was a conclusion that the learned judge was entitled to come to based on his assessment of the credibility of the various witnesses and of the weight to be attached to different aspects of the evidence in the context of a hearing involving conflicting testimony. She cited the case of **Leon O. Taylor v Wilfried Julien et al**,⁶ as authority for the proposition that an appellate court should interfere with a judge’s conclusion based on his finding of primary facts only if the finding of fact is perverse. In that case Baptiste JA explained at paragraph 21 that:

“...An appellate court should not interfere with the trial judge’s conclusion on primary facts unless satisfied that the finding of fact is plainly wrong. This applies to findings of primary facts, the evaluation of those facts and inferences to be drawn therefrom. The expression ‘plainly wrong’ was explained by the Supreme Court in *Henderson v Foxworth Investments Ltd* and another. The adverb ‘plainly’ does not refer to the degree of confidence the appellate court may feel that it would not have reached the same

⁴ [1990] IRLR 344.

⁵ Chapter 328 of the Laws of Saint Vincent and the Grenadines Revised Edition 2009.

⁶ GDAHCVAP2016/0019 (delivered 18th May 2021, unreported).

conclusion as the trial judge. It does not matter what degree of certainty the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one which no reasonable judge could have reached.”

[21] I do not doubt the correctness of the principle enunciated by counsel for the respondent. I note also that in the grounds of appeal, the specific challenges made to the findings of fact by the judge relate to the findings which had led him to conclude that the respondent Mr. Da Silva was the owner of the subject land, rather than to his consideration of Mrs. Forde’s application for title.

[22] Mr. Delves, counsel for the appellants pointed to paragraph 19 of the judgment, where the learned judge stated:

“ I had the opportunity of observing the demeanor of the witnesses when they gave their oral testimony and formed definite impressions about the witnesses in this case. I found the evidence of both the applicant’s neighbours to be forthright and reliable witnesses. I find the witnesses Tamara Owen-Brackin and Margaret Ferrari to be witnesses of truth. The evidence of the Da Silva’s was supported in many respects by the affidavit of Wagenseil in case No 292 of 1992. The evidence of the applicant was not accepted where it conflicted with the evidence of her neighbours”

[23] He urged that these passages showed that the judge had wrongly used evidence from the Wagenseil affidavit in considering and deciding upon Mrs. Forde’s claim for possessory title. Clearly, the learned judge did see the contents of the Wagenseil affidavit as supporting and corroborating “the evidence of the Da Silva’s... in many respects.” In this regard the evidence of Bertille Da Silva although principally directed towards supporting his claim to have purchased the land from Carib Isles Enterprises Ltd. did involve the assertion that to his certain knowledge neither Mrs. Forde nor anyone else had been farming the lands for any substantial period of time. The evidence of Mr. Caspar Da Silva went further in that his testimony was that he, as agent for his brother Bertille had had his workers go to the land from time to time over the years to clean and clear the land and that as late as 2010, when he had commissioned a survey of the land by Mr. Surveyor Keith Francis there was no cultivation of any sort on the land and no one in occupation of the same other than

his brother and himself. These statements were strongly contested by Mrs. Forde who claimed to have never seen Casper Da Silva or his servants on the land before April 2016. It is in this context that I note the observation at paragraph 25 of the Judgment that “Their [the Da Silva’s] statement that they had cleaned the land appears to be supported by the claim for trespass by the company against them and Wagenseil’s affidavit.” A further question arises as to whether the contents of the Wagenseil affidavit had any effect on the judge’s assessment of the relative credibility the evidence of Mrs. Forde where it conflicted with the evidence of her neighbours.

[24] It is not possible to discover whether the learned judge’s decision on Mrs. Forde’s claim would have been the same had he not taken the Wagenseil affidavit into account or had the appellant been afforded the opportunity to be heard in relation to it. In my view, there is a risk that the contents of the Wagenseil affidavit did work to the prejudice of Mrs. Forde in her application for possessory title to the land.

[25] In **R v Leicester City Justices ex parte Barrow**,⁷ a case where Justices had refused to permit an unrepresented defendant the assistance of a McKenzie friend, Lord Donaldson of Lynton MR stated:

“... What should be done? Any unfairness, whether apparent or actual and however inadvertent, strikes at the roots of justice. I cannot be sure that the Applicants were not prejudiced and accordingly I have no doubt that the justices’ order should be quashed.”

[26] In the circumstances, and for the reasons I have given, I would make the following orders:

- (a) The appeal is allowed and the decision of the learned judge set aside in its entirety.
- (b) The appellant is to have her costs of the appeal, such costs to not exceed two-thirds of the costs awarded in the court below.

⁷ [1991] 2 QB 260.

- (c) If the parties or either of them wishes further to pursue their respective applications, the matter will be remitted to the High Court for trial before a different judge.

I concur.

Gerard St. C Farara
Justice of Appeal [Ag.]

I concur.

Margaret Price Findlay
Justice of Appeal [Ag.]

By the Court

Chief Registrar