

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2017/0235

BETWEEN:

[1] HAROLD MELLANSON

Claimant

AND

[1] HORTENS VICTORIA ISAAC

[2] AVRIL MELLANSON

Defendants

Appearances:

Mr. Hugh Marshall appearing with Ms. Chantel Thomas for the Claimant

Ms. Eleanor Solomon for the 1st Defendant

Ms. Kivinee Knight-Edwards for the 2nd Defendant.

2021: November 24th

2023: February 27th

JUDGMENT

- [1] **ROBERTSON, J.:** In these proceedings this Court considers whether the claimant has acquired prescriptive title to property more particularly described in the Land Registry as Registration Section: English Harbour; Block 35 2580A:92 [subject property] and whether First Defendant acquired title to the property subject to the provisions of section 28 (f) and (g) of the Registered Land Act.
- [2] On the hearing of these proceedings the Claimant and the Second Defendant gave evidence. The First Defendant, physically fragile was incoherent on the day of the trial and as such her testimony could not have been received. The statements of this witness as stated in the affidavit

filed were accepted subject to limitations which arise from the inability of the First Defendant to be cross-examined.

- [3] The title of the subject property now held by the First Defendant was held by George Isaac, the stepfather of the Second Defendant. Rachel Isaac was the widow of George Isaac and was issued a Grant of Letters of Administration for the estate of George Isaac on 2nd March 1992. The First Defendant obtained Letters of Administration De Bonis Non for the unadministered portion of the estate of George Isaac on 4th May 2012 and the Land Certificate for the subject property on 7th March 2017.
- [4] In or about 1991/1992, after the death of the George Isaac and prior to the grant of the Letters of Administration for the estate of George Isaac, the Claimant entered upon the subject property. The Claimant who was in a relationship with the Second Defendant indicated in his evidence that he entered upon the subject property through the invitation of Rachael Isaac and as a consequence of his relationship with the Second Defendant. The Claimant continued to reside on the subject property, and indicates that he operated a business on the property.
- [5] The specific reliefs the Claimant seeks are:
 - (1) A declaration on the ownership of the subject property.
 - (2) A declaration that the Claimant is entitled to prescriptive title of the subject property.
 - (3) A declaration that the First Defendant obtained Registered Proprietorship to the subject property subject to the provisions of section 28 (f) and (g) of the Registered Land Act.
 - (4) An order that the subject property be conveyed into the name or names of the person(s) the Court deems appropriate.
 - (5) An order directing the Registrar of Lands to register the Claimant as the absolute proprietor of the subject property.
- [6] Ancillary proceedings were initiated by the First Defendant against the Claimant. The First Defendant seeks:
 - (1) An order that the Claimant/Ancillary Defendant vacate the subject property and *mense profits* at the rate of \$500 per month from 4th May 2012 until the land is vacated.
 - (2) Interests in accordance with the provisions of section 27 of the Eastern Caribbean Supreme Court Act Cap 143.
- [7] The Second Defendant through her evidence sought to assert beneficial interest in the said property by virtue of promises made to her by Rachael Isaac that the property in question would belong to the Second Defendant. The Second Defendant did not initiate ancillary proceedings. These assertions appeared in the evidence and did not form part of a pleaded case that the First Defendant was required to answer.

The Law

[8] Section 135 of the Registered Land Act provides:

135. (1) The ownership of land may be acquired by peaceable, open and uninterrupted possession without permission of any person lawfully entitled to such possession for a period of twenty¹ years:

Provided that no person shall so acquire the ownership of Crown land.

(2) Any person who claims to have acquired the ownership of land by virtue of the provisions of subsection (1) may apply to the Registrar for registration as proprietor thereof. (Emphasis Added).

[9] Section 136 (6) of the Registered Land Act provides:

(6) Possession shall be interrupted-

(a) By physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the possessor thereby loses possession; or

(b) By the institution of legal proceedings by the proprietor of the land to assert his right thereto; or

(c) By any acknowledgement made by the person in possession of the land to any person claiming to be the proprietor thereof that such claim is admitted.

[10] The law with respect to the acquisition of land by prescription was considered in the case of **Ocean Estates Ltd. v Pinder**² where Lord Diplock noted that:

“Where the questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser.”

[11] The matter of the acquisition of land by prescription has been addressed in a case decided by the Court of Appeal of the Commonwealth of the Bahamas, **Cunningham v Broadcasting Corporation of the Bahamas, Chipman v Broadcasting Corporation of the Bahamas**³. The court stated:

“The law therefore is that the plaintiff, in order to succeed in his claim must demonstrate that he or his predecessor went onto the land as trespasser and by virtue of such possession

¹ Amended by Act No. 6 of 2007.

² [1969] 2 AC 19.

³ 86 WIR 12.

beyond the limitation period, had extinguished the documentary title of the defendant or its predecessors in title.

In considering the meaning of possession, Slade J in *Powell v McFarlane* (1977) 38 P & CR p 452 at 470 held that:

“(1) ...

(2) If the law is to attribute possession of land to a person who can establish no paper titled to possession, he must be shown to have both factual possession and the requisite intention to possess (*‘animus possidendi’*).

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.

‘What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variations according to the resource or status of the claimants’: [*West Bank Ltd v Arthur* [1967] AC 665. per Wilberforce. It is clearly settled that acts of possession be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree.”....

Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

(4) The *animus possidendi*, which is also necessary to constitute possession was defined by Lindel M.R., in [*Littledale v Liverpool College* [1900] 1 Ch 19] (a case involving an alleged adverse possession) as ‘the intention of excluding the owner as well as other people.

...

What is really meant, in my judgment, is that the *animus possidendi* involves the 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.

[12] This statement of the law as outlined by Slade J in *Powell v Mc Farlane* was endorsed by our Court of Appeal in the decision of **Collins Richards et al. v Benjamin W Richardson**⁴

⁴ AXAHC VAP 2016/0002.

[13] The law indicates that the acquisition must be peaceable, open, uninterrupted and must be without permission of any person lawfully entitled to such possession for a period of twenty⁵ years. There is required to be a physical possession and the requisite intention to possess, *animus possidendi* by the person claiming title.

[14] The evidence of the Claimant is that he was in a relationship with the Second Defendant who lived on the property and the Claimant was invited onto the property by Rachel Isaac in 1991/1992. At the time of the invitation Rachael Isaac did not hold Letters of Administration but it is clear that the Claimant recognized that proprietary authority resided with Rachel Isaac and deferred to Rachel Isaac who became the administrator. The recognition of the authority of Rachel Isaac is evidenced from the fact that the Claimant accepted the invitation of Rachel Isaac to enter upon the premises and accepted, according to his evidence that Rachael Isaac represented that the title of the said property could be vested with him and with his partner. The evidence of the Claimant is that during the period of his occupation he invested time and money in the upkeep of the property and that this was done on the basis that the title in the property would be passed onto the Claimant and the Second Defendant. The Claimant in his actions do not present with the requisite intention to possess, *animus possidendi*, to the exclusion of the world at large including the owner.

[15] It is noted that when George Isaac departed this life and by reason of the section 4 **Intestate of Estates Act** the property would pass to his wife and children. In 1992 Letters of Administration was granted to Rachel Isaac thereby formerly vesting the right to lawful possession of the subject property in the hands of Rachel Isaac for the benefit of the administration of the estate. It is noted that the doctrine of relation back is applicable to the grant of Letters of Administration, thus upon the grant being made the administrator's title relates to the time of death of the deceased⁶. However, it is noted that the doctrine would not operate to disturb the interest of persons who validly acquired interests in the intervening period. This exception does not apply to these proceedings.

[16] The evidence before the Court is that the Claimant continued to have regard for the views of Rachel Isaac. The Claimant shared a living space with Rachel Isaac and the Second Defendant. In this Court's view the Claimant was not in occupation to the exclusion but with the permission of the person holding a more superior title.

[17] Rachael Isaac died in 1999. The Claimant continued to reside on the property with the Second Defendant, his partner, and remained on the premises after the Second Defendant left the subject property. The evidence of the Second Defendant is that she left the subject property in 2008

⁵ Amended by Act No. 6 of 2007.

⁶ Halsbury's Laws of England Vol. 17(2) para. 35.

when her marriage to the Claimant “took a turn for the worse”. The parties were divorced in July 2011.

[18] It is possible for there to be circumstances where a party who initially entered onto property with the permission of a person lawfully entitled to possession later acquires possession if there is a change of circumstance such that the permission once granted is withdrawn and the invited party continues in uninterrupted possession for the requisite statutory period. This circumstance is not applicable in this case as the statutory period for adverse possession had not elapsed.

The Determination of Overriding Interests

[19] The Claimant contends that the First Defendant obtained rights to the premises subject to the Claimant’s overriding interests as provided for under sections 28(f) and (g) of the Registered Land Act.

[20] Section 28(f) and 28(g) provide:

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as **may from time being subsist and affect the same**, without their being noted on the register-

(f) Rights acquired or in process of being acquired by virtue of any law relating to the limitation of actions or by prescription;

(g) In 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.

[21] Section 28 (f) and (g) preserves rights which may not be noted on the register but would have subsisted at the relevant time. Byron C.J. considered the matter of overriding interests in the case of **Ulna Jennifer George v Hilary Charlemagne**⁷ and noted that “*the clear intent of section 28(g) of the Act is to give legal effect to the rights that people have if they are in actual occupation of the land but their rights are not registered*”. Thus, the title is subject to the rights of the persons who are in actual possession⁸. In the circumstances of this case the Claimant did not acquire any rights by prescription in the subject property, the matter of proprietary estoppel will next be considered.

Proprietary Estoppel

⁷ Civil Appeal No. 24 of 2011.

⁸ Ibid. Paragraph 16.

[22] Proprietary estoppel may arise where there has been a representation made regarding a promise of an interest in property and the person promised has acted to his detriment regarding the property in question. Simply put there must be:

- (i) A representation or assurance made;
- (ii) Reliance on the assurance or representation; and
- (iii) Detriment incurred as a consequence of that reliance.

[23] The authors of Halsbury's Laws of England outlined the principle as thus,

"The traditional formulation was based on the principle that, where the owner of land (A) knowingly allowed his rights to be infringed by another (B) who expended money on the land in the mistaken belief that it belonged to B, A could not afterwards be allowed to assert his own title to the land⁹. From this formulation a five-fold test, referred to as 'the five probanda', developed, under which the following circumstances had to be present in order that an estoppel might be raised against A:

- (1) B must be mistaken as to his own legal rights; if he is aware he is infringing the rights of another, he takes the risk of those rights being asserted
- (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights;
- (3) Acquiescence is founded on conduct with knowledge of one's legal rights, and hence A must know of his own rights;
- (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silent and allow B to proceed on his mistake;
- (5) A must encourage B in his expenditure of money or other act, either directly or abstaining for asserting his legal right

This five-fold test has, however, now largely been abandoned in favor of a three-fold inquiry based not on B's mistake but on an agreement between A and B or A's encouragement of B's expectation. The court will inquire:

- (a) Whether an equity in favor of B arises out of the conduct and relationship of the parties;**
- (b) What is the extent of the equity, if one is established; and**
- (c) What is the relief appropriate to satisfy the equity" [Emphasis Added].**

[24] In the case of **Thorner v Major**, Lord Scott having considered the elements of proprietary estoppel stated in paragraph 23 above noted that:

"Always be necessary but might, in a particular case, not be sufficient. Thus, for example, the representation or assurance would need to have been sufficiently clear and unequivocal;

⁹ Halsbury's Laws of England, Estoppel (Volume 47 (2014)), 4. Estoppel by Representation, (4) Proprietary Estoppel, para, 392.

the reliance by the claimant would need to have been reasonable in all the circumstances; and the detriment would need to have been sufficiently substantial to justify the intervention of equity'.”¹⁰

[25] The evidence of the Claimant is that he entered onto the subject property and prior to the passing of Rachel Isaac he invested time and money in the upkeep of the property. The property had a house with one big bedroom and that the Claimant, and the Second Defendant “fabricated other rooms”. During cross-examination the Claimant indicated that improvements were done to the house until a decision was made to re-configure a 40-foot container into a dwelling house for the Claimant and the Second Defendant. The Claimant admitted while being cross-examined that the reconfigured 40-foot container was not affixed to the land but was moveable, “with some effort”. The evidence of the Claimant and the Second Defendant during cross-examination is that the trailer is located partially on adjoining property.

[26] The evidence of the Second Defendant on this matter is that she, with the assistance of the Claimant, expanded the west side of the house by 6 feet, painted the inside and outside of the house, changed the windows and repaired the bathroom on the property. The parties would have relocated to and resided in the re-configured 40-foot container.

[27] There was also a shed on the property. The evidence before the Court is that the shed was used by the brother of the Second Defendant as a workshop. It was destroyed by a hurricane in or around 1995 and the Claimant indicated that it was re-built by the Claimant.

[28] The Claimant and the Second Defendant contend that at some point representations were made for the property to be transferred. The evidence of the Claimant is that there were discussions for the property to be placed in the names of the Claimant and the Second Defendant. The evidence of the Second Defendant was that she approached the first Defendant to purchase the property and/or have the property transferred in her name of the Second Defendant. The evidence of the Second Defendant is that “she had no intention of having the property transferred in the name of the Second Defendant and the Claimant”.

[29] The issue of there being a detriment to the Claimant is a requirement for the consideration of proprietary trust. It is noted that the concept of detriment to the Claimant is not treated narrowly, and the Court considers all of the circumstances of the case. In the case of *Gillett v Holt*¹¹ Robert Walker LJ noted that

“As part of a broad inquiry as to whether repudiation of an assurance was or was not unconscionable in all the circumstances. There must be sufficient causal link between the assurance and the detriment asserted; the issue of detriment must be judged at the moment

¹⁰ [2009] UKHL 18.

¹¹ [2000] 2 FLR 266.

when the person who had given the assurance sought to go back on it; the detriment alleged must be pleaded and proved¹.

[30] The Second Defendant has not presented a claim, thus the matter of proprietary estoppel would not be considered for the Second Defendant.

[31] On the matter of Claimant and the whether the actions may constitute detriment to the Claimant the Court considers the evidence of the Claimant that he maintained the property prior to and after the death of Rachel Isaac, that he re-constructed a shed from which he did his work, converted a trailer into a dwelling house and paid the property taxes for the period 2007 to 2012. However, it is noted that the reconfigured trailer is moveable and not fully on the property in question, also there is no evidence of the value of the past work done to the house or in the erection of the shed. Further, there is no evidence that the house is habitable as the evidence is that the Claimant and the Second Defendant abandoned renovating the house some time ago. This Court has determined that the Claimant has not proven that he has expended resources in the subject property to acquire interest which could give rise to a claim in proprietary estoppel.

[32] As a consequence of the foregoing this Court has determined that the Claimant does not hold an interest in the property.

[33] The Court in these proceedings has been asked by the Claimant to examine the circumstances surrounding the true ownership of the property and having done so, make a declaration into the ownership of the land. The First Defendant in its ancillary claim sought an order that the Claimant forthwith vacate the land and those mesne profits be made payable to the First Defendant. The First Defendant's evidence is that Letters of Administration De Bonis Non were granted to the First Claimant in respect of the un-administered estate of the George Isaac and that a Land Certificate was issued to the First Defendant on 7th March 2017. The First Defendant contends that the Claimant occupies the property without the permission of that Second Defendant.

[34] Interestingly, although the Second Defendant has not issued an ancillary claim in these proceedings the Counsel for the Second Defendant has been able to put before the Court evidence which relates to ownership of the property. The evidence before the Court is that the Second Defendant is the granddaughter of Rachel Isaac. Rachel Isaac was married to George Isaac who was the owner of the property. The Second Defendant's father was Peter Roache and Peter Roache was the father of five children including the Second Defendant and her four siblings. It is noted that upon the death of George Isaac, Rachel Isaac, his wife was entitled to share in the estate along with her children. The Counsel for the Second Defendant contends that the Second Defendant has an interest in the property which is the subject matter of these proceedings. The evidence before the Court is that after the Grant of Letters of Administration was received by the First Defendant a Land Certificate was issued in favor of the First Defendant.

[35] The Counsel for the Second Defendant seeks that the Court makes an order that the First Defendant be removed from the register as the registered proprietor and for the name of the First Defendant to be replaced by "Estate of George Isaac". However, this comes not by a pleading but virtue of the submissions of the Counsel for the Second Defendant.

[36] In the circumstances of this case this Court notes that the indefeasibility of title is core to the registration of land under the provisions of the Registered Land Act. Consequently, the removal of a registered owner from a land certificate ought to be approached in a manner which would ensure that the landowner being challenged understands the case that he/she is required to meet. In the circumstances of this case the First Defendant is holding out a documentary title as against the Claimant and would not have appreciated that, the titled is being challenged by the Second Defendant. The Counsel for the First Defendant has stated succinctly in her submissions, "There is no issue before the Court for determination between the First and Second Defendant." A challenge to the title holder of land must be fully ventilated. Accordingly, this Court declines any order with reference to the title held by the First Defendant.

[37] This Court makes an order on the ancillary claim that the Claimant forthwith vacates the subject premises. The First Defendant sought possession and mesne profits. There is no evidence before the Court which supports the quantification of a reasonable rental/letting value of the subject property, mense profit. A nominal sum is awarded.

[38] This Court orders that:

- (1) The Claim is dismissed.
- (2) There be judgment on the Ancillary Claim that the Claimant/Ancillary Defendant do forthwith vacate the subject property more particularly described in the Land Registry as Registration Section: English Harbour; Block 35 2580A:92.
- (3) A nominal sum representing mense profit quantified in the sum of \$500.00 be payable to the First Defendant by the Claimant.
- (4) There be prescribed costs payable by the Claimant to the Defendant.

Marissa Robertson
High Court Judge

By the Court

Registrar