

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO.: ANUHCv2017/0420

BETWEEN:

**NICOLE ROXANN WARNER
(as Personal Representative of the Estate of JOSEPH WARNER
aka JOESPH EMANUEL GERVINSTON WARNER)**

Claimant

And

RELTON BRAITHWAITE

Defendant

APPEARANCES:

Mr Lawrence Daniels for the Claimant

Mr John E. Fuller and Mrs Eunica Anthony-Victor for the Defendant

2020: November 3 & 9 (written closing submissions);
2022: March 15

JUDGMENT

Introduction

- [1] **PHILLIP, J:** The claimant, Nicole Roxann Warner (“Ms Warner”) as Personal Representative of the Estate of Joseph Warner, a.k.a Joseph Emanuel Gervinston Warner (“the deceased”), filed a claim on 10th August 2017 against the defendant, Relton Braithwaite (“Mr Braithwaite”) seeking the following relief, namely: damages for the unlawful trespass to land, being a dwelling house at Gambles, described as Registration Section: Gambles, Block No. 61 1793E, Parcel: 132 (“the Property”); vacant possession of the Property; prescribed costs; interest; and any other relief the court deems fit.

- [2] Mr Braithwaite has resisted Ms Warner's efforts. He filed a defence and counterclaim on 25th October 2017 that was amended on 23rd October 2018, asserting that he is not a trespasser as he purchased the Property from the deceased in January 1999 for the price of EC\$250,000.00. However, he admits that the title was never conveyed in his name. Mr Braithwaite avers to be entitled to a transfer of the Property to him and counterclaims for specific performance of the agreement of sale of the Property; an order amending the Register of the Property to show him as the registered proprietor; and costs.

Ms Warner's Case

- [3] Ms Warner's case is, the deceased is the registered proprietor of the Property where Mr Braithwaite resides as a trespasser at all material times. On the 2nd July 2015 she, the daughter of the deceased, obtained Letters of Administration of the deceased estate and on or about 3rd November 2016 commenced having the deceased's properties transferred into her name. In having the deceased's properties moved to her name, surveyors had to attend the Property to verify the boundaries, and they recognised that Mr Braithwaite was trespassing there. He did not allow the surveyors to enter the Property.
- [4] On 5th and 7th June 2017, a police officer and a bailiff attempted to serve Mr Braithwaite with a notice to quit. He refused to accept the document claiming the name mentioned on the notice to quit is not his. Nevertheless, Mr Braithwaite was informed that Ms Warner is the personal representative of the deceased estate, but he failed and refused to stop the trespass upon the Property. Therefore, Ms Warner contends she has suffered loss, damage and incurred expenses and is entitled to interest and costs because of Mr Braithwaite's unlawful trespass upon the Property.
- [5] Copies of the said Land Register, Letters of Administration and the notice to quit are adduced in evidence.

Mr Braithwaite's case

- [6] Mr Braithwaite denies he is a trespasser, having purchased the Property from the deceased in January 1999 for the price of EC\$250,000.00. He contends that shortly after purchasing the Property, the deceased's Attorney-at-Law, Donald Halstead, to whom he paid the EC \$250,000.00 purchase price by cheque dated 26th January 1999, died. However, he asserts the cheque's proceeds were paid by the deceased or upon his instructions to the Antigua Commercial Bank ("the Bank") to discharge the Bank's charges on the Property, thereby removing all encumbrances on the title of the Property. Copies of the said cheque and the discharges executed by the Bank on 10th February 1999 are adduced in evidence.
- [7] After paying for the Property, Mr Braithwaite states, Mr Donald Halstead's office called him to sign the necessary Transfer. Upon doing so, he discovered that the Transfer was made out in "Fitzroy Braithwaite" instead of "Relton Braithwaite" and instructed Mr Halstead's clerk to redo the document with his correct name as the transferee. Shortly after that, Mr Halstead took ill and went to England before finalising the documents. The deceased died on 23rd May 2011 after a relatively short illness. Upon the demise of Mr Halstead and the deceased, Mr Braithwaite could not get anyone representing the deceased's estate for them to conclude the formalities of the purchase by him of the Property.
- [8] Consequently, Mr Braithwaite denies that he is a trespasser and that Ms Warner has suffered loss, damage and expense as alleged in the statement of claim. He contends he is entitled to a transfer of the Property to him and counterclaims for specific performance of the agreement of sale of the Property; an order amending the Register of the Property to show him as the registered proprietor; and costs.

Issues

- [9] A review of the respective case for the parties clarifies that the primary issue the court has to determine is whether Mr Braithwaite purchased the Property from the deceased. If he purchased the Property, then Ms Warner is not entitled to vacant possession, and her ancillary prays of damages, loss, and expense.

Discussion

Did Mr Braithwaite purchase the Property from the deceased?

- [10] Learned counsel for Mr Braithwaite in his written submissions urges the court to consider: the evidence of the contemporaneity of Mr Braithwaite's payment to Mr Halstead of EC\$250,000.00 with the satisfaction of the deceased's indebtedness to the Bank, the fact that the deceased, having discharged his liability to the Bank, took no steps during the remainder of his life to recover the Property from Mr Braithwaite, and that Mr Braithwaite was unshaken and consistent in the witness box. Therefore, on a balance of probabilities, Mr Braithwaite's version of events is correct, and he did purchase the Property from the deceased.
- [11] On the other hand, learned counsel for Ms Warner by his written submissions argued Ms Warner gave evidence in keeping with her witness statement that echoed her statement of claim, and her evidence was unshaken on the stand. She made it clear that Mr Braithwaite was unlawfully occupying her Property at Gambles and disputes that Mr Braithwaite made any payments to the deceased of EC\$250,000.00. More so, Ms Warner indicated that she did not know why Mr Braithwaite paid any money to Mr Halstead.
- [12] Indeed, Mr Braithwaite admitted under cross-examination that before 1999, he purchased Property at Hodges Bay in 1997 for the sum of \$25,000.00, and Mr Anthony Greer acted as his Attorney-at-Law. In December 1998, he bought land at McKinnon's for the sum of \$195,000.00 when Mrs Denise Gordon-Marshall served as his Attorney-at-Law. Again, in 2003, Mr Braithwaite purchased a property for the sum of \$1,200,000.00, and Ms E. Ann Henry acted as his Attorney-at-Law. In these instances, Mr Braithwaite signed a transfer for the properties and obtained the land certificates. However, argued learned counsel for Ms Warner, Mr Braithwaite, although very experienced and knowledgeable concerning land transactions, admitted he did not adduce any land transfer document or an agreement for sale between him and the deceased.

- [13] Further, Mr Braithwaite admitted: that he was served with a notice to quit by a police officer¹, that he issued no cheque in the name of the deceased and the cheque dated the 26th January 1999 did not refer to the deceased, and that the Bank's discharge of charge² for the Property was discharged for the sum of \$353,161.30, which the sum of \$250,000.00 was inadequate to release the charge. Mr Braithwaite also admitted Mr Halstead died on 19th May 2003, four (4) years after the alleged payment. He did not write Mr Lenworth Johnson (who had taken over Mr Halstead's law practice) concerning the payment of any money to Mr Halstead. Neither did he write the deceased after the alleged purchase of the Property concerning any payment or its transfer for the next eleven years before he died on 23rd May 2011.
- [14] It appears that the crux of what I am to decide is whether the coincidental payment by the deceased to the Bank and the payment of the cheque of \$25,000.00 to Mr Halstead is proof that Mr Braithwaite purchased the Property for \$250,000.00. I think not. While this may be a possibility, there are others. At this juncture, it is noted that the affidavit of the Bank's manager filed herein following a court order regrettably offers little assistance on this issue as the Bank's records were not available some 19 years after the closure of the deceased's loan account.
- [15] Mr Braithwaite had in the past engaged Attorneys-at-Law to act him and may well have been doing so again for reasons I will not now specular on as they were not raised in the trial. Still, it is for Mr Braithwaite to prove he purchased the Property on a balance of probability, which he has not done. Mr Braithwaite is an experienced businessman who has previously purchased land and is quite familiar with the process and procedure. It is passing strange that Mr Braithwaite would invest \$250,000.00, which in my view, is not an insignificant investment by any standard, and not seek to have some security or assurance for it. Even after the death of Mr Halstead, whom he paid and then the deceased, he contacted no one and made no efforts to complete the purchase and have the Property transferred to him. What is even more telling is that there is no evidence that even at the stage of being given the notice to quit, Mr Braithwaite asserted his ownership of the Property.

¹ found on page 15 of Trial Bundle 3

² found on page 56 of Trial Bundle 3

[16] Finally, the law relating to conveyancing and ownership of land in Antigua and Barbuda, the Registered Land Act³ (the RLA), does not support Mr Braithwaite's case. The relevant provisions provide:

"37. (1) No land, lease or charge registered under this Act shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorised:

Provided that such an action shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract -

- (i) has in part performance of the contract taken possession of the Property or any part thereof; or
- (ii) being already in possession, continues in possession in part performance of the contract and has done some other act which is exclusively referable to and in furtherance of the contract."

"83. (1) A proprietor, by an instrument in the prescribed form, may transfer his land, lease or charge to any person with or without consideration.

(2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument.

(3) The transferee of a charge may require the charger to execute the transfer for the purpose of acknowledging the amount due under the charge at the date of execution of the transfer."

107. (1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument:

Provided that the Registrar may dispense with execution by any particular party (other than the donee under a disposition by way of gift) where he considers that such execution is unnecessary.

(2) Subject to subsection (2) of section 120 an instrument shall be deemed to have been executed only:

- (a) by a natural person, if signed by him;
- (b) by a corporation-
 - (i) if sealed with the common seal of the corporation, affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer and by a member of the board of directors, council or other governing body of the corporation; or

³ Cap 374 of the Revised Laws of Antigua and Barbuda

- (ii) in the case of a corporation not required by law to have a common seal, if signed by such persons as are authorised in that behalf by any law or by the statute or charter of the corporation or, in the absence of any express provision, by the persons duly appointed in writing for that purpose by the corporation, evidence of which appointment has been produced to the satisfaction of the Registrar.”

[17] These RLA provisions indicate the need for the agreement for sale and a transfer document to be in writing and signed by the parties involved in the sale, namely the deceased and Mr Braithwaite. Admittedly none of this exists. I, therefore, conclude that considering the improbability of Mr Braithwaite’s case, there is no basis upon which I can hold that he purchased the Property.

[18] Mr Braithwaite alleged that he was entitled to a transfer of the Property to him and counterclaimed for specific performance of the agreement of sale of the Property, and an order amending the Register of the Property to show him as the registered proprietor. For completeness, I will briefly state that having concluded as I did in the last paragraph, it is otiose to give any further consideration to these ancillary matters or issues. Therefore, Mr Braithwaite failed to establish his counterclaim, which is dismissed with prescribed costs to Ms Warner.

Is Ms Warner entitled to vacant possession of the Property?

[19] Ms Warner applied for and was issued the Land Certificate for the Property on 2nd February 2018⁴. However, Mr Braithwaite contends he has an overriding interest in the Property under sections 23 and 28 (g) of the RLA and relies on ***Spiricor of Saint Lucia Limited v The Attorney-General of Saint Lucia and Hess Oil St. Lucia Limited***⁵ (para 41) that:

“A careful perusal of the words of section 28 (g) would indicate that the actual occupation” is not the protected interest. What is protected are the “rights” of a person in actual occupation. The word “rights” is not limited by any definition. In my view although the section does not refer to the equitable interest of a purchaser whose title has not been registered as an overriding interest, if [sic it] could and should be included among those equitable rights, which are treated as overriding if the purchaser is in actual occupation. This has been the construction given to similar provisions in the English Land Registration legislation.”
[underline added]

⁴ found on page 10 of Trial Bundle 2

⁵ Saint Lucia Civil Appeal No. 3 of 1996 (delivered 26th May 1997)

Sections 23 and 28 (g) of the RLA state:

“23. Subject to the provisions of section 27 [that is not relevant to this case,] 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 -

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(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:

Provided that-

- (i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;
- (ii) the registration of any person under this Act shall not confer on him any right to any minerals or to any mineral oils unless the same are expressly referred to in the register. [underline added]

“28. Unless the contrary is expressed in the register, 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-

(a) ...;

(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;

(h) ...:

Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit.” [underline added]

[20] From the statement underlined in the ***Spiricor*** case quoted above, it is apparent that mere occupation without more does not give one a right protected as an overriding interest under the RLA. Here, occupation is a threshold requirement for raising the protection of the rights to which the occupant is otherwise entitled. Accordingly, the principles in the ***Spiricor*** case relied on that section 28 (g) includes an overriding interest, as the equitable interest of a purchaser whose title is not registered if the purchaser is in actual occupation is not aptly engaged. I have already found that Mr Braithwaite did not purchase the Property.

[21] Mr Braithwaite also argues that, even if the court is not satisfied that he purchased the beneficial interest in the Property, the action is still caught by section 17 (1) of the Limitation Act, 1997⁶, which provides as follows:

“17. (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

This argument, too, is misconceived. First, there is no convincing evidence apart from Mr Braithwaite’s bare statement that he took possession of the Property on 26th January 1999 and that any right to recover the Property would have expired in January 2011, several years before commencing this action. Secondly, and more critically, Mr Braithwaite did not plead the limitation of action plea in his defence. At any rate, Mr Braithwaite’s possession of the Property believing to be a purchaser with the deceased’s consent,⁷ is inconsistent with him being there averse to the registered owner, the deceased. Adverse possession is a prerequisite for the limitation defence.

[22] In ***Althea James v Eva Fortune***,⁸ the defendant denies being a trespasser and avers, among other things, that both she and her mother have been in peaceful, open and uninterrupted possession of the parcel of land. She views the land on which her house is for over 12 years as belonging to her grandmother. The defendant contended she and her mother’s occupation of the land for more than 12 years extinguished or barred the claimants’ right to possession of it. Blenman, J (as she then was) opined (para [47]):

“It is the Court’s respectful view that Ms. Fortune cannot properly rely on any claim to adverse possession to defeat the title holders for the period of 1972, when allegedly her deceased mother occupied the land. On her own pleadings, she relocated her house in 1989. Importantly, a defence of adverse possession is inconsistent with a claim based on the occupation of lands which belongs to Ms. Fortune’s mother. I agree with the Ms. Joseph’s submission that in order to rely on the alleged adverse possession there must be pleaded material on which the Court can conclude that if proved, would be sufficient to sustain a defence of adverse possession. It is the Court’s respectful view that there must be pleaded information which points to the intention to dispossess the claimants. In the case at bar, there is no such pleaded information which can sustain such a conclusion. I find the decision of **Pollard v Dick** *ibid*⁹ very useful in that regard. Similarly, the decision of **Farrington v**

⁶ Act No. 8 of 1997

⁷ See para 5 of Mr Braithwaite’s witness statement.

⁸ Antigua and Barbuda High Court Claim No. 2002/0590 (delivered 31st October 2008)

⁹ (1977) 2 OECSLR 239. In this case, the occupier occupied the land under the expectation of purchasing the land from someone who purported to be the true owner. Accordingly, the occupier was unsuccessful in an action based on adverse possession.

Bush *ibid*¹⁰ is also very helpful. The Court applies those principles in coming to the conclusion that since Ms. Fortune in her witness statement indicates that her claim is based on her allegations that the lands were family lands; this undercuts her ability to rely on adverse possession, in her defence. There is no pleaded fact which speaks to the requisite intention.” [footnotes added]

[23] In the circumstances on the authorities mentioned in the preceding paragraph, I find that Mr Braithwaite has failed to establish that his occupation of the Property was adverse to that of the deceased and Ms Warner. His declared position is that he is a purchaser and the deceased gave him the keys. Accordingly, Ms Warner succeeds in claiming vacant possession of the Property and is awarded prescribed costs.

Whether Ms Warner is entitled to damages for trespass, loss and expenses incurred

[24] Ms Waner claims damages for trespass, loss, and expense but has not particularised nor provided evidence supporting her claim. However, because trespass is actionable *per se* without proof of damages, she will be entitled. Still, the court may be constrained to make only a nominal award of damages because to do otherwise will cause the court to speculate, which it cannot do.

[25] In ***Halsbury’s Laws of England***,¹¹ it states:

“A plaintiff is entitled to nominal damages for trespass to land even if no loss or damage is caused. If damage or loss is caused substantial damages may be recovered, and the plaintiff is entitled to the diminution in the value of the land which may be the cost of repair and reinstatement.”

[26] As indicated, there is no evidence of the Property’s size, nature, or state. I do not know whether the Property suffered a diminution in value because of Mr Braithwaite’s trespass and the cost of reasonable reinstatement or restoration to its original condition. Mr Braithwaite acknowledges that he resides at the Property; however, there is no evidence of what may be a reasonable rental value to determine the sum Mr Braithwaite should pay Ms Warner for that use or the worth of the use. In the circumstances, I am limited to award only a nominal sum that serves the purpose of vindicating Ms Warner’s right to exclusive use and occupation of the Property of \$10,000.00.

¹⁰ (1974) 12 JLR 1492. It was held that there was no adverse possession as the claimant had taken possession of the land in the erroneous belief that the land was his, and he did not have any intention of excluding the rightful owner.

¹¹ 4th ed. Reissue 1987-97 Vol. 12(1) para 870

[27] It is for these reasons, ordered that:

1. Judgment for Ms Warner that Mr Braithwaite shall forthwith deliver up vacant possession of the Property, described in the Register as Registration Section: Gambles; Block no. 61 1793E; Parcel: 132 and prescribed costs.
2. Mr Braithwaite shall pay Ms Warner damages for the trespass to the Property in the sum of \$10,000.00 together with interest under section 27 of the Eastern Caribbean Supreme Court Act, CAP 143 of the Laws of Antigua and Barbuda at the rate of 5% per annum from judgment to payment.
3. Mr Braithwaite's counterclaim for specific performance of the agreement of sale of the Property and an order amending the Register of the Property to show him as the registered proprietor is dismissed with prescribed costs to Ms Warner.
4. Mr Braithwaite shall pay Ms Warner prescribed costs of \$7,500.00 each on her claim and his counterclaim, a total of \$15,000.00.

**Justice Rohan A Phillip
High Court Judge**

By the Court

Registrar