

**BRITISH VIRGIN ISLANDS
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

BVIHCV 2018/0180

BETWEEN

JAMES HARRIGAN HERITAGE INC.

and

**GLEN HENLEY
dba CANE GARDEN BAY PLEASURE AND BOATS**

Appearances:

Ms. Akilah Anderson for the Claimant

Mr. David Penn for the Defendant

2021: March 15, 16 and 18
June 18

JUDGMENT

- [1] **RAMDHANI J.** (Ag.) This is a Fixed Date Claim for possession of a parcel of land at Cane Garden Bay, Tortola, and which also seeks damages for trespass and costs. After two days of hearing done almost entirely on the Zoom platform, the court considered that the Claimant is entitled to judgment in terms set out in the order in this Judgment.

The Plead Case

- [2] The Pleadings in this case comprised of the Fixed Date Claim together with a supporting affidavit dated the 3rd August 2018 and sworn to by the Director of the Claimant Mr. Glen Chinnery. There were five exhibits attached to this affidavit.

- [3] There was an 'Affidavit in Answer' dated the 19th day of November 2018 and sworn to by the Defendant, Mr. Glen Henley who stated he was doing business as 'Cane Garden Pleasure and Boats'. There were no exhibits to this affidavit.
- [4] An 'Affidavit in Reply' dated the 14th day of June 2019 and sworn to by Mr. Chinnery was filed to meet the matters set out in Mr. Henley's Affidavit. There were some 13 exhibits attached to this affidavit.
- [5] The Court had also deemed a Mr. Osei Baisden, Sworn Land Surveyor an expert and he was required to do a survey of Parcel 47 and to provide a report on his findings relating to structures found on the parcel; one such report was provided.
- [6] The pleaded case for the Claimant was that the subject matter of the claim is a parcel of land located at Cane Garden Bay, Tortola, British Virgin Islands more formally described as West Central Registration Section, Block 2438B, Parcel 47 which will be referred to in this judgment as 'Parcel 47'. This land is presently owned by the Claimant as the registered proprietor who holds it as family lands.
- [7] The claim is that Parcel 47 has been family land for a long time, being once owned by the grandparents of the sole witness for the Claimant. In 1926 it had been rented to the grandfather of the Defendant. Thereafter, the Defendant's grandfather vacated the land in 1976 and no one else was given any tenancy or any permission and surely not the Defendant, who the Claimant contends moved on a portion of Parcel 47 sometime in 2010 during or after a music festival had been held on Parcel 47. The Claimant says that they had not given any one permission to host any music festival nor to clear the lands for that purpose.
- [8] The Claimant's pleaded case is that the Defendant had begun his encroachment around this time and he presently runs a beach bar and restaurant, a portion of which is on a portion of Parcel 47 and also has placed a container on the land, stores beach chairs and kayaks; all of this without permission.

- [9] The Defendant's pleaded case is first that he is not on Parcel 47 and that he is on the public beach which is Crown Land. And that in any event if he is on Parcel 47, then it is the land of his grandfather. Further, and more significantly, he pleads that he has been adversely occupying Parcel 47 since 1995, after he returned from overseas and so that the limitation has run on the claim.

Evidential Issues which Arose during the Trial

- [10] A point arose early in the trial during the course of the Claimant's evidence as to whether the exhibits which were attached to the Claimant's Affidavit in Reply should be considered by the Court even though an earlier order had deemed that all the affidavits were to be treated as evidence in chief. Mr. Penn, learned counsel for the Defendant, first raised the point as Ms. Anderson was seeking to make reference to one of these exhibits as she sought to amplify the evidence in chief of the Claimant's witness.
- [11] Ultimately and effectively, Mr. Penn submitted that most of the exhibits constituted hearsay evidence and notwithstanding that there was an order deeming the affidavit as admitted into evidence, there could be no reliance on any of the exhibits which fell within this prohibition.
- [12] When the point was first raised, Ms. Anderson on the other hand expressing her astonishment to this objection not only pointed the court to the Order which had been made deeming the affidavits as evidence in chief and therefore incorporating the exhibits making them admissible, but also submitted that a 'Notice to Adduce' had been served on the Defendant over a year ago, in relation to the exhibits and that there had been no objection forthcoming.
- [13] Learned Counsel relied on sections 69 and 73 of the Evidence Act to argue that Mr. Penn's failure to indicate that he was objecting meant that he was now barred from mounting an objection and that all of the exhibits were therefore to be treated as evidence of the facts contained therein as statutory exceptions to the hearsay rule.

[14] In reply, Mr. Penn submitted that the Notice to Adduce could not be regarded as a section 73 Notice as it failed to first make reference to the section and secondly, that it had failed to expressly state that the claimant would not be calling the persons who had made those out of court statements or providing any reasons why those persons could not be called.

[15] When the objection was taken, the Court reserved its ruling on the point and informed the parties that amplification could be sought from the witness on the exhibits at this stage, but that a ruling would be provided as part of this Judgment. If it were found that the objection had merit, then the Court would disabuse its mind of the inadmissible portions of the evidence. This was so that the Court could maximize the use of the time allocated for the trial and to avoid this objection being repeated on what was expected to follow in relation to other exhibits.

[16] I have decided that I will consider the hearsay evidence as evidence in this case for the reasons now set out. Mr. Penn also appeared to have changed his position when he was making closing arguments on the case, but notwithstanding this change of position, it would be addressed in this decision.

[17] There are two provisions engaged here. The first is section 70 which reads:

70. (1) This section applies in civil proceedings where the person who made a previous representation is available to give evidence about an asserted fact.

(2) Where it would cause undue expense or undue delay, or would not be reasonably practicable, to call the person referred to in subsection (1) to give evidence, the hearsay rule does not apply in relation to—

(a) oral evidence of the previous representation referred to in subsection (1) given by a person who saw, heard or otherwise perceived the making of the representation; or

(b) a document so far as it contains the previous representation or some other representation to which it is reasonably necessary to refer to understand the previous representation.

(3) Where the person referred to in subsection (1) has been or is to be called to give evidence, the hearsay rule does not apply in relation to evidence of the representation that is given by—

(a) that person; or

(b) a person who saw, heard or otherwise perceived the making of the representation,

if, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

Portions of section 73 is also relevant to the present discussion. The relevant part reads:

73. (1) Subject to this section, sections 69, 70(2) and 71(2) and (5) do not apply in relation to evidence adduced by a party unless that party has given at least 14 days' notice, in writing to each other party, of the intention to adduce the evidence.

(2) Where a notice required under subsection (1) has not been given or the period of notice specified has not been complied with, the court may, on the application of a party and subject to conditions, direct that one or more of the provisions mentioned in subsection (1) shall apply

(a) notwithstanding the failure of the party to give such notice or to comply with the period of notice; or

(b) in relation to specified evidence with such modifications as the court specifies.

- [18] The scheme of sections 70(2) and 73 of the Evidence Act requires that a party seeking to use first-hand hearsay in civil proceedings without calling the maker of the statement must base his application on one or more of the grounds that (1) it would not be reasonably practicable to call such a witness, (2) doing so would cause undue expense or (3) would unduly delay the matter.
- [19] Where a party seeks to invoke section 70(2), he must first serve a 'Notice to Adduce' providing at least 14 days' notice to the other party of the intention to adduce the evidence. Notwithstanding that a proper notice has not been served and that the requisite period has not been given, section 73(3) confers a discretion on the Court to admit the evidence on an application of a Party at the trial.
- [20] While it is clear that the Notice to Adduce falls short of what is required for a Notice, I can hardly see how the Defendant's attorney could have conceived that there would be no attempt to seek to rely on this evidence at trial. I note in particular that there was absolutely no response to the Notice to Adduce from Mr. Penn. This matter went through several case management conferences and this point was never raised. I find it passing strange that such notice would be served on counsel and there would be no response until the trial gets underway more than one year later. Why was this not raised at a case management conference? Why would counsel wait until trial to spring this on the other side?
- [21] Secondly, and more importantly, all these exhibits were in fact before the Court during the case management conference when the Court made the order that all of the affidavits would be treated as evidence in chief. I cannot see how any of the Parties would have considered that this did not mean the affidavit and the attached exhibits.
- [22] This would have been the end of this point for the Court. But it is significant for me to mention that the two exhibits which were really relied on was a photograph which the claimant's witness testified was Parcel 47 in 2010, and the other was a series of emails between the same witness and another person about the state of the property. This witness stated that he took this photograph, and he further sought to

tie the same photograph as the basis for his belief that he had not seen any structure on Parcel 47 at the time the photograph was taken. The photograph therefore is not hearsay but direct evidence. The emails are firsthand hearsay, but the relevant portions related to what the witness saw was effectively adopted at the trial as to what he claimed he saw or did not see on Parcel 47 in 2010.

- [23] The Defendant himself sought to give evidence in relation to the photograph. He asserted that it showed a 'box' which belonged to him and it was used to store beach chairs. He used this evidence to assert that it showed that he was on the beach on Parcel 47 in 2010; that his bar was not shown because of the angle of the photograph. In short, he did not at all seek to deny that this was a photograph showing Parcel 47 in 2010.

The Affidavit of the Law Clerk

- [24] Several days before the start of the trial, the Court enquired of the Parties how many witnesses each side intended to call. The Claimant's attorney stated that there was one for the witness and two for the Defendant. The reference to a second witness related to an affidavit dated the 10th March, 2021, and sworn to by Ms. Anya Stevens, the Law Clerk of The Firm representing the Defendant. This affidavit had been sworn to after the case management order had been made deeming as evidence in chief, the affidavit in support of the claim, the affidavit in answer of the defendant, and the affidavit in reply on behalf of the Claimant.
- [25] At that point, Mr. Penn advised that he did not intend to call this witness to give evidence. It would later be clear that this affidavit had been sworn to support submissions to be made by Mr. Penn during earlier hearings that the claim was statute barred and should be struck out.
- [26] After the close of the Claimant's case, and during an attempt to amplify evidence of the defendant, Mr. Penn informed the Court that he now intended to rely on this affidavit for the purposes of the trial.

- [27] When he was reminded that he had earlier stated that he did not intend to call this witness, his response was that he had not informed the Court that he did not intend to rely on the evidence but only that he was not calling the witness.
- [28] This was a rather curious response.
- [29] Now, it became obvious to the Court that the Defendant was keen to have this affidavit in evidence and so it first became a matter as to whether the evidence was at all relevant.
- [30] Enquiries of Mr. Penn revealed that all of the information, except for one averment, related to hearsay information which the deponent had received by way of instructions from Counsel or from reading the case file in the Law Firm and the source of all that information was the defendant himself or certain family members who spoke to historical information regarding the occupation and use of Parcel 47 on their part.
- [31] The one matter which fell outside of the hearsay rule was a request which had been made by the Law Firm to the Government of the British Virgin Islands for confirmation that the Defendant had been granted approval to conduct his business which was being carried on since January 2000.
- [32] The Court considered that the affidavit was replete with secondhand and perhaps third hand hearsay. The Law Clerk could not be allowed to give this evidence, and the Court refused to allow the Defendant to call this witness or to rely on this affidavit.
- [33] Having regards to the nature of the matter and Mr. Penn's submissions that the letter from the government was independent evidence showing that the Defendant had been operating a business at least since 2000, was crucial to his case. For these reasons, and the contention that it was a government issued letter, the court gave permission for Mr. Penn to lead this evidence from the Defendant during the course of his evidence in chief. I do believe justice would be best served, if litigants

are given the best opportunity to present their respective cases, rather than on the basis of an exercise of discretion, they are barred from doing so.

The Legal and Factual Issues raised on the Claim

- [34] The claim raises the issue as to whether the defendant is firstly on the claimant's land and secondly whether he has occupied the same *nec clam nec vi nec precario* for the requisite period thereby extinguishing the right of the claimant to recover the said land.
- [35] The legal owner of land in the BVI may, having regards to the cumulative effect of Section 6(3) of the Limitation Act and section 135(1) of the Registered Land Act, lose his land to a person who has moved onto the land and has occupied the same adversely to the owner.
- [36] In **Smith (Personal Representative of Hugh Smith (Deceased)) and others (Appellants) v Molyneaux (Respondent)**, on appeal from the British Virgin Islands, the Privy Council the Board examined the two provisions thus:

“2. Under section 135(1) of the Registered Land Act, an occupier of land may acquire title to it from the registered owner if (among other things) he has possession of it without the owner's permission. Section 135(1) provides that:

“The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of 20 years.”

3. The registered owner cannot, however, allow 20 years to elapse before interrupting the possession of an occupier because under section 6(3) of the Limitation Act his right of action is barred after 12 years from the date on which the right of action accrues to him. Under section 7(1) of the Limitation Act, the right of action accrues to him on the date on which he is dispossessed.

- [37] The effect of these provisions is that if the defendant can show that he has been in uninterrupted occupation of the land in question or a portion of it for the 12-year period this action to recover possession would fail.
- [38] The question, therefore, is whether the evidence proves such occupation as there is little doubt from both sides that legal title to the land is presently held by the Claimant.

The Parties' Closing Submission

- [39] Ms. Anderson submitted that there could be no doubt that the land is owned by James Harrigan Heritage Inc as the registered proprietor.
- [40] Learned counsel submitted that the evidence, coming from Ms. Baisden, the Sworn Land Surveyor, the independent expert appointed by the Court, namely his surveys, report and oral testimony of the site visit and in court, demonstrated beyond any doubt a significant portion of the defendant's bar and restaurant is a part of Parcel 47. She submitted that this evidence was undisputed.
- [41] Ms. Anderson then submitted that the defendant's evidence as to occupation and possession to satisfy the limitation period is quite remarkable. Learned counsel pointed to the defendant's evidence, which she submitted must lead to a conclusion that he is contending first that he does not occupy parcel 47 and that alternatively, if he does, he is occupying adversely and has dispossessed the legal owner.
- [42] Mr. Penn on the other hand, has resisted this vigorously. He effectively argued that the defendant's occupation has always been clear and obvious, and it has in fact exceeded the limitation period. Learned Counsel pointed the Court to paragraph 4 of the Defendant's affidavit which was his evidence in chief to make this point. There the defendant stated: "I operated this business with permission from the Government to operate on Cane Garden Beach." Here the Defendant appeared to

be pointing to that to support his contention that he had begun his business on the beach in 1995.

The Evidence and the Facts found at Trial

- [43] Each party led one witness, and they were each allowed to question the expert who was called as a witness of the court who had provided an expert report setting out boundaries and had pointed out those boundaries and related matters to the Court on a visit to the locus in quo before any other evidence was taken.
- [44] This evidence of the expert set the stage for the Court's consideration of the evidence of each side in this matter.
- [45] This evidence comprising of the two surveys (the 2017 and the 2021 surveys), the report and the oral testimony, was cogent, credible evidence which showed clearly that size, location and boundaries of Parcel 47.
- [46] Parcel 47 is just over half an acre of land abutting the beach at Cane Garden Bay. To the west of Parcel 47 is the sea, to the east is the main road, to the north is Parcel 45 which is Crown Land reserved for public parking and public toilet facilities, and to the south is Parcel 49 which is a public cemetery. On the sea-side, Parcel 47 ends at the high water mark.
- [47] Mr. Baisden's evidence confirms that a significant portion of the Defendant's beach bar rested on a portion nearest the north west of Parcel 47. In fact, the court has accepted that the encroachment came 39 feet onto Parcel 47 from the north side (Parcel 45). The 2021 survey plan shows the beach bar occupies no more than 45 square feet of land on Parcel 47.
- [48] Mr. Baisden's evidence did not go as far as showing any other structure on the land. The Court did see a container sitting on the western side almost against the wall fence of the cemetery.

The Claimant's and the Defendant's Evidence

- [49] Apart from the expert evidence, this was essentially a two-witness case. The analysis of the evidence of these witnesses was therefore crucial in deciding the facts on this case. In this analysis, the Court will state those matters which it found as a fact and which it rejected on the evidence.
- [50] It is useful to start with the Claimant's evidence. On behalf of the Claimant, which is an incorporated entity, the witness was the Director and President of the company, Mr. Glen Chinnery. His evidence was in large part straightforward and came from two affidavits, together with certain exhibits and his evidence elicited in cross examination.
- [51] He states that the company was incorporated in 2007 and it holds 'family' property which is located at Cane Garden Bay, Tortola, British Virgin Islands more formally described as West Central Registration Section Block 2438B, that is, Parcel 47.
- [52] He stated Parcel 47 is family land and it was transferred to the claimant which was a holding company. The Registration took place in 2010, and nothing turned on this date of transfer as far as the limitation defence which was run by the Defendant, is concerned.
- [53] He said that the family had been renting the land to the grandfather of the defendant since 1929, and that the grandfather was asked to vacate the land in 1976 and that he did so. Here is the first point the Parties' evidence intersect.
- [54] The Defendant's version of this is that his grandfather and grandmother occupied the property for a very long time and that his father was born on the land, and that a number of his brothers and sisters were born on the land. He said that his grandfather left the land in 1980 and then an aunt stayed there until the late 80's or early 90's.

- [55] The defendant does not specifically state how his grandfather came to be on the land, and he appears to make much of this historical occupation contending on one version of his case, that 'if he is occupying Parcel 47 then it is his grandfather's land'. This will be returned to later on as the Court deems it to be a significant matter.
- [56] The Defendant's states that he returned to the BVI in 1995 and he started his beach business and was there on the beach since then.
- [57] As a fact, this court found that Mr. Chinnery's evidence on the grandfather's occupation to be more detailed and credible, and he presented this Court with letters showing that the grandfather was paying a rent and had been asked to vacate Parcel 47 in 1976.
- [58] The Defendant himself does not say how he came to know about his aunt's occupation and for this reason, the Court prefers the evidence of Mr. Chinnery on this point. This brings a series of events, that after the grandfather left Parcel 47 in 1976 or even 1980, the building on the land was left unoccupied and deteriorated. It remained on the land until 2010 when it was demolished.
- [59] Since then, the land was unoccupied but the house remained on the land. The family got a caretaker who took care of the land until his death in 2007, and thereafter the caretaker's son looked after the land.
- [60] This witness said that they became aware that the government had cut down most of the trees on the land in 2010 to hold a music festival. This was a cause of concern as it appeared to them that the son had given the government permission.
- [61] Mr. Chinnery stated that he came to Tortola in 2010 and he visited the land and took the picture which was attached and marked 'CG-11' to his second affidavit. That showed a drainage pipe partly buried under the sand and leading out of Parcel 47 into the sea. He said that this was because the clearing of Parcel 47 had led to flooding of the land. He said that he did not see any bar on the Parcel but he did

see a 'box' which might have very well been the defendant's container for storage of beach chairs.

[62] It is a significant matter for this court that the defendant made little of this music festival which took place on this land in 2010. There was absolutely no evidence from him which indicated that at that time he was asserting rights of ownership over the land, and it was he who had to give any kind of permission for this festival to be held. It more appeared that he was interested in his business which I find did exist that time, (where it was located is another matter), as against asserting rights of ownership over the land. If he began to adversely occupy after that, then he has fallen short.

[63] In any event, I do not find that he was at all adversely occupying the land at any time. My finding on this important matter is fortified having regards to the defendant's clear vacillation on where his structure which housed the bar and restaurant was actually situated.

[64] In his evidence in chief, at paragraph 30 of his affidavit, he states that: "my business is located on Crown Land on the Cane Garden Bay Beach and not on private property. Which even if it was (which it is not) would be on my grandfather's property."

[65] This tenor of his evidence did not change on cross examination in any significant way.

[66] Now, a defendant who claims adverse possession must demonstrate to the court's satisfaction proof of *animus possedendi* or an intention to possession in the sense required.

[67] As was stated in Slade LJ in *Powell v McFarlane* at 471 – 472 (quoted with approval in *Ellen (Edlyn) Works (by her Attorney Wellington Charles) v Mitch Phillip* and another [2015] ECSCJ No. 28)

"...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."

[68] Again, Slade LJ in *Buckinghamshire County Council v Moran* explained,

"What is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess, that is to say, an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title."

[69] The attitude of an occupier and the things he does (and the things he says, where they go against his interests), will be relevant to determining what was the nature of his occupation. See *Ellis J in Ellen (Edlyn) Works (by her Attorney Wellington Charles) v Mitch Phillip and another* [2015] ECSCJ No. 28.

[70] There is no doubt in my mind that in all the years of his occupation and the carrying on of his business on the Cane Garden Beach, this defendant believed that he was occupying a portion of the public beach. This is evident from his struggle to decide whether he is on the public beach or whether he is on private land. I understand the struggle having viewed the land and the surrounding environment. When one looks at the nearby parcel 45 to the north, it is easy to believe that when you stand on the western part of the land that you are on the beach because you are on the beach, but that portion of the beach is part of the land.

[71] This is a critical matter in this case. There is no doubt in my mind that this defendant believed that he was on the public beach. He has only thrown in the alternative for good measure.

[72] That being the case, if he believed that he was on the public beach, what would have been his intention as far as occupation was concerned? I cannot see how he could have therefore intended to exclude the world if he believed that he was on public beach. His evidence that he has been given permission by the government to operate his business on the beach cannot be ignored. I find that he has continued in that business operating on the beach with permission from the government, and

that over the years he drifted more and more onto the land. This I find, having regards to the finding that in 2010 his beach bar and restaurant had not yet encroached onto the land.

[73] This would be the end of the matter, but it is necessary that I also address the complete absence of any other evidence related to the occupation of parcel 47. As far as the trespass is concerned, the defendants' beach bar and restaurant only occupies a very small portion on the north-western portion. Whilst there is evidence that after 2010 cars began to park on the land, there is no evidence that it is defendant who maintains the land, and that he treats with any portion as his own. There is no evidence as to who maintains the fences which are on three boundaries of the land. Evidence of adverse possession is remarkably absent in this case.

[74] This, therefore, is simply a case of a man who had a beach bar and restaurant and believes that he is on the public beach and who now has found himself on the land of another person. He is a trespasser. He must remove the structure and leave the land. He must do so unless the claimant allows him an accommodation.

[75] I also find that his occupation has caused the claimant some degree of loss as they have been unable to lease the land to a third party. They have therefore been kept out of the use of the land and have lost the lease rental which would have been paid but for this trespassing defendant.

Then there could be no animus necessary to exclude the world and to occupy in the sense necessary to claim adverse possession.

[76] In all of the circumstances of this case, judgment will be granted in favour of the Claimant.

[77] The Orders of the Court are as follows:

- (a) Possession is hereby granted to the Claimant of that part of land in the Register of Title as the West Central Registration Section Block 2438B, known as Parcel 47, a portion of which the Defendant occupies.

- (b) That the Defendant is to vacate the said land, remove his structures and cease all trespass or interference with the said Parcel 47 within six months from the date of this Order.
- (c) Damages in the sum of \$21,600.00 for said trespass.
- (d) Prescribed costs.

[78] Having regards to the obvious uncertainty of the Defendant, within 30 days of this Order, a survey shall be carried out by Mr. Baisden or shall other suitable surveyor as approved by the Court to determine what portion of Parcel 47 is being occupied by the Defendant. The Defendant shall bear the cost of this survey.

[79] The Court is grateful to the parties for their assistance.

**Darshan Ramdhani
High Court Judge (Ag.)**

By the Court

Registrar