

**IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CASE NO. CAVEAT NUMBER 314 of 2012

BETWEEN:

[1] ANNETTE P. LOERNER

AND

[1] COLIN ANTHONY LEES

[2] CECILY YVETTE LEES

Appearances:

Laurina Vidal of Vidal Law for the Caveator

Michael Bruney of Dupigny Bruney & Associates for the Caveatees

2019: February 28

2020: January 24

JUDGMENT

[1] **STEPHENSON J.:** The parties to this matter are neighbours who live at Macoucherie in the Commonwealth of Dominica and the dispute concerns the ownership of a piece

of land lying between land owned by the Caveatees (hereinafter referred to as the Lees) and within the geographical boundaries of the land owned by the Caveators (Hereinafter referred to as Mrs Loerner.)

- [2] The disputed parcel of land falls within the piece of land registered in Book of Titles W4 Folio 87. The entire parcel of land was once owned by Vincent Winston deceased and comprised of 38,560 square feet. The issue in the case at bar concerns the ownership of a piece of a parcel of land comprising 10,075 square feet of land "*the disputed piece of land*" forming part of a larger parcel of land registered in Book W4 Folio 87.
- [3] It is Loerner's contention that she owns the land having purchased the land from the previous owner. Loerner along with her husband live on the land adjoining that which they purchased and they also own and operate a business called Tamarind Tree Hotel and Restaurant on the adjacent parcel.
- [4] The Lees contend that through their personal occupation and that of their predecessors in title have acquired possession of the disputed parcel of land and they are seeking to have their ownership of a piece of the said parcel of land registered pursuant to section 33 of the **Title By Registration Act (TBRA.)**
- [5] The Caveator "*Loerner*" claims to have purchased a portion of land comprising 38,560 square feet which includes the disputed piece of land. The Caveatees "The Lees" claim that they in conjunction with their predecessors in title have occupied the disputed piece of land in excess of 12 years; that their occupation and use has been open and undisturbed and that they have acquired possessory title to the said disputed parcel of land.
- [6] The Lees claim to be in possession of the disputed parcel of land for 21 years.
- [7] This case has a history of the filing of caveats by both parties and accusations and cross accusations between the parties and accusations of irregularities and improper

conduct have also been levelled against the Registrar and employees of the Registry of Titles.

[8] The Lees contend that on the 23rd December, 2010 they lodged a caveat on the said parcel of land which caveat they contend was mysteriously removed without their knowledge. Mrs Loerner contends that when she entered into discussion with the Beneficiaries of the estate of the registered owner to purchase the land and based on information received from her then attorney there was no caveat on the said title.

[9] Mrs Loerner contends that when she paid for the parcel of land she placed a caveat on the title of the land in July 2011. She subsequently sought to have the land registered in her name. During that process, she was informed by her attorney at law that the Lees Caveat appeared on the Title.

[10] Mrs Loerner in her evidence stated that when the Lees application for prescriptive title came to her attention she filed a caveat against the said application. An affidavit in support of this application was filed on the 25th February, 2015.

[11] The entire parcel is registered in the name of Vibert A Winston at book W4 folio 87.

[12] The adjacent parcel of Land sold to the Ambos 1997 and this said adjacent property was leased to and eventually purchased by the Lees in 2005.

[13] Mrs Loerner's evidence is that since the purchase of the land in July 2011 both she and her husband have attempted to prevent the Lees from coming on the disputed piece of land. Evidence was led as to confrontations between the parties some of which came to the attention of the Police.

[14] Mrs Loerner has also given evidence of her and her husband warning and demanding the Lees and their employees leave the land and to stop trespassing on same. Mrs Loerner spoke of taking legal action against the Lees to prevent them from trespassing on the property. It is noted that all of this commenced in the year 2011.

[15] Loerner states that she purchased the parcel in its entirety and that the Lees were not in possession or occupation of the disputed parcel and are not entitled to title same.

[16] The Lees filed an affidavit on the 25th March, 2015 in response to the affidavit sworn by Loerner in support of her caveat. The Lees aver that they occupied the property that they now own since 1997 and purchased the said property in 2005.¹ The Lees contend that from the time they went into occupation of their home in 1997, they have been occupying and cultivating a portion of the land adjacent to the land they occupied and now own. They describe the land as comprising of 10,075 square feet on the western and northern side of their registered property. They further stated that the said piece of land was occupied and cultivated by their predecessor in title without interference of hindrance from anyone from 1991 and they continued that use and occupation, openly and without disturbance from anyone.

[17] The Lees aver that the land subject matter of the case at bar constitutes a fruit garden which they consider to be an extension of the yard of their home since there is no physical separation between their property and the disputed parcel.

[18] It is the Lees evidence that Loerner constructed Tamarind Tree Hotel and Restaurant after they went into occupation of the property they now own as well as the land in dispute and that after the hotel was built a wire fence and retaining concrete wall was erected by Mrs Loerner's husband along the western section of their southern boundary. The Lees aver that they put a wire fence along the remaining eastern section of that boundary.

[19] The Lees go on to aver that in preparation to apply for title by adverse possession of the piece of land they occupied and used as their fruit garden, they caused a caveat to

¹ The evidence is that the Lees first occupied the house as tenants and then they subsequently purchased the house and land from the previous owners.

place on the title of the property registered in Book W4 Folio 87 of the Register of Titles registered in the name of Vincent Albert Angelo Winston.

[20] The Lees also on the 23rd November, 2012 applied by way of Case Stated pursuant to section 33 of the **Title By Registration Act (TRBA)** for the Certificate of Title in the name of Vincent Albert Angelo Winston be cancelled and a new Certificate of Title issued for the piece of land that they occupied on the basis that they and their predecessors in title had adversely occupied the said parcel of land.

[21] Shortly after their application by way of case stated it came to the Lees attention that their caveat of December 2010 had been removed without their knowledge. Following searches being conducted at the Registry of Titles, it was found that an order of removal was lodged at Registry on the 9th March, 2011 and on the 11th March, 2011 their Caveat was removed by the Registrar without any notice to them the Caveators.

[22] The Lees aver that consequent to correspondence and meetings between them, their solicitors and the Registrar of Titles their Caveat of December 2010 was reinstated.

Evidence of possession

[23] The Lees in support of their case for Adverse Possession rely on the following evidence that:

- a. They entered into possession of the property of the Ambos in **1997** as tenants and that there fruit trees on the disputed parcel of land when they entered into possession;
- b. The Ambos Their predecessors in title occupied a cultivated area adjacent to purchased lands with permanent crops including kennip, soursop, sugar apple, pommeceterre, lime, cherry and coconut trees.;
- c. That they the Lees, continued the Ambo's use the land from 1997;
- d. That they were informed by the then landlord (now previous owner) that he planted the trees on the disputed parcel without the permission of Mr Winston who was the owner of the property and that he was not

prevented from planting, cultivating or reaping the crops from the trees he planted;

- e. That after they went into occupation of the premises they now own they continued to plant, cultivate and reap crops on the disputed parcel of land without interference or disturbance from anyone including Mr Winston. Further they did so openly;
- f. That they employed the services of one Rickson Vidal and others to assist in the maintenance of the garden and he was never interfered with or prevented from doing his work in the garden;
- g. That their access to the property was through the main entrance and they erected to posts with a chain which was put up across the entrance at night, further that their dogs were also kept on the property which kept trespassers out;
- h. That in **December 2012** Mrs Loerner's husband put up a gate at the southern end of the Loerner's property giving the Loerners easy access to the disputed parcel of land and the Lees house;
- i. That there was a confrontation between the Loerners, their workers and the Lees and their gardeners which involved the police and that was in June **2013**. The fracas of that day was settled by the police with the Loerners having to remove stakes they put down and the barbwire.

[24] In 2010 Lees attempted to purchase land from the administrators of the Winston estate they held discussions with the Winston Sisters vis a vis the possible purchase of the land offered to pay market value but there was no deal.

[25] The Wintsons did not accept the offer to purchase and therefore the Lees sought to apply to prescriptive title to the land pursuant to section 33 of the **Title By Registration Act (TBRA)** and the **Real Property Limitation Act (RPLA)**.

[26] The Lees contend that they knew through the knowledge of Mrs Lees who is an experienced Attorney at Law that in offering to purchase the land they were not diminishing their rights.

[27] Loerner seeks to rely on the Memorandum of Transfer from the Winston Estate duly signed by the Personal Representatives on the 20th July, 2011 was presented to the Registry of Titles on the 14th May 2014.

[28] On the 23rd December, 2010 the Lees caveated the Certificate of Title comprising Book W4 Folio 87 on the basis that they and their predecessors in title has acquired possessory title to the disputed part of land for over 12 years and that they intended to apply for Certificate of Title to the piece of land. – This Caveat was ordered removed by Vanessa Winston as Administrator of the estate of Angelo Winston on the 11th March, 2011. The Lees contend that this removal of caveat was illegal as no warning or notice of removal was pursuant to section 119 of the TBRA (21 day warning)

[29] On 14th November, 2012 the Lees applied to the Registrar of Titles to state a case to the Judge with a view of having the Certificate of Title issued to them for the disputed parcel which formed part of Book W4 Folio 87 comprising 10,075 square feet. Their claim is based on their contention that they and their predecessors in title occupied the land for 21 years prior without being disturbed.

[30] As it is required by law, the Lees application for issue of the certificate of title was advertised in a local newspaper.

[31] On the 28th November 2012 Annette Loerner (Loerner) filed a caveat against the Lee's application on the grounds that having purchased the parcel of land she was the equitable owner of the land which was transferred to her on the 20th July, 2011 by the administrators of the Winston Estate.

[32] The Lees were never informed of the removal of their earlier caveat (December 2010) neither were they informed by the Registry of Titles that their application for title was being opposed by Loerner.

[33] The Lees were previously assured and informed by the Registry of Titles that there were no objections to their application to be registered as owners of the disputed parcel and that their December 2010 caveat had been removed and title issued to Loerner. In September of 2013 the Lees became aware of the Loerner Caveat against their application.

[34] The Lees protested the wrongful removal of their first Caveat and this Caveat was reinstated in January 2013 with retrospective effect from 23rd December, 2010 on the grounds that the removal of this caveat was contrary to law and the said removal was therefore void.

[35] On the 6th July 2011, Loerner presented a caveat against the land registered in Book W4 Folio 87 on the ground that she had an equitable interest on the land ... this caveat was never recorded on the Certificate of Title but was pinned to same

[36] On the 14th May 2013, the 2nd Caveat of the 6th July, 2011 was purportedly withdrawn and a Memorandum of Transfer bearing the date 20th July, 2011 was presented. It is to be noted that the Caveat of 23rd December, 2010 which caveat was removed and reinstated still remained in place.

[37] On 9th December, 2013 the "*disputed parcel*" of land was hatched off by Kevin Seaman Licenced Surveyor. This action was objected by the Lees, the attorney at law for the Lees and Learned Attorney General. There has been no corrective action by the Registrar of Titles.

The Law

[38] At this point it is convenient for me to set out in summary form the applicable legal principles for a case such as this. The following established legal principles have each been taken into consideration and applied by this Court when considering the evidence and in making the findings set out in this judgment.

[39] In the old case of **Entick –v- Carrington**² the words of Lord Camden CJ are helpful he says “*Our law holds the property of every man so sacred that no man can set his foot upon his neighbour’s close without his leave. If he does, he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.*”

[40] This passage is applicable to the case at bar as it is well established law that one of the ways of justifying the act of possession of another’s land is by and through the law of prescription. The lapse of time is recognised as creative and destructive of rights. This is so with the destruction of the ownership of land through dispossession for twelve years. The owner loses not only his right to recover possession of the land; he loses title to the land itself. Dispossession involves issues of fact and of law, and the onus of proof lies on him who alleges dispossession.

[41] It is the well established law in The Commonwealth of Dominica that the claimant being the registered owner has indefeasible title to the property³ subject to exceptions as is stated in statute.

[42] The word “*Indefeasible*” has been defined in the first schedule of the **Title By Registration Act (TBR ACT)** as;

“The word used to express that the Certificate of Title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in

² [1558-1774] All ER Rep 41

³ Section 8 of the **Title By Registration Act** Chapter 56:50 (**TBR Act**) of the Laws of Dominica which states “All certificates of title granted under this Act, and all notings of mortgages and incumbrances on the same, shall be indefeasible”

any court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or incumbrances in the notings thereon are not mortgages and incumbrances on the said land; except on the ground of fraud connected with the issue of the certificate of title, or the noting of the mortgages or incumbrances, **or that the title of the registered proprietor had been superseded by a title acquired under the Real Property Limitation Act, by the person making the challenge.** The word also means that, the Certificate of Title being issued by the Government, the Government is, with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving anyone justly aggrieved by its issue to bring an action for money damages against the Government” (emphasis mine)

[43] Section 10 of the **TBR Act** further provides that

“The right of the registered proprietor named in a certificate of title to the land comprised in a certificate of title granted under this Act shall be the fullest and most unqualified right which can be held in land by any subject of the State under the law of Dominica, and such right cannot be qualified or limited by any limitations or qualifications in the certificate of title itself ...

Adverse possession

[44] Our court of appeal has held that *“Adverse possession can only arise where it is recognised by the adverse possessor” that the paper title is vested in someone else. In essence, the adverse possessor seeks to say that he has dispossessed the paper owner.”*⁴

[45] The key to this case lies in section 2 of the **Real Property Limitation Act (RPL Act)**⁵ which provides

“(2) After the commencement of this **Act**, no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to some person from whom he claims; or, if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same.”

⁴Arnold Celestine (Administrator of the Estate of O’Ferril Celestine) –v- Carlton Baptiste *HCVAP* 2008/011 Grenada at paragraph 12

⁵ Chapter 54:07 of the 1990 Revised Laws of Dominica

[46] In the recent Caribbean Court of Justice Decision in **David George-v- Albert Guye**⁶ It was held that the registered ownership in land can be superseded by adverse possession (Possessory title) only under the provisions of the **RPLA**. President Adrian Saunders PCCJ in delivering the judgment of the CCJ said this about the fact that the **TBRA** recognised that the Certificate of Title could be defeated by adverse possession:

“In making this exception for adverse possession, the **TBRA** accepts, recognises and endorses the notion that the ownership rights of a person with a supposedly indefeasible certificate of title may be extinguished, that is to say, supplanted or “*superseded*”, by a title acquired under the **RPLA**. Where a registered proprietor has discontinued possession of a parcel of land for a period in excess of 12 years and a squatter has been in possession for that time or more, the title of the registered proprietor suffers precisely this fate. The **RPLA** disables the registered title owner from further asserting ownership over that land occupied by the squatter. ...”

[47] It is clear to this court that the issue in question is who owns the disputed piece of land. Is it Loerner who bought the entire piece of land including the disputed piece of land? Or is it the Lees who contend that they together with their predecessors in title adversely acquired the said portion of land thereby extinguishing the registered owner’s title to that parcel and that the said parcel should be hatched off and registered in their names?

[48] It is crucial to this case for a decision to be made as to whether or not there is evidence that the Lees and their predecessors in title have occupied the disputed parcel of land undisturbed to the exclusion of all others thereby superseding the title of the previous owner.

[49] Based on the law as understood by this court if there is evidence that the parcel of land was adversely possessed therein lies the end of the matter as by operation of law the

⁶ CCJ Civil Appeal No. DMCV2018/002 Dominica Court of Appeal No. 13 of 2012

registered owner's title would have been extinguished and they would have not been properly been able to sell same as he would have no longer owned the land. (**Re: George –v- Guye**⁷)

Removal of Caveat

[50] Where there is a caveat placed against the title to property there is a procedure laid down by the court as to how that caveat is to be removed. Was this procedure followed in the case at bar? From the evidence adduced in this trial and accepted as the truth by this court, the first caveat filed against the property by the Lees was improperly removed in the first place, fortunately it was reinstated and therefore any registration regarding that parcel of land subject to the dispute would have properly been prevented.

[51] It is to be noted and repeated that if there is a finding of fact that the Lees and their predecessors in title occupied the disputed parcel of land *nec vi, nec clam, nec precario*, then much emphasis does not have to be placed on the whole scenario with the caveat save than to say that there is a procedure that is set by law which must be observed at all times by the Registry of Titles and the Legal Practitioners.

[52] The Lees, if they have acquired possessory rights to the disputed parcel of land are entitled to apply for Title pursuant to section 33 of the **TBRA**. One would have to look at the evidence adduced on their behalf to decide whether or not they have established possession that they and their predecessors in title have occupied and used the parcel of land openly and exclusively without interference from any third party. They bear the evidentiary burden to prove their case on the balance of probabilities in this regard.

[53] If they have done so the registered title of the owners would have been extinguished by act of law under the **RPL Act**. There is evidence before this court that there was an offer by the Lees to purchase the parcel of land they occupy made to the

⁷ *ibid*

Administrators of the estate of Mr. Winston. This we saw was not accepted. This raises the question of having recognised the Owners of the parcel of land can the Lees occupy both positions that is, that they own the land adversely and at the same time offer to pay the registered owners for it? Doesn't this belie their supposed animus possessendi? Learned Counsel Mr Michael Bruney submitted the following authorities to say that their offer to purchase the parcel of land in dispute did not affect the possessory rights which they had already obtained:

- a. Re: J A Pye (Oxford) Ltd and Others v Graham and Another⁸ have established that an expression by a squatter to pay for the land which he occupies does not indicate an absence to possess. In the **Pye case** the squatter had offered to pay for the land and was always willing to lease the land; yet he succeeded in acquiring title.

In this case Lord Brown-Wilson cites with approval the case of **Ocean Estates Ltd v Pinder**⁹, ¹where Lord Diplock giving the advice of the Privy Council said¹ that "an admission by the squatter that if he had been asked by the paper owner to pay for his occupation of the disputed land or to take a lease he would have been prepared to do so" which any candid squatter hoping in due course to acquire a possessory title would be almost bound to make" did not indicate an absence of an intention to possess.

67. Lord Brown-Wilson remarks: -

"Once it is accepted that the necessary intent is an intent to possess not to own and an intention to exclude the paper owner only so far as is reasonably possible, there is no inconsistency between a squatter being willing to pay the paper owner if asked and his being in the meantime in possession. An admission of title by the squatter is not

⁸

⁹ [1969] 2 AC 19

inconsistent with the squatter being in possession in the meantime.¹

68. In the case of **Recreational Holdings 1 (Jamaica) Ltd v Lazarus** the Privy Council considered the following question:-

“A is the registered proprietor of land in Jamaica. Without A’s permission, B takes possession of the land and remains in open and undisturbed possession of it for more than 12 years. Thereafter A sells (or purports to sell) the land to C. C provides valuable consideration and has no notice of B’s possession of the land. Who owns the land ... B or C?”¹

69. The law lords then upheld a decision of the Court of Appeal of Jamaica which held that a bona fide purchaser for value of registered land acquired his title subject to such.

The Evidence

[54] The Lees evidence is that the only time there was ever any communication so to speak between them and the registered owners of the land was when the Winston Sisters came to their house to discuss the possible purchase of the parcel of land by them. The Lees evidence is that they have never seen the owners come onto the disputed piece in the 21 years they have been in occupation.

[55] Miss Winston who gave evidence on behalf of the Loerners stated that from time to time she and her sister came onto the land to pick fruit. Is this evidence of interference with any squatter’s rights which was accruing to the Lees. This court thinks not. This is what can be described as a “*nominal entry*” and would not amount to interference so as to disturb the squatters rights.

[56] Can it be said that the Lees acquired possessory title before the Loerners came on the scene. Based on the facts as accepted by this court the rights of the registered owner of the land which the 10,075 sq. feet being claimed by the Lees would have been extinguished in the year

[57] **Powell v McFarlane**¹⁰, Slade J when he stated:-

"The question 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. 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."

[58] The evidence offered in support of their claim to adverse possession by the Lees is that the disputed land formed an extension of the yard of the Lees' residence fenced off from the land of the Annette Loerner and in a location where access by strangers was almost impossible and that both the Lees and their predecessors in title used the parcel as their own by planting and reaping crops and making compost thereon.

[59] The Lees contend that Annette Loerner, the Personal Representatives of the deceased registered proprietor and the beneficiaries of the estate of the said deceased were all effectively excluded from the disputed property and even if the Court was to accept that the beneficiaries picked limes from the property at any time when the Lees occupied the property, such an act would not remotely constitute evidence of dispossession.

[60] Loerner purchased the land in 2011 as evidenced by a Memorandum of Transfer evidenced dated **20th July 2011**. Loerner bought 38,560 square feet of land contained in a title registered to the vendor now deceased in the Book W4 Folio 87 for a given

¹⁰ (1977) 38 P & CR 452

purchase price. There is no evidence adduced to this court to the contrary. The question arises however, whether or not the ownership of the entire parcel was extinguished by the adverse possession of the Lees and their predecessors in title entitling the Lees to possessory title of the parcel to which they claim?

[61] It is noted that based on the law as confirmed in the **George –v- Guye**¹¹ decision by which as I have stated I am bound if the Lees can produce evidence to this court on the balance of probabilities that they and their predecessors in title occupied the disputed parcel of land for 12 years prior to this sale the vendor's title to that portion of land would have been extinguished by operation of law and the Loerners would have in fact purchased the parcel of land they bought less the 10,075 Sq. Feet, which was adversely possessed by the Lees and their predecessors in title.

[62] It is this court's view that the entirety of this case falls to be decided on whether or not the disputed land has been adversely possessed. Based on the evidence adduced by both sides of this case, it is the finding of this court that the Lees at the very least went into possession of the parcel in dispute in 1997 when they purchased the land from the Ambos and I accept that they utilised the 10,075 sq. feet of land as a garden planting fruits and vegetables and that they employed gardeners to attend to same and enjoyed the produce reaped there from without the interference by the owners or anyone else.

[63] The Lees also contend that there are material irregularities in the **TBRA** documents presented to the court which throws a light of suspicion as to the authenticity of the documents presented by the Loerners, it is this court's view that this bears no relevance to the case at bar and I will therefore decline to comment or rule on that.

Conclusion

[64] Based on the facts as has been found by this court and applying the Law it is this court's view that the Lees would have acquired possessory title to the disputed parcel of land

¹¹ DOMHCV2007/0400

in the year 2009 having gone into possession of the plot in 1987. Their case is further strengthened by the fact that they are relying not only on their possession but the possession of their predecessors the Ambos whose possession they continued. Therefore in 2011 when the Loerners bought the 10,075 Square feet of land from the Winston Estate which included the land claimed and possessed by the Lees the title held by Mr Winston deceased would have been extinguished since the year 2009 and therefore it would have been impossible in law for the title to the 10,075 Square feet to be sold to the Loerners.

[65] Judgment is therefore entered in favour of the Lees as it is the decision of this court that they and their predecessors in title have together adversely possessed the 10,075 Square feet of land being a parcel within the 10,075 Square feet square feet of land comprising the land registered in the name of Vibert A. Winston in Book of Titles W4 folio 87 and the said parcel of land should be hatched off of the existing title and registered in the name of the Lees.

[66] Costs to the Costs of the Lees to be assessed if not agreed by the parties within 45 days herein.

M E Birnie Stephenson
High Court Judge

SEAL

By the Court

Registrar