

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

**SAINT VINCENT AND THE GRENADINES
SVGHCVAP2015/0021**

BETWEEN:

LAMOND BARKER

[1] MARY ALMANDA O'GARRO

[2] DONNA O'GARRO

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste

The Hon. Mr. Mario Michel

The Hon. Mde. Gertel Thom

Justice of Appeal

Justice of Appeal

Justice of Appeal

Appearances:

Mr. Roderick H. Jones for the Appellant

Ms. Paula David for the Respondents

2021: June 14;
October 18.

Civil appeal — Possessory title — Possessory Titles Act — Whether the learned judge erred in finding that the appellant was not entitled to a declaration of possessory title — Findings of Fact — Whether there was any evidential basis on which the learned judge could have ordered the appellant to account to the second respondent for tools, equipment, furniture and furnishings allegedly removed from a house on the disputed land by the appellant — Whether there was any evidential basis on which the judge could have ordered the appellant to return a television, gas bottles and a cement mixer to the second respondent

REASONS FOR DECISION

[1] **BAPTISTE JA:** These are the reasons for this Court's decision on 14th June 2021 dismissing the appellant's appeal against a declaration that he is not entitled to a declaration of possessory title to disputed land and an order that he returns a

television, cement mixer and gas bottles to the respondents; and for allowing his appeal in respect of an order to account.

Background

- [2] This appeal emanates from a challenge to certain aspects of an order made by Lanns J in a dispute concerning land and buildings thereon at Buccament in Saint Vincent and the Grenadines. The disputants are family members. The appellant filed an application under the **Possessory Titles Act, 2004**¹ for a declaration of possessory title; this was resisted by Mary O'Garro, the paper tile owner of the land. Mary claimed that her husband St. Clair O'Garro, deceased, was the predecessor in title and had purchased the land in 1971, as evidenced by a deed of conveyance. The respondents, Mary and her daughter, Donna O'Garro also filed a fixed date claim, seeking, among other things, recovery of possession of the disputed land; a declaration that Mary is the lawful owner of the land; and recovery of possession of a large number of chattel. The appellant filed a defence and counter-claimed for a declaratory title to the disputed land. Both matters were consolidated.
- [3] Lanns J made important findings of fact, which were plainly open to her on the evidence. The findings included that the appellant was never in exclusive possession of the disputed land; no question of animus possidendi arose from his acts of occupation between 1970 and 2009; the appellant never intended to claim the disputed land as his own until 2009; his occupation of the disputed land was permissive and there was no evidence that he exercised any act of ownership over the land prior to 1971, which justified a claim for possession for over 40 years. Lanns J also made adverse findings which severely impeached the credibility and reliability of the appellant and irreparably damaged his case.
- [4] On the principal issue before the court, Lanns J declared that the appellant is not entitled to a declaration of possessory title to the disputed land; and granted a declaration that Mary is entitled to its possession; she also dismissed the appellant's

¹ Cap 328, Revised Laws of Saint Vincent and the Grenadines.

counter-claim. The learned judge also made orders requiring the appellant to account to Donna for tools, equipment, furniture and furnishings missing from a house on the disputed land and requiring the appellant to return to Donna or her nominee, a television, gas bottles and cement mixer missing from the house or to pay their replacement value.

The Appeal

- [5] The appellant filed five grounds of appeal but only pursued grounds 1, 4 and 5. Ground 1 alleged that the learned judge erred in finding that the appellant was not entitled to a declaration of possessory title. Grounds 4 and 5 respectively challenged the orders relating to the account for the tools, equipment, furniture and furnishings; and the return of the television, gas bottles and cement mixer. This Court dismissed ground 1 of the grounds of appeal, thus affirming Lanns J's declaration that the appellant was not entitled to a declaration of possessory title. Ground 4 was allowed and ground 5 was dismissed. The appellant, not having pursued grounds 2 and 3, these grounds were also dismissed.

Ground 1- Possessory Title

- [6] Ground 1 is the most important ground and will be addressed first. Lanns J properly identified the issues relating thereto as: (i) whether St. Clair's title to the disputed land was extinguished and his right of recovery of possession thereto barred by the alleged adverse possession of the appellant; and (ii) whether the appellant's alleged use and occupation of the disputed land are tantamount to adverse possession, so as to confer on him a possessory title and bar Mary and Donna's right of recovery to the disputed land. For reasons clearly articulated, the learned judge found that the appellant was not entitled to a declaration of possessory title and granted a declaration that Mary is entitled to possession of the disputed land.
- [7] Lanns J noted that the appellant was the only person giving evidence on his behalf. His evidence was contained in an affidavit. He filed no witness statement for the purposes of the respondents' claim, relying solely on his affidavit, which was treated

as evidence in chief. The appellant stated that he had been in occupation of the land since about 1965. The land was owned by his father Leonard, who died in December 1989. Leonard lived in the same house with him. During Leonard's lifetime, he (the appellant) built a house on the land, where he also owned a shop and also built and operated a garage. The appellant also stated that he has not paid rent to anyone in respect of the occupation of the property – which he has treated as his own since 1970. Further, he rented part of the property to several tenants and collected the rent for his own use and benefit and has been in undisturbed possession of the property for over 40 years.

[8] Lanns J stated that when cross-examined as to whether he had rented the house on the disputed land, the appellant mesmerized the court when he said he had never rented any part of the disputed land to tenants, thus contradicting what he said before in his affidavit evidence. When pressed, he retracted and said he rented to one Fitzgerald for about two to three years at a monthly rent of \$300.00. Under cross-examination, he denied that his brother St. Clair, had sent money to him from time to time, thus contradicting his statement in his defence wherein he admitted that St. Clair sent money to him from time to time but denied that it was for construction of an apartment above the shop.

[9] The learned judge noted that the appellant also testified that he and St Clair had a very good relationship, yet, he did not know that St. Clair had bought the disputed land until his lawyer told him so. This lack of knowledge, the learned judge found, gave the lie to what the appellant stated in his application, unless he became aware of the acquisition after the application for possessory title and his defence had been filed. It also gave the lie to what he stated in his defence.

[10] Lanns J emphasized that in his application dated 10th September 2010, the appellant stated that there is no claim affecting the land save and except the claim made as of 18th August 2009 by Donna; that there are no other persons claiming to be owner of the land; that his predecessor in title Leonard, had been in exclusive

and undisturbed possession of the land for over twelve years; that the paper title owner of the disputed land was Leonard; that immediately before adverse possession began to run in his favour, the disputed land was registered in Leonard's name; and that he has not withheld any fact or information concerning the disputed land. Yet the appellant claimed that he has truly and honestly represented the truth about the disputed land.

[11] Lanns J found as a fact that the disputed land had never been registered in Leonard's name and Leonard had no deed or paper title to the land. The appellant's application for possessory title contained information that was demonstrably false and, on his application alone, he was not entitled to a declaration of possessory title.

[12] It was not lost upon Lanns J that in his statement of defence, the appellant made a bare denial that St. Clair purchased the disputed land from one Amelia R. Bowen, but did not go on to say the reasons for so denying. He provided no witness statement that amplified his pleading. His supporting affidavit does nothing to explain why he denies that St. Clair purchased the land from Bowen.

[13] Lanns J found that the appellant was served with a letter dated 13th August 2010 in which certain allegations were made against him and he was given notice to quit, failing which proceedings would be taken against him. He ignored the letter and continued in occupation and filed an application for possessory title on the basis of 40 years uninterrupted possession, preceding, it appears, the year 1971, when St. Clair purchased the disputed land, the 18th October 2008; (date of St. Clair's death) the 18th June 2010 when Donna obtained a grant of letters of administration, and importantly, the 30th December 1989 (the date of death of Leonard, in whose name he erroneously said the land was registered).

[14] The learned judge found that St. Clair's deed of conveyance for the disputed land, registered in the Deeds Registry as No. 1412 of 1971, being a registered document, is notice to the world that St. Clair is the true owner of the land, pursuant to section

5(3) of the **Registration of Documents Act**². Lanns J stated that the inescapable inference was that the appellant knew that St. Clair was the owner of the disputed land before the application for possessory title was filed.

[15] Lanns J also made the important finding that there was no evidence that the appellant exercised any act of ownership over the land prior to 1971, which justified a claim for possession for 40 years. Further, it was insufficient for the appellant to say that during his father's lifetime he built a dwelling house on the disputed land in stages "over the years". What period constituted over the years? His application and affidavit failed to go into any detail regarding the period of time he commenced building, and when he continued, and when he completed. The learned judge found that these purported acts of possession do not amount to acts of possession for periods which are clear and unequivocal.

[16] Lanns J referred to the appellant's evidence in cross-examination that he always lived on the land and his denial of a suggestion that he used to live at Penniston. The appellant said his wife owned property at Penniston but she and the children always lived on the disputed land. Lanns J noted that the appellant's wife took no active part in the proceedings and gave no witness statement to corroborate anything the appellant said. The learned judge found that there was no independent credible evidence to establish this most important fact. Lanns J stated that the appellant did not strike her as a credible witness and having heard and seen him, concluded that he had no regard for the sanctity of the oath he had taken.

[17] The evidence of Mary, Donna and their witnesses was also considered. Lanns J considered them to be witnesses of truth. She stated that they gave their evidence unhesitatingly and in a frank and straightforward manner; their credibility was not shaken in cross-examination and she found no fault with their veracity. Mary's evidence was that she was the owner of the disputed land by virtue of a deed of assent and that her husband St. Clair had previously owned the property by virtue of a deed. Leonard had occupied the property for many years before St. Clair

² Cap 89, Revised Laws of Saint Vincent and the Grenadines.

purchased it. He used to operate a shop from the disputed property. When Leonard became too old to run the shop, St. Clair gave the appellant and one Melvin, permission to continue to run the shop. Lanns J considered the evidence of Phyllis McDowald to be of crucial importance, because she, apart from the appellant, was the only witness who had lived on the disputed land and had the advantage of observing what activities took place there. Phyllis maintained that the appellant used to live at Penniston.

[18] Au contraire, Lanns J did not find the appellant to be a witness of truth; citing his lack of forthrightness with the court in his application, pleadings and testimony. She found that his evidence lacked truth, frankness and honesty. In cross-examination, he hedged, prevaricated and hesitated. The learned judge said she will be on safer ground if she were to accept the evidence of Mary, Donna and their witnesses whenever there is conflict with that of the appellant.

[19] Lanns J considered the meaning of adverse possession in section 2 of the **Possessory Titles Act**: 'factual possession of an exclusive nature of a piece or parcel of land... for a continuous period of twelve years or more accompanied by the requisite intention to possess the land as owner thereof'. Lanns J reasoned that in order for the appellant to acquire a possessory title to the disputed land under the **Possessory Titles Act**, the court has to be satisfied that he was in exclusive, uninterrupted / undisturbed possession for a period in excess of 12 years and had the requisite intention to dispossess Leonard or St. Clair.

[20] The learned judge properly considered whether the appellant had exclusive and undisturbed possession for a period of 12 years with the requisite intention to dispossess Leonard or St. Clair. Having considered the totality of the evidence and the exhibits, Lanns J held that the appellant had not established possessory title to the disputed land so as to extinguish St. Clair's documentary title to it. The requirement for exclusive possession was one of the appellant's greatest obstacles in his bid for possessory title to the disputed land. On the appellant's own admission,

Leonard owned the disputed land and lived on it until 1989 when he died. The appellant accepted that in 1990 St. Clair ordered a survey of the disputed land. He accepted that Phyllis lived on the disputed land up until 2008 and did not dispute that Melvin still lived on the land. These were findings open to Lanns J on the evidence.

[21] Lanns J did not accept the appellant's claim that Melvin is living on the land with his permission. Interestingly, the learned judge noted that the appellant made no such assertion in relation to Phyllis. Lanns J did not find on the evidence that the appellant was ever in exclusive possession of the disputed land. The mere fact that he operated a shop on the land, put up a structure at the back of the shop and a garage thereon, do not amount to acts of occupation tending to show an intention to exclude either his father, Leonard or his brother St. Clair, the true owner of the land.

[22] Lanns J found that no question of animus possidendi arose from the appellant's acts of occupation between 1970 and 2009 and he never intended to claim the disputed land as his own until 2009, when he unlawfully commissioned a survey of the disputed land or the latest, after Donna (as the administratrix of St. Clair's estate) caused a letter to be sent to him. No question of limitation arises. Accordingly, the appellant's contention that he is entitled to a declaration of possessory title by virtue of his adverse possession for over 40 years could not be sustained.

[23] Lanns J found the appellant's possession of the disputed land to be permissive. His occupation prior to St. Clair's death was permissive under a family arrangement and the love and affection St. Clair had for his family, especially the appellant. The appellant was the caretaker of the disputed land, as well as St. Clair's nuclear family home. St. Clair did not give the appellant permission to build on the land.

[24] It can be seen that Lanns J made very important factual findings which informed her reasons for finding that the appellant was not entitled to a declaration of possessory title to the disputed land; and for dismissing his counter-claim. Lanns J was also

clearly unimpressed with the appellant and found him to be lacking in credibility, and his evidence unreliable. On the other hand, she was quite impressed with the evidence of the respondents and their witnesses.

Credibility of Witnesses

[25] It may be useful to address the issue of demeanour as an indicium in the assessment of credibility, in light of the evolving law on the subject. The term ‘demeanour’ is used as a legal shorthand to refer to the appearance and behaviour of a witness in giving oral evidence as opposed to the content of the evidence.³

[26] Demeanour, relating as it does, to the appearance and behaviour of a witness while giving oral evidence, rather than to the content of the evidence, is in general, no longer regarded as a reliable indicium in assessing the credibility of a witness. As Legatt JA explained in **R (on the application of SS (Sri Lanka)) v The Secretary of State for the Home Department**⁴ at paragraph 36:

“... it has increasingly been recognized that it is unusually unreliable and often dangerous to draw a conclusion from a witness’s demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J in words which Lord Devlin later adopted in their entirety and Lord Bingham quoted with approval:

‘I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges to discern from a witness’s demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity?’”

³ Per Leggatt LJ in *R (on the application of SS (Sri Lanka)) v The Secretary of State for the Home Department* 2018 EWCA Civ 1391, paragraph 33.

⁴ [2018] EWCA Civ 1391.

[27] At paragraph 41 of **SS Sri Lanka**, Leggatt LJ underscored the impossibility and perhaps undesirability of ignoring altogether, the impression created by the demeanour of a witness giving evidence. He went on to say:

“But to attach any significant weight to such impressions in assessing credibility risks making judgments which at best have no rational basis and at worst reflect conscious or unconscious biases and prejudices. One of the most important qualities expected of a judge is that they will strive to avoid being influenced by personal biases and prejudices in their decision – making. That requires eschewing judgments based on the appearance of a witness or of the tone, manner or other aspects of their behavior in answering questions. Rather than attempting to assess whether the testimony is truthful from the manner in which it is given, the only objective and reliable approach is to focus on the content of the testimony and to consider whether it is consistent with other evidence (including evidence of what the witness has said on other occasions) and with known or probable facts.”

[28] Writing extra judicially in an article entitled **The Judge as Juror: The Judicial Determination of Factual Issues**,⁵ Bingham J considered the approach to deciding upon the reliability of a witness’ evidence. He stated that the main tests needed to determine whether a witness is lying or not include: (i) the consistency of the witness’ evidence with what is agreed, or clearly shown by other evidence to have occurred; (ii) the internal consistency or inconsistency of the witness’ evidence; and (iii) consistency with what the witness has said or deposed to on other occasions.

[29] The position then is, demeanour is no general indicium of honesty and in general, an unreliable guide to reliability and credibility. The focus should be on the content of the testimony, rather than the manner of giving the evidence. In assessing credibility, contemporaneous documents, admitted or incontrovertible facts, consistency, motive and overall probabilities are all key criteria and more important than demeanour. As Dunn LJ stated in **Armagas Ltd v Mundogas SA; The Ocean Frost**⁶ at page 822, it is frequently very difficult to tell whether a witness is telling the truth or not and where there is a conflict of evidence, reference to objective facts

⁵ Current Legal Problems, Volume 38, Issue 1, 1985, Pages 1-27.

⁶ [1985] 3 All ER 795.

and documents proved independently of their testimony, to the witness's motive and to the overall probabilities are of very great assistance to the judge in ascertaining the truth.

- [30] In assessing the appellant's credibility, Lanns J correctly took into account matters such as the absence of independent credible evidence tending to corroborate his evidence; his equivocation in cross-examination; internal inconsistency in his evidence; contradictory evidence; evidential shortcoming; and the appellant's demeanour. Lanns J identified what needed to be proved by the appellant. She stated the relevant law and the applicable legal principles governing the matter before her and came to the conclusion, as she was clearly entitled to, that the appellant was not entitled to a declaration of possessory title. There being no basis for appellate interference, ground 1 was dismissed.

Ground 4 – Account for Tools, Equipment Furniture and Furnishings

- [31] In ground 4, the appellant asserts that there was no basis on which the judge could have ordered a return of tools, equipment, furniture and furnishings which were allegedly removed by the appellant, as this was not substantiated by anything presented in the evidence. The order of Lanns J was for the appellant to account to Donna for the tools, equipment, furniture and furnishings missing from St Clair's house. The appellant's counsel submitted that the order to account should be set aside as the list of items said to be appropriated is quite tenuous. I agree. The learned judge could not say with precision what the items were. No evidence was led that all the items were in the house. Ground 4 was accordingly allowed.

Ground 5 – Return of Television, Gas Bottles and Cement Mixer

- [32] Ground 5 states that there was no basis on which the judge could have ordered the return of a television, gas bottles and a cement mixer when no evidence was produced to show that the appellant was entitled to claim the items. Lanns J found that by Lamond's own admission, he removed a television, two gas bottles and a cement mixer. She rejected his evidence that they were his. She believed that they

belonged to St. Clair. She accepted as a fact that the appellant agreed to meet Mary or Donna to return the missing items but absconded the jurisdiction. In light of the judge's findings, this ground of appeal was dismissed.

- [33] This Court accordingly affirmed the judge's declaration that the appellant is not entitled to a declaration of possessory title; the declaration that Mary is entitled to possession of the disputed land; and the order that the appellant shall return the television set, gas bottles and cement mixer.

Order

- [34] It is ordered that:

- (1) Grounds 1, 2, 3 and 5 of the grounds of appeal are dismissed.
- (2) Ground 4 of the grounds of appeal is allowed.
- (3) The appellant is to pay the respondents' costs of the appeal in the sum of \$3750.00, being 50% of the costs allowed in the court below.

I concur
Mario Michel
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar