

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2018/0096

BETWEEN:

JOSEPH STEWART
ANDY STEWART

CLAIMANTS

AND

VICTOR HYPOLITE

DEFENDANT

Appearances:

Mr. Richard Williams and Ms. Danielle France for the Claimant
Mr. Roderick Jones for the Defendant

2020: 21st January
22nd January
28th January
10th March

JUDGMENT

Byer, J.:

- [1] This was a case that took this court on a historical trip of one of the most Southern Grenadine islands, Union. However, this trip was not of turquoise seas and fun events but rather it was a tale of two parties who insisted on their piece of the island.
- [2] By Fixed Date Claim Form filed on the 4th July 2018 the claimants sought the following relief:
- a. Damages for trespass.
 - b. An Order that the claimants are entitled to vacant possession of the said land.
 - c. An Order that the Defendants do forthwith vacate the said land.

- d. Or alternatively, an order that the Defendant pay the claimants the market value of the said portion of land.
- e. Costs.
- f. Such further or other reliefs as the court sees fit.

[3] In response the defendant in addition to the responses to the particulars of the claim of the claimant also filed his own claim by way of Counterclaim in the Defence and Counterclaim filed on the 11th October 2018 and claimed the following:

- i. A revocation of the grant of Letters of Administration to Charles Garfield Stewart granted out of the Probate Division of the High Court of Justice in St. Vincent and the Grenadines on the 20th February 2012, bearing Registration number 1/2012;
- ii. A cancellation of Deed of Assent bearing Registration Number 660/2012;
- iii. A declaration that the Defendant is the bonafide purchaser for value of the parcel of land situate in Richmond, Union Island described in an Indenture of Conveyance registered at the Registry on the 12th day of May 1966 and bearing registration number 859/1966;
- iv. In the alternative, a declaration that the Defendant has dispossessed the paper title owner of the contentious parcel of land by virtue of in excess of 12 years occupation and possession through his parents and in his own right.
- v. Costs.

[4] It was therefore on the basis of these competing claims that the matter proceeded to trial before this court in January 2020.

[5] Upon the court assessing the competing claims the following issues emerged as the matters to which the court was required to address its mind.

[6] The issues are therefore as follows:

- (i) Whether the claimants are entitled to maintain an action for trespass:
 - a) Were the Crown Grants 121,122 and 123 of 1930 made to John Stewart Snr or John Stewart Jnr.?
 - b) Can the deed of assent of 2012 to the claimants stand or it is void and of no effect?

- c) Does the defendant have *locus standi* to challenge the Grant of Letters of Administration to Charles Garfield Stewart #1/2012 and the deed of assent that flowed therefrom?
- (ii) If the claimants are able to maintain an action for trespass, is the defendant a bona fide purchaser for value without notice of his parcel of land or has he established that he has dispossessed the claimants by adverse possession?
- (iii) Are the claimants entitled to their reliefs as prayed?

Issue #1-Whether the claimants are entitled to maintain an action for trespass:

- a) **Were the Crown Grants 121, 122 and 123 of 1930 made to John Stewart Snr or John Stewart Jnr.?**
- b) **Can the deed of assent of 2012 to the claimants stand or it is void and of no effect?**
- c) **Does the defendant have locus standi to challenge the Grant of Letters of Administration to Charles Garfield Stewart #1/2012 and the deed of assent that flowed therefrom**

- [7] The claimant's contention on this issue was that by three Crown Grants namely 121, 122 and 123 of 1930, John Stewart Snr the great grandfather of the claimants became seised of the land at Richmond, Union Island. It is this land that was conveyed by Deed of Assent dated the 2nd March 2012 (the Deed of Assent) to the claimants as joint tenants.
- [8] At trial the claimant's approach appeared to be two pronged on this issue. Firstly, that it was indeed John Stewart Snr who owned the land as conveyed to the claimants as opposed to the contention of the defendant that it was John Stewart Jnr., his son. Secondly, that the land claimed by the defendant under his deed of 1966 dated 12th May 1966 (hereinafter referred to as the 1966 deed) was not the land that he in fact sought to occupy.
- [9] The submission of the claimant with regard to the first arm of the approach was centered around the name of the individual who appeared on the Crown Grant. The claimant's evidence was that although he was aware of his grandfather's brother John Stewart Jnr., he told the Court that John Stewart Jnr. lived in Trinidad and that he would have known if his great uncle had owned the land in contention. The claimant however did admit that all of the information about the land in contention was what he would have been told.
- [10] With respect to the second limb, the claimants submissions was simply that the defendant's 1966 deed which conveyed property to which he lay claim stated clearly that the property was in Ashton. The claimants submitted that the evidence was clear that Ashton was a different locality to Richmond on the island of Union, where the claimants had their land. The defendant had therefore wrongly entered into occupation of the claimant's land and as such he was a trespasser.

- [11] With regard to the other sub issues the claimants submissions were succinctly that the defendant is not entitled to the revocation as sought in that he is not a beneficiary of the estate of Charles Stewart nor is he capable of being a person to whom a grant of administration could in fact be made. Indeed the claimants contended that if the defendant had purported to bring a claim pursuant to the contentious probate rules he would have been unsuccessful and therefore by extension he cannot be allowed to succeed on this claim as it is formulated as he has no interest which could be recognized in law. The claimants submitted that the defendant has no interest in law in the estate and therefore has no locus standi to seek the prayers as sought.
- [12] The defendant on the other hand, sought to rely on the vagueness of the Crown Grants utilizing a name that was used by two individuals who would have been adults at the time of the grants having been made.
- [13] It is the defendant's case, that the land was in fact owned by John Stewart Jnr. who sold it to his brother in law Cornelius Scrub who then in turn sold it to the defendant's parents.
- [14] The defendant seeks to rely on the fact that when the heir at law to the estate of John Stewart Snr applied for the Grant of Letters of Administration in 1971, (the First Grant) the only land that was included in the estate was land at Campbell Union Island. The defendant submits that this is sufficient evidence to show that the land at Richmond did not form part of the estate or it would have been included by the Administrator at that time.
- [15] Rather, the defendant submitted it was the son, John Stewart Jnr. who owned the parcel at Richmond who then sold it without a deed or evidence in writing to Cornelius Scrub who in turn without a deed sold to the parents of the defendant.
- [16] That being said, the Deed of Assent that grounds the claimant's title is void and of no effect as the grant obtained to the estate of John Stewart Snr could not have administered land that did not belong to him and in any event that grant obtained in 2012 (the Second Grant) did not state that it was *de bonis non* and thus was in any event void and of no effect.
- [17] Finally the defendant submitted that he was entitled to seek the revocation of the Second Grant and by extension the Deed of Assent that flowed from that grant.
- [18] The defendant's contention was that he had a legitimate interest in the subject property. He based this contention on his purchase of the property in 1966 and the additional contention that his mother had had factual occupation and possession of the said parcel of land before her death. The defendant submitted that these actions dispossessed whoever could be considered the legal owner of the land and as such by virtue of her own possession she was in turn entitled to sell it to him. These facts he submitted gave him the requisite sufficient interest to maintain his claim.

Court's Analysis and Considerations

- [19] When the court considers the issues and sub-issues raised, it was clear to the court that there was an additional consideration relied on by the claimants. This was the issue as raised by the claimants extensively at trial and in submissions that the defendant was occupying the wrong parcel in the wrong locality based on the description in his deed. Having been so raised, this court was satisfied that it was one that had to be treated with. In doing so, it was clear from the outset that this issue had never been raised on the pleadings as filed by the claimant.
- [20] The claimant instituted this action by way of fixed date claim form on the 4th July 2018. In the statement of claim that accompanied that claim form, the claimant's main contention was that the claimants were the owners of a lot of land at Richmond, Union Island since 2012, that the defendant had entered the land wrongfully and built thereon in 2010 and despite demand, the defendant has refused to vacate the parcel of land.
- [21] The defendant in response filed their defence and counterclaim on the 11th October 2018 and therein averred among other things that the land which the defendant occupies was conveyed to him since 1966 by his mother and that in any event, this parcel of land did not form part of the estate of the claimant's grandfather and as such they were not entitled to the said land. Further the defendant averred, that even if the claimants were so entitled, which they deny, that any title would have been extinguished as he had been in occupation of the same and had acquired title by way of adverse possession.
- [22] The claimants responded by filing a Reply and Defence to Counterclaim to this document on the 4th December 2018. In the defence to the counterclaim, the claimants pleaded inter alia that the defendant had no proper title to that land and denied that the great uncle of the claimants was the owner of the land and pleaded that in any event the defendant had no locus standi to challenge the validity of the grant of letters of administration that had grounded the Deed of Assent through which the claimants had title.
- [23] Thus, despite having two occasions on which these issues could have been raised, it was clear to this court that the claimants had not either expressly or inferentially pleaded that the defendant had in fact been mistaken as to the locality of the parcel to which he is purportedly entitled under his 1966 deed.
- [24] The first time that this was canvassed after the pleadings were closed was in the witness statement of the claimant Joseph Stewart filed on the 24th April 2019. At paragraph 9 and he had this to say; *"The Defendant then produced a Deed claiming that the parcel of land belonged to him by virtue of Deed No.859 of 1966, however, it is clear from the face of the deed that this is not for the land situated at Richmond, Union Island; this conveyance was clearly for land situated at Ashton, Union*

Island. Ashton and Richmond are on different side of the island. Richmond is located on the northern portion of Union Island, where Richmond Bay is located, and Ashton is the second largest town located on the very south of the island and is bounded by the Ashton Harbour."

- [25] At trial, counsel for the claimant made heavy weather of this through cross examination of the witnesses for the defendant and relied substantially on the same in their submissions as filed.
- [26] It is settled law that a party is bound by the pleadings they file in a case. In the court of appeal decision of **George W Bennett Bryson's & Co Ltd v George Purcell**¹ the court per Blenman JA had this to say about the purpose of pleading²: *"It is a rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served*³.
- [27] The court⁴ went on to state that: *"In short then, the function of pleadings is to "give fair notice of the case which has to be met*⁵*" and "to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties*⁶*". It is the duty of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings."*
- [28] Further in the case of **Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste**⁷ George-Creque JA (as she then was) in speaking to the requirement of pleading allegations of fraud or illegality cited with approval the dictum of Lord Woolf in **McPhilemy v Times Newspapers Ltd**⁸ in which he had this to say: *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statement, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the **parameters of the case** that is being advanced by each party. In particular they are **still critical to identify the issues** and the **extent of the dispute between parties**. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."* (My emphasis added).

¹ ANUHCAP2011/0023

² Op cit at paragraph 30

³ See: Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington [1895] 2 QB 114, 152.

⁴ Op cit at paragraph 33

⁵ Esso Petroleum Co. Ltd v. Southport Corporation [1955] 3 All ER 864

⁶ Halsbury's Laws of England 4th Edition Vol. 36: Pleading, para. 5: 'Function of Pleadings'

⁷ HCVAP2009/008

⁸ [1993]3 All ER 775 at 792-793

- [29] Additionally, the Learned Justice of Appeal⁹ reminded court users that a party would not have sight of an opposing parties' witness statement until he/she has no doubt prepared and filed their own. Even though the Learned Justice of Appeal was speaking of the pleading of fraud and illegality I adopt her words when she stated later on in that judgment¹⁰ that *"it would be grossly unfair and embarrassing to a party to learn of the factual basis on which a mere allegation [of differences in locality arose] is made on a pleading only at the time when a witness statement is exchanged."*
- [30] In the case at bar, the claimant has to date made no application to amend two existing statements of case as filed. Instead they sought to lead evidence and submit on a matter which was not pleaded. In fact, the first time that the defendant would have been aware of the same was at the filing of the witness statement. In my mind, it is not open to a litigant to raise matters in a witness statement that are either not specifically referred to in the pleadings or which are not even foreshadowed. As I stated elsewhere to do so would be to allow litigation to descend into chaos.
- [31] I am therefore constrained to *"accept and act upon the terms of reference which the parties have chosen and specified in their pleadings."*¹¹
- [32] That being said, this court will be bound by the case as pleaded. I therefore make no finding on this point as advanced by the claimant and I now address my mind to the specific issues at hand.
- [33] With respect to the issue of the ownership of the claimants, the court accepts that in 1971 the estate of John Stewart Snr was administered by his heir at law and son, Garnet Stewart (the First Grant). It is also accepted that on this application the only parcel of land that was declared to be owned by the said John Stewart Snr was at Campbells on the island of Union¹². No document was exhibited as to what became of this land at Campbell, but rather the Second Grant was granted to Charles Garfield Stewart (Charles Garfield) the father of the claimants. In this Second Grant, there is no indication that this was the continuation of the administration of the First Grant in that there was indeed a failure to include the words *"de bonis non"* but it is this Second Grant that vested the authority in the Administrator Charles Garfield to convey the property at Richmond in the Deed of Assent.
- [34] In the submissions of the defendant, the failure of this second grant to specifically make reference to the same being a grant *de bonis non*, rendered the same void, however they were unable to provide the court with any authority to substantiate this claim. Rather what this court considers is that, the fact that a grant is labeled *de bonis non* is really first and foremost for the purpose of notifying the world at large as to the nature of the grant. That the particular grant is carrying out tasks that were incomplete under the previous grant. I am fortified in this view when one considers

⁹ Op cit at paragraph 20

¹⁰ Op cit at paragraph 20

¹¹ **"The Present Importance of Pleadings"** Sir Jack Jacob in Current Legal Problems (1960) Vol 13 Issue (1) 171

¹² TB page 104

the purpose of a grant of that nature. The learned authors of Tristram and Coote's Probate Practice identified when grants of this nature are required. They state that *"if a person or last surviving person to whom a grant of representation has been made has died leaving part of the estate of the deceased un-administered, then unless there is an executor who has power reserved or a chain of executorship a grant in respect of the un-administered estate may be made to a new personal representative to enable the administration to be completed. Such grants of un-administered estate are commonly referred to as de bonis non administrates (literally: of the goods not administered)..."*

- [35] Additionally, I would have perhaps been more willing to agree with the submission of counsel for the defendant in this regard, if the Second Grant had purported to deal with property that had previously been dealt with under the First Grant, however it did not. This was a parcel of land that was in the name of the said John Stewart and for all intents and purposes formed part of his estate upon his death, but which had not yet been dealt with by the duly appointed administrator.
- [36] In fact, during the cross examination of the first claimant, counsel for the defendant asked him why the land the subject matter of this action had not been included in the administration of the estate of John Stewart Snr under the First Grant. It was at this juncture that the claimant agreed that indeed it was open to his great uncle Garnet to know about the land at the time he took out the First Grant but justified its failure to be included in the First Grant by the indication that it was his grandfather who had been in charge of the parcel at Richmond and therefore there was no need to include the same. This court must note that of course the claimant would have had no idea as to the real reason that the said parcel was omitted from the First Grant as he admittedly would not have been involved in that making of that decision, however what I do accept is that regardless of the reason for the same not having been included, that the parcel of land at Richmond did in fact belong to John Stewart Snr and therefore to his estate upon his death.
- [37] When the court closely examined the documents that evidenced the Crown Grants which laid the bases for the entitlement of the claimants through the estate of John Stewart Snr, it was clear that these documents did not specify father or son. In fact, it was not in dispute that at the date of the grants having been made that both men would have been in their adult hood enabling John Stewart Jnr. to also be in a position to hold the fee simple to the land. However, there was one small issue that seemed to have been overlooked by the parties which this court considered. Indeed, on the face of the said grants, in the left lower corner there appeared to be a date for each grant citing the date of allotment. There did not appear to be any reliance placed on this by either side but like my brother Matthew J (of blessed memory) in the case of **Everard Gellizeau v Ulric Hutchinson**¹³ said I find that this date is of significance. Like the learned judge therein, I believe that this date must be the date that indicates when the transaction first begun.

¹³ High Court Civil Claim No. 446 of 2004 SVG at paragraph 16

- [38] Having said so it is therefore clear that on grant number 121/1930 the date of allotment is stated as 2nd April 1913¹⁴, on grant number 122/1930 the date of allotment is stated as 27th June 1919 and on grant number 123/1930 the allotment date is at 11th November 1919.
- [39] During trial it was the suggestion of counsel for the defendants that the birth date of John Stewart Jnr. was 1904. However, when the court performs the mathematical calculation from his date of death in 1974 and his age of 72, it is in fact 1902. Whether it was 1902 or two years later in 1904, the said John Stewart Jnr. would have in any event, been under the age of 18 at the time of the allotments.
- [40] That being said, I therefore accept on a balance of probabilities that the Crown grants conveyed the property at Richmond, Union Island to John Stewart Snr and that they fell to be part of his estate upon his death.
- [41] The Second Grant was therefore in this court's mind effected to complete the administration of this estate which was done and effected by the Deed of Assent to the claimants.
- [42] The answer to this issue in part is therefore that the Crown Grants were to the estate of John Stewart Snr and that the Second Grant and the Deed of Assent flowing therefrom vested the claimants with the land in Richmond in respect of which they can maintain an action of trespass.
- [43] Having so found I will now consider whether the defendant has locus standi to challenge this Second Grant and the Deed of Assent emanating therefrom.
- [44] In this regard the court examined the authority relied on by the defendant to support his proposition that the defendant was of the class who could seek an order to set aside the Second Grant and the Deed of Assent on the assumption that he had sufficient interest in the subject matter of the action.
- [45] The court is however not in agreement with this contention.
- [46] The case of **Viola Richardson and ors v Albert Hughes**¹⁵ did not in this court's mind support the interpretation given to it by counsel for the defendant. In that case it was clear that the claimant who was successful in her bid against the defendant as administrator of the estate of Alfred Richardson proved to the satisfaction of the court that she had "*the relevant familial connection between herself and [the deceased]*"¹⁶ to allow her claim to succeed.

¹⁴ TB page 29

¹⁵ AXAHCV0036/2007

¹⁶ Op cit paragraph 101

- [47] This court finds that the defendant has not established any interest much less a sufficient interest in the property to warrant this order being made in his favour. The defendant is not a beneficiary of the estate of John Stewart Jnr. in whom he says his root of title is based. He is not a beneficiary of Cornelius Scrubb who his mother is said to have bought the property from after he bought from John Stewart Jnr. There is no nexus between the defendant and the estate of John Stewart Sr. The only nebulous connection is that he holds a deed of conveyance in his name for one acre of land which apparently forms part of the estate of John Stewart Snr.
- [48] This is not enough in this court's mind to warrant an order being made in his favour. In this court's mind his interest could not be categorized as "vested or contingent, future or [even] remote"¹⁷. In this court's mind his interest is so far removed from the estate of John Stewart Snr that he is not entitled to the order as sought and I refuse to grant that relief.

Issue #2- If the claimants are able to maintain an action for trespass, is the defendant a bona fide purchaser for value without notice of his parcel of land or has he established that he has dispossessed the claimants by adverse possession?

- [49] The claimants' submissions on this issue were unequivocally that the defendant could not be considered a bona fide purchaser for value without notice nor could he avail himself of the shield of adverse possession.
- [50] The claimants submitted that the defendant could not prove a valid root of title to the land. Their submission was that there was no evidence to show that his predecessor in title, his mother, had in fact bought the land or that he had bought the land for valuable consideration himself. All the transactions relied and failed to be evidenced in writing which was in contravention of the Statute of Frauds. These transactions, they submitted, if they existed were therefore invalid and unenforceable.
- [51] The submission of the claimants was therefore that the defendant having failed to produce any evidence to this effect, he is not in a position to rely on the defence of being a bona fide purchaser for value.
- [52] With regard to the claim of adverse possession, the claimants relied on the case of **Arnold Celestine v Carlton Baptiste**¹⁸. In that case, our court of appeal made it clear that an individual who enters into possession "as of right" cannot shield himself from dispossession of his occupation by relying on the principles of adverse possession, as his entry was not accompanied by the

¹⁷ Halsbury Laws of England Vol 17 paragraph 1460

¹⁸ HCVAPGDA2008/011

necessary *animus possidendi* to do so. The claimants therefore submit that the defendant has also failed to satisfy the court on this limb and the same must fail.

- [53] The defendant on the other hand did not specifically address the court on the issue of his entitlement to the land as a bona fide purchaser. He instead relied on what he contended was the overwhelming evidence of his mother's possession of the land and thereafter his own occupation to entitle him to the land by way of adverse possession. It is the conjoint effect of the occupation of himself and his predecessor in title, his mother, that he submitted to the court was conclusive of his entitlement.

Court's Analysis and Considerations

- [54] The plea of a defendant seeking to rely on his position as a bona fide purchaser for value without notice is based in equity. Therefore, a defendant who can show that he is a purchaser of the legal title for value and that he had no notice of any equitable interest on the part of the claimant can rely on this defence¹⁹.
- [55] The plea provides "an absolute, unqualified, unanswerable defence"²⁰ and the onus is on the person putting forward the plea²¹ to prove it.
- [56] It was therefore notable to the court, that in the submissions of the defendant, he did not address the court on the same. It is therefore not clear whether he has now abandoned this defence as pleaded. However the mere fact that it was relied on in the defence and counterclaim as filed, this court will still address the same there being no formal indication of withdrawal of the same.
- [57] When one considers the evidence that was offered at trial, the only evidence the court has before it in this regard is the statement in cross examination of the defendant that he bought the property from his mother in 1966 evidenced by the 1966 deed²².
- [58] However when the 1966 deed is examined, it is clear that the defendant's mother's root of title is by virtue of being "...seized (*sic*) in fee simple absolute in possession...." In this court's mind, this recital would have immediately put the defendant on notice that his mother's title required investigation. It is this notice that would have defeated the defence of bona fide purchaser. The learned authors of Megarry and Wade in The Law of Real Property²³ have identified three kinds of

¹⁹ Halsbury's Laws of England Vol 88 (2019) 12 at paragraph 571

²⁰ **Pilcher v Rawlins** [1872] 7 Ch. App 259 at 269 per James LJ

²¹ **Re: Nisbitt and Potts Contract** [1906] 1Ch. 386 at 404,409 ,410

²² Page 92 TB filed 6/1/2020

²³ 9th Edition – Stuart Bridge, Elizabeth Cooke and Martin Dixon

notice that can be applied to a purchaser. These are: i) actual notice, ii) constructive notice and iii) imputed notice.

[59] When one considers these distinctive characteristics of the nature of the categories so stated, it is clear to this court that the wording of the 1966 deed would have given the defendant constructive notice. Indeed, equity has imposed an obligation on purchasers to inquire about equitable interests the same way they should all legal interests. Therefore, a purchaser's ordinary duty (whoever he purchases from) is to inspect the land and to investigate the title of the vendor. In the case at bar the defendant clearly fell below this obligation when he clearly admitted under cross examination that he never questioned that the land belonged to his mother²⁴.

[60] *"A purchaser has constructive notice of all rights which would have been discovered had he or she investigated the vendor's title to the land for the period allowed by law...investigation of title means the examination of documents relating to transactions in the land during the period immediately prior to the purchase"*²⁵. In this court's mind, as soon as the root of title was stated to have been based on possession it was incumbent on the defendant to investigate. The defendant having failed to do so, can not avail himself of this defence and the same therefore fails.

[61] The separate issue and upon which the defendant's case is primarily based was whether he was entitled to rely on the principles of adverse possession to remain in occupation of the parcel of land at Richmond, having extinguished the claimants' right to the same.

[62] It is now settled law, that in order to rely on adverse possession, the proponent of the same must be able to show both the factual occupation and the intention to possess the land as their own²⁶.

[63] Indeed it is recognized that the defendant must satisfy several requirements. In the case of **George Donald Barclay and ors v Hilda Clement nee La Pierre**²⁷ Price-Findlay J had this to say about the same:

"99.Firstly, possession has to be without the permission of the person with the proper title to the land. One must enter the land without permission from the beginning, or having entered with permission, it must have expired.

100. Secondly, one has to show that one has sufficient exclusive occupation to constitute possession continuously for the prescribed period.

²⁴ At trial under cross examination

²⁵ Megarry and Wade at para 5-021

²⁶ **Jeffrey Adolphus Carty v Raphael Edwards** AXAHCV2003/0045

²⁷ GDAHCV2003/0177

101. Thirdly, such possession must be adverse to the possession of the holder of the paper title. The person claiming must exercise control of the land with the intention to exclude the owner of the land on his behalf and for his benefit. He must intend to possess the land.

102. Fourthly, the possession must be nec vi nec clam nec precario, that is, without force, openly and without permission.

103. For a party to succeed in a defence of adverse possession, all the requisite elements must exist. Should any element be missing, the defence fails and adverse possession is not made out.” (My emphasis added).

- [64] In adopting these words of the learned judge, and to determine whether the defendant has satisfied these requirements it is necessary to look at the evidence that was led on his behalf.
- [65] The evidence of the defendant was that as young as three years old he could recall his mother occupying the land in Richmond. His evidence was that his parents had acquired the one acre of land from John Stewart Jnr. and that his mother cultivated and worked this land until around 1959 or 1960 when she stopped due to ill health and interference from animals.
- [66] The defendant brought two witnesses: Amelia McKie-Regis and Headley Abraham Noel.
- [67] In the evidence of Mrs. McKie-Regis it was clear that she had one story and she intended to ‘stick to it’. All she knew was that “Ms. Vic” or Victoria Hypolite, the mother of the defendant, worked the land but knew little else as to how she got on the land or who were her neighbours as she worked the land. She knew very little of how often “Ms. Vic” worked the lands and could not speak of any period after she left Union Island in 1967.
- [68] In this court’s mind her evidence was of little assistance to the case of the defendant save and except to endorse the defendant’s case almost verbatim.
- [69] Mr. Noel on the other hand told this court that he knew that the land was owned by Benjamin and Victoria Hypolite. He told the court the boundaries of the land of “Ms. Vic” that he knew who farmed the land in boundary to “Ms. Vic” and even though he also left the area in 1960 he knew that “Ms. Vic” has stopped farming those lands at some point.
- [70] When the court sums up the evidence in its entirety, indeed it accepts that there was factual possession of the lands in favour of the mother of the defendant and that in fact he would be entitled to tack on his period of factual possession to that of his mother.

[71] However the court is soundly convinced that both the defendant and his mother lacked the requisite intention to dispossess any previous owner of the land. That is, that they both lacked the requisite *animus possidendi*.

[72] The evidence of the defendant in his second witness statement of the 29th October 2019 is as follows:

"5. During his lifetime, John Stewart (Jr.) acquired a portion of land N3 which comprised the contentious parcel of land admeasuring 3 acres, 2 roads and 2 poles.

6. John Stewart (Jr.) was the son of John Stewart (Sr) who was deceased 8th day of October 1945 intestate. That at the time of his death John Stewart was the owner of lands described at S54-S56.

7. My parents acquired one (1) acre of land from John Stewart (Jr) from the three (3) acres of land, N3.

8. I purchased the said parcel of land from my mother in 1966 as is further described in the Indenture of Conveyance bearing the registration number 859 of 1966 already exhibited and marked "VH2".

[73] It is therefore clear that at the time that the defendant's mother went into possession of the land at Richmond she did so on the basis that she had bought the same and was entering as legal owner of the same. That is, that she entered it 'as in her own right'. Who then was she "*driving out of possession*"²⁸ upon her occupation? The answer to that is no one. It was her land and she was in occupation of "her" land.

[74] Even the witness for the defendant Mr. Noel supported this contention. The pleadings of the defendant further support this contention when it is clear at paragraphs 2 and 3 of the defence he pleads the following:

"2. The contentious parcel of land was part of a larger parcel of land N3 which was owned by John Stewart Jr. the son of John Stewart Sr. This parcel of land was never owned by John Stewart Sr. As alleged or at all. John Stewart Jr. sold N3 to his brother-in-law, Cornelius Scrubb, without an Indenture of Conveyance made out in Cornelius Scrubb's name as was the practice in Union Island in the early days since there were no Solicitors resident on the island.

3. Cornelius Scrubb eventually sold One (1) acre of land from N3 to the parents of the Defendant, Benjamin Hypolite and Victoria Hypolite in 1944. This too was a transfer without title. The Defendant's parents went into possession of the land in 1944 and kept it under cultivation of corn, cotton, peas and other short term crops from the time the land was bought."

²⁸ **Gordon Charles v Clarie Holas** Civ Suit No.151 of 1996 GDA H. Ct. (unreported) per Alleyne J

- [75] The being said, the entry of the defendant's mother, his predecessor in title was therefore never adverse to anyone. At all times, she had an intention to own not occupy.
- [76] Therefore the defendant would be unable to utilize the principle of tacking by adding his purported occupation to that of his mother to create his requisite occupation. However, the defendant's claim was not only based on the occupation of his mother but also occupation in his own right since 1966.
- [77] In this regard this court accepts that the defendant entered into possession of the land at Richmond as legal owner of the land by virtue of the 1966 deed. Having done so, the defendant seeks to rely on 54 years of occupation to establish his claim.
- [78] However the court of appeal has made it clear in the case of **Arnold Celestine**²⁹ that *"to claim to be in possession of land "as of right" whilst at the same time claiming to be in adverse possession of it, is simply incomprehensible given the connotation of each. If an owner is in possession "as of right" (i.e. with the paper title) then the question of that owner being in adverse possession to his own paper title, simply cannot arise as a matter of law. It goes without saying that the obverse position is this: Adverse possession can only arise where it is recognized by the "adverse possessor" that the paper title is vested in someone else. In essence, the adverse possessor seeks to say that he dispossessed the paper owner."* (My emphasis added)
- [79] Without saying more, it is clear to this court that this position of the defendant must therefore also fail.
- [80] I therefore find that the defendant is neither a bona fide purchaser for value without notice nor entitled to the said land based on adverse possession.

Issue #3- Are the claimants entitled to their reliefs as prayed.

- [81] Based on the findings of this court, the claimants are entitled to their reliefs as prayed.
- [82] The defendant is a trespasser on the land of the claimants. By this action alone the claimants would be entitled to damages for such trespass. However, the claimants pleaded in the alternative that the defendant be made to pay the market value for the portion of land that he occupies.

²⁹ Op cit at paragraph 12 per George -Creque JA (as she then was)

[83] This court is of the opinion that given all the circumstances of this case, and the manner in which the defendant came into occupation of the same, I determine that the defendant should be at liberty to purchase the portion of land he occupies, from the claimants.

[84] Therefore the court orders that the claimants are to have a survey undertaken, which cost is to be borne by the defendant, to demarcate the area occupied by the defendant. The claimants are therefore to sell the same to him at the market value as at the filing of this claim in 2018.

Order of the court is therefore as follows:

On the Statement of Claim:

1. The prayer for damages for trespass is denied.
2. The prayer for vacant possession is denied.
3. The prayer for the vacation by the defendant is denied.
4. The defendant is to pay the claimants the market value of the said portion of land he occupies as demarcated by survey to be commissioned by the claimants and paid for by the defendant.
5. Prescribed costs to the claimant on the claim on an unvalued claim in the sum of \$7,500.00.

On the Counterclaim:

1. The entirety of the counterclaim is dismissed.
2. No order as to costs on the dismissal of the counterclaim the claimant having been successful on their claim and obtaining costs thereon.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar