

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

SVGHCV2014/0099

BETWEEN:

GRETEL JOHN

formerly of Kingstown now residing at
Montreal, Canada

CLAIMANT

AND

SHELLY MCINTOSH

AKA SHELLY GARRAWAY

formerly of New Montrose now residing
At Brooklyn, New York

DEFENDANT

Appearances:

Mr. Julian Jack for the Claimant

Ms. Anique Cummings with Mr. Jadric Cummings for the Defendant

2019: June 18
 July 11
 September 17

JUDGMENT

Byer, J.:

- [1] The case at bar concerns a disputed parcel of land being Lot No. 21 as described in the Schedule referred to in a Deed of Conveyance made on 15 March 1977 between a Conrad Lewis DeFreitas and Barclays Bank International Limited of one part and George Vincent Raymond John of the other under registration number: 699 of 1977 and as conveyed to the claimant by deed number 88 of 2013 and also Lot 21 A described in the Schedules to Deeds of conveyance bearing the registration numbers: 2612 of 2003 and 2618 of 2003 made between a Milton Kendall Ollivierre of

one part and the defendant Shelly McIntosh of the other; and the said Shelly McIntosh of the one part and the National Commercial Bank (SVG) Ltd now called Bank of Saint Vincent and the Grenadines of the other part, respectively. The allegation of the parties is that the references in the various schedules relate to one and the same parcel of land situate at Sion Hill in the Parish of Saint George in the State of Saint Vincent and the Grenadines (hereinafter referred to as “the disputed land”).

- [2] Both the claimant and the defendant claim the land in dispute as their own by virtue of Deeds of Conveyance bearing registration numbers: 88 of 2013 and 2612 of 2003, respectively.
- [3] The claimant asserts that her father and predecessor in title to the disputed land purchased Lot 21 from a Conrad Lewis DeFreitas as Vendor with the consent and agreement of Barclays Bank International Limited (referred to herein as “the Bank”) by virtue of an Indenture bearing registration number: 688 of 1977. The said George John, during his lifetime mortgaged the disputed land with two banking institutions first, the Bank by a Memorandum of Deposit of Deeds bearing registration number: 690 of 1977 and second, Caribbean Banking Corporation Limited now called RBTT Bank Caribbean Limited by virtue of Indenture No: 1969 of 1995.
- [4] Lot 21 was re-conveyed to the said George John from Caribbean Banking Corporation Limited under Indenture No: 2703 of 1999.
- [5] George Vincent Raymond John died on 17 April 2017 but before his death gifted the disputed land to the claimant, his daughter, by a Deed of Gift which bears registration number: 88 of 2013.
- [6] The defendant on the contrary claims to have purchased the land in dispute together with an adjacent parcel Lot 22A from a Milton Kendall Ollivierre by virtue of a Deed of Conveyance dated 11 August 2003 and recorded in the Registry as Deed Number: 2612 of 2003. The said Milton Kendal Ollivierre is purported to have purchased the disputed land from Conrad Lewis DeFreitas now deceased and the Bank by virtue of Deed of Conveyance bearing registration number: 1771 of 1977.
- [7] The defendant is purported to have mortgaged the two parcels of lands being Lots 21A (the disputed land) and 22A in favour of National Commercial Bank (SVG) Limited now called Bank of Saint Vincent and the Grenadines Limited by virtue of an Indenture dated 11 August 2003, which bears registration number: 2618 of 2003.
- [8] On 18 May 2016, the claimant having discovered the anomaly with her land and the claim of the defendant to the same as owner filed a Fixed Date Claim Form as amended thereby seeking the following reliefs:
 - a. The cancellation of Deed Number: 2612 of 2003 dated 11 August 2003 and for an injunction to restrain the defendant, Shelly McIntosh also known as Shelly Garraway, from occupying and

building upon the said parcel of land whether by herself, her servants and, or agents, from further encumbering same and from exercising any acts of ownership in respect of same.

b. A declaration that Mortgage Indenture Number 2618 of 2003 is null, void and of no effect.

c. Cancellation of Indenture of Mortgage dated 11 August 2003 and recorded at the Registry of Saint Vincent and the Grenadines as deed bearing registration number: 2618 of 2003.

d. A declaration that the claimant is the lawful fee simple owner of the parcel of land situate at Sion Hill in the Parish of Saint George in the State of Saint Vincent and the Grenadines and referred to in deed bearing registration number: 88 of 2013.

[9] The defendant in reply filed a defence to the Amended Fixed Date Claim Form and Statement of Claim on 17 June 2016 contending that:-

a. she was in fact the owner of the land in dispute; and that she has a proper, valid and subsisting title to the land;

b. The claimant has no claim, title, interest in the land, whatsoever, by virtue of limitation and adverse possession as set out at Sections 17(1) and 19 of the Limitation Act CAP 129 of the Revised Laws of Saint Vincent and the Grenadines Edition 2009 and Section 8(1) of Part 1 of the Schedule of the Limitation Act;

c. By aggregation that she has been in exclusive, continuous and uninterrupted possession of the land in dispute since 1 September 1977 when her predecessor Milton Kendall Ollivierre came into possession of the land.

[10] When one therefore looks at the issues that were raised on this case at bar, in this court's mind they are quite simple.

[11] I therefore agree with the same as formulated by the claimant in their skeleton submissions to this court filed on 11 July 2019 as the following:

i. Whether the claimant or the defendant is in fact and at law the owner of Lot 21 as described in the Deed of Gift bearing registration number: 88 of 2013 or as referred to as Lot 21A in the Schedule to Indenture bearing registration number: 2612 of 2003.

ii. Whether the provision of Sections 17 (1), 19 and 8 (1) of Part 1 of the Schedule of the Limitation Act CAP 129 apply to the case at bar.

Issue #1: Whether the claimant or the defendant is in fact and at law the owner of Lot 21 as described in the Deed of Gift bearing registration number: 88 of 2013 or as referred to as Lot 21A in the Schedule to Indenture bearing registration number: 2612 of 2003.

The Claimant's Submissions

- [12] On this issue the submissions of the claimant are quite simple. Under the provisions of the Registration of Documents Act CAP 132 of the Laws of St Vincent and the Grenadines (hereinafter referred to as the Registration Act) it is clear that not only must every document that relates to land be registered but additionally that such registration results in the establishment of priority of that document over any later documents that may be registered. That is the first in time must prevail.
- [13] Therefore in the instant case, the claimant submitted, where both parties claim that their root of title emanated from the same vendor (Conrad DeFreitas) it therefore meant that the only differentiation would be as to the time of acquisition and therefore the application of the provisions of the Registration Act.
- [14] Thus the claimant submits, that her father having been the first to complete his title for Lot 21, (on the 15th day of March 1977) some six months before the conveyance to the defendant's predecessor in title (on the 1st day of September 1977) the later deed could not take effect and as such in law the claimant must be the only true owner who should and could be recognized.

The Defendant's Submissions

- [15] On the contrary counsel for the defendant presented to this court a rather interesting argument, seeming to ignore the defendant's root of title upon which she now seeks to rely.
- [16] In answer to the contention of the claimant on this issue, the defendant's submission was that because the deed of the defendant's predecessor in title had not been specifically challenged by this claim, that in effect meant that the claimant had not made a claim to challenge the title of the defendant's predecessor in title and therefore for all intents and purposes the defendant's title to the land remained unchallenged.

Court's Analysis and Considerations

- [17] In this court's mind the problem raised by this dispute is that this court must determine who is in fact the paper owner of the said Lot 21.

- [18] Upon this court assessing this matter it became clear to this court that first and foremost there needed to be express clarification as to whether Lot 21 referred to in the deed of the claimant's predecessor in title was in fact the same lot of land referred to as Lot 21A in the title of the defendant's predecessor in title.
- [19] It was on this basis that this court at the conclusion of this matter made a further order that a survey was to be conducted to establish that issue for the parties and the court.
- [20] The survey report provided by Mr. Ivo Providence filed on 30 August 2019 filed pursuant to the court's order, examined the deeds that provided the roots of title for the claimant and the defendant. Having done so, Mr. Providence discovered that there had in fact been some re-measuring of Lots 21 and 22 that were conveyed to the defendant's predecessor in title that resulted in the dimensions of Lots 21A being slightly less than Lot 21 as conveyed to the claimant. Therefore it was the finding of the surveyor that based on the later plan G40/76 that Lot 21A in fact formed part of Lot 21¹.
- [21] The finding having been made, it was clear to this court that the claimant and defendant were therefore claiming the same parcel of land, Lot 21 although the size of the parcel to which the defendant claims is smaller than the parcel of the original Lot 21 of the claimant's title deed. This difference in measurement however is of no moment at this juncture as this does not affect the determination of the issues. Therefore having established this, it was also clear to this court that the provisions of the Registration Act clearly govern these circumstances.
- [22] Section 5 of the Registration Act states:

"5. Effect of Registration:

- (1) Every document relating to real estate required to be registered under this Act shall, on registration, operate both at law and in equity according to the priority of time of registration and the right, title and interest of the person conveying, incumbering or otherwise dealing with such real estate against every other document subsequently registered with respect to such real estate.*
- (2) Every such document that shall not be registered shall be deemed fraudulent and void as the real estate affected by such document against any subsequent purchaser or mortgage for valuable consideration without notice whose document shall be first registered or against any person who may have, subsequently to the date of such unregistered document, obtained a judgment operating as a charge against such real estate.*

¹ Surveyor's report filed on 30 August 2019

(3) ***The registration of documents*** required to be registered under this Act shall be ***deemed due notice of their contents to all persons whomsoever*** claiming any estate or interest in, or incumbrance on, any real estate comprised in, connected with or affected by the document registered.” (My emphasis added)

[23] Thus it is that the first in time in registration will take priority over any later document and amount to notice to the world². This is simply the codification of the common law position that “the applicable rule in competitions of title is the rule of first completion- the party who is first to complete her right being the party who prevails”³.

[24] I therefore find that with regard to the paper title that was established in 1977, that the vendor Conrad DeFreitas who purported to convey Lot 21 twice could obviously not do so. The later conveyance of September 1977, some six months after the initial conveyance of the same lot to the claimant's father, did not convey Lot 21 to the defendant's predecessor in title. Therefore, in so far as the said defendant purported to buy Lot 21, her vendor did not have Lot 21 to convey and therefore her paper title to that lot must be void and set aside.

[25] However the question still arises as to whether the defendant despite not having the paper title could have acquired the said Lot 21 through long possession or rather by the means of the limitation act which now leads this court to consider the second issue that arose in this matter.

Issue #2: Whether the provision of Sections 17 (1), 19 and 8 (1) of Part 1 of the Schedule of the Limitation Act CAP 129 apply to the case at bar.

The Claimant's Submissions

[26] The claimant's submissions on this issue are very short and precise. The submission was that the defendant having commenced what she considered her possession of the land by reliance on a paper title that did not exist, the defendant is therefore unable to claim adverse possession as her possession would have commenced without the requisite animus possidendi required for the provisions of the Limitation Act to operate.

[27] In any event the claimant also submitted that even if time could have run in favour of the defendant by virtue of the provisions of the Limitation Act that the evidence led by the defendant fell short of establishing any such claim.

²Rita Cumberbatch v Rannie Glasgow SVGHCV2017/0162 per Henry J at paragraph 30

³Stair Memorial Encyclopedia Volume 18 Paragraph 13

The Defendant's Submissions

- [28] The nub of the defendant's submission was centered on the provisions of the Limitations Act. The submission was that even if the title deed of the defendant's predecessor in title may have been defective, which they never accepted, the defendant and her predecessor in title had been in continuous exclusive and undisturbed possession since the time at which the same had been purchased.
- [29] Therefore on the basis of this possession, the defendant submitted, that the claimant's right to the parcel of land had been extinguished and therefore she no longer had any claim/title or interest in the said lot of land⁴.
- [30] The defendant's submitted that there was no evidence that had been proffered by the claimant at trial that substantiated any acts of possession by herself or even her father before her to establish the requirement of factual possession on the part of the claimant or her father. In any event having not relied on either possession or limitation in her pleadings, the defendant submitted that the claimant is now barred from relying on any such allegations and that this court should make a finding in favour of the defendant as to ownership of Lot 21.

Court's Analysis and Considerations

- [31] When one considers the issue at hand, in this court's mind the circumstances give rise to the following two questions as stated in the case of **Horace Parshall v Clara Hackney**⁵ by Mummery LJ ": *who has **better** title to the disputed land? Is it the appellant by virtue of prior registration? Or is the respondent by virtue of adverse possession of it ...for 12 years and more...*"
- [32] To this court these questions are the essence of this issue.
- [33] In determining this point, it is clear that the provisions of the Limitation Act that have been relied upon by the defendant need to be examined.
- [34] The defendant firstly relied on Sections 17 and 19 of the Limitation Act (hereinafter referred to as the LA)⁶. By Section 17 it states:
"(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

⁴ Paragraph 9 of the Defendant's Submissions filed on 17/6/19

⁵ [2013] EWCA Civ 240

⁶ CAP 129 of the Revised Laws of Saint Vincent and the Grenadines

(2) Subject to the following provisions of this section where-

- (a) the estate or interest claimed was an estate or interest in reversion or remainder or any future estate or interest and the right of action to recover the land accrued on the date on which the estate or interest fell into possession by the determination of the preceding estate or interest; and
- (b) the person entitled to the preceding estate or interest (not being a term of years absolute) was not in possession of the land on that date, no action shall be brought by the person entitled to the succeeding estate or interest after the expiration of twelve years from the date on which the right of action accrued to the person entitled to the preceding estate or interest or six years from the date on which the right of action accrued to the person entitled to the succeeding estates or interest, whichever period last expires.”

Section 19 states:

“Subject to Section 20, at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.”

- [35] By these two sections, it is established that there is a limitation period by which claims for land can be made, 12 years, and once that period is expired, then any title to the land is extinguished.
- [36] So the first part of the defendant's argument and case is that the claimant should have sought recovery of the land before 1989. Having failed to do so, any right to the land that may have existed in favour of the claimant, is now extinguished.
- [37] However if the provisions of the LA had ended there, perhaps in this court's mind the defendant may have been able to rely on the same. However, they did not.
- [38] The defendants further relied on Section 8 of the Schedule to the LA which states:
“(1) No right of action to recover land shall be treated as accruing unless the land is in possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as “adverse possession”); and where the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in **adverse possession** on that date, the right of action shall not be treated as accruing unless and until **adverse possession** is taken of the land.

(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in **adverse possession**, the right of action shall no longer be treated

as accruing and **no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.**

(3) For the purposes of this paragraph:

(a) possession of any land subject to a rent charge by a person (other than the person entitled to the rent charge) who does not pay the rent shall be treated as adverse possession of the rent charge; and

(b) receipt of the rent under a lease by a person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease shall be treated as adverse possession of the land.” (My emphasis added)

- [39] By this section it is therefore clear that the period can only run against the owner of the land when the land is in fact in the possession of someone who is in adverse possession to the owner.
- [40] So in this court’s mind, in order for the defendant to avail themselves of this provision, not only must time have begun to run but that their possession must be constituted as adverse.
- [41] When the defendant entered into possession, through her predecessor in title, the vendor Mr. Ollivierre, she did so on the basis of her deed of conveyance and having purchased the same from him. The defendant however claims to be entitled to the land, by her own argument, not through the deed, but by way of possession, possession which she argues the said Mr. Ollivierre had since he bought in 1977. However, is the defendant capable of making such a claim? In this court’s mind the answer to that must be a resounding no.
- [42] There was no “dispossession” in 1977 by the defendant’s predecessor in title, because the “taking of the land was not unlawful”⁷ or adverse. As was recognized by the court of appeal in the **Horace Parshall** case⁸ at paragraph 87 “it was not unlawful for the owners of [Lot 21] to take and remain in possession of the disputed land, because they had a registered title to it.”
- [43] In fact our own Court of Appeal has said as much. In the case of **Arnold Celestine v Carlton Baptiste**⁹ Creque-George JA (as she then was) had this to say at paragraph 12 “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 legal 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

⁷ **Horace Parshall** case Op cit

⁸ Op Cit

⁹ HCVAP2008/0011 GRENADA

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.”

- [44] So even if this court was to accept that the evidence elicited at trial by the defendant and on behalf of the defendant may have given rise to a factual matrix of factual possession, the truth of the matter is that the defendant nor her predecessor in title can in law establish a right due to adverse possession and claim thereby.
- [45] At the time of the commencement of possession, it was clear that the defendant believed that she did so based on her right to do so. She was the paper owner of the land. She holds the paper title to the land. At the time she purportedly took possession she had no reason to believe that her title was questionable. That issue was only raised upon the filing of this claim in 2016 and certainly there can be no question that time has run in her favour to take advantage of the LA for the last 3 years. In this court’s mind there can never have been an issue of adverse possession.
- [46] Having so found it is therefore not open to this court to then proceed to examine whether the evidence supported the claim for possessory title. It is simply not open to me¹⁰.
- [47] The finding of the court is therefore that the defendant is not entitled to rely on the provisions of the LA.
- [48] Before I however leave this matter, I wanted to express my dissatisfaction with the claimant pursuing relief in relation to the Mortgage held by Bank of St Vincent and the Grenadines which holds the said property as security when that entity was in fact removed as a party to the proceedings early in the process.
- [49] This court cannot be asked to make orders that would affect a third party when that party has had no opportunity to be heard as to its legal rights. I therefore decline to make any orders with regard to the Mortgage. In light of the finding of the court, it is now for the defendant to make the representations to the banking institution with regard to her security in light of this court’s determination.

¹⁰ Paragraph 13 of the **Arnold Celestine** case

This is therefore the order of the court:

1. The Deed Number 2612 of 2003 is to be rectified to remove the reference to Lot 21A.
2. The said Deed of Rectification is to be signed by the Registrar of the High Court in keeping with this judgment of the court.
3. The injunction against the defendant and her servants or agents from trespassing or exercising acts of ownership on Lot 21A only, is granted.
4. The declaration that the Mortgage Indenture Number 2618 of 2003 is null and void is refused.
5. Cancellation of Indenture of Mortgage 2618 of 2003 is refused.
6. The declaration that the claimant is the lawful owner of a parcel of land contained in Deed Number 88 of 2013 being Lot 21 is granted.
7. Costs to the claimant on an unvalued claim under Part 65.5 of the CPR 2000, in the sum of \$7,500.00.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar