

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHPT2017/0036

**IN THE MATTER OF THE POSSESSORY TITLES ACT CAP 328 OF THE LAWS OF SAINT VINCENT
AND THE GRENADINES REVISED EDITION 2009**

AND

**IN THE MATTER OF AN APPLICATION BY MARIE LAURENCE MERTZ FOR A DECLARATION OF
POSSESSORY TITLE OF LAND**

APPLICATION FOR DECLARATION OF POSSESSORY TITLE

Appearances:

Mr. Julian Jack for the applicant.

2019: Jan. 17
Feb. 28
Apr. 3

JUDGMENT

BACKGROUND

- [1] **Henry, J.:** This is an application¹ by Marie-Laurence Mertz for a declaration of possessory title to a parcel of land situated at Richmond, Union Island, in the State of Saint Vincent and the Grenadines. The subject lands are depicted on survey plan GR1405. Ms. Mertz and her witnesses Annie-Claude Tamiotti and Stephanie Browne provided testimony in support of the application. It

¹ Filed on 22nd August, 2017.

was unopposed. The application does not meet the requirements of the applicable law. No declaration of possessory title is granted to Ms. Mertz.

ISSUE

- [2] The issue is whether Marie-Laurence Mertz should be granted a declaration of possessory title to the subject lands.

LAW AND ANALYSIS

Issue – Should Marie-Laurence Mertz be granted a declaration of possessory title to the subject lands?

- [3] An applicant seeking a declaration of possessory title must establish that she has enjoyed exclusive and undisturbed factual possession of the subject land for more than 12 years. She must also prove that during that time she intended to possess it as owner.² The Possessory Titles Act³ ('the Act') outlines the procedural and legal requirements for the grant of a declaration of possessory title to land in Saint Vincent and the Grenadines.
- [4] The applicant must use the prescribed form under the Act and include in it the name of the registered owner. Ms. Mertz identified the registered owner as her deceased former common law husband François Cheverry. She produced a certified copy of a Deed of Conveyance Number 2117 of 1994 by which he purportedly acquired title. She contended that in previous proceedings initiated by her for a declaration of possessory title, the High Court in this jurisdiction, declared Mr. Cheverry to be the 'prima facie paper title owner of the land by virtue of registered Deed of Conveyance Number 2117 of 1994.'
- [5] Ms. Mertz averred that Mr. Cheverry is presumed dead. She exhibited a certified copy of the certificate of death to this effect. It reflects that Mr. Cheverry was presumed and consequently certified dead in consequence of a sea disaster. The date of death was entered as June 9th 2005. Ms. Mertz testified that she and Mr. Cheverry occupied the subject property as romantic partners up to the time of his disappearance on or about 9th June 2005. She averred that their common law

² J A Pye (Oxford Ltd & Ors v Graham et al [2002] UKHL 30.

³ Cap. 328 of the Laws of Saint Vincent and the Grenadines, Revised Edition, 2009.

relations commenced around August 1997. Her present application seeks to establish prescriptive title against Mr. Cheverry's estate.

- [6] She testified that Mr. Cheverry bought the subject lands from one Thomas Gellizeau, who had claimed possessory title and registered his entitlement to ownership, by virtue of a Statutory Declaration. Ms. Mertz submitted that Mr. Gellizeau executed the Deed of Conveyance by which Mr. Cheverry became registered as owner of the subject lands.
- [7] She chronicled the 'acquisition' of the subject property by Mr. Cheverry. She attested that the lands were originally owned by John and Jane Ruth Danielson, who left the State in the 1970s and are now both deceased. No death certificates to this effect were exhibited. Mr. Cheverry's ex-wife Annie-Claude Tamiotti provided similar testimony. In response to questions from the court, Ms. Tamiotti stated that she did not know whether Mr. and Mrs. Danielson are alive. This conflicts with her affidavit account.
- [8] Ms. Mertz said that the Danielson's' daughter Kate Millar took possession of the lands after her parents' demise, rented it to Mr. Cheverry, and arranged for Mr. Thomas Gellizeau to collect the rents on her behalf. Ms. Mertz did not indicate when the rental arrangement commenced or when it ended.
- [9] Ms. Tamiotti deposed that she and Mr. Cheverry lived at Richmond Bay, Union Island where they cohabited in a rented dwelling apartment until around August 1990 when they separated. She did not say from whom they rented. She also recalled that Mr. Cheverry told her that Kate Millar took possession of the land. She supplied no further details of Ms. Millar's dealings with the lands.
- [10] Ms. Mertz explained that Mr. Gellizeau claimed possessory title of the lands by virtue of Statutory Declaration Deed No. 456 of 1988. In it, Mr. Gellizeau declared that he went into possession of the land (being some 3 acres, 3 roods and thirty three poles) on or about January 1974. He averred further that he 'paid taxes ... on the names of Jane Ruth Danielson and John G. Danielson from the year 1974 and took care of the said hereditaments uninterrupted and undisturbed without paying rent or otherwise attorning to any landlord.'

[11] Mr. Gellizeau declared further that he:

‘continued to pay the taxes ... and take care of the said hereditaments uninterrupted and undisturbed without paying rent and otherwise attorning to any landlord up to the present day’; and is

‘unaware that anyone other than myself has any title, right or interest in the said hereditaments or any part thereof.’

The Statutory Declaration was dated 24th February 1988, signifying that it was made on that date. Mr. Gellizeau did not testify in the case at bar.

[12] Portions of the subject land were the subject matter in two previous decisions in the High Court in this jurisdiction: **Bethamous Hutchinson v Thomas Gellizeau**⁴ and an application by Ms. Mertz for a declaration of possessory title of 64,175 sq. ft. of the subject lands⁵. Ms. Mertz mentioned them in her closing submissions.

[13] In his judgment in the **Bethamous Hutchinson v Thomas Gellizeau** matter, His Lordship Matthew J (Ag.) summarized Mr. Gellizeau’s testimony as to his dealings with the Danielsons:

‘He said he initially lived and worked on the lands with the Danielsons and in the 1970’s, (sic) about 1971 or 1972, Jane Ruth left her husband and her husband vacated the property soon afterwards leaving him in possession.’

[14] Mr. Gellizeau gave similar testimony at the hearing of Ms. Mertz’s earlier application for a declaration of possessory title. In her judgment⁶, the learned Judge noted that Mr. Gellizeau provided affidavit testimony and was cross-examined. He acknowledged there that he knew Mr. Cheverry and had sold him the land in 1994 for \$21,000.00. He asserted that Mr. Cheverry paid rent in the 1980s but stopped doing so in about 1988. It is not clear from the judgment whether details were elicited from him about the rent which was collected from Mr. Cheverry and on whose behalf it was collected. It does not appear that such questions were asked.

⁴ Civil claim SVGHCV2007/27 (unreported).

⁵ Civil claim SVGHCV2013/38 (unreported).

⁶ At paragraphs 13, 14, 17, 18 and 19.

- [15] In the case at bar, Ms. Mertz testified that she believed that Mr. Cheverry bought the subject lands from Mr. Gellizeau from his personal funds and contributions she made towards the purchase. She submitted that Mr. Gellizeau confirmed this in the **Bethamous Hutchinson v Thomas Gellizeau** claim where he stated ‘that he sold the said parcel of land to Mr. Cheverry’.
- [16] Ms. Mertz sought to rely on the testimony provided by the parties and witnesses in the referenced earlier judgments. Testimony in those matters is not evidence in the case at bar. The probative value of such statements in this case is doubtful. Where the witnesses’ testimony differs from recollections in the present matter, I attach little weight to those previous accounts. In Mr. Gellizeau’s case, his absence from these proceedings is regrettable because he was not available to be cross-examined on salient matters including the manner in which his agency agreement with the Danielsons was terminated (i.e. if one existed). In his affidavit of service⁷ Bailiff Marvin Mulcaire attested that he served notice of the present application on Mr. Gellizeau on November 2nd 2017. Mr. Gellizeau is therefore aware of Ms. Mertz’s present claim.
- [17] In any event, his account is not likely to be beneficial to Ms. Mertz since it contradicts her claim in material respects, including with respect to the alleged purchase price paid to Mr. Gellizeau and the period for which Mr. Cheverry paid rent. I therefore make no findings of fact based on testimony adduced in earlier trials before other Justices. In this regard, it is perhaps instructive to highlight applicable legal principles regarding the operation of legal precedent and non-binding pronouncements by a judicial officer.

Stare decisis and obiter dictum

- [18] The doctrine of binding precedent is expressed in Latin by the phrase ‘stare decisis’. It describes the courts’ policy of abiding by principles established by court decisions in earlier cases. It requires courts to adhere to and apply determinations on questions of law, made by higher courts. A decision by a court of co-ordinate jurisdiction has no such binding force although it is considered to be of highly persuasive value.⁸

⁷ Filed on 5th March 2018.

⁸ Halsbury’s Laws of England Vol 34 (2011), para. 1032 (Lexis Nexis Edition)

- [19] The Latin expression 'obiter dictum' has been used extensively to describe pronouncements and observations made by a court which are purely incidental to and are not essential to the determination of the issues before it. Such remarks do not establish precedent. Accordingly, judicial observations in the earlier cases which touch and concern the subject matter in this case, are not binding on this court. The court may choose to follow them and should do so unless there are compelling reasons to depart from them.
- [20] Based on Ms. Mertz' testimony, Mr. Gellizeau concluded an agency agreement with Ms. Millar after her parents' demise, whereby he undertook to collect rents for her in connection with the rental of the subject property. There is no mention of such a relationship in Mr. Gellizeau's Statutory Declaration. There is no direct evidence from Mr. Gellizeau either way. If Ms. Mertz's testimony is accurate, the court would have to find that Mr. Gellizeau became Kate Millar's agent by virtue of the agency⁹. I accept her account.
- [21] As such an agent and for the duration of such agency, Mr. Gellizeau would have been precluded by law from denying that he possessed the land on behalf of the registered owner. He would also have been estopped from setting up a statutory title against the Danielsons or Ms. Millar¹⁰. He would be deemed by law to hold the land in trust for the principal, if he transferred it to himself¹¹. Moreover, in such circumstances, the Danielsons' and/or Ms. Millar as a beneficiary under such trust, would face no limitation bar to recovering the land¹², except into the hands of an innocent purchaser for value without notice¹³.
- [22] This means that the only person who would acquire an untainted legal or beneficial interest in the trust property would be a third party who acquired such interest without knowledge of the facts which point to the existence of the trust. In view of Ms. Mertz' testimony, she had notice of that trust

⁹ Bell v Marsh [1903] 1 Ch 528.

¹⁰ Lyell v Kennedy (1889) 14 App Cas 437, HL.

¹¹ Longfield Parish Council v Robson (1913) 29 TLR 357.

¹² Limitation Act Cap. 129, Laws of Saint Vincent and the Grenadines, Revised Edition, 2009, section 23 (1) (b).

¹³ Foskett v McKeown [2001] 1 AC 102.

relationship and would therefore not be able to rely on Mr. Gellizeau's prior title, to claim an interest in the subject property, as she is seeking to do in this case. Taking the foregoing into consideration, I make no finding that Mr. Gellizeau or Mr. Cheverry is or was ever the prima facie owner of the subject property.

Joint Ownership of the Subject Lands

[23] Ms. Mertz sought to establish an interest in the subject lands as partial beneficial owner. She testified that she believes that Mr. Cheverry 'would have paid Mr. Gellizeau from his personal funds and from contributions (she) would have made towards the purchase of the land'. She claimed that the purchase price exceeded \$100,000.00, payment of which is evidenced by copies of 12 cheques. By placing reliance on these factual assertions, Ms. Mertz claimed an interest in the subject property as part-owner by virtue of her contributions to the purchase price. She made submissions to that effect.

[24] She produced certified copies of the referenced cheques. They were for sums varying from \$475.00 to \$35,000.00 made payable respectively to Thomas Gellizeau, Gellizeau and Raymond Cadette between 7th November 1985 and 1st July 2003. The details are set out in the following table:

Date	Cheque or debit advice no.	Amount	Payable to	Comments
7 Nov. 1985	29876	\$475.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	Cheque
13 Feb. 1986	44611	\$1650.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	
8 Jul. 1986	44626	\$550.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	
17 Sept. 1986	44634	\$550.00	Gellizeau – Purportedly drawn on National Commercial Bank	
18 Dec. 1987		\$32,000.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	Debit advice (charges of \$3.05)
15 Aug. 1995	027011	\$500.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	No bank stamp indicative that it might have been

				encashed
7 Sept. 1995	027012	\$8000.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	No bank stamp indicative that it might have been encashed
16 Sept. 1995	027013	\$7000.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	No bank stamp indicative that it might have been encashed
13 Jun. 1996		\$35,000.00	Raymond Cadette – Purportedly drawn on National Commercial Bank	Test # (charges of \$7.50)* ¹⁴
31 Oct. 1997	027048	\$3000.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	
27 Feb. 1998	931482	\$500.00	Cash – Purportedly drawn on National Commercial Bank	
1 Jul. 2003	459008	\$400.00	Thomas Gellizeau – Purportedly drawn on National Commercial Bank	
		Total \$89,625.00		

[25] Ms. Mertz testified that Mr. Gellizeau caused Deed of Conveyance No. 2117 of 1994 to be registered in Francois Cheverry's name on 1st June 1994 after the purchase price was paid. It identifies the property as a parcel of 1 ½ acres, being sold at a price of \$21,000.00. The Deed belies Ms. Mertz account regarding the purchase price.

[26] She produced copies of tax receipts which she claimed reflected that she has paid property taxes for the land 'since the disappearance of Francois Cheverry'. Among the exhibited receipts are some for 2001 and 2005 in the name of Ruth Jane Donaldson¹⁵. No explanation was provided as to the relationship between this person and Ms. Mertz. It begs the question why tax was still being paid in the name of the previous registered owner after the property had been acquired first by Mr. Gellizeau and subsequently by Mr. Cheverry. Ms. Mertz and her witnesses offered no explanation.

¹⁴ This was not a cheque or counterfoil. It contained no information as to the nature of the record.

¹⁵ Dated 28th Nov, 2001 for tax years 1995, 1997, 1998, 1999 and 2001; and dated 18th August 2005 for tax years 2002, 2003, 2004 and 2005.

Ms. Mertz also produced copies of tax receipts for tax years 2007, 2008, 2009, 2010 and 2011 in the name of Francois Cheverry.

[27] She submitted that in her earlier claim for possessory title, Thomas Gellizeau had acknowledged that he had sold the subject land to a Francois Cheverry. She contended that she had been in undisturbed and continuous possession of the land for only 8 years at the time of the hearing of that Suit, and not 12 years the Act requires. The learned trial judge concluded as much.

[28] Ms. Mertz pointed out that having tried the facts, the Judge concluded:

‘34 On the facts and evidence in this case, Francois Cheverry was the registered title owner of the land from 1994 and as such, he is prima facie entitled to and had the right to possession of the land from that date.

35 The Applicant having lived with Mr. Cheverry as his common law wife, at his invitation and with his consent from 1997, the Court finds not only that there was no ‘factual exclusive (single) and undisturbed possession’ the Applicant during the eight year period 1997-2005 before the disappearance of Francois Cheverry , but also, there could not have been “the requisite intention to possess the said land as owner ‘which said coincidence must be established for a period of twelve years or more, before a Declaration of Possessory Title under this Act can, be made in favour of the Applicant.

36 The alleged ‘possession’ of the Applicant, enjoyed with the consent of the title owner is not adverse. As such this Court finds that the Applicant has not satisfied the provisions and criteria set down in the Act for a Declaration of Possessory Title to the land to be made in her favour, in that twelve year period for adverse possession by the Applicant of the land of Francois Cheverry could only commence, after his disappearance in June 2005.

37 The adverse possession of the Applicant can therefore only commence after June 2005 and crystallize on or about July, 2017. Accordingly twelve years adverse possession in accordance with the Act, have not passed.’

[29] Ms. Mertz submitted that Thomas Gellizeau sold the land to Francois Cheverry, her then fiancé, for in excess of XCD\$100,000.00 which was paid by Francois Cheverry. She claimed that she made

some monetary contributions of her own. She did not say how much. She argued that the receipts show that the payments made by Francois Cheverry far exceeded the sum of XCD\$21,000.00. She submitted that 2 requisitions for draft/transfer receipts dated 18th December, 1987 and the 13th day of June, 1994 evidenced that the sums of XCD\$32,003.05 and XCD\$35,007.50 respectively were remitted to Thomas Gellizeau from Francois Cheverry and payable on account at the National Commercial Bank. As reflected in the table, an examination of the exhibited cheques revealed that the total sum of the cheques produced by Ms. Mertz falls short of the \$100,000.00 stated by her.

[30] Ms. Mertz contended that the evidence shows that a series of cheques in various sums of monies were made on the account of the said Francois Cheverry at the National Commercial Bank of St. Vincent for the benefit of Thomas Gellizeau. She submitted that the monies were remitted from Francois Cheverry to Thomas Gellizeau over an extended period from around about 1985 through to around 2003.

[31] She argued that these are in addition to the acknowledgement by Attorney-at-Law Raymond Cadette on the 15th day of June 1994 of the receipt of the sum of XCD\$36,400.40. She submitted further that it is a sum which is purported to have been paid by Francois Cheverry towards government stamp duty, payable on registering the deed of conveyance, and for legal fees. Neither she nor her witnesses supplied those particulars. A witness or litigant is not allowed to supplement her evidence through submissions. There is no explanation as to the relationship between the payment to Raymond Cadette and the alleged purchase of the lands. I make no finding that any sums were paid to Mr. Raymond Cadette in respect of the said purchase of the subject lands.

[32] Ms. Mertz submitted that she made financial contributions towards the purchase money paid to Thomas Gellizeau. She argued that her interest in the land by inferred common intention may in law amount to a beneficial interest of sort with the attendant constructive trust issues. She cited in support the decided cases of **John Taylor Julie Wicks vs. Richard Ball**¹⁶ and **June Cornwall vs. Simon Crooke**¹⁷. Ms. Mertz contended that in view of her testimony that she and Mr. Cheverry had

¹⁶ [2008] EWL and RA 2006/0882, (25 April 2008) paras. 5, 6 and 8.

¹⁷ SVGHCV1996/0036, (unreported) paras. 23 and 24.

planned on raising a family on the said parcel of land, the court should apply the principles which emerge from the referenced cases with respect to the creation of trusts.

- [33] By this submission, Ms. Mertz is asking the court to find that she has obtained an interest in the property (as the beneficiary of a trust over which Mr. Cheverry was the sole trustee) by virtue of her contribution to the purchase price. Ms. Annie-Claude Tamiotti deposed that before his disappearance, Mr. Cheverry paid various sums of money to Thomas Gellizeau for the absolute purchase of the said land. Apart from her say so, Ms. Mertz has supplied no evidence from which the court can find that she contributed to the purchase price.
- [34] Even if she did make such contributions, such purchase would be compromised by the legal principles outlined earlier in respect of the law of trusts and her knowledge of the trust relationship between Mr. Gellizeau and Ms. Millar. Based on Ms. Mertz's testimony and that of her witnesses, Mr. Cheverry bought the land and had 'title conveyed to him in 1994 whereas she took possession of it from June 9th 2005 after his death. She stated that she had been living with Mr. Cheverry from about August 1997 and that they enjoyed a common law relationship from that time until his disappearance. By her own account, she had not gone into possession when the land was purchased. This admission suggests that Mr. Cheverry was the only person in possession of the subject lands up to his death in 2005.
- [35] The implication is that Ms. Mertz had laid no claim to the subject land up to that time. The further inference is that she evinced no intention to own it before then. This is inconsistent with her claim that she contributed to the purchase price. I am not satisfied that she was even in the picture when Mr. Gellizeau purported to sell the land to Mr. Cheverry and when Mr. Cheverry purported to buy it from him.
- [36] In any event, if Ms. Mertz had contributed to the purchase price her claim to a share in the property on that ground would not be sustainable under the Act. This is because she would be claiming as part owner of the subject property. It is trite law that a claim to interest in land through adverse possession is not maintainable against oneself¹⁸. Her claim on those facts and legal basis (as

¹⁸ Arnold Celestine (Administrator of the Estate of O'Ferril Celestine) v Carlton Baptistes, GDAHCVAP2008/0011.

enunciated in **Taylor v Ball**¹⁶ and **Cornwall v Crooke**¹⁷) is without merit. There is nothing on the face of the cheques and very little in the testimony adduced in this case which supports Ms. Mertz' claim that she contributed to the purchase of the subject lands. I make no finding that she did.

[37] Ms. Mertz submitted further that the land had belonged to co-owners Jane and John Danielson who left St. Vincent in the 1970s. She claimed that Thomas Gellizeau went into possession of the land with the permission of the Kate Millar nee Danielson, the Danielson's surviving daughter. Ms. Mertz submitted that the Court's in its decision in her earlier claim declared Francois Cheverry the *prima facie* paper title owner of the land, by virtue of registered Deed of Conveyance Number 2117 of 1994. She submitted further that after the referenced Statutory Declaration and the Deed of Conveyance were registered, Mr. Gellizeau's 'purported claim to the land in question was unsuccessfully challenged by a Bethamous Hutchinson' in a High Court claim.

[38] Ms. Mertz reasoned that the referenced Deed of Conveyance was registered pursuant to sections 3 (1) and 5 of the Registration of Documents Act¹⁹ and therefore constitutes notice of its contents to all persons. She submitted further that the legal effect of such registration 'once the title ... has been investigated, verified and recorded in the Register', is that it replaces and supersedes the previous documentary title. She concluded that the Deed of Conveyance would have created a new title to the land in the name of Francois Cheverry. She submitted that the court recognized that new title in her previous civil claim for a declaration of possessory title of part of the subject lands.

[39] In that case, the learned trial judge opined:

'On the facts and evidence in this case, Francois Cheverry was the registered title owner of the land from 1994 and as such, he is prime (sic) facie entitled to and had the right to possession of the land from that date.'

This pronouncement was made in respect of a parcel of land situated at Richmond, Union Island comprising 64,175 square feet and depicted on survey plan Gr1274 dated December 2012. The survey plan was prepared by Keith Francis, licensed land surveyor. The judgment contained no details about the boundaries of the subject land.

¹⁹ Cap. 132 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

- [40] Ms. Mertz produced a certified copy of survey plan Gr1405²⁰ which she claimed depicts the subject land in the case at bar. The land illustrated in it amounts to 64,199 square feet. Ms. Mertz represented that it is the same land delineated on survey plan Gr 1274. She did not exhibit survey plan G1274 to her claim or affidavits but provided a certified copy to the court, after her case was closed. The particulars on it correspond with the descriptions outlined in the referenced judgment.
- [41] At this trial, Ms. Mertz exhibited survey plan Gr1269²¹ which depicts the same land. That plan shows the land as two separate pieces comprising 21,796 sq. ft. and 42,379 sq. ft. respectively, a total of 64,175 sq. ft. The boundary markers illustrated on the external perimeter of survey plans Gr1274 and Gr1269 are identical. I accept that they delineate the same parcel of land.
- [42] Ms. Mertz provided no explanation as to the difference between the areas of land shown on survey plans Gr1274 and Gr1405. On its face, survey plan Gr1405 revealed that it was prepared by Osborne Browne and approved by Chief Surveyor Keith Francis on 17th May 2017. Ms. Mertz testified that it superseded and replaces survey plan Gr1274. A notation to this effect appears on it. I accept that it does.
- [43] Survey plan Gr1405 depicted two wall houses along the Western side. Gr1274 showed 3 houses. Survey plans Gr 1405 and Gr 1274 clearly depict large portions of the subject land. A comparison of the two surveys revealed that the boundaries on the North Western, North Eastern and South Eastern sides appear to be the same while the boundary on the South Western side has been varied effecting an increase in the size of the lot. No evidence was supplied to explain how this came about.
- [44] Deed of Conveyance No. 2114 of 1994 described²² the land which it purportedly conveyed. It set out the boundaries as:

²⁰ Approved and lodged at the Lands and Survey Department on 17th May 2017.

²¹ Which reflected on its face that it was approved and lodged at the Lands and Survey Department on 6th November 2012.

²² In the schedule.

‘All that lot piece or parcel of land situate at Richmond Union Island in the State of Saint Vincent and the Grenadines and being One and a Half (1 ½) acres and ... butted and bounded on the North by lands of Thomas Gellizeau South by lands of Collin Wilson East by lands of Thomas Gellizeau and the West by lands of the heirs of Charlotte Samuel ...’

- [45] Neither survey plan Gr1405 or Gr1274 identified any of the adjoining land owners as Collin Wilson or heirs of Charlotte Samuel. Survey plan Gr1405 showed Thomas Gellizeau as the owner of the land on the North Eastern Boundary but not on any other boundary. Survey plan Gr1274 identified the owners of lands on the Northern, North Eastern and North Western boundaries as Thomas Gellizeau. The adjoining land owners on the Western, Southern, Eastern and South Eastern boundaries were named respectively as Luciana Roberts, Hilary Samuel, Norma Harvey and Berthram Simmons. Survey plan Gr1405 named the adjoining land owners on the Western East and South Eastern boundaries as Luceana Roberts, Bertram Simmons and Norma Harvey respectively. No name was assigned to the parcel on the Southern boundary.
- [46] In the case involving the applicant Bethamous Hutchinson, Thomas Gellizeau objected to the grant of a declaration of possessory title to Ms. Hutchinson in respect of over 3 acres of land. The learned trial judge described the disputed land as comprising 3 acres, 3 roods and 33 poles. He indicated that the area was revised to 3.8040 acres²³. He noted too that Mr. Gellizeau stated that he had sold ‘about 1 ½ acres’ of that property to a Frenchman Francois Cheverie. No Deed, Statutory Declaration, survey plan or boundaries were mentioned in that judgment. No declaration was made that Mr. Gellizeau owned any legal or beneficial interest in it.
- [47] It is conceivable that the land which was the subject of that dispute comprised partially the land which is at the center of the present application. There is obviously some overlap. The description of the property in the Statutory Declaration is another piece of evidence which connects the parcels. Without specifics regarding boundaries or a survey plan for comparison purposes, it is not possible to determine precisely what portion of the two mentioned parcels of land is the disputed land in this case.

²³ Paragraph [11] of the judgment.

[48] While there is possibly some correlation between those parcels and the one in the present case the evidence is inconclusive as to:

- a) the current boundaries of the more than 3 acres of land;
- b) any overlap with the subject land in the present case; and
- c) whether Francois Cheverry and Francois Cheverie is one and the same person.

In respect of (c) I infer that it is the same person.

[49] Ms. Mertz contended that the legal effect of the registration of Deed of Conveyance No. 2117 of 1994 is that it effectively created a new title which replaces and supersedes the previous documentary title. She reasoned that accordingly, the registered Deed of Conveyance under operation of the provisions of the Act would have created a new title to the land in the name of Francois Cheverry, which the Court recognized.

[50] She argued further that the registration of title affords a degree of indefeasibility in the case of **Bethamous Hutchinson vs. Thomas Gellizeau**. She contended that by the time of that claim, 13 years had elapsed from the date of the purported sale of the land to Francois Cheverry. Ms. Mertz did not expressly invite this court to endorse the determination of the learned judge in that case. It is worth noting however, that the learned judge's statement regarding Mr. Gellizeau's entitlement to the property at Union Island was not dispositive of the issue which Ms. Mertz raised then (i.e. whether Ms. Mertz was entitled to a declaration of possessory title of the subject property). It was a statement made in passing. It is what is referred to as an *obiter dictum*.

[51] In any event, in keeping with the earlier description of the doctrine of precedent that pronouncement is not binding on this court. Furthermore, it appears that there was evidence before this court which was not before the learned judge in the previous matter. In this regard, it appears that Mr. Gellizeau did not alert the learned judge to the fact that he was for a few years, the Danielsons' and/or Ms. Millar's agent before he purported to register the subject land in his name. Ms. Mertz has introduced that evidence in the case at bar and she hinged her claim to a declaration of possessory title on two prongs: her alleged contributions to the purchase price of the subject lands and her alleged possession of the land for a period in excess of 12 years coupled with an intention to own it.

- [52] The earlier judgment refers to no evidence which explained if and how Mr. Gellizeau's agency was terminated. Having being made aware of those matters, this court cannot without more, ignore the legal implications and rubber-stamp the purported acquisition by Mr. Gellizeau of an interest in the subject property. Any underlying findings as to ownership could be affected by such matters.
- [53] Moreover, the court reiterates the oft proclaimed legal principle that a Statutory Declaration does not create any legal interest in land. Mr. Gellizeau's Statutory Declaration is regarded by this court as being self-serving and merely declaratory of his intentions to own the referenced lands. Furthermore, it could not and did form a legal basis through which Mr. Gellizeau could ground root of title in relation to his 1994 Deed. The law requires something more.
- [54] If this court were to find that Deed of Conveyance No. 2117 of 1994 created a new legal title, it would be accepting Mr. Gellizeau's Statutory Declaration as proof of his entitlement to ownership of the over 3 acres of land and would thereby legitimize it. For the reasons outlined above, I make no such determination. This appears to me to be an appropriate case in which there is good reason not to endorse a pronouncement made *obiter* by a court of co-ordinate jurisdiction as to the merits of acquisition by Mr. Gellizeau or Mr. Cheverry of such title. I refrain from doing so.
- [55] Ms. Mertz testified that she has been in exclusive and undisturbed possession of the subject lands for 12 years commencing June 2005. She stated that she has lived there in exclusive, quiet and undisturbed possession. She averred that she has been in occupation and has looked after the affairs related to the land, made renovations to the physical structure and paid charges and property tax. Ms. Tamiotti said she is aware that shortly after she (Ms. Tamiotti) moved out of the matrimonial home she shared with Mr. Cheverry at Richmond, Union Island in August 1997, Ms. Mertz moved in.
- [56] For her part, Ms. Stephanie Browne testified that Mr. Cheverry and Ms. Mertz lived together as a common law couple on the parcel of land which is the subject matter of this claim. She deposed that Ms. Mertz continued to live on the land uninterrupted even after Mr. Cheverry's disappearance and still lives there. She stated that she is aware that Ms. Mertz has been in continuous occupation of the parcel of land claimed in this application.

[57] In order to prove adverse possession, an applicant for a declaration of possessory title must establish proof that she has enjoyed exclusive and undisturbed factual possession of the subject land accompanied and did so intending to possess it as owner.²⁴ Slade J. explained the concept in **Powell v McFarlane and Another**. He stated:

‘If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (“animus possidendi”).... Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, ...

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...’.²⁵

[58] The subject lands encompass over 1 acre. Ms. Mertz and her witnesses provided no particulars about the type of land involved, what it is generally used for or for what purpose such lands are usually utilized. They did not provide specifics about the use to which Ms. Mertz puts the land. Their accounts were bare. The Act²⁶ requires that an applicant provides to the court facts on which she relies to establish adverse possession. The witnesses are mandated to ‘set out in detail any facts known to them’ which prove those acts of possession.

[59] Having regard to the extent of the subject lands, it would not be unreasonable for the court to expect the applicant to provide fuller details about her occupation of the over one acre of land, other than that she lives on it and pays taxes. I find that to be wholly inadequate. It appears and I find that Ms. Mertz lives in a house on part of the subject property and that she has done so since June 2005. However, the evidence does not establish any use by her of the rest of subject land. I find too that she formed the intention of owning that part of the subject lands, being fully aware of the facts underpinning the trust relationship between Mr. Gellizeau and Ms. Millar. Armed with such knowledge, Ms. Mertz had a duty to the court to prove on a balance of probabilities, through

²⁴ See section 2 of the Act.

²⁵ (1977) 38 P & CR 452 Ch D at 470 – 471.

²⁶ Sections 4 (b) and 5 (3).

evidence that those concerns have been satisfactorily addressed. She has not. Such evidence would have assisted the court in arriving at a conclusion that those trust concerns are no longer live.

[60] Ms. Mertz complied with the other procedural requirements in the Act, by publishing notification of her application in two local newspapers, at the Registrar's office and at the District III Magistrate's court; serving copies of the notices on adjoining owners of the subject land.

[61] The court's observations regarding the operation of the law of trusts coupled with Ms. Mertz's knowledge of Mr. Gellizeau's relationship with Kate Millar raises legal questions which cannot be ignored by the court. No explanation has been advanced which satisfactorily addresses those issues.

[62] Likewise, although no opposition has been made to the application, Ms. Mertz was duty bound to supply coherent and adequate evidence to establish her acts of possession over the entire parcel claimed. She did not do so. For the foregoing reasons, I find that Ms. Mertz has failed to establish adverse possession by her of subject land. Her application for a declaration of possessory title of the subject land is denied.

Miscellaneous

[63] Ms. Mertz made other submissions which did not go to the core of the case. They are summarized for the sake of completeness. She testified:

'Due to the fact that Kate Millar is a UK citizen she then arranged to have Thomas Gellizeau collect the rents from Mr. Cheverry.'

[64] She submitted that if Kate Millar née Danielson was John and Jane Danielson's daughter, then acting as a beneficiary under intestacy or testacy of the respective estates of the deceased, Ms. Millar would have been obliged to make application to the Court in Saint Vincent and the Grenadines for a Grant of Letters of Administration or Grant of Probate. She argued that pursuant to section 5(1) of the Alien (Landholding Regulation) Act²⁷, Kate Millar would be required to obtain

²⁷ Cap. 316 of the Laws of Saint Vincent and the Grenadines, Edition 2009.

a licence to hold the land and to appoint Mr. Gellizeau to act as her agent to collect rent. She submitted that without such a licence, Ms. Millar could not seek to recover such rents or exert any ownership in the property.

[65] Ms. Mertz contended that those issues should not be permitted to supersede those relating to her uninterrupted occupation and possession of the land and ‘the statute barred limitations stipulated under the provisions of sections 17 and 24 of the Limitation Act’. She submitted that by the operation of those provisions, any rights of recovery of the land by Kate Millar have been extinguished.

[66] Ms. Mertz submitted that where 12 years have elapsed, the combined effect of sections 17, 19, 20, 24 and of paragraphs 1 and 8 (1) of Part 1 of the Schedule to the Limitation Act is that the right of action to recover possession of land is barred as it relates to any estate, right, title, interest in the land under the intestacy or testacy of the estate of John and Jane Danielson, and of Francois Chevery. As indicated before, section 23 of the Limitation Act is the applicable provision. Ms. Mertz’s submissions regarding the other provisions of that Act do not apply.

[67] Ms. Mertz argued further that even if any beneficial interest accrues to Kate Millar respecting the land, by virtue of her relation to John and Jane Danielson she would be obliged to make an application for a grant of probate or letters of administration; the propounder of a Will; or by a proposed administrator in person and in the manner law. The law does not require a beneficiary of a trust to obtain probate before proceeding with her claim. A beneficiary of an intestate’s estate may obtain leave of the court to bring an action on the estate’s behalf. An executor may initiate action without grant of probate.

[68] None of the witnesses have provided any documentary evidence of death of the Danielsons. No proof of registration by them as owners of the subject land has been advanced. I accept Ms. Mertz’s account that they were so registered. The court need not be detained with the procedures by which Ms. Millar and/or her parents, as beneficiary of a trust or beneficiary of an estate could seek to exercise any interest they might have in the subject property. The overarching concern is

that the court must not lose sight of material legal concerns which have not been satisfactorily addressed by a litigant.

Intestacy - Francois Cheverry

[69] Ms. Mertz contended that Francois Cheverry, having been presumed dead, issues relating to probate of his estate encompasses a myriad of issues. His ex-wife Mrs. Tamiotti attested that he had no children and he never introduced her to any family member or relative. Ms. Mertz contended that where the entitlement to a grant is in doubt, it may be appropriate to apply for an order for the grant to be in the exercise of the court's discretionary powers. She cited in support, **Tristram and Coote's Probate Practice**²⁸. It is not necessary for this court to delve into matters about administration of Mr. Cheverry's estate. These submissions do not assist Ms. Mertz.

ORDER

[70] It is accordingly ordered:

- (1) Marie-Laurence Mertz's application for a declaration of possessory title of property situated at Richmond, Union Island in the State of Saint Vincent and the Grenadines, more particularly described and delineated on survey plan Gr1405 which was approved and lodged at the Lands and Survey Department on 17th May, 2017 by Chief Surveyor Keith Francis, is dismissed.
- (2) No order as to costs.

[71] I am grateful to learned counsel for his written submissions.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar

²⁸ 24th Edition, London, Butterworths, 1973) pgs. 548-551