

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2017/0004

BETWEEN:

IN THE MATTER OF THE REGISTERED LAND ORDINANCE, CAP. 229

-AND-

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE CHIEF REGISTRAR OF LANDS

SHIRLEY HODGE

Claimant/Appellant

-AND-

CHIEF REGISTRAR OF LANDS

Defendant/Respondent

Appearances: Mr. Lewis Hunte QC, and Ms. Christina Hart, Counsels for the Claimant/Appellant
Mr. Hakim Creque, Counsel for the Defendant/Respondent
Mr. Patrick Thompson and Ms. Reynela Rawlins, Counsels for the Interested Party

2018: June 28

JUDGMENT

[1] **Ellis J.:** This claim was filed on 10th April 2015 pursuant to section 147 of the Registered Land Ordinance Cap. 229 ("the Act") which provides for appeals against decisions of the Chief Registrar of Lands ("The Registrar"). The Appeal stems from an application made by the Claimant herein in which she seeks prescriptive title to 11.12 acres of land contained in Parcel 221 of Block 2737B, Sea Cows Bay Registration Section. The entire Parcel comprises 27 acres.

- [2] The Registrar convened a hearing on 28th September 2016 in which she simultaneously considered four applications from parties seeking prescriptive title to different portions of the named Parcel. Two of the Applicants included the Claimant herein, as well as the Interested Party, Valdrena Smith.
- [3] In support of her application, the Claimant produced a **Plan No. CP – 2737B – 101 – T** prepared by Mr. Alvin Lee, Licenced Surveyor and dated 4th November 2015. This Plan clearly demarcated the area being claimed by the Claimant and at paragraph 10 of her affidavit filed in support of her Application, the Appellant identifies the area claimed on the plan as Lot 3A and Lot 3B.
- [4] As part of the hearing, the Registrar also conducted a site visit on 27th October 2010. She indicated that as it was not physically possible to traverse the entire 11.12 acres of land and so she relied on information from the Survey Department in order to ascertain whether any activities had been carried on the relevant portion of the parcel. The Registrar also considered what she described as a **Schematic** produced by the Government Survey Department showing the areas of Parcel 221 which she awarded to the Claimant.
- [5] It is not denied that during the course of the hearing and prior to rendering her decision, the Claimant was not made aware of the information and representations provided by the Survey Department including the Schematic.
- [6] On 7th December 2016, the Registrar rendered a decision in which she prescribed that the Claimant was entitled to 1.19 acres rather than the 11.12 acres claimed. In arriving at her decision the Registrar concluded that whilst there was evidence that Thomas Owen Christopher (through whom the Claimants claims) had cultivated a portion of Parcel 221, there was no evidence that he had used and occupied exclusively all or any of the portion of the 11.12 acres claimed.
- [7] In appealing this decision, the Claimant has advanced the following grounds of challenge:
1. That having found that the Claimant had the requisite legal standing to bring the application on behalf of her deceased father's estate, and that her application was unopposed, the Registrar ought to have awarded her possessory title of the entire acreage claimed.

2. That the Registrar failed to take into account that 10 years had elapsed since the death of Thomas Owen Christopher so that there would be no direct evidence of cultivation. That the Registrar failed to consider that the evidence of fencing “from the top of the road to the ghut at the bottom of the land” was evidence of an intention of possess.
3. That the Registrar wrongly relied on the survey carried out by the Survey Department in order to ascertain what area Thomas Owen Christopher possessed, in circumstances where the author was not called as a witness or presented for cross examination. Further, that the drawing or Schematic relied on in her decision was not presented at the hearing and the Parties had no opportunity to address its contents.
4. That the Registrar misdirected herself in law as to the *locus standi* of Valdrena Smith, the interested party to bring an application for possessory title when she was a licensee of Thomas Owen Christopher.

[8] This Appeal was opposed by the Registrar and by the Interested Party.

COURT’S ANALYSIS AND CONCLUSION

[9] The simple question for determination in the application advanced before the Registrar was whether the Applicant acquired title to the property by peaceable, open and uninterrupted possession thereof for a period of twenty (20) years without the permission of the person lawfully entitled thereto. Although, this is essentially a question of fact to be determined on the evidence, it is worthwhile to first review the applicable law.

[10] Section 135 of the Registered Land Ordinance provides as follows:

- (1) “The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of twenty years, provided that no person shall so acquire the ownership of Crown land.
- (2) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar for registration as proprietor thereof.”

[11] At the very heart of the prescription law is establishing when the person entitled to claim the land was either dispossessed or discontinued possession of the land. This is because time starts to run “at the time of such dispossession or discontinuance of possession.”

[12] Before that question can be settled, it must be understood what the law means by possession. The English Courts have provided a number of useful judicial precedents in this area but it is generally accepted that the case of **J.A. Pye (Oxford) Ltd. & Others v. Graham and Another**¹ stands as a definitive authority on the applicable legal principles.

[13] **J.A. Pye (Oxford) Ltd and Others v. Graham and Another** reproduced from Slade LJ in **Powell v. McFarlane**² the following statement of principle:

"Factual possession signifies an appropriate degree of physical control... Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. **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.... what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.**"

[14] The two elements necessary for establishing legal possession are:

- "(1) a sufficient degree of physical custody and control ("factual possession");
- (2) an intention to exercise such custody on one's own behalf and for one's own benefit ("intention to possess").

[15] Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. A tribunal must consider whether the squatter/trespasser has dispossessed the paper owner (in this case, the registered proprietor) by going into ordinary possession of the land for the requisite period without the consent of the owner.

[16] Moreover, a tribunal is also obliged to bear in mind the very useful dictum of Cairns LJ in **Red House Farms (Thorndon) Ltd v. Catchpole [1977] 1 EGLR 125**:

"The authorities make it clear that what constitutes possession of any particular piece of land must depend upon the nature of the land and what it is capable of use for: see, for example, *Tecbild Ltd v. Chamberlain* (1969) 20 P and CR 633, at p 641. I am quite satisfied that between 1945 and 1964 the only profitable use of this land was for shooting. Our attention was drawn by Mr. Cullen, on behalf of the defendant, to the Privy Council case of *Cadija Umma and Anr v. S Don Manis Appu* [1939] AC 136, where, as appears at

¹ 2003 1 AC 419

² [1979] 38 P & CR 452 at 470 – 471

p 140, cutting the grass was treated as possession in relation to the particular piece of land. So here I think that the learned judge was quite right to treat the shooting activity as constituting possession.”

[17] The requisite intention may be, and frequently is, deduced from the physical acts themselves. The courts have made it clear that “it is not the nature of the acts which an applicant does but the intention with which he does them which determines whether or not he is in possession.”³ The squatter/trespasser’s attitude to ownership is irrelevant. He may know that the land belongs to someone else or he may mistakenly believe that it is his. Alternatively, he may never have thought about the question of ownership but simply treated the land as his because it was there and it suited his purposes. Whatever the trespasser’s understanding about the ownership of the land, he must intend to exclusively possess it – in other words he must intend to take control of it as if it were his own and to exclude everyone else from it.

[18] The *animus possidendi* was defined by Slade LJ in **Powell v. McFarlane**⁴ in the following way:

“....the *animus possidendi* involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”

[19] It will always be a question of evidence as to whether the squatter/trespasser had the necessary *animus possidendi*. In many circumstances, this will be inferred from his acts of factual possession – for example, enclosing land by erecting a new fence or fitting new locks to doors will usually be taken as convincing evidence that the trespasser intends to establish exclusive possession.

[20] Further refining the requisite intention, Slade LJ in **Buckinghamshire County Council v. Moran**⁵ made the following observation:

“What is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess, that is to say an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title.”

³ (2001) 82 P & CR 494, at p 499

⁴ [1979] 38 P & CR 452 at 471 – 472

⁵ [1989] 2 ALL ER 225

Ground No. 1 – Having found that the Claimant had the requisite legal standing to bring the application on behalf of her deceased father's estate, and that her application was unopposed, she ought to have awarded her the possessory title of the entire acreage claimed.

- [21] The Claimant's application before the Registrar included three affidavits and a surveyor's drawing indicating the area of land claimed. The evidence filed in support revealed that she made the claim on behalf of her father, Thomas Owen Christopher's estate on the basis that prior to his death, he had been in possession of the property for a period in excess of twenty (20) years and that his possession was exclusive and uninterrupted and without the permission of anyone.
- [22] Counsel for the Claimant asserts that the Claimant's application was unopposed on all of these points. He submitted that while those who knew the area and were familiar with Thomas Owen Christopher's occupation raised no objection to her claim, the Chief Registrar decided on her own that the Claimant was entitled to less land than she claimed. Counsel submitted that in doing so the Registrar discarded the evidence before her and relied on her own perceptions. Counsel appeared to submit that in the absence of any opposition to the application, the Registrar was obliged to rule in the Claimant's favour and to award possessory title of all of the lands claimed.
- [23] This contention was opposed by the Registrar who noted that the Claimant has provided no case law or other statutory authority to support the position that in the absence of objections, prescriptive title should automatically be granted to all the lands claimed by an applicant. Moreover, Counsel maintains that the law on prescription is clearly defined by statute and case law and so this ground of appeal must fail.
- [24] This Court agrees. The factors which a tribunal are obliged to consider on an application for prescriptive title are a matter of statute and settled case law. Notwithstanding that an application is unopposed, the Registrar is obliged to consider the evidence before her and come to a determination having assessed the evidence on a balance of probabilities. In that regard, it is clear that a registrar is well within his rights to grant possessory title to some and not all of the land claimed where he is satisfied that the fact of possession and the intention to possession have not been made out on a balance of probabilities.

- [25] This was made clear in the judgment of **Ulric Charles and Anor v. Kristy Antoine and Anor, SVG High Court Claim 37 of 2010** where at paragraph 41, Joseph J (as she then was) concluded that depending on the circumstances of the case, a court can specify a smaller area of land within a larger portion. By way of example the learned Judge cited the case where a Court finds that a person has been in occupation of a small defined area of land that is part of a larger area. She concluded that it is for the court to determine what information it accepts from the facts the Applicant submits or what area of land the applicant has actually possessed. On the facts of that case, the learned judge found that the applicants had satisfied the components of possession only of that portion of the property which was fenced.
- [26] Joseph J relied on the following dictum of Sir Vincent Floissac CJ in **Civil Appeal No. 13 of 1994 Florence Louise Belfon v. Lester McIntosh** where at p.7 the Chief Justice stated:
- "To adjudicate on issues of ownership and right to possession of the smaller portion of land (of a larger and smaller portion) it would be necessary to decide various subsidiary and collateral questions of fact. (1) Whether during the prescribed period M... "and the appellant were successively in exclusive possession of the small portion or whether or to what extent they were in possession concurrently with E.... and the respondents (2) Whether the buildings erected by M and her husband were erected on the larger or smaller portion, (3) If the buildings were erected on the smaller portion whether they were erected in circumstances which engender an estoppel by acquiescence or an implied resulting or constructive trust."
- [27] The Court therefore finds that as a matter of law, the fact that an application is unopposed does not oblige a tribunal to decline from carrying out an assessment of the all of the facts and circumstances and law of the case. Indeed, in the Court's view, the absence of an opposing case obliges the tribunal to anxiously scrutinize an applicant's case in order to verify the appropriate discharge of the burden of proof to the requisite standard.
- [28] In accordance with section 142 of the **Evidence Act 2006**, the applicable standard of proof in civil proceedings is "on a balance of probabilities" and not "beyond a reasonable doubt". Moreover it is now well established law that in claims for possessory title, the onus of proof lies squarely on the person asserting possessory title, who must demonstrate on a balance of probabilities that he or

she satisfies the statutory requirements of the relevant legislation. The court in **Vera Noel v. Laurina Charles et al.** explained the position in this way:⁶

“It is said that “The burden is on the plaintiff to prove a right to possession as against the defendants. Once this burden has been discharged on a balance of probabilities, the burden then lies on the defendants, on the same standard, to prove that they are entitled to resist the claim by virtue of the Limitation of Actions Act.” (per Alleyne J. in **Joseph Lett v. Nathaniel Davis and Veronica Jones**⁷.)

[29] The Claimant must therefore satisfy the Registrar on a balance of probabilities of the merits of her case and in applying the standard of balance of probabilities, a Registrar must be guided by the dicta of Baroness Hale in the House of Lords decision **Re B (Minors)**⁸ and by Lord Nicholls in **Re H (Minors) (Sexual Abuse: standard of proof)**⁹.

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

[30] For the reasons set out herein, the Court is satisfied that this is ground of appeal must therefore fail.

Ground No. 2 – That the Registrar failed to take into account that 10 years had elapsed since the death of Thomas Owen Christopher so that there would be no direct evidence of cultivation. That the Registrar failed to consider that the evidence of fencing “from the top of the road to the ghut at the bottom of the land” was evidence of an intention of possess.

⁶ GDAHCV1999/ 0513

⁷ Civil Suit No. 403 of 1994 (Grenada)

⁸ 2008 EWCA Civ. 282

⁹ 1996 AC 563 at 586 D-H

- [31] The combined effect of the matters raised in this Ground is that the Registrar failed to properly consider the evidence which was presented in support of the Claimant's application for possessory title. Having reviewed the record of the proceedings before the Registrar, her Decision and her Statement, and having heard the submissions of counsel for Parties, the Court is satisfied that the Claimant's application for prescriptive title would have posed a great difficulty for the Registrar.
- [32] This was by no means a conventional application. First, it is apparent that the area of land claimed was specifically identified in **Plan No. CP – 2737B – 101 – T (Lot 3A and 3B)**, prepared by Mr. Alvin Lee and dated 4th November 2015 delineated in red. Remarkably, when Registrar convened a site visit, it became clear that the matter would not be as straightforward. The confusion was detailed in the Registrar's Statement in the following terms:
- “Whilst there was evidence that Thomas Owen Christopher had cultivated a portion of the Parcel, there was no evidence that he had used and occupied exclusively all or any portion of the 11.12 acres being claimed. The area being claimed was in a totally different location from the area pointed out by the Claimant/Appellant at the locus; that area being where the horse stable was located and where the mango trees and other fruit trees had been planted.”
- [33] Also in her decision, the Registrar found:
- “The visit to the locus revealed that Mr. Christopher occupied and possessed that portion of Parcel 221 where he kept his horses and his animals and where he planted numerous fruit trees.”
- [34] As a result, the Registrar determined that the Claimant had met the required standard of proof only in relation to 1.19 acres out of Parcel 221, which most closely abuts Parcel 11 and she ordered the Claimant to demarcate the 1.19 acres as shown as “Lot D” on the **Schematic** which she annexed to her decision. In the schematic, that area appeared in the upper portion of Parcel 221 just below Parcel 11.
- [35] The discrepancy was reiterated during the trial of this matter and it became clear that the 1.19 acres awarded to the Claimant was located in an entirely different part of Parcel 221 than that delineated in red in the **Plan No. CP – 2737B – 101 – T**. It was therefore clear that this land was not the subject of the Claimant's application for possessory title.

[36] While it is clear that the Registrar is able to award a smaller area of land within a larger portion of land claimed, it would undoubtedly be incongruous for a Registrar to award prescriptive title to land which did not form part of an application and which was not advanced or pursued by the Claimant. The court in **Ulric Charles and Anor v. Kristy Antoine** recognized this at paragraph 41 of the judgment:

“Learned Counsel submitted that the Court has no authority under Section 4 (a) of the Act to specify a different area of land than that described by the Applicants. **I think depending on the circumstances of the case, a Court can specify, not a different area of land but a smaller area of land within a larger portion.**” **Emphasis mine**

[37] It appears from the Registrar’s decision, that she refused the Application for prescriptive title made in respect of the land delineated in the Alvin Lee’s Plan which was the actual land claimed by the Claimant. Her Statement reflects that she did in fact take into account of the fact that 10 years had elapsed since the death of Thomas Owen Christopher and that some natural overgrowth was possible since his death. However, she stated that there was *“no evidence that there were fruit trees planted or that cultivation had taken place on the specific portion of the Parcel being claimed by the Claimant.”*

[38] With regard to the presence of fencing, her Statement revealed that:

“The remnants of the fence said to be erected by Owen Christopher were still visible as pointed out by the Claimant/Appellant and other family members at the site visit. However, the area where the remnants of the fence were located bore no relation to that part of the Parcel being claimed by the Claimant/Appellant. There was no evidence of fencing on any part of the 11.12 acres being claimed.”

[39] In the ordinary case, such findings would be entirely acceptable however it appears that Registrar’s inability to make findings of fact regarding possession is tied to the topography of the land claimed. Her decision reflects the following:

“What is worthy of note is that the Applicant’s claim relates to 11.12 acres which appears on a steep slope well below Parcel 11 and which the Tribunal was unable to access due to the nature of the terrain. The area was not accessible. The Applicant’s family showed the remains of a track which was once used to access the lower slopes of Parcel 221.”

[40] Unfortunately, it is the very same inaccessible area of the Parcel which is the subject matter of the Claim. It appears that because she was unable to traverse and examine the area, the Registrar relied on information obtained from the Survey Department in order to ascertain whether any

activities had been carried out of the relevant portion. Unfortunately, it is apparent that this information was not provided to the Claimant and she was given no opportunity to test the same.

- [41] In the Court's judgment such failure is inconsistent with adjudicating role undertaken by the Registrar. In circumstances where acts of possession are alleged in respect of an area of land which is inaccessible, clearly the Registrar cannot be expected to endanger her personal health and wellbeing. However, it would seem to the Court that every effort and all reasonable means should be employed in order to verify the alleged acts of possession exercised over the land. For example, in some cases this may require the use of specialized equipment or personnel or aerial photography.
- [42] It was therefore entirely reasonable for the Registrar to co-opt the assistance of the Survey Department to carry out the physical examination of the property and to report on their findings. However, in so doing, the Registrar was obliged to adhere to the principles of natural justice. Had she done so she would no doubt have had the benefit of a more fulsome recount of the user of that land. For example, she would no doubt have been told that while the track to the ghut was not exclusively used by Thomas Owen Christopher, it was actually located outside the area claimed and so the question of exclusive possession could have been fully and more accurately ventilated.
- [43] In the Court's judgment, it was not reasonable for the Registrar to simply ignore the evidence in support of the application in circumstances where it was difficult or impossible for her to have verified otherwise. The Registrar must have a basis by which she could properly conclude that the allegations of acts of factual possession and intention to possess have been disproved on a balance of probabilities.
- [44] Further, if as indicated, the Registrar secured the assistance of the Survey Department in order to verify or corroborate these assertions, she was then obliged to apply natural justice principles.
- [45] Having considered all of the evidence in this case as well as the written and oral submissions, the Court is not satisfied that the Claimant's application in respect of Lot 3A and Lot 3B would not have been suitably considered.

Ground No. 3 – That the Registrar wrongly relied on the survey carried out by the Department of Surveys in order to ascertain what area Thomas Owen Christopher possessed in circumstances where the author was not called as a witness or presented for cross examination. Further that the drawing or Schematic relied on in her decision was not presented at the hearing and the Parties had no opportunity to address its contents.

- [46] The Claimant submits that rather than rely on the affidavit evidence advanced by the Applicant, the Registrar took into account a report from personnel within the Survey Department who did not give evidence during the hearing and were not subjected to cross examination, thereby substituting their views for the unchallenged evidence of witnesses who testified under oath.
- [47] In responding, Counsel for the Registrar conceded that drawing or schematic was not presented at the hearing and did not form part of the evidence. However, she states that it came about because of a need to clarify the overlapping claims made in respect of Parcel 221.
- [48] The Registrar submitted that she was entitled to rely on information obtained from the Department of Surveys in order to ascertain whether any activities have been carried out on the relevant portion of Parcel claimed. She submitted that such reliance speaks to the unchallenged practice of the Registrar to rely on aerial surveys and other information available from the Survey Department.
- [49] The Registrar relied on the dictum of Olivetti J in **Elizabeth Beach Resort Ltd. v. Registrar of Lands and Joseph Lettsome BVIHCV No. 317 of 2006**. That case concerned a boundary dispute and at paragraph 14, the learned Judge noted:
- “It is obvious that the Registrar relied on the findings of the Survey Department as contained in the report as well as on his own observations which propelled him to accept that report. The Registrar is not himself a surveyor I believe and is entitled to rely on expert evidence if he finds that evidence convincing. The RLA in fact gives the Registrar the authority to consider such evidence as he sees fit in determining a boundary dispute.”
- [50] In the Court’s judgment, the peculiar nature of claims made in respect of this Parcel and the imprecise way in which they were advanced made it almost inevitable that the Registrar would require the assistance of a surveyor and the Survey Department. The Court agrees that the Registrar would be entitled to take into account all relevant matters in coming to her decision. In

doing so, she cannot lose sight of the basic principles of natural justice which prescribes that whenever the interest of a person is affected by a judicial or administrative decision, that person be provided the opportunity to know and to understand the allegations made against him/her, and to make representations to the decision-maker to confront those allegations. A fundamental element of fair adjudication prescribes that the individual have the right to be informed in advance of the case to be met – i.e. the factual basis on which the decision maker may act. The rules of natural justice also prescribe that an individual has the right to cross-examine persons who may have made prejudicial statements to the decision-maker. Irrespective of the nature of the body making the decision, whether that is judicial/quasi-judicial or administrative, the main aim is that a person should be treated fairly.

[51] It therefore follows that if the Registrar had tasked an individual of the Survey Department to carry out investigations on which she intended to rely and if a draft schematic was prepared as a result, then this ought to have been presented to the parties involved so that they could properly address the same.

[52] Ironically, these principles were clearly acknowledged and applied by the registrar in **Elizabeth Beach Resort Ltd. v. Registrar of Lands and Joseph Lettsome**. The facts of that case reveal that the registrar in that case conducted a site visit during which representatives of the appellant and their solicitor and representatives from the survey department were present. The registrar instructed the survey department to carry out field investigations and in so doing to notify the respondents to give them an opportunity to make representations. The survey department carried out their field investigations which included a site visit and on that date the second respondent attended on behalf of all the respondents. The survey department subsequently presented its written report with a plan to the registrar. Thereafter, the registrar conducted a final site visit to show the surveyor's findings on the ground to the parties. At that time both parties were represented and the registrar and the surveyor were present.

[53] In the Court's judgment this was the appropriate course to be followed in the circumstances of the case and the failure of the Registrar to apply this procedure means that this ground of appeal must be upheld.

Ground No. 4 – That the Registrar misdirected herself in law as to the locus standi of Valdrena Smith, the interested party to bring an application for possessory title when she was a licensee of Thomas Owen Christopher

- [54] At the hearing before the Registrar, the evidence in respect of Valdrena Smith reveals that she had a relationship of Thomas Owen Christopher who was cultivating the subject land when she met him. She stated that she moved into his house in the 1980s and lived with him until his death but they were never married.
- [55] The Claimant submits that Valdrena Smith was a mere licensee who is unable to claim possessory title because by her own admission, Thomas Owen Christopher had already established the right to prescriptive title by the time she moved into his house. She submitted that the only way in which Ms. Smith can establish a right is by showing that she had dispossessed Thomas Owen Christopher. Counsel for the Claimant submitted that it is not disputed that at the date of his death Thomas Owen Christopher was still in possession of the property and 20 years would not have elapsed since his death.
- [56] This submission did not persuade the Registrar who found that Thomas Owen Christopher was unable to grant a license to Ms. Smith because at the time he was not the lawful owner of the land and so did not have the requisite legal capacity to grant a licence to occupy. Counsel submitted that the Registrar correctly addressed her mind to the fact that Ms. Smith applied for prescriptive title in her own right after she had occupied that part of the parcel for the requisite 20 year period, partly during the time that she cohabitated with Thomas Owen Christopher and for 10 years after his passing. The Registrar found that Ms. Smith made her claim independently of her association with Thomas Owen Christopher.
- [57] A fundamental principle of the common law is that possession of land is *without more* capable of giving a good title against the rest of the world save someone having a better legal right to possession.¹⁰ The principle that title to land is dependent on the better right to possession is embodied in our legal systems which have repeatedly applied the dictum in **Asher v Whitlock**¹¹

¹⁰ Rosenberg v Cook (1881) 8 Q.B.D. 162, at 165, per Jessel M.R

¹¹ (1865) L.R. 1 Q.B. 1.

- [58] In **Allen v Roughley**¹², Dixon C.J. observed that “there can be no doubt that a person who is in possession of land without a good documentary title has, whilst he continues in possession, a devisable interest in the property.” Similarly, Taylor J. stated that “the inchoate interest [resulting from possession of the land] . . . was an interest which might have been assigned or, as actually occurred, devised by the testator.” One practical consequence of this is the fact that if a squatter’s possession is disturbed by trespass or nuisance, he can sue on the strength of his own possession and does not have to prove his title.¹³
- [59] The courts have determined that transmission of a possessory title is possible by sale or gift, or on death, and in the Court’s judgment the adverse possessor may also grant a licence to occupy. After all, a licence is essentially a permission given by the owner or occupier of land (the licensor) to another person (the licensee) to enter upon the land for some purpose.¹⁴
- [60] The judgments in **Ward v. Ward [1871] LR 6 Ch. App. 789** and **MacCormack v. Courtney [1895] 2 IR 97**, make it clear that two persons may jointly exercise acts of ownership, and they may thus gain a possession which vests in them an estate as joint tenants. Where two or more persons acquire a title under the statute of limitation by joint possession, they would become joint tenants of the property so acquired. In such a case, there is really one possession, with the possessors enjoying together the rights which flow from it.
- [61] It would of course be very different where there are two persons on land, each claiming possession independently of the other. In that case, neither could acquire actual possession without excluding the other. Unfortunately, it appears that this is precisely the case advanced on behalf of Ms. Smith.
- [62] The judgment in **Jacqueline Chance v. 1. Jane Sutherland; 2. Stafford Baptiste; 3. Lydia Baptiste St. Vincent High Court Civil Claim No. 90 of 2008** is instructive.
- [63] In that case, the first defendant based her claim to the disputed land on two grounds including that:
- (a) Isaac Brown, her predecessor in title was in peaceable undisputed possession of the land in

¹² (1955) 94 C.L.R. 98,

¹³ *Simpson v Ferguson* (2000) 79 P. & C.R. 398, at 401, per Robert Walker L.J.; *Hunter v Canary Wharf Ltd* [1997] A.C. 655, (H.L.

¹⁴ 4th Edition Commonwealth Caribbean Property Law Gilbert Kodilinye at page 86

excess of twelve years. (b) She was in joint possession of the disputed land with Isaac Brown in excess of twelve years, or she successively possessed the disputed land. Counsel for the First Defendant argued that she and the deceased, Isaac Brown were both in adverse possession of the disputed land and that he later agreed for the First Defendant to have the beneficial interest when he bequeathed the said land to her by Will. Under cross examination, the first defendant testified that her mother had a relationship with Isaac Brown who at that time had a common law wife. They had no children. She told the Court that she believed the disputed land was Isaac Brown's land because he worked the land. Isaac Brown later gave her all the land he had in his will including the subject house and the land.

[64] It is therefore not surprising that the learned Thom J. (as she then was) reached the following conclusion at paragraph 43 of the judgment:

“However, I do not find that Jane Sutherland was in joint possession with Isaac Brown of the disputed land. Jane Sutherland recognised the land as belonging to Isaac Brown, living in his household she assisted him from time to time in cultivating the small area of land around their home. She did not have joint factual possession as explained in the case of JA Pye, she was not dealing with the land as an occupying owner might have been expected to deal with it. She thought the land belonged to Isaac Brown and she was merely helping him being a member of his household.”

[65] It is unclear whether the Registrar had regard to the relevant case law. It appears that having decided that Thomas Owen Christopher was not a lawful owner or licensor, the Registrar may not have gone on to consider the authority by which Ms Smith came to be on the land and whether she could be said to have dispossessed her common law husband, Thomas Owen Christopher who had by the date of her entry onto the land been in possession for the statutory period.

[66] However, for purpose of this Appeal, the Court will make no definitive finding as to the Valdrena Smith's claim because it is clear that Ms. Smith's claim does not relate to actual lands claimed by the Claimant. This factor was made clear during the course of this trial as the Claimant continued to rely on the **Plan No. CP – 2737B – 101 – T** prepared by Mr. Alvin Lee which demarcated the area (at trial Counsel for the Claimant represented that it would be Lot 3A and Lot 3B) being claimed by the Applicant. This is the land which forms the subject matter of this Appeal. The area (measuring 0.20 acres) of Parcel 221 vested in Valdrena Smith appears as Lot A on the schematic

and bears no relation to the lands claimed by the Claimant. The Court will therefore decline to make any finding as to the propriety of the Registrar's finding regarding Ms. Smith's title.

The Claimant's *locus standi*

- [67] In legal submissions filed during the trial, Counsel for the Interested Party submitted that the Claimant has no *locus standi* to make this application. This submission is premised on the basis that although she is the personal representative of the deceased Thomas Owen Christopher's estate, she cannot demonstrate that she was in possession of the Property on behalf of her father.
- [68] Counsel submitted that there is no evidence that the Claimant was put in possession by her father or enjoyed possession jointly with him for a period of 20 years. Counsel therefore argued that as she cannot demonstrate the requisite possession on her own, then the Claimant cannot claim possessory title through her later father under section 136 of the Act.
- [69] Counsel further argued that even if Thomas Owen Christopher had a right to make an application for possessory title while he was alive, that right terminated on his death and cannot lawfully devolve to his personal representative. The Claimant relies on the judgment in **Asher v. Whitlock**. Curiously, Counsel argued that if Thomas Owen Christopher had devised the property by will to the claimant she would then have an interest in land because he did not have title to the land. Counsel further argued that Thomas Owen Christopher's interest in the property could not pass to the Claimant on intestacy.
- [70] The Court has considered the case of **Asher v. Whitlock**¹⁵ and the Court is satisfied that it does not assist the Interested Party. On the contrary, this case makes it clear that a mere possessory title is devisable. It made clear that the state of the testator's title has no effect on the power to devise or bequeath, but he can only devise or bequeath, and the devisee or the legatee can only get, what the testator had at the time of his death. The decision in **Asher v Whitlock** demonstrates that a possessory title is capable of transmission on death either by will or on an intestacy. In the words of Cockburn C.J.:

¹⁵ See also *Clarke v Clarke* (1868) IR 2 CL 395; *Calder v Alexander* (1900) 16 TLR 294

“There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner. Here the widow was a prior devisee, but *durante viduitate* [during widowhood] only, and as soon as the testator died, the estate became vested in the widow; and immediately on the widow’s marriage the daughter had a right to possession; the defendant however anticipates her, and with the widow takes possession. But just as he had no right to interfere with the testator, so he had no right against the daughter, and had she lived she could have brought ejectment; although she dies without asserting her right, the same right belongs to her heir.”

[71] It is interesting to note that, in this case, there were two stages of devolution. First, the possessory right passed to the widow under the testator’s will and, secondly, it passed to the daughter’s heir upon an intestacy.

[72] In Halsbury’s Laws of England¹⁶ the learned authors state the position in the following terms:

“While a person who is in possession of land without title continues in possession, then, before the statutory period has elapsed he has a transmissible interest in the property which is good against all the world except the rightful owner but an interest which is liable at any moment to be defeated by the entry of the rightful owner, and, if that person is succeeded in possession by one claiming through him who holds until the expiration of the statutory period, the successor has then as good a right to the possession as if he himself had occupied for the whole period.”

[73] In response to this complaint, Counsel for the Claimant relied largely on the dictum on **Burton v. Elvin** 46 WIR 117 in which Eastern Caribbean Court of Appeal. In that case, William went into occupation of the disputed land in 1952. He was married to Beatrice, who also occupied the land. Beatrice died in 1968 and William subsequently married his second wife, the respondent. By her original will, Beatrice left part of the disputed land to William. In 1973, Beatrice’s personal representative issued a writ against William claiming (*inter alia*) an account of rents and profits from the disputed land from the date of Beatrice’s death. William died intestate in 1987; letters of administration of his estate were granted in 1989. The respondent applied for the grant of a first certificate of title to the disputed land by reason of William’s prescriptive title acquired over thirty years. The appellant, as Beatrice’s successor-in-title, entered a *caveat* to the application for a first certificate, claiming that she (or he) had been the true owner of the disputed land and that her (or his) assertions of ownership had interrupted William’s acquisition of a prescriptive title to it.

¹⁶ 4th ed. Vol. 28 paragraph 988

[74] The central issue in that appeal was whether the disputed land belonged to William (the late William Alexander Elvin) or to Beatrice (the late Beatrice Elvin, who was William's first wife). If it belonged to William, it would have devolved to the respondent who is William's widow, second wife and administratrix (or personal representative). The Court of Appeal held that William acquired a prescriptive title to the disputed land during his lifetime, as evidenced by the receipts for municipal and house and land taxes in his name, certificates in his favour from the Rent Restriction Commission, credible testimony from two witnesses and the absence of evidence rebutting his prescriptive possession.

[75] In that case, the respondent adduced evidence that for at least thirty-five years (i.e. from 1952 to the date of William's death in 1987), William performed various acts of ownership and possession of the disputed land. It follows that it is entirely appropriate for a personal representative to advance a case for prescriptive title on behalf of the estate of a person in respect of whom there was sufficient acts of possession and ownership proven to the requisite degree and for the prescribed period. Further, the fact that the personal representative was not in occupation at the time of application would not without more militate against an application for prescriptive title.

[76] In the Court's judgment, this objection raised by the Interested Party cannot be maintained.

[77] Given the Court's findings in respect of Grounds 2 – 4, the Court is satisfied that this appeal must be allowed. The Court is aware that its powers on an Appeal are wide.¹⁷ However, the Court is satisfied that on the way in which this application has been dealt with, that the appropriate course is to have the matter remitted to the Registrar for her consideration in accordance with the terms of this judgment.

¹⁷ ECSC CPR Part 60.8 (4)

[78] **The Court's order is therefore as follows:**

- i. The Claimant's appeal is allowed.
- ii. The decision of the Registrar awarding 1.19 acres of land identified as Lot D or the Schematic to the Claimant is set aside.
- iii. The matter is remitted to the Registrar for her to consider the Application in accordance with the findings of this Court.
- iv. The Claimant will have her costs to be assessed not agreed.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar