

EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2012/0257

BETWEEN:

RUSHAN BTHELMIE

Attorney on record for Son Bethelmie

Claimant

And

FRANCOIS BTHELMIE

Defendant

Appearances:

Mr. Glen Ducreay of Glen Ducreay Chambers for the Claimant

Mrs. Hazel Johnson of de Freitas, de Freitas and Johnson Chambers for the Defendant

.....
2014: May 28th, 29th

October 16th

Re-issued: October 30th
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JUDGMENT

- [1] **THOMAS, J: [AG]** By way of a fixed date claim, filed on November 16th, 2012, Rushan Bethelmie, holder of a Power of Attorney from Son Bethelmie, the Personal Representative of McDonald



Bethelmie, deceased, of Calibishie in the Parish of St. Andrew in the Commonwealth of Dominica; claims against the defendant, Francois Bethelmie certain reliefs, with respect to land.

Statement of Claim

- [2] In his statement of claim the claimant avers that he was at all material times a beneficiary under the will of McDonald Bethelmie and holder of a Power of Attorney from his brother, Son Bethelmie. And, as far as the defendant is concerned, the contention is that he was at all material times a trespasser and occupier of land belonging to the heirs of McDonald Bethelmie, including the claimant.
- [3] As far as the will of McDonald Bethelmie is concerned, it is pleaded that: the said McDonald Bethelmie bequeathed his estate including land to his children, including the claimant, and that on September 16th, 2011 probate was granted to Son Bethelmie.
- [4] With respect to the trespass alleged by the claimant, the averments are that: The Estate of McDonald Bethelmie included land in Quete Coco, also known as "Quete Coco", in Calibishie. On a part of the said land, the defendant, not being an heir of McDonald Bethelmie, deceased, has trespassed and illegally occupied. And further that the defendant has erected a wooden house on the said land.
- [5] At paragraphs 6 and 7 of the said statement of claim the efforts to end the defendant's trespass to no avail are pleaded. Instead, the solicitor for the defendant wrote to the solicitor for the heirs of McDonald Bethelmie informing him that the land occupied by the defendant does not legally fall under the Estate of McDonald Bethelmie; and that moreover the defendant has been in continuous and undisturbed possession of the said land for well over 20 years thus giving him prescriptive title to the land.
- [6] At paragraphs 10 to 12 of the said statement of claim the averments are that: On July 20th, 2012 the Registry issued a Certificate of Title in favour of Son Bethelmie, as Executor of McDonald Bethelmie in respect of 5.04 acres of land situate at Quete Coco, Calibishie; prior to the registration

the said 5.04 was held as unregistered land of the family of McDonald Bethelmie; the nine children of McDonald Bethelmie were born in a house on the said land and throughout their lives except when they migrated overseas resided in the said house situate on the said land. Further, that the claimant's father and mother remained in continuous occupation of the said land until in or about 1981 when they migrated to St. Croix. And further still, that prior to the occupation by the claimant's father and mother the land was occupied by the claimant's grandfather who purchased the same from Simon George, also known as Simeon George.

- [7] In respect of the alleged trespass by the Defendant, Francois Bethelmie, it is pleaded that the trespass commenced within the last seven years and that the defendant has constructed a wooden house on the said land.
- [8] Pled at paragraphs 16 to 19 is the administration of the estate of Simeon George by Eugenie George, personal representative of the said Simeon George, who died before the administration and distribution of the 30 acres to the heirs of McDonald Bethelmie. And that after her death Letters of Administration (De Bonis Non) were granted to Anelta P. Nixon, the granddaughter of the said Eugenie George and the said Anelta P. Nixon upon receipt of the Letters of Administration on July 16th, 2012 transferred the land to Son Bethelmie, Executor of McDonald Bethelmie, deceased.
- [9] Finally, it is pleaded that the defendant's trespass to the land plus his failure to quit the land is causing the claimant and the beneficiaries under the will of McDonald Bethelmie loss and damage.
- [10] In the premises the claimant's prayer is for the following reliefs:
1. A declaration that the claimant and the beneficiaries of McDonald Bethelmie, deceased are the owners of the property occupied by the defendants.
 2. The defendant deliver up possession of the said land
 3. Damages for illegal trespass and loss of access and use
 4. Interest or damage at the rate of 5% from the date of judgment.
 5. Further or other relief as the court deems fit.

Defence

- [11] In his defence the defendant in denying paragraph 2 of the statement of claim, avers that he is the owner in possession of a portion of land situate at Quete Coco in Calibishie containing 0.550 acre which land he was put in possession by his father, Pierre Bethelmie, aka Phillip, in or about 1989. And further that the defendant has been in undisturbed possession of the said land, as owner, for well over 20 years.
- [12] At paragraph 3 of his defence, the defendant pleads his occupation as a farmer and the cultivation of the said land from 1989 and also that the construction of a house thereon in 1999 and has lived therein with his family from 2006. Also pleaded is the survey carried out on his behalf in November 2009 for the purpose of applying for a Certificate of Title.
- [13] With respect to paragraph 8 of the statement of claim is admitted and in this regard the averment is that the first and only letter or 'appeal' received by the defendant from the alleged heirs of McDonald Bethelmie, in respect of the occupation of the land, was in late 2009 or early 2010.
- [14] At paragraph 9 the defendant avers that the land being claimed does not form part of the Estate of McDonald Bethelmie and the defendant admits that a caveat was lodged against the Certificate of Title.
- [15] Regarding paragraph 12 of the statement of claim, no admission is made by the defendant as to where the children of McDonald Bethelmie were born, and it is also denied that the 5.04 acres of land has been occupied and possessed by the family of McDonald Bethelmie for well over 60 years as alleged at paragraph 16 of the statement of claim.
- [16] At paragraph 16 of his defence it is pleaded by the defendant that he acquired a prescriptive title of his 0.550 acre of land in preference to the claimant's Certificate of Title pursuant to the provisions of the Title by Registration Act and as such he is entitled to a certificate of title. A further averment is that owing to the defendant's undisturbed possession of the land for well over twenty years, the

claimant is barred from bringing this claim against him and is therefore not entitled to be heard by the court in the matter.

[17] Finally, the defendant denies that the claimant is entitled to the reliefs claimed.

Evidence

Rushan Bethelmie

[18] In his witness statement Rushan Bethelmie gave his age as 72 and says that his father, McDonald Bethelmie, deceased, owned, occupied and cultivated 5.04 acres of land at Quete Coco and the said land was owned and occupied by the Bethelmie family for over 100 years.

[19] According to the witness, his father and his mother, Denise Bethelmie, also known as Cleotil Bethelmie, constructed their matrimonial home on the said land of McDonald Bethelmie, deceased, and had ten children upon the said 5.04 acres in the said matrimonial home being the site upon which the defendant has constructed his residential building.

[20] It is the evidence of Rushan Bethelmie says that "In the 50's"his father bought property in Calibishie and relocated his house from Quete Coco to the new location in the village of Calibishie for reasons of access to school and medical attention for his family. Further, in relation to the establishment of a new matrimonial home away from Quete Coco the witness also says that his father continued to farm the land in Quete Coco including his land currently occupied by and trespassed upon by the defendant.

[21] At paragraph 8 of his witness statement, the witness gave evidence of his journey to England in 1961 to work, his father's migration to St. Croix, U.S.V.I in 1981, his father's death in 1988 and the manner in which his mother, Denise Bethelmie, the immediate beneficiary of the late McDonald Bethelmie dealt with the area of the land upon which the defendant built his house. The witness goes on to say that: "At that time – 1991- neither the defendant nor his father, Phillip Bethelmie, had occupied the said land or any part thereof or cultivated any agricultural crops upon the said land and any part thereof."

- [22] The witness at paragraph 12 speaks of the survey he caused to be carried out in July 1997 in order to construct his home which was completed in 2006. He says further that at this time neither the defendant nor his father, Phillip Bethelmie were in occupation of any part of the land. Occupation was by Raymond Gredgaur .
- [23] In terms of the actions of the defendant on the lands of the heirs of McDonald Bethelmie, the witness' evidence is that the defendant began erecting a wooden house on the said land in early 2000's and that various members of the family informed him of his trespass. In this regard too, the evidence is that Bernard Bethelmie, a beneficiary under the will of McDonald Bethelmie and the lawyer for the Bethelmie family wrote to the defendant. In response the defendant, through his attorney, claimed that the land he occupied did not legally fall under the Estate of McDonald Bethelmie and that the defendant had been in continuous and undisturbed possession of the said land for over 20 years.
- [24] The evidence ends by detailing two events: On September 2011 probate was granted to his brother, Son Bethelmie in the Estate of McDonald Bethelmie, who subsequently granted him Power of Attorney in the said estate; and on July 20th, 2012 a Certificate of Title was issued in favour of Son Bethelmie, deceased in respect of the said 5.04 acres of land at Quete Coco.
- [25] Under cross-examination Rushan Bethelmie said that he left Quete Coco in 1958 with his family, when he was a teenager, to live at Calibishie Flats, also known as by the bay. The witness went on to testify that the land at Quete Coco was purchased by his grandfather. He went on to say also that he did not say that before, and that he did not see a Certificate of Title in his father's name, and that he did not see the will of McDonald Bethelmie.
- [26] Concerning the move to Calibishie Flats the witness testified that his father demolished the house at Quete Coco and brought it to the Flats.
- [27] When questioned about cows being on the land on which he built his house the witness said that he did not see any cows in 1997 and in 2003 there were no cows. In further cross-examination the

witness said that he did not have a good relationship with Francois. He added that the only time he went to Francois' house is when he went to tell him he had no right to be on the land.

Elta George

- [28] Elta George in her witness statement says she is the daughter of McDonald Bethelmie, deceased and a beneficiary thereof.

- [29] It is Elta George's evidence that her father owner, occupied and cultivated land at Quete Coco of 5.04 acres for more than 60 years and the land has been owned and occupied by the Bethelmie family for over 100 years; her father and mother, Denise Bethelmie constructed their matrimonial home on the said land and gave birth to 10 children, now aged between 86 years and 60 years.

- [30] The occupation of part of the said 5.04 acres by the defendant is also given in evidence.

- [31] It is the further evidence of the witness that her father moved his house from Quete Coco to another location in the village at which time she was 5 years old. The witness went on to say that despite the removal of the house her father still continued to farm his land at Quete Coco including the land occupied and trespassed upon by the defendant.

- [32] Among the matters highlighted in her evidence are: her father retiring in 1981 and migrating to St. Croix, U.S.V.I, her mother, Denise Bethelmie, by agreement in 1991 with Raymond Gradgaur allowed him to occupy and cultivate the area upon which the defendant built his house; in 1991 at the time of the said agreement, neither the defendant nor his father had occupied or cultivated the said land or any part thereof; in July 1997 her brother Rushan Bethelmie caused a lot of the said land to be surveyed in order to construct a house in which he still resides; commencing in 2009 efforts were made to inform the defendant of his illegal occupation; and on July 20th, 2012 a Certificate of Title was issued in favour of Son Bethelmie, as Executor of McDonald Bethelmie, deceased in respect of the said 5.04 acres of land at Quete Coco.

- [33] Under cross-examination Elta George said that the land in Quete Coco was referred to as Bethelmie land because her father's name was Bethelmie and the land was owned by Edward Bethelmie.
- [34] In further cross-examination the witness said that in 1976 she was in her 20's and she added that it is not true that her father did not cultivate Quete Coco when he lived in Calibishie flats. And she agreed that persons in Quete Coco would pick the fruits.
- [35] In relation to paragraph 9 of her witness statement and the measurements of 5.04, the witness said that as far as she was aware her father did not survey the land. And later the witness denied that her father did not know the land in Quete Coco was 5.4 acres. She said her father said the land was 5 point something acres.
- [36] With regard to the interaction with Francois Bethelmie, Elta George testified that she spoke to him once at the home of Rushan Bethelmie but could not remember Rushan offering Francois a drink. And further that she could not remember that Rushan was there. The witness in further evidence said that when she spoke to Francois she told him that the land he was on did not belong to him and that she should make a paper for him to pay rent of fifty cents per month. The evidence went on in this way: "I do not remember Francois saying to me that if he had to pay anything it would be to his father. I recall him saying that it was his father who put him on the land. He did not say anything about his father's share."
- [37] Continuing her evidence regarding the defendant the testimony is as follows: "I do not remember Francois Bethelmie went on the land between 1989 -1996. I do not know he planted crops before he built the house. I do not know he had fowls and rabbits. I do not know he had cows on the land where Rushan has his house now. From 2010 I know that Francois lives there and he plants there. I do not know if he is a farmer."
- [38] In re-examination Elta George said that she could not remember when she spoke to Francois Bethelmie. And with respect to her father she said he grew breadfruit, mangoes, shaddock, cocoa, coffee, dasheen and yams. She said he also had pigs.

Patrick George

- [39] Patrick George in his witness statement said he was born in Calibishie Ridge and is married to the daughter of McDonald Bethelmie, Elta George, nee Bethelmie.
- [40] In relation to the land in issue, the witness said that having grown up in Calibishie, he not only knew McDonald Bethelmie but also his land and always knew that McDonald Bethelmie's land bounded and still bounds with his father's property. And in respect of Phillip Bethelmie, the witness says that he has never known him to possess or reside upon or cultivate land at Quete Coco. In this regard the witness said that he knows that Phillip Bethelmie owns, resides on and cultivates land at Calibishie Ridge on land given to him by his grandmother.
- [41] Patrick George gave evidence that in 1979 he left Dominica to take up residence in St. Croix, U.S.V.I but returned on an average of once every three years. On one such return in 2003 to construct a house of Isidore Bethelmie, he saw a wooden shack being erected on the property of McDonald Bethelmie but there was no one residing there. He says further that he later found out from the defendant that the wooden shack belonged to him. And with respect to the land on which the shack was being built the witness said that it was being cultivated by the heirs of McDonald Bethelmie and one Raymond Gredgaur.
- [42] Concerning the residence of Phillip Bethelmie, the witness said that in 1996 the defendant resided and rented the house of Mrs. Marilyn Daniel in Calibishie which is not in Quete Coco. He added that the defendant was evicted from the house in 2006.
- [43] In cross-examination Patrick George said in Quete Coco he did not know the land called Bethelmie land and that he did not know that people call land by the family name. It is his evidence that when he came back to Dominica in 2003 to build Rushan's house, Francois was using the land and at that time he had crops on the land where he is now. He added that he saw a house there but no animals.
- [44] With respect to Raymond, the witness said that when he came in 2003 he had no crops and it is there we had to build the house. In further evidence on Francois Bethelmie house, the witness said

that it was 85% complete, it was wooden, it had a roof but there was no water or electricity and there were some windows or doors.

- [45] Finally, Patrick George testified that the land which Francois occupied has a view, the land belongs to the family and they should get it.

Selwyn Bruney

- [46] Selwyn Bruney in his evidence in chief said that he once worked as a Police Officer in the Calibishie District 1972 to 1976 and got to know McDonald Bethelmie quite well. And he also knew that he owned land in Quet Coco which he visited quite often because his daughter's land also bounds with the land of McDonald Bethelmie.

- [47] With respect to the defendant, the witness said that he is the son of Phillip Bethelmie whom he knew very well as residing at "Ravin Made," Calibishie Ridge; and never knew the defendant nor his father to occupy the land of McDonald Bethelmie.

- [48] Under cross-examination Bruney said that he met McDonald Bethelmie who told him he owned land in Quete Coco and he had no reason to doubt him. He added that he did not tell me how much land he owned.

Griffith Bethelmie

- [49] Griffith Bethelmie in his witness statement said he's a mason, grandson of McDonald Bethelmie, his father is Bernard Bethelmie, one of the children of McDonald Bethelmie, deceased and his mother is Claris George.

- [50] Griffith Bethelmie's further evidence is that he knows the land of McDonald Bethelmie having grown up on the said land and cultivated crops on it. He also said that he resided in his mother's mother, Alexia Massicot, house, which is next to the land of McDonald Bethelmie's house.

- [51] Regarding the defendant, the witness said he occupied the land of McDonald Bethelmie in or about 2000, built a house upon it and cultivated part of the said land. The witness also said that he knows

the defendant's father Phillip Bethelmie and has never known him to be in occupation or possession of any land save and except the land he currently owns at "Ravine Made," Calibishie Ridge.

[52] Griffith Bethelmie also testified that he is aware that his uncle, Rushan Bethelmie, built a house on the said land and resides on the said land of McDonald Bethelmie, his deceased father.

[53] Finally, the witness denied that the defendant is an heir of McDonald Bethelmie, deceased, and that land he currently occupied by the defendant belongs to the heirs of McDonald Bethelmie, deceased.

[54] In cross-examination Griffith Bethelmie said that he knew Francois Bethelmie who used to plant bananas high up. He went on to say he built a shed in Quete Coco, which had 4 posts and a cover. He said further that it was in 2000's and I did not see Francois until later on. The witness testified further that he never saw Francois Bethelmie plant crops in Quete Coco and that he never knew that he reared fowls and rabbits.

[55] Finally, Griffith Bethelmie said that he is aware that Rushan Bethelmie built a house in Quete Coco. He also said that he is McDonald Bethelmie's grandchild.

[56] In re-examination Griffith Bethelmie testified that the defendant's garden was "way away" from McDonald's land.

Ruddy Bethelmie

[57] Ruddy Bethelmie in his witness statement said that McDonald Bethelmie, deceased was his grandfather, and his father Jno Baptiste, aka Son Bethelmie, is his father.

[58] The witness in giving evidence of his grandfather's land said he knows it and that the land occupied by the defendant belonged to McDonald Bethelmie, deceased, and now his heirs. The witness went on to say that he knows Phillip Bethelmie, the father of the defendant, but never knew him to occupy and cultivate any land occupied by the defendant, his grandfather or, in the present case, land currently occupied by Francois Bethelmie which said land belongs to the heirs of

McDonald Bethelmie. The witness said further that he worked the land for a few years, and never saw Phillip Bethelmie or the defendant on any part of McDonald Bethelmie's land; but he did see Raymond Gredgaur cultivating part of the land.

[59] Finally, the witness said that the land occupied by the defendant is the land of McDonald Bethelmie and further that the defendant has no rights to or interest in the said land.

[60] Under cross-examination the witness said that he knew McDonald Bethelmie and that the land occupied by Francois is McDonald's land. He went on to say that he grew up with them.

[61] With respect to Francois Bethelmie the witness said he knew him all his life but he did not know he was a relative which he found out after he left school.

[62] Concerning his father's land, the witness said he had not seen the title to it but he knows it is 5.4 acres and he knows where Francois is on the land. In further evidence the witness said he did not know Francois was planting the land he lives on and that he had no idea that he raised cows, fowls and rabbits.

[63] Finally, Ruddy Bethelmie in giving further evidence on the land in issue said that he is not a part owner and has no part to get. And when it was put to him that he only came to court because he was expecting to get a part of the land said: "I am not looking forward to that."

John George

[64] John George's evidence centered on his familiarity with McDonald Bethelmie and his family living on land which belonged to the said McDonald Bethelmie and which he cultivated.

[65] As far as the defendant, Francois Bethelmie, is concerned, the witness said that he knows that he lived in Calibishie Ridge, but he currently resides on the land of McDonald Bethelmie on the very location where the family house of McDonald Bethelmie had been situated. He said further that the defendant used the structure and materials extracted from the house at Calibishie Ridge to build his house at Quete Coco.

[66] And in relation to Phillip Bethelmie, the witness said that he was never in possession or occupation of the land now occupied by the defendant.

Francois Bethelmie

[67] Francois Bethelmie gave evidence that he is a farmer and lived in Calibishie all his life. He said further that he grew up in Calibishie Ridge, Sunrise Flat on land close to where he now lives in Quete Coco.

[68] It is the evidence of Francois Bethelmie that growing up his father told him about land at Quete Coco which belonged to his grandfather, Edward. He said that the land was not occupied by anyone and had a lot of bush on part of it and fruit trees on the other part.

[69] It is the witness' further evidence that in late 1989 to early 1990 when he wanted to occupy a piece of land at Quete Coco and do farming he spoke to his father who brought him to the land and showed him the boundaries but there were citrus trees. According to the witness, he was taken to another piece which only had bush and based on what his father told him he cleared the bush and planted crops there, and later added animals.

[70] At paragraph 9 of his witness statement Francois Bethelmie relates a conversation with Rushan Bethelmie when he came to Dominica to build his house. And that as a result of the conversation he moved his cows from the land at the request of Rushan Bethelmie. The witness went on to say that Rushan never asked him to stop planting or to leave the land.

[71] Concerning the building of Rushan's house and his home, the witness said he worked on it while Rushan was overseas and he started to build his house with money earned and completed it around 2006.

[72] In terms of the relationship between Rushan and himself, the witness said they had a good relationship and that Rushan never told him he should not be on the land.

- [73] At paragraphs 14 to 17 of his witness statement the witness detailed the survey of "my land", correspondence received from the claimant's attorney asking him to quit the said land, his attorney's response and a caveat lodged against the Certificate of Title that Son Bethelmie got for the land, and the filing of a case against him on 16th November 2012.
- [74] Under cross-examination Francois Bethelmie gave evidence of the places where he resided, and of the fact that he knew McDonald Bethelmie. The witness went on to deny that McDonald Bethelmie had any connection with the land.
- [75] As far as his father's connection to the land is concerned, the witness said he did not know his father planting other land. He added that he planted land at Sunrise Flats which is a different area. Mention was also made of what his father told him about land he had land at Quete Coco.
- [76] In relation to the certificate of title at pages 95 and 96 of the Trial Bundle, the witness said he was aware that there is a Certificate of Title and that the person's name on it is the owner. It was then put to the witness that the Certificate of Title relates to land at Quete Coco to which he responded by saying that he does not know anything else but the land belonged to his grandfather. He went on to say that Quete Coco has land other than McDonald Bethelmie's land of 5.4 acres, but he did not know how much land there was in Quete Coco.
- [77] Francois Bethelmie said his father showed the land at Quete Coco in 1990 and disagreed that he started going to the land in 1996. And he claimed that when he went to the land he never saw McDonald Bethelmie and disagreed that mango, orange and grapefruit trees were planted by McDonald Bethelmie.
- [78] It was put to the witness that the land where he picked the mangoes belonged to McDonald Bethelmie. The witness responded by saying that he was aware of that as he [McDonald] once occupied the land, but he never owned it. The witness went on to say that when he saw the land it was abandoned because it had big bush. He added further that the mango trees were not in the area where McDonald lived. At a later stage in the cross examination, Francois Bethelmie doubted that the citrus on the land was planted by McDonald Bethelmie.

[79] In maintaining that he occupied the land from 1990, François Bethelmie further testified that Rushan Bethelmie never told him to vacate the land in person but only by a lawyer letter. But even then he did not vacate. The witness went on to say that the family wanted him to pay rent sometime in 2009; but he did not quit when he got the letter.

[80] Towards the end of his cross-examination, François made these responses based on propositions put to him by learned counsel: The land was gifted to me by my father in 1990; I have been in occupation for 23 or 24 years. I am not occupying the land of the heirs of McDonald Bethelmie and for over 20 years nobody disturbed me in my occupation.

Pierre "Phillip" Bethelmie

[81] In his witness statement Pierre "Phillip" Bethelmie established that he is 89 years old, lived in Calibishie all his life and that François Bethelmie is his son.

[82] Concerning the land in issue the witness said that he knows it very well having been raised on it by his grandfather, Edward Bethelmie. He said further that his father had bought the land with some friends and that before he died; his grandfather had shared the land among his children, including his father. And even further that his father had shown him his boundaries which is part of where Rushan is now.

[83] In paragraph 7 to 10 of his witness statement Pierre "Phillip" Bethelmie gave the following pieces of evidence: McDonald Bethelmie had a small house on the land where François is now, he lived there with his wife and children; McDonald had a lot by the bay in Calibishie and he broke down the house at Quete Coco and put it on the lot at the bay; he took his family and went to live in Calibishie flat; McDonald also broke down my grandfather's house at Quete Coco to extend his house at Calibishie Flat and used the rest to build a house for one of his sons; and nobody was using the land at Quete Coco and it became covered in bush.

[84] In the remainder of his witness statement the witness detailed the manner in which he gave François "the land of my father". According to the witness, the land had bush and some citrus but did not know who planted them. Further, the piece of land where McDonald used to have his house

was in the bush and he told Francois to take that piece. The land was cleared by Francois, built a house there and has been in occupation for more than 20 years.

[85] Under cross-examination Pierre Bethelmie said that McDonald Bethelmie was his uncle and he knew him "good" and raise with him in Quete Coco. He continued: "Now I live in Calibishie Hill/ Calibishie Flats. It is not Quete Coco. I cannot remember when I stopped living in Quete Coco.

[86] On being cross-examined about land, the witness said that his father gave him land but I never told McDonald that my father gave me land. And regarding McDonald, the witness said he left Dominica and at that time he lived in Calibishie Flats and before that he lived in Quete Coco and was cultivating land in Quete Coco. The witness went on to testify that when McDonald went to Calibishie Flat he was not cultivating anything on the land. He continued his evidence in this way: "McDonald lived in Quete Coco with his wife and family. I knew all the children and their families. Only two were born in Quete Coco, the others were born in the flats. When McDonald left Quete Coco, I don't know he had ten children. I cannot recall that it was 1958 when McDonald left."

[87] In testimony on where he lives now, Pierre Bethelmie testified that it was given to him by his grandmother, Cece Bethelmie who was McDonald's mother. In further testimony the witness said: "She did not give McDonald any land. My father never occupied any land in Quete Coco. He showed me the land. He did not show me any proof he always said that his share is my share and what he has is mine. The land claimed by the heirs of McDonald is part of the land they are saying is their land. He added: I don't know that my father McDonald told him to leave. I don't believe that McDonald has a title."

[88] In evidence on the land in Quete Coco the witness said that the land belonged to Sirneon George and all the land is claimed by the heirs of McDonald, but I have no idea of all the land at Quete Coco, but the rest of the land is more than 5 acres. The heirs of McDonald have not been in occupation of the land for 60 years.

[89] In terms of the occupation of the land by his son, Francois, the witness said this: "I can remember he has 20 years on the land. I believe he came on the land in 1994. It is more accurate to say he went on the land in 2002."

[90] The following issues fall to be determined:

1. Whether at any time the 5.4 acres of land situate at Quete Coco formed part of the Estate of McDonald Bethelmie, deceased.
2. Whether the defendant can rely on section 2 of the **Real Property Limitation Act** to enable him to obtain title to the 0.550 acres of land situate at Quete Coco by adverse possession.
3. Who is liable to pay costs.

Issue No.1

Whether at any time the 5.4 acres of land situate at Quete Coco formed part of the Estate of McDonald Bethelmie, deceased.

[91] The claimant seeks a declaration that the beneficiaries of McDonald Bethelmie, deceased are the owners of the property currently occupied by the defendant. This in turn is said to rest on the will of McDonald Bethelmie which states in part:

"I hereby also, give devise and bequeath to my sons Henry Bethelmie, Rushan Bethelmie, Victor Bethelmie, Bernard Bethelmie five sons all together all that parcel of land situated at Calibishie, Parish of St. Andrew, in the state of Dominica."

[92] The will bears the date 1st June 1969 and while there are boundaries given of the land devised and bequeathed the area of the land is not given. This came in survey plan of land surveyed and drawn by Lionel Laville dated April 16th, 2012 for Son Bethelmie, as Executor for McDonald Mitchell Bethelmie (deceased). The area of the land is 5.04 acres.

Submissions

[93] The following submissions are tendered by learned counsel, Mr. Glen Ducreay, on behalf of the claimant:

"116. As to the issue of whether the land fell or did not fall under the estate of McDonald Bethelmie the Defence pleads that the disputed land does not form part of the estate of McDonald Bethelmie. In the Amended Defence at paragraph 8 the Defendant avers that

the land was part of a larger portion of land consisting of approximately 6 acres of which Edward Bethelmie was owner.

118. The Edward Bethelmie and Harry Bethelmie are deemed by the Defence in the Amended Defence to have died intestate without having adduced any independent and verifiable evidence to corroborate the assertion and moreover the evidence of both the Defendant and Phillip Bethelmie fail to adequately address and/or support what seems to be the Defence's argument that the estate of McDonald Bethelmie of 5.04 acres is part of the estate of Edward Bethelmie of 6 acres and given the Defence's assertion that Edward Bethelmie died interstate with surviving children including McDonald Bethelmie and Harry Bethelmie and thus the Defence alleges the estate of McDonald Bethelmie is not entitled to the land of Edward Bethelmie to the exclusion of the other heirs.

119. The Defence has failed to adduce any evidence save and except the claim in paragraph 8 of the Amended Defence to support the assertion that the Estate of Edward Bethelmie is 6 acres or any evidence to demonstrate the extent of the estate of Edward Bethelmie.

120. Notwithstanding the above which is circumstantial, speculative, exploratory and controversial at best, there is compelling evidence to show the history and root of the ownership of land of McDonald Bethelmie as the said land formed part of land contained in a certificate of title in favour of "Eugenie George as Personal Representative of Simon George a.k.a Simeon George, deceased" containing 30 acres registered in Book of Titles B5 folio 61. Even the Defendant testified that part of the land had a title in the name of Simeon George.

121. Additionally, there is an exhibit in evidence if a certificate of title in favour of Son Bethelmie (a.k.a Jno.Baptiste Bethelmie) as Executor of McDonald Bethelmie.

123. The testimony of the Defendant's father, Phillip Bethelmie is very instructive in regard to this issue. He testified that McDonald "take my share so I take his share" and it is that share that he gave to the Defendant.

124. The evidence of the Defendant paragraph 5 of his witness statement is thus clear and unambiguous. "He showed me an area of land which was his father's piece, but there were some citrus plants among the bushes. He brought me to another piece on the opposite side."

125. Additionally, in cross-examination he stated that his father's land was the area where the Claimant built his house (See paragraph 82) above. He further continued in paragraph 83 above that his father saw poles on his father's land and thus gave him land that was abandoned. Furthermore, in paragraph 84 he stated that he did not get a problem in the said land and thus occupied it."

[94] In sum, the claimant's contention is that there is no evidence adduced by the defendant to support the claim that the Estate of Edward Bethelmie is 6 acres or any evidence to indicate the extent of the estate of Edward Bethelmie. But, on the other hand, the history and root of title of the ownership of the land is grounded in a certificate of title in favour of Eugene George as Personal Representative of Simon George a.k.a Simeon George containing 30 acres. Added to that, is a certificate of title in favour of Son Bethelmie as Executor of McDonald Bethelmie with respect to 5.04 acres of land at Quete Coco, Calibishie.

[95] Learned counsel for the Defendant, Mrs. Hazel Johnson, on the other hand, submits that the land in dispute was demonstrated by reference to the survey plan annexed to the certificate of title, that the 0.550 acre occupied by the defendant falls within the land described and contained in the said certificate of title; but it does not fall under the Estate of McDonald Bethelmie.

[96] Having regard to the evidence and the submissions, it would be accurate for the court to conclude that the 0.550 acre of land in question falls within the certificate of title issued to Son Bethelmie, Executor of the Estate of McDonald Bethelmie deceased, especially in light of the content of the will of the deceased and the survey plan of 5.04 acres carried out on behalf of Son Bethelmie.

Issue No. 2

Whether the defendant can rely on section 2 of the Real Property Limitation Act to enable him to obtain title to the 0.550 acre of land situate at Quete Coco by adverse possession.

[97] This issue turns substantially on section 2 of the **Real Property Limitation Act** which contemplates a defendant pleading adverse possession of land occupied for 12 years or more. This is the case of Francois Bethelmie, the defendant which is vehemently opposed by the claimant and the other heirs of McDonald Bethelmie, deceased.

[98] Learned counsel for the claimant in his submissions refers to section 2 of the **Real Property Limitation Act**, ¹sections 8, 10 and 33 of the **Title by Registration Act**² and examines their import based on a number of decided cases from Dominica³. In addition, an analysis is made of the evidence for the purpose of showing that the defendant was in occupation of the subject land for less than 12 years. In this regard the following issues in the evidence are highlighted: the testimony of the defendant as to the land in issue; the defendant's evidence under cross examination that his father's land was the area where the claimant built his house; the giving of land by Phillip Bethelmie to Francois Bethelmie that did not belong to Phillip Bethelmie; the defendant has produced no evidence to show ownership of the land in issue; the agreement executed in 1991 by

¹ Chap. 54:07

² Chap. 56:50

³ Anne Marie Garraway and Errol Alexander, *Gilbery Guye, Shirley Guye v Clarenton Andrew*, DOMHCV2009/0368; *Andrew Laville v Marcus Marcellin*, DOMHCV2013/0001

the wife of Mc Donald Bethelmie concerning the grant of permission to Raymond Gregoire granting temporary permission to continue to cultivate; the claimant's evidence that in 1997 he neither saw the defendant or his father Pierre Bethelmie in occupation of the land of McDonald Bethelmie; the testimony of Griffith Bethelmie that he never saw the defendant planting on the land the defendant now occupies; Phillip Bethelmie's evidence that when Raymond Gregoire was on the land planting bananas, the defendant was not on the land; and Phillip Bethelmie's evidence that his son was in the possession of the land from 2002.

[99] The submissions end, in part, as follows:

"142. For the reason advanced as aforesaid we submit that the Defendant was not in adverse possession of land for more than 12 years. We further submit that the Defendant was in possession of the land from in or about 2002 for the earliest.

143. In light of the above, we submit that the Defendant cannot rely on section 2 of the Real Property Limitation Act and humbly ask the court not to grant the Defendant the relief sought.

144. As to the final issue of whether the Defendant had been in continuous and undisturbed possession of the land for well over (20) years and as such has a prescriptive right to the land we submit that based on the evidence, that that is not the case and we humbly ask the court to rely on the foregoing reasons and facts that we submitted to show that the Defendant had not been in possession of the land more than 12 years.

145. By the same token, if the Defendant could not have been in possession adversely or not of the land for 12 years he could not have been in possession for well over twenty (20) years.

146. Assuming but not admitting that the argument by the Defence has a modicum of merit, the evidence still does not support the assertion of the Defendant that he had been in continuous and undisturbed occupation for well over twenty (20) years.

147. The Defendant himself agreed that the term "well over twenty years" meant 23-24 years but could only stretch his alleged occupation of the land to 20 years. On a perusal of the evidence, the court is minded to accept part of the testimony of the Defendant's father that his son came on the land after Raymond left, the testimony of the Claimant, the agreement executed by the wife of the McDonald Bethelmie and the conflicting testimony of the Defendant that he was only contacted that is, disturbed in 2009 (which appears not to be the case) by one Bernard Bethelmie and the lawyer representing the heirs of McDonald Bethelmie then the earliest Raymond Gregoire could have left would be 1992 and consequently, that would make it 17 years representing occupation from 1992-2009 thus making the conclusion the best the Defence could hope for which is not supported at all if the evidence in its entirety is taking into consideration.

148. In this case, according to the evidence, the Claimant testified that he spoke to the Defendant in 2003 about his alleged occupation of the land and that he spoke to the Defendant about that- the said matter-before 2003.

149. The Defendant himself also stated that Elta George spoke to him in 2004 about the Defendant paying rent which we submit amounts to a disturbance as to his occupation of the said land.

150. The Defendant also testified that Bernard Bethelmie wrote him to vacate the land and that was sometime in 2009.

151. We therefore submit that based on the foregoing, the Defendant could not have been in continuous and undisturbed possession for even 20 years much less for well over 20 years, as alleged by the Defence.

153. We also humbly and [respectfully] ask the court to consider the testimonies of the Defendant as to the reliability of his evidence. He stated that he reared animals including cows. The Claimant stated that he did not know the Defendant as rearing any rabbits or cows and that he never saw the Defendant with any cows or saw any cows in 1997 for that matter. Patrick George testified that in 2003 he noticed no rabbits or fowls or animal pens on the land occupied by the Defendant. Griffith Bethelmie also said that he does not know the Defendant as raising fowls and the like.

154. We therefore ask the court that in arriving at its decision the court makes reference in its judgment to the present occupation of the land by the Defendant's brother, Martin Bethelmie.

155. In conclusion, we are requesting of this honourable court not to grant to the Defendant the relief that he so seeks and that the court grant the Claimant a declaration that the said 5.04 acres of land belongs to and is rightfully owned by the heirs of McDonald Bethelmie and that the Defendant be ordered to vacate the land with damages and costs granted to the Claimant."

[100] In submissions on behalf of the defendant learned counsel also refers to section 8 of the **Title By Registration Act** and the First Schedule to the said Act and goes to make submissions.

[101] At the start of the submissions the following evidential issues are addressed: the defendant does not dispute that Son Bethelmie as the paper holder of the disputed 0.550 acre; following the departure of McDonald Bethelmie in 1958 the evidence shows that he was not in possession thereafter; attempts by Elta George to show that McDonald left someone in charge of the land in his absence and asking the court to reject her evidence; the claimant has failed to prove that the possession of the land in issue by McDonald Bethelmie or his agents after 1958; and the defendant went into possession upon the instructions of his father who gifted it to him.

[102] The submissions continue thus:

"37. The Defendant's activities and stance clearly constitute acts of ownership and intention to possess the land in his own name and on his own behalf and to exclude the owner, whether it be his father, the Claimant or anyone else.

38. The Defendant's evidence is that he has been in possession of the land from 1990. He recalls that he was already occupying the land when his first child was born. It is submitted that the birth of a firstborn is a milestone, that it is usual for persons to remember and to peg events in their life to. The Defendant's evidence is that his daughter was born on 16th September 1990. Counsel sought to challenge the date of birth but only by a few days, suggesting to the Defendant that his daughter was born on 27th September, 1990. The Defendant rightfully denied this. In any event, it would still place the Defendant on the land before September 1990.

41. Phillip Bethelmie gave evidence that he cannot recall the year that the Defendant went on the land, but its more than 20 years since he is on the land. When pressed by Counsel he said he would say more like 24 years. We submit that this is consistent with the Defendant's evidence that he has been on the land from 1990. Phillip was answering a question from Counsel for the Claimant as to how long since the Defendant has lived on the land.

42. It is clear from the attestation on the witness statement that Phillip is unlettered. Also it was clear at trial that he is now visually impaired. Throughout his cross-examination, he repeatedly indicated that he could not recall the year events took place, but could recall that they took place. In all those instances, except one, Counsel accepted his response and never sought to bait him with the dates. However when he gave evidence that "it have 20 years since he (the Defendant) on the land", and that he could not recall when the Defendant went on the land, Counsel proceeded to suggest 1994 and then 2000 to him. He agreed to both those dates. We ask the Court not to put any or any significant weight on his agreeing with the dates suggested by Counsel, as the treatment of the matter, in all the circumstances, was unfair, and clearly his evidence as a whole shows that he did not recall dates generally. In fact, other witness, much more junior to Phillip in age stated at some point in their evidence that they could not recall dates.

43. Elta George, although having stated in her witness statement that Gredguair started planting on land in Quete Coco in 1985, said in cross examination that she was not aware when he started and could not remember when he stopped. The young man Ruddy Bethelmie told the Court that he could not recall when he (Ruddy) started to plan at Quete Coco.

44. As expected the Claimant's witness challenge the period of time the Defendant has been in occupation of the land. Rushan in his eagerness to "prove" that the Defendant was not on the land in 1991 and that Gredguair was still planting on the land in 1991. On further cross examination he had to admit that he was not in Dominica in 1991.

45. The other witnesses for the Claimant, Patrick George, Ruddy Bethelmie and Phillip Bethelmie all claim not to be aware that the Defendant was planting crops and rearing animals on the land. Elta George admits that she does not know when the Defendant went on the land or his activities there, she asserts that that was not communicated to her. It is therefore clear that she relied on information and communication from third parties and little firsthand knowledge of activities on the land.

46. The evidence of the Defendant and Phillip is that Gredgaur was not planting at Quete Coco when the Defendant took possession of the land.

47. It is submitted that by deameanour and consistency the Defendant and Phillip both presented themselves as honest witnesses. We ask the Court to favour their evidence.

48. Rushan and Elta were shown in cross examination either not to have personal knowledge of critical matters or to be telling falsehoods. Their evidence is unreliable and unsatisfactory.

49. The other witnesses for the Claimant, Ruddy and Phillip, both grand children of McDonald Bethelmie have a clear interest in giving the evidence they gave. We ask the Court not to accept their evidence as respects the Defendant's activities and period of occupation.

50. We respectfully submit that the Claimant is not entitled to the declaration sought. The Claimant has failed to prove that he is entitled to possession. On the contrary the evidence is that the claimant was dispossessed by the Defendant in 1990 at which time a right of action accrued. The Claimant failed to exercise that right until 2012, i.e. more than 12 years later, but which time this right had extinguished.

51. The Defendant, having been in possession of the 0.550 acres of land with the intention to possess it as owner to the exclusion of all, and having done so for more than 12 years is entitled to the protection of S.2 of the Real Property Limitation Act, and to a title by prescriptive right under the Title by Registration Act."

Law relating to land registration and adverse possession

[103] As has been shown, section 2 of the **Real Property Limitation Act** as well as sections 8, 10 and 33 of the **Title by Registration Act** and the First Schedule thereto are relevant to this issue. Accordingly these provisions are set out: first, sections 8, 10 and 33 of the **Title by Registration Act** are in these terms:

"8. All certificates of title granted under this Act and all notings of mortgages and incumbrances on the same shall be indefeasible.

10. The right of the registered proprietor named in the certificate of title comprised in a certificate of title granted under this Act shall be the fullest and most unqualified right which can be held in land by any subject of the state under the law of Dominica, and such right cannot be qualified or limited by any limitation or qualification in the certificate itself, unless the limitation and qualifications were inserted in any state grant in lace of which a certificate of title has been issued, or in respect of any certificate of title issued by virtue of any scheme under the Town and Country Planning Act or under the slum clearance and Housing Ordinance, or by any Acts replacing these enactments, or in the case of mortgages and incumbrances, where these are noted on the certificate of title.

33. Where any person has acquired, or claims to have acquired under the Real Property Limitation Act, the ownership of land brought upon the operation of this Act he shall present a request to the Registrar of titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title, and the person who has acquired, or claims to have acquired, the ownership shall not be entitled to maintain any suit in regard to the land until he has obtained a certificate of title thereto. When a request for such a certificate of title is presented to the Registrar of Titles, he shall state a case to

the Court, and shall not issue a certificate of title on the request until he has received the directions of the Court thereupon."

- [104] Section 2 (3) of the said Act provides that: "Whenever any of the expressions defined in the First Schedule occurs in this Act, it shall, unless the context otherwise requires, have the meaning assigned to it in the said Schedule. "One such expression defined is 'indefeasible' which says as follows:

"Indefeasible – the word used to express that the certificate of title issued by the Registrar of Titles, and the notings by him thereon, cannot be challenged in any court of law on the ground that some person, other than the person named therein as the registered proprietor, is the true owner of the land therein set forth, or on the ground that the mortgages or incumbrances in the notings thereon are mortgages and incumbrances on the said land; except on the ground of fraud connected with the issue of the certificate of title, or the noting of the mortgages or incumbrances, or that the title of the registered proprietor had been superseded by a title acquired under the Real Property Limitation Act, by the person making the challenge. The word also means that, the certificate being issued by the Government, the Government is, with the exceptions above mentioned, prepared to maintain the title in favour of the registered proprietor, leaving anyone justly aggrieved by its issue to bring an action for money damages against the Government."

- [105] Finally, section 2 of the **Real Property Limitation Act** reads thus:

"2. After the commencement of this Act, no person shall make and entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to some person through whom he claims; or, if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same."

- [106] In short detail, sections 8, 10 and 33 of the **Title by Registration Act** seek to detail the legal attributes of a registered title, culminating in a comprehensive definition of "indefeasible", but at the same time expressly bring the **Real Property Limitation Act** into the equation.

Synthesis

- [107] The issue in the end comes within a very narrow compass, being whether or not the defendant was in occupation of the 0.550 acre of land situated at Quete Coco so as to permit him to place reliance on section 2 of the **Real Property Limitation Act**⁴

⁴ Chapter 54:07.

- [108] The court accepts that the objective reality of the land is that Mc Donald Bethelmie occupied the land up until 1958 when he left Quete Coco with his wife and 10 children to live at Calibishie Flat. There is evidence of the dismantling of the matrimonial home and that of a distant relative to build a bigger house to accommodate his large family. Learned Counsel for the defendant points to the latter events as evidence of the permanence of Mc Donald's move in 1958, which two of his children, Elta George, then aged 5 and Rushan Bethelmie, then aged 14 remember vividly.
- [109] Of importance to the defendant is what happened to the land between 1958 and November 2012 when the claimant filed his action against the defendant.
- [110] The picture is made more transparent when it is noted that 5.04 acres containing 217,889⁵ square feet of land and the 0.550 acre contains 23,970 square feet of land. At the same time there is evidence of the land as a whole being overgrown by bush mixed with citrus and other fruit trees in 1990.⁶
- [111] It is in the context of the foregoing that a determination must be made as to whether or not the defendant occupied 0.550 acre of land for over 12 years in order to ground his contention. The claimant's opposing contention is that he and the heirs of Mc Donald Bethelmie never lost possession.

Law relating to possession

- [112] Gray and Gray, in **Elements of Land Law** ⁷ deal extensively with the common law principles governing possession of land and cognate matters. From this, it may be said that the following emerge: 'Possession' is perhaps best described as 'a conclusion of law defining the nature and status of a particular relationship of control by a person over land'; ⁸ in **JA Pye Oxford Ltd v Graham**, the House of Lords reaffirmed the traditional analysis of possession as an amalgam of externally verifiable physical and mental components; possession of land can only be attributed to a person only if he can demonstrate that he has both factual possession (*corpus possession* or

⁵ An acre contains 43,560 square feet.

⁶ Witness statement of Francois Bethelmie and Pierre Bethelmie at paras 4 and 5 and 10 respectively

⁷ (5th ed) at paras: 2.1.6 to 2.1.14

⁸ Authorities cited: *Mabo v. Queensland (No. 2)* 213 CLR 161 207 per Toohey J.

factum possessionis) and a possessory intent (*animus possidendi*);⁹ the *corpus* or *factum* of possession depends ultimately on evidence that the claimant's possession has asserted a complete and exclusive control over the land;¹⁰ it must be shown that the alleged possessor has been dealing with the land in question as an occupying owner might have expected to deal with it; and that 'no one else has done so';¹¹ possession by its nature implies exclusion: any claimant to possession necessarily reserves and retains the ability to exclude all others from the land occupied;¹² whether a Claimant has exclusive physical control of the subject land must ultimately be determined with particular reference to the nature of the land and the manner in which land of that nature is commonly enjoyed¹³; the nature of required 'possession' may differ markedly according to whether the claim relates to a dwelling or to uncultivated land¹⁴; a claim of possession necessarily presupposes a certain continuity in respect of both *factum possessionis* and *animus possidendi*; and a common (often critical) feature of successful possessory claims is the consistent assertion of control over access of strangers to, or activities of strangers upon the land in question¹⁵.

[113] The import of *animus possidendi* is rendered clear and simple by Lord Justice Slade in **Powell v McFarlane**¹⁶ when he reasoned thus:

"The *animus possidendi*...what is really meant, in my judgment is that 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 process of the law will allow."

⁹ Authorities cited: Buckingham CC & Moran (1990) CL 623, 641 B per Slade LJ; JA Pye Oxford Ltd v Graham (2003) 1AC 419 [41] per Lord Brown-Wilkinson.

¹⁰ Authority Cited: Buckinghamshire CC V Moran [1990] Ch 623, 641B per Slade LJ, supra.

¹¹ Authorities cited: Powell & McFarlane [1977] 38 P & CR 452, 471 per Slade J. Mudchang v. Curramore Ply Ltd (1974) 2 NSWLR 464, 479 E per Bowen CJ.

¹² The footnote reads in part: Exclusivity is of the essence of possession. JA Pye (Oxford) Ltd v. Graham [2003] 1AC 419 at [70] per Lord Hope of Craighead.

¹³ Among the authorities cited are: Powell v. McFarlane [1977] 38 P & CR 452 at 471 per Slade J, Kirby v. Cowderoy [1912] AC 599, 603

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¹⁵ Authority cited: Railtrack plc v Hutchinson (unreported, Chancery Division, 17 December 1998.

¹⁶ [1977] 38 P & CR 452

Defendant's possession of the land or lack of it

[114] It is the determination of the court based on the defendant's direct evidence and that of his father, Pierre Bethelmie, plus circumstantial evidence such as: the raising of animals, the cultivation of the land in issue, the collection of wood to build his house, and the cutting of pegs to be used in the construction of Rushan's house, that his possession began in 1990. Of significance is the evidence that the defendant then aged 22/23¹⁷, told his father that he wanted land and eventually was given a parcel in Quete Coco. With that comes the reality that the area of land (which turned out to contain 0.550 acre or 23,957 square feet was covered in bush and had to be cleared. Further, there is no evidence that defendant was assisted by anyone in clearing the bush from the land he claimed was given to him by his father.

[115] The law establishes that control may not arise within a short period but it can extend over time. On the evidence the court accepts as factual that the defendant falls into the [called] category in that after he went on this land in 1990 a series of events followed. These events are detailed by the defendant in his witness statement at paragraphs 6 to 12:

6. I cleared the bush on the land and I planted crops there. I planted limes, oranges, coconuts, ground provisions, and plantains. From 1991 I added animals to my farm and started raising fowls, rabbits and cows. I used to graze my cows on the piece of land opposite where I was planting.
7. I was already planting on the land when my first child, Leana Bethelmie was born on 16th September, 1990.
8. During the time I was planting on the land I started cutting wood and collecting lumber for me to build a house there. I collected wood and packed it on the land and kept it covered.
9. When Rushan Bethelmie came to Dominica I was already planting on the land. He met me in Calibishie and asked me if I could remove my cows from where I was grazing them because he wanted to build a house there. I removed them. He never told me that I should not plant on the land where I was planting or and he never asked me to leave.

¹⁷ In his witness statement signed on 2nd April 2013, the defendants say he is 48 years old. This was not challenged.

10. Pat George built the house for Rushan Bethelmie. While the house was being built Rushan was overseas. Pat asked me if I cut the wood for the pegs to square the house. I did so and continued to work with him on the house until it was finished.
11. I was making a little extra money while I was working on Rushan's house, so I started to build my house. I worked by myself and I did not have a lot of money so it took me a lot of time, i.e. some years to finish the house. I finish it around 2006 and I moved in with my family.
12. Rushan came back to Dominica sometime after his house had finish. We had a good relationship. He used to come to my home on the land and have a few drinks with me and I also went to his home for drinks. He never told me I should not be on the land. He told me that his father, McDonald Bethelmie did not pay for land and the land is family land so we should enjoy it. He also said that to my brother Eloi Bethelmie, who also live on part of the land

[116] The defendant was cross-examined by learned counsel for the claimant, but nothing of serious evidential value emerged to shake the defendant's evidence. For example, the question regarding the birth of the defendant's first child was premised on the fact of a child being born, but the issue was the date of birth.

[117] As noted before, learned counsel for the claimant has pointed to the insufficiency of the survey plan produced by the defendant in contrast to the Certificate of Title produced by the claimant, added to this is the evidence adduced by the claimant seeking to show that the land remained in the hands of the heirs of Mc Donald Bethelmie at all times between 1958 and 2012. Therefore, in submitting that the defendant does not meet the threshold of 12 years' possession, learned counsel further pointed to the evidence of the defendant's father who said, under cross examination, that it would be more accurate to say that his son came to the land in 2002.

[118] In this context, having regard to the claimant's pleadings and the evidence adduced, there must be some further analysis of the evidence of or concerning the persons who were supposed to do various things in order to ensure that the 5.04 acres of land at Quete Coco remained in the hands of the heirs of Mc Donald Bethelmie between 1958 and 2012. This is in the face of a Certificate of Title issued to the Executor of McDonald Bethelmie, deceased.

- [119] The persons falling within this hand are: Odessa Maxwell, Ronald Gredgaur, Rushan Bethelmie, and Elta George. Of these, Odessa Maxwell and Ronald Gredgaur did not give evidence in the case; while Elta George and Rushan lived overseas and, as seen from the evidence, had little or no contact with the land, far less control. In fact, the cross-examination of Elta George by learned counsel for the defendant, focused on matters which the witness said she verily believed [at-a trial] were brought into legal context and reality. In any event, the reality of the evidence is that it showed very little contact with the land in whole or part thereof during the period in issue. It is the defendant who said he saw Raymond in 1990 when he went on the land given to him, but there is evidence going beyond 1990 in respect of Raymond on the land.¹⁸ At the same time, it is not clear to the court whether Raymond and the defendant were on the same area of .0550 acre or on different or adjacent portions of the 5.04 acres.¹⁹ With that said, the evidence is that the area where the defendant grazed his cows and where Rushan built his house are adjacent areas.
- [120] Elta George left Dominica in her early 20's in 1976 to live in St. Croix and built a career there but there is no evidence of frequent visits to Dominica to evict trespassers on the land. The same can be said of Rushan who left Dominica for England in 1961 and who said he returned to visit "very often".²⁰ However, the evidence shows him visiting in 1997, 2002, sometime in 2006 or thereafter when the defendant's house had been completed, and in 2012 when he filed this action. On this evidence some 35 years elapsed before Rushan re-visited his domicile.
- [121] In agreeing with learned counsel for the defendant that the evidence adduced by the claimant is 'unreliable and unsatisfactory', the court also wishes to point to Odessa Maxwell, who by reasonable inference and by definition, given that she was Mc Donald Bethelmie's granddaughter, had to be a young person in 1981 when Elta George "was verily informed" that Odessa had been put in charge of 5.04 acres of land. Thus, the rhetorical questions become these: What does being in charge of 5.04 acres or 217,889 square feet of land covered by big bush mean or entail for a young lady in terms of being in charge thereof? And what is the evidence beyond what appears to be a mere statement of intended intent?

¹⁸ Indeed, Patrick George's evidence under cross-examination is that when he came in 2003 Raymond when he knew was not there and there were no crops planted

¹⁹ According to Lionel Laville, Land Surveyor the 5.04 acres are on both sides of a paved road- Trial Bundle p. 92.

²⁰ Witness statement at para 8.

[122] Raymond Gredgaur who was put in charge of the .0550 acre by the widow of Mc Donald Bethelmie. The defendant did say in evidence that he saw a man called Raymond planting bananas on the land for a few years. The other person in the picture is Rushan Bethelmie, the claimant, who said he told the defendant of his trespass which was denied. In fact, the defendant said in evidence that there was never a request from Rushan to quit the property. That request was in relation to an area, other than the 0.0550 acre, where the defendant had his cows and where Rushan said he wanted to build his house. Finally, there is the matter of Elta George who claimed to have some conversation with the defendant concerning the payment of rent.

[123] The court has found no material gaps in the possession by the defendant. And even if the presence of Raymond planting bananas on the land in 1990 for 'a few years' is considered a disruption. It is *de minimis* in this context. This conclusion rests on the law on the point is made clear by the following learning:

"A claim of possession necessarily presupposes a certain continuity in respect of both *factum possessionis* and *animus possidendi*. It is not fatal that acts relied upon as evidencing 'possession' are intermittent in character, but they must be marked by consistency and regularity. Acts of alleged possession required to be viewed cumulatively in order that the court may determine whether taken as a whole rather than in isolation they establish a factual possession. Possessory activity has, moreover, a quality of transparency. It cannot be surreptitious, but consists instead of conduct which openly displays to the rest of the world that the claimant asserts a significant control over the land in question"²¹

[124] At the end of the day, the court restates its determination that the defendant commenced possession of the 0.0550 acre of land situate at Quete Coco in 1990 and continued to assert possession and control. In this regard the court is further guided by the following learning contained in **Elements of Land Law**:

"The constituent features of possession were the subject of a comprehensive review in *JA Pye (Oxford Ltd v Graham)*. Here, although articulating the scope of 'adverse possession' for the purpose of the Limitation Act, the House of Lords indicated that this term comprises nothing more than possession in the ordinary sense of the word. However, whilst elaborating the supposedly neutral or objective character of possession in the modern law, the law lords confirmed that possession is a notion of some complexity. At common law the phenomenon of possession involves much more than a bare physical occupancy of land. Indeed, a person may be in possession of land without being in occupation of it at

²¹ See: Gray and Gray at para 2.1.11.

all. Possession is an inherently behavioral phenomenon which incorporates a particular mindset. Far from connoting mere factual presence upon land, possession is constituted by a range of inner assumptions about the power conferred by such presence. The relevant emphasis is on the deliberate, strategic control of land. Possession is the self-evident state of affairs which prevails where one person is in position to control access to [land] by others and, in general, decide how the land will be used. For this reason, whereas 'occupation' is a question of fact, 'possession' is a conclusion of law, and its presence or absence leads to important legal consequences."

[125] As been noted before, it is said that possession had been judicially described as an amalgam of externally verifiable physical and mental components, being the *corpus possessionis* and the *animus possidendi*. On this account it had been shown from the evidence that the defendant formed the intent to possess or a mindset and conveyed it to his father who gave him a parcel which he occupied from then and beyond. In terms of control, while the evidence is that the defendant said he saw Raymond, who was supposed to be in charge of the 5.04 acres planting bananas, there is no evidence that they were in conflict using the implements they would normally have in that context or otherwise. In any event Raymond's presence did not go beyond planting bananas in or about 1990. Further, all the persons who had some kind of duty to safeguard the interest of the heirs of McDonald Bethelmie, did not succeed in disrupting the defendant's exclusive control. Not even the letters of March, 2010 and November, 2011²² from the attorney-at-law acting on behalf of the claimant.

[126] There is evidence from Elta George and Rushan Bethelmie that the land in Quete Coco was hilly or steep and their father decided to move to Calibishie Flats because his young children had to walk up and down the road. This piece of evidence is mentioned because of the common law rule that the nature of the land is a factor to be considered when dealing with the issue of exclusive control. But it is reasonable to infer that the defendant had no difficulty in establishing exclusive control as there is an absence of any physical conflict or encounter with anyone acting on behalf of the claimant or any other person between 1990 and 2012. This is accentuated by the fact Patrick George in his witness statement, at paragraphs 6 to 8 and under cross examination said that when he returned to Dominica in 2003 to build a house for Isidore Bethelmie²³ he saw an unoccupied wooded shack of the property of McDonald Bethelmie which he later found out was owned by the

²² Exhibits RB5 and RB3

²³ AKA "Rushan"

defendant. He also said that the defendant was using the land while he was there. To this must be added the fact the defendant completed his dwelling house in 2006 and moved in with his family.

- [127] As to whether the defendant behaved as an occupying owner, this is illustrated by **Gray v Gray** by relying on **JA Pye (Oxford) Ltd v Graham** to show that the respondent in that case of adverse possession had done everything which an owner would have done. The facts and the holding in the case are given as the following at para 2.1.9:

"The *corpus* or factum of possession depends ultimately on evidence that the claimant possessor has asserted a 'complete and exclusive physical control' over the land. It must be shown 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'. In the *Pye* case, for example, G had briefly enjoyed a written grazing licence over P's potentially valuable development land. Following the expiration of this licence, P had repeatedly refused a request for renewal of the grazing agreement. G nevertheless continued, for over 12 years, to use the land for agricultural purposes in the self-confessed hope that a formal agreement authorizing his use would be forthcoming. During this period the land was accessible only through a gate kept padlocked by G, who effectively farmed the disputed area as a unit with his own adjoining land. The House of Lords held that G had established an independent possession which was adverse to P, not least because G and his family had '[f]or all practical purposes...used the land as their own and in a way normal for an owner to use it'. G and his family had, in short, done 'everything which an owner of the land would have done' and indeed, said Lord Hutton, it was difficult to think of anything more that the 'occupying owner...might have done' to demonstrate his possession."

- [128] Except for the matter of the licence and the installation of a gate the actions in both cases are substantially in alignment, so that it is reasonable to conclude that the defendant in this case had done all an owner would have done in the circumstances, notwithstanding the nature of the land and the fact that the Madder Ravine runs along its eastern boundary.

- [129] In a valuation of the 5.4 acres of land situate at Quete Coco, dated July 16th, 2012 Lionelle Laville, Land Surveyor, says that he inspected the said property in April 2012 and gave, *inter alia*, this description²⁴:

"The property is located on either sides of a paved road on a ridge, in the heights of Calibishie, 1 ½ miles from the village. Adjacent to the road are moderate slopes of about 50 feet from the road, thereafter the land is steep towards Madder Ravine on the east and the River Douce to the west. Sparse coconut and mangoes is evident on the eastern

²⁴ Trial Bundle page 92

section of the property. Approximately 50% of the western section is cultivated under coconuts."

Conclusion

- [130] In the face of the attributes of indefeasibility evidenced in the **Title by Registration Act** and especially section 8, 10 and 33 plus the definition of indefeasibility contained in the First Schedule to that Act, section 2 of the **Real Property Limitation Act** can still prevail to permit a person to obtain title to land by adverse possession. And given its importance in this context it is wise to repeat its content:

"2. After the commencement of this Act, no person shall make and entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to some person through whom he claims; or, if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has first accrued to the person making or bringing the same."

- [131] The immediate consequence of the provision is that it makes no distinction between registered and unregistered land. It speaks of 'land' which is not defined. And when resort is had to section 2 of the **Interpretation and General Clauses Act**²⁵ "land" is defined inclusively to include "buildings and other structures, land covered by water and any estate, interest, easement, servitude or right in or over land..."In short section 2 of the **Real Property Limitation Act** is at large and section 2 thereof is no exception.

- [132] It is therefore the determination of the court that the defendant can rely on section 2 of the **Real Property Limitation Act** to enable him to obtain title to the 0.550 acre of land situate at Quete Coco by adverse possession because:

- (a) he formed a possessory intent (*animus possidendi*) to own land (later shown by admeasurement to contain 0.550 acre) situate in Quete Coco in 1990 and took possession (*corpus possessionis*) thereafter up to the date of the service of this fixed date claim on December 16th, 2012, and beyond being in excess of twenty years;
- (b) he did all the things which an owner would do in the circumstances; and his acts on the land were transparent and consistent;

²⁵ Chap. 3:01, *supra*

- (c) the fact that he built a house on the land and moved into it in 2006 with his family is not fatal since the rule is that all actions of a person so circumstanced must be taken in their totality in order to determine whether or not there is possession;
- (d) there is no credible evidence that any of the heirs of McDonald Bethelmie or their agents did anything on the land to interface with or force the defendant to give up possession;
- (e) the evidence adduced by the claimant to show that other persons, on his behalf, did acts to disrupt the defendant's possession or to take possession is unsafe and unreliable;
- (f) even although there is a discrepancy in the evidence of Phillip Bethelmie, a witness for the defendant, in terms of what he said in relation to the period of possession by the defendant in his evidence in chief and cross-examination that discrepancy does not destroy his evidence of a whole having regard to his age of 89 and physical condition; in the context of events of 1990.

Issue No 3

Who is liable in costs

- [133] The claimants are liable in costs and must pay the defendant prescribed costs based on the value of their claim.
- [134] There is no valuation in evidence with respect to land claimed and occupied by the defendant which is 0.550 acre. What is in evidence²⁶ is a valuation of \$30, 240.00 with respect to the 5.04 acres. And with the necessary calculations based on the \$30,240.00 value of 5.04 acres yields \$6,000.00 per acre. Thus, the value of the 0.550 acre is 0.550 acre multiplied by \$6,000.00 which yields \$3,300.00. This would be the value of the claim.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The area of land situate at Quete Coco containing 5.04 acres by admeasurement:

²⁶ Trial Bundle at pg. 92

(a) which is described in the last will and testament of McDonald Bethelmie signed on June 1st, 1969 and probated on September 16th, 2011;

(b) in respect of which a Certificate of Title was duly issued on July 20th, 2012

forms part of the estate of McDonald Bethelmie, deceased.

2. The defendant can rely on section 2 of the **Real Property Limitation Act** to enable him to obtain title to the 0.550 acre of land situate at Quete Coco by adverse possession because:

(a) he formed a possessors intent (*animus possidendi*) to own land (later shown by admeasurement to contain 0.550 acre) situate in Quete Coco in 1990 and took possession (*corpus possessionis*) thereafter up to the date of the service of this fixed date claim on December 16th, 2012, being in excess of twenty years;

(b) he did all the things which an owner would do in the circumstances; and his acts on the land were transparent and consistent;

(c) the fact that he built a house on the land and moved into it in 2006 with his family is not fatal since the rule is that all actions of a person so circumstanced must be taken in their totality in order to determine whether or not there is possession;

(d) there is no credible evidence that any of the heirs of McDonald Bethelmie or their agents doing anything on the land to interfere with or force the defendant to give up possession;

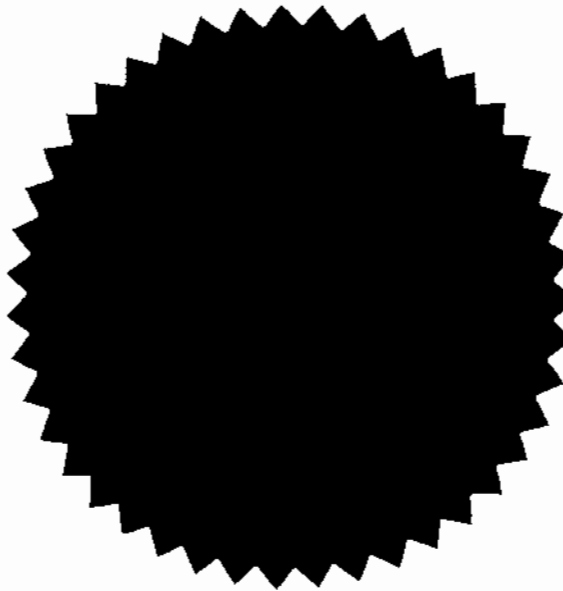
(e) the evidence adduced by the claimant to show that other persons, on his behalf, did acts to disrupt the defendant's possession or to take possession is unsafe and unreliable

(f) even although there is a discrepancy in the evidence of Phillip Bethelmie, a witness for the defendant, in terms of what he said in relation to the period of possession by the defendant in his evidence in chief and cross-examination, that discrepancy does not destroy his evidence of a whole having regard to his age of 89 and physical condition; in the context of events of 1990.

3. The claimant is liable to pay the defendant prescribed costs on the value of his claim.

Appreciation

It is obvious to the court that learned counsel on both sides fought hard with eloquence, research and submissions to make their case. The case is extraordinary which the court appreciates immensely. The efforts of learned counsel now and those before go a long way towards making the Commonwealth of Dominica a leading land law jurisdiction, certainly in the Commonwealth Caribbean, given the intensity and complexity of such matters. The court's appreciation must again be stated.



Handwritten signature of Justice Errol L. Thomas in black ink.

Justice Errol L. Thomas

High Court Judge [Ag]