

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL SUIT)**

**BRITISH VIRGIN ISLANDS
BVIHCV 2008/0314**

Sylvia Maduro-Dale	Claimants
Lucia Chalwell	
and	
The Registrar of Lands	Respondent

Appearances:

J.S. Archibald Q.C. and Anthea Smith of JS Archibald & Co. for the Claimants

Jo-Ann Williams Roberts Solicitor-General with K. Edwards for the Respondent

2010: May 27th ; June 10th

JUDGMENT

- [1] **Joseph-Olivetti J:** This matter comes to the High Court by way of an appeal from a decision dated 12th September 2008 of the then Registrar of Lands, Mr. Cecil Dawson. It raises the oft visited question of whether or not the Claimants have acquired prescriptive title to a parcel of land at Baughers Bay, Tortola in the Territory of the Virgin Islands. The Registrar ruled that they did not and being aggrieved they are seeking relief from this court pursuant to their right of appeal under section 147 of the Registered Land Act Cap. 229 (“the Act”).

Grounds of Appeal

[2] Eight grounds of appeal are relied on as set out in the affidavit of Michele Worrell filed in support of the appeal on 13th October, 2008- see para. 14 thereof. These are as follows:-

Ground 1 – The Registrar has not made any findings of fact on the evidence of each or all of the two Applicants and their witnesses in relation to the matter of their possession of the Parcels in issue for determination, including uncontradicted evidence of possession for in excess of 20 years;

Ground 2- The Registrar failed to take into account that the evidence of each of the Applicants as to prescriptive occupation and possession was virtually unchallenged and uncontradicted in cross-examination;

Ground 3- The Registrar wrongly took into account matters which he considered as interruption of possession which were not in fact or in law interruptive events set out in Section 136 (6) of the Act;

Ground 4 -The Registrar failed or refused to consider the Final Skeleton Arguments and Submissions of Counsel for the Applicants together with the case authorities, all as complied in a bundle delivered to him;

Ground 5 - The Registrar failed or refused to visit the site of the land claimed by the Applicants;

Ground 6 - The Registrar erred in concluding that Blanche Malone exercised rights as an owner in possession when she transferred the land to Julie Malone in 1996 and used this as a basis for coming to the conclusion that the Applicants were not in possession of the land;

Ground 7 - The Registrar erred in finding that possession was interrupted when Blanche Malone-Fraser was registered as Trustee for the beneficiaries and when Blanche Malone-Fraser transferred the land to Julie Malone;

Ground 8 - The Registrar failed to carry out a proper judicial hearing of the claim of the Applicants.

The Registrar's Decision

- [3] The gravamen of the Registrar's decision as set out in his written decision was that the application for prescriptive title failed as the Claimants had not satisfied the requirements of section 135 of the Act, as the evidence established that the Claimants' mother Althea Scatliffe from whom they derived title had been given permission by the then registered owner of the land, Arabella Malone to occupy the land. Further, that they did not meet the twenty year possession criteria as their possession was interrupted by the transfer of the land by Blanche Malone Fraser to Julie Malone, the objector, in 1996 and thus they had not occupied the land for 20 years after Julie Malone became the registered owner.

The Facts

- [4] This is taken from the background facts as set out by the Registrar in his written decision. Mrs. Arabella Malone was the registered owner of land at Baughers Bay, which after several subdivisions now comprises parcel 343, the disputed land. She had two children, Rufus Malone and Blanche Malone-Fraser. Rufus had a relationship with the Claimants' mother, Althea Scatliffe and had four children by her, Cecil, Marvin, James and Antonio. They are the half brothers of the Claimants, who are two other children of Ms. Scatliffe.
- [5] Althea Scatliffe was given permission by Mrs. Malone to construct her house on a portion of the land after Ms. Scatliffe's home was destroyed by the ravages of a hurricane in the 1950's. Ms. Scatliffe, through her sons, the half brothers of the

Claimants, erected a concrete house on the land. Ms. Scatliffe dwelt on the land until her death in 2002.

- [6] Initially both the Claimants lived with their mother on the land. The Second Claimant ceased to reside there when she left for St. Thomas in 1974 and later the First Claimant moved out and in the 1990's, returned to reside with her mother. Mrs. Malone died intestate in 1976. Her property was administered and Blanche Malone-Fraser became the trustee of the estate and she transferred the disputed land to Julie Malone, the objector, as the sole heir of Julie's father, Cecil. Julie Malone then lived in the United States. The Claimants applied for prescriptive title in 2000, after Mrs. Malone Fraser had indicated to the Second Claimant that they would have to vacate the land and would no longer be able to live there once their mother died.

Consideration of the Grounds of Appeal

- [7] The Court shall address Ground 5 first as it can be dealt with shortly. As far as I can determine, on my perusal of the Act and the Registered Land Rules, there is no provision which requires the Registrar to visit the disputed land. The procedure for dealing with an application for prescriptive title is governed by section 137 and it is patently silent on visits to the locus. In addition, as far as the notes of evidence and the submissions before the Registrar disclose, the Claimants did not request a visit. And, finally, the question of whether or not to visit the locus is a matter for the discretion of the Registrar as the sole arbiter. He could properly refrain from doing so if in his view a visit would not assist. Having regard to the issues before him a visit to the land would not have assisted and therefore he did not act improperly by not visiting the site. This ground of appeal therefore fails.

- [8] I now turn to Grounds 4 and 8 which concern the propriety of the proceedings. It is true, as Mr. Archibald QC, counsel for the Claimants argued that the Registrar made no mention in his written decision of Counsel's written submission and authorities. But, from this simple omission to refer expressly to the submissions, can one imply that the Registrar did not consider them? I think not as it would be to deem the Registrar wholly unprofessional and wanting in his approach which is certainly not borne out when one considers the entire process of adjudication employed by the Registrar as reflected in the notes of evidence and in his written decision. Here one can apply the well known maxim, *omnia praesumptur rite esse acta*.
- [9] Furthermore, of the authorities cited by counsel, **Village Cay Marina Ltd. v. Acland and Others** (1996) 52 WIR 238, concerned the issue of how uncontradicted evidence should be dealt with and the other, **Sheila Schulerbrandt v. Gertrude Callwood Coakley et al** BVI HCV 39/2000, dealt with the elements of a prescriptive title and could not help with the issue of permission to occupy, which was one of the determining factors in this case. These grounds therefore have no merit.
- [10] Now to Grounds 1 and 2 which raise factual issues. On a careful reading of the Registrar's reasons for decision it is evident that he took into account the evidence on behalf of the Claimants and in particular made findings on how they, through their predecessor in title, first entered on the land. He found that the predecessor entered into occupation with the permission of the registered owner. This finding implies that he accepted the uncontradicted evidence of the Claimants and their witness that their mother had been given permission to build her house on a portion of the land by the registered owner. The Registrar concluded from this however that the Claimants did not satisfy section 135 of the Act as they were occupying with the permission of the owner. The Registrar was not obliged to make findings of fact on

all the points raised in the evidence but only in relation to matters which would assist him in determining whether the Claimants had obtained title by prescription. Having found that the Claimants did not satisfy one of the requirements he was not obliged to go on to consider evidence of the other requirements. I therefore find no merit in those grounds.

[11] Now to Grounds 3 and 7. The Act in section 136(6)¹ defines acts which can interrupt possession. The Registrar erroneously held that the acts of registering Blanche Malone-Fraser as a trustee and of later transferring the title to Julie Malone were acts capable of interrupting possession. This was a patent misdirection as such acts are not included in section 136(6). However, these rulings do not materially affect the Registrar's decision to refuse the Claimants' application which was based on his findings having regard to the evidence that the Claimants' mother entered on the property with the permission of the person entitled to possession, the paper owner, Arabella Malone.

[12] I now turn to Ground 6. Again clearly the Registrar misdirected himself when he held that Blanche Malone Fraser exercised rights as an owner in possession when she transferred the land to Julie Malone in 1996 and used this as a basis for coming to the conclusion that the Applicants were not in possession of the land. The

¹ Section 136 (6) of the Act states, Possession shall be interrupted-

- a. by physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the possessor thereby loses possession; or
- b. by the institution of legal proceedings by the proprietor of the land to assert his right thereto or
- c. by any acknowledgement made by the person in possession of the land to any person claiming to be the proprietor thereof that such claim is admitted.

possession that is required is actual physical possession or receipt of the rents or profits thereof. See section 136(1) of the Act.

[13] And in **JA Pye (Oxford) Ltd. v. Graham** (2002) UKHL 30, at para 32, possession was explained thus “In the absence of authority, therefore, I would for my own part have regarded the word, “possession” in the 1939 Act as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as *animus possidendi*, that would entitle a person to maintain an action of trespass in relation to the relevant land...” (Slade J in *Powell v McFarlane* (1977) 38 P & CR 452, as quoted by Lord Browne –Wilkinson).

[14] At no time was Blanche Malone–Fraser in actual physical possession of the disputed land or in receipt of the rents or profits therefrom and therefore the Registrar erred in holding that she exercised rights of possession by effecting the transfer of the land to Julie Malone.

General considerations

[15] The Court’s power on appeal is by way of re-hearing, See CPR 60.8 (5)². I have considered the whole of the evidence before the Registrar and the law. Section 135 (1) of the Act stipulates- “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”[Emphasis added]. Thus every element of the section must be satisfied by a person claiming prescriptive title.

² The court is not bound to allow an appeal because of –

(a) a misdirection; or

(b) the improper admission or rejection of evidence;

unless it considers that a substantial wrong or a miscarriage of justice has been caused.

- [16] To my mind the evidence called on behalf of the Claimants and the objector clearly established that Ms. Scatliffe occupied the land with the permission of Arabella Malone, the person entitled to possession, in other words the owner of the land. And, therefore the Claimants have failed to satisfy section 135(1) of the Act as in effect the Act requires that the person claiming prescriptive title be a trespasser that is a person in occupation without permission of the owner.
- [17] In **J.A. Pye (Oxford) Ltd.**, Lord Browne-Wilkinson, in reflecting on the nature of the possession that is required to establish a possessory title, said at, at para. 36, “In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act.”
- [18] Applying the law to the evidence, the Registrar’s conclusion that the Claimants failed to establish a prescriptive title because their mother, from whom they derived title, had entered into occupation with the permission of the owner is unassailable.
- [19] I have been referred to several authorities including Halsbury’s Laws of England on the nature and incidence of a licence. However, in my view it is not necessary to embark on the precise legal nature of the right/permission to occupy the land given by Mrs. Arabella Malone to Ms. Scatliffe once it is shown that Ms. Scatliffe occupied the land with the permission of the owner.

[20] In passing I remark that Mr. Archibald advanced that the Claimants' case is that the land was given to their mother as a gift. If that is so, then equally this cannot be used as a basis for claiming prescriptive title. If the land were indeed a gift then other avenues were open to the Claimants to perfect that gift. Instead, they sought to claim prescriptive title before the Registrar and their claim properly failed as a title based on a gift is diametrically opposed to the concept of a prescriptive title.

Conclusion

[21] For the foregoing reasons the appeal is dismissed with costs to the Respondent summarily assessed at \$2,500.00. This is on the basis that the claim was not for a monetary sum and therefore the default value under CPR rule 65.5 (2) (b) (iii) applies. Further, the court has discretion to determine the amount that should be awarded having regard to the complexity etc, of the case. This case was not complicated and hence I deem it fair to award \$2,500.00 instead of \$14,000.00 which is the maximum costs that can be awarded in a matter of this nature.

Postscript

[22] By order of the court the Registrar was required to submit the Notes of Evidence. A copy of the notes in manuscript was submitted. To my mind these notes ought properly to have been typed and submitted as it is onerous to expect the court to wade through a manuscript however legible.

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Rita Joseph-Olivetti
Resident Judge,
Territory of the Virgin Islands