

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV 2007/0069

BETWEEN:

**[1] HUGH SMITH
[2] LEROY SMITH
[3] JOHN SMITH**

Claimants

and

WINSTON MOLYNEAUX

Defendant

Before:

The Hon. Mr. E. Anthony Ross, QC

High Court Judge [Ag.]

Appearances:

Ms. Asha Johnson for the claimants

Mr. Duane Jean Baptiste and Ms. Anthea L. Smith for the defendant

2009: September 24.

JUDGMENT

- [1] **ROSS, J. [AG.]:** This is a possession action brought by the claimants in an effort to secure certain lands locally known as Parcel 40 Block 2235B located in Capoons Bay, Tortola.
- [2] The claimants are the holders of title to the lands in question, and I am in effect asked to rule on 0.28938 acres that has been, for some time, occupied by the defendant, Winston Molyneaux.
- [3] Counsel for both sides have worked exhaustively, as is evidenced by the closing submissions (193 pages submitted by the claimants and 100 pages submitted by the Defence). Substantial legal effort has been employed in serving the interests

of the parties. However, there is a significant hurdle that the Defence did not overcome and that is “adverse possession”. If sufficient occupancy of “the land” is found to meet the requirements of “adverse possession”, such occupancy must be open, notorious, continuous and exclusive, not only to the known owner, but to the world at large.

- [4] I refer to the drawing declared to by Wayne R. Nibbs as being a survey done by him and is accurate. My first comment is that the drawing does not appear to be a survey which could be employed to properly identify the lands subject to this dispute and claimed by the defendant, Winston Molyneaux. I will not comment further on the adequacy of the survey but indicate that consistent with the requests of counsel for both parties, I attended and viewed the site in dispute at which time the defendant, Winston Molyneaux, attempted to identify on the ground, the lands which he claims as being his by adverse possession and which, according to him, was depicted on the 4th survey prepared by Mr. Nibbs.
- [5] The north-eastern boundaries of the disputed lands are, on the survey, identified by the points 2N815, 2N816 and 4S8262 and 4S8263. The western boundary of the disputed property is identified by the numbering on the survey as 2N812, 2N811, 2N810, 2N809 and 2N808. However, in the field, these were not the points as adopted by the defendant, Winston Molyneaux. To the contrary, in the presence of both Counsel and the Court, Mr. Molyneaux identified his eastern boundary as the extension through the points 2N815, 2N816 and 4S8262 and continuing straight through to the public road. As to the western boundary, Mr. Molyneaux identified this as the extension of the line from points 2N808 through to 2N809 in a south-easterly direction intersecting with a line through point 2N810 going in a north-easterly direction. The lands as described by Mr. Winston Molyneaux are not consistent with the lands outlined in the survey.
- [6] As to the relevant law, it has long been established that a complete title to real estate exists where the right of property, the right of possession, and the possession itself, are united in the same person.

- [7] It is also trite law that actual possession of itself confers no title, although if much time is suffered to elapse, without diligence on the part of the owner of the land to turn out an intruder from its property the length of possession will eventually confer a title on the occupier and destroy that of the former owner, being considered as presumptive evidence of a title. This general principle is subject to certain limitations which do not appear to apply to this law suit.
- [8] The law on adverse possession is succinctly set out in the decision of the Court of Appeal in **Polland v Dick**, Court of Appeal Civil Appeal No. 11 of 1976 as follows:
- “...in order to acquire by the Statute of Limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.”
- [9] Dealing with discontinuance, the court considered that the known owner has never ceased paying land tax in respect of the land. This was the evidence in this matter by both parties. This evidence shows clearly that there has never been any intention on the part of the owner to part with the possession of the land.
- [10] It goes on:
- “But if the appellant has lost his right to the land it must not be by reason of any withdrawal or discontinuance of possession on his part, but by reason of his being dispossessed by the respondent, and the appellant could not be dispossessed unless the respondent obtained possession *animus possidendi*, that is, occupation with the intention of excluding the owner as well as other people.”
- [11] The evidence that the defendant never had any such intention is extremely strong. He assumed possession of the land after the death of his wife Victoria in 1992. The evidence is that Victoria was a “share-cropper” for the claimants. The first demonstrated attempt by the defendant to exercise rights akin to ownership was when he refused to accept that he was a licensee of the claimants in 2006 and 2007, and even so, other licensees of the claimants crossed the dispute lands from time to time without the permission of the defendant. The defendant certainly had no demonstrated intention to dispossess the rightful owner.
- [12] Actual possession is always considered to be prima facie evidence of title, and the owner of lands when seeking to recover his occupation against the stranger in

possession, is bound to prove a title in himself before he can succeed. This case is, in my view, on the same footing, the claimants having met their standard of proof, and as such the person in possession must make out a better title in himself or lose the suit.

- [13] The conduct on both sides appears to have been substantially relaxed. The claimants did not move to eject the defendant until by the defendant's actions, in 2004, he appeared to be exercising rights akin to ownership of the lands. Prior to that date, the relationship between the defendant and the claimant was not one of open notorious exclusive adverse position, but that of an occupier of lands to which the claimants had proper title and against which accommodations were being granted. Other persons occupying other lands in the area and who acknowledged the claimants as owners crossed the disputed land at will to access the lands in the larger parcel.
- [14] I find that the evidence as set out in the witness statements and as heard at trial through amplification and cross examination, the evidence of the claimants as a collective, is substantially stronger to that of the defendant. From time to time, the defendant appeared confused with respect to relevant meetings, their location and time. His evidence was in conflict with the survey advanced by him for the purpose of the Court identifying the lands subject to this dispute and the evidence of licensees claiming possession under the claimants.
- [15] Accordingly, judgment will be entered for the claimant. The defendant Winston Molyneaux, is hereby directed and ordered to vacate the property described as Mount Stage Registration, Block 2335B, Parcel 40 within 60 days of the filing and service upon him of a court stamped copy of this order pursuant to this judgment on counsel for the defendant.
- [16] Costs to the claimants which, if not agreed, shall be prescribed costs based on the property value of \$50,000.00.


E. Anthony Ross, QC
High Court Judge [Ag.]