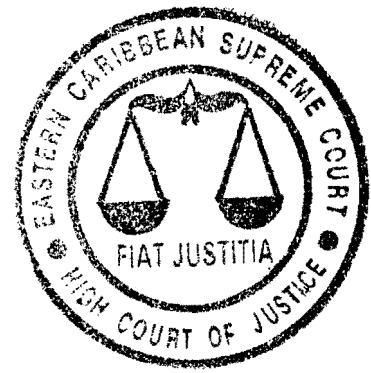




THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 350 OF 2000

BETWEEN:

PALM BEACH COTTAGES LTD

Claimant

V

NOLBERT SIMMONS

Defendant

Appearances:

Mr. S.E. Commissiong for the Claimant

Mr. R. Williams for the Defendant

2007: May 16 & 18;
June 15;
July 13.

JUDGMENT

- [1] **MATTHEW J (Ag.):** On August 17, 2000 the Claimant filed a statement of claim alleging that it is a limited liability company and that the Defendant is a person of full age residing at Bequia; a dependency of Saint Vincent.
- [2] The Claimant alleged that by deed of conveyance dated December 19, 1988 and registered as No. 198 of 1989 it purchased a portion of land, measuring 3 acres and situated at Mount Pleasant in Bequia, from William Gooding.
- [3] The Claimant stated that the said portion of land is shown on a plan of 3 parcels of land surveyed by E. Stinson Campbell, a licensed land surveyor, and which was lodged and approved on October 16, 1970 as GR 148 and which contains 124,942 square feet.

- [4] The Claimant alleged that during the year 1999 it discovered that the Defendant wrongly entered a portion of the Claimant's land and erected some concrete poles on the Claimant's land.
- [5] There is no dispute that the Defendant's land lies to the North of the Claimant's land and the portion of land in dispute is at the Northern end of Plan GR 148.
- [6] The Claimant then caused a survey to be made of its land. Colin Alexander, a licensed land surveyor, did that survey and in August 1999 he produced a plan which was lodged and approved on August 26, 1999 as GR 682. That plan showed the encroachment to the extent of 11,486 square feet.
- [7] The solicitors of the Claimant and the Defendant exchanged letters on the matter and resulting from these letters is the claim of the Defendant that he is owner of the 11,486 square feet of land.
- [8] The Claimant brought its action for damages, costs and an injunction; as well as a declaration that the Defendant is not entitled to enter, cross or occupy the said portion of land.
- [9] The Defendant entered an appearance on August 21, 2000 and filed a defence and counterclaim on December 4, 2000. In his defence the Defendant denied the trespass and alleged that the disputed property is part of his land bought from Dillon Gooding on January 13, 1966 for which he holds a deed No. 931 of 1967.
- [10] The Defendant alleged that when he bought his land he obtained a receipt from Dillon Gooding and the receipt sets out the boundaries of the land. The later deed contains the same boundaries as on the receipt. There is also no dispute that the Defendant, to this day, has never surveyed his land.

- [11] The Defendant further alleged that he has occupied the land he bought unmolested and that after the purchase poles were put on the land to establish his boundaries. He stated that concrete mounds were also placed at the very spots where the poles were planted.
- [12] On October 11, 2002 the Defendant obtained an amendment to his original defence to add at the end of paragraph 2 the following words:
- "Further the Defendant was never informed nor aware of the survey by Stinson E. Campbell until the institution of this action."
- [13] The Defendant stated that he would contend that he was in possession of his land and that his poles and mounds were planted more than 12 years prior to the bringing of the action and so the Claimant's title was extinguished by virtue of Section 19 of the Real Property Limitation Act Chapter 90 of the Revised Laws of Saint Vincent and the Grenadines, 1990.
- [14] To understand the logistics of the last paragraph one needs to set down the dates of the various transactions. The Claimant's deed was made on December 18, 1988. Let us assume he got into possession on that day. The Claimant brought this action on August 12, 2000 which is less than 12 years. It is therefore difficult to see how Section 19 can apply in the Defendant's favour.
- [15] However that defence can turn on its head against the Defendant if the Claimant alleges that it has been in possession of the disputed land from the date of purchase in 1988 to the date of hearing of this case.

EVIDENCE:

- [16] At the hearing Giselle Balcombe, Robert Banfield and Robert Balcombe gave evidence for the Claimant. Nolbert Simmons and Milton Creese gave evidence for the Defendant. On October 16, 2001 the Court appointed McArthur Robertson, a licensed land surveyor, to conduct a survey on the disputed parcel of land and to report to the Court. Mr. McArthur Robertson filed his report on December 4, 2001.

- [17] Giselle Balcombe stated that she is a director of the Claimant Company and has full knowledge of the facts of the case. She said the Claimant became the owner in fee simple of a portion of land measuring 3 acres situated at Mount Pleasant in Bequia by virtue of deed No. 198 of 1988.
- [18] She said that prior to the purchase of the land she made divers visits to the land in 1988 and traversed the entire lands and inspected the boundaries and was accompanied by the vendor. She also visited the land in 1989 after purchase.
- [19] She stated that at no time during her visits did she see any poles or monuments erected on the land and there were no fences of any kind or erections along the area of dispute in this matter.
- [20] She said that sometime in 1998 when visiting the land she saw poles erected on the Claimant's land and was told that the Defendant was responsible for placing the poles and fencing on the land.
- [21] As a result she caused a survey to be made of the boundaries to the Claimant's lands in August 1999 and then consulted her lawyer and thereafter she gave instructions for these proceedings.
- [22] Under cross-examination she reiterated that William Gooding, the vendor, did show her the boundaries of the land before the Claimant bought it. At this point learned Counsel for the Claimant was permitted to put into evidence all the documents he had disclosed at page 22 of the case file.
- [23] She denied that when she went to the area all the lands around were demarcated by rain trees and she said what she saw were wild trees. She also said she was shown a plan of the land she bought before and after her visit to the land. This was plan G 147 and G 148 which related to the same portion of land.

- [24] She said at the time she purchased and when William Gooding was showing her the boundaries to the Claimant's land she did not know that Nolbert Simmons owned adjoining land to the North of the Claimant.
- [25] She resisted the question that Mr. Simmons is not encroaching on her land by stating that according to her plan he is encroaching at the Northern end of the Claimant's land.
- [26] She said she was not aware that Plan GR 148 was prepared without notice being given to Mr. Simmons. She said Mr. Simmons was present when Mr. Alexander came to do the survey for her in August 1999, but she did not hear any discussion pertaining to the deed and receipt of Mr. Simmons.
- [27] Robert Banfield visited the lands in dispute some time around April to May of 1998 when he accompanied Eric Balcombe, one of the owners of the land. He said he traversed the various boundaries of the land which was covered in bush and shrubs and saw no fence erected nor poles planted on any of the boundaries to the land or any part of it.
- [28] On a subsequent visit in 2002 he noticed that fences and poles were erected along a portion of the land which were not there in 1998 when he first visited.
- [29] Under cross-examination he stated that his first visit to the land in 1998 was after the purchase of the land by the Claimant. He denied that when he went there the lands in the area were bounded off by trees and fences. He resisted the suggestion that when he visited the land in 1998 the land had steel poles in the ground demarcating it.
- [30] Robert Balcombe, who is also one of the directors of the Claimant, said that prior to the purchase of the land he also made divers visits to the land in 1988 and 1989 and traversed the entire lands and saw no poles, fences or any monuments on the land or its boundaries.

- [31] However, some time in the 1990's, an anonymous caller reported something to him and as a result he journeyed to Bequia and saw that poles and fences were recently constructed on the said lands.
- [32] He found out that the Defendant was responsible for placing the poles and fences on the land and he made a report to his mother, Gisela Balcombe.
- [33] Under cross-examination he said he first saw the land in question in 1982 when his mother showed it to him. He denied that at all material times there were steel poles demarcating the land.
- [34] He said he would not say that the lands in the general area were demarcated by poles and trees.
- [35] Nolbert Simmons stated that he is an architect who lives at Bequia and who on the 13th day of January 1966 bought a portion of land from Dillon Gooding at the Mount Pleasant Estate for the full purchase price of \$180.00.
- [36] He said on the same day he was given a receipt signed by Dillon Gooding and witnessed by Milton Creese. He said the land was already boundaried off from the remainder of the land of Dillon Gooding.
- [37] He said the land he purchased had 9 monuments on it, four of which were along his southern boundary adjoining the remainder of the Gooding estate.
- [38] He stated that in 1970, William Gooding, son of his vendor, surveyed his land which adjoined the Defendant's land and in the process overstepped his boundary and went on the Defendant's line and erected a new boundary.
- [39] He said at one time there was a major fire which burnt down all the poles and he erected steel poles on the same line exactly as it was in 1991. In 1993 the poles began to tilt so he

got his employee, Machel Baptiste, to put concrete at the base of the poles to hold them in place.

[40] In 1999 the poles were rusted so he put a PVC pipe over each pole and filled it with concrete to keep the boundary lines in place and to keep the poles from further deterioration.

[41] He said when he purchased the land he took immediate possession of it and cultivated it with fruit trees and remained in undisturbed possession of it.

[42] He stated that he obtained a deed of conveyance No. 931 of 1967 in respect of the said land. The deed was admitted in evidence as NS1 and the receipt he obtained from Dillon Gooding was admitted and marked NS2.

[43] He referred to the measurement in the receipt and he referred to the word "centre line" in the receipt. He said he heard Mr. McArthur say the previous day that 14A on a drawing of GR 94 is the same, maybe a few feet from S1 on the plan of Erris Simmons and he agreed with that.

[44] I might note that GR 94 does not appear to be a plan drawn by a licensed land surveyor and the survey plan of Erris Simmons was not put in evidence by McArthur Robertson, the maker of the document.

[45] Simmons said plan GR 148 drawn by licensed land surveyor Stinson Campbell in August 1970 was done after he purchased his land and he was not notified of the survey. He said he first got to know of the survey when licensed land surveyor, Collin Alexander, came to survey the Claimant's land in August 1999 and made GR 682.

[46] He said S1 on plan GR 682 is a common boundary for William Gooding, Erris Simmons, Leslie and himself. Let me say right away that I reject that evidence since the Defendant is not a licensed land surveyor and is not competent to give such evidence. I hold the same

view of his evidence in relating a reference on the receipt to the drawing GR 94 of unknown origin. There is no signature to that document. There is not the usual information like grid coordinates. It is not lodged and approved by the Chief Surveyor.

- [47] Under cross-examination he said that he received a notice from Collin Alexander when he came to survey in 1999 and that was the first time he became aware of survey plan GR 148. He gave several reasons why up to the time of trial he had not surveyed his land.
- [48] He said he was present when Dillon Gooding used a cloth tape to survey the land sold to him and it was Dillon Gooding and Milton Creese who dealt with Mr. Sylvester to make his deed as he had gone to Canada.
- [49] He said he understood he had bought 1 ½ acres of land but now knows his land is a little over 2 acres according to the report of McArthur Robertson.
- [50] He stated that he was present when Collin Alexander was surveying to make plan GR 682 and he objected to the new line that Alexander brought up, not being the centre line. He said he showed Alexander the poles as his boundary.
- [51] He said that he knows the Claimant's plan was registered by Mr. Alexander at the Surveys Department but has not done anything about that.
- [52] Through his counsel Defendant said that plan GR 682 supersedes plan GR 148 and the disputed portion of land is shown as Lot No. 1 on plan GR 682. In answer to the Court the Defendant stated that the discipline of architecture includes a bit of civil engineering and land surveying.
- [53] Milton Creese was present when the Defendant bought the land from Dillon Gooding and he was a witness to the receipt. He said at the time there were glyrcedar trees on the parcel of land and there were also 4 monuments that showed the boundaries to the land.

- [54] Creese made his witness statement on the 25th day of March 2002 and just before that date he visited the land and saw the same monuments that had been placed on the land since 1966.
- [55] Under cross-examination he stated that the receipt was signed in St. Vincent and not in Bequia.
- [56] He said the four monuments he spoke of were constructed of steel and were driven into the ground. He said from the beginning the boundaries were steel boundaries but there were also rain plant trees.
- [57] He said the person who measured the land for Mr. Gooding was an old fellow, Howie Ollivierre, who used a steel tape, not cloth, to do the measuring.
- [58] At the conclusion of the evidence of Milton Creese, the last witness for the Defendant, I ordered that Counsel serve and file their final submissions not later than Friday June 15 at 3:00 p.m. Learned Counsel for the Defendant did not comply.

McARTHUR'S SURVEY REPORT:

- [59] Mr. McArthur, licensed land surveyor, carried out his survey in the presence of both parties to the case and filed his report on or about December 4, 2001. In the carrying out of the survey he referred to the Defendant's deed No. 931 of 1967 and that of the Claimant, No. 198 of 1999.
- [60] He also referred to what he called registered survey plans GR 94, GR 147, GR 148 and GR 682. He said GR 682 superseded GR 148. GR 148 was drawn by Stinson Campbell. He said Norbert Simmons showed him a receipt with measurements contained and when these measurements were roughly calculated the extent of the land amounted to an area in excess of 2 acres.

- [61] He said that his survey confirmed that the parcel of land in dispute is part of Plan GR 148 and that the line 2 – 3 – 10 – 8 on the plan GR 682 is verified as being the Northern line shown on plan GR 148. I note plan GR 148 shows the Northern line as 2 – 3 – 10 – 9 – 8.
- [62] He said there was a line of concrete posts approximately 15 feet apart erected along line S1 – 11 – 8 of GR 682. I note this line is well within the area of the land the Claimant purchased and the line forms the Southern boundary of the land in dispute. He said the poles appeared to be recently erected.
- [63] He said that the Defendant told him that his boundary was established since he purchased the land in 1966 and that the new fence posts had replaced existing ones. He found no survey plan to verify that boundary. Mrs. Balcombe told him that no fence existed along line S1 – 11 – 8 when the Claimant purchased the land in 1988.
- [64] Mr. McArthur's report was tendered in evidence and marked MAR 1. He was then questioned by learned Counsel for the Claimant and said that in the course of his survey the Defendant did not object to the survey. He said that he had an opportunity to look at GR 682 which is filed at the Survey Department.
- [65] Counsel asked questions about the field notes to survey GR 682 drawn by Collin Alexander. The field notes were tendered in evidence as MAR 2.
- [66] The survey done by Mr. Campbell, GR 148, shows the land to contain 124,942 square feet and that done by Mr. Alexander of the same land gives a measurement of 123,239 square feet.
- [67] A copy of the field notes of Stinson Campbell was admitted and marked MAR 3. When I asked the expert what really is GR 94 he said it is just that this plan touched on one of the boundaries in survey GR 682. He said GR 94 was lands to the East of GR 682 and GR 147 was land to the West of the said GR 682. GR 94 was admitted and marked MAR 4.

- [68] He said he did not have a copy of plan GR 147 but if one were to look at the Western boundary of plan GR 682 one would see GR 147. GR 148 was admitted and marked MAR 5.
- [69] He gave a plausible explanation for his conclusion that the parcel of land in dispute is part of GR 148. He said the bearing shown on GR 148 is consistent with those on plan GR 682. The bearing on the Northern-most line on GR 682 has basically the same bearing as the corresponding line on GR 148.
- [70] He said from his experience he could see the Defendant's posts were made of fresh concrete not like concrete of 30 years old or 20 years old. He was then cross-examined by Mr. Williams.
- [71] He said that from the receipt which the Defendant gave him he would say that the boundaries were fairly well described except where it mentions a coal pit since a coal pit is not a structure.
- [72] He said he saw on the receipt reference to a centre line. He said from the field notes of Stinson Campbell it would be fair to say that nobody was served with a notice of the survey.
- [73] He admitted it was a requirement that prior to a survey neighbouring land owners had to be served. He said in the field notes of the survey of Campbell the persons appearing were William Gooding and Delastie Leslie for themselves and for the estate of Dillon Gooding.
- [74] He admitted that because the adjoining land owners had not been informed GR 148 may have been defective. He conceded that GR 148 came from GR 94. Earlier he had said GR 94 was to the East of GR 148. GR 148 is part of GR 94. He said the lands shown on the Northern and Eastern boundaries of GR 148 marked "Remaining lands of Heirs of Dillon Gooding" could be lands of GR 94. He said he was comfortable with that.

- [75] He agreed that "4" on GR 148 is the same point as "13" on GR 94. He said he did not know what was referred to as a centre line. He said he saw a point 14(a) on GR 94 but could not say that was a centre line.
- [76] He found difficulty in answering the hypothetical question: "If 14(a) on GR 94 is the centre line referred to in the receipt wouldn't it mean GR 148 and GR 682 are incorrect?"
- [77] He said if he saw a survey plan he can make an assumption and give an opinion as against when someone tells him they have a measurement he does not know how it was arrived at.
- [78] At the instance of the Court he said if 14A on plan GR 94 is the centre line referred to in the receipt then the measurement on GR 148 and 682 could be incorrect.
- [79] He said he had done some work for Mr. Erris Simmons who owned land directly West of the Defendant and he was shown a copy of the plan of Mr. Erris Simmons which he had prepared.
- [80] He was shown the point S1 at the South Eastern tip of the land of Erris Simmons and admitted from the evidence it is in the location of the boundary of Nolbert Simmons.
- [81] When asked if it was not a fact that S1 on plan GR 682 and on plan GR 6/86 (Mr. Erris Simmons' plan) is the same point as 14 (a) on GR 94, assuming it is the centre line, he said, No, but they could be in the same general location, about 4 feet apart.
- [82] Mr. Robertson admitted that if 14 (a) on plan GR 94 is the centre line, then Lot 1 on GR 94 could be considered the land of the Defendant. Soon after he answered, if it is that 14(a) on the plan GR 94 is the centre line referred to in the receipt and S1 in the plan 682 is the centre line it is difficult for him to say the land more or less would belong to the Defendant.

- [83] He agreed that from what Mr. Alexander was basically saying in his field notes in relation to the measurement of 280 feet on the receipt the area that is marked out in yellow could belong to the Defendant.
- [84] When asked whether it is fair to say that the point suggested by Mr. Alexander as 277.4 feet is nearly in the same area as 14 (a) which the Defendant called the centre line, he said those two distances are close.
- [85] When asked whether it is not a fact that, if GR 682 is correct the land would be in an abnormal shape he replied that it was incorrect. He said most of the lands are following a parallel line.
- [86] When asked whether it is not reasonable to say that the disputed land belongs to the Defendant he replied: "I cannot say that, Mr. Williams, I cannot say that."

CONCLUSIONS:

- [87] The Defendant's case to a large extent rests on the centre line which is mentioned in his receipt and which he equates, with the mark 14(a) on GR 94. During his examination of Mr. Robertson I asked learned Counsel for the Defendant whether he was suggesting that at the time the receipt was made the Parties looked at GR 94 to make the receipt and he said, "No, my Lord."
- [88] The Defendant is not a licensed land surveyor and is not competent to relate a term in a receipt to a survey or map which is only in evidence because Mr. Robertson in his report referred to it. GR 94 is a drawing of a portion of land containing 31 acres 3 roods and 33 perches. As I said earlier, there is no indication that it was drawn by a licensed land surveyor.
- [89] Further a boundary mark based on the location of a coal pit which is not a permanent structure cannot be relied upon. It follows that the hypothetical question: "If 14(a) on Plan

GR 94 is the centre line referred to in the receipt then you would easily agree that the Defendant is basically occupying the land that were referred to" does not call for an answer as I reject the contention that 14 (a) on plan GR 94 is the centre line referred to in the receipt. That is conjecture and guess work by the Defendant.

[90] A challenge has been made to the authenticity of GR 148 as the adjoining owners, and in particular, the Defendant, was not served with notice of the survey by the Surveyor, Stinson Campbell in 1970. Section 16(2) of the Land Surveyors Act provides for such notices and that is reinforced by Section 18(1), (5) and (6). The Act does not stipulate what is the effect of the failure to give notice and it may be that the effect is that the survey is defective.

[91] However, Section 25 provides for the authentication of plans by the Chief Surveyor and it states in subsection (2) that every plan authenticated by the Chief Surveyor shall in any court of law be conclusive evidence of the survey information comprised thereon. As learned Counsel for the Claimant submits, from at least 1999 the Defendant knew of the existence of GR 148 and has taken no steps to cancel it by the Chief Surveyor. Both surveys GR 148 and 682 were approved and lodged by the Chief Surveyor.

[92] I believe Gisela Balcombe that the Claimant obtained possession of the land contained in GR 148 as early as 1988 when it was purchased from William Gooding and has remained in full possession to this day. She said there were no boundary marks on the land and it was later in 1999 that she discovered poles erected.

[93] Balcombe's evidence is supported by that of McArthur Robertson who stated in his report that the concrete posts he saw on the land appear to be recently erected and not concrete of 20 or 30 years old.

[94] The evidence of boundary marks given by the Defendant and his witness vary to a significant degree. Milton Creese in his witness statement said the monuments that were on the land in 1966 were still present when he visited the land in early 2002. Under cross-

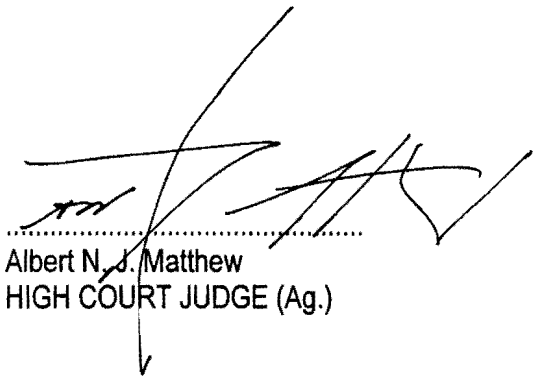
examination he admitted that the monuments were made of steel and were driven into the ground. He admitted that from the beginning the boundary marks were made of steel.

[95] The Defendant in his witness statement said there were 9 monuments from the beginning but he did not say, neither was he asked what they were made of. He said a major fire burnt down the poles and then in 1991 he erected steel poles on the same line as before. When he was cross-examined he said he met glirycedar trees on the boundary marks, then he replaced them with a hardwood called touch when the glirycedar trees got burnt. Later he decided steel was the answer.

[96] I do not believe the Defendant and his witness that there were boundary marks on the land that the Defendant purchased in 1966. I do not believe there were any boundary marks on the land when the Claimant purchased it in 1988. I believe the boundary marks only came into existence in 1999 after the Claimant had been in full possession of its land for close to 11 years.

[97] In the circumstances I find for the Claimant and declare that the disputed land measuring 11,486 square feet and referred to as Lot 1 on plan GR 682 is the property of the Claimant.

[98] The Defendant is to pay costs to the Claimant in the amount of \$4,000.00.



Albert N. J. Matthew
HIGH COURT JUDGE (Ag.)