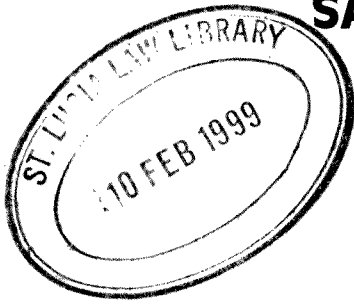




SAINT LUCIA

IN THE HIGH COURT OF JUSTICE (CIVIL) A.D. 1997

SUIT NO: 784 OF 1993

Between:

- (1) **JOSEPH BERNARD** also known as
JOSEPH CANJOE
- (2) **JEREMIAS BERNARD CANJOE** also known
as JEREMIAS BERNARD acting herein and
represented by his duly appointed
Attorney EDISON JULIEN as appears
by Deed of Deposit of Power of
Attorney and Appointment of Substitute
registered at the Office of Deeds and
Mortgages in Vol. 146a No. 168664

PLAINTIFFS

AND

GEORGE DOUGLAS GUY
C/o FRANCIS DEVAUX, Vigie, Castries
Saint Lucia

DEFENDANT

Appearances:

Mr. Peter I. Foster for the Defendant/Applicant

Mrs. Fleur Byron-Cox for the Plaintiffs/Respondent

1997: NOVEMBER 7
DECEMBER 19

JUDGEMENT

FARARA J. In Chambers

By Summons filed 16th June, 1994 the Defendant applied for
dismissal of the action on two grounds:

- (1) res judicata, the "issues" in this action having been determined and adjudicated upon in Petition Suit No. 72 of 1989 and Civil Appeal No. 18 of 1989 (including the Notice of Motion filed on 16th May, 1989 wherein the first-named Plaintiff swore to an affidavit raising the same issues contained in this action); and
- (2) the action is frivolous and vexatious and an abuse of the process of the Court.

The application is supported by the affidavit of Francis Devaux, who in paragraph 1 deposes.

"I am the attorney for the Defendant in this action and as such duly authorized to make this affidavit on his behalf".

Learned Counsel for the Plaintiffs submitted that a deponent can, in interlocutory proceedings, either depose to matters within his personal knowledge or on information or belief giving the source therefor, but cannot make an affidavit on behalf of someone else.

She submitted in limini, that, having regard to paragraph 1 of the said affidavit, the entire affidavit ought to be struck out and, consequently, the application. She cited no authority in support of this proposition.

As I understand it, an affidavit in a matter may be sworn by a non-party who is the agent or duly appointed attorney for a party. At the commencement of the hearing of this application on 7th November, 1997, at which time neither the Plaintiffs or their Counsel appeared, Learned Counsel for the Defendant/Applicant produced to the court a copy of the Power of Attorney dated 4th November, 1985 registered 13th November, 1985 in Vol. 135a No. 150947 by which the Defendant appointed the said Francis Devaux his attorney with general and wide powers, including the power to manage his property in St. Lucia, to appear for and on his behalf in any court of justice concerning such matters, to appoint Solicitors and Counsel, and to accept service of any Writ of Summons.

I am satisfied that Francis Devaux has the power and is authorized to swear affidavits in relation to any matter affecting the property of the Defendant in St. Lucia and to do so as his

attorney and in that sense, on his behalf. That does not in any way detract from the requirements of Order 41 r. 5 that in interlocutory proceedings a deponent may depose as to matters within his knowledge or upon information and belief stating the source or sources of the information. The matters addressed by Mr. Francis Devaux in his said affidavit, are almost without exception matters of record in Suit 72 of 1989 and this Suit 784 of 1993.

I therefore do not agree with the submission in limini of Learned Counsel for the Plaintiffs and the application to strike out the affidavit of Francis Devaux and dismiss the Defendant's application on that ground is refused.

Documentation

Learned Counsel for the Defendant on 7th November, 1997 passed up to the Court, in addition to the Power of Attorney previously mentioned, the following documents:

- (1) A chart showing the title history of the land the subject matter of this action, described at Particulars "A" to paragraph 9 of the Statement of Claim, as an aid memoir.
- (2) A chart showing the "family tree" starting with Sophie Bernard, as an aid memoir.
- (3) A record of the entire proceedings in Petition Suit 72 of 1989 and Civil Appeal 18 of 1989 consisting of some 39 numbered pages.
- (4) A copy of the Deed of Deposit registered at the Office of Deeds and Mortgages in Vol. 142a No. 161997 mentioned at particulars "B" to paragraph 9 of the Statement of Claim.

Learned Counsel for the Plaintiffs, at the hearing on 11th December, 1997 provided the Court with a copy of the Deed of Sale and Adjudication dated 28th March, 1917 registered at the Registry of Deeds and Mortgages in Vol. 71 No. 38254, by which the Sheriff sold to James Henry Cox the land described in the schedule thereto comprising 9 1/2 carres of land at Pointe Delie, in the Quarter of Dennery, the property the subject matter of

this action.

I propose to deal firstly with the second limb of the Defendant's Summons filed 16th June, 1994 and then address the issue of res judicata.

Frivolous Vexatious and Abuse of Court's Process

Learned Counsel for the Defendant/Applicant attacked the Statement of Claim in this action and, in particular, the causes of action pleaded therein, on the broad basis that they have not been properly pleaded and are unmaintainable in law.

At paragraph 8 of the Defence filed in this action, the Defendant pleads that the Plaintiffs' claim "is an abuse of the process of law".

By paragraph 4 of the Statement of Claim, the Plaintiffs admit that the Defendant was on 20th October, 1986 registered as proprietor of the land the subject matter of this action.

A number of claims or causes of action appear to be raised by the Statement of Claim.

(A) Overriding Interest/Prescription

At paragraph 5 it is pleaded -

"That on 20th October, 1986 the Plaintiffs had and continue to have overriding interests in the said land under the Land Registration Act Section 28(f)".

And at paragraph 7 it is pleaded -

"That consequently the Plaintiffs had and continue to have overriding interests in the said land under the Land Registration Act 1984 Section 28(g)".

Overriding interests are certain interests subsisting in or over registered land which need not be registered. Section 28(f) concerns "rights acquired or in the process of being argued by virtue of any law relating to the limitations of actions or by prescription"; and section 28(g) concerns "the rights of a person in actual occupation of the land". It is on these two types or categories of overriding interests that the Plaintiffs rely.

By virtue of Section 23(b) of the Land Registration Act, absolute title to registered land is subject to overriding interests, unless the contrary is expressed in the register.

Learned Counsel for the Defendant submitted that no particulars of actual occupation or of prescriptive title has been pleaded by the Plaintiff and it not enough in law to simply plead peaceable possession; it must be sole undisturbed possession. He relied on **Article 2057 of the Civil Code** which reads -

"For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal, and as proprietor."

However, Articles 2058 and 2059 are also of relevance -

Article 2058 - *"A person is always presumed to possess for himself and as proprietor, in the absence of proof that his possession was begun by another."*

Article 2059 - *"When possession is begun by another, it is always presumed to continue so, if there be no proof to the contrary."*

As regards occupation, possession and prescription the Plaintiffs in their Statement of Claim plead, firstly, at paragraph 3, that prior to 20th October, 1986 they "were the beneficial owners of the land and prescriptive owners of the title thereto as per Particulars "C" hereto". Subparagraph 3 of Particulars "C" reads -

"Possession of said land by Antoine Canjoe from 17th July, 1924 to 1st March, 1940."

Secondly, at paragraph 6, the Plaintiffs plead that they were in actual occupation of the said lands on 20th october, 1986 the date of registration of the Defendant as proprietor thereof.

At paragraph 10 they plead that Antoine Canjoe "remained in peaceful undisturbed possession" of the said land from date of purchase 17th July, 1924 up to his death on 1st March 1940. In my view, though the word "continuous" has not been used, the thrust of this pleading is continuous possession from 1924 to 1940 and satisfies the requirement, as far as pleadings are

concerned, of Article 2057 and a presumption of continuous possession arises by virtue of Article 2059.

And finally on this aspect, the Plaintiffs plead at paragraph 13 -

"That the Plaintiffs, successors in title to Antoine Canjoe ..., have remained in possession of the said land from the 1st March, 1940 up to and including the present time."

The Plaintiffs have therefore pleaded that they and the predecessor in title Antoine Canjoe, their father, have been in possession of the said land from 1924 to the date of filing of the Writ, a period of some 69 years, which, if established at the trial, would entitle them to apply for registration as proprietor pursuant to Section 94 of the Land Registration Act, 1984.

In my judgment the Plaintiffs have adequately pleaded possession and prescription and the pleading is not incurably bad.

(B) Documentary Title

In addition to a possessory or prescriptive title, the Plaintiffs also plead that prior to 20th October, 1986 the Defendant was the trustee for them of the land.

In support of this plea they reply, at Particulars "B", on -

- (1) the Deed of Sale and Adjudication to James Henry Cox recorded 28th March, 1917;
- (2) the "Contract of Sale" between James H. Cox and Antoine Bernard in respect of the said land dated 17th July, 1924;
- (3) and subsequent sales or transfers of the said land from -
 - (a) George Henry Cox et al for the heirs of James Henry Cox to Joseph Philogene dated 24th April, 1954;
 - (b) Gerald Joseph Daniel to Sylvester Harold Devaux registered 8th December, 1960; and

- (c) Sylvester Harold Devaux, Monica Theresa Devaux and Monica Theresa Devaux to the Defendant, George Guy, dated 13th October, 1967.

It is also pleaded at paragraphs 10, 11 and 12, that Antoine Canjoe purchased the land from James Cox and paid in full the purchase price on 17th July, 1924 but the latter did not, prior to his death on 23rd December, 1929 execute a deed of conveyance of the said land to Antoine Canjoe.

Learned Counsel for the Defendant/Applicant, relying on Articles 1967, 1970 and 1973 of the Civil Code, submitted that the receipt on which the Plaintiffs rely as proof of purchase by Antoine Bernard (Canjoe) of the land the subject matter of this action, having not been registered until 1989 cannot take priority over the Defendant's prior registered title. Further, it cannot prejudice the rights of the Defendant as a subsequent purchaser for valuable consideration whose title was duly registered. In short "he who registers his deed first has the preference".

While this submission is not without merit, it relates only to the question of documentary title. It is conceded by the Plaintiffs that the Defendant has the registered title under the Land Registration Act. To that extent the Plaintiffs' reliance on the receipt would not affect the Defendant's registered title, which at this stage is beyond dispute. However, a registered title can be defeated by a prescriptive title and the enjoyment affected by overriding interests, which is the main pleaded case for the Plaintiffs.

Learned Counsel for the Defendant/Applicant also sought to assail the Deed of Deposit pleaded by the Plaintiffs in paragraph 9 particulars "B" subparagraph (2) of the Statement of Claim. Relying on Articles 1148, 2013, 2017 and 2020 of the Civil Code he submitted that the document is defective in that it does not satisfy any of the requirements of a memorial in Article 2020.

It is apparent that the Deed of Deposit does not state the name of the place where it was executed, and the nature of the title being acquired by the purchaser is not specifically stated in the document, although the document purports to evidence an

outright sale of the land to Antoine Bernard, presumably of the fee simple interest.

However, even accepting that the Deed of Deposit is defective or does not satisfy all the requirements of a memorial for registration, that would render the Plaintiffs documentary title, defective, but the Plaintiffs rely, in the main, on a possessory or prescriptive title where documentary proof of title is not necessary.

Conclusions on State of Pleadings

For the reasons given above I am not satisfied that the action is frivolous vexatious and an abuse of the Court's process.

However, I agree with the submission of Learned Counsel for the Defendant that the Plaintiffs, having not pleaded fraud or mistake cannot obtain the relief of rectification of the land register. **Land Registration Act 1984 Section 98; Skeleton v. Skeleton** (1986) 37 WIR 177.

Fraud and mistake must be specifically pleaded with sufficiently particularly.

RSC Order 18 r. 8 and 12

Ecedro Thomas et al v. Augustine Stout and Grethel Stout Civil Appeal No. 1 of 1993 (British Virgin Islands).

Res Judicata

The Defendant pleaded res judicata in paragraph 6 of the Defence as required by RSC Order 18 r. 8 and 12 and it is one of the two grounds in his Summons filed 16th June, 1994.

In particular, the Defendant contends that the issues in this action have been determined and adjudicated upon in Petition 72 of 1989 and Civil Appeal No. 18 of 1989 in his favour.

Mr. Foster argued that the Plaintiffs in this action, are the children of Antoine Canjoe, whom they plead was in possession of the land from 19th July, 1924 to his death on 1st March, 1940.

In Petition Suit No. 72 of 1989 the Defendant, as petitioner, sought an injunction against Eddison Julian, Charles Bernard and Daniel Nelson restraining them from doing certain acts in relation to the Petitioner's said land including being or remaining or entering upon the said land.

The Plaintiffs were not parties to the said Petition Suit. However, the First Plaintiff swore to an affidavit on 6th May, 1989 which was filed in that Suit on behalf of the Respondents. In that affidavit he deposes, inter alia, that he and Jeremias Bernard are the lawful children and heirs at law of Antoine Bernard, also known as Antoine Canjoe, who died 1st March, 1940. He refers to the Deed of Deposit whereby on 17th July, 1924 their father purchased the said land which, upon his death, devolved to Jeremias and himself, their mother having predeceased their father.

At paragraph 8 of the said affidavit, the First Plaintiff deposed that the heirs of Sophie Bernard and Madam Sophie Bernard and their families have been in possession of the said land in their own right "and also with the permission of the said Antoine Bernard and the heirs of Antoine Bernard", that is he and his brother the Second Plaintiff.

At paragraph 9 he deposes that two of the respondents in Suit 72 of 1989 namely, Eddison Julian and Charles Bernard, are his cousins and belong to families of the heirs of Sophie Bernard and Madam Sophie Bernard.

And so, in this affidavit filed in the proceedings in Suit No. 72 of 1989 the First Plaintiff asserted or relied upon the Deed of Deposit and long possession or prescription.

The Defendant was successful in obtaining the injunction in Suit 72 of 1989 and the respondent Charles Bernard filed on 28th June, 1989 a Notice of Appeal expressly relying in his grounds of appeal, on, inter alia, overriding interests under Section 28 (e) and (g) of the Land Registration Act and invalidity of documents relied on in the judgment of Matthew J. That appeal was dismissed with costs on 31st January, 1990.

Learned Counsel for the Defendant/Applicant submitted that, notwithstanding that the Plaintiffs were not parties to Suit 72 of 1989, the First Plaintiff participated in the proceedings by swearing an affidavit raising the self same issues on which they rely in the Statement of Claim herein and they are barred by the judgment in that Suit and the dismissal of the appeal from raising those issues in this action.

Learned Counsel also relied on the doctrine of estoppel by record based on the judgment in Matthew J in Suit 72 of 1989 delivered 26th May, 1989. He submitted that it is a judgment in personam and binds the parties to Suit No. 72 of 1989 and all persons privy to them. In support of this proposition he cited **Halsbury Laws of England 4th Ed. Vol. 16 para. 990** which reads -

"A judgment in personam or inter partes raises an estoppel only against the parties to the proceedings in which it is given and their privies, for example those claiming or deriving title under them. As against all other persons it is res inter alios acta . . . Privies are of three classes: (1) privies by blood, for example, ancestor or heir; (2) privies in law, for example heir-at-law . . . or (3) privies in estate or interest . . ."

Mr. Foster submitted that the Plaintiffs and the Respondents in Suit 72 of 1989 are "privies in blood" and are bound by the judgment in that action. In particular he referred to a statement of the Learned Judge at pages 5 to 6 -

"The Respondents for whatever reason failed to have their claims processed at the appropriate time and they have stated in their grounds that they will be seeking rectification of the Land Register. The Respondents therefore, and quite rightly so, acknowledge that the absolute title of the Petitioner is in their way. How can they still contend that they have a right to go on the land?"

In my view, there is no finding of fact or determination of any legal issue made by the Learned Judge in the foregoing passage of his judgment. It is not in issue, and is in fact conceded by the Plaintiffs, that the Defendant has the registered title having been registered with absolute title after the land adjudication

process. However the Land Registration Act specifically provides for overriding interests, including interests founded upon rights acquired or in the process of being acquired under the Limitation Act or prescription, and makes any absolute title subject to those rights.

It would have been a different matter if the Plaintiffs had filed a claim to the land based on long possession or prescription and the Land tribunal awarded the property to the Defendant as the successful claimant.

In those circumstances, that decision, if not appealed, would have been final and determinant of any claim based on prescription or actual occupation, and the principle of res judicata would apply.

Learned Counsel for the Plaintiff in her submissions on 11th December, 1997 relied on and Article 1171 of the Civil Code. She submitted that in the Defendant's plea of res judicata must fail because:-

- (1) The respondents in Petition No. 72 of 1989 were not the same as the Plaintiffs in this action.

That is undoubtedly so. The Plaintiffs were in fact not parties to Suit 72 of 1989 although the First Plaintiff did swear to an affidavit, which was used by the respondents in that action, in which he raised some of the same matters that are pleaded by the Plaintiffs in this action.

- (2) The two Suits are not founded on the same cause or causes of action. In the instant matter, the Plaintiffs' claim is based upon beneficial ownership of the land, overriding interest under Section 28(f) and (g) of the Land Registration Act by virtue of prescription and actual occupation, whereas in Suit No. 72 of 1989 the respondents were fending off the incidents of an injunction by claiming that they were entitled as licencees of the owner.
- (3) In the instant matter, the Plaintiffs are relying on a constructive trust which was created when the Plaintiffs'

predecessor in title, Antoine Bernard also known as Antoine Canjoe, purchased the land in 1924, paid in full the consideration therefore, and was let into possession or occupation thereof but did not receive a conveyance. As such, Counsel submitted, the vendor James H. Cox became a constructive trustee for the purchaser of the said land.

She relied on the principles relating to constructive trust under the Laws of England, which are imported into the Laws of St. Lucia by virtue of Article 916 A (2) of the Civil Code.

While the concept of constructive trust can apply to a vendor and purchaser, it is of little or no avail to the Plaintiffs in the instant action in my judgment, as the purchaser, Antoine Bernard, sat on his receipt, did not register it, and his rights to the land would not have been protected as against a bona fide purchaser for value thereof, such as the Defendant and several of his predecessors in title thereto. Any doubt concerning this issue was finally put to rest by the registration of the Defendant as the proprietor of the land with absolute title.

I therefore do not accept that the concept of constructive trust has any application to the instant matter.

On the other hand, the Plaintiffs rely on overriding interests, which can affect an absolute registered title and, if based on prescription, can defeat that title or be used as a shield against any claim to possession by the registered owner. A leading authority on the legal effect of overriding interests on registered land or registered title is **Graham Davies v. Charles** (1992) 43 WIR 188 (P.C.). At page 199 Lord Jauncey, delivering the advice of the Board, put it this way -

"It follows that the respondents did not lose any overriding interest which they or their predecessors in title possessed at the date of the appellants' registration and are in no way barred from seeking now to enforce those interests. In the event of their success in this appeal it will be open to them to apply to the Registrar of Titles for registration as proprietors under Section 135(2) of the Registered Land Act."

Conclusions on Res Judicata

In my judgment, there is no decision, ruling or finding in the judgment in Suit 72 of 1989 which finally determines the Plaintiffs' claim to overriding interests, as they were not parties to that action and those issues were not determined or adjudicated upon by Matthew J, who simply relied on the registered title of Mr. Guy in refusing to set aside or discontinue the injunction against the respondents in that suit.

It is therefore open to the Plaintiffs in this action to assert overriding interest and the Defendant's registered title is not a bar thereto. If successful they would be entitled to apply for prescriptive title under Section 94 of the Land Registration Act or under Article 2103 of the Civil Code. See **Bridges v. Mees** (1957) 2 AER 577.

I therefore hold that the Plaintiffs causes of action in Suit 784 of 1993 are not res judicata by virtue of the decision in Suit 72 of 1989 and/or Civil Appeal No. 18 of 1989.

Laches

Finally Learned Counsel for the Defendant/Applicant submitted that the Plaintiffs have been guilty of laches or delay in bringing or asserting their claim some 7 years after the Defendant obtained registered title to the land.

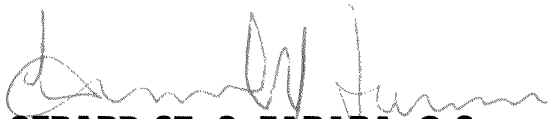
Firstly, laches is not pleaded in the Defence and is not a ground in the Summons filed 16th June, 1994.

Secondly, the very nature of overriding interests is that they affect the rights of the absolute title of a proprietor, without being noted on the register and without any legal claim being made thereto. They are to be used principally, though not exclusively, as a shield, although a person who has acquired a prescriptive title may apply for registration as owner or proprietor of the land and thereby defeat the title of the registered proprietor.

For those reasons I reject any argument founded on laches.

Orders

Accordingly, the Defendant's application by Summons filed 16th June, 1994 is dismissed with costs to the Plaintiffs to be taxed unless agreed otherwise.



**GERARD ST. C. FARARA, Q.C.
HIGH COURT JUDGE, (ACTING)**