

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2009/0022

BETWEEN:

WINSTON MOLYNEAUX

Appellant

and

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

Respondents

Before:

The Hon. Mde. Janice M. Pereira
The Hon. Mr. Don Mitchell
The Hon. Mr. Geoffrey Bell

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Sydney S. Bennett, QC, with him Ms. Anthea L. Smith, for the Appellant
Ms. Asha Johnson for the Respondents

2012: April 18.

Civil appeal – Land possession – Adverse possession – Limitation Act – Whether learned trial judge applied the correct law of limitation of the Virgin Islands

In 1956, the appellant moved onto a portion of a parcel of land more specifically delineated as Mount Sage Registration Section, Block 2335B, Parcel 40 and cohabited with Victoria Molyneaux nee Cameron ("Victoria"), who was found, by the trial judge, to be a share cropper for the respondents. During the time that the appellant and Victoria lived together on the land they maintained four structures on it and lived in undisturbed possession of same until Victoria's death on 16th August 1992. The appellant continued in exclusive possession. The evidence disclosed that at no time prior to the year 2006 did the respondents perform any act of ownership in relation to the land nor did the appellant ever had any discussions or arrangements with the respondents about his presence on the land.

The respondents claimed and were granted possession of the land as the learned trial judge found that the appellant's defence that the claim was statute barred would only be applicable if the appellant was able to show that the respondents had either discontinued their possession or that the appellant had shown an intention to oust them from possession of the land.

The appellant appealed.

Held: allowing the appeal and setting aside the order of the court below; and awarding costs to the appellant, that:

1. There are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control, or factual possession; and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit. The intention required of the trespasser is not one to own or acquire ownership of the land. All he need intend is to possess it for the time being in so far as that was reasonably practicable. It must be an 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 reasonably practicable and so far as the processes of the law will allow. Once such an intention on the part of the trespasser exists, the true owner is said to be dispossessed. In this case, the appellant had been dealing with the land as an occupying owner might have been expected to deal with it; he possessed all two elements necessary for legal possession. By continuing in exclusive occupation of that part of Parcel 40 after the death of Victoria, the appellant dispossessed the respondents.

JA Pye (Oxford) Ltd and Another v Graham and Another [2003] 1 AC 419 applied; **Mayor & Burgesses of the London Borough of Lambeth v Blackburn** (2001) 82 P&CR 39 applied; **Powell v McFarlane and Another** (1979) 38 P & CR 452 cited.

2. The respondents had a right of action against the appellant as a trespasser and this right existed from the date of Victoria's death. The latest date by which an action could have been brought by the respondents to recover possession from the appellant was 16th August 2004, being 12 years from the date when the cause of action first accrued to them. The claim was commenced on 5th April 2007; consequently it was statute barred.

Section 6(3) of the **Limitation Act** applied.

REASONS FOR ORAL JUDGMENT

- [1] **PEREIRA CJ:** This is a judgment of the Court. We have been asked to state in writing, for the purposes of further appeal, our reasons for the oral judgment of the Court delivered on 18th April 2012 at the conclusion of argument, and we are pleased to do so now.
- [2] This was an appeal against a judgment of Ross J [Ag.] made in the High Court on 24th September 2009 by which he made an order that the appellant, Winston Molyneaux ("Mr. Molyneaux") vacate the property described as Mount Sage Registration Section, Block 2335B, Parcel 40 ("Parcel 40") within 80 days of the filing and service on him of the Court-stamped copy of the order. The order was made in favour of the respondents Hugh Smith, Leroy Smith and John Smith ("the Smiths") on their claim for possession of the land occupied by Mr. Molyneaux. Mr. Molyneaux's defence was that their claim was statute barred by operation of section 6(3) of the **Limitation Act** ("the Act").¹ The issue on the appeal was whether the learned trial judge had applied the correct law of limitation of the Virgin Islands.

The Law

- [3] The law concerning limitation of actions in a claim for possession of land in the Virgin Islands is contained in sections 6, 7, 11 and 12 of the Act. Section 6(3) provides:

"6. (3) No action shall be brought by any other person to recover land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

By section 7(1) of the Act:

"7. (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has

¹ Cap. 43, Revised Laws of the Virgin Islands 1991.

while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the date of dispossession or discontinuance.”

Section 11(2) of the Act provides that:

“**11.** (2) A tenancy from year to year or other period, without a lease in writing shall, for the purposes of this Ordinance, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.”

Section 12(1) of the Act provides that:

“**12.** (1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as “adverse possession”) and where under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.”

[4] The law on adverse possession was explained in the House of Lords in the case of **JA Pye (Oxford) Ltd and Another v Graham and Another**.² Lord Browne-Wilkinson said at paragraph 41, approving the statement of Slade J in **Powell v McFarlane and Another**³ that:

“... what must be shown as constituting factual possession is 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...”

² [2003] 1 AC 419.

³ (1979) 38 P & CR 452.

- [5] The relevant intention that Mr. Molyneaux was required to have is explained in the case of **Mayor & Burgesses of the London Borough of Lambeth v Blackburn**.⁴ In that case a squatter broke the padlock securing a council flat and replaced it with his own. He first moved into occupation of one room of the flat. In doing so he did not regard the flat as other than a temporary home and expected to be evicted at any time. His testimony was that he had no claim to the freehold and would have been happy to pay rent had he been asked or permitted to do so. He gradually moved into the rest of the premises over a number of years, all the time expecting to leave as and when he received an eviction notice. He had been there in excess of 12 years when he finally was served with eviction proceedings. It was only on taking advice in relation to those proceedings that he became aware of the provisions of the Limitation Act. The Court of Appeal held that he had the necessary animus possidendi to be entitled on the facts to title by adverse possession.

The Facts as Found by the Judge

- [6] The facts as the learned trial judge found them were that in the early 1920s Alexander Smith, the father of Hugh Smith and John Smith and grandfather of Leroy Smith, purchased an estate in Capoon's Bay, the extent of which has now been reduced by sale to other persons to an area. Included in that estate was a parcel of land, now registered as Parcel 40 in the names of the Smiths as proprietors in common, and measuring some 50 acres in area. At the time of the purchase of the original estate by Alexander Smith, Victoria Cameron, subsequently Victoria Molyneaux ("Victoria") was living on a portion of it, while other portions were occupied by other persons. The evidence was that she lived there rent free, and in return, as with the other occupiers of adjoining lots, she sent a portion of whatever she harvested from the property in lieu of rent to Alexander Smith. The judge found that she was thereby a share cropper for the Smiths.

⁴ (2001) 82 P&CR 39.

- [7] Mr. Molyneaux moved onto the land in 1956 and he cohabited with Victoria whom he married on 29th December 1963. During the time that Mr. Molyneaux and Victoria lived together on the land they maintained four structures on it which constituted their matrimonial home. The structures do not appear to have been of any great permanence. The Smiths described the home as a shack and the other structures as sheds. It appears that Mr. Molyneaux used the sheds for the purpose of manufacturing his fish pots and for storing his fishing gear. Victoria and Mr. Molyneaux fenced in a portion of the 0.28938 acres that Mr. Molyneaux claimed they occupied and farmed. They continued in undisturbed possession of it, until Victoria died on 16th August 1992 aged 81 years. At the date of her death, Victoria had lived on the land her entire life.
- [8] The Smiths lived abroad and their cousin Egbert Smith was responsible for the property during their absence. Mr. Molyneaux neither sought nor obtained permission from the Smiths or their agent for his actions on the land. In the view of the Smiths, the land was theirs and they were permitting him to stay there with their permission. The evidence indicated that at no time prior to the year 2006 did the Smiths perform any act of ownership in relation to the land claimed by Mr. Molyneaux. Their evidence was that at no time did they ever have any discussion with Mr. Molyneaux about his staying on their land. There was no arrangement made between the parties for Mr. Molyneaux to remain on the land. Any decision on the part of the Smiths to grant him any accommodation took place only in their minds. It was only in 2006 that the Smiths first approached Mr. Molyneaux and requested that he acknowledge that his presence on the land was with their permission. This he refused to do.
- [9] Any informal share cropping arrangement by Victoria with the Smiths would necessarily have ended with her death on 16th August 1992. If Victoria was a tenant of the Smiths, then Mr. Molyneaux was her licensee. His licence would have terminated at the date of her death. He paid no rent to anyone, nor did he have any discussions or arrangements with the Smiths about his presence on the

property. He altered the buildings on the property to his taste and without any consulting anyone. He dealt with the property in the way that an owner in occupation may have been expected to deal with it. The evidence of the Smiths was that they and other persons living in the area occasionally walked through the area cultivated and occupied by Mr. Molyneaux. Mr. Molyneaux testified that if they did so it was only in his absence.

The Law Applied by the Judge

- [10] The learned trial judge found that although Mr. Molyneaux had assumed sole possession of the claimed premises after the death of his wife in 1992, his first demonstrated attempt to exercise rights akin to ownership was when he refused to accept that he was a licensee of the Smiths in 2006 and 2007. Prior to that date the relationship between himself and the Smiths 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 owner crossed the disputed land at will to access the lands in the larger parcel...”⁵

- [11] The learned trial judge's finding on the applicable law was that the Smiths' claim to possession of the land occupied by Mr. Molyneaux would only be statute barred if Mr. Molyneaux was able to show that the Smiths had either discontinued their possession or that Mr. Molyneaux had shown an intention to oust them from possession of the land. He held that the Smiths paying their taxes on Parcel 40 showed that they never intended to part with possession of it. Further, he found, Mr. Molyneaux could not show that he had dispossessed the Smiths since he was merely an occupier of land to which the Smiths had proper title and against which they were granting him an accommodation. He found that Mr. Molyneaux did not begin to exercise rights akin to ownership of the land until 2004, and then in 2006

⁵ At para. 13 of his judgment.

when he demonstrated an attempt to exercise rights of ownership by refusing to accept that he was a licensee.

Conclusion

- [12] The learned trial judge appears to have been influenced by the concept of the true owner being required to have an intention to part with the possession of the land. He seems to have conflated the paying of taxes by the legal owner in order to maintain legal ownership with the fact of possession through physical control of the land. The only intention that matters is the intention of the squatter. As Lord Browne-Wilkinson said at paragraph 45 of **Pye**, the suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is “heretical” and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring an inconsistent user. The only intention required is the intention to possess and occupy in the ordinary sense of those words. Once such an intention on the part of the squatter exists, the true owner is said to be dispossessed.
- [13] At paragraphs 10 and 11 of the judgment the learned trial judge found that the evidence that Mr. Molyneaux never had the intention of being in “... occupation with the intention of excluding the owner as well as other people...” was “... extremely strong ...” and that “... the defendant certainly had no demonstrated intention to dispossess the rightful owner...” These findings disclose a misunderstanding on the part of the learned trial judge as to the nature of the possession that Mr. Molyneaux was required to show in order for such possession to be held to be adverse to the Smiths.
- [14] Following the learning in the **London Borough of Lambeth** case, it was evident that the learned trial judge misled himself by the use of the expression “intention to dispossess the rightful owner”. There is no need for any confrontation or knowing removal of the true owner from possession as in the old law of adverse possession. All that is necessary now is for the squatter to go into ordinary

possession of the land for the requisite period without the consent of the owner. There are thus two elements necessary for legal possession: (1) a sufficient degree of physical custody and control, or factual possession; and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit. The intention required of the trespasser is not one to own or acquire ownership of the land. All he need intend is to possess it for the time being in so far as that was reasonably practicable. It must be an 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 reasonably practicable and so far as the processes of the law will allow.

- [15] If the learned trial judge had applied the correct principles of the law of adverse possession to the facts found by him he would have held that to the extent that Mr. Molyneaux remained in exclusive possession of the occupied area after the death of Victoria, his possession would have been adverse to the Smiths from that date. He would have been a trespasser with exclusive possession of the former matrimonial home. While the Smiths testified that after Victoria's death they spoke to Mr. Molyneaux about their plans to develop the property in the future, Mr. Molyneaux denied any such conversation. In any event, there was no acknowledgement in writing made by Mr. Molyneaux of the right of the Smiths, nor it appears was any asked of him until 2006. The Smiths were dispossessed on 17th August 1992 the day after the death of their licensee Victoria. The only proper conclusion for the learned trial judge to have come to was that time began to run in his favour from 16th August 1992. By continuing in exclusive occupation of that part of Parcel 40, he dispossessed the Smiths and a right of action accrued to them to recover the occupied area from him from that date. The latest date by which action could have been brought by the Smiths to recover possession from him was 16th August 2004, being 12 years from the date when the cause of action first accrued to the Smiths. The action was however brought on 5th April 2007, by which time it was statute barred by the operation of section 6(3) of the Act.

[16] We were satisfied that the learned trial judge erred in failing to find that the claim of the Smiths was statute barred under the Act. The learned trial judge ought to have dismissed the case against Mr. Molyneaux. We allowed his appeal and we set aside the order made by the judge with costs to Mr. Molyneaux in the court below based on a valuation of \$50,000.00, and with costs in the Court of Appeal calculated at two thirds of the amount in the court below.