THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2007

CLAIM NO. AXAHCV/2003/0045

BETWEEN:

JEFFREY ADOLPHUS CARTY

Claimant

AND

RAPHAEL EDWARDS

Defendant

APPEARANCES:

Mr. Thomas Astaphan and Mr. Duane Jean Baptiste for the Claimant

Mr. Michael Bourne, Mr. John Benjamin and Ms. Tara Carter for the Defendant.

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Date: 2006: October 16th, 17th
2007: January 15th

JUDGMENT

[1] GEORGE-CREQUE, J.: This case highlights the pitfalls facing an absentee land owner in Anguilla. The Claim, commenced by fixed date claim form, is brought by way of an appeal pursuant to section 147 of the Registered Land Act[1] ("the Act") from the decision of the Registrar of Lands dated 24th May, 2006, whereby the Defendant was successful on his application, made pursuant to section 135 of the Act, to be registered by prescription

of a portion of land situate at South Hill and then recorded on the Land Register as Parcel 81 Block 08412B, Road Registration Section. The Application was made to the Registrar on 17th July, 2003. The Claimant objected to the Defendant's application and a full hearing took place before the Registrar of Lands. The portion of land in respect of which the Defendant is now registered is described as being "*part of Parcel 330 formerly part of Parcel 81 and particularly delineated on Survey Plan Ref: CN 061/02 comprising 0.30 acre"*[2] ("the Land"). Parcel 81, based on the Land Certificate issued to the Claimant by the Registrar of Lands in 1981 and prior to the carving out of Parcel 330 therefrom, comprised in excess of 4 acres.

Appeals to the High Court

[2] CPR 2000, Part 60 governs appeals to the High Court. Specifically, Part 60.8 governs the hearing of such appeals and, in essence, provides that the appeal is by way of a rehearing with the power to receive further evidence on matters of fact and draw any inferences of fact which may have been drawn in the proceedings in which the decision was made. The parties availed themselves of this facility and filed witness statements which were treated as the witnesses' examination in chief. The issue before the Registrar of Lands was whether the Respondent had acquired title to the Land, then recorded on the Land Register in the name of the Claimant, by prescription.

The Law

[3] Section 135 of the Act states as follows:

"*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 12 years, but no person shall so acquire the ownership of crown land.*

(2) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar for registration as proprietor thereof."

[4] Section 136 says that *"Possession shall be interrupted—*

(a) by physical entry upon the land by any person claiming it in opposition to the person

[1] The Registered Land Act R.S.A c.R30, section 147 provides for an appeal to the High Court from a decision of the Registrar of Lands.

in possession with the intention of causing interruption if the possessor thereby loses possession;

(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."

[5] The Defendant also relies on the Limitation Act[3] section 5 (3) which in part says, in essence, that no action shall be brought by a person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him. The Limitation Act is commonly regarded as a Defendant's shield to a claim brought by the paper owner (registered proprietor) for recovery, whereas the prescriptive provisions contained in the Act are regarded as the Defendant's sword enabling him to take a positive act in establishing and perfecting his possessory title to land.

[6] Suffice it to say, that this action relates solely to the Defendant's utilization of section 135 of the Act as his sword to defeat the Claimant's paper title. This action by the Claimant, as alluded to earlier, is not in the nature of an action brought for recovery of possession but rather by way of challenge to the Decision of the Registrar of Lands finding in favour of the Defendant on his application for registration by prescription pursuant to section 135 of the Act. Accordingly, although an application of the relevant principles by route of the Limitation Act may inevitably lead to the same result, I do not consider, for the purposes of the nature of the case at bar, that any discourse into the Limitation Act is necessary or desirable. I therefore propose to confine myself to the application of the provisions of the Act to the facts as I find them to be, having regard to the relevant principles, in arriving at a determination in this matter.

The issue

[7] The simple question for determination then is whether the Defendant acquired the Land by his peaceable, open and uninterrupted possession thereof for a period of twelve (12)

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[2] As described in the Decision of the Registrar of Lands dated 24th May, 2006

[3] The Limitation Act R.S.A C L60

years without the permission of the person lawfully entitled thereto. This is essentially a question of fact to be determined on the evidence. This question, though simply posed, has, in the past, given rise to considerable difficulty and confusion in the application of the relevant principles bearing on its answer.

[8] In JA Pye (Oxford) Ltd. & Anr. -v- Graham & Anr.[4], cited by counsel for the Defendant, the House of Lords in the United Kingdom took the opportunity to trace and examine the history and development of the law relating to the acquisition of title by prescription or the extinction of title by virtue of the provisions of the Limitation Act, and restated the applicable principles relating to 'possession'. These principles are very helpfully set out in the erudite judgment of Lord Browne-Wilkinson, with whose opinion all members of the Panel agreed. Their Lordships cited with approval, inter alia, the cases of Powell-v-McFarlane[5], and Buckinghamshire County Council-v-Moran[6] cited by counsel for the Claimant. I consider Pye's case to be of highly persuasive authority given that the relevant principles as to possession are integral to the determination of the case at bar.

[9] Lord Browne-Wilkinson in paragraph 36 of his opinion in Pye, stated the position thus: "*The question is simply whether the defendant squatter has dispossessed the paper owner (in this case, the registered proprietor) by going into ordinary possession of the land for the requisite period without the consent of the owner".* At paragraph 40 of his opinion, he succinctly stated the two elements necessary for establishing legal possession thus:

"(1) a sufficient degree of physical custody and control ("factual possession");

(2) an intention to exercise such custody on one's own behalf and for one's own benefit ("intention to possess"). ....Such an intention may be, and frequently is, deduced from the physical acts themselves.

He went on further to say that "*it is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession"*

[4] [2002] UKHL 30, [2003] 1AC 419
[5] (1979) 38 P. & C.R.452
[6] [1989] 2All ER 225

[10] Factual possession

Lord Browne–Wilkinson at Paragraph 41 cited with approval from the dicta of Slade J in Powell's case where Slade J said at pp 470-471 of his judgment thus: *"Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. ……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."*

[11] Intention to possess

Pye's case may be said to have settled the law in terms of what is required to ground this element which had become clouded by the use, over time, of expressions relating to 'acts of ownership' or an 'an intention to own'. As was said by Hoffman J in Moran's case, at pp 238 of his judgment "*What is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess for the time being the land to the exclusion of all other persons including the owner with the paper title."* This statement of the principle was expressed by their Lordships in Pye as being *'manifestly correct'* .

[12] Acts inconsistent with the intentions of the registered proprietor

Pye's case may also be taken to have settled the law on the question as to whether the acts of the possessor must be inconsistent with the intentions of the paper owner so as to establish possession. At paragraph 45 of his opinion, Lord Browne-Wilkinson, in describing such a requirement as a heresy of Bramwell B in the case of Leigh -v- Jack[7] , had this to say: *"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. …. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner."*

[7] (1879) 5 Ex D 264

The Evidence

[13] Bearing these principles in mind, I now turn to consider the evidence given in this case. Apart from the statements given before the Registrar, the Defendant gave evidence on his own behalf and called three other witnesses. The Claimant and one other witness gave evidence on his behalf. The Defendant must show that he was in peaceable, open and uninterrupted possession of the land without the Claimant's consent, at latest, as from 16th July, 1991, which would be a period of twelve years from the date of his application for registration by prescription. It could be earlier than 16th July, 1991, but not later. I now set out the salient features of the evidence given by the witnesses in so far as I consider same relevant to the issue.

[14] The Defendant, also known as "Raffee" in his statutory declaration in support of his application for registration by prescription, after referring to the Land in issue as Lot 1 on Plan CN:061/02, in essence, stated that:

(1) In July, 1985, he was informed and believed he had an interest in the estate (which comprised land at South Hill) of one Garton Carty.

(2) On or about 10th August, 1987, he entered the Land and began construction of a bar and restaurant now called "Raffees". He also cleared the area and planted trees and shrubs thereon.

(3) From that date, to the present, he so occupied the Land, operating a restaurant, bar and garden for his sole benefit without interference from anyone.

[15] In the Defendant's witness statement filed on October 11th 2006, he therein stated as follows:

(1) In or about 1985, I moved unto property which I was later told is legally registered as 08412B, Parcel 330 and erected a tent to operate my restaurant business.

(2) In or about 1987, I erected a temporary structure on the property which remained undisturbed until its destruction by Hurricane Luis in 1995. After the hurricane, I erected

a permanent wooden structure on the property and I retained Mr. Cecil Niles to place markers around the property.

(3) From the time I moved unto the land until the current time, I have operated my business without any interruption or physical entry of any persons claiming title.

(4) Furthermore, I have never paid any lease payments or rent for this property.

(5) I have never conveyed any oral or written acknowledgment of title to any person claiming to be proprietor of the land.

[16] In the proceedings before the Registrar, during his examination the Defendant stated, in essence, that:

(1) Around July, 1985 he was really operating (a restaurant) from a cooler and a tent selling chicken and ribs and did so until he had permission from the building board to erect the same structure- a wooden structure which he erected sometime after Hurricane Luis in 1995.

(2) Apart from erecting the structure and operating the restaurant, he had markers put down.

(3) He recalled making an application to the building board but said he knew nothing about the certificate on the application which stated that all persons who were owners of the Land had been notified of the application.

(4) He did not recall a meeting at the Offices of the Registrar, Mr. Corker, about the Land.

(5) He recalled a meeting with the Claimant on the porch of a house at South Hill about the Land, but not about him paying or agreeing to pay the Claimant rent for the Land. He said he recalled that the Claimant was making the same claim that he(the Defendant) was making. In essence he said that he considered himself just as much an owner as was the Claimant.

(6) He rented the premises out for one year to two other persons but said that he was told by them that one Lowell Hodge came unto the premises and told them to remove themselves.

(7) There was a discussion with the Claimant sometime in 1996 about leasing the Land but called it a "contention chat". He said the Claimant did not have any more right to the Land than he had.

(8) He received a letter dated in 1996 from the Claimant referring to him (the Defendant building on the Land without his permission. He recalled that the Claimant asked him to remove the structure from the Land and return it to its previous condition.

(9) *The Claimant and his father, he said, ought not to have been registered as owners of the Land.*

[17] During cross-examination at the trial, the Defendant, in essence, said:

(1) *He had certified on his application for building permission that he had notified the owners of the Land of the application, but that he had not in fact done so.*

(2) *He had a discussion with the Claimant on the porch of his sister-in-law's house in 1996 about the Land, leasing the Land and paying a monthly rent of $600.00 but that he disagreed with the Claimant about leasing the Land and paying rent and does not recall paying him $600.00 for rent.*

(3) *He thought that the land should be taken away from the Claimant and his father and decided he was going to do something about it – by going on the Land and building a structure*

(4) *He started off on the Land with a cooler and BBQ grill around 1985 which he would take there in a vehicle and remove when he was finished. Eventually he began to leave the grill and cooler on the land and would bring ice and drinks for the cooler.*

(5) *Later, he set up a shack – and placed the cooler and the grill in the shack. He operated with this until Hurricane Luis blew it away in September, 1995.*

(6) *After Luis he erected a permanent wooden structure.*

(7) *He did not recall when he moved unto the land and said it was either July or August 1985, then said that it was in 1987 as stated in his statutory declaration.*

(8) *The tent or shack was 4, 6 to 8 poles and a tarpaulin and that was "Raffees".*

(9) *He probably had a meeting with Mr. Corker and the Claimant about the Claimant's ownership of the land but said that he ignored the whole thing.*

(10) *He also said that the Claimant sent him a lease to sign and he ignored that too and never paid the Claimant any rent.*

(11) He said *"My position was that Mr. Carty had no right to own that land so I was not studying him."*

[18] Mr. Hubert Hughes, a former Minister of Government and a person who lived the bulk of his years at South Hill in fairly close proximity to the Land said in his witness statement:

(1) *"I … have personal knowledge that the Respondent moved on these lands over 20 years ago, somewhere in or about the 1980s. ….. I personally recall that the Respondent*

erected his structure from the 1980s where he sold barbecue chicken and drinks and operated his restaurant. From that time, he continued to improve the structure.'"

(2) No one had been using the land for any other purpose.

(3) I know that the Appellant (sic Claimant) resides in the United States.

In cross examination he, in essence, said:

(1) *It was close to 1985 when the Defendant erected the structure.*

(2) It was always a wooden structure with a roof.

(3) The structure there now, he said, is "an evolution of the initial structure. He is always upgrading the place."

(4) He recalled Hurricane Luis in 1995 and knew that the original structure had been damaged.

[19] Mr. Kirk Hughes, owner of Flavours Restaurant on Back Street South Hill also lived in South Hill for thirty eight years immediately in the area occupied by Raffee's Restaurant. In his witness statement, he said that Raffee's Restaurant was in the same location since the late 1980s. He recalled meeting at Raffee's Restaurant on an occasion in 1990 with the proprietors of Beach Stuff situate across the street from Raffee's. In cross-examination, it was revealed that he had been interested in a piece of land located between Raffee's and Flavours Restaurant but gave up on his interest as the same was in contention between the seller, from whom he was purchasing, and the Claimant.

[20] Mr. James "Freddie" Hughes also of South Hill said in his witness statement that sometime in 1987 he began construction of an apartment building east of Raffee's establishment and by that time he was aware that the Defendant had been occupying the property in Back Street, South Hill. He said he would frequent Raffee's location as he barbecued at nights and that the Defendant occupied the same location since 1985 or 1986. In cross-examination, he referred to the Defendant using a grill made from a gas cylinder and selling drinks from a cooler and that he had begun erecting a structure. He said that the structure before Hurricane Luis and after Hurricane Luis was about the same type.

[21] The Claimant, in his answers before the Registrar, stated, in essence, that:

(1) *He lived in California in the late 70s – 80s, and now lives in Georgia. He first came to Anguilla in 1972.*

(2) *He wrote the Defendant a letter asking him to vacate the land and a year or so later, he had discussions with the Defendant in Anguilla about leasing the Land.*

(3) *The Defendant agreed to lease the Land and paid him $600.00 in cash and then refused to make any further lease payments. He did not recall if he gave the Defendant a receipt for the money.*

(4) *He found out that the Defendant had subleased the Land to two other persons*

(5) *That as far as he knew the Defendant went on the Land in 1995. He had visited several times and had seen no evidence of the Defendant being on the Land.*

[22] In his witness statement he, in essence, said:

(1) *After his first visit to Anguilla in 1972, his next visit was six years later and thereafter, he returned more frequently.*

(2) *On his visits to Anguilla he would visit the Land and never saw any evidence of the Defendant on the Land.*

(3) *That in late 1995 his sister-in- law informed him of construction taking place on the Land.*

(4) *He obtained a copy of the Defendant's planning application and soon thereafter wrote a letter to the Defendant asking that he vacates the Land.*

(5) *He also enlisted the assistance of various governmental agencies and retained a lawyer to write letters to the Defendant.*

(6) *In 1997, he visited Anguilla, primarily to attend a meeting with the Registrar of Lands at the request of the Defendant.*

(7) *It was from this meeting that the idea of a rental Agreement came about, leading to a meeting with the Defendant where he agreed to lease the Land.*

(8) *That a down payment of $600.00 was paid by the Defendant and a written lease was to be drawn up and sent to the Defendant, which he did.*

(9) *The Defendant never returned the document nor did he make any further payments.*

(10) *Thereafter, several demands were made that the Defendant either abide by the terms of the Agreement or vacate the Land.*

(11) *He did neither, but instead, filed an application for registration by prescription.*

[22] In cross-examination, he said:

"The structure could not have been there prior to 1995. I had made several trips to Anguilla and viewed the *property I have never seen it. I did not see a tent structure in 1985. …… I did not take any action through the court to protect my interest. ….. I became aware that the Defendant had sub-leased the property. I went to the individuals between 2000- 2003 and explained the situation. The sub-lease was an important action against my interest."* On the discussions on the lease of the Land he said: *"I did not issue a receipt for the $600.00. I did receive the money."*

[23] Lowell Hodge, on behalf of the Claimant, said he knows the Land and would drive past the Land from time to time. He left Anguilla for the US in 1986, returned in January 1987, and then left again in 1987, returned in 1988, and left again in 1990 and returned permanently to Anguilla in 1991. The sole structure on the land, he said, was one occupied by one Alburn Rogers known as 'Gareth'. He never saw any other structure on the property. He knew the Defendant from seeing him around Anguilla but never saw the Defendant operating on the Land during the periods he was in Anguilla and that he first noticed the Defendant on the Land in or about 1996.

Observations and evaluation of the evidence

[24] It is reasonable to infer from the evidence that the Land is in close proximity to the public road. There is no suggestion that the Land was enclosed or that access thereto was in any way restricted at any time. Indeed, it is not unusual in Anguilla to see large expanses of land existing in its natural state and unfenced or un- enclosed in any manner. Also not unusual is to see vendors on land in close proximity to various roads operating from food vans or similar structures or conveyances. In my view, it would be most surprising to the ordinary Anguillian if the view was held that such persons were in possession of those areas such as without more, would enable them in due course to obtain title thereto by prescription.

[25] Whilst assessing the evidence given by both sides, I am mindful of the fact that the evidence given by the Defendant and the Claimant may, to a certain extent, be self serving. As is clear from the Defendant's testimony, he was in certain respects contradictory. On occasion he was less then frank and seemed prepared only to give

evidence which he felt may help his cause. He was not a very convincing witness. I consider that the Defendant's statutory declaration sets out more accurately the date when he first entered upon the land as being sometime in and around the month of July, 1987 and that when he did so it was by taking unto the Land a cooler and a BBQ grill made from a gas cylinder. He then barbecued chicken on the grill and sold drinks from the cooler. This operation became known as "Raffees". Eventually, he began to leave the grill and cooler on the Land. It is not suggested nor did he say that he secured or sought to secure the area where these items were left.

[26] He later erected a tent or shack which he said was comprised of 4-6-8 poles in the ground covered with a tarpaulin and placed the cooler and grill in the shack. He operated in this manner on the Land until Hurricane Luis blew away the tent or shack in September, 1995. Other witnesses testifying on the Defendant's behalf were more generous in their description of this structure. I am satisfied, however, that the Defendant's description of the same as a tent or shack, given the materials of which it consisted, is more reflective of its character. It is not suggested that any attempt was made during that period to enclose or secure the area around the tent which was to all intents and purposes an open and temporary structure. There is no evidence that access to the land had thereby become in any way restricted in respect of the registered proprietor or any other person.

[27] Do these acts then amount to the exercise of a sufficient degree of custody and control of the Land such as to constitute factual possession of the Land? Is this a single and exclusive possession? To my mind, these acts were equivocal and do not amount to acts which may be considered as giving rise to a single and exclusive possession. To say that from these acts an intention to possess the land may be deduced is, in my view, a far stretch.

[28] The facts in the case at bar are clearly distinguishable from the facts and circumstances in Pye's case even though the principles expounded therein are quite relevant. In Pye, disputed land was fully enclosed by hedges and gates which could be accessed by keys held by the occupiers of the disputed land to the extent that the whole world was excluded

including Pye, the paper owner, from the land save with the key, which he did not have, or by way of a footpath over a certain portion of the land. Pye had no rights of access over the driveway. The occupiers who had first been let into possession by permission for the purpose of farming the land remained in possession after the licence ended without any further permission being granted and continued their farming in the same manner as they had previously done for a period in excess of twelve years. On the peculiar facts of Pye's case, applying the relevant principles, the court found as a fact that the occupier had been in continuous possession without the permission of Pye for a period in excess of twelve years after the initial period of possession by permission.

[29] It was only sometime after Hurricane Luis in 1995, that the Defendant engaged Mr. Cecil Niles to put down markers demarcating the Land. It is to be noted that the Defendant's application for planning permission preceded Hurricane Luis, as it is dated 24th April, 1995, and was approved on August 29th, 1995. It is after the Defendant obtained planning permission in 1995 and then set about demarcating an area as well as putting down a permanent structure that, to my mind, it can be said that the Defendant was then exercising the degree of custody and control over that portion of the land for his own benefit amounting to a single and exclusive possession. It is then that he clearly demonstrated his intention to exclude the world at large including the registered proprietor from that portion of the land. The earliest that the Defendant may be said to have been in possession of the Land without the consent of the registered proprietor then, is from sometime in the year 1995.

[30] This accords, in my view, with what transpired after that period and explains why prior to this the Claimant on his visits to the Land was unaware of any occupation thereof by the Defendant until there was something to be seen in the nature of the construction of a building thereon, and the physical demarcation by markers of an area surrounding same.
It also explains why Mr. Lowell Hodge on his drives in and around the area, also did not observe any structure thereon until sometime in 1996. It is around this time in 1996 that the parties had discussions pertaining to the land and the leasing of same to the Defendant which is not disputed by the Defendant and had meetings with the Registrar of

Lands seeking a resolution of the matter. The Defendant, obviously from his testimony, had no intentions of leasing the Land and paid no attention to those discussions nor paid any mind to the lease document when received.

Conclusion

[31] Based upon the foregoing, I am not satisfied that the Defendant at the time of making his application to the Registrar for title by prescription in 2003, had been in possession of the Land for the requisite period of twelve years enabling him to obtain title thereto. I consider that the Defendant's premature action was no more than an attempt to steal a march on the absentee registered proprietor. This, however, should not be taken as being in any way sympathetic to the Claimant. The Claimant who sleeps on his rights is in no better position in the eyes of the court than the person who seeks to steal them away. It is important in any legal system that there is in place a mechanism for the extinguishment of stale claims. This is primarily the mischief which the Limitation Act seeks to address.

[32] Having concluded that the Defendant could only be said to be in possession of the Land as from 1995, I do not consider that it is necessary to make any findings as to whether the Defendant subsequently entered into a lease in respect of the Land for the purpose of interrupting the period that the Defendant may be said to have been in possession without the Claimant's permission.

Orders

[33] I accordingly order that the Registrar's decision of 24th May, 2006, wherein it was ordered that the Defendant be registered as proprietor by prescription of Parcel 330, Block 08412B, Registration Section Road, and being formerly part of Parcel 81 of the same Block and Registration Section recorded in the name of the Claimant be and is hereby set aside and the name of the Claimant be restored as the registered proprietor thereof.

Costs

[34] Counsel on both sides agreed that the costs on the Claim be calculated based on the value of the Land. This is as contemplated by CPR 2000 Part 65.5 (2)(a). A valuation of the Land dated 8th December, 2006 was submitted to the court. The value given to the Land is US $160,000.00. I accordingly award costs based on the scale for prescribed costs set out in Appendix B pursuant to CPR Part 65.5, in the sum of US$ 33,000.00 to be paid by the Defendant.

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Janice M. George-Creque
High Court Judge