THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CLAIM NO. 466 OF 2003

BETWEEN:

SYDNEY McMILLAN
(by his attorney ANDREA McMILLAN)

Claimant

V

JULIAN ARRINGTON

Defendant

Appearances:
Mr. J.O.R. Martin for the Claimant
Mr. P.R. Campbell Q.C. and Mr. M. Peters for the Defendant

2007: April 17, 18 and 25;
May 10

JUDGMENT

[1] **MATTHEW J (Ag.)**: On October 28, 2003 the Claimant filed a fixed date claim against the Defendant asking for an order for possession of a parcel of land located at Three Rivers, South Rivers. The claim was amended on July 28, 2004. The Claimant asked for costs; and further or other relief.

[2] In the amended statement of claim, the Claimant alleged that the land consists of two parcels each approximately 1 ½ acres by admeasurement. No plans of survey were submitted.

[3] The Claimant alleged that the Defendant and himself are paternal half brothers and that the Defendant is currently in possession of the land which was donated to him by his father

by virtue of indentures dated July 14, 2000 and bearing Registration Numbers 2096 and 2097 of 2000.

[4] The Claimant alleged that some time in 1982 the Defendant and his full brother, Paul Arrington, were given permission to cultivate the land by their father, Maurice Defreitas.

[5] The Claimant further alleged that in 1999 Maurice Defreitas developed prostate cancer, and needing money for his medical treatment, approached the Defendant to purchase the land which the latter refused to do; and therefore he had to pay all Maurice's medical needs and in consideration of the Claimant's love and affection Maurice executed two deeds of gift conveying both portions to the Claimant.

[6] The Claimant alleged that he issued two notices to quit to the Defendant who has refused to give up possession.

[7] On November 17, 2004 the Defendant filed a defence and counterclaim in which he claimed that he has been in sole, exclusive, continuous, public possession of the disputed parcels of land as owner from 1981 to the present time; and that therefore he has been in adverse possession of the said land for a period in excess of the Statutory Limitation period. He said the Claimant's alleged right of action is barred by the applicable provisions of the Limitation Act, Chapter 90 of the Revised Laws of Saint Vincent and the Grenadines.

[8] The Defendant acknowledged the existence of Deeds 2096 and 2097 but said that these deeds were ineffective to convey the disputed parcels of land to the Claimant. Part of the defence is that Maurice Defreitas had orally donated the land to the Defendant.

[9] The Defendant counterclaimed for an order that he is entitled to possession of both parcels of land; such further or other relief as the Court might seem just; and costs.

[10] On February 9, 2005 the Claimant filed a reply and defence to the counterclaim in which he stated that the Defendant's possession was never adverse to that of Maurice Defreitas

and that the Limitation Act of 1990 is not applicable since at least up to the year 2000 Maurice Defreitas demonstrated his rights of ownership.

[11] The Claimant alleged that Maurice Defreitas remained in possession of the land until it was transferred to the Claimant by deeds of gift in 2000.

EVIDENCE

[12] Andrea McMillan is the mother of Sydney McMillan. Both herself and Maurice Defreitas gave witness statements for the Claimant and were subjected to cross-examination. The Defendant, Julian Arrington, also gave a witness statement and was cross-examined. He called no witnesses.

[13] Maurice Defreitas first gave evidence. He admitted he was the father of the Claimant and the Defendant. He said that he lived wth one Amazil Dublin who died in 1974 in a common law relationship that produced 12 children one of whom was the Defendant.

[14] After the death of Amazil he entered into another common law relationship with Andrea McMillan and they produced children including the Claimant.

[15] He said he purchased one parcel of land from Priscilla James and another from her brother, Aubrey James, and put his son, Paul Arrington, to work the land in the year 1981. Paul worked the land for one year having taken the Defendant to work with him and then left to go to work for Manny Francis.

[16] He said after Paul left he called the Defendant to his home and told him to work the land and save his money so that when he is ready to sell, he will sell to him if he is able to provide the price for the land. He said early in 1990 he decided to sell the land. He called the Defendant and told him he is offering to sell him the land. The Defendant said he would return to talk to him about the offer and never returned despite messages sent to him up to the year 1994.

[17] He said he continued going to the land even after he made the arrangement with the Defendant and he had about 5 acres of land next to the disputed parcels of land and he would often go to see how well the Defendant was managing the land. He said he continued going there until the year 2000 when he was diagnosed with prostate cancer.

[18] He said after he realized the Defendant was not interested in purchasing the land he conveyed them to the Claimant.

[19] Under cross-examination Maurice Defreitas stated that the Defendant did not pay rent or anything at all for the land. He admitted that the Defendant was refusing to buy the land from 1990 and that he never went on the land to work the land since the Defendant was working the land.

[20] Andrea McMillan stated that in or about the year 1974 she became involved in a common law relationship with Maurice Defreitas after his first common law wife, Amazil Dublin, passed away.

[21] She reiterated that Paul Arrington left the disputed land in 1981 and the Defendant took over after Maurice called him to his home and told him that he must work the land and save his money so that he can buy the land when his father was ready to sell.

[22] She said she was present in 1990 when Maurice called the Defendant to their home and offered him the land for sale and the Defendant agreed to return to discuss the matter and never returned.

[23] Under cross-examination she admitted that from 1981 to the present the Defendant has been working the land. She said in 1990 his father called him to buy. He refused to buy and has not handed back the land since.

[24] Julian Arrington stated in his witness statement that he was the sixth child of the twelve children that his mother, Amazil Dublin, bore to Maurice Defreitas. He said in 1981 his father orally donated oen of the disputed parcels to him for his sole use and benefit. He said from that time his father has never gone on the disputed parcel of land, nor has he sought or received from him any produce of the land. He said he has cultivated the land for his sole use and benefit, planting bananas and other crops.

[25] He stated that in 1993 by High Court Suit No. 168 of 1993, Fitzroy McDonald unsuccessfully brought an action against him for alleged trespass to some of the land he had been cultivating since 1982.

[26] When he was cross-examined he reiterated that his father bought the land for him and they did not have any arrangement that he would work the land, save the money, and when the father was ready to sell, he would be given the first option to purchase. He denied that he was lying.

[27] He said he was working the land for the benefit of himself and his children. He acknowledged that the father was owner in 1994 but not afterwards. He said his father was not involved in any way in Suit 168 of 1993 and he did not inform his father about the case.

[28] He said he did not know that his father had given the land to his brother until he received the notice to quit.

[29] After the taking of the evidence both Counsel requested, and the Court agreed, to allow both Counsel to present final submissions not later than April 25, 2007 at 3:00 p.m.

SUBMISSIONS OF COUNSEL

[30] Learned Counsel for the Claimant submitted the issues in this case to be the following:

(a) Whether the Defendant was orally donated the disputed land or whether he was given permission to work the land with a promise of an opportunity to purchase.

(b) Whether the Defendant was in exclusive possession of the land.

(c) Whether or not an offer was made to the Defendant to purchase the land.

(d) Whether in his defence to Claim 168 of 1993 he acknowledged that Maurice Defreitas was owner of the land.

(e) Whether the Defendant was a licensee or tenant at will.

(f) Whether time ran in favour of the Defendant for the full period of twelve years thereby entitling him to a declaration of title.

[31] Counsel then developed the submissions. On the first issue Counsel submitted that the Defendant ought not to be believed that his father donated the disputed land to him. On the second issue, Counsel submitted that Maurice Defreitas maintained a sort of overseeing or controlling presence with respect to the land.

[32] Counsel submitted that by the Defendant's own acknowledgement in his defence in Suit 168 of 1993 he was not in exclusive possession and that at least up to that time could not claim adverse possession.

[33] Counsel submitted that the acts of entry by Maurice Defreitas even if they may be considered formal in nature may be sufficient to negative the exclusivity of possession that the Defendant must assert for a claim of adverse possession as was found in the case of ***Solling v Broughton*** 1893 AC 556 at pages 560 – 561.

[34] As regards the third issue Counsel submits this is a question of fact for the Court to decide but urges the Court to accept the evidence of the Claimant rather than that of the Defendant.

[35] As regards the fourth issue Counsel submitted that in Suit 168 of 1993 the Defendant in any event acknowledged that Maurice Defreitas was the owner and possessor of the disputed land. In this connection reference was made to Sections 29 and 30 of the

Limitation Act, Chapter 90 and to the Privy Council case of ***Browne v Perry*** 1987 40 WIR 165.

[36] As regards the fifth issue Counsel submitted that the relationship between Maurice Defreitas and the Defendant was that of owner and licensee. Counsel realized that the Privy Council case of ***Ramnarace v Lutchman*** on which the Defendant relies stood in his way and in effect submitted that there are factual differences between that case and the one with which we are presently concerned.

[37] As regards the sixth and final issue Counsel submitted that time will run against the Claimant only if the Court construes a tenancy at will. Earlier Counsel submitted that the critical distincton between the case ***Ramnarace v Lutchman***, 2001 1WLR 1651, and the case under review is the meeting in the year 1990 between Maurice Defreitas and the Defendant.

[38] Counsel contended that the meeting stopped the limitation period from running (I suppose from 1981 or 1982) and a new tenancy at will would be created which would determine one year later in 1991 at which time the limitation period would now begin to run.

[39] As I indicated learned Queens Counsel for the Defendant relies essentially on the Privy Council case of ***Ramnarace v Lutchman***. It behoves me to set down in this judgment as learned Queen's Counsel has done in his submissions the facts and decision in ***Ramnarace*** which were as follows:

> "The plaintiff's uncle and aunt, who were the defendant's parents, offered to allow the plaintiff to live on land which they owned and they said she could occupy it until she could afford to buy it from them. The plaintiff entered into occupation of the land in July 1974 and built a wooden house on it for herself and her family to live in. At no time did she pay rent or other sum for her occupation. The uncle died in 1975. In 1978 and 1985 the defendant issued notices to quit but took no steps to enforce them. In 1988 the aunt died. The plaintiff replaced the wooden house with a concrete structure and enclosed the disputed land with a chain link fence. The defendant pulled the fence down and in November 1990 the plaintiff commenced proceedings against the defendant. In her statement of claim served in November 1991 she sought a declaration that the title of the defendant and his predecessors in title had been extinguished by virtue of the 16-year limitation

period for recovery of the land laid down in section 3 of the Real Property Limitation Ordinance 1940. The defendant served a counterclaim in December 1991 seeking a declaration that he was the owner of the disputed land and an order for possession. The judge found that the plaintiff had entered into occupation of the disputed land as a tenant at will and by operation of section 8 of the Ordinance that tenancy had determined after one year; in July 1975, when the right of action of the defendant's predecessors in title to recover the land had first accrued, so that the defendant's title had been extinguished 16 years later in July 1991. The Court of Appeal allowed the defendant's appeal on the ground that the plaintiff had entered the disputed land as a licensee and her licence had been determined by the death of her aunt in 1988, so she had not been in adverse possession of the land for long enough to extinguish the defendant's title.
On appeal by the plaintiff –
Held, allowing the appeal, that a tenancy at will could not be created where there was no intention to create legal relations; that since the plaintiff had been in exclusive possession and her occupation had been attributable not merely to her uncle's generosity but to the parties' genuine intention that she should purchase the land in due course, she had to be taken to have entered into possession of the disputed land as an intending purchaser and as a tenant at will; that by virtue of section 8 of the Ordinance that tenancy at will had automatically determined at the end of one year and the owner's right of action had accrued immediately; that, no new tenancy having been created, any later determination of the tenancy was ineffective for limitation purposes; that, without more, service of the notices to quit was insufficient to stop time running; and that, accordingly, the defendant's title to the disputed land had been extinguished pursuant to section 3 in July 1991 before, by his counterclaim, he had brought an action to recover the land." [3301] 1 WLR 1651-1652.

[40] Counsel submitted that the case of ***Ramnarace*** is relied upon for the proposition that a tenancy at will is created when a person is put into possession of land as an intended purchaser of the land.

[41] Counsel readily accepts that there is no provision in the Limitation Act Cap 90 which is the equivalent of section 8 of the Trinidad and Tobago Ordinance. Counsel submitted that ***Ramnarace*** also established that a tenancy at will is deemed for limitation purposes to have been determined automatically at the end of the first year, according to the Trinidad Legislation, but that if a tenancy at will is determined otherwise the owner's right of action accrues immediately.

[42] Counsel referred to Section 17 (5) of the Limitation Act, Cap. 90 and to paragraph 7(1) of the Schedule to the Limitation Act which states:

> "7(1) Subject to sub-paragraph (2), a right of action to recover land by virtue of a forfeiture or breach of a condition shall be treated as having accrued on the date on which the forfeiture was incurred or the condition broken."

[43] It was the Defendant's case that the Defendant claims adverse possession of both parcels of land from 1981 to July 2003 when the Claimant's claim was filed, a total period of 22 years and continuing; but that even if the Court does not find favour with the above but accepts the Claimant's version of the disputed facts; the Court ought still to find that from 1990 when the Defendant refused to buy the lands until 2003 the Defendant would have become an adverse possessor for more than 12 years. Reliance was placed on Section 17(1) of the Limitation Act 1990.

CONCLUSIONS:

[44] As regards the first issue identified by learned Counsel for the Claimant I do not believe Maurice Defreitas orally donated any land to the Defendant and it would follow that I do not accept the contention of learned Queen's Counsel for the Defendant that the Defendant was in adverse possession from 1981.

[45] As regards the third issue, I again prefer to believe the version of the Claimant and witness that Maurice Defreitas made an offer to the Defendant in 1990 to purchase the land and he neglected or refused to do so.

[46] In respect of suit 168 of 1993 between the Defendant and Fitzroy McDonald I agree with the submission of learned Queen's Counsel for the Defendant that nothing turns on the statement made by the Defendant in the defence of that suit for in effect what the Defendant said was in fact true for by that time he was only in the process of occupation of the land for less than the limitation period.

[47] In the course of his submissions in relation to the acknowledgement by the Defendant of the Claimant's title learned Counsel for the Claimant relied on the Privy Council case of ***Browne v Perry*** 1987 40 WIR 165. That case stated:

> "A claim to adverse possession of land may be defeated by any acknowledgement made by the person in possession of the land to any person claiming to be proprietor of the land that his claim is admitted."

[48] The facts of that case clearly showed that the acknowledgement was made by Mrs. Browne, the appellant to Mr. Perry, the respondent. This is not the case here. The Defendant has not made any acknowledgement, whether in writing, or otherwise to the Claimant.

[49] In passing, I should note that ***Browne v Perry*** at page 169 states the three ways in which possession shall be interrupted –

> "(a) by physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the possessor thereby loses possession; or
> (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."

[50] As stated above learned Counsel for the Claimant submitted that the Defendant only had a licence from Maurice Defreitas to occupy the disputed land. The cases of ***Hughes v Griffin and Another*** 1969 1 All E.R. 460 and ***Dottin v Callendar*** 1964 8 WIR seem to indicate that the Statute of Limitation was not applicable to a licensee in possession of land for a specific purpose. In ***Hughes*** Harman L.J. stated at page 463 letter I:

> "Time cannot run, as I see it, in favour of a licensee and therefore he has no adverse possession. It can run in favour of a tenant at will, because by virtue of section 9 of the Act a tenancy at will is put an end to at the end of the year and the tenant is deemed to be in adverse possession."

[51] I am of the view, and having regard to the judgment of ***Ramnarace***, that the Defendant was not a licensee but a tenant at will whose tenancy was determined early in 1990 after which he began to be in adverse possession.

[52] I have no doubt whatsoever that the Defendant was in exclusive possession of the disputed land from about 1981 to the present time. This is not even a case where as in ***Williams Brothers Direct Supply Ltd v Raftery*** 1958 1 Q.B. 159 or ***Wallis Clayton Bay Holiday Camp Ltd v Shell-Mer and BP Ltd*** 1975 1 QB 94 the issue of discontinuance of possession is in issue; for according to the evidence neither the Claimant nor his father was ever in possession of the disputed land.

[53] What Maurice Defreitas did was simply to visit the disputed land to see how well the Defendant was doing. I do not believe Maurice did any clearing of the land and he admitted he did not work the land while the Defendant was in possession. I need not resort to the case of ***Solling v Broughton*** 1893 AC 556 to come to the conclusion that what Maurice did was ineffective for in any view he did nothing.

[54] In ***Pye v Graham*** 2002 3 All ER 865 the House of Lords stated that legal possession required –

(i) a sufficient degree of physical custody and control (actual possession) and

(ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess).

I am satisfied that the Defendant had legal possession of the disputed land. See also ***Myra Wills v Elma Wills*** 2003 U.K. P.C. 84.

[55] The Defendant can be said to have entered on the land as an intended purchaser. In ***Pottinger v Raffone*** 2007 U.K. P.C. 22 Pottinger, an intending purchaser went into possession of 34 lots of land pending the completion of the sale. The sale was never completed. The intending vendor, who had been the registered owner of the land, was kept out of possession for a period exceeding the limitation period. Their Lordships ruled that the intending purchaser had obtained a good possessory title against the paper owner of the land.

[56] Adopting the rationale of ***Ramnarace v Lutchman*** I am of the view that the Defendant entered into possession of the disputed land as an intending purchaser and as a tenant at

will; that by virtue of the breach of the condition that he should purchase, time began to run against the Claimant and his predecessor in title from about January 1991 and by the time the Claimant's action was brought in October 2003 the Defendant had already obtained a good possessory title under the Limitation Act Chapter 90.

[57] There is one other matter to be addressed. On the first day of the trial Maurice Defreitas was said to have left his home together with his common law wife and on the way had to return home because of illness. On the next day he came to Court. He was obviously a sick man. Before trial I suggested to him that it must be traumatic for him to have to come to court to give evidence for one son against another, and whether he would consider giving one parcel of land to one son and the other to the other since both portions were of the same extent and in the same location.

[58] He was reluctant but was persuaded to go out with his common law wife and his Counsel to consider my suggestion. They went out but he soon returned to say that if he must give the Defendant one of the two portions he must pay the full price. The case therefore began. In the course of the Defendant's examination in chief by Queen's Counsel he stated that if he were to be successful in the action he would return one of the two parcels to the Claimant or to Maurice Defreitas. It seems the time has come to keep to his word for it would be evident that I am going to find in his favour. The action of the Claimant is dismissed.

[59] I do not think that the Defendant should give back the land to his father but it should be given to the Claimant without any qualification "if he will accept it." I think this is a family dispute. I therefore dismiss the Claimant's action and I make no order that one brother should pay the other's costs.

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