ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVA 2006/014

BETWEEN:

ROWAN BAILEY

Appellant

and

[1] FERDINAND CARTY
[2] KIM SAMANTHA JANE CARTY as Personal Representative of the Estate of CYRIL ROMMERICK AKA CYRIL JOSEPH, deceased

Respondents

Before:

The Hon. Mr. Justice Hugh Rawlins	Justice of Appeal
The Hon. Mde. Justice Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mr. Justice Errol Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. John Fuller for the Appellant
Ms. Ann Henry and Ms. C.W. Burnette for the Respondents

2007: December 5, 6;

JUDGMENT

[1] EDWARDS, J.A. [Ag.]: This is the judgment of the court. The deceased Cyril Rommerick is the registered owner of the property situate at Falmouth and Bethesda known as Block 34 2482B Parcel 71. The appellant who is the grandson of Cyril Rommerick occupied a portion of the property during the deceased's lifetime. Upon the death of Cyril Rommerick in England, on the 28th February, 2001 the respondents who are his personal representatives, filed a fixed date claim to recover possession of the land occupied by the appellant.

[2] In the claim which was filed on the 19th January, 2005 the respondents pleaded that the appellant held a bare licence to occupy a portion of the land near to the sea during the deceased's lifetime.

[3] In his defence filed on the 5th February 2005, the appellant alleged that he was in occupation of the said land since 1979 without the permission of anyone, and that the deceased while knowing of his peaceable open and uninterrupted possession of the land, did nothing to dispute or interrupt the appellant's possession of it. The appellant contended that by the provisions of section 135 of the Registered Land Act Cap 374 of the Laws of Antigua and Barbuda (1992) Revised Edition, he has acquired the ownership of the said property. The appellant counterclaimed for an order that he be registered as proprietor of the land he was occupying, pursuant to section 135 of the said Act.

[4] The learned trial judge delivered a judgment in this matter on the 29th June 2006. She found that the appellant had failed to establish his claim for an order of possession against the deceased's estate, and that the respondents on a balance of probabilities had established their claim for possession against the appellant. She ordered that the respondents be granted possession of the property, and that the appellant do deliver vacant possession of it to the respondents by the 30th January, 2007.

[5] By his Notice of Appeal filed on the 4th August, 2006 the appellant challenged the learned trial judge's finding that he lacked the required *animus possidendi* up to 1995, and was a mere licensee up until 1995/1996 when he took steps with the view to claiming interest or ownership of the property by erecting 2 buildings on it. The appellant complained that the learned judge relied on hearsay evidence from the respondents and their witness in arriving at her decision. Mr. Fuller contends that the judge ought to have accepted the evidence of the appellant and his

witness, instead of this hearsay evidence which was comprised of factual statements made by persons who were not called as witnesses at the trial.

Hearsay Evidence in Witness Statements

[6] Though the common law rules regarding hearsay evidence are applied in Antigua and Barbuda, hearsay evidence may be admissible where it exists in a document containing admissible hearsay statements. Section 12 of the Evidence Act Cap. 155 of the Laws of Antigua and Barbuda (1992) Revised Edition, states that, "Every document, which, by any law now in force, or hereinafter to be in force, is or shall be admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any Court in Antigua and Barbuda, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence." There is no statutory definition of 'document" under Cap. 155.

[7] This provision requires the courts in Antigua and Barbuda to apply the English Civil Evidence Acts 1968, 1972 and 1995 relating to documentary evidence. These English Acts have effectively removed most of the common law restrictions against documentary hearsay contained in certain records and statements, while stipulating certain prerequisites such as the requirement of competence (section 5(1) of the 1995 Act) for the reception of this hearsay evidence in some cases.

[8] Section 1(1) and (2) of the Civil Evidence Act 1995, provides:

> "(1) In civil proceedings evidence shall not be excluded on the ground that it is hearsay.
>
> (2) In this Act-
>
> (a) 'hearsay' means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and
>
> (b) references to hearsay include hearsay of whatever degree."

[9] Section 13 provides, among other things, that:

> " 'statement' means any representation of fact or opinion, however made; 'document' means anything in which information of any description is recorded; and 'copy', in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly."

It is worth noting that our CPR 28.1(2) has a similar definition for 'document' and 'copy'.

[10] Pursuant to CPR 29.1, 29.4, 29.10 and 38.6(2)(g) served witness statements may stand as the evidence in chief; and a witness statement becomes evidence when verified on oath by the witness at trial. The witness statement which obviously qualifies as a 'document' under the English Civil Evidence Acts, may contain out of court hearsay statements made by persons other than the deponent, who are not being called as witnesses.

[11] The procedural safeguards for such hearsay evidence is provided by Section 2 of the Civil Evidence Act 1995 which states:

> "(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section; give to the other party or parties to the proceedings-
> (a) such notice (if any) of that fact, and
> (b) on request, such particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.
> (2) Provision may be made by rules of court –
> (a) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and
> (b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.
> (3) Subsection (1) may also be excluded by agreement of the parties; and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.
> (4) A failure to comply with subsection (1), or with rules under subsection (2) (b), does not affect the admissibility of the evidence but may be taken into account by the court-

(a) in considering the exercise of its powers with respect to the course of the proceedings and costs, and
(b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 4."

[12] The applicable rules for carrying the provisions of the English Civil Evidence Act into effect are the English Supreme Court Practice Civil Procedure Rules. Our Civil Procedure Rules 2000 must therefore be applied also wherever possible, when considering the rules of court referred to in Section 2 (2) of the English 1995 Act, in our view.

[13] Rule 29.5(1) (e) of CPR 2000 states that a witness statement must "not include any matters of information or belief which are not admissible or, where admissible, must state the source of any matters of information or belief." It is therefore evident that the maker of any out of court hearsay statements in a witness statement should be disclosed in the witness statement.

[14] The English CPR 33.2 states that a party intending to rely on hearsay evidence at trial complies with section 2(1)(a) of the Civil Evidence Act 1995 by serving a witness statement on the other parties in accordance with the court's order; and serving a notice on the other parties not later than the deadline date for serving witness statements, which identifies the hearsay evidence, states that the party serving the notice proposes to rely on the hearsay evidence at trial; and gives the reason why the witness will not be called.

[15] The English CPR 33.3 specifies the circumstances in which notice of intention to reply on hearsay evidence is not required.

[16] Section 3 of the Civil Evidence Act 1995 provides that: "Rules of court may provide that where a party to civil proceedings adduces hearsay evidence of a statement made by a person and does not call that person as a witness, any other party to the proceedings may, with the leave of the court, call that person as a witness and cross-examine him on the statement as if he had been called by the first-

mentioned party and as if the hearsay statement were his evidence in chief." The English CPR 33.4 is the relevant rule. It provides that where a party proposes to rely on hearsay evidence and does not propose to call the person who made the original statement to give oral evidence, the court may, on the application of any other party, permit that party to call the maker of the statement to be cross-examined on the contents of the statement. An application for permission to cross-examine under this rule must be made not more than 14 days after the day on which a notice of intention to rely on the hearsay evidence was served on the applicant.

[17] Concerning the weight to be given to hearsay evidence, section 4 of the Civil Evidence Act 1995 provides:

> "(1) In estimating, the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence
>
> (2) Regard may be had, in particular, to the following-
> (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
> (c) whether the evidence involves multiple hearsay;
> (d) whether any person involved had any motive to conceal or misrepresent matters;
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;
> (f) whether the circumstances in which the evidence is address as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[18] Section 5(2) of the Civil Evidence Act 1995 provides for the credibility of the absent maker of the original hearsay statement to be impeached. It states as follows:

> "(2) Where in civil proceedings hearsay evidence is adduced and the maker of the original statement, or of any statement relied upon to prove another statement is not called as a witness-

(a) evidence which if he had been so called would be admissible for the purpose of attacking his credibility as a witness is admissible for that purpose in the proceedings; and

(b) evidence tending to prove that, whether before or after he made the statement, he made any other statement inconsistent with it is admissible for the purpose of showing that he has contradicted himself. Provided that evidence may not be given of any matter of which, if he had been called as a witness and had denied that matter in cross-examination evidence could not have been adduced by the cross examining party."

[19] The proviso to section 5(2) obviously refers to the common law rule on finality of answers to questions on collateral issues. The English CPR 33.5 requires a party who wishes to call evidence to attack the credibility of the maker of the original hearsay statement, to give notice of intention to do so, to the party who proposes to give the hearsay statement in evidence not more than 14 days after being served with the notice of intention to rely on hearsay evidence.

[20] The record discloses that most of the hearsay evidence that Mr. Fuller complained about, was elicited by the appellant's Counsel under cross-examination. Otherwise, there seems to have been no objection by appellant's Counsel to the hearsay evidence in the witness statements of the respondents and their witness before and at, the trial. The admissibility is not open now to challenge in this court having regard to Section 12 of Cap. 155 and the relevant provisions of the English Civil Evidence Act 1995. We are of the view that the learned trial judge was entitled to take into account this hearsay evidence in arriving at her conclusions.

[21] Learned Counsel, Mr. Fuller confined his oral submissions to the facts found by the trial judge. In essence, he argued that the judge ought to have accepted the evidence of the appellant concerning his occupation and possession of the land since 1979. Having regard to sections 135 and 136 of the Registered Land Act Cap 374, section 17 of the Limitation Act No. 8 of 1997 of the Laws of Antigua and Barbuda, and the applicable law concerning *animus possidendi*, the question is:

whether the learned trial judge reasonably assessed the evidence in this case and correctly applied the law in arriving at her conclusions.

The Applicable Law

[22] Section 135 of Cap. 374 states that, "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 twelve years".

[23] Section 136 of Cap 374 provides that: "where it is shown that a person has been in possession of land,…at a certain date and is still in possession…, it shall be presumed that he has, from that date, been in uninterrupted possession of the land…until the contrary be shown."

[24] Section 136 (6) of Cap 374 states that:

> "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."

[25] Section 17(1) of the Limitation Act No. 8 of 1997 of the Laws of Antigua and Barbuda states that: "No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it has just accrued to some person through whom he claims, to that person."

[26] Halsbury's Laws of England 4th Edition, Volume 28, paragraphs 979 and 997 state as follows:

> "979 For there to be adverse possession the person claiming possession should have the necessary *animus possidendi*, that is, an intention to

possess the land to the exclusion of all the persons including the owner with the paper title so far as is reasonable and so far as the process of the law will allow".

"977 No right of action to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run (adverse possession). What constitutes adverse possession is a question of fact and degree and depends on all of the circumstances of each case, in particular the nature of the land and the manner in which the land of that nature is continually used…(T)he claimant's possession… should be sufficiently exclusive, and the claimant should have intended to take possession."

[27] In the court below and also before us, learned Counsel Ms. Henry referred to the burden of proof on the appellant to adduce compelling evidence to establish: (1) that he had acquired possession of the deceased's property; (2) that he had the requisite intention to possess the property; and (3) that he had made such intention clear to the world. She relied on the cases Powell v Mc Farlane (1977) 38 P. & C.R 452 and J.A. Pye (Oxford) Ltd and Another v Graham and Another [2002] U K H L 30; [2002] 3 All ER 865.

[28] In Powell Justice Slade stated at p. 472 that: "If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*animus possidendi*)…An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession, will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner

as best as he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner."

[29] The House of Lords in J.A. Pye approved and applied Slade J's statements of the law in Powell.

Conclusions

[30] Having reviewed the evidence of the appellant at the trial, Ms. Henry argued and we agree that he was an inconsistent witness whose credibility was clearly an issue at the trial. Could the appellant's evidence have been regarded by the trial judge as clear and affirmative evidence which discharged his burden of proof in the circumstances? We agree with the submissions of Ms. Henry that the quality of the appellant's evidence was such that it was open to the trial judge who saw and heard the appellant testify to conclude as she did: that the appellant had failed to establish his claim for an order of possession against the estate of his deceased grandfather.

[31] We therefore dismiss the appeal and affirm the judgment and order of the learned trial judge, subject to the following variation:

(a) The appellant shall deliver vacant possession to the respondents on or before the 1st June 2008.

(b) The appellant shall pay the prescribed costs below pursuant to CPR 65.5(2)(iii) being $14,000.00; and pursuant to CPR 65.13(b) being 2/3 of $14,000.00 as costs on appeal.