

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 239 OF 2004

BETWEEN:

ALPHIAN BURKE

Claimant

v

DOUGLAS O'NEIL CREESE

Defendant

Appearances: Mr. A. Williams and Ms. R. Browne for the Claimant
Mr. Carlyle Dougan Q.C. for the Defendant

2007: May 9
2008: January 29

JUDGMENT

[1] **THOM, J:** This is a claim for a declaration that the Claimant is the fee simple owner of a parcel of land situate at Belvedere in the State of Saint Vincent and the Grenadines and for damages for trespass on the said land.

[2] The Claimant contends that he purchased the parcel of land described in Deed No. 1758 of 1982 and dated the 22nd day of July 1982 from James Creese for eight thousand dollars (\$8,000.000). The Claimant further contends that he took possession of the said land in 1981 and has since been in exclusive uninterrupted possession until his possession was interrupted by the Defendant in February 2004.

[3] The Defendant contends that he purchased the land described in Deed No. 785 of 1981 which includes the land described in Deed No. 1758 of 1981 from his father James Creese. The Defendant in his counterclaim seeks inter alia a declaration that he is the fee

simple owner of the said parcel of land described in Deed No. 785 of 1981 and damages for trespass.

[4] The Claimant gave evidence on his own behalf and called two witnesses being Ms. May Saunders and Mrs. Maude De Freitas. The Defendant gave evidence on his own behalf, he called no witnesses.

[5] The evidence led on behalf of the Claimant is that the Claimant resides in the United Kingdom but he visits Saint Vincent and the Grenadines occasionally. In 1981 while on one such visit the Defendant's father James Creese persuaded him to purchase the land in dispute which was owned by James Creese and situated opposite the Claimant's property at Belvedere. The Claimant made a down payment for the land and sent the remainder of the purchase price to his mother-in-law Mrs. Maude De Freitas who paid the money to Mr. James Creese. In 1982 Mrs. De Freitas collected Deed No. 1758 of 1982 dated 22nd day of July 1982 from Mr. James Creese and sent same to the Claimant in the United Kingdom. The said Deed was signed by the Defendant and witnessed by Ms. May Saunders a Solicitor's Clerk. Ms. May Saunders testified that during the years 1981 and 1982 she worked as an Office Attendant at the Chambers of Attorney-at-Law Dr. Kenneth John. She knew the Defendant to be a man who lived overseas. He signed Deed No. 1758 of 1982 at her desk at Dr. John's Office and she witnessed his signature. She subsequently made a declaration before the Deputy Registrar.

[6] From 1981 when the down payment was made the Claimant went into exclusive possession of the said property through his agents Peter and Maude De Freitas his father and mother-in-law who were residing in the Claimant's home at Belvedere opposite the land in dispute. In 1994 the Claimant fenced the said land with concrete walls on three sides; the fourth side was already fenced by the owner of the neighbouring land. Several fruit trees and pigeon peas trees were planted on the said land.

On 21st April 1981 James Creese conveyed all of his land in the area including the parcel of land in dispute to the Defendant by Deed No. 785 of 1981. Survey plan G1905 which

was prepared in September 1997 on the instructions of the said James Creese shows the disputed land to be land of De Freitas, that is the Claimant's in-laws. In February 2004 the Defendant's Solicitor wrote to the Claimant in the United Kingdom informing him that he had built a wall on the Defendant's property. The Defendant trespassed on the said land in February 2004. He broke down the fence, destroyed the trees and ploughed the land. The Claimant caused his solicitor to write to the Defendant informing him that he had trespassed on the Claimant's land and requested him to replace the fence which he failed to do.

[7] The evidence of the Defendant is that he is the owner of two and one-half acres of land situate at Belvedere as described in Deed No. 758 of 1981 and dated 21st April 1981. He never sold any land to the Claimant nor did he receive any money for the sale of land to the Claimant. He did not sign Deed No. 1785 of 1982. He lived several years in the United Kingdom and returned to Saint Vincent and the Grenadines intermittently. During one of his visits he observed that someone had trespassed on his land and had built a fence thereon. He made enquiries as to who had trespassed on his land and he discovered it was the Claimant who lived at an unknown address in the United Kingdom. He removed the fence since he needed his land for cultivation and the wall was "environmentally ugly."

[8] Trespass to land is defined in Halsbury's Laws of England 4th Edition paragraph 505 as follows:

"Every unlawful entry by one person on land in the possession of another is a trespass for which a claim may be brought even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it or if he erects or suffers to continue on his own land anything which invades the airspace of another or if he discharges water upon another's land, or sends filth or an injurious substance which has been collected by him on his own land onto another's land."

[9] The Defendant does not dispute that he broke down the fence and that he ploughed the said land around 2004 to 2005. He contends that he is the owner of the land by virtue of

Deed No. 785 of 1981. He has been in possession of the land since 1981. He has ploughed it on more than one occasion also his father.

[10] The Claimant contends he is the owner by virtue of Deed No. 1758 of 1982 and he has been in exclusive uninterrupted possession of the land since 1981.

[11] The issue for the Court to determine is who is the owner of the disputed land.

[12] The following facts are not in dispute:

- (a) The land in dispute was previously owned by Mr. James Creese.
- (b) The Claimant did not purchase the land from the Defendant.
- (c) In 1981 the Claimant made a down payment on the land to Mr. James Creese and subsequently paid the remainder of the purchase price.
- (d) Mr. James Creese conveyed the said land to the Defendant in 1981 by Deed No. 785 of 1981.
- (e) The land described in Deed No. 785 of 1981 was surveyed at the instance of James Creese in September 1997.
- (f) The land was surveyed after the Claimant had fenced the land in dispute.
- (g) Mrs. Maude De Freitas was living on land opposite to the disputed land.
- (h) The area marked De Freitas on the survey plan G 1905 is the disputed land.
- (i) Mr. James Creese died in 2002.
- (j) The Defendant broke down the fence and ploughed the land and at that time there were trees on the land.

[13] I will deal first with the Claimant's contention that he is the owner by virtue of Deed No. 785 of 1982.

[14] The evidence of the Claimant is that the Claimant purchased the land from James Creese who then conveyed the land to the Defendant and the Defendant conveyed the land to the Claimant by Deed No. 785 of 1982. While it is not disputed that the Claimant paid Mr.

James Creese for the land, the Defendant disputes that he signed the Deed No. 1758 of 1982.

[15] The Claimant relied on the witness May Saunders to prove that the Defendant signed Deed No. 1758 of 1982.

[16] I found Ms. May Saunders to be an unreliable witness. Ms. Saunders signed the Deed while working as an Office Attendant at Dr. John's Office some twenty-six (26) years ago. She could not accurately recall the transaction. She acknowledged it was a long time ago. Under cross-examination she could not state correctly how the Defendant signed his name.

[17] There is no evidence from the Claimant as to the date when the down-payment or the remainder of the purchase price was made in 1981. The Claimant did not give any date in his testimony or produce any receipts evidencing payment. It is therefore not clear whether Mr. James Creese purported to sell the land to the Claimant after he had already conveyed the land to the Defendant on 21st April 1981 by Deed No. 758 of 1981.

[18] The onus was on the Claimant to prove on a balance of probabilities that he became the owner of the land by Deed No. 1785 of 1982. He has failed to do so.

[19] The Claimant also contends that he is the owner by virtue of him being in exclusive uninterrupted possession of the land since 1981.

[20] The relevant provisions are sections 17 and schedule 1 of the Limitation Act Cap. 90. The effect of these provisions is that the right of action to recover land is barred whenever twelve (12) years have elapsed from the time when a right of action is accrued. The right of action is accrued only when the land is in adverse possession of a person other than the true owner. Time begins to run at the time when adverse possession is taken of the land.

[21] In Halsbury's Laws of England 4th Edition Volume 28 paragraph 768 the learned author explained adverse possession as follows:

"Meaning and Effect of Adverse Possession. "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. Such possession is called adverse possession. What constitutes such possession is a question of fact and degree; there is no general principle that to establish possession of an area of land, the Claimant must show that he made physical use of the whole of it. On the other hand a claim to prescriptive rights to easements may be so extensive as to amount practically to a claim to the whole beneficial user of the servient tenement, in which case it can only succeed as a claim to adverse possession."

[22] The principles to be applied by the Court in determining whether a person was in adverse possession were outlined in the case of **Powell v McFarlane** [1977] 38P p. 452. These principles were approved by the House of Lords in **JA Pye (Oxford Ltd) and another v Graham** [2002] 3 AER p. 865. The Court stated at p. 866 as follows:

"Legal possession required:

- (i) a sufficient degree of physical custody and control (factual 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).

As regards factual possession, everything depended on the circumstances, but broadly, such possession was constituted where the alleged possessor had been dealing with the land as an occupying owner might have been expected to deal with it, and nobody else had done so. The necessary intent was one to possess, not to own and an intention to exclude the proper owner only so far as was reasonably possible."

[23] Applying the above principles to this case the question is: did the Claimant dispossess the true owner of the said land, and if so, when did he go into possession? The onus of proving that the owner has been dispossessed is on the party who alleges it. In this case it is the Claimant.

[24] The evidence of the Claimant on this issue is that he went into possession of the land in 1981 after he made the down payment. His father and mother-in-law continued in possession of the property while he was in the United Kingdom. He visited occasionally. Crops were planted on the land and in 1994 he fenced the land with a concrete wall.

[25] I believe the testimony of the Claimant and the witness Mrs. Maude De Freitas. Their testimony on this issue was not contradicted. It was suggested to Mrs. Maude De Freitas under cross-examination and she agreed that she was a good friend of Mr. James Creese. She testified that Mr. James Creese assisted them to reap the crops.

[26] I do not believe the testimony of the Defendant on this issue that he was in possession of the land since 1981 when he purchased it and he and his father has been ploughing same since 1981. The Defendant agreed that he visited Saint Vincent and the Grenadines in 1996. He also agreed that the land was already fenced in 1996. I find it incredible that the Claimant would only enquire in 1997 about who built the concrete fence on the land that he had a deed for and had ploughed on more than one occasion, bearing in mind the Claimant described the wall as being “environmentally ugly and an eye sore.” It was only after his father had died in 2002 that he broke down the fence and ploughed the land in dispute. I believe the evidence of the Claimant that the Defendant was cultivating the adjoining parcel of land which he owned and which is shown on survey plan G 1905.

[27] I find that the Claimant has proved on a balance of probabilities that he has been in exclusive uninterrupted occupation of the land for a period in excess of twelve (12) years. His occupation was only interrupted in February 2004. His solicitors wrote to the Defendant on March 1, 2004 and this claim was filed on May 11, 2004.

[28] Judgment is entered for the Claimant. It is ordered that:

(a) It is hereby declared that the Claimant is the fee simple owner of the parcel of land set out in Deed of Conveyance No. 1758 of 1982 and is entitled to possession thereof.

(b) An injunction is hereby granted restraining the Defendant whether by himself his servants and or agents or howsoever otherwise from trespassing on the Claimant's said land.

(c) Damages to be assessed.

- (d) Cost in the sum of \$14,000.00 to be paid to the Claimant by the Defendant pursuant to Case Management Order dated 3rd November 2004.

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Gertel Thom
HIGH COURT JUDGE