

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: GDAHCV2006/0423

BETWEEN:

MT. HARTMAN BAY ESTATE LIMITED

Claimant

AND

ASHOK BHAWNANI

Defendant

Appearances:

Mr. Bristol instructed by Wilkinson, Wilkinson & Wilkinson for the Claimant

Mr. Dickon Mitchell of Grant Joseph & Co for the Defendant

2008: June 2

JUDGMENT

- [1] **HENRY, J.:** By Fixed Date Claim Form filed 27th September, 2005, claimant seeks a declaration that it is the owner of the 9,535 square feet of land identified in the survey prepared by Mr. Denis Thomas, Licensed Land Surveyor; a declaration that the defendant is not entitled to enter or cross or fence the said land and an injunction to restrain the defendant whether by himself or by his servants or agents or otherwise howsoever from entering or crossing the said land. Claimant also seeks damages for trespass, interest and cost.
- [2] In its Statement of Claim, claimant alleges that from the 18th May, 2004 it is and was the owner and entitled to the possession of land and premises situate at L'Ance Aux Epines in the parish of Saint George, by virtue of a conveyance from Richard Graham Smith and Stephanie Smith recorded in the Land Registry of Grenada in Liber 19-2004.

- [3] It is not disputed that on 10th November, 1971 Stephanie Smith purchased a lot of land situate at L'Ance Aux Epines measuring 22,460 square feet from one Gordon Braithwaite. In October 2003, by deed of gift, Stephanie Smith conveyed an interest as joint tenant to her husband Richard Smith. It is also not in dispute that this is the same lot that in May 2004, Stephanie and Richard Smith conveyed to the claimant.
- [4] However, the defendant alleges that on 3rd August, 1978, Gordon Brathwaite sold two lots of land to one Gordon Lewis. One of the lots purchased by Gordon Lewis contained, by mistake, a portion of land later shown to comprise 9,535 square feet which had been previously conveyed in 1971 to Stephanie Smith (hereinafter called the disputed land).
- [5] It is defendant's case that Stephanie Smith took no steps to secure the purchase made by her in 1971. Defendant asserts that by 9th October, 2003 when she allegedly conveyed an interest to her husband, Stephanie Smith no longer had title to the land; that whatever title she had would have been extinguished by operation of law. The defendant relies on sections 4, 5 and 27 of the Limitation of Actions Act, Chapter 173 of the 1990 Revised Laws of Grenada.
- [6] The sole issue between the parties therefore, is one of adverse possession.

The Law

- [7] Sections 4, 5 and 27 of the Limitation of Actions Act provide:

"4. No person shall make an entry or distress, or bring an action to recover any land, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action, has first accrued to some person through whom he claims, or, if the right has not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make the entry or distress, or to bring the action, has first accrued to the person making or bringing it.

5. In the construction of this Act, the right to make an entry or distress or to bring an action to recover any land shall be deemed to have first accrued at such time as is hereinafter mentioned, that is to say -

(a) when the person claiming the land, or some person through whom he claims, has in respect of the estate or interest claimed, been in possession or receipt of the profits of the land and while entitled thereto has been

dispossessed or has discontinued the possession, then the right shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits were so received;

27. At the determination of the period limited by this Act to any person for making an entry or distress or bringing an action, the right and title of that person to the land for the recovery whereof the entry, distress, or action, might have been made or brought within that period shall be extinguished."

[8] The Courts have repeatedly held that the court will ascribe possession to the paper owner of land or to a person who can establish title through the paper owner.

[9] The Court can only ascribe possession to a person who does not have paper title if that person has factual possession, that is, a degree of physical control of the land which amounts to possession in fact and *animus possidendi*, the requisite intention to possess the land. **J. A. Pye (Oxford) Ltd. and Another v Graham and Another** [2000- UKHL 30; **Hector Ceasar Luke as Personal Representative of Phillip Luke v Bernard Alexander** DOMHVU2001/0161.

[10] As Slade J., stated in **Powell v. McFarlane** [1977] 38 P6 cr 452:

"The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which the land of the nature is commonly used or enjoyed.

Everything must depend on the particular circumstances, but broadly, I think 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] Claimant submits that none of the acts relied on by the defendant show a sufficient degree of physical custody and control and neither did the alleged acts continue for the requisite 12 year period. Defendant, on the other hand, claims that the evidence is overwhelming that he and his predecessor in title have been in continuous exclusive possession of the disputed land and that the title of the Smiths has been extinguished.

The Evidence

- [12] Six persons gave evidence on behalf of the claimant in addition to the evidence of the surveyor, Mr. Denis Thomas. Stephanie Smith's evidence is that she resides in Surrey, England; that on many occasions from the time she purchased the property and up to March 2005 when she last visited Grenada, the property has always been covered in trees, bush and prickle and has never been developed. The property she states was never fenced nor groomed and there were no animals on the said property at any time. She describes it as covered with thick vegetation which would have prevented animals from grazing. She notes that in recent times she noticed a broken down shed on the property.
- [13] Richard Smith's evidence is similar to that of his wife. His first visit to Grenada was in February 1965. Since his wife purchased the property, he states that they have both visited on many occasions. He too states that the property has always remained covered in trees, bush and prickle and has never been developed. He states that he never saw anyone fencing or putting claim to any part of the lot. Mr. Smith admitted in cross-examination that during the revolution he and his wife did not visit Grenada. Those years when they did come, his evidence is that they would visit the land; that he could see that it was covered in bush; that he would walk as far as he could but that one could not walk around the land because it was totally overgrown and very dense.
- [14] The witness Glynn Evans Junior lives in L'Ance Aux Epines. He purchased the land on which his house is built in July 2000, and he built his house between March 2001 and March 2002. His land, he states, is in boundary with the lot of land that was owned by Stephanie Smith and which was purchased by claimant. His land is also in boundary on one side by the land of Ashok Bhawani, the defendant. The witness states that he is familiar with the properties in the vicinity of his property. In particular he states that the land that was Stephanie Smith's property was never occupied; that it has always been thick with bush. It has never been fenced nor has he seen animals grazing there or tethered thereon. He also notes that at one point when he was constructing his house he had to clear the thick vegetation from a portion of the Smith property and the Ashok Bhawani property so as to enable him to erect his fence.

- [15] On cross-examination the witness admitted that he was not in Grenada between 1978 and 1985 and obviously could not speak to what may have taken place on the land during those years. His further evidence is that he moved back to Grenada in 1985 and stayed until 1987. Between the years 1987 to 1996 he paid only yearly visits to the island. Between 1996 and 2007 he was in Grenada once every other month.
- [16] Peter Evans is a real estate agent who lives at L'Ance Aux Epines. He states that he is familiar with lands and properties in that area both in his professional and personal capacities. In particular he states that he is familiar with Mt. Hartman Bay Estate and the surrounding properties. He asserts that the Smith property has never been occupied by anyone. The property has always been overgrown and has never been enclosed by a fence.
- [17] Peter Robinson is a British National who lives at Mt. Hartman Bay Estate in L'Ance Aux Epines. He has lived there since 1994 when he commenced work with the previous owners of Mt. Hartman Bay Estate. He now works for the current owners as Manager and Builder. He is therefore familiar with the claimant's property which was purchased from the Smiths. He describes it as covered in very thick vegetation including prickly trees and bush; that it has never been cleared or manicured and that there has never been any building thereon except for a garden shed erected by him. He also states that he has never noticed any building material such as sand, gravel or stones on the property from the time he arrived in 1994. He further states that in 2005 he erected a wire fence with wooden poles along the access road and on the northern boundary to the defendant's land. Within a couple days, however, the fence was removed by persons unknown and he observed a new fence being erected and was told that it was being done on behalf of the defendant. He spoke with defendant and proposed that neither side put up a fence until the dispute was resolved. The property has remained unfenced since then. The witness admits that before he commenced putting up the fence in 2005, the defendant came to the property several times and told him that he owns part of the property on the northern end close to the sea, and that he had purchased same from one Gordon Lewis.

[18] The defendant in his evidence claims two countries of residence - Grenada and Venezuela. His evidence is that he first came to Grenada in 1977. He took up residence in Venezuela in 1993 and his wife and son continue to reside there. He explains that he spends 40 percent of his time in Grenada and 60 percent outside of Grenada. In his witness statement, the defendant sets out the purchase by him in May 1988 of two lots of land from Gordon Lewis – one measuring 29,560 square feet and the other 14, 943 square feet. He states that in January 1989 he mortgaged both lots of land to the Bank of Nova Scotia. In July 1992 the land was re-conveyed to him by the said bank. He states further that since he purchased the two lots he has paid property taxes and has cleared the land on at least three occasions – in 1989, 2002 and 2003. He also allowed Mr. Robin Vinnie, deceased, his next door neighbor, to erect a green house on the land. He subsequently fenced both lots sometime after August 2004. He subsequently fenced both lots sometime after August 2004 but that the part of the fence around the disputed land was torn down by the servants or agents of Richard Lee. His evidence is that he has had no problems with anyone claiming the lots until May 2004 when he became aware that Mr. and Mrs. Smith were claiming ownership of 8,244 square feet of his land.

[19] The only witness called by the defendant was Mr. Gordon Lewis, the person from whom he purchased the lots. Mr. Lewis' evidence is that he purchased the two lots measuring 14,943 square feet and 29,560 square feet from Gordon Brathwaite in August 1978 and confirmed that he sold the said two lots to the defendant in May 1988. He asserts emphatically that he was in possession of both lots until he sold them to the defendant. In his witness statement he grounds his asserted possession on the following acts:

1. He planted a number of coconut trees along the beach reserve which was in boundary with the 29,560 square feet lot; that he placed on the seaside boundary area of the lot a number of huts which were used whenever there were beach parties.
2. Sometime during 1981 to 1983, he began construction of a twenty-six room hotel on both lots; that he had profiles marking out the building which took up most of

the land of both lots; further, that he placed on the lot construction materials including sand, gravel and stones for use in the construction.

3. In 1986 he mortgaged both lots to the Bank of Nova Scotia to secure a sum of \$740,000.00 and in 1987 he borrowed an additional sum of \$98,000.00.

[20] On cross-examination he explained that the trucks carrying the materials would drive down Lover's Lane and the stones were dumped near the boundary at the 'parking reservation'. The materials, he insisted, were dropped outside the profiles towards the edge of the land since most of the land was taken up by the profiles and batter boards. Mr. Lewis then indicated by reference to the surveyor's plan that the materials had been placed on the disputed land. His evidence is, however, that construction of the hotel stopped due to the 1983 invasion. He asserts however, that when he sold the lots to the defendant in 1988, the construction materials were still on the land and that he had suggested to the defendant that he could pay him for the materials and that as recently as 2004 when he last visited the lots of land there were still some construction material left on the land.

[21] Cross-examination in regard to the planting of the trees and the building of huts proved difficult for Mr. Lewis. Mr. Lewis was asked to point out the area on the map where he planted the trees along the beach reserve as alleged in his witness statement. He was unable to locate for the Court where the trees and huts were located and eventually pointed out an area in the sea.

Findings of Fact

[22] I accept the evidence of the witnesses for the claimant that at the times they observed the land it was covered with thick vegetation including prickly trees and bushes; that there was no building on it except for an old garden shed – no one ever lived on the land during the relevant period. I also find that from the time Stephanie Smith purchased the land to the time it was conveyed to the claimant that the Smiths did nothing on the land that would amount to acts of possession. The land was unfenced when she purchased it and remained so until Peter Robinson's attempt in 2005.

[23] The Court accepts the evidence of Mr. Lewis that he entered onto the disputed land and commenced building of what was to have been a hotel between 1981 and 1983. I accept that the construction stopped with the invasion in 1983 and I find that it never resumed. I also find that during the time the construction lasted there was a profile of the building, including batter boards, on the disputed land. Also placed on the land were stones, sand and gravel. I find that all of these materials, however, did not remain on the land until it was sold to the defendant. There is evidence that the batter boards used in the profile were subsequently removed, and I so find. Although there was no evidence that the gravel and sand and stones were removed, I find it significant that there was no evidence from the defendant that when he purchased the land that the stones, sand and gravel were present on the land. The Court found the evidence of Mr. Lewis in regard to the planting of trees and the placing of huts on the boundary of the disputed land unconvincing. He had great difficulty in pointing out the beach reserve where he allegedly planted the trees and huts and in light of the surveyor's report which shows that the disputed land is not in boundary with the beach reserve, the Court does not accept the evidence of Mr. Lewis that the trees and huts were placed by him on the boundary of the disputed land.

[24] I find that Mr. Lewis conducted no further activities on the disputed land between the time construction ceased in 1983 and when the lots were sold to the defendant in 1988. I accept that the defendant cleared the land on three occasions – in 1989, 2002 and 2003. I find that prior to Peter Robinson's attempt at fencing, that the defendant did orally assert that he owned the disputed land, but it was not followed up by any particular action.

[25] I accept the evidence that defendant mortgaged the land as stated, as did Mr. Lewis before him.

Conclusions of Law

[26] As has been noted in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, so that if the defendant is to dispossess the claimant or its predecessor in title, defendant and his predecessor must be shown to have both factual possession and the requisite intention to possess. **Powell v. McFarlane** (1977) 38 P&CR 452 at 470. Such possession with the requisite intention

must be for the continuous period under the Limitation Act, that is, twelve years. It is accepted that Claimant claims through Stephanie Smith who held paper title to the disputed land and that the disputed land was mistakenly transferred to defendant's predecessor.

Gordon Lewis' Alleged Acts of Possession

- [27] In this matter, the Court agrees with the defendant that Mr. Lewis' entry on the land and the commencement by him of construction of his hotel constituted an act of factual possession. The Court is unable, however, to agree with defendant that Mr. Lewis was in exclusive possession of the two lots from 1978 to 1988. From the evidence, Mr. Lewis' first entry onto the disputed land was between 1981 and 1983. It ended in 1983 with the abandonment of the hotel project. There is no evidence of any acts of factual possession after the project ended. He claims to have left the stones and gravel wherever they had been dumped.
- [28] The Court has already noted the absence of confirmation by the defendant of the presence of any materials on the land when he purchased same or of any offer of sale to him of same. More importantly, although he gave evidence of having cleared the land on three occasions, there is no evidence that he observed any of the materials allegedly left by Mr. Lewis.
- [29] Even if materials such as stones and gravel were left on the land by Mr. Lewis, given the nature of the land, within three months after being cleared the lands would have returned to bush. The only conclusion is that if they remained they would have been covered by bush. This is consistent with the evidence of persons who observed the land. Mr. Glynn Evans, although not in Grenada for the entire period, was in Grenada between 1985 and 1987 and his evidence is that the land was covered in thick vegetation. That evidence is also consistent with the defendant's own description of the land. He purchased same in 1988 and cleared it in 1989 and describes it as returning to bush within three months. So that the abandonment of materials on the land between 1983 and 1988 does not amount to a sufficient degree of physical control of the property to the exclusion of all others so as

to amount to possession, nor can the mortgaging of the lands by Mr. Lewis in 1986 or the payment of taxes be considered continuation of factual possession of the property.

[30] The Court therefore finds that the factual possession established by Mr. Lewis was eventually abandoned with the stopping of the construction in 1983. The Court is therefore unable to agree with the defendant's submission that Mr. Lewis was in possession up until the time he conveyed the two lots to the defendant. This means that if the defendant is to establish title to the disputed land he must show that he entered and dispossessed the claimant's predecessor and that his possession continued for the requisite 12 years.

Defendant's Alleged Acts of Possession

[31] The Court has found that the defendant cleared the disputed land in 1989, 2002 and 2003. He also mortgaged the land in 1989 and paid property tax. He also asserts that he fenced the disputed land after August 2004.

[32] Given the nature of the disputed land, the intermittent clearing of the land does not amount to sufficient acts of sole possession so as to amount to adverse possession. These acts do not, either separately or cumulatively, constitute clear and unequivocal acts of adverse possession. **West Bank Estates Ltd v Arthur** [1967] AC 665; **Cobham v Frett** (2000) 59 WIR 161. Neither does the mortgaging of the land or the payment of property taxes. The defendant also cannot rely on the evidence that he fenced both lots. The evidence is that both parties attempted to fence the disputed land. I accept that thereafter the parties agreed not to fence until the dispute was settled. Even if fencing was completed by defendant sometime after August 2004, this cannot assist the defendant in this matter since the statutory period would not have run.

[33] There is one other piece of evidence that bears mention. In cross-examination of Peter Robinson evidence was elicited of the presence on the disputed land of a shed; that the defendant's brother had indicated to the witness that the said shed was on their land, but later said that it was all right to leave it there because it was not hurting anything. It was put to the witness that he had rented the land where the shed was located. The witness denied this. Defendant submitted that this evidence supports the defendant's position that

he was in possession of the disputed land from the time Peter Robinson started living in L'Ance Aux Epines in 1994. The Court must disagree. The shed was not erected by the defendant. The oral assertion made by the defendant's brother to Peter Robinson without some action having been taken by the defendant does not assist him.

[34] The defendant has therefore failed to establish continuous possession of the disputed land for the requisite 12 years so as to entitle him to judgment against the claimant.

[35] That part of the action seeking damages having been abandoned, judgment is granted for the claimant as follows:

1. A declaration that the claimant is the owner of the 9, 535 square feet of land identified in the survey prepared by Mr. Denis Thomas, Licensed Land Surveyor.
2. An injunction restraining the defendant whether by himself or by his servants or agents or otherwise howsoever from entering or crossing the claimant's land.
3. Prescribed costs in the sum of \$12,500.00.


Clare Henry
High Court Judge