BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV2007/0224

BETWEEN:

EGON STOUTT (Personal Representative of SAMUEL STOUTT)
JOSEPH FRETT (an heir of ANGELA THOMAS)

Claimants/Appellants

and

ECEDRO THOMAS
ALFRED THOMAS
ALSIE THOMAS MALONE
ALICE THOMAS
THE REGISTRAR OF LANDS

Defendants/Respondents

Appearances:

Ms. Mishka Jacobs of McW Todman & Co for the Appellants
Mr. Gerard St. C. Farara, Q.C. of Farara Kerins for Respondents 1 – 4

2008: April 25, June 24th

JUDGMENT IN CHAMBERS

(Appeal from the Registrar of Lands under Registered Land Act Cap. 229 – whether evidence adduced at hearing sufficient to support finding that the Respondents were in peaceable, open and uninterrupted possession of land without permission of any person for 20 years or more – whether Registrar's decision is against the weight of the evidence - Registered Land Act s. 135(2))

[1] **JOSEPH-OLIVETTI, J.:** Ownership of land in the British Virgin Islands despite our Torrens system of title by registration continues to give rise to bitter disputes and as here it is not uncommon for the opponents to be members of the same family. This matter comes by way of appeal from the decision of the Registrar of Lands and is brought under Section 147(1) of the Registered Land Act Cap. 229 ("the RLA") and CPR Part 60. In substance, the Appellants are aggrieved by the Registrar's decision to allow the First Four

Respondents' application for prescriptive title to certain lands at Paraquita Bay on the island of Tortola.

Grounds of Appeal

[2] The Appellants rely on the following grounds:-

(1) "The decision of the Registrar of Lands is wrong in law.

(2) The Registrar of Lands failed to consider or properly consider the acts of occupation relied on by the Applicants for title by prescription.

(3) The decision of the Registrar of Lands is against the weight of the evidence presented.

(4) The decision of the Registrar of Lands is irreconcilable. By order dated the 28th February 2006 on a hearing on the 10th August 2005 the Registrar of Lands decided in favour of the Claimants/Appellants… this decision was appealed and pursuant to a written judgment of the Honourable Justice Joseph-Olivetti in BVIHCV 2006/0080 Ecedro Thomas, Alfred Thomas and Alice Thomas v. the Registrar of Lands a re-trial was ordered. A second hearing was conducted on the 10th April 2007 based on the same facts as the first hearing. The Registrar of Lands in the second hearing has decided against the Claimants.

(5) The Registrar of Lands should have found that the Applicants did not prove good title to parcel 67 Block 3437B in the Long Look Registration Section based on the evidence presented.

(6) Based on the aforementioned reasons the Appellants are aggrieved by the decision or order of the Registrar of Lands dated the 10th September 2007."

The Orders Sought

[3] The Appellants seek the following relief:-

(1) "The decision of the Registrar of Lands be quashed.;

(2) The Court declares that the Appellants are the registered proprietors of parcel 67 Block 3437B in the Long Look Registration Section;

(3) In the alternative that the Registrar of Lands be ordered to conduct a new hearing".

Brief History

[4] The land, the subject matter of this appeal is a parcel of land consisting of approximately 6 and ½ acres. It is registered as Long Look Registration Section; Block 3437B; Parcel 67 ("Parcel 67") in the names of ten persons or their heirs including the Appellants as proprietors in common in various shares.

[5] The parties are all related as they have a common ancestor, Mr. Sonny Thomas, deceased who together with Mr. Ecedro Thomas' brother, Alfred, also deceased were the original proprietors of lands of which Parcel 67 formed part.

[6] On 27th February 2004 the Respondents applied to the Registrar to be registered as proprietors of Parcel 67 by prescription pursuant to Section 135(2) of the RLA. The application was heard on 10th August 2005 and by order dated 28th February 2006 the Registrar denied their application but gave no reasons for his decision. The Respondents were aggrieved and appealed. The appeal was successful and the matter was remitted to the Register for a re-hearing. This was held on 10th April 2007 and this time the Respondents' application was granted. The decision of the Registrar is contained in his written ruling of 10th September 2007.

[7] At the second hearing the Registrar heard evidence from Mr. Ecedro Thomas on behalf of the Respondents, and from Mr. Joseph Frett on behalf of the Appellants and Oliver, Egon and Harold Stoutt (together the Objectors). These were the same persons who testified at the first hearing.

Discussion

[8] On considering the Grounds of Appeal the court is of the view that Grounds 1, 2, 3, and 5 can be dealt with together as the gravamen of these complaints is that the Registrar's decision cannot be supported either on the evidence or in law. Ground 6 is not a ground of appeal as it merely states that the appellants are aggrieved by the decision.

[9] First, however, I will consider Ground 4 as to my mind it can be readily disposed of. Ms. Jacobs who appeared on behalf of the Respondents bravely submitted that at the second hearing the parties relied on the same evidence that was relied on at the first hearing and as the Registrar came to a different conclusion from that arrived at after the first hearing

this his second decision is irreconcilable and perforce cannot stand. Mr. Farara Q.C. pointed out that the first decision was set aside and therefore this argument had no merit.

[10] Ms. Jacobs' contention at first sight might appear attractive but is a specious argument as it overlooks the obvious fact that the court set aside the first judgment – an insurmountable hurdle. It cannot therefore be argued that the second judgment is irreconcilable with the first as the first no longer exists. This ground is therefore devoid of merit.

[11] Now to Grounds 1, 2, 3 and 5. Ms. Jacobs in a nutshell submitted that the Registrar's decision was wrong in law as the Respondents had adduced no evidence to support an application under s.135 of the RLA having regard to the law on adverse possession. That the acts of occupation relied on by Mr. Thomas, namely cultivation of the land and the rearing of animals are acts which do not amount to actual possession as required by law and that there is no evidence that the Respondents erected any structure on the land. Further, that the Respondents' alleged acts of occupation are acts which are not inconsistent with the enjoyment of the land by the persons entitled to it; that there is no requirement in law for the Appellants to physically occupy the land and that the use of the land by the Respondents does not amount to adverse possession to the exclusion of the rightful owners. Ms. Jacobs also submitted that the Registrar in his ruling failed to identify what acts of occupation he considered in making his decision and whether the acts relied on amounted to acts of possession as required by the law.

[12] Counsel relied on **Geoffrey Cobham v Joseph Frett, (as personal representative of Thomas Frett, deceased)**[1], **West Bank Estates Ltd v Shakespeare Cornelius Arthur**[2]**,** and **Samuel Lettsome v Landford Lettsome**[3] for the relevant legal principles.

[13] Mr. Farara submitted that there was sufficient evidence before the Registrar to support his conclusion in favour of his clients both in fact and in law. That when one perused his ruling it was evident that the Registrar analyzed the salient aspects of the evidence of the parties, that he preferred the Respondents' evidence and found that the Respondents and their father had been in very long and exclusive possession and user of the entire parcel. That having regard to the evidence on the nature and situation of the land, the acts carried out by the Respondents on the land since 1951 was sufficient to establish sole possession

[1] Privy Council Appeal No. 41 of 1999
[2] [1967] AC 665
[3] Suit No. 39 of 1994, British Virgin Islands

to the exclusion of the other owners of the land who themselves on their own evidence had not used the land for over 40 years. And, that the Registrar's decision could be supported by the evidence and was correct having regard to the law as explained in the leading cases cited by Ms. Jacobs.

[14] I have considered the ruling. From this it is clear that the Registrar found that the registered owners of parcel 67 at the date of the application (27th February 2004) were Walter Stoutt, Victorene Joseph, Heirs of Edmund Stoutt, Clara Wheatley, Heirs of Moses Stephens, Ingram Frett, Heirs of Angela Thomas, Caroline Stoutt and Egon Aston Stoutt (Personal Representatives of the estate of Samuel Stoutt), Esme Ernestine Rabsatt and Marion Smith (Personal Representatives of the estate of Rosamond Malone), William Glanville Stoutt and Iona Stoutt Forbes (executors of the estate of Essie Stoutt). These persons were tenants in common in various shares. This finding is not challenged.

[15] The Registrar found that initially parcel 67 was occupied by Mr. Samuel Stout (Uncle Sammy) the uncle of Mr. Ecedro Thomas and Mr. Ecedro Thomas' father, Mr. Caesar Thomas. Both Uncle Sammy and Mr. Caesar Thomas reared cattle on the land. Uncle Sammy left the land during his lifetime but his sons continued in occupation until they too ceased. When they ceased occupation they had no dealings with the land save that they observed it occasionally as they passed by on the public road.

[16] The Registrar found the evidence of Mr. Joseph Frett contradictory Mr. Frett lived abroad for forty years and visited the BVI every five years. His evidence in chief as to when Uncle Sammy ceased occupation was clearly not accepted and it must be inferred that the Registrar accepted his answer on cross-examination that Uncle Sammy left the land in the sixties. And that the Registrar also accepted the evidence of Mr. Ecedro Thomas that the Thomas's occupied and had possession of the land without interference from anyone after Uncle Sammy and his children ceased occupying the land. The Registrar also found that it is not clear when they did so but that when they did Mr. Caesar Thomas took over the entire occupation of the land.

[17] It is true as Ms. Jacobs has complained that the Registrar did not state specifically what acts of the Thomas's he considered as amounting to exclusive possession and that he did not advert to the case law on the subject or to section 135 of the RLA itself in deciding as he did. These are matters which the Registrar might very well on reflection consider it

significant and prudent to include in his written ruling in the future. However, the Registrar is acting in a judicial capacity and is taken to be conversant with the law unless the contrary is shown. The question therefore is whether his decision granting the Respondents' application for prescriptive title can be supported by the evidence and if it is correct having regard to the relevant law whether or not he adverted to it.

[18] It is also useful before I embark on this exercise to bear in mind the powers of the High Court on such an appeal. These are set out in CPR Part 60.8.This provides that an appeal is by way of re-hearing. The court may receive further evidence on matters of fact and may draw any inference which might have been drawn in the proceedings. In addition, the court may given any decision or make any order which the Registrar might have made, or make such further or other order as the case requires or may remit the matter for a rehearing. And, the court is not bound to allow an appeal because of a misdirection or improper admission or rejection of evidence unless it considers that a substantial wrong or miscarriage of justice has been caused.

[19] Section 135 of the RLA provides - **'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 twenty years: Provided that no person shall so acquire the ownership of Crown Land'.**

[20] And s 136 (1) stipulates - '**where it is shown that a person has been in possession of land, or in receipt of the rents of profits thereof, at a certain date and is still in possession or receipt thereof, it shall be presumed that he has, from that date, been in uninterrupted possession of the land or in uninterrupted receipt of rents or profits until the contrary is shown.'**

[21] Subsection 6 states the ways in which possession shall be interrupted, namely by physical entry upon land, institution of legal proceedings or any acknowledgment made by the person in possession of the land.

[22] The cases relied on by both counsel establish that to succeed on a claim for adverse possession there must be a sufficient degree of sole possession to exclude the possession of the registered proprietors and that intermittent or sporadic acts will not suffice. In for example **Geoffrey Cobham,** Lord Scott of Foscote had this to say on what was the right question to be answered in such cases:- " **the judge was entitled to regard the evidence**

as not establishing a sufficient degree of sole possession and user by Mr. Thomas Frett. Mr. Archibald's plea to their Lordships 'what else could have been done on the land' is not the right question. An answer might be that Mr. Frett would have fenced-off parcel 57, incorporating it into his own property, parcel 58, and excluding everyone, including the true owner and his agents. <u>But in any event the right question would be whether what was done by Mr. Thomas Frett was sufficient to exclude the possession of Mr. Cobham and his agents.'</u> Emphasis added.

[23] On the evidence before the Registrar were the acts relied on by the Respondents established and were they sufficient to exclude the possession of the Appellants for the requisite period of twenty years?

[24] Mr. Thomas on behalf of the Respondents testified **'since 1951 we used the land for raising animals, - raising them on the land. We cleared the land and fenced it. My brother and I farmed the land. We have goat and sheep on the land. This was done all my life, every year, every day. We put barbwire fence. Fencing was done many times… we cleared the land and we used it.'**

[25] Mr. Joseph Frett on behalf of the Appellants testified that he left the BVI for the United States of America before Mr. Samuel Stoutt died and remained there for over forty years and that he did not know how Parcel 67 came about or where the boundaries are and that he did not know who cleared the land or who burnt coal on the land. Mr. Harold Stoutt testified that he has resided in St. Thomas since 1965 and that there came a time when his family had no animals or burned coals on the land and after his family stopped using the land he no longer went upon the land. Undoubtedly from the evidence they ceased to occupy the land in the sixties and they could not testify to the user to which parcel 67 had been put since their father and themselves ceased occupation and so could not seriously challenge the evidence of the Respondents as to user.

[26] There is no requirement in law that the rightful owner must be in physical occupation of the land as Ms. Jacobs rightly noted and the Registrar did not so hold. What is important is that the acts of adverse possession necessary to found prescriptive title must be such as to exclude the right of the lawful owner. Based on the evidence, the acts of the Respondents cannot be regarded as intermittent or sporadic as the acts relied on in **Cobham.** The evidence of the Respondents which the Registrar must be taken to have

accepted is that in the 1940's Mr. Samuel Stoutt and Mr. Caesar Thomas occupied Parcel 67. Mr. Samuel Stoutt fenced a part of parcel 67 which he used for rearing cows until 1951 when he ceased using the land. His children used the land until sometime in the sixties. After Mr. Samuel Stoutt and his children left the land Mr. Caesar Thomas continued using all of parcel 67. He cleared it, burnt coals and herded cattle and other livestock on it until his death in 1984. He was often assisted by his children and upon his death two of his children (Ecedro and Alfred) continued rearing animals on the said parcel of land **on a daily basis.** Mr. Ecedro Thomas continues to occupy the land up to present. The Appellants did not challenge the fact that Mr. Ecedro Thomas and his brother have been using the land for rearing their animals since they and their father ceased using it.

[27] The gist of the evidence is that the Respondents have been in occupation of parcel 67 beginning with their father on **a daily basis** over a period of more than forty years tending their cattle and subsequently fencing the land including the portion that was occupied by Mr. Samuel Stoutt. The land was always used for the pasturing of animals and the daily use made of it by the Thomas's coupled with their fencing of it were acts in my judgment which in law excluded the rights of the Appellants as owners. Further, there was no evidence on behalf of the Appellants of any action taken against the Thomas's family which could in law amount to interruption of that possession and the statutory period has been met.

Conclusion

[28] It follows therefore for the foregoing reasons that the Registrar's decision in allowing the Respondents' application for prescriptive title is correct having regard to the law and to the evidence. Accordingly, the appeal is dismissed with costs to the Respondents. Costs fall to be determined under the provisions of CPR 65.5 (prescribed costs) which set out the maximum costs which can be awarded, namely $7,500.00 as this is a claim with no value and therefore the default value of $50,000.00 applies. The court has a discretion as to the amount of costs to be awarded in any event. In determining the amount of costs the court must bear in mind that costs must be in an amount that the court deems reasonable "were the work to be carried out by a legal practitioner of reasonable competence and which appears to the court to be fair both to the person paying and to the person receiving the costs". In deciding what is reasonable the court must take into account all the

circumstances including the specific matters mentioned in CPR 65.3 which includes the importance of the matter to the parties, the novelty, weight and complexity of the matter and the time reasonably spent on the matter. In all the circumstances this was not a complex matter, the evidence was straightforward and the law on the subject is well settled. Accordingly, I will allow the Respondents the sum of $3,500.00

[29] In closing I cannot help but reflect on the Appellants' plaintive cry that it is not fair for one family to get all the land. Oftentimes the law seems to be at odds with morality although law is meant to reflect the morality of a country at the time of the decision but I leave this matter to the dictates of the conscience of the Respondents. It is well-known that in our islands that owners of land are often forced to seek their fortunes elsewhere in their youth intending someday to return, often neglecting their birthright and that in so doing they put themselves at the mercy of others who remain even their own families who might very well attempt to and succeed in setting up adverse claims against them.

Rita Joseph-Olivetti
Resident High Court Judge
British Virgin Islands