THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHCV 2006/0316

BETWEEN

OLIVIA DONOVAN-CARTY
CAROLINE DONOVAN

Claimants

and

ROSALIE DONOVAN
RENARDIS DONOVAN

Defendants

Appearances:

Mr. Lewis Hunte QC and Ms. Kelly-Ann Payne of Lewis Hunte & Co for the Claimants
Ms. Asha Johnson of Samuels Richardson & Co for the Defendants

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2009: February 18, 24, 25
April 20

JUDGMENT

(Land Law – whether evidence adduced at trial sufficient to support finding that the Defendants were in peaceable, open and uninterrupted possession of land without permission of any person for 20 years or more – whether defendants should vacate the land – whether defendants should remove structures and debris from land – whether Limitation Act applies – Registered Land Act sections 135 and 136)

[1] FOSTER, J. (Ag): On the 28th December 2006, the Claimants filed a Fixed Date Claim against the Defendants for an order that they vacate a parcel of land registered as Parcel 67 Block 2336B in the Mount Sage Registration Section ("the Land") and to deliver up possession thereon or alternatively an injunction requiring them to pull up any structures thereon and remove all debris from the Land.

[2] The Land is situate in the Carrot Bay area of Tortola, is generally flat and has ocean frontage. The land was registered in the names of Olivia Donovan-Carty and Caroline Carty ("the Claimants") on

16th August 2006 as the personal representatives of Samuel S. Donovan, deceased. The first registration of the Land was on 25th September 1974 in the name of the "Heirs of Samuel Donovan". Samuel Donovan was the father of the Claimants and the grandfather of the Second Defendant.

[3] In their defence, the Defendants claim that they have been in possession of the Land since 1986 to the present time and as such have counterclaimed, claiming a declaration under Section 135 (1) of the Registered Land Act (Cap 229) that they are entitled to have prescribed ownership of the Land and are therefore entitled to possessory title thereof as they have been in possession of the Land for more than 20 years prior to the commencement of these proceedings. They also claim to have had undisturbed possession of the Land to the exclusion of the Claimants and that they have exercised acts of ownership over the Land. The Defendants further claim to have operated a fruit stand on the Land and in so doing procured the connection of water and electricity to the premises erected on the Land and then applied for and obtained a trade license to operate the business.

[4] The trial of this matter took one day, the Claimants and Defendants calling 3 witnesses each.

The Evidence

[5] The Second Defendant at paragraphs 2, 3 and 4 of his Supplemental Affidavit (which was tendered in this case as his evidence in chief) states: -

> (2) *"in or around 1986, my father and uncle gave me permission to occupy Parcel 67, Block 2336B, Mount Sage Registration Section, the said property in dispute".*
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> (3) *In or around late 1990 or early 2000, an oral agreement was made between my three (3) aunts, Amanda Donovan, now deceased, and the First and Second Named Claimants and I. The essence of our agreement was that if I gave up my claim to Parcel 63 where I have my house, they would give me full possession and control of Parcel 67.*
>
> (4) *I had started doing business on Parcel 67 since 1986. As such, I agree to give up one of the Parcels, that is Parcel 63, and I kept Parcel 67".*

That was the extent of the Second Defendant's written evidence in chief.

[6] At the trial of this matter the Second Defendant amplified his written testimony and gave evidence that he used the Land for selling fruit, vegetables, drinks and to cook. He also stated that he did not seek permission to occupy the Land from the Claimants.

[7] The Defendants applied for and obtained permission from the relevant bodies to connect electricity and water to the premises on the Land. They produced receipts showing the payment of these respective charges over a period of time. I will revert to these time periods later on. In essence, the Defendants had erected a structure on the Land selling fruit therefrom and in or around 30 November 2004 applied for and obtained approval from the Building Authority on the 16 December 2004 to erect a new building on the Land. The Second Defendant testified that he did not seek permission from the Claimants to construct a concrete building on the Land but that he sought permission which was granted from the Building Authority.

[8] It is noted that the permission granted by the Building Authority was to erect a new building and was not to reconstruct add or alter a building or to remove a building. The Defendants commenced building a wall structure on the Land thereafter. The Claimants noticed this construction in progress and by letter dated 14 July 2005 to the Town & Country Planner, identified themselves as the remaining heirs of Samuel Donovan stating: - *"We have been informed that a building plan submitted to your Department by one Rose Donovan was approved for the construction of the said building, and since we have not given neither Rose Donovan nor your Department permission for the erection of the said building, we are by this letter asking that you take immediate steps to inform Rose Donovan to discontinue such construction on the abovementioned property until further notice."* On the 22 July 2005 a Notice to Quit was hand delivered to the Defendants at Carrot Bay. Further, on the 28 July 2005 the Chief Town and Country Planner caused a Compliance Notice to be served on the First Defendant asking that she cease operations on the Land.

[9] In cross-examination by Learned Queen's Counsel Lewis Hunte, the Second Defendant testified that his written evidence was true. He agreed that he had not produced any tax receipts in respect of parcel 67. He agreed that up to 2007 he was still saying that his aunt had given him permission to be on the Land. Importantly he further testified that that there are about 4 other structures on the

Land, that they belong to 'family' and that persons other than himself occupy the Land. He agreed that his occupation is not exclusive.

[10] In relation to his cross-examination on whether or not he received a "Stop Notice" from the Building Authority, the Second Defendant testified that he could not remember. I would reasonably assume that the "Stop Notice" referred to was the Compliance Notice I earlier mentioned that was served on his wife, the First Defendant.

[11] On observing this witness and his demeanour he was hesitant when asked probing questions concerning the "Stop Notice". I determined that in relation to this aspect of the evidence he was not entirely truthful to the court. He tried to hide behind his apparent inability to read to feign a lack of knowledge concerning the "Stop Notice". I believe he knew of the "Stop Notice" and was therefore fully aware of the attendant consequences of its disregard. His wife, the First Defendant with whom he lives is fully literate and was fully aware of the "Stop Notice" and its consequences and I so find.

[12] The First Defendant gave evidence in this matter by way of affidavit. She testified that her husband, the Second Defendant and her constructed a wooden structure on the Land and sold fruit produce and drinks. In July 1988 her husband, signed an agreement "as owner" of the Land for the supply of water to it. The court has had regard to Exhibit RD 1 (agreement for water supply from government mains) and noted that the application had a space for the entry of the owner of the Land. It read "Name of Owner of Property" and in the space next to that entry, the words written in were "Renardis Donovan". In the next line there is a space for the entry of the applicant which reads "Name of Applicant" and next to this the hand written words "Renardis Donovan" was entered. There was therefore an expectation that the name of the applicant and the name of the owner could be different. There was no suggestion that Renardis Donovan was the "owner" of the Land at the time. The Defendants have now applied to the court, to be declared the prescriptive owners of the Land.

[13] The Registered Land Act mandates that they would have to establish possession of the Land for 20 years. However, the evidence of the Second Defendant claiming to be the owner of the property in his application to the water authorities was tendered to establish the Defendants occupation of the property in 1988.

[14] The Defendants produced a Trade Licence dated the 13 April 1989, again to establish their occupation of the Land in 1989. It was also produced to prove the type of occupation by the Defendants of the Land and I so accept. The first Defendant stated that they (her husband and herself) did not pay rent for their occupation of the Land. She also testified in cross examination that they had received the Compliance Notice from the Town and Country Planning Department and that they continued to build "in spite of the Stop Notice" and that she had shown it to her husband, the Second Defendant. She testified that they had appealed the decision to cease all operations on the Land. This does not however authorize or entitle the Defendants to disregard the notice and continue building.

[15] Orien Donovan gave evidence on behalf of the Defendants. Orien testified that he has known the Defendants for over twenty years and that the Defendants have "occupied the property since the 80's". This could mean any time between 1980 and 1989. He testified that he rented the property from the Defendants for about a year whilst they were away in Australia but he could not remember the monthly rent. Then he later said he ran the bar for his brother in law (the Second Defendant) until he came back. I find that Orien did not give truthful evidence as the Second Defendant said he was away for six months and I also find that if he was renting the property for himself, he could not be running it for his brother in law. I therefore agreed with the suggestion put by Mr. Hunte QC to this witness that he never occupied the property whilst the Defendants were away in Australia.

[16] Iona Dawson gave evidence on behalf of the Claimants. I have found her to be a witness of truth. She testified that she owned a restaurant which is situated on the same side of the road as the Land and the Land had been occupied by the Defendants since the early nineties. She also testified that whilst the Defendants went to Australia some time around 1994, the Land was unoccupied and there was no activity there. She said that she opened her restaurant daily and that if there was activity during this time it would not have escaped her notice. During cross-examination, Iona Dawson was not challenged in any material way on her evidence regarding the occupation of the Land by the witness Orien Donovan. She was simply asked when she started her restaurant and her answer was in 1994. She was not challenged on her testimony regarding the time period the Defendants entered the Land.

Court's consideration

[17] It is not disputed that the Claimants are the registered owners of the Land. The issue to be determined is whether or not the Defendants are entitled to be declared the owners of the Land by virtue of Section 135 (1) of the Registered Land Act. The said section provides as follows: "*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".*

[18] The Claimants have challenged every aspect of the Defendants' claim for prescriptive title. The Defendants therefore have to prove that they have been (i) in peaceable possession, (ii) open and uninterrupted possession of the Land, (iii) for a period of twenty years (iv) without the permission of any person lawfully entitled to possession of the Land. The Defendants must therefore first establish that they have been in possession of the Land for at least twenty years. There has been no credible evidence produced either documented or oral by the Defendants or any one otherwise to establish on a balance of probabilities that would encourage or lead the court to believe that the Defendants have been in occupation of the Land since 1986. The Defendants have simply stated that they have been on the Land since early 1986. Their only witness testified that the Defendants have been on the property since the 80's. There was therefore no sufficient independent credible evidence to establish this most important fact. They had produced agreements and water and electricity receipts to show use of these utilities to establish their occupation of the land from that time. This is not enough. In my judgment the occupation of the Land by the Defendants, the nature, quality and use to which the Land was put does not amount to acts of possession which are clear and unequivocal. The testimony of both Defendants failed to go into any detail regarding the nature and quality of their acts of possession.

[19] Indeed the Second Defendant stated that there were four other structures on the Land and the Land was also occupied by other family members. This certainly does not lend itself to the requirement of possession of the whole of the Land by the Defendants. The issue therefore is whether the Claimants title to the Land *"has been extinguished and their right to recovery thereto has been statute barred by the alleged adverse possession of the Defendants and whether the Defendants alleged use and occupation of the Land are tantamount to adverse possession so as to confer on them a possessory title and bar the Claimants right of recovery to the Land in question."*

See Cobham v Frett PC Appeal No. 41 of 1999 per Lord Scott quoting Justice Georges in the High Court.

[20] The claim for possession of the Land was filed and served in 2006. The time therefore between any credible evidence concerning the Defendants occupation of the Land and the bringing of the claim is eighteen years as evidenced by the production of the receipts for the payment of the water and electricity bills. This time period falls short of the required time limit by two years. The institution of legal proceedings by the proprietors of the Lands to assert their rights would interrupt prescription. Therefore if the Defendants had been in "adverse possession" of the Lands from 1988, then the institution of these legal proceedings would have interrupted prescription. See section 136 (6) of the Registered Land Act.

[21] The Second Defendant claimed that he entered the Lands in 1986 by permission of his father and uncle. His father, like the Claimants were entitled to possession of the Lands just as were the Claimants who established this right by becoming the personal representatives of the deceased Samuel Donovan. The Defendants "possession" of the Lands in 1986, if this is true was not a clear manifestation of "animus possedendi". They therefore never began to possess the Lands adversely and this is borne out by the Defendants' pleading in their Reply at paragraph 6 where they stated *"permission was given to the Second-Named Defendant/Respondent by his father to construct on the said property. Therefore, we do not see that we are in any violation of any permission as none was granted by the First or Second-Named Claimants to build".* I am fortified in my view and my acceptance of the evidence of the Claimants that the permission granted to the Defendants was to operate a fruit stand on the Land. In violation of this permission the Defendants attempted in 2005 to construct a wall building and immediately on so doing, the Claimants put in motion proceedings to stop this unauthorized use and occupation of the Lands.

[22] In my view, the evidence presented by the Defendants have not established a sufficient degree of sole possession and user by them of the Land. Indeed there are others in occupation of the Land according to the testimony of the Second Defendant. The only acts committed by the Defendants inconsistent with the permission granted to them occurred in 2005 when they commenced building a concrete structure on the Land. If this act of building on the Land to the exclusion of the others

had occurred for a period of at least 20 years, then this act may have resulted in the Defendants acquiring prescriptive title of the Land.

[23] The absence of the Defendants on the Land in or about 1994 when they travelled to Australia amounts to an interruption of their possession of the Land for a long enough period to break the requirement of continuous occupation for a period of 20 years. The Defendants attempted to remedy this defect by bringing the witness Orien Donovan to have "continued" their possession during this period of their absence from the Land. I however have found that Orien Donovan was not in occupation of the Land during this period and having observed him give evidence under oath and in cross-examination I did not believe his evidence. Indeed, if the Defendants had rented out the property to him, there would have been some form of receipt showing this rental for that period. Orien Donovan could not remember what the amount of the rent was. I believe he could not remember because a rental of the Lands or of the structure on the Land never took place. He was therefore not in occupation of it.

[24] Of immense assistance in determining this matter and the legal principles to be applied are to be found in the House of Lords authority JA Pye (Oxford) Ltd & Anr v Graham & Anr [2002] UKHL 30. Lord Browne-Wilkinson at paragraphs 36, 37 and 40 of his opinion stated: -

> "[36] …the question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.
>
> [37] It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act…
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> …
>
> [40] …there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ('factual possession'); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess'). What is crucial is to understand that, without the requisite intention, in law there can be no possession…"

[25] In this case the Defendants never had the requisite intention to possess as they were there by virtue of the consent and permission of the persons entitled to possession of the Land. In simple terms, the Second Defendant had sought and or was given permission to be on the Land to

operate his fruit stand. It is only when his acts of possession became inconsistent with this permission that he manifested his intention dispossess the paper title owners. The acts of the Defendants do not amount to a sufficient degree of custody and control of the Land such as to constitute factual possession of the Land. See Jeffrey Adolphus Carty v Raphael Edwards Claim No. 2003/0045 (Anguilla) per George-Creque, J at paragraph 27.

Limitation

[26] At the hearing of the trial of this matter, Counsel for the Defendants attempted to raise the issue of limitation as provided by section 6 (3) of the Limitation Act Cap 43 which provides: *"No action shall be brought by any other 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 first accrued to person through whom he claims, to that person."* It stands to reason that the 12 year period begins when the "right of action accrued to him" (the Claimants). That right would accrue to him from the time the person in possession had begun to occupy the Land in a manner inconsistent with the permission given to the Defendants. I have found earlier that the Defendants "occupation" of the Land was consistent with the permission given by the Second Defendant's father and uncle up to 2005 when the Defendants attempted to construct the concrete building, when the right accrued to the Claimants as the paper title owners of the Land.

[27] Accordingly, the limitation defence does not operate in this case. In any event, the limitation plea is a defence that has to be pleaded in the Defence. It is a shield and not a sword, as is the action for prescriptive title. The Defendants did not plead limitation as a defence to this action and the submission also fails on this basis. Part 20.1 (3) of CPR is the governing procedure on amendments to statements of case. That Rule provides that *"the court may not give permission to change a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary because of some change in the circumstances which became known after the date of that case management conference."* The time therefore to have changed the statement of case of the Defendants must have been at or before the case management conference unless the party wishing to change the statement of case can satisfy the court that the change is necessary because of some change in circumstances

which became known after the date of the first case management conference. No such action was taken in this case. This defence is therefore not available to the Defendants.

Conclusion

[28] Based on the matters above I am not satisfied that the Defendants have satisfied any of the requirements under Section 135 to claim prescriptive title to the Land. I am not convinced that they had been in occupation of the Land from 1986. I believe they were given permission to occupy the Land in 1988. I am not satisfied that they formed the necessary intent to possess the Land and dispossess the paper title owners whether it be the Claimants or the title holders before them. I am also satisfied that any occupation or purported possession of the Land was broken when the Defendants visited Australia in the nineties. I did not believe the evidence of Orien Donovan and believed the testimony of Iona Dawson called on behalf of the Claimants. I am not satisfied that they occupied the entire Land as in their evidence the Defendants testified that there are other family members on the Land. No further evidence was given to expand on the nature of this "occupation" therefore the Defendants were not in exclusive occupation of the Land.

[29] I am satisfied that the Defendants were properly served with a "Stop Notice" which in effect ordered them to stop the construction of the concrete building on the Land. In absolute defiance of the "Stop Notice", the Defendants ignored and disobeyed the order from the Town & Country Planning Department. It is no excuse to say that the decision was appealed and that this would entitle them to continue the construction. The continued construction of the "new building" was carried out in bad faith. I am also satisfied that the Defendants must have been totally aware of the consequences of their disobedience of the "Stop Notice".

Order

[30] I would therefore order that the Defendants do deliver up possession of the Land within 30 days of the date of this order. After 30 days from the date of this judgment the Defendants whether by themselves, agents or otherwise are restrained from remaining on entering or in any other way trespassing on the Land.

Costs

[31] Costs were not addressed in the Case Management conference and in the Pre trial review there is a reference to "prescribed cost." There being no agreement and no value placed on the claim I order that cost in the sum of $9,000.00 be paid by the Defendants to the Claimants.

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Peter I Foster
High Court Judge (Ag)
British Virgin Islands