

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 36 OF 2009

IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF POSSESSORY TITLE

BETWEEN:

ELROY ARTHUR

Applicant

v

T. MICHAEL FINDLAY

Respondent

**Appearances:** Mr. Carlyle Dougan, Q.C., for the Applicant  
Mr. Andrew Cummings, Q.C. for the Respondent

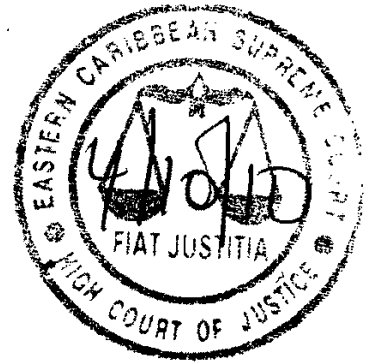
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2010: July 27<sup>th</sup>,  
August 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>  
October 4<sup>th</sup>

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### **BACKGROUND**

- [1] **JOSEPH MONICA J:** On 25<sup>th</sup> May 2009 applicant Elroy Arthur, under section 3 of the Possessory Titles Act 2004 (No.38 of 2004) (the Act), filed an application for a declaration of possessory title. That application was in respect of a parcel of land at Belvedere Estate at Belvedere in the parish of Saint George, admeasuring one acre 18 poles (48,460 sq. ft) (the property) and was supported by his affidavit.
- [2] Notice of the application for possessory title was published in newspapers, posted in the Registry of the High Court and on the court building in the relevant district, as required by section 7 of the Act.



- [3] On 2<sup>nd</sup> July 2009, entry of appearance opposing the application was filed by T. Michael Findlay, the agent of Muriel E. Small nee Findlay, (Findlay-Small), who holds Power of Attorney No. 143/2009 dated 4<sup>th</sup> May 2009. A claim outlining the opposition was filed on 20<sup>th</sup> July 2009.

#### **WRITTEN SUBMISSIONS WERE FILED ON 25<sup>TH</sup> AUGUST 2010**

##### **WITNESSES:**

- [4] Applicant Elroy Arthur gave oral evidence. Donald Martin and Louis Jones, who swore supporting affidavits, gave oral evidence. For the respondent, Michael Findlay and Findlay-Small swore affidavits and gave oral evidence. Bastien Zincte Alexander, a character witness for T. Michael Findlay, gave oral evidence.
- [5] Mr. Alexander was called as a character witness in response to the line of cross examination of Michael Findlay. As Counsel for the applicant indicated that he did not intend to attack Mr. Findlay's character, I do not think it necessary to make any comment.

##### **ISSUES**

- [6] Mr. Dougan for the applicant submitted that the issues are:
- (1) Was the applicant in actual/factual possession of the disputed land for the period of at least twelve years immediately preceding 2005 – viz from 1993 to 2005 exclusively and undisturbed accompanied by the requisite intention to possess the land as owner?
  - (2) If the answer to the aforementioned is that the applicant was in actual possession of the said land, did that possession amount to adverse possession?

### CASE FOR THE APPLICANT

- [7] Prior to the applicant's possession, his father Alban Spencer of Brighton worked and occupied the property plus three acres adjoining as implied agent for "Bobo" Findlay (Clarence Findlay).
- [8] For over sixteen years - from about 1993 to the present time, the applicant has been in factual exclusive and undisturbed possession of the property for a continuous period of 12 years or more with the requisite intention to possess the property as owner.
- [9] During his occupancy, without any interruption or objection, he constructed on the property three buildings including: (a) an incomplete two storey concrete building with a gross floor area of 297 square feet; (b) a second concrete building with a gross floor area of 475 square feet and; (c) a third building with floor area of 1173 square feet, and has operated a bar, restaurant, and night club.
- [10] The applicant had electricity and water installed on the property in his name. The respondent has not taken any steps to remove the applicant from the property. The applicant's rights under the Act crystallized in 2005.

### CASE FOR RESPONDENT

- [11] Clarence Frederick Findlay (deceased) by way of indentures bearing registration nos. 443/1949 and 1825/1979 became the owner of lots of land on the Belvedere Estate containing altogether four acres one rood and twenty eight poles.
- [12] From about 1986, Clarence Fraser, then legal representative of the owners of the estate, put Alban Spencer of Belvedere, the applicant's father, in charge of cultivating the four acres of land and rearing and breeding animals. In 1988 that arrangement was formalized by a Land Overseer Agreement.

- [13] In 1991, the four plus acres were subdivided into four lots and Clarence Findlay made gifts to his four children. Deed No. 3362/1991 dated 21<sup>st</sup> October 1991, Lot 1 comprising 1 acre and 18 poles i.e., 48,460 square feet to Findlay- Small (who resides in the United States of America), is the subject matter of this case; Lot 2 to Margaret Findlay; Lot 3 to Noreen Findlay and Lot 4 to Vernon Findlay. In 2009 Lots 2, 3 and 4 were sold by the owners to C.D. Viera Investments Ltd, Deed No. 2071/2009, without any ownership challenge by the applicant.
- [14] Alban Spencer's health failed which prevented him from carrying out his functions on the property, and his son Elroy Arthur took over those functions. Elroy Arthur constructed a part wooden/part concrete building on the property. He has been operating an entertainment business (bar, restaurant and night club) in the building.
- [15] In 2003 Findlay-Small and Margaret Findlay as owners toured the four acre land in company with the applicant and agent Clarence Fraser. The applicant made no claim to the property during discussions that were held.
- [16] On 10<sup>th</sup> December 2007, Findlay-Small informed the applicant that she proposed to sell the property and gave him first preference to purchase at a price of EC\$8.00 per square foot, which price was lower than the then EC\$15.00 per square foot value of the land.
- [17] There are two memoranda of agreement made on 11<sup>th</sup> December 2007 between the parties. In one agreement, the applicant agreed to be caretaker of the property under the supervision of Michael Findlay, thus acknowledging Findlay-Small's title to the property. That agreement is signed by Michael Findlay for Owners and ratified by them. There is another memorandum of agreement made on 11<sup>th</sup> December 2007, which is signed by Findlay-Small and witnessed by Michael Findlay. This latter agreement was an agreement for sale of the property to the applicant for \$387,680.00, with a down payment of \$30,000.00 payable on the signing of the agreement, the balance to be paid on or before 28<sup>th</sup> February 2008.

- [18] By letter dated 4<sup>th</sup> May 2009 Attorney at Law Randolph Howard on behalf of Findlay-Small wrote the applicant requesting him to comply with the terms of the memorandum of agreement for sale. He did not.
- [19] The respondent claims that the applicant has not met the requirements of the Act and the Court ought not to grant him a declaration of possessory title.

### **SUBMISSIONS**

- [20] Learned Senior Counsel for the applicant submitted that what Findlay-Small did or said did not legally affect the quality of adverse possession by the applicant. He cited from the judgment of **Sir Vincent Floissac** in Civil Appeal No. 13/1944 **Florence Louise Belfon v Lester McIntosh** at p. 7:

“ The respondents’ extra-judicial protests, objections and demands do not in law constitute acts of ownership (i.e., acts which evince an intention to assert ownership) or acts of possession (i.e. acts which evince an intention to assume, retain or regain possession) or acts which legally interrupt, disturb or otherwise affect the quality of adverse possession.”

- [21] Learned Senior Counsel for the respondent submitted that there was a signed agreement of 11<sup>th</sup> December 2007 between the parties that clearly acknowledges the respondent’s title in writing. He cited **Pottinger v Raffone** (2007) 70 WIR 238 at 240 paragraph f:

“Where, however, the person in possession acknowledges the proprietor’s title in a signed document, then the period of 12 years runs from the date of that acknowledgment”.

- [22] Learned Senior Counsel differentiated the **Pottinger** case from **Pye (Oxford) Ltd v Graham** (2003) 1 AC 419 where there was no signed document.

### **FACTS AND LAW**

- [23] Clarence Findlay owned four acres of land at Belvedere Estate and entered into what is referred to as a Land Overseer Agreement appointing Fraser as his agent over the land

and permitting Alban Spencer to cultivate the land. That agreement dated 23<sup>rd</sup> July 1988 reads:

"Land Overseer Agreement between Clarence Findlay, his daughter Muriel Findlay Small and Mr. Alban Spencer.

Mr. Alban Spencer will continue to work on the Belvedere Estate under ownership of Mr. Clarence Findlay as he has in the past, cultivating, rearing and breeding of animals.

Mr. Spencer will be directly accountable to Mr. Clarence Fraser who has approved of this agreement.

Proceeds from same will be rightfully handed over in due time and amounts to Mr. C. Fraser, same being 1/3 of funds collected for land and ½ of the sale profit of animals."

- [24] Section 2 of the Act defines "adverse possession" to mean factual possession of an exclusive and undisturbed nature of a piece or parcel of land in Saint Vincent and the Grenadines for a continuous period of 12 years or more accompanied by the requisite intention to possess the said land as owner thereof."
- [25] The applicant has acknowledged that Findlay-Small is the paper owner of the property. His claim in his affidavit filed on 25<sup>th</sup> May 2009 is that he is entitled to a declaration of possessory title in that since about 1993 he has been in factual exclusive and undisturbed possession of the parcel of land for a continuous period of 12 years or more.
- [26] The applicant also acknowledged that by the Land Overseer Agreement, his father was permitted to occupy the four acre land. Paragraph 9 of the applicant's affidavit reads:
- "That prior to his (Elroy) possession his father Alban Sears (correct name Spencer) worked and occupied the said land plus three adjoining acres as implied agent for "Bobo" Findlay deceased (4)...
- My father was in charge of four acres. In 1988 my father was working for Mr. Findlay. My father had agreement with owners of the land in 1988 to take care of the land. I lived with my father."
- [27] In cross examination, the applicant stated that his father took ill, became blind and he occupied the land in his father's place. He could not remember when this happened. In

cross examination, his witness Donald Martin stated that the applicant's father became blind probably around 1991. Martin also said that the applicant occupied the land for sixteen years i.e. in early nineties, 1991 possible it is 1993."

[28] I accept that possession of the property by the applicant ran from 1993. Twelve years from 1993 would be 2005.

[29] On 24<sup>th</sup> June 2003 the applicant, Fraser, Findlay-Small, Margaret Findlay and Findlay-Small's grandson Denzel, walked around the four acre land. Walking on the land, without more, is not evidence of possessory ownership of the property.

[30] I accept Findlay-Small's evidence that during that visit in 2003, Fraser introduced her and her sister Margaret as owners of the land to the applicant. I understand that to mean owners of the four acres of the land. The applicant in cross examination stated:

"My father Albert Spencer used to work the land. Didn't know at time it was not his land. When Ms. Findlay come I knew it was not his land. I thought all four acres were his land. In the latter I learnt it was not his land. When M. Findlay come and they bring some proof realize is their land. When she come I know she owned one acre of the four. Ms. Findlay is paper owner of one acre."

[31] In paragraph 10 of her affidavit Findlay-Small deposed that, during the 2003 visit, the applicant "gave me mangoes and pineapples from my said land and this he clearly understood."

[32] The act of giving of mangoes and pineapples during a visit to the property is equivocal. Were those items given as a gift to persons visiting the land or was it given as an acknowledgment of ownership of land or part payment to an owner?

[33] What transpired when the fruits were handed over? Did the owner indicate to the applicant that the fruits were accepted as part of what she expected to receive from him as owner of the property? Did the applicant indicate to the owner that what he was giving her was a part of the produce of the land from one who is occupying the property with permission of the owner of the property?

- [34] If those fruits had been sent by the applicant from Belvedere to Findlay-Small in Kingstown, I might have been able to infer (taking into consideration the quantity), that he was fulfilling a duty as a person providing a portion of the land's produce to the owner of the property. I cannot so infer in this case.
- [35] What is meant by the expression in her affidavit "and this he (applicant) clearly understood"? What did he clearly understand? How did he manifest that clear understanding? The evidence was that Findlay-Small and the applicant were meeting in 2003 for the first time. I cannot conclude from that comment and the giving of mangoes and pineapples it was clear that he gave her as owner of the property.
- [36] I would expect to see some evidence that the receiver or the giver, or both, had made some reference to the giving of mangoes and pineapples as being part of the arrangement relative to the property. I am unable to find evidence pointing to the fact that the mangoes and pineapples were so given. I cannot hold that mangoes and pineapples given during a visit to a farm constitute giving products in furtherance of the agreement to supply an owner with farm produce.
- [37] In 2003 the applicant had been in possession of the property for ten years. Disturbance of his possession must be by process of law. Findlay-Small did not institute legal proceedings to assert her ownership and time continued to run in favor of the applicant. In 2005 he had been in possession for twelve years and had thus satisfied the qualifying period for adverse possession. At the beginning of 2006 Findlay-Small's ownership rights were extinguished.
- [38] **Perry v Clissold** (1907) A.C. 73 at p. 79 (Privy Council) Lord Macnaghten stated:  
"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the



case, his right is forever extinguished, and the possessory owner acquires an absolute title.”

[39] The relevant sections of The Limitation Act (Cap. 90) are sections 17 and 19.

“17. 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.”

“19. ....at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.”

### REQUISITE INTENTION

[40] I now consider whether the applicant had the requisite intention to acquire the property by adverse possession. In re-examination Findlay-Small said:

“In 2003 Mr. Fraser took myself and my sister and grandson to the land and introduced us to Mr. Arthur as owners of the land. Mr. Arthur led us around the land. He didn't show any attitude that the land wasn't ours. Mr. Clarence Fraser was agent at the time.

When I visited land Arthur didn't say anything really to me. Next day we had meeting with me at Mr. Fraser's house. Mr. Fraser wanted him to sign agreement that he was taking care of the land cultivation and taking care of animals. He had crops, trees. Mr. Arthur was hesitant to do so. I told him that he should sign the paper as anybody can come and tell him the land is theirs and throw him off..... In 2003 had discussion with him along with Mr. Fraser. Discussed was signing of paper that he was responsible for taking care of land. He Mr. Fraser stressed to Mr. Arthur caretaker that wooden structure is the only structure on the land and he was given permission by Mr. Fraser to do that.

Further discussion it could be torn down at any time when owners wanted land back. He proceeded to build concrete structure. Mr. Fraser kept me up to date phone calls in relation to the land. Mr. Fraser in 2003 was vigorous person then. He had power of attorney of the land. Mr. Fraser kept me up to date 2005.”

[41] On consideration of that evidence, it is evident that the applicant's intention was manifesting itself in 2003. He was hesitant and, after discussions with Findlay-Small, he did not sign the agreement that he would be caretaker of the property. If it was his intention to be caretaker why did he not sign the agreement? That failure, in 2003, to sign

the agreement should have alerted Findlay-Small and also agent Fraser as to the applicant's intention to acquire the property by adverse possession.

[42] Findlay-Small was aware of the applicant's continued failure to sign the agreement, as her agent appointed in 2007 Michael Findlay, in paragraph 4 of his Affidavit of 3<sup>rd</sup> March 2010, deposed:

"After the said Mr. Elroy Arthur took charge of the said lands being 4 lots, the said Mr. Clarence Fraser (the first agent) tried several times to get the said Mr. Elroy Arthur to sign an agreement in like terms of the one previously signed by his father which said agreement he promised he would sign but never did."

[43] On one hand, the applicant was acknowledging orally a certain situation, i.e. that Findlay-Small was the owner of the property and he was occupying the property as caretaker as his father had done: promising Findlay-Small not to build other structures (in 2003 there was only a wooden structure on the property). Findlay-Small accepted the applicant's promises. He seemingly calmed any doubts she may have had. .

[44] On the other hand, the applicant treated the property as his own and, subsequent to 2003, put up structures on the property although he had been told not to do so. The applicant's intention was to obtain ownership of the property which ever way it was possible to do so: by occupying it and obtaining title by possessory title or by purchasing it, if he had to.

[45] The applicant had built substantial structures on the property and he had made a significant investment. His actions belied his words and, by his actions, his intention was clear. He was occupying the property with the intention to acquire it by adverse possession. His refusal, for four years, 2003 to 2007, to sign the memorandum of agreement to be caretaker of the property, inescapably points to that intention. Time of twelve years that commenced in 1993 was continuing to run through 2003 to 2005.

[46] It is not clear whether the additional structures were constructed before or after 23<sup>rd</sup> September 2006, the date agent Fraser died. Up to that date, it was Fraser's responsibility to report to owner Findlay-Small that the applicant was constructing buildings on the property, contrary to instructions. He could not miss what was happening on the property

as, according to Findlay-Small's affidavit, Fraser "lived nearby approximately 250 yards from the said land". Findlay-Small also said that Fraser kept her informed by telephone of what was happening on the property, up to 2005.

- [47] I conclude that, at some point in time, she became aware that the applicant had constructed additional buildings on the property. It was therefore imperative for Findlay-Small, before the passage of twelve years, to come forward and assert ownership, not merely by giving spoken directions that the applicant was not to construct buildings or additional structures, but by taking legal action.
- [48] Oral directions as to what the applicant was or was not permitted to do on the property are not sufficient. The authorities indicate, even taking action by written notification to a person in possession that he is to give up possession, is not sufficient to take over possession from the possessor.
- [49] In **Mount Carmel Investments v Peter Thurlow Ltd** (1988) 3 AER p. 129 at 133 (Court of Appeal) Nicholls L.J. had this to say:
- "We do not accept that, in a case where one person is in possession of property, and another is not, the mere sending and receipt of a letter by which delivery up of possession is demanded, can have the effect in law for limitation purposes that the recipient of the letter ceases to be in possession and the sender of the letter acquires possession."
- [50] I find that the applicant had the requisite intention to obtain the property by adverse possession.

#### **WAS CLAIMANT FORCED TO SIGN MEMORANDUM OF AGREEMENT DATED 11/12/2007**

- [51] Two agreements relating to the property were signed by the parties. The Memorandum of Agreement for sale of the property to the applicant was signed by Findlay-Small and the applicant. The applicant said that Michael Findlay had advised him to seek legal advice but that at the time he signed the agreement he had not had legal advice. He said:

"I didn't intend to buy it. Mr. Findlay tell me see a lawyer but I didn't see lawyer. Michael Findlay force me to sign it."

- [52] His evidence was that Michael Findlay read the document to him but that he did not understand the document. He was attempting to convince the Court that he did not understand the true significance of the document. The Court is not so convinced.
- [53] The 'force' he referred to was that Michael Findlay informed him that the people were awaiting the signing of the agreement. In re-examination he stated having been so told, he thought people were waiting and worried and were desperate for the agreement to be signed.
- [54] From his account of what had transpired at the time the agreement was signed, I find that the applicant was not forced by Michael Findlay to sign the agreement. I find that he signed the agreement freely.
- [55] By the time the agreement was signed in 2007, the applicant had, in 2005, obtained the property by 12 years adverse possession. In the other agreement the applicant agreed to take care of the property on behalf of Findlay-Small.
- [56] The applicant acknowledged in both documents of 11<sup>th</sup> December 2007 that Findlay-Small is the owner of the property. In law, that acknowledgement by the applicant establishes ownership rights of the owner of the property from the date of the acknowledgement. Findlay-Small's right of action to recover possession of the property accrued on 11<sup>th</sup> December 2007
- [57] Sections 29 (2) and 30 (1) of the Limitation Act set out the law on acknowledgement of a title by a person in possession:
- "29 (2) If the person in possession of the land or personal property in question acknowledges the title of the person to whom the right of action has accrued, the right shall be treated as having accrued on and not before the date of the acknowledgement.

30 (1) to be effective for the purpose of section 29, an acknowledgment must be in writing and signed by the person making it.”

[58] It follows that the applicant’s possession of the property that commenced in 1993, continued until 10<sup>th</sup> December 2007, the date before the agreements were signed - that is fourteen years.

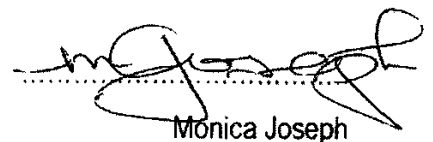
### **CONCLUSION**

[60] The applicant has been in possession of the property for a continuous period of twelve years: 1993 to 2005. The applicant has the requisite intention to acquire the property by adverse possession. Muriel Findlay-Small’s title to the property is extinguished.

[61] I thank Learned Senior Counsel for both parties for the assistance provided to the Court.

[62] It is ordered that:

1. The claim of the respondent in opposition to the applicant’s application for Possessory Title fails.
2. The applicant’s application for possessory title succeeds. Declaration of Possessory Title to the property to issue to applicant Elroy Arthur.
3. I award costs of \$100.00 to the applicant. Liberty to apply - on costs.



Monica Joseph

**HIGH COURT JUDGE (ACTING)**

1<sup>st</sup> September 2010