

In the Eastern Caribbean Supreme Court
Commonwealth of Dominica
In the High Court of Justice
Civil
Case no. DOMHCV2003/0186

BETWEEN: Aldie Martina Toussaint Claimant

 And

 Mary Austrie [Oshanghnessy] Defendant

Before the Hon. Justice Brian Cottle

Appearances: Mr. Bernard McDonald Christopher for the Claimant

 Mrs. Zena Moore-Dyer for the Defendant

2012: January 25th

27th

DECISION

[1] COTTLE J: The parties own neighboring lots in the Canefield Housing Development. Both have Certificates of Title. The Claimant owns lot 472. According to the Certificate of Title it contains 1836 square feet. The Defendant owns lot 470 which according to the Certificate of Title measures 1952 square feet.

[2] The facts of this matter are not in dispute. There now exists a wall between the two parcels. That wall was constructed by the Defendant's predecessor in title more than twelve (12) years before the institution of the Claim. Unfortunately, a survey reveals that the wall has not been constructed

along the true boundary between the parcels. It encloses a three feet wide strip of the land encompassed in the Claimant's Certificate of Title.

- [3] The Claimant brings this Claim seeking a declaration that the true boundary be re-established and an order for the demolition of the wall. She further seeks damages for trespass and mense profits as well as a permanent injunction prohibiting further trespass.
- [4] The Defence simply avers that the Claim cannot be maintained as it is Statute barred. The Claimant's say the Act does not apply to registered land in Dominica.

PRELIMINARY MATTERS

- [5] During the course of Case Management the Court ordered the parties to file skeleton arguments with authorities in support on the issue of "The applicability of the Real Property Limitations Act to registered land in Dominica". The Claimant filed skeleton arguments as ordered. The Defendant did not. At a subsequent Pre-trial review the Court ordered that the Defendant fully comply with the Case Management order within a week; failing which the Defence shall be treated as struck out. This was in 2005. Again the Defendant failed.
- [6] When the matter came up for trial before this Court, Counsel for the Claimant raised the issue of the Defendant's failure to abide by the Pre-trial review order and the Case Management order. He submitted that in effect the Defence had been struck out. Counsel could offer no explanation as to why he had not applied for judgment on the basis of the striking out of the Defence at an earlier date. In the circumstances of this case, in which there is no factual dispute and the parties agree that the matter turns strictly upon statutory interpretation, I declined to enter judgment for the Claimant on the basis of the striking out of the Defence- especially in light of the failure of the Claimant to apply for judgment before.

THE LAW

- [7] Section 2 of the Real Property Limitations Act, Chapter 54:07 of the Laws of Dominica reads as follows:

" After the commencement of this Act, no person shall make an

entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, 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 or suit, has first accrued to the person making or bringing the same."

[6] Section 8 of the Title by Registration Act, Chapter 56:50 reads:

"All certificates of title granted under this Act, and all notings of mortgages and incumbrances on the same, shall be indefeasible."

[7] Section 10 of the Title by Registration Act, Chapter 56:50 reads:

"The right of the registered proprietor named in a certificate of title to the land comprised in a certificate of title granted under this Act shall be the fullest and most unqualified right which can be held in land by any subject of the State under the law of Dominica, and such right cannot be qualified or limited by any limitations or qualifications in the certificate of title itself, unless the limitations and qualifications were inserted in any State grant in place of which the certificate of title has been issued, or in respect of any certificate of title issued by virtue of any scheme under the Town and Country Planning Act or under the Slum Clearance and Housing Ordinance, or any Acts replacing these enactments, or as in the case of mortgages and incumbrances, when these are noted on the certificate of title."

[8] Section 33 reads:

"Where any person has acquired or claims to have acquired under the Real Property Limitation Act, the ownership of land brought upon the operation of this Act, he shall present a request to the Registrar of Titles to have a certificate of title issued to him in lieu of the registered proprietor in the original certificate of title, and the person who has acquired, or claims to have acquired, the ownership shall not be entitled to maintain any suit in regard to the land until he has obtained a certificate of title thereto. When a request for such a certificate of title is presented to the Registrar of Titles, he shall state a case to the Court, and shall not issue a certificate of title on the request until he has received the direction of the Court thereupon."

[9] As I understand the argument for the Claimant, the Defendant's father obtained a Certificate of Title for the land in 1969. The Defendant got a Certificate of Title in her name in 1989. Mr. Christopher argues that the effect of the grant of this new Certificate of Title to the Defendant is to

destroy any rights to the encroached upon the strip which her predecessor in title might have accrued. He cites in support of his argument the decision of the Privy Council in Chrisolm v Itall, 1 WIR 413.

[10] I have carefully considered the case referred to. I conclude that I am unable to agree that it supports the proposition advanced by Mr. Christopher. At page 421 Letter H, Lord Jenkins, in delivering the judgment of the Court had this to say:

"...The scheme of S.69 is reasonably plain. The registration of the first Proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to investigation of title to the property and as to notices and advertisements which are considered a sufficient protection to anyone claiming any right of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under the relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted on the certificate, and accordingly are not only binding on the proprietor against whom they were originally acquired but are not displaced by any subsequent transfer or transmission."

[11] Applying that learning to the instant case the Claimant's Certificate gave her title to the encroached upon strip but the occupation by the Defendant for more than the statutory period has defeated the Claimant's title to this portion of her parcel.

[12] Mr. Christopher has another string to his bow. He argues that mere possession is insufficient to displace the owner. It is true. The possession by the squatter must be nec clam nec vi nec precario. The Act of enclosing the strip in my view demonstrates the required anumus possidendi.

[13] In the circumstances, I hold that the Claim fails on the basis that it is statute barred by virtue of S. 2 of the Real Property Limitations Act. The Claim accordingly stands dismissed. The Defendant is awarded prescribed costs in the sum of seven thousand five hundred dollars (\$7500) as per the Case Management Conference order.

Brian S. Cottle
High Court Judge