

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2010/0001

BETWEEN:

DAPHNE LEWIS

Claimant

And

1. KEVIN WHITE
2. JOYCELINE WHITE

Defendants

Appearances:

Mrs. Cynthia Hinkson Oulah for the Claimant

Ms. Patricia Augustin for the Defendants

2011: November 28th
2012 April 30th

DECISION

[1] **BELLE J:** On 4th January 2010 the Claimant filed a Fixed Date Claim in which she prayed for the following remedies:

- a. Possession of the Property (the portion of land, measuring 322.8 square feet which the Defendants currently occupy).
- b. An Order that the Defendants cease occupying the Claimant's land.
- c. Damages of \$78,062.00
- d. Interest pursuant to article 1009a of the Civil Code Ch. 242 of the Revised Laws of Saint Lucia 1957 from November 1991 from the date of occupation of the Claimant's property.
- e. Mesne Profits from December 3rd to date of vacation of property @\$6.58 per day.
- f. Costs.

- [2] In their Counterclaim to the Claimant's claim the Defendants claimed that the Claimant had encroached on their property from the time of the Defendant's entry into possession of the property in or about November 1991.
- [3] In her statement of claim the Claimant stated that the Defendants began occupying the White Property on or about November 1991 and their occupation included the erection of a chainlink fence along their boundary which unknown to the Claimant encroached on the Lewis property. According to the Claimant she became aware of the encroachment in November 2008 whilst surveying the Lewis property for the purposes of erecting a perimeter wall along the roadside.
- [4] It is common ground that the Claimant and the Defendants are neighbours sharing a common boundary. The Defendants built a concrete wall which encroaches on 322.8 square feet of the Claimant's land. The Claimant also encroached on 51.8 square feet of the Defendants' land. This was not noticed by either party for eighteen years. It is also common ground that Defendants demolished the wall which encroached on the Claimant's property in or about July of 2010.
- [5] The issues before the court were established as:
- (1) Whether the Claimant's claim for damages for a period of eighteen years is prescribed pursuant to Article 2122 of the Civil Code.
 - (2) What is the period of time for which the Claimant is entitled to damages?
 - (3) What is the measure of damages to be applied in order to compensate both parties.
- [6] The Claimant claimed that by encroaching on the Claimant's land without her consent or licence the Defendant is a trespasser and occupies as a tenant at sufferance. The Claimant also claimed that as a result the claimant suffered loss and damage and particularised the loss and damages as (1) Diminution of value to the Claimant's property $322.8 \times \$200.00 \times 12 \text{ months} \times 18 \text{ years} = \$34,862.40$ and (2) rental value of $322.8 \times 200.00 \times \text{months by } 18 \frac{1}{12} \text{ years} = \$43,200.00$, or a total of \$78,062.00.

[7] Counsel for the Claimant argues that the wrong done in this case is governed by Article 2074. Article 2074 states:

“Positive prescription takes place by (30) years’ possession in respect of corporeal immovables in excess of what is given by the title , and negative prescription takes place in the same time for the discharge of obligations which the title imposes.

In the matter of dues and rents, the enjoyment of more than the title confers does not occasion the acquisition of such excess by prescription.”

[8] Counsel for the Claimant argued that the result of this Article is that the Defendant cannot benefit from prescription.

[9] Counsel for the Defendants argued that the Claimant’s claim was in trespass. This is not denied. Where the parties differ is on the Defendants’ counsel’s argument that Article 2122 of the Civil Code applies pursuant to which the Claimant would not be able to claim damages beyond 3 years because this is the prescribed period for trespass. Counsel therefore concludes that the Claimant would be entitled to damages for three years immediately preceding the filing of the claim and therefore according to Article 2129 no action could be maintained against the Defendants for a period beyond three years preceding the filing of the claim.

[10] The Defendants counsel cites **Dorina Joseph et al v Nora St. Louis** HCVAP 2008/025 in support of this submission. In that case it was held that:

(1) Article 2047 of the Civil Code of Saint Lucia provides that prescription is a means of acquiring property, or being discharged from an obligation by lapse of time, and subject to conditions established by law. Actions in delict or quasi-delict are prescribed by three years under Article 2122.

(2) Interruption of the period of prescription only takes place if an action is filed and served before the prescribed period under the Civil Code. If service of process takes place after the relevant period of prescription has elapsed, it matters not at all when the suit was filed.

[11] Counsel relied on the dictum of Gordon JA in which he outlined the law governing prescription in the Civil Code in the following terms:

“Article 2047 of the Civil Code of Saint Lucia, Chapter 4.01 of the Laws of Saint Lucia (hereinafter “the Civil Code”) defines prescription. It reads as follows: ‘2047. Prescription is

a means of acquiring property, or of being discharged from an obligation by lapse of time, and subject to conditions established by law.

Extinctive or negative prescription is a bar to, and in some cases precludes, any action for the fulfilment of an obligation or the acknowledgement of a right when the creditor has not preferred his claim within the time fixed by law.'

Article 2122 sets out the period required to prescribe certain types of causes of action. It reads in part:

'2122 (am. 34-1956). The following actions are prescribed by three years:

- 1. For seduction, or lying-in expenses;*
- 2. For damages resulting from delicts or quasi-delicts, whenever other provisions do not apply...'*

Article 2085 of the Civil Code reads in part:

'2085. A judicial demand in proper form, served upon the person whose prescription is sought to hinder, or filed and served conformably to the Code of Civil procedure when a personal service is not required, creates civil interruption.'

Article 2129 sets out the effect of prescription in certain circumstances, it reads:

'2129. In all the cases mentioned in articles 2111, 2121, 2122, 2123 and 2124, the debt is absolutely extinguished and no action be maintained after the delay for prescription has expired in the case of promissory notes and bills of exchange where prescription is precluded by a writing signed by the person liable upon them.'

[12] Counsel also argued that it has been held that the provisions of the Civil code in Articles 2122 and 2129 cannot be avoided by the exercise of judicial discretion. This is confirmed in **Bertha Francis v First Caribbean International Bank** Claim no.0583/1998 by Mason J as she then was.

[13] Counsel argued I think correctly that there was no diminution of value of the property and this is not a situation in which the damages should be calculated on a rental basis. Counsel therefore sought the guidance of law other than the Civil Code to calculate the damages in the case. That guidance came for the Land Registration Act Cap. 5:01 of the Laws of Saint Lucia Revised Edition 2007. Counsel therefore applied a case which assessed damages for mesne profits under the Land Registration Act. That case is **Jospeh W. Horsford v Lester Bird and others** Privy Council Appeal No. 43 of 2004. Although the approach makes sense in principle I would not accept that this court would be bound on the figures which would have been supplied in that case as a basis for calculating mesne profits in Antigua.

- [14] Counsel for the Claimant has already established the rental or \$200 per month as a reasonable rental for the property. In this case the mesne profits would have been prescribed pursuant to Article 2122 for any period more than three years before the filing and service of the claim. The Claim was served on 7th January 2010 and the wall was demolished in July 2010. In my view then the damages accruing should be calculated at \$200 .00 per month from the month of January 2007 to July 2010 or for a period of 42 months/ 42 x 200 or a total of \$8,400.00.
- [15] On their own method of calculation the Defendants are entitled to \$407.93 mesne profits. It is important to note that this is not what the Defendants claimed in their Counterclaim but the position adopted in their skeleton arguments. It is therefore clear that the parties were working towards a negotiated settlement. Even though I do not agree with the method of calculation in principle I see this as a fair way of resolving the matter for the purpose of doing justice. The sum of \$407.93 should therefore be deducted from the claimant's mesne profits which would result in a total of \$7992.07.
- [16] Counsel for the Claimant filed supplemental submissions, on the court's request. In those submissions she suggests that the court not follow the approach of **Hosford v Bird** mentioned earlier. She submits that alternatively the court should follow the Canadian decision in **Themens v Royer Kings Beach of Quebec 1937**. Respectfully, I cannot agree with this submission since the latter decision really turns on the question whether the remedy should be damages in light of the fact that the encroachment was done in good faith pursuant to Articles 417 and 418 of the Quebec Civil Code.
- [17] The Learned Judge in assessing Articles 417 and 418 of the Quebec Civil Code stated:
"These two articles create a mechanism which purpose is to give effect to the principle of equity, under which the possessor who made, with this materials, improvement on the land of another , cannot lose, depending on the case, the benefit of the disbursement he made."
- [18] But there is nowhere in this case a claim for the benefit of the investment made on the land of the Claimant to be paid to the Defendant. The issue in the case meanswas whether the Superior court's decision for demolition of the encroaching structure should stand and the court found that it

should. In the case at Bar both parties have agreed that damages would suffice, demolition having already taken place.

- [19] Counsel for the Claimant argues that Article 2074 is the applicable Article in relation to the circumstances of the encroachment of the Defendant in this case and that it means that the defendant is not entitled to prescribe before the passage of thirty years where there is an enjoyment of dues or rent, more than the title confers. The second part of Article must be read in conjunction with the first part. Therefore the prescriptive rights being referred to must be both negative and positive.
- [20] The word “acquisition” plays a pivotal role in this part of the Article. One meaning that can be given to this part of the Article then is that one does not acquire based on the payment of rent or dues more than the title which the owner can confer. Or alternatively if one is occupying more than one’s title confers and receiving rent for it, that does not permit you to prescribe against that part which is in excess of your title, simply because you received rent for the excess. The third possible interpretation is that the payment of dues and rent cannot lead to acquisition if one remains in occupation beyond the period of the lease or license to occupy or use land.
- [21] None of these interpretations are applicable to this case since there was no obligation by either party to pay rent or dues based on any contractual or other legal relationship. I therefore conclude that the Article refers to circumstances where such an obligation exists in the absence of a breach and not on the basis of a quasi-delict. If this were not the case it is my view that the Article would have said that it refers to land occupied as delicts and quasi delicts. Article 2074 does not fall under the general rubric of damages payable for the breach of an obligation or the commission of a delict or quasi-delict.
- [22] The Article speaks to circumstances which may hinder positive or negative prescription. Nowhere under the rubric at Chapter Third between Articles 2065 and 2074 does the Civil Code refer to breaches of obligations, delicts or quasi delicts.

- [23] In this case the only relevance of prescription is on the basis of a quasi delict committed by the Defendant. The issue of prescription on the basis of enjoyment of more than the title confers is not relevant. The dispute then is not over acquisition of title. It is about prescription against the obligation imposed by title to which the Defendant was subject and the calculation of the damages as a result.
- [24] The logic of this analysis begins with an analysis of the Civil Code which sets out the various kinds of relationships which create obligations. Among such relationships are usufructs, servitudes and leases. I therefore conclude that Article 2074 sets out the way in which prescription operates when the possession of land is affected by obligations created by the kinds of relationships listed above. It does not deal with the damages caused by a delict or quasi delict.
- [25] A lease creates the obligation of the payment of rent or dues. Article 2074 speaks to the extent to which such a relationship affects the claim for positive or negative prescription. An obligation in this case can also arise as a result of a delict or quasi delict in accordance with the interpretation of "obligation" in the interpretation section of the Civil Code. Article 2074 does not address such an obligation. It addresses the ability to acquire land pursuant to usufructs, leases, servitudes or similar relationships, by prescription.
- [26] Damages arise as a result of a delict and the issue of rent only arises as a form of calculating damages which would be the remedy for committing the delict. There is no relationship in these circumstances which creates the obligation to pay rent.
- [27] In the circumstances I cannot agree that Article 2122 does not apply and that Article 2074 is applicable to the facts of this case. Article 2122 is the applicable provision for the prescription of damages for delicts and quasi-delicts. The damages in the circumstances are prescribed by the passage of three years.
- [28] I would therefore hold that the Defendant is to pay the Claimant \$7992.07 as mesne profits for the use and occupation of the land encroached upon for 42 months, including the deduction of \$407.93 for the Claimant's encroachment.

[29] The Defendant is to pay the Claimant's costs in accordance with part 65 of the CPR 2000.

Francis H V Belle
High Court Judge