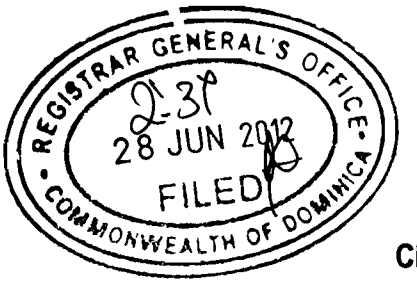
COMMONWEALTH OF DOMINICA

DOMHCV2010/0304



BETWEEN:

PAMELA LIBURD **Claimant**

and

JOAN JOSEPH **Defendant**

Before: **The Hon. Justice Brian Cottle**

Appearances:

Mrs. Hazel Johnson and Ms. Lisa Defreitas for Claimants
Mr. J.Gildon Richards for Defendant

[2012: April 2nd, 3rd]
[June 28th]

JUDGMENT

[1] **COTTLE J:** At the start of the case counsel for the claimant indicated that she wished to object to the reception of the evidence for the defendant because the witness statements has not been exchanged and filed in conformity with the case management conference order. That order required the filing and exchange of witness statements by 29th July 2011. The defendant filed her witness statements on 24th January 2012. The defendant did not apply for any extension of time to file the statements or for relief from sanctions for the late filing. No affidavit was filed offering any explanation for the failure by the defendant.

[2] The court indicated that this objection would be considered at a later stage of the trial. At the close of the claimant's case the defendant was called and sworn. The claimant's counsel repeated her objection at this stage. She urged the court to apply CPR 2000 part 29.11 which reads:

1. ***"If a witness statement or summary is not served in respect of an intended witness within the time specified by the court, the witness may not be called unless the court permits.***
2. ***The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8"***

[3] Mrs. Johnson says the court does not have an unfettered discretion to permit a party who has failed to serve witness statements by the stipulated time to call the offending witness. The discretion only applies where the party in default has a good reason for not previously seeking relief under CPR 2000 part 26.8.

[4] The defendant in this case has not filed any affidavit setting out any reason for not previously seeking relief under part 26.8. Counsel for the defendant advised the court that the defendant could enter the witness box and testify to adduce the reasons for not previously seeking relief. Indeed Mr. Richards himself says that he was ready to doff his robes and enter the witness box himself to provide the reasons.

[5] In Bristol v Blackburn GDAHCV2005/0144 Price Findlay J applies the reasoning of Edwards JA in Goldgar et al v Baird Civil appeal 13 of 2007 from St. Kitts. Edwards J is quoted as saying

> ***"CPR 2000 part 29.11 in my view is very clear and imperative terms. The rule does not permit a tortuous construction of its very clear words in order to accommodate a non compliant claimant or defendant"***

[6] Mr. Richards sought to distinguish Bristol's case on the basis that the defaulting party in Bristol had failed to file a witness statement while in the instant case the defendant was merely 6 months late. With the greatest respect for counsel I do not see that this is of any assistance to him. I therefore did not permit the defendant to call witnesses applying the learning as set out in Bristol.

[7] This claim by the claimant is for possession of certain lands. The claimant holds the certificate of title. The defendant is in occupation of a part of the land comprised in the certificate of title. The entire parcel is 8.145 acres. The defendant in 2011 was in occupation of about one half of the holding. The defendant resists the claim on the basis that she has been in adverse possession for more than 12 years and is entitled to the protection of section 2 of the Real Property Limitation Act. Section 2 (Chap 54:07)

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."

The Evidence

[8] Because of the matters referred to earlier, only the evidence on behalf of the claimant fell to be considered at the trial. The court heard from surveyor Mr. J. Robinson. He says that in 1999 he had cause to walk through the claimant's land on some 6 occasions between March and June. He noted that the defendant then occupied an area of about .75 acres. The plot was sparsely planted in dasheen, tannias, yams and scattered bananas. In June 1999 he noticed 4 tall coconut trees in that plot had been felled. Mr. Balthazar Watt, another licensed land surveyor testified that by February 2010 the defendant had extended her cultivation to between 4.5 to 4.75 acres. Importantly, Mr. Watt says that the defendant in February 2010 acknowledged the claimant as the owner and expressed a desire to purchase albeit at a reduced price.

[9] Mr. Glovello Toussaint is a third surveyor. He gave evidence that in July 2009 the defendant asked him to survey a portion of land the defendant wished to purchase from the claimant. He visited the land with his crew. He met with the parties but they could not agree as to how the survey was to be done and which 3 acre portion of the land was to be surveyed for sale to the defendant by the claimant. The survey was then aborted.

[10] The claimant gave evidence that the defendant went into possession in or about 1999 and initially cultivated ½ to ¾ acres. This acreage was gradually expanded to the present holding of about 4.5-4.75 acres of cultivation. In his submissions, Mr. Richards for the defendant urged the court to consider the pleadings of the defendant that she had entered into possession in 1989 and thus had been in possession for more than 12 years thereby extinguishing the claimants' title. Unfortunately pleadings are not evidence. There was no evidence from the defendant as to the exact date of her entry into possession.

[11] It is also the law that mere possession is insufficient. The defendant also needs to demonstrate the required animus possidendi. Several bits of evidence strongly suggest that at all material times the defendant acknowledged the rights of the true owner. Mr. Watt says she stated so. She visited the claimant at her home and made arrangements to purchase the land. This action is not consistent with an intention to treat with the land as owner. She even signed a document evincing her interest in buying the land from the claimant on 6th July 2010.

[12] Mr. Richards seeks to get around these acts by the defendant on the basis that the period of 12 years had already expired and these subsequent acts were of no moment as the title of the claimant had already long been extinguished. The difficulty in that argument is twofold. Firstly there is no evidence from the defendant that she entered into possession before 1999. And secondly her actions seem to suggest that whatever the date that she went into possession she lacked animus possidendi as she always acknowledged the title of the holder of the certificate of title.

[13] For these reasons I hold that the claimant has established her claim on a balance of probability. Judgment is entered for the claimant for possession of the land comprised in her certificate of title and occupied by the defendant. The defendant is ordered to give up possession forthwith. The defendant will pay the claimant prescribed costs of $7,500.00.

Brian Cottle
High Court Judge