THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
HIGH COURT CIVIL CLAIM NO. 48 OF 2007

BETWEEN:

MICHAEL LUIK
MARK LUIK
TIMOTHY LUIK

Claimants

v

SHEILA GEORGE

Defendant

Appearances:
Ms. N. Sylvester and Ms. L. John for the Claimants
Mr. Duane Daniel for the Defendant

2012: April 17
July 23

JUDGMENT

(1) **THOM, J:** Mr. Arthur Creese and his wife Ruby both now deceased were the grandparents of the Claimants. Mr. Arthur Creese owned a parcel of land at Belvedere ("the property"). He died intestate on the 12th day of November 1984. Letters of Administration in relation to his estate was granted to Mr. Albert Creese on the 18th day of February 1989.

(2) By Deed No. 2879 of 1996 Mr. Albert Creese conveyed the property to Adina Luik now deceased, the mother of the Claimants and the Claimants jointly.

(3) The Defendant is currently in occupation of the property. The circumstances of her occupation of the property is disputed.

(4) The Claimants by their solicitors by letter dated March 26, 2006 gave the Defendant notice to vacate the property. The Defendant having failed and or refused to vacate the property the Claimants instituted these proceedings in which they allege that by an agreement dated November 26, 1999 between the Claimants and the Defendant (the Agreement) the Defendant was permitted to occupy the property as a tenant at will. This tenancy was determined by the notice dated March 26, 2006. In their claim they seek an order for possession of the property, special damages of $1,370.00 for use and occupation at $750.00 per month from 1st October to January 2007; mesne profit at the rate of $750.00 per month from February 2007 until delivery of possession and costs.

(5) The Defendant in her defence alleged that she was not put into possession of the property in 1999 in accordance with the Agreement as alleged by the Claimants, but she was in possession of the property with her common-law husband Albert Creese now deceased since 1976. The Defendant further alleged that the Agreement does not truly reflect the discussion between the parties where it was agreed that in recognition of her interest in the property that she would oversee the construction of a new building and given a life interest in the property. The Claimants breached the Agreement in that the new building was not constructed. The Defendant's interest in the property by continuous and uninterrupted possession from 1976 was not invalidated by the Agreement since the consideration was never provided. Alternatively

since only two of the Claimants signed the Agreement, the Agreement is null and void.

(6) The Defendant made a counterclaim in which she claims a declaration that she has an interest in the property, that the Agreement is null and void or in the alternative that the Claimants are in breach of the Agreement and the Agreement be set aside, and damages, interest and costs be awarded to her.

ISSUE

(7) The issue is whether the Defendant has any interest in the property, and whether she is entitled to remain in possession of the property.

EVIDENCE

(8) Mr. Michael Luik gave evidence on behalf of the Claimants and the Defendant gave evidence on her own behalf.

CLAIMANT'S EVIDENCE

(9) The evidence on behalf of the Claimants is that they became owners of the property by virtue of Deed No. 2879 of 1996. By virtue of the Agreement they permitted the Defendant to occupy the property rent free for residential purposes only and that she would vacate the property on the Claimants giving her reasonable notice. They never agreed to the Defendant having a life interest in the property. The Defendant breached the agreement when she operated a rum shop on the property. A copy of the Agreement was tendered into evidence. By letter dated 26th May, 2006, the Defendant was given six months notice to deliver up possession of the property to the Claimants. Mr. Albert Creese who was the Administrator of the estate of Arthur Creese never acquired any interest in the property.

(10) Under cross-examination Mr. Michael Luik testified that during the 1970's his uncle Mr. Albert Creese lived in Antigua and Barbuda. He was a member of the Police Force in Antigua and Barbuda. He returned to live in Saint Vincent and the Grenadines in the mid 1980's. Mr. Luik agreed that Mr. Albert Creese lived on the property during his childhood. When he visited St. Vincent in 1996 Mr. Albert Creese was not living at the property but was living with one McLean in Calliaqua or Prospect. Mr. Luik also agreed that in 1996 the Defendant was in occupation of the premises but he did not know how she came to live on the property. He testified further that the Claimants permitted the Defendant to remain on the property because they needed someone to take care of the property. The Agreement was made after the death of Mr. Albert Creese. Mr. Luik denied that the Claimants were in breach of the Agreement and explained that while the drawings and the surveys were completed the house was not built because of the violation of the Defendant who operated a rum shop on the property. He further agreed that the letter giving notice to deliver up possession does not make any mention of violation of any term of the Agreement by the Defendant.

Evidence on Behalf of the Defendant

(11) Ms. Sheila George testified that she was in a relationship with Mr. Albert Creese and she has lived on the property since 1976. While living there she took care of Mr. Albert Creese and she made substantial improvement to the dwelling house such as repairs to windows, and roof and flooring boards. She applied for electricity in her own name since the 1980's. The water bill was in her name and Mr. Albert Creese. She exhibited a copy of a water bill.

(12) Ms. George further testified that Mr. Albert Creese died in 1999, and a few months after his death Mr. Michael Luik and Mr. Mark Luik brought a document prepared by a lawyer and they explained to her that they

would build a new house on the property. She would oversee the construction of the new house and they would allow her to reside there for the rest of her life. Ms. George testified that she believed them, she thought that they were grateful to her for taking care of Mr. Albert Creese and the property. Because of this she signed the Agreement. She never saw nor heard from the Claimants again. They never built the new house. She was tricked into signing the Agreement. She has occupied the property for more than thirty years without interference or interruption or accounting to anyone and she has always treated it as her own.

(13) Under cross-examination Ms. George agreed that Mr. Arthur Creese died in 1984 and that the property where she now lives was the home of Mr. Arthur Creese and his wife Ruby. Ms. George also agreed that while Mr. Arthur Creese was alive she did not live on the property. She made an error in her witness statement when she stated that she was living on the property since 1976. Ms. George further testified that she got to know Mr. Albert Creese after he retired from Antigua and Barbuda in the 1980's. At that time she was in a relationship with another gentleman. No renovations were made by her during the lifetime of Mr. Arthur Creese.

(14) Ms. George further agreed that she was not the only person in occupation of the property. Mr. Albert Creese rented the property to two other persons. It is by virtue of her relationship with Mr. Albert Creese that she has an interest in the property. After Mr. Albert Creese died she did several renovations to the property.

(15) Ms. George also testified that she erred in her witness statement when she said that she applied for electricity in the 1980's. Also the water bill was in the name of Mr. Albert Creese in care of her and not in her name as she stated in her Witness Statement. Ms. George also agreed that she

never paid any property taxes for the property. The rum-shop was built between 2000-2001. The Agreement that she signed did not have a termination clause.

SUBMISSIONS

(16) At the end of the trial the Court ordered that written submissions must be filed by the parties on or before April 25, 2012. No submissions were received on behalf of the Defendant.

(17) Learned Counsel for the Claimants submitted that the Defendant was not a credible witness, there were several inconsistencies in her testimony. The Defendant did not acquire any interest in the property by adverse possession since she did not satisfy the requirements of the Limitation Act. She also did not acquire any interest in the property through Mr. Albert Creese since he was the Administrator of the Estate and had no interest in the property. The Defendant was a mere licensee.

(18) Learned Counsel further submitted that the Agreement was a valid agreement notwithstanding that the Deed referred to in the Agreement related to another parcel of land since the mistake in the number of the Deed was not a fundamental mistake – Bell v Lever Bros (1931) AER p.1; and ICS Ltd v West Bromwich Building Society (1998) 1 WLR p896.

(19) Learned Counsel also admitted that the Defendant did not raise the issue of misrepresentation in her pleadings, she therefore could not rely on the issue at the trial.

FINDINGS

(20) Having reviewed the evidence of the two witnesses, Mr. Michael Luik for the Claimants, and Ms. Sheila George the Defendant, I believe the evidence of Mr. Michael Luik. Mr. Luik's testimony was consistent, he

was not contradicted. Under cross-examination in those instances where he was not familiar with the facts he readily admitted so, such as the time when the Defendant when to live on the property and the circumstances in which she went to live on the property prior to the Agreement. On the other hand Ms. George was contradicted in several instances. Ms. George testified in examination-in-chief that she was in occupation of the property since 1976, but under cross-examination she agreed that she met Mr. Albert Creese after he returned from Antigua and Barbuda in the 1980's. Further Mr. Arthur Creese died in 1984 and while he was alive he resided at the property, she was not resident there during his lifetime. Ms. George also agreed that her testimony in examination-in-chief that she applied for electricity to the property in the 1980's was not correct. Also it was only under cross-examination that Ms. George testified that the Agreement she signed did not contain a termination clause. The Agreement was referred to in the Claim Form and exhibited with the Claim Form at no time in her pleadings, or in her witness statement did Ms. George state that it was not the Agreement which she signed.

(21) The Claimant's evidence of their ownership of the land by virtue of Deed No. 2879 of 1996 in which the land was conveyed to them by the Administrator Mr. Albert Creese was not contradicted. The Deed was tendered into evidence. There was simply no evidence to contradict this evidence.

(22) The main thrust of the Defendant's pleaded case is that

(1) She has been in occupation of the property jointly with her common-law husband Mr. Arthur Creese since 1976. After agreeing in cross-examination that she was not resident on the property in 1984, in re-examination the Defendant stated that she moved onto the property in 1985.

(2) The Claimants agreed to give her a life interest in the property in 1996. The Agreement does not truly reflect the agreement reached by the parties. Further the Agreement was not signed by all three of the Claimants.

ADVERSE POSSESSION

(23) In relation to the defendant's claim in adverse passion I find that this claim has no merit. The law dealing with adverse possession is contained in Section 17 and paragraphs 1, 2 and 8 (1) and (2) of the Schedule of the Limitation Act. Section 17 reads as follows:

> *"1. 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 or, if it first accrued to some person through whom he claims, to that person.*
>
> *2. .....*
>
> *3. .....*
>
> *4. .....*
>
> *5. Part 1 of the schedule contains provisions for determining the date of accrual of rights of action to recover land in the cases therein mentioned."*

(24) Paragraphs 1, 2 and 8 (1) and (2) at the Schedule read as follows:

> *"1. Where the person brings an action to recover land or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or has discontinued his possession, the right of action shall be treated as having accrued on the date of dispossession or discontinuance.*
>
> *2. Where any person brings an action to recover any land of a deceased person (whether under a will or on intestacy) and the deceased person –*
>
> *(a) was on his death in possession of the land or in the case of a rent charge created by will or taking effect upon his death, in possession of the land charged; and*
>
> *(b) was the last person entitled to the land to be in possession of it,*

the right of action shall be treated as having accrued on the date of his death.

8. (1) No right of action to recover land shall be treated as accruing unless the land is in possession of some person in whose favour the period of limitation can run (referred to the land in this paragraph as "adverse possession" and whereby the preceding provisions of this schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

(2) Where a right of action to recover land ceases to be in adverse possession, the right of action shall no longer be treated as accruing and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession."

(25) The effect of the above-mentioned provisions is that the right of action to recover the land is barred whenever twelve years have elapsed from the time when a right of action accrued. The right of action is accrued only when the land is in adverse possession of a person other than the true owner. Time begins to run when adverse possession is taken of the land.

(26) The principles to be applied by the Court in determining whether a person was in adverse possession of property were outlined in Powell v Mc Farlane (1977) 38 p8 CRP p452. These principles were approved by the House of Lords in J.A. PYE (Oxford) Ltd and another v Graham and another (2002) 3AER p.865 at 866 as follows:

> "Legal possession required (i) a sufficient degree of physical custody and control (factual possession) and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). As regards factual possession, everything depended on the circumstances, but broadly, such possession was constituted where the alleged possessor had been dealing

> with the land as an occupying owner might have been expected to deal with it, and nobody else had done so. The necessary intent was one to possess, not to own and an intention to exclude the proper owner only so far as was reasonably possible."

(27) The onus of proving that the owner has been dispossessed is on the party who alleges it. In this case it is the Defendant. The Defendant is required to prove on a balance of probabilities that she had both factual possession of the property and an intention to possess the property for an uninterrupted period of twelve years before the commencement of these proceedings.

(28) Having reviewed the evidence of the Defendant I find that there is no evidence of her intention to possess the property. The Defendant testified under cross-examination that the property belonged to her common-law husband Mr. Albert Creese and that she was entitled to an interest in the property by virtue of her relationship with Mr. Albert Creese. This shows clearly that the Defendant had no intention to possess the property during the lifetime of Mr. Albert Creese. She regarded the property as belonging to Mr. Albert Creese. Mr. Albert Creese died in 1999.

(29) Further the Defendant was not in exclusive possession of the property. The evidence of the Defendant is that the property was also occupied by two other persons. Mr. Albert Creese had rented part of the property to the two other persons.

VALIDITY OF THE AGREEMENT

(30) The Defendant challenged the validity of the Agreement on three grounds:

(a) The Agreement did not truly reflect the discussion of the parties.

(b) The Deed referred to in the Agreement does not refer to the property.

(c) All of the Claimants did not sign the Agreement.

THE AGREEMENT DID NOT REFLECT THE DISCUSSION

(31) In relation to the Defendant's claim that the Agreement did not reflect the discussion which the Parties had, that she would have a life interest in the property, having seen and heard both witnesses as indicated earlier I believe the evidence of Mr. Michael Luik. I do not believe the evidence of the Defendant that it was agreed that a new building would be constructed and she would be given a life interest in the property. At the time of the Agreement the Defendant was a mere forty-two years old. I believe the testimony of Michael Luik that since the Claimants were resident in Canada they wanted someone to reside in the property and take care of it while they were away and this is what was agreed with the Defendant. An examination of the terms of the Agreement show this is reflected in the Agreement. Also the Defendant agreed that she read the Agreement before she signed it. In paragraph one of the Agreement in bold letters it is stated that the Defendant is a **"RENT FREE TENANT AT WILL".** The sub-paragraphs also referred to the Defendant as a Tenant at will. I also agree with the submission of Learned Counsel for the Claimants. I find there is no merit in the Defendant's submission that the Agreement did not reflect the discussion of the Parties. I also agree with the submission of Learned Counsel for the Claimants.

Termination Clause

(32) The Defendant under cross-examination testified that when she signed the Agreement she did not see paragraph (h) which reads:

> "The Tenant must however vacate the premises on demand by the Landlords after the receipt of reasonable notice in writing."

The Defendant further testified that if she had seen that paragraph she would not have signed the Agreement. She however agreed that she had read the Agreement before she signed it. She also agreed that the signature on the Agreement exhibited was her signature. This issue was not raised in the defendant's pleadings. In any event the remedy of non est factum is not available to the Defendant since all of the requirements that must be proved were not fulfilled, being:

(a) that the signature was induced by a trick or fraud;

(b) that a fundamental mistake was made as to the nature of the document;

(c) that she was not careless in signing it, were not fulfilled.

The Defendant in her evidence stated categorically that she read the Agreement. There is no evidence that she made a fundamental mistake as to the nature of the document that she signed. Saunders (Executrix of the Estate of Rose Maud Gallie) v Anglia Building Society (formerly Northampton Town and Country Building Society (1971) AC 1004.

Number of the Deed

(33) It is not disputed that the Deed referred to in the Agreement does not refer to the property. The Deed referred to in the Agreement is Deed No. 2876 of 1996. This Deed was exhibited by the Defendant. An examination of this Deed shows that the parties are The National Commercial Bank (SVG) Limited and Kelton Lewis. It is a Deed of Reconveyance of mortgaged property to the mortgagor. It is not disputed that the Deed that relates to the property is Deed No. 2879 of 1996.

(34) I agree with the submission of Learned Counsel for the Claimants that this was not a fundamental mistake – Great Peace Shipping Ltd. v Tsavliris Salvage (International) Ltd. (2003) Q.B679. It is not disputed that the discussion between the parties related to the property. Also the entire Agreement referred to the property where the Defendant resided. The Agreement accurately describes the property as being Lot No. 5 admeasuring 21,361 sq. ft situate at Diamond. It was the intention of the Parties that the Agreement would apply to the property. I do not find the Agreement to be invalid in this ground, the remedy of rectification is available see – Graddock Bros v Hunt (1923) 2ch.1.

Execution of the Agreement

(35) The Parties Clause of Deed No. 2879 of 1996 states that the Agreement is made between Michael Luik, Mark Luik and Timothy Luik of the first part and Sheila George of the Second Part. However the Agreement is signed by Michael Luik and Mark Luik and Sheila George. The Agreement was not signed by Timothy Luik.

(36) The Defendant contends that since the Agreement was not signed by Timothy Luik the Agreement was invalid.

(37) The question that arises is whether an agreement executed by some of the joint owners of property is valid and binding.

(38) The nature of a joint tenancy is that all of the co-owners hold one estate. They do not individually own any specific part of the land. Consequently one or two of three joint tenants cannot create a binding lease over the land. In Megarry and Wade Law of Real Property 6th ed. paragraph 9-005 p.478 the Learned Authors stated the legal position in the following manner:

> "Any legal act e.g. a conveyance or lease of the land, or a surrender of a lease or the exercise of a break clause, or the giving of a notice, requires the participation of all the joint tenants. They cannot be effected by one joint tenant alone because he does not by himself have the whole estate. But exceptions are found in the cases of personal representatives and of the determination of periodic tenancies (e.g. weekly or monthly tenancies) which are determinable on the usual notice given by one of joint landlords or one of the joint tenants.

(39) The present case does not fall within any of the exceptions mentioned. While the parties clause does mention all three of the joint tenants only two of them signed the Agreement. A valid lease would only be created if all of the joint tenants executed the lease. In any event even if the Agreement was valid, it was determined or the expiration of the six months notice given by the letter dated May 26, 2006. The Defendant does not dispute that she received the notice.

(40) I accept the Claimants evidence of $750.00 payment for use and occupation of the property as a reasonable sum. The Defendant did not lead any evidence to the contrary.

(41) The Claimants have proved on a balance of probabilities that they are the owners of the property and that they are entitled to possession of the property. They have not been dispossessed by the Defendant by adverse possession as outlined in the Limitation Act.

(42) In conclusion I find that the Claimants claim successful. The Defendant's counterclaim fails. Ms. George has failed to prove on a balance of probabilities that she became the owner of the property by adverse possession or that she has any interest in the property.

(43) It is ORDERED THAT:

(1) The Judgment is entered for the Claimants.

(2) The Defendant's counterclaim is dismissed.

(3) The Defendant shall vacate the property on or before September 1, 2012.

(4) The Defendant shall pay the Claimants special damages in the sum of $3,750.00 and mesne profit at the rate of $750.00 per month from the 1st day of February 2007, until delivery of possession of the property.

(5) The Defendant shall pay the Claimants prescribed costs.

Gertel Thom
HIGH COURT JUDGE