

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2012/0150

BETWEEN:

[1] ELIZABETH CAIN
[2] ADINA LATHAM

Claimants

and

[1] VELDA CHARLES

Defendant

Appearances:

Mr. R. Marks and Ms. P. Marks for the Claimants

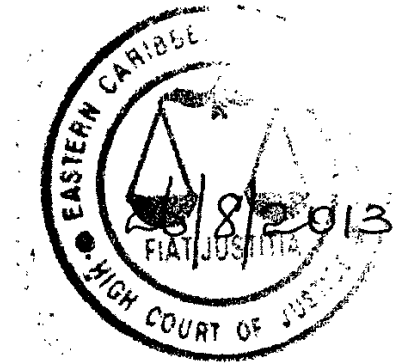
Mrs. K. Bacchus-Browne for the Defendant

2013: January 30
August 26

JUDGMENT

[1] **THOM, J:** The Claimants are the aunts of the Defendant.

[2] By Deed of Gift No. 1901 of 2009 the Claimants were registered as the owners of a parcel of land situate at Richland Park. The property was originally owned by Rebertha Cain the mother of the Claimants and the Grandmother of the Defendant. Rebertha Cain transferred the property to her daughter Jenny Cain who in 2003 transferred the property to Barbara Cain and Gail Cain who in turn transferred it to the Claimants.



- [3] In 1998 the Defendant was granted permission to occupy a house which is situated on a portion of the property. The Defendant has been in occupation of the house since 1998.
- [4] The Claimants having tried unsuccessfully in getting the Defendant to vacate the house instituted these proceedings in which they seek an order of possession and mesne profit at the rate of \$400.00 per month from the 1st day of July 2011 until possession is delivered up.
- [5] The Defendant in her defence contends that in 1998 she was given permission by the legal owner of the property Ms. Jenny Cain to live rent free on the property. Since 1998 she has been in adverse possession of the property.
- [6] In her counterclaim the Defendant claims among other things, a declaration that she is the owner of the property and an injunction restraining the Claimants or their agent from molesting or interfering with her peaceful possession of the property.

ISSUE

- [7] The sole issue for the court to determine is whether the Claimants' right to the property has been extinguished.

EVIDENCE

- [8] Mr. Elmore Caine, the Attorney-on-Record for the Claimants, Mrs. Gwendolyn Cottoy and Ms. Cynthia Jack gave evidence on behalf of the claimants who reside in Canada. Mrs. Velda Charles testified on her own behalf.

CLAIMANTS' EVIDENCE

- [9] Mr. Elmore Cain testified that he lived on the property from his childhood. Rebertha Cain was his Grandmother. Approximately fifteen (15) years ago he built a house on a portion of the property. Ms. Jenny Cain made the Claimants the managers of the property and the Claimants made him the manager of the

property. Since about 1995 he has paid the taxes for the property on behalf of the Claimants.

[10] In 1998 when the Defendant returned to Saint Vincent she lived with her father in Richland Park for a short while. The Defendant discussed with himself and their cousin Mrs. Gwendolyn Cottoy her desire to live in the house on the property. At that time the Spiritual Baptist Church held religious meetings at the house. He informed the Defendant he could not give her permission to live in the house but he would seek permission from the Claimant. He telephoned the Claimants in the presence of Mrs. Gwendolyn Cottoy and the Defendant. The Claimants subsequently instructed him to give the Defendant the keys to the house. He did so and the Defendant and her children moved into the house. Her husband subsequently moved into the house with her. The Claimants verbally requested the Defendant to vacate the house and when she refused to do so they caused their Attorney to write to her in 2007.

[11] Under cross-examination Mr. Elmore Cain testified that the Defendant said to him "me ah stop here me na moving from here." Under re-examination he explained that the Defendant made the statement after the notice to quit was served on her in 2007.

[12] Mrs. Gwendolyn Cottoy and Ms. Cynthia Jack supported the evidence of Mr. Elmore Cain. In addition Ms. Cynthia Jack testified that around 2007 while the Claimants were in Saint Vincent, the Defendant visited her at her home and she offered the Defendant her father's home in Yambou, but the Defendant refused the offer. In 2009, the Defendant requested her to ask the Claimants to give her a piece of land for her to live on. She suggested to the Defendant that they should pray about the matter.

DEFENDANT'S EVIDENCE

- [13] Mrs. Velda Charles testified that around 1998 she was deported from Canada. Ms. Jenny Cain the owner of the property gave her permission to live on the property. She has lived on the property with her husband and children since 1998. She never paid rent to anyone. From the inception of her occupation in 1998, she intended to keep the property as her own. She paid the rates and taxes.
- [14] The Defendant further testified that while she was in the detention centre in Canada, the Claimants visited her and told her to return to Saint Vincent. She told them that she had nowhere to stay. They called Mrs. Gwendolyn Cottoy and instructed her to open the house on the property for her.
- [15] In order for her to get water and electricity connected to the house Ms. Jenny Cain sent letters for her to take to the water and electricity company with Mr. Elmore Cain who was in Canada at the time and she was able to get the water and light connected to the house.
- [16] The Defendant denied that she sought permission from Mr. Elmore Cain and Mrs. Gwendolyn Cottoy to live on the property. They never give her keys to the house. She admitted that in 2009 she visited Ms. Cynthia Jack and requested her to ask the Claimants to give her a piece of land to live on and Ms. Jack told her that they should pray about it. The Defendant clarified that it was not her intention to relinquish the property on which she lived.
- [17] Under cross-examination the Defendant denied that when she received the notice to quit that she went in search of an alternative place to live. She further testified that when the Claimants told her to stay on the property as long as she wanted, she understood it to mean she could live there for a lifetime.

SUBMISSIONS

Submissions on behalf of the Claimants

- [18] Learned Counsel Mr. Ronald Marks referred the court to the definition of adverse passion under Section 2 of the Possessory Title Act and to the decisions of JA Pye (Oxford) Ltd and Another v Graham and Another:¹ and Powell v McFarlane² and submitted that the Defendant's actions show that she never intended to remain on the property permanently since no evidence was advanced that she effected any repairs to the house even though she claimed that the door of the house could not be locked. Learned Counsel also referred to the Defendant's testimony where she admitted that in 2007 after discussion with Ms. Jack, she was granted permission to reside at Ms. Jack's father's house but she declined the offer because a tree was growing in the house and the distance was too far from the children's school and submitted that this evidence also shows that the Defendant did not have the requisite intention to possess the property. Learned Counsel further submitted that since the Defendant visited Ms. Jack in 2007 that evidence shows that she recognized that the property belonged to the Claimants and any intention to possess the property adversely would have been formed in 2007, some five years before these proceedings were instituted.
- [19] Learned Counsel also referred to the Defendant's testimony under cross-examination that she made preparations to build a house on another piece of land owned by the Claimants, but since the Claimants did not give her a deed in relation to that parcel of land she did not pursue the matter. Learned counsel submitted that this evidence also shows that the Defendant did not have the intention to possess the property and that she regarded the Claimants as the owner of the property.

¹ [2002] UKHL30

² [1977] 38 P.C.R. 452

Submissions of behalf of the Defendant

- [20] Learned Counsel Mrs. Kay Bacchus-Browne submitted that the evidence shows that the Defendant was in adverse possession of the property for over twelve years. The Claimant tried for many years to get the Defendant to move and she refused to do so. While the Defendant was put into occupation by the Claimants and Jenny Cain temporarily the Defendant defied the owners and decided to live there permanently. The Claimants sought to negotiate an exchange of land with the Defendant. This action of the Claimants is inconsistent with the actions of the legal owners of property.
- [21] Mrs. Kay Bacchus-Browne referred the Court to Section 17 (1) of the Limitation Act and the case of **JA Pye, Jacqueline Chance and Jane Sutherland**³ and **Ferdinand Carty et al v Rowan Bailey**⁴ and submitted that in the case at bar the Defendant intended to possess the property from very early after she entered upon the property.
- [22] Mrs. Bacchus-Browne further submitted that while the family arrangements were made on the basis of trust and respect with no formal document the Defendant demonstrated to all that her intention was to make the property her own.

FINDINGS

- [23] It is not disputed that in 1998 when the defendant went into occupation of the house on the property, the legal owner of the property was Ms. Jenny Cain. It is also not disputed that since the Defendant went into occupation of the house she has not paid rent to anyone. The evidence shows that she was not requested to pay rent by Ms. Jenny Cain or the Claimants. This was a family arrangement where out of compassion the Defendant was permitted to occupy the house on the property. When the permission was given the Defendant was pregnant and in a detention centre in Canada. She had no place to live in Saint Vincent. The

³ SVGHCV NO.2008/0080

⁴ ANUHCV NO.2005/0028

Defendant's case is that she received permission to occupy the house on the property from Ms. Jenny Cain who was the legal owner of the property in 1998. She accepts that she entered on the property as a licensee. This was pleaded in paragraph 5 of her defence. Paragraph 5 of her defence reads in part as follows:

"On or about the year 1998 the defendant was deported from Canada and the owner of the disputed property decided to let her live rent free in the property..."

The Defendant has been in occupation of the house ever since November 1, 1998.

[24] While the size of the property was not given in evidence, the Deeds in relation to the property which were exhibited, being the Deed by which Ms. Jenny Cain became the legal owner of the property and the Claimants' Deed both describe the property as being one house lot. It is agreed by both parties that Mr. Elmore Cain also lives on the property in a separate house.

[25] The statutory provisions relating to adverse possession are contained in Sections 17 (1) and 19 and schedule 1 paragraphs 1, 2 and 8 (1) and (2) of the Limitation Act Cap. 129.

Sections 17 (1) and 19 read as follows:

"17.1. 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.

19. Subject to Section 20, 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."

[26] Paragraphs 1, 2 and 8 (1) and (2) read as follows:

"(1) Where the person bringing 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 intestacy) and the deceased person:

(a) was on the date of his death in possession of the land and 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 below in this paragraph as "adverse possession"); and where under the preceding provision 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 accrued and after it's accrual, before the right is barred, the 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."

[27] The effect of the above mentioned provisions is that the right of action to recover land is barred whenever twelve (12) 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. Time begins to run at the time when adverse possession is taken of the land.

[28] In Halsbury's Laws of England⁵, the Learned Authors explained adverse possession as followed:

"Meaning and Effect of "Adverse Possession"

No right of action to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. Such possession is called adverse possession. What constituted such possession is a question of fact and degree; there is no general principle that to establish possession of an area of land, the Claimant must show that he made physical use of the whole of it."

[29] The principles to be applied by the court in determining whether a person was in adverse possession were outlined in the case of Powell v McFarlane. These principles were approved by the House of Lords in JA Pye and have been applied time and time again in our courts. In JA Pye, the court stated at p.866:

"The legal possession required is (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 intention was one to possess, not to own and or intention to exclude the proper owner only so far as was reasonably possible."

[30] Applying the above principles to the case at bar, the question is whether the Claimants and their predecessors in title were dispossessed of the disputed property prior to the institution of these proceedings. The onus of proving that the paper owner had been dispossessed is on the party who alleges it. In this case it is the Defendant.

[31] Learned Counsel Mr. Ronald Marks in his submission referred the court to the definition of the adverse possession in Section 2 of the Possessory Title Act. I wish to state that the definition of adverse possession in Section 2 of the Possessory Title Act is only applicable to applications for Possessory Title made

⁵ 4th ed vol 28 at paragraph 768

pursuant to that Act.

[32] Critical to the doctrine of adverse possession is that the person claiming to be in adverse possession must be in possession without consent of the owner. See Hughes v Griffin⁶. As stated earlier the Defendant does not dispute that when she went into occupation she was a licensee. Rather it was submitted on her behalf that shortly after she went into occupation she formed the intention to occupy the property as her own. She relied on her testimony in her witness statement at paragraph 7 where she states as follows:

"I have never paid rent for the property and from about the inception of my occupation in 1998, I intended to keep the property as my own. Infact my last child Brendon was born on the land on 3rd February 1999 and before that we always regarded the property as our own..."

[33] At the trial she testified that when the Claimants told her that she could occupy the house as long as she liked since they would not return to Saint Vincent, from that moment she said the property is mine. When the Defendant's evidence is considered as a whole, at no time did she make it known to Ms. Jenny Cain or the Claimants that she intended to possess the property.

[34] The Defendant also relies on the evidence of Mr. Elmore Cain under cross-examination that she said "me a stop here, me na moving from here."

[35] Having seen and heard Mr. Elmore Cain, I believe his testimony as he clarified it under re-examination that the statement of the Defendant was made after the Claimants served notice to quit on the Defendant.

[36] I find that the Defendant did not have the intention to possess the land until in 2007 when she received a notice to quit from the Claimants. Learned Counsel Mrs. Kay Bacchus-Browne argued that having regard to the testimony of Mr. Elmore Cain that the Claimants tried to get the Defendant to vacate the property

⁶ [1969] 1 AER 460

many years before the notice to quit was served shows that the Defendant had long formed the intent to possess the land from the time she went into occupation. As stated earlier the onus was on the Defendant to prove on a balance of probabilities that she was in adverse possession of the property for a period of twelve (12) years prior to the commencement of the action. The term "many many years" prior to 2007 is very ambiguous. It could be any period. It could have been in 1998 and also it could have been in 2000 or in 2002, or any number of years prior to 2007. The onus was on the Defendant to prove when time began to run.

[37] Further there is no evidence that the Defendant had exclusive possession of the property or that she was dealing with the property as an occupying owner might have been expected to deal with it. As stated earlier the size of the property is described as one house lot. There are two houses on the lot. The house in which the Defendant by Ms. Jenny Cain resides is not situate in a fenced area. The Defendant did not cultivate any specific portion of the property. She did not exercise any control over any specific portion of the property. There is no evidence that she has made any addition or alteration to the house. She testified that she has maintained the house. She gave no details of maintenance done. This was disputed by the witnesses of the Claimants who all testified that the house is in a dilapidated state. The Defendant was given permission to occupy the house and the evidence shows she did just that and nothing more. The Defendant admitted that the only time she paid the rates and taxes was in 2012 the very year in which these proceedings were instituted.

[38] The Learned Authors of Halsbury's Law⁷ outlines the nature of a licence in the following manner:

"Nature of Licence:

A mere licence does not create any estate or interest in the property to which it relates it only makes an act lawful which otherwise would be unlawful. A person cannot grant a licence to himself, nor to himself jointly with another. A purely personal licence is not assignable. A gratuitous

⁷ Vol 27 at paragraph 9

licence is recoverable by notice at any time and is revoked by the death of either party or by an assignment of the land owner which the licence is granted."

[39] The documentary evidence shows that in 2003 the property was conveyed to Barbara Cain and Gaily Caine who subsequently transferred it to the Claimants. This means that by 2003 the licence granted to the Defendant would have been revoked. Adverse possession could only have commenced in 2003. This action was instituted on the 14th May, 2012.

[40] In conclusion I find that the Defendant has failed to prove on a balance of probabilities that she has been in adverse possession of the property for a period of twelve years prior to the institution of these proceedings. I therefore find that the Claimants are entitled to possession of the property. The Claimants did not pursue their claim for mesne profit.

[41] It is ordered:

- (a) Judgment is entered for the Claimants.
- (b) The Defendant shall vacate and deliver up possession of the property situate at Richland Park and more particularly described in Deed of Gift No. 1901 of 2009 within six (6) weeks from the date of this judgment.
- (c) The Defendant shall pay the Claimants prescribed costs pursuant to Part 65.5 of CPR 2000.



Justice Gertel Thorn

HIGH COURT JUDGE