

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

IN THE HIGH COURT OF JUSTICE



CLAIM NO. SVGHCV2007/0194

BETWEEN:

[1] RECARDO ROBERTS

Claimant

and

[1] GENE HAMILTON

Defendant

Appearances:

Mr. Stephen Williams and Mr. Sten Sargeant for the Claimant.
Ms. Lakeisha John for the Defendant.

CLAIM NO. 281 OF 2007

[1] JAVAN MCINTOSH

[2] NELLIE ROBERTS

[3] NELA LUKE

(By their attorney on record LEONARD DEROCHE)

Claimants

and

[1] JOMO ALEXANDER

[2] RECARDO ROBERTS

Defendants

Appearances:

Ms. Lakeisha John for the Claimants
Mr. Stephen Williams and Mr. Sten Sargeant for the Defendants.

2013: February 18; 19
September 25

JUDGEMENT

- [1] **THOM, J:** During the 1950's Mr. Ernest Mc Tair now deceased and his wife Mrs. Jessie Mc Tair resided on a portion of Crown Land (the disputed property) on Union Island within the state of Saint Vincent and the Grenadines. Around 1959 Mrs. Jessie Mc Tair migrated from Union Island and has not returned since. The second and third Claimants are her daughters, Mr. Ernest Mc Tair was not their father.

- [2] Around 1961 Mr. Ernest Mc Tair commenced a common-law relationship with one Ms. Margareta Roberts now Mrs. Margareta Jones. At this time Mr. Ernest Mc Tair was living with his mother. They subsequently moved to live on the disputed property. The relationship produced five children, the defendant Mr. Recardo Roberts being one of them. Mr. Ernest Mc Tair paid the taxes for the disputed property from at least 1961. Receipts from 1961 were exhibited.

- [3] Mr. Ernest Mc Tair died in 1983. Mrs. Margareta Jones and her children continued to reside on the disputed property and pay the taxes in the name of Mr. Ernest Mc Tair. In 1993 Mrs. Margareta Jones got married and migrated to the United States of America. Mr. Recardo Roberts and some of his siblings remained at the disputed property.

- [4] In 1997 Mrs. Nellie Roberts and Mrs. Nela Luke obtained a Crown Grant for the disputed property. The Crown Grant shows that they paid a sum of Seventy-Nine dollars and Eighty-Three Cents (\$79.83).

- [5] In 2001 Mr. Recardo Roberts made a statutory declaration by Deed No. 3572 of 2001 that he was in adverse possession of the disputed property in excess of twelve years.

- [6] In 2006 Mrs. Nellie Roberts and Mrs. Nela Luke sold the disputed property to Javan McIntosh.

- [7] On May 26, 2007 Mr. Gene Hamilton the father of Mr. Javan McIntosh in the presence of the police entered into the disputed property and removed some items from the house. Mr. Recardo Roberts claims that the items removed were his property and that they were damaged in the process of being removed. On June 5, he instituted Claim No. 1194 of 2007 against Mr. Gene Hamilton in which he claims an injunction restraining Mr. Gene Hamilton from trespassing on the disputed property, special and general damages and costs. Mr. Javan Mc Intosh was made an Ancillary Defendant.
- [8] Mr. Javan Mc Intosh and Mr. Gene Hamilton in their defence denied that Mr. Gene Hamilton trespassed on the disputed property since he was given permission to enter the disputed property by Mr. Javan Mc Intosh the owner of the property he having purchased it from Mrs. Nellie Roberts and Mrs. Nellie Luke in 2006. They also denied the allegations of loss and damage.
- [9] On August 7, 2007 Mr. Javan McIntosh, Mrs. Nellie Roberts and Mrs. Nela Luke instituted Claim No. 281 of 2007 against Mr. Jomo Alexander the nephew of Mr. Recardo Roberts and Mr. Recardo Roberts. They claim Mr. Javan Mc Intosh is entitled to possession of the disputed property, a declaration that he is the owner in fee simple of the disputed property and an injunction restraining Mr. Jomo Alexander and Mr. Recardo Roberts from remaining on the disputed property.
- [10] Mr. Jomo Alexander and Mr. Recardo Roberts in their defence contend that Mr. Recardo Roberts and his predecessors have been in exclusive uninterrupted possession of the disputed property in excess of fifty-one (51) years. In their counterclaim they contend that Mrs. Nellie Roberts and Mrs. Nela Luke obtained Crown Grant No. 104 of 1997 by fraud. They seek a declaration that Mr. Recardo Roberts is the fee simple owner of the disputed property, an injunction restraining Mr. Javan Mc Intosh and or his agents from trespassing on the disputed property, general damages and costs. By order of Court dated October 12, 2011 the two matters were consolidated.

ISSUES

[11] The issues to be determined by the Court are:

- (1) Whether Recardo Roberts and his predecessors acquired title to the disputed property by adverse possession prior to the issue of the Crown Grant to Mrs. Nellie Roberts and Mrs. Nela Luke.
- (2) Whether Crown Grant No. 101 of 1997 to Mrs. Nellie Roberts and Mrs. Nela Luke was obtained by fraud.
- (3) If Mr. Recardo Roberts and his predecessors were in adverse possession for a continuous period of thirty (30) years prior to the issue of the Crown Grant to Mrs. Nellie Roberts and Mrs. Nela Luke, whether Mr. Javan McIntosh was a bona fide purchaser for value without notice.
- (4) Whether Gene Hamilton trespassed on the disputed property and whether he damaged the items when he removed them from the house.

EVIDENCE

[12] The evidence on behalf of Mr. Javan McIntosh, Mrs. Nellie Roberts and Mrs. Nela Luke is that the disputed property was originally owned by the Crown. In the 1950's it was occupied by Mr. Ernest Mc Tair and his wife Mrs. Jessie Mc Tair. Mrs. Jessie Mc Tair had built a house on the disputed land with the help of the Seventh-Day Adventist Church. The house was damaged by a hurricane. Mrs. Jessie Mc Tair and her brother James Cudjoe rebuilt the house. Mrs. Jessie Mc Tair and Mr. Ernest Mc Tair subsequently separated and around 1959 Mrs. Jessie Mc Tair migrated from Union Island and has not returned. She left her brother James Cudjoe in charge of the property. Other persons were also put in charge of the property at various times such as Mr. Prince Cudjoe, Mrs. Theodora Alexander and more recently Mr. Leonard De Roche. Some years later around 1967, Mr. Ernest Mc Tair who was then living with his mother was permitted to occupy the

house on the disputed property. Mrs. Margareta Jones his common-law wife and their children also occupied the property. When Mr. Ernest Mc Tair died they remained on the property with permission of the agents of Mrs. Jessie Mc Tair.

[13] In 1994 the Crown requested payment for the disputed land and Mrs. Nellie Roberts and Mrs. Nela Luke paid the sums. In 1997 they were issued with Crown Grant No. 104 of 1997 dated September 26, 1997. By this Crown Grant they became the fee simple owners of the disputed property.

[14] In 2004 Mrs. Nellie Roberts and Mrs. Nela Luke through their agents Mr. Leonard De Roche requested Mr. Recardo Roberts to vacate the disputed property and he did so and went to live in his aunt Roslyn's house, they subsequently through their agent Mr. Leonard De Roche put the disputed property up for sale. The property was purchased by Mr. Javan McIntosh with Mr. Gene Hamilton his father acting as his agent. Prior to purchasing the disputed property, Mr. Gene Hamilton through his solicitor inspected the title to the disputed property and the search revealed that it was free from encumbrances. Mr. Gene Hamilton also inspected the disputed property and found that it was vacant. A Deed of Conveyance No. 4426 of 2006 conveying the property to him was registered on the 20th June, 2006

[15] Sometime after the disputed property was purchased by Mr. Javan Mc Intosh Mr. Jomo Alexander moved into the disputed property. Also after the purchase was completed Mr. Leonard De Roche showed Mr. Gene Hamilton several letters between his solicitor and Mr. Recardo Roberts's solicitor bearing dates October 12, 2004, March 23, 2005, April 22, 2005, May 5, 2005, June 2, 2005 and September 21, 2006.

[16] In May 2007 Mr. Gene Hamilton went to the disputed property with a Police Officer and he removed some items that were in the house. None of the items were damaged in the process.

- [17] The evidence on behalf of the Defendants is that in 1961 Mr. Ernest Mc Tair and Mrs. Margareta Jones commenced a common-law relationship. At this time Mr. Ernest Mc Tair was residing at his mother's home. He was in the process of constructing a concrete house on the disputed property.
- [18] In 1962 they moved into the house on the disputed property although it was not completed. Mrs. Margareta Jones gave birth to their first child Magnus Roberts in the house. Over the years they made extensions to the house which is now a two-storey building with four bedrooms, living areas, kitchen and bathrooms. All of her five children were born on the disputed property, the last child being Mr. Recardo Roberts who was born in 1972. James Cudjoe and Prince Cudjoe lived nearby and they never visited nor prevented any of the construction. Mr. Ernest Mc Tair made payments toward the purchase of the land and he paid the taxes for the land in his name. Mr. Ernest Mc Tair died in 1989 and Mrs. Margareta Jones and the children continued to live on the disputed property and pay the taxes in the name of Mr. Ernest Mc Tair. In 1993 Mrs. Margareta Jones got married and migrated to the United States of America. Mr. Recardo Roberts, his wife and some of his siblings continued to reside on the disputed property. In 1997 when Mr. Recardo Roberts attempted to pay the taxes for the disputed property he discovered that the 2nd and 3rd Claimants were registered as the owners of the disputed property.
- [19] In 2001, Mr. Recardo Roberts made a statutory declaration that he was in adverse possession of the disputed property.
- [20] In 2004 his aunt Mrs. Roslyn James who resides in the United States of America requested him to take care of her property. The property is also situated at Clifton, Union Island. He moved there in 2004 whilst still retaining control over the disputed property. In December 2003 his nephew Mr. Jomo Alexander moved into the disputed property.

- [21] Sometime around May 2004 Mr. Leonard De Roche requested him to remove his belongings from the house as he was about to sell the house. He caused his solicitor to write to Mr. De Roche by way of letter dated 17th May, 2004. Several exchange of letters followed between his solicitor and the solicitors for Mrs. Nellie Roberts and Ms. Nela Luke.
- [22] Around May 25, 2007 Mr. Gene Hamilton visited the property and informed Mr. Jomo Alexander to vacate the disputed property. At this time Mr. Recardo Roberts was employed on the island of Canouan. On May 26, 2007 Mr. Gene Hamilton broke the locks of the house and caused substantial damage to his belongings. He also forced his nephew Mr. Jomo Alexander out of the property.

ADVERSE POSSESSION

- [23] Learned Counsel Ms. John submitted that the Crown's title to the disputed property had not been extinguished by 1997 when the Crown conveyed the disputed property to Mrs. Nellie Roberts and Mrs. Nela Luke. The evidence shows that Mr. Recardo Roberts was not in possession of the disputed property for a period of thirty (30) years prior to the Crown Grant. Mr. Recardo Roberts was born in 1972 he could therefore not be in possession of the disputed property for the requisite thirty (30) year period.
- [24] Ms. John further submitted that Mr. Recardo Roberts was in occupation of the disputed property as a licensee. He was granted permission to occupy the disputed property by Mrs. Nellie Roberts and Mrs. Nela Luke. When he was requested by their agent to vacate the disputed property, he did so and went to reside at his aunt Roslyn's house.
- [25] Learned Counsel Mr. Sargeant submitted that Mr. Recardo Roberts and his predecessors have been in actual possession of the disputed property since 1961. Learned counsel relied on the evidence of Mrs. Margaret Jones that Mr. Ernest Mc Tair made payments towards the purchase price and he paid the rates and taxes

in his name from 1961. Mr. Sargeant referred to the Crown Lands Act and submitted that pursuant to the subsidiary legislation made under the Act, the Crown may allow persons to live on the land while making payments towards the purchase price and title is granted upon the full payment of the purchase price.

[26] Mr. Sargeant further submitted that Mr. Recardo Roberts and his predecessors had the requisite intention to possess as shown by the following evidence:

- (i) Mr. Ernest Mc Tair was making payments towards the purchase of the land;
- (ii) Payments for the land and house tax were made yearly;
- (iii) Improvements to the property over the years were made without questions from anyone;
- (iv) Mrs. Nellie Roberts and Mrs. Nela Luke produced no evidence that Mr. Ernest Mc Tair, Mrs Margaret Jones or Recardo Roberts ever acknowledged them or Mrs. Jessie Mc Tair as owner, or paid them any rent;
- (v) Mr. Recardo Roberts made a statutory declaration as to his rights;
- (vi) Mr. Recardo Roberts refused to give up possession by letter dated 8th June, 2006 and exercised his rights in the court by first in time bringing claim 194 for damages for trespass and injunctive relief.

[27] Mr. Sargeant also submitted that there is no reliable evidence that Mr. Recardo Roberts was granted permission to possess the disputed property by Mrs. Nellie Roberts and Mrs. Nela Luke.

FINDINGS

[28] While the Defendants in this matter are Mr. Jomo Alexander and Mr. Recardo Roberts, Mr. Alexander did not participate in the trial and claims no interest in the disputed property. Therefore in referring to the Defendants I will only refer to Mr. Recardo Roberts.

[29] It is not disputed by the parties that the disputed property was originally owned by the Crown. The relevant provisions of the Limitation Act are sections 17(1) and 19 and paragraph 10 of part 11 of the schedule. They 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.

Paragraph 10. Subject to paragraph 11, Section 17(1) shall apply to the bringing of an action to recover any land by the Crown with the substitution for the reference to twelve years of a reference to thirty years."

[30] In Halsburys Laws of England¹, the Learned Authors explained adverse possession as follows:

"Meaning and Effect of Adverse Possession: No right of action to recover land accrues unless the land is in possession of some person in whose favour the period of limitation can run. Such possession is called adverse possession. What constitutes 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."

[31] 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 McFarlane². These principles were approved by the House of Lords in JA Pye and Another v Graham and Another³ and have been applied time and time again in our courts.

In JA Pye the Court stated the principles as follows:

"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

¹ 4th ed. vol 28 at paragraph 768

² [1977] 38 P&CR 452

³ [2003] 1 A.C. 419

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 no-one else had done so. The necessary intention was one to possess, not to own and or intention to exclude the paper owner only so far as was reasonably possible."

[32] The onus is on Mr. Recardo Roberts to prove that he and his predecessors were in adverse possession of the disputed property for a period of thirty years prior to the sale of the disputed property by the Crown in 1997 to Mrs. Nellie Roberts and Mrs. Nela Luke.

[33] Mr. Recardo Roberts's case is that he and his predecessors were in adverse possession of the disputed property from about 1961. His father Mr. Ernest Mc Tair made payments to purchase the disputed property. Therefore, by 1997 the rights and title of the Crown to the disputed property had been extinguished by operation of law.

[34] Mr. Recardo Roberts pleaded that:

"The second and third claimants' mother Jessie Cudjoe formerly of Carriacou was married to the second defendant's father Ernest Mc Tair in the early 1950's. The Couple lived in a chattel house on the disputed land. They separated in or around 1959 and Jessie Cudjoe left the State. Prior to and subsequent to their separation Ernest Mc Tair made payments towards the purchase of the land in question."

[35] Mr. Recardo Roberts led evidence through Mrs. Margareta Jones to support this contention. Mrs. Jones testified as follows:

"As the relationship between Ernest and I developed we began further construction to the property on the land. This was later to become our family home. My husband paid the taxes for the property and on occasions I would pay on his behalf. I am also aware that he was making payment towards purchase of the land."⁴

⁴ Paragraph 6 of her witness statement dated 13th March, 2008

[36] It is settled law that a licensee is not in adverse possession of the land - see Hughes v Griffin⁵. Two issues arise for consideration. Firstly, whether the Defendants and their Predecessors were in possession of the disputed land with the permission of the agents of Mrs. Jessie Mc Tair and the 2nd and 3rd Claimants. Secondly, the effect of payments to purchase the disputed property by Mr. Ernest Mc Tair.

Permission by Agents of the Mrs. Jessie McTair and 2nd and 3rd Claimants

[37] Mr. Leonard De Roche on whose evidence the Claimants rely testified that himself and the 2nd and 3rd Claimants gave permission to Mr. Recardo Roberts to occupy the disputed property because of the family relationship. However, under cross-examination Mr. De Roche admitted that Mr. Recardo Roberts lived on the disputed property from his birth. Mr. De Roche also testified under cross-examination that permission was given to Mr. Ernest Mc Tair by Mr. Prince Cudjoe the agent of Mrs. Jessie Mc Tair when Mr. Ernest Mc Tair's house where he was living on the flats got damaged. I do not find this evidence of Mr. De Roche to be reliable. There is no evidence that he was privy to any discussion between Mr. Prince Cudjoe and Mr. Ernest Mc Tair in relation to the disputed property. He did not state in his evidence when permission was granted. In the early 1960's (I accept the evidence of Mrs. Margareta Jones that herself and Mr. Ernest Mc Tair moved into the disputed property in 1961), Mr. Leonard De Roche would have been about fourteen (14) years old, he having testified that he was born in 1947. There is no evidence that he had any association with either Mr. Prince Cudjoe or Mr. Ernest Mc Tair. He testified that he became agent in 1997. The undisputed evidence is that Mr. Ernest Mc Tair and Mrs. Margareta Jones have been in occupation of the disputed property since in the 1960s. I find the evidence of Mrs. Margareta Jones to be reliable that over the years Mr. Ernest Mc Tair and herself made renovations to the house. Mr. Gene Hamilton admitted that the house is not the same as it was in the 1960s. There is no evidence that these renovations were made with the permission of Mr. Prince Cudjoe who lives within close proximity of

⁵ [1969]1AER 460

the disputed property or with the permission of the 2nd and 3rd Claimants. There is also no evidence that anyone objected to the renovations.

[38] I also do not find Mr. De Roche's evidence that Mr. Recardo Roberts vacated the disputed land when he requested him to do so in 2004 to be reliable. Mr. Recardo Roberts in his testimony explained that he moved to his aunt's Roslyn's house to take care of it. She resides in the United States of America. He spends time at both houses and he has some of his belongings at the house on the disputed property. He did not move at the request of Mr. De Roche. I accept the evidence of Mr. Recardo Roberts. His testimony is consistent with the documentary evidence. The documentary evidence shows that after the request to vacate was made by Mr. De Roche, Mr. Roberts through his solicitor wrote to Mr. Leonard De Roche on May 17, 2004 indicating that Mr. Recardo Roberts was residing on the property unmolested for over thirty years. Several letters were exchanged between solicitors for Mr. De Roche and Mr. Recardo Roberts. As late as 2006, Mr. Recardo Roberts' solicitor wrote indicating that Mr. Roberts was not prepared to give up possession of the property.

[39] In view of the above, I find that Mr. Recardo Roberts and his predecessors were not in possession of the disputed land with the permission of the agents of Mrs. Jessie Mc Tair or the 2nd and 3rd Claimants.

Payments Towards the Purchase Price

[40] The Regulations under the Crown Lands Act on which Mr. Sargeant relied do provide for a person to enter into a written agreement with the Crown for the purchase of land and for the Crown to permit the person to occupy the land while payment is made towards the purchase price. The Regulation also provides that in such circumstances the person would be a licensee. Regulation 6 (1) and (2) reads as follows:

"Agreement regarding Crown Grant.

"(1) In every case where a successful applicant has been allowed to make the deposit of the sale price in installments, an agreement

shall be executed, in the form set out in the Second Schedule, before possession of the land is granted.

- (2) It shall be a condition of every agreement referred to in sub regulation (1) that –
- (a) the land shall be held only on license;
 - (b) the licensee shall not part with his right of possession of the land without the written permission of the Minister."
 - (c) ...

[41] While no written agreement as referred to in Regulation 6 was exhibited and no evidence was led that there was such an Agreement, as stated earlier I found Mrs. Margareta Jones to be a reliable witness. I accept her testimony that Mr. Ernest Mc Tair made payments towards the purchase price of the disputed property. Where a person in possession is making payments towards the purchase price to the owner of the land, the only reasonable inference which could be drawn is that the person is in possession with the consent of the owner. There can be no adverse possession where a person is in possession with the consent of the owner. In other words a person cannot be in the adverse possession while at the same time he is making payments to the owner of the property to purchase the property. A person in adverse possession is someone against whom a right of action has accrued to the owner to recover possession of the land. Where a person is in possession pending completion of the sale of the purchase price in installments, while the vendor retains the legal estate until the sale is completed he holds it as a trustee for the purchaser. No cause of action accrues to the owner against the purchaser unless the purchaser is in breach of the contract of sale. During this period pending completion of the contract of sale the purchaser is not a person in adverse possession of the land.

[42] Pursuant to Section 17 of the Limitation Act time would only begin to run when the land is in adverse possession. Time could therefore only begin to run after Mr. Ernest Mc Tair had ceased to make payment towards the purchase price. There is

no evidence as to when Mr. Mc Tair ceased to make payments toward the purchase price. Mr. Ernest Mc Tair died in 1989. On the evidence the earliest period from which time could begin to run would be from his death. By 1997 when the disputed property was conveyed to the 2nd and 3rd Claimants by the Crown, the limitation period of thirty years would not have elapsed.

[43] In view of the above I find that the Defendants have failed to prove on a balance of probabilities that the Crown's right and title to the disputed property had extinguished pursuant to the Limitation Act prior to the sale of the disputed property to the 2nd and 3rd Claimants.

[44] In his pleadings Mr. Recardo Roberts also contended that he had obtained Possessory Title for the disputed property by Statutory Declaration No. 3572 of 2001 dated 5th October, 2001.

[45] It is a well established principle of law that a Statutory Declaration of exclusive uninterrupted possession of land for a period of twelve (12) years does not vest legal title to the land in the person making the declaration – see **Gordon Charles (Also known as Augustus James Alexis) (Administrator in the Estate of Lorna Alexis deceased, by his Attorney Raymond Scott v Clair Holas**⁶

FRAUD

[46] Mr. Recardo Roberts in his counterclaim alleged that the 2nd and 3rd Claimants obtained title to the disputed land fraudulently. He outlined the particulars of fraud as follows:

- (a) The second and third Claimants and/or their agents had surreptitiously obtained the death certificate of the second Defendant's father, Ernest Mc Tair and fraudulently represented that they had exclusive interest in the land in question.
- (b) When applying for the Crown Grant the second and third Claimants and/or their agents failed to disclose the existing

⁶ GREHCV 1996/15/

interests of Ernest Mc Tair's beneficiaries or their occupation of the property and land.

- (c) Further the second and third Claimants and/or their agents paid the balance of EC\$79.88 due and owing to purchase the land without the second Defendant's knowledge or consent in order to induce the revenue office as to their interest.
- (d) By their actions and/or their agents the second and third Claimants have fraudulently obtained title to the land."

[47] In support of his allegation of fraud Mr. Recardo Roberts relied on his evidence as outlined in paragraph 13 of his witness statement where he stated as follows:

"In or around 1997 I went to pay the house tax for that period. I was shocked to discover that my father's name had been removed from the roll and substituted by the name of the 2nd and 3rd Claimants. I queried this but was informed that I could not replace these false names with that of the correct owner who was my father. I made further enquires with the Valuation Office to discover that James Cudjoe, brother to Jessie Cudjoe, had obtained my father's death certificate and given this to another brother Prince Cudjoe. I knew Prince Cudjoe as he lived on land adjoining the disputed land. It appears that he represented the 2nd and 3rd Claimants had an interest in the land as their mother had previously made a payments (sic) and had a receipt/s in her name. They claimed that this was her land. Thereafter they paid the outstanding balance for the land which was EC\$79.88 and obtained the Crown Grant. I have been advised that this was obtained fraudulently as the Claimants were well aware that my family and I as beneficiaries of Ernest Mc Tair were and have always been in possession of the property and land and they failed to disclose this fact when applying for the grant. As far as I know the Claimants have never been in possession of the land and neither they nor their mother made any contribution towards the property."

[48] Mr. Sargeant referred to the elements of the tort of deceit as stated by Lord Hershell in Derry v Peak:

"First, in order to sustain an action in deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is bit an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I

think always be an honest belief in its truth.”⁷

[49] Mr. Sargeant also referred the Court to the cases of Re H (Minors) (Sexual Abuse): (Standard of Proof),⁸ and Drake v Harbour⁹ and submitted that the standard of proof is the civil standard. He further submitted that the evidence of Mr. Roberts was not contradicted. In such circumstances based on the decision in Drake v Harbour the Court could draw an inference adverse to the Claimants. If the Court concludes that on the preponderance of probability that the 2nd and 3rd Claimants could have obtained the Crown Grant in the manner put forward by Mr. Roberts then he has proved his allegation of fraud.

[50] Ms. John submitted that no evidence was adduced to prove the allegation of fraud.

FINDINGS

[51] When Mr. Roberts' evidence is examined carefully it amounts to mere speculation. Mr. Roberts by his own evidence admitted he had no knowledge of the sale transaction between the Crown and the 2nd and 3rd Claimants, he discovered the change of name on the Tax Register in 1997 when he went to pay the taxes. His statements in paragraph 13 of his witness statement are all based on discussion he had with an unnamed individual or individuals at the Valuation Office and advice he received from an unnamed person. Inferences could only be drawn from facts which are found on admissible evidence. Further there is no evidence to show that the statements attributed to Mr. Prince Cudjoe are inaccurate, far less fraudulent. Mr. Recardo Roberts did lead evidence that Mr. Ernest Mc Tair made payments but this does not mean that Mrs. Jesse Mc Tair did not also make payments towards the purchase price.

⁷ [1989] 14 App Cas 337

⁸ [1960] 1AER1

⁹ [2008] EWCA CIV25

[52] In view of the above I find that the Defendants have failed to prove on a balance of probabilities that the 2nd and 3rd Claimants obtained title to the disputed property fraudulently.

TRESPASS

[53] Mr. Recardo Roberts alleges that Mr. Hamilton trespassed on the disputed property and broke the lock to the entrance and damaged property belonging to him.

[54] Mr. Sargeant referred the Court to the evidence of Mr. Recardo Roberts and his wife Mrs. Karen Roberts and submitted that Mr. Hamilton believing that he had a better right to possession entered onto the disputed property and destroyed the items of Mr. Recardo Roberts.

[55] Ms. John submitted that there is no substantial evidence of the items that were allegedly destroyed nor the cost of the items. The claim is speculative.

FINDINGS

[56] It is not disputed that on May 12, 2007 Mr. Hamilton went to the disputed land and requested Mr. Jomo Alexander who at the time was in occupation of the property to vacate the property. It is also not disputed that on the 26th day of May, 2007 Mr. Hamilton entered onto the disputed property and removed items from the property. Mr. Hamilton contends that he was granted permission by his son Mr. Mc Intosh who was the fee simple owner of the disputed property.

[57] Having regard to my finding that the Crown's title to the disputed land was not extinguished pursuant to the Limitation Act and the evidence of Mr. Hamilton that he was granted permission by Mr. Mc Intosh to enter the disputed land, this evidence was not contradicted, I find that the action for trespass must fail.

[58] It is settled law that an owner of property may himself evict a trespasser.

[59] Mr. Jomo Alexander disputes the allegation of Mr. Recardo Roberts that items were damaged and some destroyed in the process of removing them.

[60] Mr. Recardo Roberts testified that when the items were removed he was not present he was working at Canouan. The items were his property. He outlined a list of the items that were damaged and were missing and the cost of each item.

[61] The evidence of Mrs. Karen Roberts is outlined at paragraphs 3 and 4 of her witness statement. They read as follows:

3. On the 26th day of May 2007 I received a phone call at around 7a.m. and I went to my husband's property. When I arrived at the property I met one Gene Hamilton aka Mc Intosh and a police officer.

4. I went inside and I inquired as to their presence on my husband's property and I was informed by Gene that the property was his. I saw Gene forcibly removing and throwing various documents and items from the upstairs of the house to the downstairs which caused substantial damage to my husband's personal belongings and to the property..."

[62] Mr. Hamilton in his testimony admitted that he removed some items from the property but denied that any items were damaged. When he went to the disputed land he was accompanied by a police officer and Mr. Jomo Alexander was present.

[63] The onus was on Mr. Recardo Roberts to prove on a balance of probabilities that the items removed from the house were damaged and some destroyed or unaccounted for as a result of the action of Mr. Hamilton. Having seen the witnesses and having reviewed the evidence I accept the evidence of Mr. Hamilton. Mr. Roberts was not present when the items were removed from the house. Mr. Jomo Alexander the 1st Defendant who was present did not testify at the trial. Mrs. Roberts who arrived at the disputed property after some of the items were already removed did not give any evidence of the nature of the damage of

any of the items. Her testimony is just a blank statement that the items were damaged. I do not believe her testimony that she saw Mr. Hamilton throwing things out of the house and items were damaged. Mr. Hamilton took a Police Officer with him to the disputed property after Mr. Jomo Alexander refused to vacate the disputed property. The items were removed in the presence of the Police Officer and in the presence of Mr. Jomo Alexander. I believe Mr. Hamilton's testimony that he did not throw any of the items out of the house and that he did not damage any of the items. He simply put the items out.

[64] Mr. Javan Mc Intosh had pleaded in the alternative that he was a bona fide purchaser for value without malice. In view of my finding that the Crown's title in the disputed property was not extinguished prior to the sale of the disputed property to the 2nd and 3rd Claimants, I find that it is not necessary for me to consider this issue.

[65] In conclusion I find that the Claimants have proved on a balance of probabilities that the 1st Claimant is the fee simple owner of the disputed property. I also find that Mr. Gene Hamilton did not trespass on the disputed property nor did he damage or destroy any of the items that were removed. No evidence was led in relation to mesne profit. In view of my findings above Mr. Recardo Roberts is not entitled to any of the reliefs sought in the counterclaim.

[66] It is ordered:

- (i) Judgment is entered for the Claimants in Claim No. 281/2007, the counterclaim is hereby dismissed.
- (ii) Claim No. 194/2007 is hereby dismissed.
- (iii) A declaration is hereby made that Mr. Javan Mc Intosh is the fee simple owner of the land described in Deed No. 4464 of 2006 and is entitled to possession thereof.
- (iv) The Defendants shall pay the Claimants prescribed costs pursuant to Part 65.5 of CPR 2000.



Justice Gertel Thom

HIGH COURT JUDGE