IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

HIGH COURT OF JUSTICE

SUIT NO. GDAHCV 2006/0620

BETWEEN:

MAGDELENE LENDORE

Claimant

and

WINSFORD FRANK
VIOLA FRANK

Defendants

Appearances:

Mr. Alban John and Ms. Thandiwe Lyle for the Claimant
Mrs. Winifred Duncan-Phillip for the Defendants

2013: November 4
December 12

DECISION

[1] **MOHAMMED, J.**: The island of Carriacou is approximately 13 square miles with a population of 7,000 persons. With such a ratio of land mass to people it is not surprising to the Court that there are often disputes surrounding the ownership of land in Carriacou. The instant action is one such dispute which has engaged the Court's attention.

[2] The Claimant instituted this action for the Court to declare that she is the owner of a piece of land situate at Harvey Vale consisting of 10,420 square feet ("the said lot") and identified on a plan annexed to a deed dated 7th June 1991 ("the 1991 deed") which conveyed the said lot to her. She is also seeking an order for the Defendants to remove a fence enclosing the said lot and to vacate and give up

possession; injunctive relief stopping the Defendants their servants and or agents from further trespassing onto the said lot and interfering with her ownership, damages for trespass and costs of her action. She obtained an interim injunction on 20th December 2006 restraining the Defendants their servants and/or agents from trespassing on the said lot and stopping them from threatening, harassing or molesting her.

[3] The Claimant's case is based on two grounds. Firstly, she has the paper title to the said lot based on the 1991 deed. According to the Claimant, she was told by a surveyor and she had seen a copy of a plan of the Grand Ance Estate dated 1905 and on that plan the surveyor indicated to her that the said lot was part of Lot No 2 and the Defendants lot was Lot No 3. She also relies on the undisturbed occupation and possession by her predecessors in title of the said 1 acre lot and the said lot since the 1950s. The trespass which the Claimant complained off was the erection of a fence and the placing of a container. It was not part of the Claimant's pleaded case that any of her predecessors in title, including her father Daniel George, purchased the said 1 acre lot from the First Defendant's great-grandfather, Henry Frank also referred to as Buddy Frank. Therefore I have attached no weight to the evidence from the Claimant and her witness Helena John on this matter since it materially departs from the pleaded case and is therefore irrelevant.

[4] The Defendants' Defence[1] is they are the owners of the said lot and that the predecessor in title of the First Defendant permitted the Claimant's father and mother to occupy the lot, which ended in 1965. They claim that the said lot forms part of the estate of the First Defendant's great-grandfather, Henry Frank deceased, who became the owner by virtue of a deed dated 26th October, 1910 ('the 1910 deed"). In the 1910 deed Henry Frank's land is described as Lot No.3 on a subdivision drawn by one M J Landreth Smith in 1905 ("the 1905 Landreth Smith plan"). The lands of Henry Frank deceased were subsequently conveyed to

[1] Affidavit of the first defendant filed on 21st February 2007

the First Defendant and his siblings by a deed dated 11th December 2000 ("the 2000 deed"). They contend that the Claimant has built on their land; the First Defendant's grandfather William Frank permitted the Claimant's father Daniel George to place a chattel house on Lot No.3, and after he died his wife Emelina George, the Claimant's mother, continued in possession until 1965. The house was later removed from the property and that was the end of the George's occupation of the said lot.

[5] At the trial the Claimant and John Mc Donald gave evidence in support of the Claimant's action. No witnesses were called for the Defendants since their sole witness, the First Defendant, passed away on 30th May 2011. Apart from the two witnesses, Mr Gilbert Massell, Licenced Land Surveyor who was appointed by the Court on 19th January 2007 ("the January 2007 order") to *"conduct a survey of the lands at Harvey Vale Carriacou in the State of Grenada and formerly part of Grand Ance estate conveyed by deed made the 26th October 1910 in favour of Henry Frank as shown on the plan drawn by M.J.Landreth Smith to determine the correct boundaries thereof and whether the dwelling house of the Claimant, Magdelene Lendore encroaches on the said lot of land in the possession of the Defendants"* also gave evidence. His report is dated 30th May 2007[2] ("the Massell report").

[6] Upon the completion of the evidence, the Court refused the Defendants application filed 22nd October, 2013 to tender the witness statement of the First Defendant, deceased, which was filed on 9th May 2008. The reasons for the refusal were: the Defendants were aware that the First Defendant had passed away since 30th May 2011; they were aware since 13th June 2013 that the trial was fixed for 30th October 2013 and the failure by the Defendants to comply with the timeframe for notice to the Claimants as prescribed by the CPR 29.8 was unsatisfactory.

[2] Page 56 of Trial Bundle

[7] Although the evidence of Helena John was taken de bene esse on 30th May 2011 pursuant to an order of Price Findlay J of 1st March 2011 ("the March 2011 order"), the Court refused the Claimant's application to admit this testimony on the basis that the Claimant had failed to comply with the time frame for the serving of notice on the Defendants as set out in CPR 33.14. However, in the closing submissions, the Claimant has requested the Court to revisit its ruling on the admissibility of the testimony of Helena John for the reasons set out hereafter.

[8] There are three issues arising for determination by the Court, namely:

(a) Can the Court revisit its ruling and admit the testimony of Helena John?

(b) Has the Claimant proven on a balance of probabilities that she is the owner of the said lot by the 1991 deed?

(c) Can the Claimant rely on sections 4,12 and 27 of the Limitation Act of Grenada to prove that she is the owner of the said lot and if so, has she proven that she or her predecessors in title have dispossessed the Defendants of the said lot ?

Can the Court revisit its ruling and admit the testimony of Helena John?

[9] The March 2011 order directed that Helena John of Belmont, Carriacou be examined on oath in Carriacou by the Registrar of the Supreme Court at a date to be fixed by the Court. The Registrar and Counsel for both the Claimant and Defendants were present on 30th May 2011 when the testimony of Helena John was taken and where Counsel for the Defendant cross-examined Ms John. Counsel for the Claimant has now brought to the Court's attention the authority of **Calvin Todman v Marguerite Hodge**[3] where the Court of Appeal, in this jurisdiction, on addressing the issue of notice under CPR 33.14 expressed the view that:

> " Ms. Hodge was aware of the taking of the deposition and had notice in good time that it was intended to be used at the trial. There is no special

[3] HCVAP2012/002 at paragraph 13

form of notice prescribed by the Rules, nor is such a notice required to be filed in court in the proceedings".

[10] The Court acknowledges that at the time of the initial ruling it did not have the benefit of the guidance from the Court of Appeal in **Calvin Todman** with which this Court is bound. At the time the deposition of Helena John was taken Counsel for the Defendants was present and cross-examined the witness Helena John extensively. Based on the decision in **CalvinTodman** this amounted to notice to the Defendants that the Claimant would be relying on Ms. Helena John's evidence to prove her case at the trial.

[11] In the interest of fairness to both parties, the ruling made at the end of the trial refusing to admit the testimony of Helena John to be admitted into evidence is now recalled on the basis that the Court was unaware of the ruling in **Calvin Todman** and the said testimony is now admitted into evidence.

Has the Claimant proven on a balance of probabilities that she is the owner of the said lot by the 1991 deed?

[12] At the time the action was instituted in 2006 the Claimant was 63 years old. The Claimant's pleaded case[4] is since she became aware of her surroundings she lived with her mother and siblings in the family home which was situated on a lot of land measuring 1 acre at Harvey Vale, Carriacou ("the 1 acre lot") which was commonly called "Andecin". The house was originally a two-storey concrete building but after it was damaged by Hurricane Janet in 1955, the top floor was replaced with a wooden structure. She left Carriacou in 1965 and her mother, who had suffered a stroke, left the house in the same year to live with her sister Margaret. Her mother died in 1967. The house was then rented out from 1965 for 2 to 3 years and thereafter it went into ruin in the mid 1970s.

[4] The Claimant's affidavit filed 14th December, 2006

[13] The Claimant also pleaded that her family occupied the 1 acre lot as the owners and never accounted to anyone for rent or profits, and her eldest sibling Margaret paid property taxes for the 1 acre lot since 1960s. In 1989 her brother Kennedy George obtained a grant of letters of administration for her mother's estate and by deed dated 15th November 1989 ("the 1989 deed") he transferred the 1 acre lot to the beneficiaries of her mother's estate, which were the Claimant and her siblings. Subsequently by the 1991 deed, her siblings transferred her share of the said 1 acre lot, namely the said lot to her. From 1991 to the time of the institution of this action in 2006 she has paid the taxes for the said lot. She built her house on the said lot while she was residing in the United States of America in around 2000. In 2002 the Defendants built their house downhill from her house and placed a container on a portion of the said lot. In 2005 the Defendants trespassed on a portion of the said lot by erecting a fence along the south-western and south-eastern boundaries of the said lot.

[14] The 1 acre lot was described in the 1989 deed as *" ALL THAT lot piece or parcel of land situate at Harvey Vale in Carriacou containing by admeasurement One Acre English Statute Measure and abutted and bounded as the same is delineated and described in the plan or diagram marked with the letter "G" and hereunto annexed..."*. In the plan dated 10th December 1988 prepared by Andrew Alleyne, licensed surveyor, the boundaries are the Grand Ance Estate, the remaining lands of Lot No.2 and a road.

[15] In the 1991 deed the said lot was described as*" ALL THAT lot piece or parcel of land situate in Harvey Vale in the Dependency of Carriacou in Grenada containing by admeasurement ten thousand four hundred and twenty Square Feet English Statute Measure and abutted and bounded as the same is delineated in the Plan or Diagram marked with the letter "L" and annexed hereto"*. The boundaries to the plan which was surveyed on 10th December 1988 by Andrew Alleyne, licensed surveyor are Grand Ance Estate, remaining lands of Old Harvey Vale Estate Allotment No.2, remaining lands of Lot No.2, a 10 ft. allowed road and lands of

Estate of Emelina George. However, there is no reference in the 1991 deed that the said lot is a portion of the said 1 acre lot. The common boundaries between the said 1 acre lot and the said lot appear to be the Grand Ance Estate and the remaining lands of Lot No 2.

[16] Under cross-examination the Claimant admitted that the 1989 deed did not disclose how her mother, Emelina George became the owner of the 1 acre lot. She acknowledged that from the plans annexed to the 1989 deed and the 1991 deed, there are two common boundaries which referred to the remaining lands of Lot No.2, yet she maintained that it was not clear from the same plans (which she initally relied on to institute the instant action) that the said lot was part of lot No 2. This position taken by the Claimant is clearly inconsistent with her case which is the said lot is part of the said 1 acre lot.

[17] The Claimant stated in her affidavit filed 14th December 2006 in support of her claim that the Defendants relied on the 1910 deed to establish their claim to the said lot. However, under cross-examination she denied ever having seen the 1910 deed. This is another inconsistency with the Claimant's position since the affidavit was a sworn document which she submitted to the Court to support her claim. This court does not accept that she never saw the 1910 deed since she specifically referred to it in her affidavit and annexed it as exhibit ML11. In this regard, the Court will presume that she fully knew of the 1910 deed.

[18] In the 1910 deed Henry Frank became the owner of " *ALL THAT piece or portion of land being part of the acquired Estate called Harvey Vale in the Island of Carriacou in the said Colony of Grenada which lot piece or portion of land measures 3 acres, 3 roods, 36 poles or thereabouts in extent and in the map or plan of the said Estate drawn by M J Landreth Smith is numbered 3 North Industry and is situate and bounded as shown delineated and described therein (which map or plan is dated the 10th day of October 1905 and is duly recorded in the Registrar's office)*".

[19] Gilbert Massell confirmed that in preparing for the survey he examined all relevant plans, and while he was not certain of seeing all the deeds, he stated he was familiar with all the plans attached to the deeds concerning the said lot. In light of his evidence, the relevant plans and deeds were the 1905 Landreth Smith plan, the 1910 deed, the 1989 deed, the 1991 deed, a deed dated 11th December 2000 between Terril Frank and Winsford Frank, Daphne Frank and Jonathan Frank ("the 2000 deed") and a plan showing a subdivision of the Grand Ance Estate (ML10).

[20] In the Massell report it is noted that:

> "Original Cut Stone concrete Monuments were found on either side of the 24 foot wide road at its intersection with lots 1 and 2. These monuments were aligned along the lot boundaries and had the lot numbers engraved on them. The numbering were consistent with lots as they were shown on the survey plan of Harvey Vale prepared by J Landreth Smith.
>
> Markers (Concrete Monument and/or Iron Pegs) were found at all other corners of the property consistent with Landreth Smith Plan.
>
> The property (House with enclosure) occupied by Mr and Mrs Gerald and Magdalene Lendore was found to be completely within the parcel surveyed i.e Lot 3. The relationship between the Lendore's House is shown on the attached Plan or Survey which forms part of the report."

[21] In the attached Massell plan ("the Massell plan") the size of Lot No.3 is 4 acres 0 Roods 13.7 poles and the boundaries are Lot 2 Beneficiaries of the Estate of Lisborne Adams (deceased) Beneficiaries of the Estate of Samuel Corion (Deceased) (Grand Ance Estate) Lot 6 Beneficiaries of Estate of Felix Adams (deceased) and a 24 foot wide road.

[22] Gilbert Massell confirmed that the Lot No 3 in the Massell plan was the same as Lot 3 in the Grand Ance subdivision. He explained that the "cut stone monument" referred to in his report are stones cut from rock which were used in the original

subdivision of Harvey Vale Estate with the numbers marked on them. The subdivision at page 12 of the Trial Bundle was Harvey Vale and that the subdivision at North Industry Grand Ance is in boundary with the Harvey Vale subdivision. On examining the plan annexed to the 1989 deed he agreed that from the plan the said 1 acre lot appeared to have been cut out from Lot No.2 and the latter touches the Grand Ance Estate. He confirmed that the plan annexed to the 2000 deed (which is the Defendant's deed) was consistent with the 1905 Landreth Smith plan.

[23] In light of the evidence of Mr. Massell, the 1910 deed, the 1989 deed, 1991 deed and the 2000 deed, I find that the Claimant has failed to prove that she is the owner of the said lot by virtue of the 1991 deed and that her house was built on the Defendants' land for the following reasons:

(a) The Claimant's pleaded case was the said lot was part of Lot No 2 of the Grand Ance Estate/subdivision and that the Defendants owned Lot No 3 and Gilbert Massell confirmed that the Claimant's house was indeed built on the Defendants Lot No.3.

(b) It is clear from the 1910 deed and the 2000 deed that the Lot No 3 is part of the Grand Ance Estate subdivision.

(c) Mr Massell agreed that the plan annexed to the 2000 deed was consistent with the 1905 Landreth Smith plan and is the same as Lot No 3 in the Grand Ance subdivision.

(d) It is unclear from the 1989 deed and the 1991 deed which lot or subdivision the said 1 acre lot and more importantly the said lot was part of.

Can the Claimant rely on sections 4,12 and 27 of the Limitation Act of Grenada to prove that she is the owner of the said lot and if so, has she proven that she or her predecessors in title have dispossessed the Defendants of the said lot ?

[24] Having made the aforesaid finding the Court can bring this matter to an end at this juncture. Howevever, the Claimant also made a plea for adverse possession on the basis that her predecessors in title were in undisturbed occupation and possession of the said lot since the 1950s. Where such a plea is made by a party, the provisions of the Limitation Act of Grenada must be examined in light of the evidence. George-Creque J.A. in **Arnold Celestine v Carlton Baptiste** [5] explained the full effect of sections 4, 12 and 27 of the Limitations Act and the circumstances where a party can rely on these provisions:

> "... On a proper construction of these sections of the **Limitation Act,** it becomes clear, in my view, that these provisions do no such thing. It appears to have been overlooked that these provisions are directed at the right of the paper owner to bring a claim for recovery of land and limit the time frame within which the paper owner may do so. This contemplates that the paper owner must have become dispossessed of the land – by the adverse possessor. What these provisions do not permit or contemplate is the situation where, as here, the adverse possessor brings a claim against the paper owner and then sets up the limitation bar as against the paper owner as a basis upon which the adverse possessor becomes entitled to ownership of the land."

[25] It is clear to this Court that a person who is an adverse possessor cannot rely on these provisions of the Limitation Act to be used as a sword to mount an action for possession against an owner who has the paper title but they can only be relied on as a shield against a paper title owner who has been dispossed by the adverse

[5] HCVAP 2008/011 at paragraph 15

possessor and has brought an action to recover possession. Therefore, in law, the Claimant cannot rely on her adverse possession to bring an action to dispossess the owners of the paper title, in this case the Defendants.

[26] In any event, to prove adverse possession physical, possession or occupation with the intention to possess must be proven. At paragraph 33 of the Claimant's closing submission[6] the Claimant conceded that *"even when they went out of physical occupation, they were not dispossessed"*. However, the evidence adduced by the Claimant to support any contention that her predecessors in title were in occupation and possession of the 1 acre lot or even the said lot since the 1950s is at best weak and untenable to support such a contention. She claimed that she always knew her family to be occupying and in possession of a concrete house and then a partially wooden and concrete house on the 1 acre lot, yet she was stated that she was unaware when the concrete house was built since she always knew it to be there. Under cross-examination she admitted that when she migrated to England in 1966 her mother left the family house to live with her sister. Although she said that the house was rented for 2-3 years thereafter, before it went into ruin in the 1970s, she did not return to Carriacou until 1988. Therefore for at least 22 years she had no direct or personal knowledge of who occupied the said 1 acre lot or the said lot. Even her witness Helena John's evidence added no value to support her contention that her family continued to occupy the said lot. Helena John migrated from Carriacou to England in 1960 where she stayed for 29 years and although she return three times during that period, she admitted that she did not visit the said lot.

[27] Even if the Claimant's predecessors in title were in occupation of the said lot, at best it ended by 1970 since everyone had left and the house went into ruin. At paragraph 34 of the Claimant's closing submissions[7] Counsel for the Claimant has requested that if the Court makes a finding that the Claimant's family house

[6] Filed on 12th November 2013
[7] Filed 12th November 2013

was built in the 1950s, it should by extension find that the Defendants predecessors in title would have conceded an irrevocable proprietory licence to the Claimant's parents and the Defendants are now estopped from asserting the contrary. This submission I consider to be "the kitchen sink" argument. The Claimant's pleaded case was not based on proprietory estoppel. It is therefore unfair to the Defendants at this stage, who were not called upon to answer a claim for proprietory estoppel, to call upon the Court to take a quantum leap and make such a finding. This Court is not minded to do so since proprietory estoppel was not the Claimant's pleaded case.

[28] The Claimant also sought to rely on the payment of property taxes for the 1 acre lot and the said lot as acts in support of her claim of ownership. She stated her family paid taxes during the period 1962 to 1995 in the name of her mother Emelina George. She exhibited copies of a certificate of payment for 1962 to 1982 issued by the District Revenue Office of Carriacou. She also stated that since 1991 to 2006 she paid taxes for the said lot and she exbited copies as proof. Her witness John Mc Donald, an employee of the Inland Revenue Department ("the IRD") in Carriacou for 22 years added no assistance to the Court. He confirmed that although the IRD collected taxes it was not the procedure to check for evidence of ownership of the property before the collection of taxes. I agree with Counsel for the Defendants that with this procedure more than one person can be paying taxes for the same piece of land. Helena John's evidence of the payment of taxes by the Claimant's father for the said 1 acre lot is at best hearsay and unreliable since she had no direct knowledge of the payment of taxes for the 1 acre lot or the said lot. The unreliability of the payment of taxes for land was commented on by Price Findlay J in **George Donald Barclay and ors v Hilda Clement nee La Pierre** [8] where the learned judge said:

> " ...They have submitted that the Taxes Management Act, Cap 29 requires that the owners of land pay taxes for the acreage they occupy. But that Act also provides for tenants and persons who have a charge on

[8] GDAHCV2003/0177 at para 83

taxed property to pay taxes and either deduct them from the rent or recover them from the owner.

It stands to reason that persons paying land taxes is not necessarily an indication that they are the owners of that property."

[29] I fully endorse the comments of the learned judge that the payment of property taxes for land is not conclusive proof of ownership of the land.

[30] I therefore find that the Claimant cannot rely on a claim for adverse possession of the said lot and in any event her evidence has failed to support such a claim. The Claimant having failed to prove ownership of the said lot, I find that the Defendants have not trespassed on the said lot.

[31] In the January 2007 order, the Court gave directions for the payment of the costs of the survey which was done by Mr. Massell. The proviso in that order was *"if the survey reveals any encroachment then the encroaching party shall reimburse the other party their portion of the cost of the said survey."* Mr. Massell's invoice dated 18th November 2011 was for the sum of $4,100.00 and he was only paid the sum of $3,800.00 which was paid by the Claimants. There was no evidence before the Court that the Defendants paid any of his fee. Mr. Massell also attended Court on 4th November 2013 to give evidence and he indicated that he had attended on the 23rd October 2013 when the matter was not called. There was no reason presented why Mr Massell attended Court on 23rd October, 2013. The matter was scheduled for 30th October, 2013 and not the 23rd October, 2013 .

[32] I therefore order the Claimant to pay the outstanding sum of Mr. Massell's fee in the sum of $300.00 and his fee for his attendance in Court on 4th November , 2013, which I have assessed in the sum of $500.00.

Order

[33] The Claimant's action is dismissed.

[34] The Claimant to pay the Defendants the costs of the action in the sum of $9,500.00.

[35] The injunction granted on 20th December 2006 is discharged.

[36] The Claimant to pay the outstanding sum of Mr. Massell's fee in the sum of $300.00 and his fee for his attendance in Court on 4th November, 2013, which I have assessed in the sum of $500.00.

[37] Liberty to apply.

Margaret Y. Mohammed

Margaret Y. Mohammed
High Court Judge