

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

IN THE COMMONWEALTH OF DOMINICA
[CIVIL]

SUIT NO. DOMHCV2008/0459

BETWEEN:

ANNE MARIE GARRAWAY
(Attorney for Robert Garraway Administrator of
the estate of Isla Garraway deceased)

Claimant

AND

ERROL ALEXANDER

Defendant

Appearances:

Mrs. Colleen T Felix- Grant Counsel for the Claimant
Dr. William E. Riviere Counsel for the Defendant

2013: October 17th and 18th
2014: April 11th

JUDGMENT

- [1] **Stephenson J:** This case relates to the ownership and right to possession of a portion of land known as #50 Old Street, Roseau, in the Parish of St George, in the Commonwealth of Dominica ("the property").
- [2] The central issue in the case at bar is whether the disputed property belonged to the Estate of Isla Garraway or whether the defendant has been in undisturbed possession of the land so as to acquire prescriptive rights to same.
- [3] The proceedings were commenced by fixed date claim form dated the 25th November 2008, by the claimant, Anne Marie Garraway as attorney for Robert Garraway, Administrator of the estate of Isla Garraway deceased of 211 Sandbridge Circle, Worthington, Ohio, United States of America against the defendant Errol Alexander for the following relief:
- (a) A declaration that the Claimant is the lawful owner of the property known as #50 Old Street, Roseau, in the Parish of St. George, in the Commonwealth of Dominica ("the said property");
 - (b) An order compelling the Defendant to give up possession of the said property and/or restraining him from continuing in possession thereof;

- (c) Damages for trespass;
- (d) Interest at the statutory rate;
- (e) Costs;
- (f) Further and/or other relief.

- [4] The claimant bases her claim to the property on the ownership in fee simple of one Isla Garraway (Deceased) who died on the 2nd June 1934.
- [5] That the defendant rented the said property in 2000 and paid rent for same up until 3rd September 2002. That the defendant was asked to vacate the property since 2001 and he failed and or refused so to do.
- [6] That the defendant has remained in wrongful occupation of the property in spite of attempts by the claimant to have him give up possession thereof.
- [7] That as a result of the defendant's continued occupation of the property the claimant who is acting as the lawful attorney for the Robert Garraway the lawful administrator and sole surviving heir of the estate of Isla Garraway has been denied access to the property and has continued suffering loss of use to the property.
- [8] In his Defence and Counterclaim dated 4th March 2009, the defendant denies the claimant's ownership and denies that he entered the property as a tenant as claimed at any time or at all. The defendant stated that after Hurricane David the property was badly damaged and abandoned by the then tenants who he knew and thought to be the owners and in 1982 he took possession of the abandoned and badly damaged property of his own accord. That he did repairs to the building bringing it into a habitable condition.
- [9] The defendant contends that he remained in continuous, open and undisturbed occupation of the property up until 27th November 2008, when these proceedings were commenced.
- [10] The defendant also contends the following:
- i. That he was approached by a member of the claimant's family when he commenced repairs to the building saying that the premises belonged to her family.

- ii. That he was later contacted by the Roseau City Council regarding arrears of municipal rates and taxes which he brought this to the attention of said family member Patricia Inglis who disowned the premises and the arrears were not paid by any member of the family.
- iii. That he paid the arrears of the said rates and taxes.
- iv. That the records at the Roseau Town Council show the owner of the property as recorded since 1961 to be The Estate of Jane Lawrence.

[11] The defendant admits in his defence to making a single rental payment in September 2002 and that in doing so he was of the view that he was making the said payment to the estate of Jane Lawrence.

[12] By way of Counterclaim the defendant is claiming as follows:

- (a) A declaration that Isla Garraway, deceased was not, and her heirs are not the lawful owners of the property known as 50 Old Street, Roseau, Commonwealth of Dominica.
- (b) A declaration that Jane Lawrence deceased was the lawful owner of the said property of the said property
- (c) A declaration that he the defendant is the lawful owner thereof by virtue of the said land being partly in his sole and undisturbed possession and being partly in the sole and undisturbed possession of the aforesaid Estate of Jane Lawrence, continuously for a period of more than 30 years.
- (d) Costs
- (e) Further and other relief

[13] In her Reply and Defence to Counterclaim the claimant joins issue with the defendant on his defence and contends that even if the defendant went into possession on his own accord he acknowledged the claimant's ownership of the property when he paid rent to diverse persons who were the claimant's agents.

[14] The claimant also contends that when the defendant made the payment to Mr. Gene Pestaina he knew that it was to the claimant and not to the estate of Jane Lawrence as claimed.

[15] The claimant contends that the property was not owned by the Estate of Jane Lawrence as claimed by the defendant and that they the claimants have exercised clear acts of ownership of the property from the death of Isla Garraway to the present and asserts that the defendant in his defence has not

disclosed any reasonable ground for defending the claim and denies that the defendant is entitled to the relief as sought in the Counterclaim or to any other relief.

[16] The matter proceeded to trial with *viva voce* evidence being presented by both sides. At the end of the trial each side was ordered to file their written closing submissions with authorities, which was done on the 13th and 16th December 2013 respectively.

Issue:

[17] Whether the property is owned by the claimant herein or whether the defendant has acquired ownership of the said property by way of adverse possession and should be declared owner of the said property.

[18] This is essentially a question of fact to be ascertained from the evidence adduced at the trial and a consideration of the circumstances which was disclosed by the evidence.

Claimant's case

[19] The claimant adduced evidence that she is the duly appointed administratrix of the estate of Robert Garraway the husband of Isla Garraway deceased. Three witnesses were called on behalf of the claimant.

[20] The claimant claims that the property was purchased by Isla Garraway from one Jane Lawrence and that upon and since her death the family has continued in possession and ownership thereof.

[21] That over the years Robert Anthony and Francis Garraway sons of Isla Garraway lived on the said property with one Harrison Peter who was then a tenant.

[22] That through various agents rent was collected from the tenants who occupied the property including from the defendant.

[23] That the defendant was a tenant of the property having moved into the property in or around 1982 for a temporary period whilst his matrimonial home was being built, and in fact he moved to the said matrimonial home upon its completion with his family. That after he and his family moved to their matrimonial (family) home he the defendant continued to occupy the rear of the premises using same as a tyre repair shop which is considered a separate part of the property to the house.

[24] The claimant contends that defendant who also did woodwork carried out his trade at the property and then on the ground floor of the matrimonial home. It is noted that the matrimonial home was up the road from the property.

[25] It is also the claimant's case that the defendant took up residence once again in the property after his marriage broke down in about the year 2000.

[26] That during the period 2001 to 2007 there were a number of letters sent to the defendant by Peter Garraway one of the heirs of the estate of Isla Garraway about the terms of the defendant's occupation of the property and in an attempt to have him regularize same. Those letters also referred to discussions which seemingly took place between the defendant and Mr. Peter Garraway.

[27] In 2002 pursuant to a letter of demand made to him, the defendant paid the sum of EC\$1,400 to Mr. Gene Pestaina, Attorney at Law then acting for and on behalf of the claimant as part payment of rent due and owing to the claimant for his occupation of the property at #50 Old Street. It is noted that the receipt issued by Mr. Pestaina was exhibited and not denied by the defendant.

[28] The claimant has not been in uninterrupted open continuous possession of the property. That the defendant has acknowledged the claimant as owner of the property.

Defendant's case

[29] The defendant is the occupant of the property since 1981 after the passage of Hurricane David. The defendant contends that he knew the property to be occupied by the Yankees and after the passage of the Hurricane it was damaged and they left Dominica and went to Antigua.

[30] That when he took up residence he did so without the permission of anyone. That he needed a place to live with his partner (subsequently his wife) and son and that they had no place to go. That he repaired the place and moved in with his family;

[31] I have distilled the following points from the defendant's evidence:

- i. That when he commenced repairs he was approached by Patricia Inglis who informed him that the property belonged to the Garraways and he ignored her and continued his repairs;
- ii. That when he moved in he did not move in with the intention of owning the property.
- iii. That if the owners (The Yankees) were to return and want the place he would have to move out.

- iv. That if the Yankees returned in 1983 he would have asked them back for the money that he spent and if they did not he would have lost it;
- v. That he paid \$1,400.00 rent to Mr. Pestaina and Mr. Garraway because he was of the view that if they had title for the property and if he did not pay them he would be evicted.
- vi. That Peter Garraway wrote to him before he made the payment to Mr. Pestaina.
- vii. That Peter's wife also came and told him on numerous occasions to get out of the property.
- viii. That when he was approached by the City Council about the outstanding rates and taxes he referred them to Mrs. Inglis who he thought was the representative of the owner.
- ix. That when she refused to make the payment he went to pay the rates and taxes and when he first went so to do
- x. he discovered that it was Estate of Jane Lawrence and he made payments for the on behalf of the said estate. .

[32] I have distilled the following points from the claimant's evidence:

- a) That the property was acquired by Isla Garraway from Jane Lawrence prior to her death and she and her heirs at all material times were the owners of the property.
- b) That the children of Isla Garraway occupied the property after their mother's death.
- c) That the property was rented out at diverse times and rent was collected by named agents of the estate of Isla Garraway.
- d) That the defendant went into occupation as a tenant and paid rent to Patricia Garraway Inglis whilst she was working at the Banque Francaise Commerciale.
- e) That the defendant rented the property as a tyre repair shop and the adjacent dwelling house as a marital home whilst his own home was being constructed.
- f) That after the construction of his matrimonial home was completed the defendant and his family moved to the new home. That he lived upstairs and continued doing his wood work to the bottom of the property. That thereafter he continued to occupy the back of the premises as a tenant for the purposes of the tyre repair shop.
- g) That the defendant encountered marital problems and moved back in the property by himself in 2000.
- h) That after he moved back in he was constantly contacted by the claimant's representatives about his occupation and in 2002 he was written to and rent was demanded of him and in

response he paid \$1400.00 to Mr. Gene Pestaina as attorney at law for the claimant that money representing part payment of the rent for the time he was living in the house for the period commencing 2000.

- i) That at all material times the defendant was aware that the claimant claimed to be owner of the property and had acknowledged same and that he, the defendant, never occupied the building or property as a trespasser.

Legal Submissions:

[33] Learned Counsel for the claimant submitted: That the defendant has put no evidence before the court to contradict the claimant's claim to ownership of the property in respect of the occupation and ownership of #50 Old street and the estate from 1943 after the death of Mrs. Isla Garraway.

[34] That the defendant moved from the premises and returned in 2000. That his occupation in the first instance terminated when he moved to his matrimonial home and started again in 2000.

[35] That the defendant admitted to having paid rent to the estate of Isla Garraway through Gene Pestaina in 2002 for the period which he had occupied.

[36] That the Estate of Isla Garraway has been in possession of the said property since 1965 and has not been dispossessed by anyone including the defendant.

[37] That the evidence amounts wholly to that of a tenancy and nothing more. That the claimant falls within the definition of landlord as provided for by the Tenancies and Rent Control Act ¹ which defines Landlord to include

- “... (a) *the owner of any premises*
(b) *the person deriving title under the original landlord;*
(c) *any person having a vested interest in the property who is entitled to receive the rent payable for the letting of any premises beneficially;*
(d) *any person who is entitled to the possession of the premises; or*
(e) *any person bona fide acting for and or on behalf of the landlord in managing the premises and collecting rental therefore ...”²*

¹ Chapter 54:72

² It is noted that reference to the Tenancies & Rent Control act was made only for purposes of assisting with the definition of the term landlord and no more.

[38] Further, that the defendant falls within the definition of tenant to wit –

“... the one who is in possession of the property through a right of occupation given to him by the landlord and pays the rent to the landlord or the person acting on behalf of the landlord in exchange for the occupation”

[39] That the back portion of the property was used as a tire repair shop that was rented by the defendant and he used to pay Ms. Inglis rent for same, in fact it is not disputed that the defendant used the back of the premises as a tire repair shop and did so as a tenant.

[40] That in spite of his statements otherwise the defendant always knew that the property belonged to the estate of Isla Garraway and that when he paid rent to Gene Pestaina it was because he knew that he was a tenant of Isla Garraway's estate.

[41] As it regards to whether or not the claimant is barred to bring the claim as is contended by the defendant, learned counsel for the Claimant submitted that the defendant has failed to show that he had complete and exclusive possession and control of the property for the period of 12 years as is required by the law³ or to provide evidence amounting to such.

[42] That the defendant has failed to satisfy the requirements of exclusive possession with an intention to own. Learned Counsel made reference to the case of **Pollard –v- Dick**⁴ and relied on the Court of Appeal's finding as to what amounts to dispossession of the known owner and what amounts to the relevant *animus possedendi* and urged that the reasoning in that case be followed.

[43] Learned Counsel for the claimant Coleen Felix-Grant contended:

- i. The defendant said in his evidence that when he first entered onto the property he thought it belonged to the Yankees and that if they returned that he would have had to vacate and that they would have had to refund him his expenses incurred;
- ii. That he never formed the intention to own the property. That he submitted a list of the repairs carried out on the property and that when the City Council contacted him about the outstanding taxes he directed them to Ms. Inglis as the agent of the owners and when he did pay he paid in the name of Jane Lawrence.

[42] That the defendant's actions were not that of one who intended to own the property.

³ Section 2 of the Real Property Limitation Act Chapter 54:07 of the Revised Laws of Dominica

⁴ Op cit

[43] Learned Counsel's submission was that the claimant has established a longer and better title than the defendant. That the defendant's occupation of the property commenced on a contractual basis and that he paid rent. That since the early 1990's Peter Garraway came to the property to discuss his occupation and that his occupation was disturbed by Peter Garraway and his wife in the early 90's so even if in the event the court is minded to consider that the defendant entered the property not on contract as alleged by the claimant he never acquired 12 years peaceable open occupation as he would have acquired that in 1994 and by his own admission he was disturbed since in the early 1990's.

[44] That the defendant's state of mind is expressed through his actions in that he:

- a. Directed the City Council to Miss Inglis as representing the owners
- b. He paid rent to Gene Pestaina out of fear which was stemmed from his knowledge that he was a tenant of the Garraways and that they had the power to evict him.

[45] Learned Counsel for the defendant Dr. W. Riviere submitted: The claimant has failed to establish her burden of proving her case on a balance of probabilities.

[46] That the claimant has failed to put forward evidence on which the court might reasonably hold that she is the lawful owner whether by paper title or in possession or howsoever of the property. That the defendant trespassed on the land has not been established.

[47] That the claimant has failed to establish that the defendant was party to a tenancy arrangement at any material time or at all.

[48] That the defendant between the years 1982 to 1994 had continuous and exclusive physical possession and control of the property for which he paid rent to no one .

[49] That from the time of his occupation of the property that he had an intention to possess same to the exclusion of the whole world including the lawful owner which he maintained beyond 1994.

[50] That the defendant's part payment is not compromised by his retroactive part payment of the arrears of rent in 2002 as it was 8 years outside of the limitation period.

[51] That the defendant holds possessory title of the property by adverse possession pursuant to section 2 of the **Real Property Limitation Act**⁵ and section 33 of the **Title by Registration Act**⁶.

⁵ Op cit

⁶ Chapter 56:60 of the Laws of Dominica

Courts considerations:

[52] There is no doubt that the defendant went into occupation of the property in 1981 sometime after the passage of Hurricane David with his partner and infant child. The question to be determined is in what capacity was that occupation?

[53] I accept the claimant's contention and find as a matter of fact that he did so as a tenant. Further the claimant stated that the defendant entered the property for a period of six months whilst he built his matrimonial home which is within the same vicinity of the property.⁷ I find it passing strange that the defendant moved to the matrimonial home close by after it was completed and that he wants to insist he remained in the property. I find as a matter of fact that he moved not only his family but his workshop.

[54] Adverse possession is a matter of fact. In order to amount to adverse possession **there must be clear evidence** that the squatter is not merely a persistent trespasser but is seeking to dispossess the owner⁸. (emphasis mine)

[55] **Halsbury laws** states:

"...for the claimant's possession of the land to be adverse, so as to start time running against the owner, the factual possession should be sufficiently exclusive and the claimant should have intended to take possession. Where the occupier's possession of the land is by permission of the owner, that possession cannot be adverse..."⁹

[56] Under cross examination the defendant said a number of things which casts doubt on his intention to take possession; specifically he stated that when he entered into possession of the property "he did not move in there with the intention of owning it". Mr. Alexander also said that if the Yankees came back he would have had to give up the property ... as he in the first instance felt that the property was owned by the Yankees.

[57] He also said should the Yankees have returned earlier than later he would have asked back for the money that he expended on the property and if they returned after a while he would have considered having lived out his money.

⁷ The disputed property is located at #50 Old Street and the matrimonial home was located at #54B Old Street

⁸ Powell –v- McFarlane(1977) 36 P & C 452

⁹ Volume 28 Fourth edition paragraph 977

[58] So clearly from the very evidence of the defendant one can see there was no intention on his part when he went into occupation to own the property or to dispossess the owner. I find that I must agree with the submissions of learned Counsel for the claimant that the defendant did not exhibit the required *animus possedendi* at the time he entered into possession of the premises.

[59] Based on the evidence before the court, when would the defendant have evidenced the mental element to acquire the property so that time could have started running? The evidence before the court emanating from the defendant himself is that: When the Municipal authority came to him regarding the rates and taxes he did not jump and make a payment, instead he sent them to Miss Inglis who he knew or accepted was the agent of the owner.

[60] This action to my mind belies Mr. Alexander's claim to have the mental element to dispossess she who came and said that the property was owned by the Garraways. He acknowledged their ownership by his actions.

[61] Mr. Alexander said under cross examination that Mr. Peter Garraway started giving him trouble since 1981 that would have been from the time he took up possession of the property. Mr. Alexander also said under cross examination that during the 1990's to 2000 he was always interfered with by Mr. Peter Garraway and Mr. Garraway's first wife as it relates to his occupation of the property.

[62] It is unbelievable that the defendant thought he was making payment to the estate of Isla Garraway when he made the payment of rent to Mr. Pestaina. He said under cross examination that he was constantly troubled by members of the Garraway family about his occupation of the property. He also knew that Mr. Pestaina was representing them and was in fact related to the Garraways in that his (Mr. Pestaina's) wife was a Garraway.

[63] The defendant claims that he paid rates and taxes to the City Council and in doing so he did so on behalf of and for the estate of Jane Lawrence and this is supportive of the fact that he did not recognise the Garraways as the owner of the property. That he did so is of no moment in the case at bar, neither does it assist the defendant in his attempt to show none recognition of the claimant as owner.

[64] I refer to and apply the case of **Bazill et anor –v- Wharton**¹⁰. In this case the Court of Appeal of Guyana applied the case of **Richardson –v- Lawrence**¹¹ where it was held that acceptance of a receipt from the local authority in the name of another person as owner for the payment of rates in respect of a parcel of land does not in itself bar time from running in favour of the payer in possession of land in claims based on adverse possession.

[65] In that case the Court of Appeal of Guyana examined the regime of the issuing of receipts for the payments of rates and taxes made in the name of the “owner” and the court concluded that the acceptance of a receipt from a local authority in the name of another does not bar time from running in favour of the person making the payment against the person named in the receipt.

[66] Applying that to the case at bar, that the defendant made payments to the City Council and received receipts in the name of Jane Lawrence cannot (emphasis mine) be construed and I certainly will not construe it as an acknowledgement that the person named in the receipt is the owner of the property and will not aid him in his denial that he knew the Garraways were the owners of the property.

[67] I shall assume that the regime of issuing receipts for the payment of rates and taxes are similar if not the same as that which exists in Guyana and Trinidad. I find the words of Wooding CJ as quoted by George C to be helpful on this point. Wooding CJ said :

‘...They are not payable necessarily by an owner or even by an occupier; anybody who chooses to pay officiously or otherwise may do so and on its acceptance by the authority entitled to the rates, whether the Government or a local authority, a receipt is given for the payment in the name of the person who is recorded in the rate-book as owner of the land. But the fact that somebody’s name appears as owner in the rate-book does not in any sense mean that that person is the owner. The person whose name so appears may have died several years before or may have been dispossessed, or may have alienated the land without the person who

¹⁰ (1992) 47 WIR 238

¹¹ (1966) 10 WIR 234 (Trinidad Court of Appeal)

became its alienee having made the prescribed statutory return so as to have his name substituted as owner in the rate-book.'

Conclusion:

[68] I saw the witnesses on both sides and I preferred the testimony of the claimant and her witnesses. I am satisfied on the balance of probabilities that the claimant has shown that she (the estate of Isla Garraway) was in possession of the land, there was also additional evidence adduced by the claimant which solidified my belief that the Estate of Isla Garraway was always in possession of the property.

[69] When subjected to close scrutiny I found the defendant's evidence to be less than believable. I find that his evidence was unconvincing and I am not persuaded that he went into possession of the property in the manner or way as he claimed he did. I find as a matter of fact that he never had any intention of owning the property when he first went to the property after the passage of Hurricane David and that he was in fact a tenant and that he paid Mrs. Inglis rent.

[70] Applying the law to the facts as I have found them, the defendant, in this matter has not established on the balance of probabilities as he is required to do, that his possession of the property was adverse to the owners or the persons legally entitled to the said land. He has failed to show that there was any *animus possidendi* on his part. He did not possess *nec clam, nec vi, nec precario*.

[71] Further, I am satisfied after giving due consideration to and from the analysis of the evidence presented and the law submitted. I find that defendant has failed in his claim and I therefore dismiss the Counterclaim and enter judgment for the claimant in the following terms:

1. I declare that the claimant is the lawful owner of the property known as #50 Old Street, Roseau, in the Parish of St George, in the Commonwealth of Dominica;
2. That the defendant is to give up possession of the said property within 6 months of today's date and is restrained from entering and remaining in possession of the property thereafter.
3. Costs to the claimant to be the prescribed costs.

[72] The claimant has asked for an award of damages for trespass to the land. The claimant has led no evidence in that regard and also I find that the defendant occupied the property not as a trespasser but as a tenant and over the years he has made repairs and maintained the building to facilitate his living

there and carrying out his business. That he has also made payments of the outstanding rates and taxes for the building. I would therefore consider the defendant's expenditure as a set off to any rent or mesne profits which he would have paid or have had to pay.

[73] I wish to thank Learned Counsel Mrs. Colleen Felix-Grant and Dr. William Riviere for their kind assistance in this case.

M E Birnie Stephenson
High Court Judge