

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

IN THE MATTER OF an application under Article 2103a of the Civil Code Cap 4:01 of the Revised Laws of Saint Lucia, 2001 for a Declaration of title to Immoveable property

AND IN THE MATTER OF Section 4 of the Supreme Court – Prescription by Thirty Years (Declaration of Title) Saint Lucia Rules no. 7 of 1970

CLAIM NO. SLUHCY 2011/0854

TO: THE HIGH COURT OF JUSTICE, SAINT LUCIA

PETITIONER: THE BAGSHAWS OF ST. LUCIA LIMITED

RESPONDENT: PAVLIN LIMITED

Appearances:

Mr. Peter I. Foster, Q.C. with Ms. Diana Thomas for the Petitioner

Mrs. Esther Greene-Ernest with Mrs. Petra Nelson for the Respondent.

2013: September 16,17
October 28

JUDGEMENT

The Application

- [1] **CARTER J.** The application before this court is made pursuant to Article 2103 of the Civil Code of St. Lucia, Cap 4:01 of the Revised Laws of St Lucia and the Supreme Court – Prescription by Thirty Years (Declaration of Title) St Lucia Rules no. 70 of 1970.

- [2] The application is brought by the Bagshaws of St. Lucia Limited (hereinafter referred to as “the Petitioner”) for a declaration of title to 491 square feet of land situated in Marigot in the quarter of Castries (hereinafter referred to as “the disputed area”). Upon the claim being made for title to the disputed area Pavlin Limited (hereinafter referred to as “the Respondent”) entered an appearance in the suit to answer the Petition for a declaration of title.

The Facts giving rise to the Application

- [3] There are a number of facts that are not in dispute in this case and the court will enumerate them here.

(a) In 1970 Guy Walter Boudreau and Mary Theresa Boudreau purchased the property now registered as Parcel 0443B 76. The disputed area is located immediately adjacent to Parcel 0443B 76.

(b) In June 1994, the Boudreaus sold this property, Parcel 0443B 76 to the Petitioner. The disputed area did not form part of the property so transferred.

(c) On the 12th June 1981, Mr. Kenneth Monplaisir acquired title to lands including the disputed area from the Sheriff after a seizure and sale.

(d) In 2000, the disputed area, as part of that parcel so acquired in 1981, was registered in the name of Kenneth Monpaisir by title in Volume 121, No. 131932 as Parcel 0443B 138.

(e) Vandyke Duke acquired title to lands including the disputed area from Kenneth Monplaisir on the 23rd July 2007.

(f) The Respondent acquired legal title to the Land in which the disputed area falls from Vandyke Duke on the 29th day of August 2008.

(g) The Petitioner's application for title to the disputed area was filed on the 11th day of August 2011.

(h) Subsequent to this the Respondent entered an appearance to answer the Petition for a declaration of title.

- [4] The Petitioner claims to have acquired title to the disputed area in 2000 on the expiration of 30 years of effective possession. The Petitioner in the person of its managing director, Mrs. Alice Bagshaw, contends that the Petitioner's possession joined with the exclusive possession of the

disputed area by the Boudreaus from 1970 to support the instant application. The Petitioner takes no issue with the fact that immediately before prescription began to run in the Petitioner's favour, in the year 2000, the property was registered in the name of Kenneth Monplaisir by title in Vol. 121 No. 131932 but insists that the registration of the disputed property by Mr. Kenneth Monplaisir in 2000 did not interrupt her right to make the instant application for title by prescription.

The issues

[5] The Parties agree that the sole issue for the court's determination is:

Has the Petitioner demonstrated sole and undisturbed possession of the disputed area for thirty years sufficient to satisfy this Court that it has thereby acquired prescriptive title to the disputed area?

The Law

[6] Article 2103 A of the Civil Code of St. Lucia Cap 4:01 of the Revised Laws of St Lucia states that:

"title to immovable property, or to any servitude or other right connected therewith, may be acquired by sole and undisturbed possession for thirty years if that possession is established to the satisfaction of the Supreme Court which may issue a declaration of title in regard to the property or right upon application in the manner prescribed by any statute or rules or court."

[7] The Supreme Court – Prescription by Thirty Years (Declaration of title) St. Lucia Rules, No 7 of 1970 states further that:

"An application for a declaration of title to immovable property or to any servitude or other right connected therewith under article 2103A of the Civil Code shall be made by petition to the Court"

[8] The St. Lucia Civil Code at Article 2057 states that:

"For the purposes of prescription, the possession of a person must be continuous and uninterrupted, peaceable, public, unequivocal and as proprietor."

[9] The Civil Code states further at Article 2060 that:

"Acts which are merely facultative or of sufferance cannot be the foundation either of possession or of prescription."

[10] In **Powell v Slade**¹ the court stated thus: "If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")" This was confirmed in the case of **J A Pye (Oxford) Ltd and Others v Graham and Anor**² and followed in **Winston Molyneux v Hugh Smith et al**³. The intention required of the person without paper title to possession is an "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."⁴

[11] In order for it to be demonstrated that the physical ownership was continuous, interrupted, public, peaceful, unequivocal and as proprietor the court has been guided by a contemplation of the acts that constitute a sufficient degree of exclusive physical control over the property in question. In **Powell v Slade**, the court emphasized that such exclusive physical control will depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. "Everything must depend on the particular circumstances but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

Sole Uninterrupted Possession for 30 Years

[12] The Petitioner claims that prescription began to run in its favour from the year 2000 and that the period of possession in support of the instant application, began in 1970 when the Boudreaus first

¹(1977) P&CR 452

²[2003] 1 A.C. 419.

³BVIHC VAP2009/0022

⁴Per Lord Browne-Wilkinson in JA PYE

acquired legal title to the property, now known as Cliff House. The Petitioner claims that their exclusive possession of the disputed area passed to her by virtue of her purchase of the property, now registered as Parcel 0443B 76, from the Boudreaus in 1994 and continued up to the year 2000 and even up to the time of the filing of the instant application.

- [13] The court must examine the evidence presented, in order to be satisfied that the Boudreaus' occupation of the disputed area was "continuous and uninterrupted, peaceable, public, unequivocal and as proprietor" as required by the provisions of Article 2057 during the twenty-four year period 1970 to 1994. The Petitioner must then further establish that the occupation of the disputed area by the Petitioner, during the period 1994 to 2000 was of the same nature and to the same extent pursuant to that said Article. The Petitioner cannot succeed otherwise on this application since its own occupation of the disputed area without that of the Boudreaus can only amount in total to some seventeen years at the time of the filing of this application for title by Prescription, well short of the thirty years required.

Possession from 1970 to 1994

- [14] The court had the benefit of a number of witnesses for the Petitioner in support of this application, their Evidence in Chief having been tendered by way of sworn witness statements. The evidence presented to the court in relation to the possession of the disputed area by the Boudreaus came from Mr. Albert Nicholas, Mr. Moses Jameison, Mr. Richard Fielden and Mr. Robert Boudreau.
- [15] The evidence of Albert Nicholas was that he is a taxi driver who lived in Marigot Bay, and worked for the Boudreaus during the time that they lived at what is now known as Cliff House. Mr. Nicholas stated that he knew the Boudreaus very well during the time that they lived at Cliff House. He also did work for the Petitioner, transporting guests to Cliff House when she bought Cliff House from the Boudreaus.
- [16] Mr. Nicholas recounted for the court, that at the time that he worked for the Boudreaus, the area of Cliff House was like a deserted area, that he remembered that the Boudreaus erected a shed on the disputed area and that this shed was really only a roof on four wooden posts, the area under

the shed being like dirt road. As far as he recalled by the time that the Boudreaus left the property and Mrs. Bagshaw came, the shed was no longer there.

- [17] Mr. Moses Jameson is a retired gardener and resident of Marigot. He recounted that he worked for the Boudreaus and that he had worked on the land, Cliff House, from 1971 up until the Petitioner brought the property sometime in 1994. He recalled that by the time he left the property in 1994, the shed, and there is no dispute that there was only one shed built by the Boudreaus, was already broken down.
- [18] Both witnesses agreed that the shed on the disputed area was used for parking and both witnesses were clear that by the time the Petitioner purchased the property, the shed was already broken down. Their evidence in this regard was supported by that of both Mr. Richard Fielden and Mr. Robert Boudreau.
- [19] Mr. Richard Fielden also appeared on behalf of the Petitioner. Mr. Fielden lived at Cliff House from 1992 -1994. He remembered that there was a shed there at that time, but that it was "not much of a shed, it was broken down and dilapidated." He recalled that Boudreau House, now called Cliff House, was not fenced in at all during that period. He also recalled that the area around Cliff House was very isolated and there was no reason for anyone to come up there. If the presence of the shed was to be conclusive of the Boudreaus exclusive possession as proprietor of the disputed area, this court finds that by 1994 the shed was no longer evident. However the presence of the shed and its use by the Boudreaus is evidence that the court can consider in seeking to come to a conclusion whether the physical possession as required for prescriptive title during this period 1970-1994 has been proved to the court's satisfaction.
- [20] Apart from the evidence of the presence of the shed and its use by the Boudreaus, the Petitioner also relied on evidence of the planting of palm trees by the Boudreaus during this period to support its claim that the Boudreaus had exclusive physical possession of the disputed area.
- [21] The court notes further that the cultivation of land as a garden has been found sufficient in amount to possession, provided that there is clear boundary marking out the extent of the land cultivated as in the case of **Powell v McFarlane** 1977 38 P & CR 452. As the authorities state, even all-round

fencing is not unequivocal if other explanations exist as to why it may well have been placed round the land in question, as, for instance, to protect the ground from incursions of others.⁵ The evidence of the physical possession of the Boudreaus must be measured against these authorities in order to determine whether the evidence that has been presented to the court is sufficient to establish exclusive physical control of the disputed area.

[22] The evidence of Robert Boudreau, the son of the owners of Cliff House during this period, 1970-1994, was also presented and focused on this point. His evidence, taken at its highest on this point, was that the planting of the trees in the disputed area was to prevent soil erosion and to maintain the integrity of the disputed area which they used for parking, as it sat directly over a precipice. Mr. Boudreau recalled for the court that he was a teenager when his parents acquired Cliff House. He recounted that as far as he was aware, the planting of the trees in the disputed area was to prevent soil erosion, something that he and his siblings had learnt from his parents. He agreed that there had been no attempt even then to use it to demarcate the property.

[23] "...When a trespasser seeks to oust the true owner by proving acts of unauthorized and long continued user of the owner's land, he must show that those acts were done with animus possidendi, and must show this unequivocally."⁶ The court must therefore go on to consider whether there is also evidence of the requisite intention to possess, the animus possidendi, on the part of the Boudreaus. On this point the only evidence presented which could attest to the mindset of the Boudreaus, was that of their son, Robert Boudreau.

[24] Robert Boudreau cannot, and this court is satisfied that he did not, attempt to give direct evidence of the mindset of his parents, the legal owners of Cliff House, in relation to the disputed area. The evidence of Mr. Robert Boudreau was that Cliff House was set out in an isolated area and the disputed area was at the end of the road leading to the House. He stated in cross-examination that "no one ever disturbed our possession of it" referring to the disputed area, but equally that his parents had never blocked the entry of anyone to that parking area, now the disputed area or prevented its use by anyone else.

⁵ Per Harman LJ in *George Wimpey & Co Ltd v Sohn* [1976] Ch 487

⁶ Slade J in *Powell v McFarlane*, (1977) 38 P & CR 452

[25] He admitted that after he left Cliff House, which was some two years before the property was sold to the Petitioner, he had no personal knowledge of how the disputed property was used and that at the time of sale of Cliff House, there was a hedge and some board fence around the property. The court understands that this did not include the disputed area.

[26] After having considered all of the evidence relating to the use of the disputed area between 1970 – 1994, the court is not satisfied that the Petitioner has shown evidence sufficient to found Prescription within the meaning of Article 2103A by the Boudreaus. There is no evidence of the exclusive physical control over the disputed area as contemplated by **Powell v Slade**. The evidence of a shed is not conclusive on this point. The description of the shed and its use and the lack of its maintenance on the part of the Boudreaus do not point to the exclusive physical control required on this application.

[27] There is no evidence that the palm trees planted by the Boudreaus were used to demarcate the disputed area but rather that they were planted to protect the integrity of the soil in the disputed area. Further there is no evidence of the intention by the Boudreaus to act as owners of the disputed area, to exclude the world at large from the disputed area. Instead the evidence is that they never blocked the entrance to the area by anyone or sought to exclude anyone from that area. For these reasons the court finds that the Petitioner has not satisfied the requirements of Article 2103A for prescription during the period 1970-1994.

Continued Possession from 1974 to 2000

[28] If the court is not right in its conclusion that the Boudreaus' possession of the disputed area was not sufficient to satisfy the requirement of being "continuous and uninterrupted, peaceable, public, unequivocal and as proprietor" for the period 1970 to 1994, the court will go on to consider whether the Petitioner has satisfied the court of possession within the requirements of the Civil Code in this regard during the period 1994 to 2000.

[29] Mrs. Alice Bagshaw is the Managing Director of the Petitioner, responsible for the day to day running of the company and specifically Cliff House. In her Examination in Chief, she set out the

basis of the claim for Prescription. She agreed with the facts set out at paragraph 3 above. In further support of the application, Mrs. Bagshaw gave evidence that her predecessors in title, Guy and Mary Boudreau, had constructed the shed on the disputed property which they used as a parking garage and storage shed, that this shed was constructed in or about the year 1970 and that the Boudreaus had planted palm trees along the southern boundary of the disputed property to demarcate the property also, in or about the year 1970. She explained that these trees were also planted to protect the steep slope along the Petitioner's property and that the Petitioner continues to tend these trees as the Petitioner had been advised that the trees maintain the integrity of the soil in the property.

[30] Under cross examination, Mrs. Bagshaw testified that when the Petitioner first purchased the property, Cliff House, the disputed area was just a dirt road, a parking area, comprised of grass and dirt and a few timbers left over. There was no shed there by that time. She stated that from the time of the purchase by the Petitioner, that the disputed area was used for periodical parking of vehicles. She stated that she had never cordoned off or blocked the area or kept a chain over it. She admitted that she never made any attempt to exclude anyone else from the area and that she had no personal knowledge of what existed on the disputed area before she purchased the property in 1994. She admitted that she had put a protective mesh and some wire and a private door around Cliff House where it adjoined the disputed area, within the boundary of the property that was purchased by the Petitioner, effectively a boundary between Cliff House and the disputed area.

[31] There are a number of interesting statements made by Mrs. Bagshaw, which this court finds very relevant to the main issue on this application. Mrs. Bagshaw stated in her Evidence in Chief that immediately before Prescription begun to run in favour of the Petitioner, Mr. Kenneth Monplaisir obtained title to the property within which the disputed area falls. Under cross-examination, while she did not deny that she said this, she stated to the court that she did not remember writing that, although it is in her Evidence in Chief, and also stated clearly on the Petition filed herein on the 11th day of August 2011.

- [32] Mrs. Bagshaw admitted being aware after the Petitioner bought Cliff House, that there was some confusion between Mr. Monplaisir and Mr. Vandyke Jude, about who owned what and that the subject of the dispute included parcel 138, of which the disputed area is a part, and that they, Mr. Monplaisir and Mr. Jude, did some surveys in that area. There is no evidence, either from Mrs. Bagshaw herself or from any of the witnesses called in support of the instant application, that Mrs. Bagshaw made any inquiry about the work or plans for the parcel at this stage as one might have expected, if the Petitioner was asserting exclusive physical control over the disputed area.
- [33] Mrs. Bagshaw stated to the court that in 2005, she asked Mr. Vandyke Jude, by this time the registered owner, about purchasing Parcel 138. Her evidence was: "I offered him a cheque which he turned down." Although she stated in cross examination that that she did not consider then that the disputed area was part of parcel 138, it is instructive to the issue at hand that Mrs. Bagshaw admitted that she discussed with Vandyke Jude about him keeping the palm trees in the disputed area to protect the integrity of the property around Cliff House. Again, the court notes that this act was not that of someone asserting exclusive physical control of the disputed area on behalf of the Petitioner, with the intention to exclude the world at large on one's own behalf.
- [34] Mrs. Bagshaw further stated under cross examination that it was only after her attempts to purchase parcel 138 from Mr. Vandyke Jude failed, and the Pavlins showed her their plans in 2009, for the proposed use of the property that she filed this petition. Previous to this, although on her own application the Petitioner would have been able to claim Prescriptive rights to the disputed area as early as the year 2000, it is evident from the evidence presented that there was no thought on the part of Mrs. Bagshaw as to whether the disputed area was the Petitioner's or not. It was used by Mrs. Bagshaw, her guests and everyone else as a parking area. These factors do not support the Petitioner's claim to having possessed the requisite animus possidendi in relation to the disputed area during the period 1994 - 2000.
- [35] With regard to this period of possession, the evidence presented by the Respondent is relevant. Evidence on behalf of the Respondent was given by Mrs. Jamina Pavlin, who recounted having come to St. Lucia and deciding with her husband to purchase property to erect a house in the Marigot area. Mrs. Pavlin recounted visiting St. Lucia on a number of occasions and visiting the property, Parcel 0443B 138, which the Respondent purchased from Mr. Vandyke Jude in 2008.

- [36] In cross examination, Mrs. Pavlin recalled meeting Mrs. Alice Bagshaw at a party in 2009: "I had a conversation with Mrs. Bagshaw at the party and she told me sometimes her guests would park or turn their car around in the disputed area. She asked me to keep the area open because her guests and Norm's guests, used it for parking."
- [37] Mrs. Pavlin was clear in her evidence that: "When I was hearing the conversation I knew exactly where she was speaking about. I knew we were discussing the flat area at the edge of the property because I saw parked cars there and saw Norm's guests there and also Alice's car there."
- [38] The Respondent also called Mr. Vandyke Jude, to give evidence in opposition to the Petition. Mr. Jude, an Attorney-at-law in St. Lucia recalled for the court his purchase of property including the disputed area from Mr. Monplaisir in 2007. He stated to the court that he knew Mrs. Alice Bagshaw well. The court views Mr. Jude's evidence as crucial on this application.
- [39] Mr. Jude in Evidence in Chief, stated that during the period that he was excavating the land in 2008, prior to his sale to the Pavlins, that he spoke to Mrs. Bagshaw to tell her that she could not have guests parking on the disputed area during this time. He stated that she did not have a problem with that and that he was working there during a six to eight week period. When he had completed the excavation, Mrs. Bagshaw asked him if it was then okay for her guests to resume parking in the disputed area.
- [40] Under cross-examination, Mr. Jude recalled that he conducted a survey of the land, as his architect needed a topography of the lot. He stated that Mrs. Bagshaw had indicated her belief that the disputed area was part of the roadway and that this was another reason to conduct the survey.
- [41] He recalled that at one point before he excavated the property, that Mrs. Bagshaw had put a chain across the entrance to the disputed area. He stated that he called her to come and take the chain off right away and she came and took it off. The court accepts the evidence of Mr. Jude on this point. This evidence points to the mindset as well as the extent of the possession exerted over the disputed area by the Petitioner even after the Petitioner would have been entitled, on the Petitioner's submissions, to prescriptive rights over the disputed area.

[42] This court is of the opinion that the totality of the evidence leads to the inescapable conclusion that the Petitioner, in the person of its Managing Director, Mrs. Bagshaw, believed that the disputed area was part of the road leading to Cliff House. There is no dispute that Mrs. Bagshaw and her guests and others used the disputed area for parking and as a turnaround point. Her actions subsequent to Mr. Monplaisir acquiring title and when Mr. Vandyke Jude began to excavate parts of Parcel 138, are not those of a person who believed that the Petitioner had possessory rights to the property. The Petitioner after having sight of Mr. Vandyke Jude's survey and commissioning her own, became aware that the disputed area was not part of the road and this has led to this petition being presented to the court.

[43] The court having considered all of the evidence presented upon this application, both on behalf of the Petitioner and the Respondent during the period 1994 – 2000, finds that the Petitioner has not satisfied the requirements necessary to acquire prescriptive rights over the disputed area during the period 1994-2000 or at all. The evidence presented by the Petitioner does not establish exclusive physical possession nor the mens rea, the animus possidendi, necessary to succeed upon this application during the entire period of 1970 to 2000.

Joinder of Possession

[44] In relation to the factual possession, the instant application calls for the court to make an assessment of two time periods in arriving at the required thirty-year requirement. The Petitioner relies on the case of **McDonald v Lambe** in support of this proposition. In **McDonald**, although the possessor of the property was not the owner of the title, it was found that he could transfer his possessory rights to that of his successor who continued his possession. However, it was not the mere fact that one possession had succeeded the other that constituted a sufficient joinder of the possession.

[45] For this reason, the Respondent takes issue with the proposition in so far as it can support the facts of the instant case and instead submitted to the court, that there was no contract or sale creating an obligation of delivery or of the transfer of the rights **to the disputed area** to satisfy the continuation of possession, sufficient to establish the Petitioner as a successor by particular title as

contemplated by **McDonald**. This court is not convinced that the Petitioner can, without showing the obligation of delivery or a transfer of rights to the disputed area, claim a transfer of any possessory rights to the disputed area at the time of its acquisition. However, for the reasons outlined above in relation to this application, the court is not called upon to make a determination on this issue, in this case.

Interruption of Possession

[46] In the case of **National Insurance Board v Christopher Matthew Alsace** SLU, Suit no. 257 of 1999, Saunders J. emphasized that:

“In assessing a claim made by prescription a court focuses not only on the acts and paper intention of the person claiming by prescription but also on the acts and attitude of the title owner. The acts and attitude of the latter can serve to rebut or help to confirm the claim that the person prescribing has enjoyed possession that is continuous and uninterrupted, peaceable, public, unequivocal and as proprietor. If there is evidence that the documentary owner has discontinued possession or abandoned the land, well that is one thing. But if during the period of possession claimed by the adverse possessor, the paper title owner has evinced an active assertion of title by, for example, carrying out surveys of the land in question, then it is difficult to see how the occupation by the adverse possessor can attain the character required by Article 2057.”

[47] In the instant case, there are two acts of the documentary owner that the Respondent submitted, interrupted the Petitioner's possession and assertion of title to the disputed area: the acquisition of title from the sheriff and registration of the property in 2000.

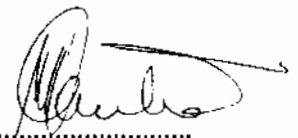
[48] There is no dispute that in 1981, Mr. Kenneth Monplaisir acquired title to lands including the disputed area. The Petitioner's submission is that there was no need for the Boudreaus to register their interest during the Land Registration and Titling Project because they were in the process of acquiring rights by prescription. As the court has found above, there is no evidence that the

Boudreaus ever considered that they were in the process of acquiring rights by Prescription over the disputed area or even evidence from which such an intention can be inferred.

- [49] The Petitioner states in its petition for prescriptive title, that immediately before prescription began to run in its favour in 2000, Mr. Monplaisir registered his title to these lands. The court notes that there is no evidence either that the Petitioner disputed the registration or that the Petitioner sought to assert exclusive possession of the property as owner in any way at this point. However, in light of the court's findings with regard to the claim by the Petitioner to prescriptive title of the disputed area, there is no issue as to whether the acquisition or the subsequent registration interrupted the Petitioner's possession of the property, the disputed area.

Court's Order

- [50] (1) The application for prescriptive title to the disputed area is dismissed.
(2) Costs to the Respondent be assessed if not agreed.



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Marlene I. Carter
High Court Judge