EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2017/0013

BETWEEN:

BERNADINE HARRIGAN
(In her capacity as Administratrix of the Estates of CLARENCE BROWNE, also known as CARLTON BROWNE and AMANDA BROWNE)

Appellant

and

CURTAIN BLUFF LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

On Written Submissions:

Mr. Jason A. Martin for the Appellant
Ms. Kari-Anne Reynolds for the Respondent

2018: January 11.

Interlocutory appeal – Jurisdiction of the High Court to hear possession and trespass to land claims – Abuse of process – Prescription of title – Striking out – Stay of proceedings – Section 135 and 146 of the Registered Land Act Cap. 374 Revised Laws of Antigua and Barbuda

The appellant, Bernadine Harrigan is the Administratrix of the estates of her deceased parents Clarence and Amanda Browne. Clarence Browne is the recorded proprietor of parcel 112 and along with Amanda Browne are the proprietors in common of parcel 107. The respondent, Curtain Bluff is a company registered in Antigua and Barbuda under the Companies Act and owner of the hotel Curtain Bluff Hotel.

Curtain Bluff filed applications pursuant to section 135 of the **Registered Land Act** to acquire title to parcels 112 and 107 by prescription. Subsequently, the appellant Ms. Harrigan filed objections to the grant of prescriptive title.

The appellant also instituted legal proceedings in the High Court claiming possession of and trespass to the said lands. In response, a defence was filed by Curtain Bluff alleging that they were in open, peaceful and uninterrupted possession of the lands since around 1980 and that the claim was statute barred by virtue of section 17 of the **Limitation Act**.

The respondent thereafter applied to have the appellant's claim struck out on the ground that it was an abuse of process pursuant to rule 26.3(1)(c) of the **Civil Procedure Rules 2000** ("CPR"). The respondent argued that the appellant's claim was and will have the effect of disrupting the prescription application which was before the Registrar of Lands. The learned judge, in considering the application, concluded that the court did not have jurisdiction and accordingly ordered that the statement of claim be struck out with costs to the respondent.

The appellant appealed on two grounds: Firstly, that the learned judge erred in finding that the court had no jurisdiction to entertain the appellant's claim and secondly, that the learned judge erred in applying relevant legal principles in finding that the appellant's pleadings on their face were clearly and obviously unsustainable or an abuse of process and deserved to be struck out.

Held: allowing the appeal; setting aside the learned judge's order in its entirety; reinstating the appellant's claim for possession and trespass of land; staying the prescription application proceedings before the Registrar of Lands and awarding the appellant costs in the sum of $2,500.00, that:

1. The learned judge erred in principle in finding that the court lacked jurisdiction to entertain the appellant's action for possession and trespass. The **Registered Land Act** does not take away the court's original jurisdiction on matters of possession of or trespass to land but rather expressly reinforces the court's original jurisdiction to try such matters. The claim was therefore properly before the court.

   Section 157 of the **Registered Land Act**, Cap. 374, Revised Laws of Antigua and Barbuda applied; **Attorney General v Vance Chitolie** SLUHCVAP2003/0014 (delivered 10th January 2005, unreported) distinguished.

2. There is no abuse of the court's process in respect of bringing a possessory or trespass claim while applications for prescription of title are before the Registrar of Lands. This course of action is specifically recognized and provided for by the **Registered Land Act** as a method of interrupting possession. The two processes, namely the claim in the High Court and the objection to the grant of title by prescription before the Registrar of Lands, while similar in some underlying factual aspects, are distinct and separate in nature. The relief granted in respect of each is different to that of the other.

   Section 136 of the Registered Land Act, Cap. 374, Revised Laws of Antigua and Barbuda applied.

JUDGMENT

[1] **PEREIRA CJ:** This appeal is brought with leave of the court granted on 31st July 2017, against the decision of the learned judge dated 12th June 2017 and entered on 20th June 2017, striking out the appellants statement of claim for possession and other relief in respect of the real property recorded and registered in the Registry of Lands as Registration Section, Christian Valley, Block 52 1680D, Parcels 112 and 107 (together, "the Lands"). The learned judge struck out the statement of claim on the basis that the "court lacks jurisdiction where alternative dispute resolution machinery is provided for in the Act".

Background

[2] The appellant ("Ms. Harrigan") is the Administratrix of the estates of her deceased parents Clarence Browne[1] and Amanda Browne. Clarence Browne is recorded on the land register as the proprietor of Parcel 112 and Clarence and Amanda Brown as proprietors in common of Parcel 107. The respondent ("Curtain Bluff") is a company registered in Antigua and Barbuda under the Companies Act and the owner of the hotel, Curtain Bluff Hotel which is located in close proximity to the Lands.

[3] Curtain Bluff, on 20th August 2015 and 23rd June 2016, filed applications pursuant to section 135 of the **Registered Land Act**[2] ("the Prescription Applications") for prescriptive title to a portion of Parcel 112 and to Parcel 107 on the basis that it has been in open, peaceable and uninterrupted possession for a period of at least 20 years. Consequently, the appellant, on 1st March, 2016, filed an objection to the grant of prescriptive title.

[4] Ms. Harrigan instituted proceedings in the High Court against Curtain Bluff on 26th August 2016 claiming possession of the Lands on the basis that Curtain Bluff was in prior possession of the Lands by permission of her deceased parents and asserting that Curtain Bluff was a trespasser of the Lands since 4th March 2016

[1] Also known as Carlton Browne.
[2] Cap. 374, Revised Laws of Antigua and Barbuda.

when possession was demanded from Curtain Bluff. Curtain Bluff filed a defence to the claim on 28th October 2016, in which it claimed that it has been in open, peaceful and uninterrupted possession of the Lands since around 1980 and that the claim was thereby barred by virtue of section 17 of the **Limitation Act**.[3] Curtain Bluff further alleged in its defence that the claim was frivolous, vexatious and an abuse of the process of the court in light of its existing Prescription Applications to the Registrar of Lands which, it asserts, is the forum for addressing the matter.

[5] Thereafter, on 25th November 2016, Curtain Bluff applied to the court pursuant to rule 26.3(1)(c) of the **Civil Procedure Rules 2000** ("CPR") and in the alternative CPR Part 24.2(1) to have the claim form and statement of claim struck out as an abuse of process primarily on the basis that Ms. Harrigan by her claim for possession was seeking to obstruct the just disposal of the Prescription Applications, and that the claim was frivolous, vexatious and an abuse of process.

[6] The learned judge having considered the application in making her order, observed that there were applications before the Registrar of Lands for prescription pursuant to section 135 of the **Registered Land Act** and that there was an appeal process at section 146 of the Act. She then concluded on the basis of the decision in **Attorney General v Vance Chitolie**[4] that "the Court lacks jurisdiction where an alternative dispute resolution machinery is provide for in the Act'. She accordingly ordered that the statement of claim be struck out with costs to Curtain Bluff in the sum of $1,500.00.

The Appeal

[7] The appellant in her notice of appeal has put forward two grounds of appeal:

(1) That the learned judge erred in placing reliance on the decision in **Chitolie** and the legal principles therein in finding that the court had no

[3] Limitation Act 1997, Cap. 456, Laws of Antigua and Barbuda.
[4] SLUHCVAP2003/0014 (delivered 10th January 2005, unreported).

jurisdiction to entertain the appellant's claim, as that authority is distinguishable from the instant matter; and

(2) That the learned judge erred in correctly applying relevant legal principles in finding that the appellant's pleadings on the face of it clearly and obviously unsustainable or an abuse of process and therefore deserving of being struck out.

The Issues

[8] First off, I observe that the learned judge in her order dated 12th June 2017 which is the subject of this appeal discloses no finding to the effect that the "pleadings on the face are clearly and obviously unsustainable or and abuse of process deserving to be struck out". Apart from the paragraphs appearing in the preamble to the order, and referred to above, no further written reasons have been provided. It is therefore undesirable to speculate on any other findings or conclusions the learned judge may have made absent a note of reasons provided by the judge, or a transcript of the hearing before her.

[9] I propose therefore to be guided by the observations and conclusion made by the learned judge as appears from the preamble to her order. The appeal therefore raises a single issue for determination, namely, whether the High Court has jurisdiction to hear the claim for possession and trespass in light of the prior Prescription Applications and the objection to the Prescription Applications made by Ms. Harrigan. In that context, I will also consider whether Ms. Harrigan's possessory claim amounts to an abuse of process which was the gravamen of Curtain Bluff's complaint, although, for the reasons earlier expressed it ought not to be treated as a self-standing ground of appeal.

Submissions – The Appellant

[10] The main thrust of the appellant's argument is that the learned judge misapplied the legal principle in **Chitolie** to the circumstances in this case which are distinguishable. According to the appellant, **Chitolie** would only be applicable if the appellant brought a claim for prescription (which she did not), her claim being one

for possession and damages for trespass. In short, she was not seeking prescriptive title to any lands which is the matter to which section 135 of the **Registered Land Act** concerns.

[11] The appellant says that the learned judge appeared to base her order on the language of section 135 of the **Registered Land Act** which creates the right to acquire land by prescription and section 147 of the said Act which provides a method of redress by an appeal to the High Court to challenge any decision made by the Registrar of Lands. He pointed out that the appellant's claim being one for possession and trespass, were not claims which the **Registered Land Act** specifically addresses and thus, the learned judge erred in failing to appreciate the distinction.

[12] Additionally , the appellant contends that an application for prescriptive title does not bar her from bringing a claim to assert her right of ownership because section 136(6)(b) of the **Registered Land Act** expressly permits the institution of legal proceedings by the proprietor of land as a method by which possession is interrupted in relation to prescription. Section 136(6)(b) states:

> "Possession shall be interrupted—
> (a) by physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the possessor thereby loses possession; or
>
> **(b) by the institution of legal proceedings by the proprietor of the land to assert his right thereto;** or
>
> (c) by any acknowledgment made by the person in possession of the land to any person claiming to be the proprietor thereof that such claim is admitted."
> (Emphasis added)

The appellant accordingly contends that the court has jurisdiction to hear the claim, as it is not a claim for prescription and that the initiation of legal proceedings is the appellant's only option for interrupting Curtain Bluff's possession to stop time running in its favour.

The Respondent

[13] Curtain Bluff, on the other hand, argues several points. Firstly, it argues that the striking out of the statement of claim was an exercise of the judge's discretion with which an appellate court will only interfere, on well-established principles, in reliance on the well-known decision of the court in **Dufour and Others v Helenair Corporation Ltd and others**[5] followed in several later decisions of this Court.[6] The principle shortly stated is this:

> "in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court".[7]

[14] Secondly, Curtain Bluff argued that the trial judge never gave any reason for the striking out and based upon the application, which was an application to strike out the claim as an abuse of process, the trial judge therefore found that, the filing of the claim in addition to the proceedings before the Registrar of Lands was an abuse of process. I have already explained above that the learned judge made no such finding and there is very little scope if at all in the absence of additional reasons or a transcript to infer such a conclusion.

[15] Curtain Bluff also submitted that, the High Court is a court of unlimited jurisdiction and has jurisdiction to entertain the claim, which it did and chose to strike it out. Having relied in his application to strike out on CPR Part 26(3)(1)(c), Curtain Bluff contends that the judge entertained the application and exercised the jurisdiction in striking out the claim. Curtain Bluff bolstered its argument by relying on the dicta of Lord Millet in **Strachan v Gleaner Co. Ltd**[8] in which he stated that "whenever a judge makes an order he must be taken implicitly to have decided that he has the

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[5] (1996) 52 WIR 188.
[6] See also SFC Swiss Forfaiting Company Ltd. v Swiss Forfaiting Ltd BVIHCMAP2015/0012 (delivered 4th July 2016, unreported).
[7] See Nilon Ltd and another v Royal Westminster Investments SA and others [2015] UKPC 2.
[8] [2005] 66 WIR 268.

jurisdiction to make it". Curtain Bluff says that the learned trial judge did not use **Chitolie** as a reference for jurisdiction, but rather for the principles of abuse of process. It says therefore, that the learned trial judge was correct in applying **Chitolie** and that the appellant has failed to show that the learned judge erred in the exercise of her discretion.

[16] Curtain Bluff further submits that striking out the claim was in line with the overriding objective of the court and relies on **Myrna Norde v Jacqueline Mannix (As personal representative of Hengry Alford Mannix)**[9] in which the court stated that striking out a claim as an abuse of process is an issue to be determined on evidence and that an abuse of process is where there are two or more proceedings brought in respect of the same subject matter which can amount to harassment of the defendant. In reliance on this principle, Curtain Bluff says that the legislature employed the Land Registrar to settle disputes relating to land acquired by prescription, and that it would be difficult for the High Court to exercise its appellate court function for the purpose of the **Registered Land Act** if it essentially considers the same issues in relation to the same subject matter between the parties. Curtain Bluff contends that the appellant has asserted her right to title and stopping time for possession from running by filing an objection to the grant of prescriptive title at the Land Registry. Additionally, says Curtain Bluff, the appellant has not been denied access to justice by the striking out as any decision made by the Registrar of Lands can be appealed to the High Court.

Discussion
Jurisdiction of the court

[17] An appropriate starting point for the purposes of this discussion is to examine the respective claims of the parties. The appellant, as Administratrix of the estates of the registered proprietors of the Lands has not made a claim for prescriptive title to the Lands. Indeed, her deceased parents are recorded as the proprietors thereof. Rather, she seeks recovery of possession of the Lands on behalf of the registered proprietors. Additionally, she has claimed damages for trespass.

[9] ANUHCVAP2015/0034 (delivered 16th February 2017, unreported).

These are claims which cannot be made under the **Registered Land Act** and the relief claimed cannot be granted by the Registrar of Lands. A close examination of the **Registered Land Act** reveals that it does not create any specific procedure or authority/tribunal to deal with issues regarding possession or trespass. Thus, this is left to the court[10] to adjudicate. This is reinforced by section 136(6) of the **Registered Land Act** which provides as a method and an act interrupting possession, of a person who may otherwise prescribe or is in the process of acquiring prescriptive title, the bringing of an action in the High Court for possession.

[18] On the other hand, Curtain Bluff has claimed a right by prescription, over a period of twenty years to be registered as proprietor of the Lands. This is a statutory right given by the **Registered Land Act** which provides for a person claiming title by prescription to apply to the Registrar of Lands. Conversely, Curtain Bluff cannot bring a claim in the court for prescriptive title. It may use its prescriptive right as a sword only by application to the Registrar of Lands if it satisfies the 20 year prescription period and other requirements as stipulated under the **Registered Land Act**. If sued for recovery of possession, as the appellant has done in this case, then Curtain Bluff may set up its adverse possession over a 12 year period as a shield to defeat the appellant's claim for recovery of possession which is precisely what Curtain Bluff has done in its defence by praying in aid section 17 of the **Limitation Act**. In essence, Curtain Bluff may defeat the appellant's possessory claim as being time barred under the **Limitation Act** but this does not thereby afford Curtain Bluff a right to title to the Lands by prescription without more and certainly not by way of asserting a positive claim for prescriptive title before the court.

[19] Another consideration to which regard must be had is the fact that the relevant periods are different. In order to acquire the right to title by prescription the

[10] Either the High Court or the Magistrate's Court depending on the value – see section 157 Registered Land Act

Registered Land Act stipulates a period of 20 years, whereas the period under the **Limitation Act** for defeating a possessory claim is 12 years.

[20] Additionally, there is nothing in the **Registered Land Act** which equates the filing of an objection to an application for prescriptive title as an act which interrupts an applicant's possession and Curtain Bluff has cited no authority for this proposition. Indeed, the **Registered Land Act** itself expresses in section 136 the various methods by which possession may be interrupted for purposes of prescription and the commencement of an action for possession is expressly stated as one such method. Were an objection to the Registrar of Lands in respect of a prescription application intended to have the effect of interrupting possession, section 136 could have easily so stipulated. I therefore unhesitatingly reject this proposition.

[21] I do not consider that it is properly open to Curtain Bluff to say that the order of the learned judge striking out the claim does not disclose that the order was made on the basis of lack of jurisdiction. The order on its face is pellucid. Whereas the respondent's application was on the basis of abuse of process, the clear wording of the order cannot be ignored. It is quite clear to me that the basis for striking out the statement of claim was on the basis of lack of jurisdiction and not on a finding of abuse of process.

[22] I agree with the appellant that this case is quite distinguishable from **Chitolie.** The main issue dealt with in **Chitolie**, surrounded the jurisdiction of the court and not at all abuse of process. In **Chitolie**, Gordon JA stated that the **Customs (Control and Management) Act**[11] of St Lucia codified the procedure for the determination of disputes concerning the amount of duty demanded. The Act also provided for the appointment of Customs Appeal Commissioners to handle disputes. Gordon JA ruled that the High Court and the Court of Appeal only have appellate jurisdiction as section 139 of the **Customs Act** provides for appeals to the High Court against decisions of the Commissioners and to the Court of Appeal against any decision of the High Court.

[11] Cap.15.05, Revised Laws of St. Lucia.

[23] For the reasons which I have set out above, and as further explained below, the **Registered Land Act** cannot be treated as a codification of a possessory claim. To the contrary, it contemplates the bringing of a possessory claim to the court and not to the Registrar of Lands who, being a creature of statute has no jurisdiction to deal with a claim by a registered proprietor for possession of land.

[24] On the construction of the **Registered Land Act**, it creates a right of acquiring title to land by prescription and appoints the Registrar of Lands as the authority to adjudicate matters in relation to the same. The Act also makes specific provision for redress by appeal to the High Court where one is aggrieved by a decision of the Registrar of Lands. Section 147(1) states:

> "any person aggrieved by a decision of the registrar may within thirty days of the decision give notice to the registrar in prescribed form of his intention to appeal to the court against the decision."

It is important to note however, that the right of appeal thereby given can only relate to a decision which the Registrar of Lands is empowered to make such as a decision on an application for prescription. Since the Registrar is not empowered to make a decision on a claim for possession as no such application may be made under the **Registered Land Act**, then the appeal process thereby contemplated under section 147 does not encompass a possessory claim and has no application in respect of such a claim. For this reason also, the ratio in **Chitolie** is inapplicable to this case and is a powerful consideration leading me to the conclusion that the court clearly did not lack jurisdiction in respect of the appellant's claim because of the existing Prescription Applications.

[25] Of importance is section 157 of the **Registered Land Act** which places the question of the court's jurisdiction to hear the claim herein beyond doubt. It states:

> "Civil suits and proceedings relating to the ownership or **possession of land**, or to a lease or charge registered under this Act or to any interest in any such land, lease or charge, being an interest which is registered or registerable under this Act, or being an interest which is referred to in section 28 **shall be tried by the court**,[12] or where the value or the subject

[12] "Court" means the High Court unless otherwise expressly provide – see section 2 Registered Land Act.

> matter in dispute does not exceed fifteen thousand dollars by a Magistrate's court." (Emphasis added)

Accordingly, to my mind, there can be no doubt that the High Court had jurisdiction to entertain the appellant's action for possession.

[26] Unlike in **Chitolie** where the legislation in question, according to Gordon JA, took away original jurisdiction of the High Court leaving it with only an appellate jurisdiction, the **Registered Land Act** does not take away the court's original jurisdiction on matters of possession of or trespass to land. Rather, it expressly confers and thus reinforces the court's original jurisdiction to try such matters and not the Registrar of Lands. Put shortly, the Registrar of Lands, being a creature of statute, has no jurisdiction to entertain a claim for possession or for damages for trespass.

[27] The claim was therefore properly before the High Court. The trial judge, in my view, wrongly approached the matter as raising an issue of jurisdiction rather than one of abuse of process which was the underlying basis of Curtain Bluff's application. In striking out the statement of claim on that ground, the trial judge erred in principle. Furthermore, since the learned judge dealt with the matter as one of jurisdiction rather than the exercise of a discretion it may be said that she did not exercise her discretion at all although it may be said that having ordered the striking out of the statement of claim she assumed jurisdiction over the claim. This leaves it open for this Court to decide whether the statement of claim ought to be struck out as an abuse of process.

Abuse of process?

[28] Much I what I have already said above in relation to jurisdiction is relevant to a consideration of this question. Suffice it to test the issue in this way: the appellant cannot make a claim for possession to the Registrar of Lands and therefore the Registrar is not empowered to grant her the relief she seeks. Further, assuming the respondent failed on its application for prescription, the appellant still does not by default, thereby recover possession - the relief she seeks. Conversely, the

respondent may not bring an action in the court for title by prescription. This is a statutory right in respect of which he may only apply to the Registrar of Lands.

[29] It may very well be that the underlying facts to be proved in respect of each party's claim may be the same in many respects. There may also be many differences given the differences in time periods under the respective statutes. What cannot be disputed however is that the substantial reliefs claimed are quite different and may be said to be in the obverse vis-a-vis the other. I can see no basis on which the appellant's claim can be said to amount to an abuse of process. Her step in bringing suit is perfectly justifiable in the circumstances and indeed recognized by the **Registered Land Act** as an act which has the effect of interrupting possession.

[30] Accordingly, in addition to the reasons given in relation to the jurisdiction question, it is obvious that there is nothing abusive of the court's process in respect of the bringing of the possessory claim by the appellant. This is a course of action specifically recognized by the **Registered Land Act** as an act which may be taken for the purpose of interrupting possession. Furthermore, the **Registered Land Act** expressly confers upon the court the jurisdiction to try issues relating to possession of land. The notions put forward by Curtain Bluff to the effect that the Registrar is empowered to resolve such issues, and that the appellant, by bringing an action for possession, is thereby seeking to obstruct the just disposal of the Prescription Applications are ill founded and in any event, are unsupported by authority.

[31] Based on the foregoing, I would be prepared to hold that had the learned judge struck out the statement of claim as an abuse of process on the basis of the existing Prescription Applications she would have similarly erred in principle in so doing leading to the setting aside of her order. I would accordingly reinstate the statement of claim[13] and to the extent that it is to be assumed that the claim form was also struck out, I would also reinstate the claim in its entirety.

[13] The judge's order purports to strike out the statement of claim only and not the claim form.

[32] This leaves the question whether the Prescription Applications and the possessory claim ought to be allowed to run in tandem with the attendant risk that each forum may reach findings on facts as to possession which may be inconsistent each with the other - a result which is highly undesirable. To my mind, the court, in the exercise of its case management powers under rule 26.1(2) of the CPR should consider staying one of the processes pending the determination of the other. While staying the first in time may be a convenient rule of thumb, this may not achieve the most suitable result. To my mind, although the possessory claim was filed last in time I am of the opinion that this claim should be proceeded with to trial and determination, given the advanced stage of the pleadings. Further, this forum being one requiring pleadings of specific facts more discreetly places the burden on each party to set out with greater particularity their respective cases to be supplemented by witness statements, disclosure and the like in due course. If it turns out that the respondent succeeds on its limitation defence, no violence is done to his Prescription Applications which engages a different time period. If the appellant succeeds on her claim the respondent no doubt will have to consider its prescriptive claim in light of the court's determination. I would therefore order that the Prescription Applications be stayed pending the hearing and determination of the possessory claim before the court.

Conclusion

[33] For the reasons given, I would allow the appeal and set aside the learned judge's order dated 12th June 2016 in its entirety and award costs on this appeal and in respect of the application below to the appellant fixed in the sum of $2,500.00. Accordingly, I would make the following orders:

(1) The appeal against the order made by the learned judge on 12th June 2016 is allowed.

(2) The order of the learned judge dated 12th June 2016 is hereby set aside and the claim form and statement of claim are hereby reinstated.

(3) The Prescription Applications are stayed pending the hearing and determination of the claim herein.

(4) The respondent shall bear the appellant's costs on this appeal and on the application in the court below fixed in the sum of $2,500.00.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar