[2007] CA (Bda) 4 Civ

IN THE COURT OF APPEAL FOR BERMUDA

CIVIL APPEAL No. 25 of 2005

Between:

RONALD WILSON

Appellant

-and-

RODERIC PEARMAN

Respondent

Before: Hon. Justice Zacca, President
Hon. Justice Evans, J.A.
Hon. Justice Ward, J.A.

Date of Hearing: **12 June 2007**
Date of Judgment: **15 June 2007**

Judgment

Sir Austin Ward J.A.

1. On the 12th June 2007 after hearing the submissions of Counsel for the Appellant we dismissed the appeal with costs. We now give our reasons.

2. By her Judgment dated 12th October 2005 delivered on 27th October 2005 the learned judge ruled that the Plaintiff, the Respondent to the appeal, had acquired possession of the parcel of land known as No. 7 Cooks Hill Road in Sandy's Parish referred to throughout the proceedings as "Lot B" by adverse possession. The Plaintiff made his claim to adverse possession through Dulciebella Bremmer Simmons and Iris Almeria Davis, his predecessors in title.

3. By an Amended Notice of Appeal dated 7th May 2007, the Appellant appealed against the entire decision broadly on the grounds that the evidence of the Plaintiff was insufficient to establish that the Plaintiff had a right to "Lot B" - the disputed property – acquired by virtue of adverse possession of his predecessors in title and also that the conclusion of the Judge to that effect was erroneous in law.

4. At Cooks Hill Road there are three adjacent lots of land Nos. 5, 7 and 9 designated Lots "A" "B" and "C". Lot "A" is the property of Mr. Pearman, the Respondent to this appeal. Lot "A" was purchased by Dulciebella Bremmer Simmons on 29 September 1923 from John Benjamin Zuill. The linear measurements of Lot "A" were 22. 86 metres to the East and to the West 11.33 metres to the North and 5. 38 metres to the South. The total area of the lot was 2030.97 square feet. It was a very small lot indeed and clearly insufficient to stand on its own for housing purposes. It would appear that from the time of the purchase of Lot "A", Dulciebella Simmons took possession of Lots "A" and "B". The evidence is that certainly from 1933 she had the undisputed use of Lot "B" until her death on 7th September 1973 – a period of 40 years.

5. The linear measurements of Lot "B" were 23.9 metres to the East and West, 18.9 metres to the North and 11.3 metres to the South. The total area of the lot was 3,839.86 square feet. It is not surprising therefore, as stated by the witness, Iris Davis, that Lots "A" and "B" which together totaled 5,870.83 square feet were treated as one lot.

6. The linear measurements of Lot "C" were 18.29 metres to the East and West, 25.14 metres to the North and 18.89 metres to the South. The total area was 4,338 square feet.

7. On 21 March 1980 the Appellant purchased Lot "C" which is to the immediate North of Lot "B" and they share a common boundary.

8. By her Will of 10th March 1969 Dulciebella Simmons devised the lands which she possessed at Cooks Hill Road to her cousin Iris Davis. Probate was granted on 18th October 1973. Iris Davis continued to have undisturbed possession of Lots "A" and "B" until the Appellant purchased Lot "C" and began to encroach upon Lot "B".

9. Charles Hansey purchased Lot "C" in 1905 and on 21st March 1980 the Appellant purchased it from the successors in title to Charles Hansey. Iris Davis sold Lots "A" and "B" to Pearman on 29 June 1998.

By his affidavit of 23 December 1999 the Appellant confessed to making a brazen attempt to acquire squatter's rights to Lot "B" from the day he purchased Lot "C". At paragraph 7 of his affidavit he swore:

> *"That from that day I purchased my property, I believed that eventually I would own the disputed property. This was my belief because before I even purchased the property I spoke with Mr. Ruberry about the disputed property and the history behind it. Before the documents of conveyance were drawn on my property, I cleaned and cleared part of the disputed property and from then, until today I have used the land for various reasons."*

Mr. Ruberry was a surveyor.

10. He goes on to say at paragraph 8:-

> *"In or about 1985 Miss Davis got a Court Order to prevent me from using the disputed property."*

He ignored the Court Order and continued to use Lot "B" nonetheless. In paragraph 9 he stated:

> *"I did knock down a wall which Miss. Davis had erected on the disputed property, which I knew was not hers."*

He was convicted for criminal damage.

11. Iris Davis did not surrender the rights she had acquired to Lot "B" when challenged by the Appellant. She erected a boundary wall which he demolished; she reported him to the police and secured a conviction against him. She put up "No Trespassing" signs and she asked him and his children to desist from trespassing. She acted as a lawful owner would have done to protect her property.

12. The actions of the Appellant in trying to take over an adjacent parcel of land so that he could improve the amenities of his own must be deprecated. Such actions gave him no rights at all. He did not dispossess Iris Davis. The learned judge found as a fact that the Appellant did approach Iris Davis and Colin Pearman with a view to purchasing Lot "B" but he could not afford to do so at the time. His explanation of the discussion was rejected. Meanwhile, he was trying to obtain the property by other means.

13. On the 27th October 2005 the learned Judge made an Order restraining the Appellant, his servants or agents from remaining on or interfering with the Respondent's ownership or enjoyment of Lot "B".

14. The law is not in dispute. In matters of this nature it is agreed that the true owner can only be dispossessed if the squatter performs sufficient acts and has a sufficient intention to constitute adverse possession. _Buckingham County Council –v- Moran_ *[1990] 1 Ch. 623 at p. 644.* See also *Bermuda Civil Appeal 1989 No. 13* _Wilkinson –v Mackie_ and *Bermuda Civil Appeal 1998 No.* _23 Lewis et al. –v- Swan._

15. The Appellant through his Counsel has conceded that if Pearman, the Respondent, has acquired title to lot "B" through adverse possession acquired by his predecessors in title, namely Dulciebella Simmons and Iris Davis, then his claim succeeds.

16. The learned Judge found that from 1933 for a period in excess of 20 years Dulciebella Simmons and Iris Davis performed sufficient acts with the requisite intention to constitute adverse possession of Lot "B" in their favour. The rights acquired by them were transferred to Pearman, the Respondent. The two elements required were factual physical possession and the intention to establish adverse possession.

17. The paper title holder to Lot "B" was unknown. It was not knowingly held by Charles Hansey, it was not held by Dulciebella Simmons, the owners of Lots "C" and "A" respectively. But certainly from 1933 Dulciebella Simmons made use of it in conjunction with Lot "A" as if it were one parcel of land. Iris Davis continued with the physical possession of the lot and maintained the intention to use it as an occupying owner might have been expected to deal with it.

18. The learned judge found that from 1933 at least Dulciebella Simmons had exercised acts of ownership and possession, on the disputed land – Lot "B" - by the digging of a tank, the building of a shack for storage, quarrying, the cleaning of the premises and by granting permission for children to play. These acts were done without obtaining the consent of anyone and demonstrated that Dulciebella Simmons was treating the land as if it were her own.

19. The declarations of John Henry Butterfield, a former husband of Constance Hansey, a granddaughter of Charles Hansey dated 22 February 1985 and of Gladys Ina Melvina Pitt, another granddaughter of Charles Hansey dated 12

March 1985, both of whom resided on Lot “C” testify to acts of possession and control, exercised by Dulciebella Simmons over Lot “B” at the material time.

20. According to Iris Davis, Dulciebella Simmons gave permission to the Hanseys to dig a pit within 10 feet of the boundary between lots “C” and “B” when the Hanseys were installing a modern bathroom. Such permission would not have been necessary if Dulciebella Simmons had not been the acknowledged occupier.

21. It has been argued on behalf of the Appellant that the acts of Dulciebella Simmons in exercising ownership over Lot “B” were not of sufficient intensity or over a sufficiently long period. We do not agree. In relation to the quarrying, it is the fact of the quarrying, the use of the land for the purpose of extracting stone as only one with a claim of ownership could do, and not its duration, that is important. A credible reason was advanced for the cessation of the quarrying operation, namely the presence of the sandy soil.

22. It has also been argued that the location of the shed which Dulciebella Simmons caused to be erected was not shown to be exclusively on Lot “B”. It may have been on Lot “A” or on Lot “B”. If it had been placed on Lot “A” that would not assist the Claimant in respect of Lot “B”. The Respondent, Pearman, recollected that there were two posts on Lot “A” and two posts on Lot “B”. Iris Davis remembered the location to be between Lots “A” and “B” but mostly on Lot “B”. When one looks at how the lots are laid out and bearing in mind the very narrow width at the southern end of Lot “A”, it is not surprising to find that any structure on Lots “A” and “B” would in all probability be placed on some part of Lot “B”.

23. The fact that Dulciebella Simmons did not reside on Lot “A” or Lot “B” whereas the Appellant resided on Lot “C” is of no importance. It is not necessary to reside on a piece of land in order to exclude the world at large. Dulciebella Simmons resided not far away and was seen on the disputed land on many occasions by many witnesses. According to the evidence of Iris Davis, Dulciebella Simmons made sure that the land was kept in reasonably clean condition.

24. Counsel for the Appellant submitted that the learned Judge failed to take into account or ignored evidence that was relevant to the Appellant’s case and drew conclusions which were unsupportable on the evidence presented at the trial. We do not agree that in this case the learned Judge should be

reversed on questions of fact. She went through the evidence in great detail, noted discrepancies and made her findings of fact in a balanced and judicious manner. Clearly more often than not she did not believe the Appellant whose credibility was questionable and who, out of his own mouth, created the impression that he would say whatever would serve his ends. As he himself stated he would swear anything to get out of the Court and go home and do the same thing again. The Appellant demonstrated a cynical disregard for the judicial process. That by itself was not enough for the Respondent to prove his case, but was a relevant factor to be taken into account by the Judge in assessing conflicting evidence.

25. The affidavit evidence of Eugene Hansey was not tested by cross-examination and where there was conflict with the viva voce testimony of the Respondent’s witnesses, the learned Judge quite properly preferred the evidence on behalf of the Respondent.

26. The Appellant complained of the delay in the completion of the trial. His counsel submitted that the trial took three years. The writ was filed in July 1999. The trial began in October 2002 and soon thereafter in succession Counsel on both sides and the Judge became seriously ill. The trial resumed 17 November 2004 and concluded with submissions in August 2005. The Judgment was given in October 2005. Without a doubt, in August 2005 both sides had an opportunity to review all of the evidence and to refresh the memory of the learned Judge. We do not accept that the delay in any way prevented the learned Judge from rendering a true verdict according to law.

27. The evidence that cows strayed on the land from time to time without being prevented from so doing, did not divest Dulciebella Simmons of such rights as she might have had over the land. Cows are known to stray and the evidence is that they returned to their proper places of abode at the end of the day.

28. We have found therefore that there was an abundance of evidence on behalf of the Respondent which, if accepted, would support his claim. The learned Judge accepted the case presented by the Respondent and entered judgment accordingly. We have found no reason to disturb her findings and have affirmed the judgment and dismissed the appeal with costs.

Zacca P.

Evans J.A.

Ward, J.A.