In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No. 445

BETWEEN:-

ETOILE ELIZABETH BURCH

Plaintiff

-and-

WESTEND PROPERTIES LIMITED

Defendant

JUDGMENT
(In Court)

Date of hearing: 25th and 26th January 2016
Date of judgment: 10th February 2016

Mr Bruce Swan, Mr Bruce Swan, Apex Law Group Ltd, for the Plaintiff
Mr Adam Collieson, Appleby (Bermuda) Limited, for the Defendant

Introduction

1. This is a case about a disputed plot of land known as Lot 11 at 42 Dunscombe Road, Warwick ("Lot 11" or "the Lot"). Both parties claim

paper title to the Lot. In the alternative, the Defendant claims title by way of adverse possession.

Paper title

2. The conveyancing history of Lot 11, insofar as it is possible to reconstruct it, is as follows. The Plaintiff's father, Lemuel Norman Tucker ("Mr LN Tucker")[1], and his wife, owned a tract of land in Warwick Parish which was divided into lots. On 22nd February 1939 they conveyed a number of these lots to their children. One such conveyance was Lot 11 to the Plaintiff, who was then aged 18. The deeds of conveyance are lost, but each conveyance was recorded in a document headed "*Heads of Voluntary Conveyance*" which was registered at the Registry General on 7th March 1939. There was a separate Heads of Voluntary Conveyance for each conveyance. I accept that these documents are reliable evidence that the conveyances to which they refer in fact took place.

3. The Plaintiff gave evidence that she did not learn that Lot 11 had been conveyed to her until about five years ago, and then only through her son, David Burch ("Mr Burch"). Mr Burch gave evidence that he learned about the conveyance following a discussion at a family funeral. When cross-examined the Plaintiff accepted that it was peculiar that prior to that no-one had ever told her about the grant. She conjectured that it was because she had moved to many different places with her husband and had often been quite ill.

4. Mr LN Tucker died on 26th October 1945. By a will dated 7th February 1945 he bequeathed the rest of his land in Warwick. The fact that he did not purport to dispose of Lot 11 is cogent evidence that he had already done so and therefore corroborates the Heads of Voluntary Conveyance in relation to the Lot. Further corroboration is provided by a plan annexed to his will which shows both the land in Warwick of which he was disposing in the will

[1] In using the phrase "*Lemuel Norman Tucker and [his]wife*" I am adopting the terminology used in the Heads of Voluntary Conveyance.

and the land which he had disposed of previously. Lot 11 is shown on the plan marked in the name of the Plaintiff. The Plaintiff's sister Christiana Eunice Ophelia Tyrrell ("Mrs Tyrrell") has confirmed in an affidavit sworn in these proceedings that she recognizes the handwriting on the plan as Mr LN Tucker's.

5. The next surviving document is an indenture dated 30th November 1969 ("the 1969 Indenture") whereby Peter and Ida Petty conveyed a tract of land in Warwick now known as the "*Faraway*" Development to the Defendant. It appears that the Defendant is connected to the Fairmont Southampton Princess ("the Fairmont Southampton") and the Fairmont Hamilton Princess Hotels, as the Faraway Development has been used to provide staff accommodation for these hotels since 1972 when the Fairmont Southampton opened.

6. The land conveyed by the 1969 Indenture purportedly included Lot 11. The recitals to the 1969 Indenture traced the Pettys' purported title to Lot 11 to an indenture made in 1953 ("the 1953 Indenture"):

> "*AND WHEREAS by an indenture dated the Thirtieth day of October One thousand nine hundred and fifty-three and made between Mabelle Elizabeth Tucker of the first part Christiana Eunice Ophelia Tyrrell of the second part and the said Peter Chiappa Petty of the third part for the consideration therein mentioned a further portion of the hereditaments and premises described in the Schedule hereto (being an eastern portion of the same) …*"

The 1953 Indenture has unfortunately been lost.

7. The Schedule mentioned in that recital describes the land being conveyed as being bound:

> "*EASTERLY … partly by land of Henry Lemuel Tucker and there measuring One hundred and twenty-one decimal one two feet …*"

8. There was a plan annexed to the 1969 Indenture. This showed that Lot 11 (although it was not described as "Lot 11" on the plan) was bound to the east by land belonging to Henry Lemuel Tucker ("Mr HL Tucker"). The eastern boundary of Lot 11 was the only boundary which the land conveyed by the

indenture shared with Mr HL Tucker's land. It is for this reason that I am satisfied that the reference to land purportedly conveyed in 1953 was a reference to Lot 11.

9. Mabelle Elizabeth Tucker was the Plaintiff's mother and, as noted above, Christiana Eunice Ophelia Tyrrell is one of the Plaintiff's sisters. Mrs Tyrrell is 99 years old and was too infirm to attend court. The Plaintiff gave evidence that Mrs Tyrrell had moved into a rest home shortly before Christmas 2015 as she had started to experience falls. The Plaintiff stated that, since then, Mrs Tyrrell had become confused, but that she had not been confused previously, eg when she swore her affidavit in these proceedings in May 2014.

10. In her affidavit, Mrs Tyrrell stated that her father named her and her paternal uncle, Philip Henry Tucker, as executrix and executor of his will. She stated that the only recollection that she had of discussions with Mr Petty was when he wanted to use or buy a piece of land between Lot 11 and Lot 12 to the East. (By 1969 Lot 12 was part of the land owned by Mr HL Tucker). She stated that the 1953 Indenture was for another piece of land to the East of Lot 2 further down Dunscombe Road. (The plan annexed to Mr LN Tucker's will shows that the there is a lot marked Lot 3 which lies between Lot 2 to the West (ie Lot 3 is to the East of Lot 2) and Lot 11 to the East.)

11. Mrs Tyrrell stated in conclusion that she did not transfer Lot 11 on behalf of the Plaintiff; that as far as she was aware the Plaintiff never transferred Lot 11; that in her role as executrix only the property listed in her father's will was ever reconveyed to another or sold; and that Lot 11 did not form part of her father's estate.

12. When evaluating Mrs Tyrell's evidence I am mindful that I did not have the opportunity to hear and observe her give oral evidence and that she was not cross-examined. Even the best of memories can fade over time and the 1953 Indenture was made more than 60 years ago.

13. My conclusions are as follows. Based on the Heads of Voluntary Conveyance and the corroboration provided by Mr LN Tucker's will, I am

satisfied that in 1939 Lot 11 was conveyed to the Plaintiff. I am also satisfied that the Plaintiff had not parted with title to Lot 11 prior to 1953 and that she did not authorise and was not party to its purported conveyance in that year. It was not until many years later that she became aware of her interest in Lot 11. Any such purported conveyance would therefore not have been effective.

14. As I have not seen the 1953 Indenture I cannot exclude the possibility that the land which it included was not accurately described in the Schedule to the 1969 Indenture, which was prepared by a prominent local law firm, but I think that unlikely. On balance, therefore, I think it probable that the 1953 Indenture did purport to convey Lot 11 to the Pettys. Thus on this point I prefer the evidence of such conveyance provided by the recitals to the 1969 Indenture to the recollection of Mrs Tyrell. How Lot 11 came to be included in the 1953 Indenture is a mystery. It may be that Mrs Tyrell and her mother had intended to convey another lot instead or alternatively that they overlooked the fact that Lot 11 was not included in the residue of Mr LN Tucker's estate. At this remove in time it is impossible to say.

15. As the 1953 Indenture did not convey legal title to Lot 11 to the Pettys, the Pettys could not pass legal title to the Defendant. Thus paper title to Lot 11 remains with the Plaintiff. Ie, according to the documented chain of ownership she holds legal title to the freehold interest in the Lot.

16. Mr Collieson, who appeared for the Defendant, tried to get around this difficulty by relying upon certain provisions in sections 16 and 17 of the Conveyancing Act 1983 ("the 1983 Act") which provide protection to purchasers.

17. Section 16 is headed "*Statutory commencement of title*". It provides in material part:

> "*(1) In the completion of any contract for the sale of land a purchaser shall not require a vendor of land to show title to the land for a longer period than twenty years.*"

18. Section 17 is headed "*Other statutory conditions of sale*". It provides in material part:

> "*(1) A purchaser of any property shall not —*
>
> *(a) require the production, or any abstract or copy, of any deed, will or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument furnished to the purchaser;*
>
> . . . . .
>
> *and he shall assume, unless the contrary appears, that the recitals of any deed, will or other document furnished to the purchaser, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, or otherwise:*".

19. Mr Collieson submitted that by reason of these provisions the Defendant need only establish an unbroken chain of title to Lot 11 for the last 20 years, and that it could therefore establish good root of title by producing the first title document which is as old as or older than that 20 year period, namely the 1969 Indenture.

20. The difficulty with this submission is that section 47, which is headed "*Act only to apply to deeds executed after 2 January 1984*", provides:

> "*This Act shall only apply to deeds, wills, orders and other instruments executed, made or coming into operation after 2 January 1984 unless it is otherwise provided.*"

21. It follows that sections 16 and 17 only apply to purchasers of land purchased after 2nd January 1984. The Defendant does not fall into that category and therefore cannot rely on those sections. There was no similar statutory regime in place prior to the 1983 Act. In relation to England and Wales,

Judith-Anne MacKenzie and Mary Phillips state in their well-known student text Textbook on Land Law Fifteenth Edition[2] 2014 at page 70:

"*Originally at common law the term implied was that one had to prove the devolution of the title for a period of at least 60 years, but this was reduced progressively and the relevant period is now 15 years by virtue of [Law of Property Act 1969] s. 23.*"

22. It is not clear from that extract whether the 60 year requirement was reduced partly by the common law and partly by statute, or alternatively was reduced wholly by statute. If the common law period applicable to Bermuda prior to the 1983 Act was 60 years then the purchasers in 1969 and indeed 1953 would have been required to investigate title going back beyond 1939. Whether any such requirement was reflected in pre-1983 conveyancing practice in Bermuda I cannot say.

Adverse possession

The law

23. As the period of adverse possession upon which the Defendant relies extends back in time beyond the date on which the Limitation Act 1984 ("the 1984 Act") came into force, the Defendant's claim is governed by the Real Property Limitation of Actions Act 1936 ("the 1936 Act"). However, like Kawaley CJ in Rawlins v Russell [2014] Bda LR 65 at para 5, I am unaware of any material difference between the two statutory regimes and none was mentioned by counsel. The provisions of the 1984 Act analogous to the relevant provisions of the 1936 Act are contained in sections 18 and 16(1) and paragraph 8 of the First Schedule. The effect of these provisions is that if another person is in adverse possession of land for 20 years then the owner's title to the land will be extinguished unless, within that period, the owner has brought an action to recover the land.

[2] The extract from the textbook included in the Defendant's bundle of authorities was from the ninth edition, but the relevant text has not changed.

24. The classic exposition of the law on this topic remains the judgment of Slade LJ (as he then was) in Powell v McFarlane (1979) 38 P&CR 452, which was cited with approval by the Court of Appeal in Wilkinson, Outerbridge & Brewer v Mackie [1990] Bda LR 7 at 10 – 11.

"*(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*

(2) 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').

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must 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. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. 'What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants': West Bank Estates Ltd. v. Arthur per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession. ... 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.

(4) The animus possidendi , which is also necessary to constitute possession, was defined by Lindley M.R., in Littledale v. Liverpool College (a case involving an alleged adverse possession) as 'the intention of excluding the owner as well as other people.' ... What is really meant, in my judgment, is that, the animus possidendi involves the 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."

25. In Simmons v Steede and others [2009] Bda LR 5 at para 57 Kawaley J (as he then was) provided a gloss on *animus possidendi*:

"*In terms of proving the intention to possess disputed land, or animus possidendi, the Court requires 'clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world.' However such affirmative evidence of intent is not required where the claimant establishes that he mistakenly but genuinely believed he held paper title to the disputed land (or any material portion thereof).*"

This is because the requisite intention to possess may readily be inferred from the claimant's belief that he holds paper title to the land.

26. Not every act of interference by the claimant with the rights of the owner will be enough to establish factual possession. In Simmons v Steede and others at para 52, Kawaley J cited one such example, upon which the Plaintiff placed heavy reliance:

"*Firstly, Tecbild-v- Chamberlain (1969) 20 P &CR 633, an English Court of Appeal decision, suggests that merely allowing children to play and animals to be tied on vacant land are acts too trivial to dispossess the true owner, even though such owner never used the land at all during the requisite period.*"

27. All I need tease out further from these principles is that the Court looks to the claimant's subjective intentions when considering *animus possidendi* but to the situation viewed objectively when considering factual possession.

The facts

28. I accept that the Defendant had the requisite *animus possidend*i to possess the whole of Lot 11 because it mistakenly believed that it had paper title to the Lot.

29. The Defendant's case on factual possession was that for a number of years it had fenced off the northern part of Lot 11, which was adjacent to the Faraway Development, with a chain link fence. The fenced area comprised roughly one third of Lot 11.

30. The evidence on this point came chiefly from Stephen Dutton, who has since 1979 been the Rehabilitation Manager in the Engineering Department of the Fairmont Southampton. He gave evidence that he was very familiar with Lot 11 as he had overseen the day-to-day maintenance and upkeep of the Faraway Development, including Lot 11, for more than 36 years. He stated that he believed that the Defendant had cleared and fenced off a portion of Lot 11 sometime around 1972. He stated further that during his 36 years as Rehabilitation Manager the Fairmont Southampton's gardeners had trimmed the hedges and mowed the lawn within the fenced area once a month and that the hotel staff who occupied the two apartments bordering Lot 11 used the fenced area as a garden.

31. Mr Dutton produced aerial photographs taken in 1973 and 1981 showing Lot 11 with the fenced area, which appeared (insofar as one could tell from the photographs) to have been maintained as a lawn. Photographs of Lot 11 taken more recently by Mr Burch in 2011 and Mr Dutton in 2012 confirm that as of the date of the photographs the fenced area was still maintained in this way.

32. Mr Dutton gave evidence in chief that the purpose of the fence was partly to keep out stray dogs and trespassers and partly to prevent members of hotel staff from straying over a steep drop which lay a foot or so outside its eastern boundary. When cross-examined, he accepted that the purpose of the fence was primarily for the safety of hotel staff. When determining questions of factual possession, however, I am concerned with what inferences should be drawn from the fact of the fence viewed objectively and not with the subjective intentions of the Defendant and others when putting it up.

33. The Plaintiff gave evidence that at her request Mr Burch had attended to the maintenance of Lot 11. Mr Burch had interpreted this request as her authorisation to remove the chain link fence, which he had done in March 2011. The fence has not been put back, but the fence posts remain in place and I accept Mr Dutton's evidence that the Defendant continues to maintain the area within them.

34. As to the unfenced area, Mr Dutton stated that this had been overgrown ever since he had been at the Fairmont Southampton and that he had never been asked to go on the other side of the fence. His evidence on this point is not disputed. Photographs produced by both parties show the unfenced area covered in cane grass standing three or four feet high.

35. The Plaintiff invites me to conclude that the actions of the Defendant are not sufficient to establish factual possession of any part of Lot 11. Her attorney, Mr Swan, submitted that the maintenance, such as it was, carried out by the Defendant within the fenced area was analogous to merely allowing children to play in the area. In my judgment it was far more than that.

36. Mr Swan elicited from Mr Dutton that elsewhere on the Faraway Development the boundaries were marked by a three foot high wall with a hedge or fencing just inside it: a barrier which was substantially more robust than the chain link fence. He submitted that I should therefore be slow to conclude that the chain link fence had been sufficient to extend the boundary of the Faraway Development into Lot 11. However I do not find the way in which boundaries were demarcated on the rest of the Faraway Development assists me in determining whether the chain link fence was sufficient to establish factual possession of the fenced area.

37. Mr Swan further submitted that the use of the fenced area as a garden to the two adjacent apartments raised an inference that, if and insofar as the chain link fence established physical possession, it established physical possession by the successive occupants of the apartments and not the Defendant. However Mr Dutton's evidence, which was that the Fairmont Southampton and not the occupants of the apartment had maintained the fenced area, did

not support that inference. Moreover, for purposes of establishing adverse possession a tenant or licensee possesses the land on behalf of the landlord. See Sze To Chun Keung v Kung Kwok Wai David [1997] 1 WLR *per* Lord Hoffmann, giving the judgment of the Privy Council, at 1235 E – F. Therefore I did not find Mr Swan's submissions on this point persuasive.

38. Mr Collieson, on the other hand, submitted that the erection of the chain link fence established physical possession of the whole of Lot 11. He submitted that it was not practicable to fence off the entirety of the Lot. However I am not satisfied that this was the case.

39. Further, Mr Collieson relied on evidence from David Summers, a surveyor instructed by the Defendant, that in 1982 the family owning land to the West of Lot 11 had entered into discussions with the Fairmont Southampton to purchase the unfenced area as demonstrating physical possession. However nothing came of those discussions, which in my judgment go to the requisite *animus possidendi* rather than to physical possession.

40. I am satisfied that by fencing off and maintaining part of Lot 11 for more than 20 years the Defendant has established factual possession of the fenced area. However throughout that period and indeed since the 1969 Indenture the Defendant has left the land outside the fence untended and unused. In my judgment the Defendant has not established physical possession of the unfenced area of the Lot. I accept that taking factual possession of part of a piece of land is capable of establishing factual possession of the whole, but that is not what happened in this case.

41. The Defendant has therefore established adverse possession of the fenced but not the unfenced area of Lot 11. But this finding is subject to an important qualification. Conferring paper title to the fenced area upon the Defendant would necessarily involve a subdivision, a term which is defined by section 35A (a) of the Development and Planning Act 1974 ("the 1974 Act") to include "*any conveyance of a part of any lot or block of land by way of a deed or transfer*". Section 35B (1) of the 1974 Act provides that,

subject to certain exceptions which do not apply to Lot 11, "*planning permission is required for any subdivision of land*".

42. I therefore direct that the parties should apply jointly for the grant of planning permission to subdivide Lot 11 in this manner. I shall hear the parties as to the costs of the application, although my provisional view is that they should be borne by the Defendant as the party claiming adverse possession and for whose benefit the application to subdivide will be made. If planning permission is refused I shall hear the parties as to how best to give effect to my findings on adverse possession in what then might well be a novel situation.

Damages

43. The Defendant claims damages in relation to the destruction of the chain link fence. Its other claims for damages were not pursued. The appropriate measure of damages would be the cost of replacing the fence. However it is not clear to me that Mr Burch was acting within the scope of his instructions from the Plaintiff when he removed the fence. The Defendant's claim for damages is therefore dismissed. The facts which I have found do not support the Plaintiff's claim for damages, which is also dismissed.

Summary

44. The Plaintiff holds paper title to Lot 11. However the Defendant's claim for adverse possession succeeds in relation to the fenced but not the unfenced area of the Lot. I therefore direct that the parties make a joint application for planning permission for the subdivision of Lot 11. I shall hear the parties as to the costs of the application although my provisional view is that these should be borne by the Defendant. If planning permission is not granted the Court will hear further submissions as to how best to give effect to its finding of adverse possession. Both parties' claims for damages are dismissed.

45. I shall hear the parties as to costs.

Dated this 10th day of February, 2016

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Hellman J