IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2006: 131

BETWEEN:

GWENDOLYN MAE TODD

Plaintiff

-and-

ARNOLD RAWLINS PEMBERTON

Defendant

REASONS FOR DECISION

Date of hearing: January 11, February 27, 2007
Date of Decision: February 27, 2007
Date of Reasons: February 28, 2007

Mr. Llewellyn Peniston, Peniston & Associates, for the Plaintiff
The Defendant did not appear

Introductory

1. By a Generally Indorsed Writ issued on May 2, 2006, the Plaintiff sought a declaration that she was the owner in fee simple of Lots 22 and 23 , East Avenue, Sunnyside Park, Southampton, on the grounds of adverse possession. Injunctive relief against the Defendant was also sought.

2. On May 3, 2006, Trott & Duncan, on behalf of the beneficial owner of these lots, then said to be abroad at an unknown address, disputed the adverse possession claim, asserting that during the period of adverse possession relied upon, the Plaintiff's now deceased husband had attempted to buy the lots from their client. This potential defence was very properly disclosed by Mr. Peniston on his ex parte application for leave for substituted service.

3. Pursuant to Wade-Miller J's Order of August 24, 2006 authorising substituted service, the Writ was advertised in the Royal Gazette on Tuesday, August 29 and Wednesday, September 13, 2006, as deposed to by Mr. Peniston in his September 28, 2006 Affidavit. No appearance was entered on the Defendant's behalf.

4. On October 19, 2006, when an application was made for judgment in default, I ruled that Order 13 rule 6 as read with Order 19 rule 7 applied, and Mr. Peniston sought leave to adduce evidence in support of an application for judgment in default of defence. Leave was granted, and affidavits were duly filed in support of the Plaintiff's claim by her sister (Rose Marie Simons), her two daughters

(Tamika Renee Todd and Trina Nicole Todd), her neighbour (David Nathaniel Eugene Richardson), and herself, all sworn on April 19, 2006.

5. I initially heard the matter in Chambers on January 11, 2007, and indicated that I would in principle grant the declaratory relief sought provided that further evidence was filed to clarify the Plaintiff's legal interest in the property adjoining the land to which the present action relates. I reserved judgment to enable this evidence to be filed. In the course of preparing the present Judgment, I somewhat belatedly realised that a trial in open court was required[1], and gave pre-trial directions by Order dated January 26, 2007. Under these directions, the affidavits filed were ordered to stand as witness statements, and the need for the deponents to attend was dispensed with.

6. On the hearing of the trial I refused an adjournment application, orally requested by the Defendant's granddaughter, further to a letter by Trott & Duncan on behalf of the "*Pemberton Family*". There was no indication that the Defendant himself had any intention of contesting the present action, nor that any clear defence existed[2]. It was represented to the Court that the Defendant was notified of the present proceedings as long ago as October, 2006, and the distinct impression was given that he had no personal interest in the present proceedings.

7. Accordingly, I refused the adjournment application, granted leave to amend to delete the misleading words "The Estate of" in the title of the action (since the Defendant is still living), and granted an Order making a declaration that the Plaintiff is a tenant for life and trustee for her two daughters of the land in question. Although the present action was brought in the name of the Plaintiff, it was for practical purposes brought by the Plaintiff on behalf of herself and as trustee for her daughters Trina Nicole Todd and Tamika Renee Todd. Had any point been taken about the style of the action, I would have granted leave to amend in this regard.

8. I indicated that I would give the present reasons later, and Mr. Peniston helpfully undertook to supply a copy of this Judgment to the Pemberton family through Messrs. Trott & Duncan, so that the family-if not the Defendant- could consider any possible challenge to this decision.

Factual findings-principal issues

9. At the adjourned hearing of the application for judgment in default, I declined to grant the injunction sought on the grounds that no evidence supported the need for such relief. The Plaintiff's evidence clearly supported use of the land as if it belonged to her husband's property between 1971 and 1994 when he died, a period in excess of 20 years. I accordingly indicated that I was minded to grant the declaration sought, namely that the Plaintiff was owner in fee simple of the two lots, provided that she filed a further affidavit evidencing her legal title to the adjacent land the lots were said to have regarded as part of. On January 18, 2007, the Plaintiff's Second Affidavit of the same date was filed together with an engrossed order for my signature. This exhibits the Plaintiff's late husband's title deeds together with a Vesting Deed dated December 6, 1994, executed by the Executors and beneficiaries of the Estate of Reginald Vincent Todd, the Plaintiff's late husband.

10. The Plaintiff has, I find, failed to prove that she is the successor in title to the property she has occupied since 1971 and which was owned in fee simple by her husband until his death on January 29, 1994. This is because the Vesting Deed

[1] This was because the adverse possession claim was not made out on the face of the pleadings: Supreme Court Practice 1999,paragraph 19/7/15.

[2] It was suggested by Mrs. Pemberton-Jeter that negotiations for the purchase of the lots in question had taken place in recent years, and a 1944 sketch plan was shown to the Court indicating that the Defendant may at some time have possessed legal title. An offer to purchase made after the Plaintiff's title by adverse possession had been created would not, it seemed to me, automatically constitute a defence to the present action.

recites that in the Testator's July 3, 1972 Will, he disposed of the property he legally owned at that time to the Plaintiff as trustee for his daughters, subject to a life interest in the Plaintiff's favour. So even if the property described in his 1972 Will by the Testator's death could properly be construed as including the two lots, the Plaintiff would not be entitled to a declaration that she is owner in fee simple of the lots.

11. In my view, the Plaintiff at most would be entitled to an Order declaring that she "holds the properties known as Lots 22 and 23 East Avenue, Southampton Parish, and outlined on the Drawing dated March 13, 2001 prepared by Erwin Adderley Associates and annexed to the Plaintiff's Second Affidavit herein, as a tenant for life and as a trustee for Tamika Renee Todd and Trina Nicole Todd". But this assumes that the Will can be construed as having conveyed the adjoining lots as well as the main property, even though the Vesting Deed only explicitly conveyed the latter.

12. In light of these considerations, the Court requested the Plaintiff's attorneys to supplement their further evidence with a complete copy of the Will. This was duly provided to the Court, initially in facsimile form, and then exhibited to a Third Affidavit sworn by the Plaintiff on January 31, 2007.

13. The crucial paragraph in the Will reads as follows:

> "*2. I DEVISE my house and land situate at Sunnyside Park in Southampton Parish unto my wife Gwendolyn May Todd for her life or so long as she may remain my widow and from the death of my said wife or from and after her marriage (whichever shall first happen) unto any child or children born of our marriage (and if more than one in equal shares as tenants-in-common)…*
> *4. I DEVISE and BEQEATH all the residue of my estate both real and personal unto my child or children born of my said wife and myself as aforesaid (and if more than one absolutely in equal shares)…*"

14. As a matter of first impression, the term "*my house and land at Sunnyside Park*" would seem to encompass the land at Sunnyside Park to which the adverse possession claim in the present action relates. Only land at some other location would seem to fall into the residue to be dealt with under clause 4. This construction is consistent with the Plaintiff's evidence that at the time of the testator's death, he had treated the land in question as part of the house and land he legally owned for over 20 years.

15. The evidence of this uninterrupted user as of right since 1971 is contained in, in particular, the Plaintiff's Affidavit of April 19, 2006 and that of her neighbour, David Richardson, sworn on April 21, 2006. The neighbour deposed that (a) he has lived next door to the property the Plaintiff legally owns for 50 years, (b) that the vacant lots adjoining the house the Plaintiff's husband built were used by the tenants of the house from the outset. This house was built when he was around seven years of age, and the Plaintiff and her husband took up occupation when he was twelve or thirteen, (c) "*they always maintained the vacant area and planted shrubs there*", and (d) in building a dog house on one of the lots, with the deponent's assistance, the Testator "*always behaved as if he was the owner of the property*." Obviously, this evidence was un-contradicted as the Defendant did not participate in the trial.

16. However, Mr. Peniston very creditably placed before the Court a letter from Messrs. Trott & Duncan dated May 3, 2006 which alleged that: (a) after August 1992, the Plaintiff enquired of Marjorie Pemberton as to whether the Pemberton's had sold the land, and that (b) before his death, the testator had been negotiating with "Arthur Pemberton" for the purchase of the lots. It was further suggested that the Defendant owned the disputed property and had been located abroad by the law firm. Peniston & Associates advised Trott & Duncan by reply in a letter dated May 10, 2006 that the communications alleged to have taken place were denied.

17. It seemed doubtful that any credible evidence exists of any alleged negotiations between the Plaintiff's ex-husband and "Arthur Pemberton." Any documentary evidence would, one would have expected, have been referred to in Trott & Duncan's May 3, 2006 letter. It seems that the Defendant's son, whom he believed had acquired title to the property[3], is now deceased. If he is the Arthur Pemberton with whom the alleged purchase negotiations took place, it is improbable that any admissible evidence can be adduced in this regard. It has never been formally asserted that the Plaintiff's wife has, since her husband's death, made any offers to purchase on her own behalf.

18. In short, the suggestions in correspondence were insufficient to cast any material doubt on the sworn evidence of the Plaintiff and her supporting witnesses. Accordingly, I was satisfied that the Plaintiff through her uncontested evidence had established her claim for a declaration of ownership based on adverse possession for an uninterrupted period of at least 20 years by her husband as legal owner of the neighbouring property until his death in 1994. The fact that the Vesting Deed only explicitly purported[4] to transfer from the Testator's estate to the Plaintiff that portion of land which he owned by virtue of a paper title did not, in my view, constitute any sufficient grounds for rejecting the Plaintiff's evidence in support of the adverse possession claim. I have assumed that the declaratory relief sought will be sufficient to confer the requisite legal title on the Plaintiff and her daughters.

Legal findings

19. The Plaintiff's Counsel supplied the Court with a bundle of authorities from which I have extracted the principles set out below as to the law relating to adverse possession. In *Powell-v- McFarlane and Another* (1977) 38 P& CR 452, Slade J stated as follows[5]:

> "*It will be convenient to begin by restating a few basic principles relating to the concept of possession under English laws:*
>
> *(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 then, 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.*

[3] According to Mrs. Pemberton- Jeter's representations to the Court.
[4] The land described in the Vesting Deed was the property to which the Testator's paper title related.
[5] At pages 470-471.

'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. On the particular facts of Cadija Umma –v- S. Don Manis Appu the taking of a hay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the Red House Farms case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting: per Cairns, Orr and Walker L.JJ. 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.' This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at best until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. 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 processor of the law will allow.

The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the Courts will, in my judgment, require 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. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."

20. This first instance judgment has been cited in numerous subsequent English judgments, including at the Court of Appeal and House of Lords levels, as the classical statement of the law on this topic. I was bound to apply these principles because the above-cited passage has been adopted by the Court of Appeal for Bermuda in *Wilkinson-v-Mackie*, Civil Appeal No. 13 of 1989[6]. In the typical case, the Court is required to have regard to the presumption in favour of the paper title holder, and weigh conflicting evidence on the extent of the user relied upon by the adverse possession claimant. Despite the fact that no evidence has been adduced to contradict the Plaintiff's claim in the present action, nor indeed to establish the existence of a paper title, I have assumed that such title is held by the Defendant or someone other than the Plaintiff, and that she was required to discharge the presumption in favour of the paper title holder.

21. In addition to the authorities relied upon by Counsel, in interpreting the will with a view to determining whether title to the disputed land passed under it from the Testator to the Plaintiff, I had regard to the following principles. In Re *Wakefield, Landy –v- Campbell* [2003] Bda LR 26, I held:

> "*29. Where property is accurately described in a will, as Mr. Horseman submitted, only that property passes under the relevant devise and no more: see Coles Raymond Dill (as the Executor of the Will of Ednick Paul Hill) et al –v- Pauline Smith et al [1991] Bda LR 62 , where Sir James Astwood cited with approval the passage from Williams on Wills set out in paragraph 10 above. In this case, the Supreme Court found that a will accurately described one piece of real estate, and so this accurate (but arguably incomplete) description could not be extended to include the testator's interest in two neighbouring lots of land…*"

22. The applicable general test for construction of a will referred to in the foregoing passage is as follows:

> "*The first and great rule to which all others must bend is that effect must be given to the intention of the testator; but that the intention here in question is not the intention in the mind of the testator at the time he made his will, but that declared and apparent in his will…*
> *The court of construction must ascertain the language of the will, read the words used and ascertain the intention of the testator from them. The court's duty is not to ascertain what the actual intentions were. The only question for the court of construction is what is the meaning of the words used, and the expressed intention in all cases is considered to be the actual intention…*" [7]

23. It is also important to recall that section 20 of the Wills Act 1988 provides:

> "*Every will shall be construed, with reference to the real and personal estate referred to in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will.*"

24. So the Will in the present case is to be construed as if it had been written immediately prior to the Testator's death, thirteen years ago, at which time he had enjoyed legal title to the main property for almost 30 years, and (according the evidence adduced in the present action) treated the adjoining Lots 22-23 as if they formed part of the main property for more than 20 years. Notwithstanding this, it is also necessary to recall the passage from *Re Wakefield* set out above, and the following additional passage from *Williams on Wills*:

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[6] Per da Costa JA at pages 10-12 ; [1989] Bda LR
[7] '*Williams on Wills*', 5th ed (Butterworths: London, 1980), page 42..

> *" If all the terms of description fit some particular property (a), the whole of that property and nothing more passes; the description will not be enlarged so as to include anything which part of those terms does not accurately fit (b), nor will it be restricted so as not to include some part of the property accurately described…"* [8]

Concluding Findings

25. I found that the Plaintiff has proved that, prior to her late husband's death in 1994, he had since at least 1971 taken factual possession of the two lots adjoining the property he legally owned as his own property on an uninterrupted basis and in a manner which manifested his intention to exclude the world at large, including the paper title holder.

26. I further found that Lots 22-23 Sunnyside Park, Southampton were transferred to the Testator's daughters subject to a life interest in favour of their mother, the Plaintiff, under clause 2 of the Will. This clause devised the *"house and land situate at Sunnyside Park in Southampton Parish"*. No enlargement of the description is required for the devise to be construed as including the lots in question. Such difficulty would only have arisen if the two lots of land were not located at Sunnyside Park, Southampton Parish. There are no words used in the crucial clause which would suggest that the Testator, at the time of his death, intended to distinguish between (a) the house and land he owned by virtue of a paper title, and (b) other land fitting the descriptive term used but in relation to which he had acquired ownership of by way of adverse possession.

27. For these reasons, I ruled yesterday that the Plaintiff was entitled to a declaration that she was a life tenant of the property in question, and trustee for her two daughters. No order was sought as to costs. The form of the declaration should, based on the evidence, be in the following or substantially similar terms:

> "*The Plaintiff holds the properties known as Lots 22 and 23 East Avenue, Southampton Parish, and outlined on the Drawing dated March 13, 2001 prepared by Erwin Adderley Associates and annexed to the Plaintiff's Second Affidavit herein, as a tenant for life and as a trustee for Tamika Renee Todd and Trina Nicole Todd.*"

28. I had previously indicated that the Plaintiffs evidence did not support the grant of an injunction and that I proposed to refuse that head of relief sought. On January 11, 2007, when I provisionally ruled that the Plaintiff was entitled to declaratory relief, I made no order as to the injunction claim. Due to an oversight, I made no order yesterday in this regard either, when perhaps the application ought properly to have been dismissed or adjourned *sine die*. The practical result, it seems to me, remains the same.

Dated this 28th day of February, 2007 _____

KAWALEY J.

[8] At page 486.