In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 81

BETWEEN:

CHARLES WINSTON RAWLINS **Applicant**

-v-

(1) RALPH RUSSELL
(2) GLENNAMUIR PAULINE RUSSELL
(3) PERSONS UKNOWN

Respondents

JUDGMENT

(in Court)

Date of trial: May 27-28, 2014

Date of Judgment: June 20, 2013

Mr. Edward King, Edward Ishmael King, for the Applicant
Mr. Peter Sanderson, Wakefield Quin Limited, for the Respondents

Introductory

1. The Applicant is the legal owner of a property in the City of Hamilton known as 37 and 39 Union Street, Hamilton (collectively, "the Property", and individually "#37" and "#39") . On March 20, 2013, he issued an "Ex Parte Originating Summons" seeking a mandatory injunction compelling the Respondents to vacate the Property. The injunction was sought on the following seemingly straightforward grounds:

    (a) the Property had been unoccupied, locked up and secured against vagrants prior to 2000;

    (b) in about 2000, it came to the Applicant's attention that the Respondents and others had broken in and were occupying the premises as squatters;

    (c) attempts to exclude the squatters by boarding up the premises and by verbally requesting them to leave failed. In 2010 he had attorneys serve the squatters with notices to quit, which were ignored.

2. Although the Applicant's attorneys used the form of an Ex Parte Originating Summons, this Summons was in fact, quite properly, served on the Respondents. The Respondents appeared through counsel on the first return date (April 4, 2014) and indicated that they intended to assert an adverse possession claim. At the initial hearing, directions for the filing of evidence were given. The Applicant issued a Summons for Directions on March 14, 2014 with a view to the matter being set down for trial. By this stage it was clear that the 1st Respondent's case was, very broadly, that:

    (a) he moved into the Property, occupying the ground floor of #39 in 1976, and has been a registered voter at this address since then;

    (b) he has had exclusive possession of the entire Property for 36 years;

    (c) he met the 2nd Respondent around 1984, they had a daughter (Handreth) in 1988, and mother and daughter joined him in the Property in 1992. The Respondents married in 1996;

3. There is no modern record of an adverse possession claim being asserted to residential property in Bermuda. Previous cases have all concerned either vacant land or boundary disputes. While the general principles of what is required to establish an adverse possession claim are the same, the law relating to what steps are required to

interrupt the possession of a squatter are quite distinctive and, to the uninitiated, somewhat surprising. The adverse possession claim was asserted by the 1st Respondent alone as he is a Bermudian and his wife, the 2nd Respondent is not.

Legal findings: requirements for an adverse possession claim

General principles

4. Mr. King referred the Court to my own decision in *Simmons-v-Steede* [2009] SC (Bda) 5 Civ (27 January 2009); [2009] Bda LR 5, as setting out the governing principles for an adverse possession claim In that case, the period of adverse possession relied upon pre-dated the 1984 Limitation Act, and so it was common ground that the Real Property Limitation of Actions Act 1936 applied. In this case also, the claim began in 1976 although the most credible evidence of occupation came from after the 1984 Act was enacted.

5. I am unaware of any material distinction between the two statutory regimes, and none was mentioned by counsel. Section 16 of the Limitation Act 1984 provides as follows:

> "*(1) No action shall be brought by any person to recover any land after the expiration of 20 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*"

6. Paragraph 1 of part I of the Schedule to the 1984 Act provides as follows:

> "*Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.*"

7. These provisions are broadly the same as those found in sections 2-3 of the 1936 Act, set out at paragraph 41 of *Steede-v-Simmons*. The main aspects of the Judgment in the latter case upon which Mr. King aptly relied were those which emphasised the need for clear evidence to support an adverse possession claim. Counsel for the Applicant firstly referred to the following passages of my Judgment in that case:

> "*39.The law related to the evidence required to prove an adverse possession claim is shaped by the following practical considerations. The whole framework of private property ownership would be thrown into chaos if people with valid legal title to land could be easily displaced by trespassers or squatters. There is obviously a strong public policy interest in protecting*

persons who have acquired valid legal title to real property from having their property rights being usurped by trespassers bold enough to take advantage of the fact that the true owner is not occupying their property. There is a countervailing legal policy which holds that if the true owner permits a trespasser to use his property for many years, the trespasser's extensive use of the property will (at such point as Parliament may determine to be the limitation period) will extinguish the original owner's title. The original owner is effectively treated as having abandoned his title if he has permitted the trespasser to treat the property as his own for 20 years.

40.The tension between these two opposing legal policies has resulted in rules designed to assist both courts and property owners to determine what physical acts in connection with somebody else's property if not interrupted for 20 years will extinguish the owner's title. These rules state certain basic principles the application of which may vary greatly depending on the type and location of property to which the adverse possession claim relates..."

8. Mr. King then referred to the following passage in the same case on the essential elements for proving an adverse possession claim, emphasising the references to the need for clear evidence:

"*47.Mr. Doughty also submitted without dissent that the leading Bermudian authority on adverse possession under the 1936 Act is the Court of Appeal decision in Wilson-v-Mackie [1990] Bda LR 7 where Harvey da Costa JA at pages 10 to 12 of his judgment cited with approval the following passages from Powell-v-McFarlane (1977) 38 P & CR 452 at 470-472:*

> *" '(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. <u>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</u>*

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 generalize 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 nay 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 shoo-ting 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 Wiker L. JJ. Everything must depend on the particular circumstances, but broadly, I think that 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 had done so.

(4) The animus possidendi, which is also necessary to constitute possession, was defined by Lindley M.K., 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 realize that, at least until he acquires a statutory title by 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 process 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.' (emphasis added).""

9. I adopt these general principles in the present case. I also accept the Respondents' argument that, depending on the facts of each case, proof of exclusive possession of one part of what constitutes in physical terms a coherent whole piece of property, may amount to sufficient proof of possession of the entire property concerned. Mr. Sanderson referred the Court to paragraphs 54-63 of *Roberts-v- Swangrove Estates Ltd.* [2007] EWHC 513 (Ch); [2007] All ER (D) 233, which make the same point. The following extract from the judgment of Lindsay J I found most instructive:

> "*54. Does a squatter, to succeed, have to prove that the acts of possession on which he relies have blanketed the whole of the area he claims? There will be many cases of adverse possession when this does not fall to be considered. If, for example, a squatter has occupied a terraced house, has lived in it and has denied access through its doors other than to his visitors, he would, no doubt, be taken to have had possession of the whole house notwithstanding that he failed to prove he had occupied a back room on the top floor.*"

10. Finally, the following statutory rules set out in Part 1 of the First Schedule to the Limitation Act 1984 also apply:

> *"8 (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to in this paragraph as "adverse possession"); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.*
>
> *(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.*
>
> *(3)…*
>
> *(4) In determining whether a person occupying any land is in adverse possession of the land the court shall take in account whether or not the owner of the land had actual knowledge that the person occupying the land was in possession thereof adverse to his interest.*"

Dispossession

11. The law relating to dispossession applied to a squatter who is occupying residential property is a topic which the Bermudian courts do not appear to have addressed in recent times. I accept the submission of the Respondent's counsel that merely writing letters demanding possession or threatening proceedings does not stop time running against the paper title holder. In *Mount Carmel Investments Ltd.-v- Peter Thurlow Ltd.* [1988] 1 WLR 1078 at 1084, Nicholls LJ (delivering the judgment of the English Court of Appeal) held:

> "*We do not accept that, in a case where on person is in possession of property, and another is not, the mere sending and receipt of a letter by which delivery up of possession is demanded, can have the effect in law for limitation purposes that the recipient of the letter ceases to be in possession and the sender of the letter acquires possession.*"

12. I also accept the proposition made by Jourdan & Radley-Gardner, '*Adverse Possession*', 2nd edition, at paragraph 7.65:

> "*Once a squatter has taken possession, entry on to the disputed land by the true owner will not suffice to prevent a squatter who is in effective control of the land from being in possession, unless the owner takes back actual possession, ie effective and exclusive control of the land.*"

13. The same text (at paragraph 7.77) illustrates what would interrupt the period of adverse possession by reference to a nineteenth century case where the owners turned out the squatter and his family and removed most of their possessions. Even though the squatters resumed occupation later the same day, time started running against the owners from the date they removed the squatters, albeit for a short time: *Randall-v-Stevens* (1853) 2 E&B 641.

All or part of the Property?

14. The 1st Respondent under cross-examination conceded that he would be content if the Court awarded him ownership of #39 alone. Mr. King submitted that the adverse possession claim had been pleaded on an all or nothing basis and that it was not open to the Court to allow the Respondents' claim in part alone. He relied in this regard on the following passage in the Privy Council decision of *Ramroop-v- Ishmael* [2010] UKPC 14 (Lord Walker):

> "*24. As a matter of principle land can be owned in horizontal layers, as every*

purpose-built block of residential flats illustrates. The important issue, in the context of adverse possession, is whether the claimant is in de facto possession of the property in question to the exclusion of other persons (except so far as those other persons are family, visitors or other licensees of the person in possession). The English Court of Appeal has accepted (Simpson v Fergus (2000) 79 P & CR 398, 401) that:

> *'Possession of a flat with a front door that can be locked is obviously different from possession of part of an unfenced moor or hillside.'*

25. The Board cannot therefore agree with the wide proposition accepted by the Court of Appeal. But if a claimant is to establish title by adverse possession to part only of a building, it is necessary that the pleadings should precisely define the part of the building claimed to have been in the possession of the claimant, and that there should be credible evidence that that part of the building was capable of being possessed by the claimant to the exclusion of others (apart from the claimant's licensees), and that the claimant did in fact enjoy such possession throughout the limitation period. A case of that sort might be relatively easy to plead and prove if the property in question was a self-contained residential flat in a purpose-built block. It might be much more difficult in a building which had slipped into informal multiple occupation with shared facilities.

26. The appellant's claim met none of these requirements. Her pleadings never put forward (at all, still less with precision) an alternative case based on possession of part only of 22 Union Street[1]. In her evidence she persisted, in the face of compelling evidence to the contrary, in asserting that Lystra Parfitt was not another non-paying tenant but was instead her licensee. There was no clear or detailed evidence as to the layout of the building (for instance, how occupants of the top floor went upstairs, and what if any kitchen or bathroom facilities were used in common).

27.The appellant came from a humble background and had no educational advantages, as Sir Fenton pointed out. Courts will always try to show indulgence to litigants from such backgrounds, especially if they are acting as litigants in person. But in this case the appellant had the benefit of legal representation throughout. Moreover she put before the Court a case which was, both in its original pleaded form and in the evidence which she gave at trial, false in several respects. It gradually attained more plausibility as its false elements were exposed and abandoned. If what Hamel-Smith JA aptly called her final attempt had been based on an amended pleading which put her reformulated case precisely, and her evidence had provided detailed and credible support to the amended pleading, her case based on multiple occupation, afterthought though it was, might have succeeded. But in fact a case on multiple occupation was neither pleaded not proved"

[1] The reference to "Union Street", coincidentally the address in the present case, ought probably to have read "Union Road", as in paragraph 1 of the Judicial Committee's judgment.

15. I find that the Court in the present case is not debarred from considering an alternative claim to part of the property, based on the quoted passages from *Ramroop*, for the following reasons:

    (a) there were no formal pleadings here, this being a case commenced by Originating Summons;

    (b) it was common ground that #37 and #39 were separate buildings (and that #39 North and South were separate living areas) forming part of a single legal title and that the Respondents had only actually occupied #39 North;

    (c) the fact that it was physically possible to occupy #39 North and/or South without occupying #37 was self-evident, and the layout of the Property was fully explored at trial;

    (d) from the outset it was clear on the face of the 1st Respondent's written evidence that the extent of control he exercised over #39 was far greater than over #37;

    (e) it was the Applicant's case that there were three buildings, and that whatever use of #39 North was enjoyed, the Respondents on any sensible view of the evidence did not have exclusive possession and control of either #37 or #39 South for the requisite period;

    (f) there is no inherent inconsistency between the claim to the entire Property and an alternative claim to #39 and/or #39 North alone. The rejection of a claim to all three 'buildings' does not necessarily entail a finding that the primary claim was false.

Factual findings: have the Respondents proven an adverse possession claim to all or part of the Property?

<u>Overview of the Applicant's witnesses</u>

16. The Applicant, a retired Customs Office, Chairman of the Treatment of Offenders and is also a lay preacher, is a classic "pillar of the community". Despite his strong commercial interest in his own case, I found the Applicant overall to be a credible witness. Very little of great consequence in his evidence was challenged, save for his assessment of how long the 1st Respondent had been exercising control over the Property - in particular, when he took up occupation of #39 North.

17. In his First Affidavit, he asserted that he first became aware of the Respondent's occupation of the Property in or about 2000, after which he made repeated but unsuccessful attempts to lock them out. In paragraph 5, he deposed:

> "*On a few occasions, when I attended the premises, and requested that the occupants vacate, so great was their hostility that I feared for my safety and retreated.*"

18. The Applicant's Witness Statement was the first opportunity he had to respond to the Respondent's formally asserted adverse possession claim. He explained that his father purchased the Property in 1940 and that he inherited it in 1966. Since then he has paid all taxes to the Tax Commissioner and the Corporation of Hamilton.

19. Formerly Lot No. 7, the property consists of three buildings. #37 presently consists of a ground floor shop accessed from Union Street and an upstairs apartment, accessed through a courtyard. #39 is accessed entirely through the courtyard, and consists of two buildings: (1) the south single story apartment and garage, which was the Rawlins family home for 40 years, and (2) the two-story north apartments, the lower of which was first occupied by the 1st Respondent on a date which is disputed. However, the Applicant deposed that:

    (a) the North apartments in #39 were only rented until the mid-1970's;

    (b) the Applicant's mother remained in #39 South apartment until 1978. This apartment was rented to Ruby Caines from around 1982 until 1995. Meanwhile he considered unfulfilled plans to renovate the North apartments, which remained vacant and secure;

    (c) at some unspecified point during Ms Caines' occupation of the South apartment, the Applicant heard that vagrants had broken into both #37 and #39 North apartments, and that illegal activities were going on there. He boarded up the premises, and considered the problem was solved until about 2000, when he learned that the Respondents had broken in;

    (d) the shop at #37 was rented from the 1970's until the 1990's for approximately 20 years to one Earl Matthews, and from 2006 to his nephew, Michael Astwood;

    (e) since the Respondents have occupied the lower North apartment, he has not been able gain access to it or the upper North apartment.

20. The Applicant was not shaken in cross-examination although, without the benefit of contemporaneous documents, it was obvious that he could not be completely sure

about many precise dates, including when Ruby Caines vacated the South apartment. He also admitted that Mr. Hill replaced Ruby Caines in #39 South and paid him rent, although he did not recall meeting him and was far from convincing in his recollection of when Mr. Hill left. This date appeared to me to be significant as it was the latest date when any lawful tenant was occupying any part of #39, giving the Applicant cause to visit the Property. It seemed inherently more probable that the 1st Respondent would have taken possession with the requisite intention of the lower North Apartment when the entire Property (#39) was vacant, as opposed to when part of it was lawfully occupied. However, the Applicant conceded that #39 North was initially broken into while Ruby Caines was still in #39 South.

21. Andrew Kennedy was the Applicant's first (subpoena) witness, who confirmed the truth of an April 1, 2013 letter describing the state of #39, which he inspected at the Applicant's request. Under cross-examination he confirmed that certain repairs had been carried out, but insisted that the toilet was not flushing normally. He was a straightforward witness whose credibility was not in issue.

22. The same applies to Roydon Holdipp, the Bermuda Electric Light Company ("BELCO") Credit Officer. He produced an application by the 1st Respondent for service at #39 dated October 3, 2000. He testified that such an application is usually made by new account holders or in respect of new houses. He could not positively say that the Respondent had never previously had an account and was unsure when BELCO records were first computerised.

23. The Applicant called two former occupants of #39, Gaynel Kelly-Smith and Nadia Neasley. They both testified that during the period 2009 to 2010, when desperate for accommodation they stayed at #39 and paid rent to the 2nd Respondent, their fellow Jamaican, who described the Property as her own. There was no running water or flushing toilets; water was obtained from a tank. They subsequently learned that the Russells were squatters. I found both of these witnesses to be credible. While these witnesses' testimony suggested that no improvements had been carried out to the property in plumbing and other terms, their evidence supported the adverse possession claim in that both stated that the 2nd Respondent behaved as if the apartment the 'tenants' stayed in belonged to her.

24. Ranay Boyles, who used to work for the Applicant's brother in the Fire Service, testified that in about 1995/1996, he demolished a balcony on the Property at the Applicant's request. He saw no trespassing signs, which appeared quite new, and drugs paraphernalia, with no signs of anyone living on the Property. He admitted under cross-examination that it was possible that there were occupants who were simply absent at the time, and insisted that (contrary to the 1st Respondent's case) he did pull down the balcony which formed part of #39. I found him to be a generally credible witness, although his evidence was somewhat inconsistent with the Applicant's own testimony.

25. The Applicant's First Affidavit and his Witness Statement gave no hint that the Applicant took any interest in #39 North after initial renovation work (ripping out floor boards) in around 1980. The only mention he makes of dealings with this part of the Property, before he discovered the Respondents were there in 2000 or 2001, is of hearing of vagrants breaking in while Ms. Caines was in #39 South. His response was to secure the premises, which "*seemed to have remedied the problem until about 2000*" (Witness Statement, paragraph 8). Why the Applicant would have wanted to remove a balcony in an abandoned section of the Property, in or around 1995-1996 at a time when he believed it was unoccupied, was unexplained and inherently improbable. On the face of it, it made more sense that the Respondents, occupying that area, would have been concerned about the safety implications of the balcony for their daughter, as they testified. Who pulled down the balcony in my judgment is a peripheral issue and I see no need to make any formal findings in this regard.

26. Vernon Darrell, a graphic designer and the Applicant's nephew, testified that on two occasions in the last ten years he made and placed two no trespassing signs at the Property. On one occasion, according to his Witness Statement, he saw a "tall thin man" who left when told he ought not to be there. He did not identify this man as the 1st Respondent. According to his Witness Statement he only ever put up signs in #37 and #39 South, which suggest his instructions were more designed to prevent the vacant units from being occupied than encouraging the Respondents to vacate #39 North. Under re-examination, he was shown a sign in photo 11 but denied that it was his, indirectly confirming the 1st Respondent's evidence that he had at some point put up signs of his own. I found Mr. Darrell to be a credible witness.

27. Michael Astwood, a carpenter and also a nephew of the Applicant, testified that he has been using #37 for his carpentry business since 2006. Since then, he became aware of the Respondents occupying "various apartments" on what used to be his grandfather's property as squatters. Under cross-examination, he confirmed that he did not pay rent for his use of #37. I found him to be a credible witness whose evidence was not subject to any material dispute.

Overview of Respondents' Witnesses

28. The 1st Respondent was clearly a witness whose evidence ought to be approached with some care. He had much to gain from his adverse possession claim, and had admittedly entered the Property unlawfully as a squatter in circumstances he was not keen to explore in great detail. He was accused of resisting lawful attempts by the Applicant to remove him by intimidating behaviour. His claim to having enjoyed exclusive possession of the entire Property since 1976 was unsupported by any other credible evidence, and seemed extravagant on its face. Nevertheless, when he gave his oral evidence from the witness box, he generally appeared to me to be a truthful witness who was not setting out to deceive the Court. Where his evidence conflicted

with that of a more independent witness, or was unsupported by such evidence, I have declined to accept his evidence. (On many issues in the case as a whole which I considered peripheral, I have simply not made any findings at all).

29. In his First Affidavit, the 1st Respondent deposed that he had been a registered elector at #39 since May 1, 1976, relying upon a letter from the Parliamentary Registrar to this general effect. When he moved in, the Property was in a dilapidated state and he fixed up #39 upstairs and downstairs (no clear distinction was made between North and South) over the years, as well as painting the exterior of #37. Various portions of the Property were, with his permission, occasionally occupied by other persons, while other areas were used for storage. In the 1990's #37 became a drug den, and he and his wife were constantly calling the Police to clear the area.

30. Under cross-examination by Mr. King, the 1st Respondent conceded that some of his occupation of #39 had been restricted to #39 North, because a lawful tenant was occupying the South apartment, and that the same applied for most of the period in question as regards the shop at #37. When asked whether he was seeking all or nothing, in terms of the scope of his claim, Mr. Russell (in what I considered to be the most impressive part of his testimony) stated that he would be happy if he were granted ownership of #39 alone. This appeared to me to be, based on the witness' demeanour, a tacit concession that his claim to the entire Property was not an entirely fair or reasonable claim. He nevertheless insisted that he, and not the Applicant, had taken down the porch or balcony on #39. He also insisted that "*since I've been there, there's always been electricity, whether it was generator operated or BELCO*". His professed enthusiasm for house painting, throughout his time at the Property, seemed to be somewhat over-stated, however.

31. The 2nd Respondent's evidence clearly had to be approached with some caution due to her obvious financial interest in her own adverse possession claim even though she was, in general terms, a credible witness. In addition she gave her evidence in a somewhat dramatic fashion, suggesting a witness (to some extent at least)[2] as much concerned with creating the right impression on the Court as with telling the objective truth. She testified that she first came to Bermuda in 1981 or 1982 from Jamaica, and next came back from time to time in 1991 or 1992. She took offence about being asked where she met her husband, and was adamant that it could not have been in 1984 (when the 1st Respondent himself said they first met). She said that in 1992 when she stayed at #39, the apartment had electricity.

32. Over the years, she implied, maintenance had constantly taken place: "*It's a constant fixture.*" On the other hand, she appeared to concede that upkeep required money which was in limited supply. Mrs. Russell admitted having to draw water from a tank,

[2] The colourful character of her evidence was no doubt also attributable, in part, to the witness' personality and cultural background.

but insisted that water had always been available on the Property in the absence of tap water and access to the rivers she was used to at home. She also sought to portray her husband as an obsessive house painter, effectively admitting that some painting work had been done in the days preceding the trial after the Applicant's photographs were taken. She claimed to have lived in all of #39, while admitting that #37 had been boarded up (by her account by the Corporation) since the fire (that was generally agreed to have occurred at the turn of the century). The 2nd Respondent was unwilling to admit charging rent, and claimed to have only offered homeless people shelter. She also admitted being incarcerated for conspiracy to import controlled drugs into Bermuda, but accused the Applicant of visiting her in the Co-Ed Facility and telling her that she would not get parole.

33. Handreth Russell McGowan, the 1st and 2nd Respondents' daughter (born in 1988), was called as a representative of persons unknown, the 3rd Respondent. She gave her evidence in a straightforward and credible manner, understandably displaying loyalty to her parents when asked to comment on the alleged shortcomings of the maintenance of the exterior of the Property. She made no claim to the Property or any part of it in her own right although she testified that she believed she had lived at #39 since she was 4 years old in 1992. Because she was so young at the crucial time of the early 1990's, her evidence was of limited significance, serving mostly to demonstrate that the Respondents have apparently succeeded in raising an articulate, devoted and personable daughter.

34. Milton Hill now works as a caregiver for Dr. Clarence James. He grew up in the same neighbourhood as the 1st Respondent in Happy Valley Road and has known him since the 1960's, although they are not close friends. He was a tenant of the Applicant's from 1985 to 1991, he testified, and remembers having to get the Applicant to sign his Transport Control Department ("TCD") form as his landlord after he purchased a Mitsubishi car in 1988. He also remembered being at Union Street for Hurricane Emily in 1987. And was adamant that TCD, records, BELCO records and Bermuda Telephone Company records would confirm that he was there during that time. He also recalled starting a business with his son in the cellar in 1991.Most significantly, he testified that found the 1st Respondent on the property when he moved in. He was also aware of Ruby Caines, his sister, being a tenant at #39 South from around 1978 to 1982 rather than until an unspecified date in the 1990's. He was sure that she was living at another address (Flatts Peak Road, Smiths) in 1995, when it was put to him that she only left #39 in 1995.

35. Mr. Hill gave very vivid and colourful descriptions of drug addicts who frequented the upper portion of #39 North (not #37), and testified to having fixed the floor of the bathroom in the upper section of #39 North, together with the 1st Respondent. This was inconsistent with other accounts of which part of the Property drug addicts frequented, although he was, perhaps, describing an earlier period of time. He was positive that Mr. Russell was on the Property while his sister was still there and

implied that he assumed he had some sort of arrangement with the Applicant to be there. He also described the Applicant as not being very visible during this period. Mr. Hill was an important witness, and a generally credible one. He did, however, display some partisanship by suggesting that Mr. Russell should be commended for clearing #37 of junkies. On the other hand he denied being bosom buddies with the 1st Respondent, and claimed never to have visited the Property since leaving in 1991.

36. Mr. George Scott, a former MP and current Corporation of Hamilton councillor, was another important witness. His independence and credibility were not challenged in cross-examination. He revealed the fact that the 1st Respondent nominated him as a Corporation of Hamilton Councillor, under cross-examination, explaining how he came to know the address was 37 and 39 Union Street. He testified that he first met Mr. Russell in 1992 when the witness was a regular visitor to the nearby Astor House, the Bermuda Industrial Union building, as an officer of the BIU Taxi Co-operative. Mr. Scott's evidence is, in general terms, consistent with the position being that the 1st Respondent was occupying the premises somewhat tentatively in the mid-80's, but quite openly by 1992.

37. He recalls seeing the 1st Respondent often coming out of the Property as far back as 1986, but 1992 is when he first understood the 1st Applicant to actually live there. He denied hearing the Property described as a drug den, although he admitted seeing some unusual activity taking place on the "left side" of the Property. Although aware now of who owns the Property, Mr. Scott did not know at the time. The witness was not challenged as to the accuracy of his memory, or why he recalled 1992 as the year when he first started chatting with the 1st Respondent outside Astor House. He was, overall, the Respondents' most credible witness.

38. Dandre Leach-Caines testified that he lived on Union Street from his birth in 1969 until 1997. He admitted knowing the 1st Respondent since he was around 10 years old as a contemporary and friend of his older brother. Early in his cross-examination, the witness said that, to his knowledge, Mr. Russell moved in around "*the beginning of the 90's…*" without attempting to be unduly precise. His unwillingness to support the Respondent's insistence that he had been there much earlier made him, to my mind, a generally credible witness.

Findings: when did the 1st Respondent take up continuous occupation with the intent of excluding the world at large from #39 North?

39. I find that the 1st Respondent first took up continuous residence on the Property no later than 1992. I reach this finding based on the fact that the 1st Respondent's own evidence in this respect is corroborated by the evidence of Mr. Milton Hill, Mr. Leach-Caines and, in particular. I also find that as of 1992 the 1st Respondent took up residence with the intention of excluding the world at large from #39 North.

40. The evidence in support of these findings is sufficiently clear to displace the presumption in favour of the legal owner of the Property, who did not contend that he was, after this date, exercising effective control over this part of the Property. The nature of any pre-1992 occupation is simply less than clear and I make no findings as to precisely when the 1st Respondent (or indeed his wife) first started living on the Property. Although I see no reason to reject Mr. Hill's evidence that the 1st Respondent was in #39 North when he moved into the South wing, I am unable to find based on this evidence that Mr. Russell's possession at this point was adverse to that of Mr. Rawlins. By Mr. Hill's account, he assumed he must have had some "arrangement" with the legal owner of the Property. This is inconsistent with any express or implied intention on Russell's part to treat the premises, at this juncture, as if he owned them. The 1st Respondent's own evidence about the control he assumed over the Property is only credible, as regards the North wing, after the last tenant vacated the South wing in or about 1991, leaving the 1st Respondent as the sole occupant of the entire Property (save for lower #37). As he put it in cross-examination: "*When they* [Ruby Caines and Milton Hill] *left, the exclusive came to me.*"

41. The Applicant's initial evidence (Witness Statement, paragraph 7) was that #39 South had been rented to Ruby Caines until she died in the 1990's. But under cross-examination he accepted that Mr. Hill moved in after Ms. Caines moved out and appeared to me to be quite vague as to precisely when this was. In the absence of any contemporaneous documentation, it was entirely understandable that Mr. Rawlins should be unclear as to the precise timeline. And when Mr. Hill quite confidently and convincingly testified that Ms. Caines moved out in about 1985 and he moved in until around 1991, this evidence was not challenged as being completely wrong, nor was it otherwise discredited. The Applicant was most certain the 1st Respondent was not in #39 North in the 1970's.While he said he was not aware of the Respondents' occupation until around 2000, the Applicant put forward no tangible basis for challenging the Respondents' witnesses account that the 1st Respondent was settled in #39 North from the early 1990's.

42. The most reliable evidence of all which supports these findings is a certified copy of the 1995/1996 Parliamentary Register, which lists "*RALPH EUGENE RUSSELL…039 UNION STREET CITY OF HAMILTON*". I regard this as cogent and convincing evidence that by 1995 the 1st Respondent was so well established in #39 that he was willing to list it as his official address. I find it impossible to believe that he would have registered as a voter at this address if he was only living there covertly, in a manner designed to conceal his occupation from the true owner. It seems far more likely that the 1st Respondent had by 1995 been on the Property for at least three years, and with no other lawful occupant of #39 since 1991 when Mr. Hill vacated #39 South, and by this stage regarded himself as truly in charge of that entire portion of the Property.

43. Obviously, registering the address for voting purposes is not, in and of itself, as unequivocal an assertion of rights of ownership as charging rent to other occupants is in general terms. However, this public record is wholly inconsistent with the picture painted by the Applicant of the state of the building during this period, namely a derelict building which was constantly being boarded up to prevent squatters breaking in, and which gave every appearance of being unoccupied at all until around the year 2000. And bearing in mind that the Respondents in the 1990's were, by the Applicant's own account, occupying #39 North without his knowledge or consent and without paying rent, publishing the 1st Respondent's unlawful occupation in a very public record is more reflective of assertions of ownership than it is of covert occupation by a squatter, 'living rough'.

44. Voters are registered in particular constituencies at the address at which they ordinarily reside. Parliamentary registers are scrutinised by persons actively involved in elections and are available for inspection by ordinary members of the public as well. The register in question took effect from May 16, 1995, in a year in which a Referendum on Independence took place in August. I find that the 1st Respondent's registration as a voter at #39 is, in all the circumstances of the present case, "*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": Powell-v-McFarlane* (1977) 38 P & CR 452 at 470-472 approved by the Court of Appeal for Bermuda in *Wilson-v-Mackie* [1990] Bda LR 7 (Harvey da Costa JA at pages 10 to 12).

45. The Respondents tendered extracts from the Parliamentary Register which listed names and addresses for 1994, but did not produce evidence that the 1st Respondent was registered in that year. Earlier extracts (1976 and 1980) listed the 1st Respondent merely as constituent in Pembroke East, without any address. A letter dated April 16, 2013 from Parliamentary Registrar Kenneth Scott, who was not called as a witness, stating that his records showed that Mr. Russell had been registered at 37 and 39 Union Street since 1976 was insufficient to satisfy me of this fact. The only actual records placed before the Court linking the 1st Respondent with the Property were nearly 20 years later than 1976, and then referred only to #39.

46. I reject the suggestion that the 2000 application by the Respondents to BELCO for electricity suggests that they just moved in at that point. I consider it just as inherently improbable that, in a small community, Mr. Russell would have applied to open a BELCO account as soon as he started squatting on the premises as I consider it improbable that he would have registered as a voter at #39, as soon he started occupying the premises illicitly. I make no finding as to when the Respondents first opened a BELCO account, and accept the 1st Respondent's evidence that at some point before this was done a generator was used to supply electricity to the premises.

47. In light of the quality of the evidence of factual occupation combined with using the address for official purposes, the fact that the 1st Respondent may have lived for some time in poor conditions, in terms of plumbing and the like, is not inconsistent with a finding that, throughout the requisite 20 year period, he intended to exclude the Applicant and all other persons from the premises. As Neuberger J (as he then was) opined in *Purbrick-v-London Borough of Hackney* [2004] 1 P& CR 34 in a passage upon which Mr. Sanderson relied:

> "*[21]To my mind it is dangerous to conclude that the squatter did not do sufficient to achieve adverse possession because he should have improved the premises. In my judgment, while I would not rule out the possibility of the court ever holding that there was insufficient activity because there was no improvement, it would require a rare case where the mere failure to carry out improvements to a dilapidated property, or property out of repair, meant that the squatter didn't have sufficient physical possession…*
>
> *[23] I also consider this aspect to be irrelevant to the question of intention to possess…* "

48. There is direct evidence from the Applicant himself that the Respondents effectively excluded him from #39 North after he first confronted them about their occupation of the premises at some point after in or about 2000 when there was a fire at #37. It is moreover implicitly admitted that the Applicant did nothing after the Respondents took up occupation of the North wing to interrupt their possession. While this inference may not be a strong one, the 1st Respondent's admittedly hostile response when first confronted by the legal owner about his occupation of the premises makes it seem more likely than not that a similar disposition would have been displayed at any earlier point after in or about 1992. Moreover, according to the Witness Statement of Vernon Darrell, he (twice in the last 10 years) only posted signs "*on the apartment where the Rawlins family used to live, and the other on the steps leading up to the apartment above the shop*" (paragraph 4). This suggests that the Applicant only instructed him to protect the unoccupied portions of the Property from being occupied by squatters (#37 upper level and #39 South), not to attempt to dispossess the Respondents whom the Applicant by this time admittedly knew were there. The only alternative inference is that Mr. Darrell did not pursue placing signs on #39 North, as the Applicant instructed him to do, because he met with resistance from one or more of the Respondents.

49. I take into account the fact that the Applicant may not have had actual knowledge of Mr. Russell's occupation during the period 1992-2000, as the Applicant contended. This does not diminish the weight to be attached to the Respondents' adverse possession claim during this period because I am satisfied that if the Applicant had made any serious attempts to ascertain whether the premises were being occupied

during this period, he would have discovered that Mr. Russell (and at some point, his wife as well) was there. The Applicant did not claim to have actually gone into the #39 North lower apartment at all in the 1990's. The only evidence he led about this period was through Mr. Boyles, who testified that he saw no one when he pulled down the balcony adjoining the North wing in around 1995 or 1996. He accepted in cross-examination that it was possible that although he saw no one, someone was occupying the Property. Although I lean somewhat towards preferring Mr. Boyles' evidence to the Respondents' on the issue of who pulled down the balcony, his evidence does not directly contradict the other credible evidence of Mr. Russell's occupation of #39 North by 1995 to 1996 when he was a registered voter at that address. I see no need to formally decide this issue.

50. The Applicant did testify (Witness Statement, paragraph 8), that while Ruby Caines was a tenant he heard that "vagrants" had broken into the lower #39 North apartment and the apartment above the shop at #37, and that illegal drug activities were taking place. He claims to have notified the Police and had all doors padlocked and openings boarded up. By the Applicant's account, this happened at some point between 1982 and 1995, although I prefer Mr. Hill's account that he (Hill) was the tenant in in #39 South between roughly 1985 and 1991. So I find that this attempt to secure the North wing must have taken place far earlier, before Mr. Hill replaced his sister in 39 South. It was not suggested to Mr. Hill that the North wing was padlocked while he was on the Property. So the Applicant's evidence does not provide any credible basis for challenging the evidence of the 1st Respondent, supported by three witnesses and (inferentially) the 1995/1996 Parliamentary Voters List, that he was in adverse possession of 39# North from at least 1992.

51. My initial inclination was to place considerable weight on the Applicant's evidence that he paid land tax and Corporation of Hamilton taxes for the entire Property throughout the period of time in question. However, I was persuaded to adopt the view expressed with respect to this type of evidence by Madden CJ in *Bree-v-Scott* (1903) 29 VLR 692 at page 702: "*the fact that the true owner pays the rates affords a very slight inference in his favour that the person in possession is not holding for herself*". This is the sort of payment an owner would be expected to make, and does not in any meaningful sense contradict the fact that the relevant property is being occupied by a squatter and otherwise being treated by the squatter as his own property.

52. Time did not stop running against the Applicant until he commenced the present proceedings on March 19, 2013. This was more than 20 years after I find the 1st Respondent first started permanently and openly occupying #39 North by way of adverse possession.

Findings: did the 1st Respondent take up continuous occupation with the intent of excluding the Applicant and the world at large from #39 South?

53. The evidence of Mr. and Mrs. Russell themselves potentially supports a finding that they exercised effective control over #39 South as well as #39 North, after Mr. Hill vacated #39 South without being replaced by another lawful tenant. #39 South had historically been a separate living unit altogether and was at all material times physically separate to the North wing of #39 (albeit connected and characterised by Mr. Russell as part of one building). The extent of control exercised by the Respondents over the South wing is accordingly far more ambiguous than as regards the North. There was no clear independent support for their account on this issue, and their evidence in this respect seemed to me to be somewhat exaggerated.

54. The 1st Respondent accepted that #39 South was not in a dilapidated state when he moved in and, in fact, was rented by the Applicant until at least 1991. I found it noteworthy that the Respondents' own 'tenants' were clearly occupying the same living area the Respondents primarily occupied in #39 North, and not the vacant South wing. Having regard to the need for clear evidence in support of an adverse possession claim, I find that the Respondents have failed to prove that they dispossessed the legal owner from #39 South.

Findings: did the 1st Respondent take up continuous occupation with the intent of excluding the Applicant and the world at large from #37?

55. The case for adverse possession of #37 as a whole was hopeless, because it was clear from the outset that the Applicant retained exclusive possession of the lower portion of that building which continues to be occupied by his tenant/licensee. There was no credible evidence that the Respondents (or any of them) had exclusive possession of that building as a whole.

56. There was some evidence that the Respondents asserted ownership rights over the upper apartment above the shop by taking active steps to prevent it being used by so-called "junkies". The upper apartment was accessed through the same courtyard which bordered #39 North; however, the Respondents' evidence in this respect was as consistent with an inference that they were seeking to protect a right to peaceably enjoy their occupation of the apartment they lived in, as it is with the inference that they regarded #37 (upper apartment) as their own property.

57. Ignoring Mr. Russell's concession that he would be content with being granted ownership of #39, the Respondents' evidence fell well short of the clarity required to establish an adverse possession claim to all or even the upper portion of #37.

Conclusion

58. The 1st Respondent's claim for a declaration that he has become the owner of the Property by adverse possession succeeds, but only so far as #39 North is concerned. It fails in all other respects.

59. The Applicant, so far as may be necessary, is entitled to the relief sought by his Originating Summons, but only as regards those portions of the Property that have been described in this Judgment as #37 and #39 South.

60. I will hear the parties as to costs, and as to the terms of the formal Order required to give effect to the present Judgment.

Dated this 20th day of June, 2014 _____

IAN R.C. KAWALEY CJ