

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 861 of 2007

BETWEEN:

TYRONE BISHOP

PLAINTIFF

AND

LORNA WARD

DEFENDANT

Before The Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2013: July 08

Mr. Joseph Serrant for the Plaintiff

Ms. Sheridan Reece of Messrs Carrington & Sealy for the Defendant

**DECISION**

**Nature of Action**

[1] Tyrone Bishop and Lorna Ward are neighbours in the rural village of Alleyndale, St. Lucy. Mr. Bishop owns Lot #7 and Miss Ward resides at Lot #5. In this action, Mr. Bishop has brought a claim against Miss Ward for possession of premises, an order that she remove an encroachment on his land, an order that she cease picking his fruit and damages. Miss Ward's defence is that she has, by adverse possession of over ten years, obtained an interest in the land.

[2] The application was filed by originating summons, and was for an order (sic) that:-

- “1. The Plaintiff be granted possession of his premises situate at Lot 7 Alleyndale Village in the in the parish of St. Lucy containing by admeasurements 506 square metres.
2. The Defendant removes the shed and or any building that she wrongfully built on the Plaintiff's land.
3. The Defendant cease and desist from taking any of the Plaintiff's fruit and that the Defendant compensate the Plaintiff for such fruit taken and converted to their use.
4. Damages in the sum of \$7,500.00 from loss due to deprivation of use of their land by reason of the Defendant's occupation.”

## The Evidence

- [3] The evidence was brief. Both parties filed affidavits and were cross examined. A land surveyor also gave evidence on behalf of the Plaintiff.
- [4] In his affidavit Mr. Bishop deponed that he had resided at and was the owner of the 506 square metres of land that composed Lot #7. The land had been gifted to him by his mother by virtue of a Deed of Gift dated 17<sup>th</sup> April 1986. The two properties shared a boundary line. He deponed further that in April 1992, the Defendant erected a shed and garage on the property, and began to take mangos and coconuts from the fruit trees on the property. He warned her not to encroach and she refused, but instead, on the 15<sup>th</sup> August 2005 she offered to buy the piece of land on which the shed was erected and he refused to sell. His affidavit states further that she repeated the offer in the presence of a Senior Land Surveyor, Ministry of Public Works and he again refused. The surveyor, however, does not recall this. He then wrote to the Ministry of Public Works informing them of the encroachment and on 19<sup>th</sup> July 2006 he obtained the services of a certified surveyor from the same Ministry to reconstruct and replace the boundary lines.
- [5] It should be noted here, that it was the evidence of this surveyor, Harrell Grafton Gaskin that he did make such a plan, and exhibited it, and that he found a structure, namely a garage, a paling and a shed belonging to Miss Ward encroaching on Mr. Bishop's lands. In fact the encroachment actually prevented him from marking the boundary at the North West corner of Lot 7 because it was in the way. The encroachment, shown on the plan exhibited shows Miss Ward occupying 53.1 square meters of Mr. Bishop's property which contains 340.6 square meters of land. I shall say more on Mr. Gaskin's evidence later.
- [6] Mr. Bishop went on to say that he requested compensation from Miss Ward and she refused, and that she also refused to remove the shed. On cross examination, Mr. Bishop agreed that Enid Bishop had indeed conveyed 506 square metres but that the Government had subsequently compulsorily acquired part of the property. To refer to Mr. Gaskin's evidence again, he gave evidence that that the plan he made in 1996 showed the residual land after the acquisition of a portion by the Crown.
- [7] He also admitted that at the time that the shed was built he and his mother were living at Lot 40 Alleyndale, because a highway was being built running through the land and that they were resited to Maynards from 1988-1990, when he returned.
- [8] In her affidavit, Miss Ward denied that Mr. Bishop lived at Lot #7, but instead stated that he had been relocated since 1983 upon the compulsory acquisition of the land. Her evidence was that she constructed the shed in or about 1989, since it was to her knowledge that Enid Bishop had been compensated for the land. She gave evidence that she herself planted the fruit trees. The gravamen of her evidence is that she was in adverse possession of the land on which the shed stands for over ten years and that Mr. Bishop had no title to it.
- [9] On cross-examination she changed her story somewhat. She agreed that the Bishops were relocated in 1990, and she also admitted that part of the shed was built on the boundary marks. Under questioning by Mr. Serrant, she denied that Mr. Bishop ever spoke to her about the land until 2006. She also said something quite significant. She admitted that "all along she thought the land belonged to the government" and that she "understood" that Government had "paid out the Bishops and it was a watercourse". She also admitted that in 2006 she offered to purchase the land from Mr. Bishop after he approached her. Miss Ward's evidence was quite clear and straightforward.
- [10] The evidence of the land surveyor Mr. Gaskin has already been referred to. He was the surveyor who executed the plan dated the 21<sup>st</sup> July 2006, and is a registered Certified Surveyor for the last thirty -five years with the Ministry of Transport and Works. He explained that he made the plan of the land belonging to Enid Bishop, and he found the encroachments as referred to above as well as an encroachment of a driveway.
- [11] The clear issue for the court is whether the encroachment was built in circumstances in which Miss Ward obtained a right of adverse possession over it, and secondly if she has not, what damages she should pay.

## **ADVERSE POSSESSION**

- [12] The law on adverse possession in Barbados focuses on the acquisition of title to land in circumstances where there was undisturbed possession for a period of ten years without the title of the true owner being acknowledged. (**Refer Commonwealth Caribbean Land Law; by Sampson Owusu (2007) Routledge-Cavendish at page 267**). The purpose of the limitation period of ten years (as prescribed by Section 25 (1) **Limitation Act No 11 of 1997**) is to effectively set a cut-off date by which the true owner of the property must lay claim. It is therefore in instances of adverse possession that title can be founded upon undisturbed possession by a party.

### **When does time start to run?**

- [13] The first question to be considered is when does time run in order to establish adverse possession. **Owusu** suggests that time begins to run only where there is actual adverse possession and that there are two conditions implied. The first condition is the absence of possession either as result of the owner being dispossessed or as a result of the owner's possession being discontinued. The second condition is the adverse possession of a squatter where "an intruder has assumed and retained possession of land for the statutory period before the institution of action". (**Rains v Buxton (1880) L.R. 14 Ch. D 537 at 539-40**). The instant matter falls on the second plank of the first condition.

- [14] It is indisputable, and the court so holds, that Mr. Bishop is the current owner of the property and has been since 2006. No challenge has been made to the deed of gift. However, it is clear that Enid Bishop was the owner prior to that date. Why she has not joined in the claim, or given evidence has not been explained. The Court assumes that she is still alive. Despite the evidence of Mr. Bishop that he was the owner since 1986, the clear evidence is the deed of gift was not done until 2006. The court does accept that he resided on the premises from his childhood, until he and his mother were resited to Maynards. However the Court cannot accept that he returned to Lot 7, since the Lot was empty and there was nothing to return to.

#### THE ELEMENTS OF ADVERSE POSSESSION

- [15] A person claiming adverse possession must rebut the presumption that the title holder of a portion of land is the party in possession. In **Basildon v Charge [1966] CLY 4929** the court noted that

“the holder of the paper title is deemed to be in possession in the absence of contrary evidence. It was for the person seeking to establish adverse possession to produce contrary evidence which must be cogent and compelling evidence of a single degree of occupation and physical control of the land unimpeded by others, with the relevant *animus possidendi*...”

- [16] In other words as **Owusu** puts it, there must be factual possession (*factum possessionis*) and an intention to possess (*animus possidendi*). “Exclusivity is of the essence of possession” (*plures eandem rem in solidum possidere non possunt*) (**Pye v Graham [2003] 1 AC 419 at 445**) and a party claiming adverse possession must therefore show that their use and enjoyment of the land was continuous and exclusive.

#### Factual Possession

- [17] Factual possession refers to those acts of physical custody and control that a party in adverse possession would do that an occupying owner might normally be expected to do. (Refer **Powell v McFarlane (1977) 38 P & CR 452, 470-71 per Slade J.**) The nature and quality of the occupation is vitally important in any determination of *factum possessionis* and whether possession had indeed been established is a question of fact based on all the circumstances of a particular case (refer **Bligh v Martin [1968] 1 All ER 1157**).

“The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest... are to be taken into account in determining the sufficiency of possession.” (**Lord Advocate v Lord Lovat (1879- 80) LR 4 App Cas 273 at 288**)

- [18] Was there factual possession in this matter? The court accepts that the shed was built in 1992, and not 1989 as Miss Ward contends. It is clear that Miss Ward has erected an encroachment on the property, and commenced her occupation as a trespasser. She does not deny it. It is also indisputable that for most of the period of encroachment, certainly during the time which adverse possession may have been obtained, that is 1992-2006 the property was not owned by Mr. Bishop, but by his mother.

- [19] I do not accept that Mr. Bishop spoke to Miss Ward on a number of occasions, the first being in 1992 when the shed was erected. The evidence reveals that the first written communication with respect to the encroachment came from Mr. Bishop in 2006. There has been no evidence presented to substantiate the Plaintiff’s claim that he spoke to the Defendant at any point prior to 2006, nor indeed has any evidence been provided to show that his mother objected to the Defendant being on the land. The Defendant’s possession was therefore uninterrupted from 1992 – 2006, a period of 14 years. I find therefore that the Defendant had “sole and undisturbed possession, user and enjoyment deliberately, adversely and exclusively exercised” (**Li v Walker (1968) 12 W.I.R. 195 at 206**) for the relevant prescription period.

#### Intention to Possess (*Animus Possidendi*)

- [20] On a review of the facts of any case in adverse possession, it must be evident that there was the intention to exclude or dispossess the world at large including the true owner from the plot of land in question (refer **Pye v Graham** and **Powell v McFarlane**). It must be noted however, that the emphasis is on possession and not the intention to own (**Buckinghamshire County Council v Moran (1990) Ch 623, 642**) and where therefore factual possession has been proved, the need to show an intention to possess becomes less important.

- [21] Factual possession in this matter has been clearly established. Nonetheless it is clear from Miss Ward’s evidence that she believed the land which she was occupying did not belong to the Bishops, but was government land when she deliberately set about building, as she said “on the boundary”. In accordance with the authorities outlined above, the court finds that she had the intention to dispossess all the world, including the true owner (although she was mistaken as to who that was) from possession and to establish possession herself.

- [22] I note at this point that the Defendant’s admitted offer to purchase the piece of land upon which the encroachment stood, while clearly in conflict with her actions, does not displace her rights acquired by adverse possession. It betrays a lack of legal knowledge about her rights, nothing more, because by then she had already been on the land long enough to establish adverse possession.

#### CONCLUSION

[23] In the circumstances I find that the claim of adverse possession has been made out by Miss Ward, and she has gained ownership of the 53.1 square metres of land on which her shed has stood since 1992. Therefore the Plaintiff's claim fails.

[24] Costs are awarded to the Defendant to be agreed or taxed.

**Jacqueline Cornelius**

**Judge of the High Court**