BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 362 of 2009
No. 2132/07
BETWEEN:

SEASPRAY HOLDINGS INC. PLAINTIFF

AND

BARBARA BABB-CADOGAN DEFENDANT

Before the Hon. Madam Justice Margaret A. Reifer, Judge of the High Court.

2009: Nov 6, 9
2011: April 20, 27
May 4, 9
2012: January 17, 18
2014: April 25

Appearences

Mr. Stephen W. Alleyne, Attorney-at-law for the Plaintiff

Mr. Alwyn A. Archer, Attorney-at-law for the Defendant

DECISION

BACKGROUND TO THIS CLAIM

[1] This action was originally started as an application for injunctive relief under suit no. 2132 of 2007, which was refused. As a consequence of the factual matrix that unfolded in this previous proceeding, and the nature of the relief

sought, the parties were invited to properly plead their claims by way of Writ of Summons. (See Order of 2009-02-12 that the matter be continued as a Writ action).

[2] The Writ of Summons with Statement of Claim was filed in this action in February 2009 (erroneously under a new suit number but later (2009-05-07) consolidated with the original action), and it narrowed what previously was a much wider claim by the Plaintiff. This Writ sought the following relief:

> " (1) A declaration that the Plaintiff is estopped from denying the Plaintiff's title to the said strip of land (by virtue of a decision given in Supreme Court Suit No. 63 of 1965 Joseph Nathaniel Yearwood v Ivan Sobers);
> (2) Alternatively, a declaration that the Plaintiff is the owner of the said strip of land in the Sketch annexed hereto and bordered green by virtue of adverse possession;
> (3) An injunction ordering the Defendant to demolish and remove said wall;
> (4) Damages;
> (5) Costs;
> (6) Further or other relief.

[3] By consent of the parties, it was agreed that the affidavits and the exhibits attached to the affidavits of both the Plaintiff and the Defendant in suit no. 2132 of 2007 would stand as pleadings and the parties were at liberty to add thereto the pleadings in suit no. 362 of 2009.

THE PARTIES

[4] The Plaintiff in this action is a corporation which appears to have been established for the purpose of owning and managing a property situate at Half Moon Fort in the parish of Saint Lucy in this Island. The beneficial ownership in this property is vested in Les Conley Warner (Les Conley Warner is its sole shareholder and director). This property was originally a family property owned by his late father Joseph Nathaniel Yearwood (who was in possession of it since 1954, some 6 years before it was conveyed to him in 1960), which Les Conley Warner (hereinafter 'Warner') purchased by acquiring the interests of his siblings for value, sometime in 2006.

[5] He thereafter embarked on a path of renovating and upgrading this property thereby converting it into the substantial and valuable property that it is today. It is evident that in this process much conflict was generated as the closeness of the Seaspray property to the boundary line (in some places apparently less than 2 feet) would have necessitated some trespassing by workmen with equipment on the Defendant's property.

[6] The adjoining property to the south is owned by relatives of the Plaintiff /Warner. The Defendant is the cousin and neighbor of the Plaintiff/Warner. In effect, the Defendant is sued in a representative capacity. The evidence reveals that this property is occupied by the Defendant and her mother, who

together with her siblings are the beneficiaries of the estate of father and husband, Clifford Clarke, deceased. Clifford Clarke became the owner of this property consisting of 13,512 square feet of land by a conveyance dated the 30th day of January 1970. There are certified surveyors' plans of the land purchased by Clifford Clarke, namely, Compton Fraser 1968, Harold A Went 1972 and more recently Nigel Lucas February 2008.

THE CAUSE OF ACTION

[7] The narrowed dispute relates to a strip of land consisting of 33.7 square metres. A "Sketch" as opposed to a survey plan of this strip has been produced by the Plaintiff and admitted into evidence with the consent of the parties.

[8] As is the case with neighbours and families where resentments and small conflicts simmer untended, a conflagration erupted around August 2007 when the Defendant built a concrete wall enclosing her property, which said wall enclosed the above-mentioned strip of land. This concrete wall largely followed the footprint of a chain link fence and before that a wire fence all erected by the Defendant's predecessors, but a correction to this was made when the Defendant retained Land Surveyor Nigel Lucas whose involvement resulted in a minor adjustment to the block wall to ensure compliance with the survey plan.

[9] In a letter to the Plaintiff's attorney, who wrote on his behalf asking her to remove the concrete wall, the Defendant stated that she was forced to erect the wall to protect her property from further encroachment by the Plaintiff.

THE PLEADINGS

[10] The following paragraphs of the Plaintiff's Statement of Claim bear special mention as they address the factual matrix to be proven by the Plaintiff in justifying the relief sought. They are as follows:

> " 5. The Plaintiff and its predecessors in title of the Half Moon Fort property and the several occupiers thereof have for a total of more than 53 years been in open, exclusive and uninterrupted possession of the said strip of land and have used it as a car park and a means of access to the beach and the western side of the property.
>
> 6. On the 17th day of February 1965 Joseph Yearwood, the then owner of the plaintiff's property commenced an action in the High Court of Justice against the predecessor in title of the property at Half Moon Fort now owned and occupied by the Defendant intituled No. 63 of 1965 Joseph Nathaniel Yearwood v Ivan Sobers for trespassing on the said strip of land on two occasions during the year 1964. The Defendant's predecessor in title duly entered an appearance in the said action and defended the same on the grounds pleaded in his defence in the said action that he was the owner of the said strip of land. The Plaintiff at the trial of this action will refer to the said pleadings in the said action for their true terms and the issues raised therein.
>
> 7. During the years 1966, 1967 and 1968 the said action came on for trial before the Honorable Mr. Justice Delisle Ward who, after hearing the evidence tendered by Joseph Nathaniel Yearwood and Ivan Sobers in the said action, entered judgment for the Plaintiff therein."

[11] The case for the Defendant as revealed in her Defence is that the 33.7 square metres is part and parcel of the Defendant's property as shown on a surveyor's plan dated 7th February 2008 by Nigel SA Lucas, Land Surveyor. Open, exclusive and uninterrupted possession of this strip of land for 53 years or at all, is hotly disputed. These paragraphs are germane to the Defendant's challenge to the Plaintiff's claim:

> "4 ….The Plaintiff's predecessors in title were permitted by the Defendant's predecessors in title to use a portion of the strip of land at its north eastern boundary as it abuts and adjoins the road for the purpose of parking one car only and for that permission, the Plaintiff paid a monthly rental of 50 cents per week up until 1987. Thereafter the use as a car park was terminated.
>
> 5. Further, the Defendant denies that the strip of land was used as a means of access to the beach as the terrain thereto was rough, rugged and precipitous. The Defendant will contend that the access to the beach was via a set of steps on the northern boundary of the Plaintiff's land as it adjoins lands known as Half Moon Fort House.
>
> 6. As to paragraph 6 and 7 of the statement of claim, … it is denied that the said judgment identified this 33.7 square metres strip of land or any specific area at all as the area to which this present action relates."

[12] As to the car spot, the Defendant alleges that over time this spot had become overgrown with bush and has been debushed and maintained by the Defendant's gardener since it forms part of her land and was no longer used for parking a car.

THE ISSUES AS REVEALED BY THE PLEADINGS

[13] The issues for the determination of this Court are twofold:

1. Is there a case for Estoppel; and

2. Is there a case for Adverse Possession. In other words, did the Defendant discontinue possession of the 33.7 square metre strip of land for a period of ten years or more and did the Plaintiff remain in possession of the said strip of land for a period of 10 years or more.

THE EVIDENCE

[14] Les Conley Warner was the principal witness for the Plaintiff and he gave evidence of residing at this property from the time he was a boy, living there with his father Joseph Nathaniel Yearwood and his wife Dolly Yearwood, who was not his mother. He has however lived in the United States since 1983, returning to the island periodically. He gave evidence concerning the dispute of the 1960's. His evidence as to the disputed area is that it involved an area encompassing a coconut tree.

[15] His evidence is as follows:

> "Q: What was the relationship like between your father and Ivan Sobers?
> A: He did not live there and eventually they had a dispute about Ivan Sobers trespassing on the land. A coconut tree was located to the rear of the house on the south side. Someone removed it. There is another coconut tree there."

[16] In cross-examination, when it was put to him that this case has nothing to do with the coconut tree above-mentioned, he revealed that at the time of the dispute he was a boy and might have been about 8 to 10 years old.

[17] His evidence is that after the property was purchased by the Defendant's father, his wife and her (Defendant's) mother erected a chain link fence between the two properties. It is his evidence that this fence excluded the 33.7 square metres (consisting of a strip of land providing access to the beach and inclusive of the parking lot) being claimed. Thus he claims, from the 1960's to 1992 when his father died, his father had uninterrupted possession of the 33.7 square metre strip and thereafter it remained in the possession of himself and his siblings until he became the sole beneficial owner in 2006. It was in 2007 that he received word while in the United States, where he lives, that the chain link fence had been demolished and a block wall erected.

[18] He denied any knowledge of the Defendant's father ever renting a car spot to his father, but grudgingly admitted in cross-examination that the "old house" used up almost all of the 2620 square feet and the 'new' structure is on the same footprint. It was established to the satisfaction of the Court in his examination and cross-examination that between 1987 and 2006 when he purchased, there was only a brief period of continuous occupation by Warner's brother Terry who lived there from around 1990 to 1995. While living there he did not own a car.

[19] It was Warner's evidence that he always stayed on the ground floor when he visited and that he had friends staying there from time to time and friends who would go to the house to check it for him. He admitted that after his brother left, the electricity and water were both turned off, but countered that he had a generator downstairs and that when he came to Barbados he "put [his] suitcase there" and "When I came to the island I put my car there".

[20] It is significant that Warner has lived in the United States for the last 20 years and was unable to establish continuous occupation of the premises from 1995 to 2006 (or for that matter from 1987 to 1995). His statement that when he came to the island he 'left his suitcase there' was significant, as was his admission that water and electricity to the building were turned off after his brother Terry left. Neither his brother Terry or any other member of his family or any relevant witness for that matter, gave evidence of this occupation and possession of the 33.7 square metre strip. He gave evidence that on average he spent between 15 and 20 days per year in Barbados and that he only stayed at the house if he came without his wife.

[21] A significant admission by the Plaintiff (Warner) in his cross-examination is the existence and location of the chain link fence which pre-dated the block wall. When counsel for the Defendant put to him that the chain link fence

followed the perimeter of the area used for car parking and then went westward, he replied as follows:

"I agree, but there was no L it was one straight fence."

[22] Also when it was put to him that the wall as presently erected follows the northern boundary of the Defendant's linemark, he responded as follows:

"I agree."

THE EVIDENCE OF G DEVERE WALCOTT (LAND SURVEYOR)

[23] This Court placed little evidential value on the evidence of this witness for the reasons that will become evident. His evidence was is no way probative of whether there has been adverse possession for in excess of 10 years. He neither knew Warner, the parties or the preceding events before he went to the property in October 2007.

[24] His involvement in this matter is as a result of his retention by Warner, through his attorney in October 2007, after the block wall started going up. As a result of instructions received, and after looking at linemarks and evidence of an old fence, he prepared a "Sketch" dated October 18th 2007, the purpose of which was to delineate the 33.7 square meters. See also Affidavit of Devere Gregory Walcott filed January 19th, 2009 in suit no. 2132 of 2007. He made this significant admission:

> "This sketch was never intended to accurately reflect the position. It was not an actual survey of two properties. Purpose of the sketch was to get approximate area for land in dispute."

[25] He agreed, when shown the plan of Nigel Lucas Land Surveyor, that this plan was an accurate reflection of the actual size of the property. When shown the Affidavit of Nigel Lucas he agreed with its contents. (See paragraph 9 of his Affidavit of January 19th, 2009).

[26] When asked by counsel for the Defendant how he knew that the 33.7 square meters delineated in his 'Sketch' was used by Warner's family, he responded as follows:

> "The sketch shows area claimed by Warner family. I was told this by Mr. Les Warner after I did the survey… I was told that evidence of an old fence on the site was the disputed area and to represent this area on a sketch."

[27] At paragraph 10 of his Affidavit of January 19th, 2009 he states as follows:

> "… I say that the sketch was never intended to be a plan of the respective properties of the Plaintiff and the Defendant but was merely to identify the area of land falling outside the Defendant's original fence." (my emphasis)

[28] His evidence ended the case for the Plaintiff.

THE CASE FOR THE DEFENDANT

[29] The Defendant gave oral evidence in support of her defence. She lived at Half Moon Fort for 20 years prior to 1967. In that year she immigrated to New York, from which she returned permanently in 1981. She visited Half

Moon Fort from her matrimonial home in Mullins from 1981 to 1989, returning to live between there and New York after her marriage ended in 1989. She presently still resides there. She has an intimate knowledge of what took place over the years as she and her sister sent home money from New York to facilitate her father's purchase of this parcel of land.

[30] There was always a fence between the two properties from the seaside but it did not come all the way up to the road. In cross-examination she told the Court that: "when my mother returned from New York in 1983 she erected a green fence."

This was in response to it being put to her that the fence was erected in 2000.

[31] She told the Court that the northeast corner of her father's property abutting the road was a space left for rental to Joseph Yearwood. The space was left for the parking of one car and for which he paid 50 cents per week by way of rent. She produced a rent book which purportedly recorded those payments. She stated as follows:

> " … The rent was recorded in a rent book. When my father was getting down he gave me the rent book and other papers and told me always keep it… he told me to keep the rent book with the land papers and this is what I did."

[32] The book produced had notations of dates on which land rent was received, the last of which was in 1987. As observed by counsel for the Plaintiff, there was no specific notation as to the location of the land being rented to Joseph

Yearwood, but also there is no evidence from either quarter to suggest that Clifford Clarke was the owner of any other land that was rented to Joseph Yearwood. Her evidence is that her father died in 2000.

[33] After 1987 the house was empty until Warner's brother, Terry, moved there around 1990/1991, moving out around 1994. The car park fell into holes and bush grew up. It was used, but they [the Defendant and her family] undertook the responsibility of cleaning it monthly. She told the Court in her cross-examination :

> "… Our gardener came every month and cleaned in that area."

[34] It was her evidence that the house remained unoccupied until 2006/7 when Warner took it over and renovated it. During that time it fell into disrepair, had cracks down the sides of the wall and rastas had moved in. There was no light or water on the premises.

[35] Between 1987 and 2007 she never saw any hired cars parked in the spot, with 'the exception of a lady and her husband who came in from Boston'. She never saw Warner's brother Terry park a car there while he lived in the house between 1991/2 and 1994 when he moved out. In answer to whether her father collected rent for the spot from Terry, she responded that it was to her knowledge that when her mother was instructed by a sister to collect rent, she refused to do so, saying that Terry did not have a car.

[36] She gave evidence that one Sunday morning in 2007 she received a call from Warner from a New York number. He asked her if he could buy the land out there, and she understood him to mean the car park. She explained to him that the land was not hers to sell and that further more it was not for sale. Prior to this call she had received the same enquiry from a cousin of Warner purportedly acting as his agent.

[37] This evidence is not of itself fatal to the claim of Adverse Possession or in other words, it is not seen in law as an admission/or acknowledgement if the factual basis, that is, factual possession and intention to dispossess already exists: see **J A Pye (Oxford) Ltd and Others v Graham and Another [2003] AC 419.**

[38] It is her further evidence that in August 2007 her brothers came home from overseas for the express purpose of taking down the fence and putting up the block wall. In cross-examination she stated:

> "When my brothers put the wall up, they placed it in the same position as the fence except the area that had the car park."

[39] She returned from a visit to New York in September 2007, and it was then that she received a letter from counsel Mr. Alleyne dated September 7th 2007. After receiving another such letter she contacted her Land Surveyor Mr. Nigel Lucas, giving him instructions to ascertain the correct boundary and advise persons working on the Plaintiff's property the location of their

boundary line. As a result of her consultation with Surveyor Nigel Lucas, it was drawn to her attention that they had encroached **slightly** (my emphasis) northwards, outside of her boundary line. The block wall was taken down and re-erected in accordance with Mr. Lucas's directions: See Affidavit of Nigel Lucas filed in suit No. 2132 of 2007 on July 21st 2008.

[40] In her cross-examination she gave pertinent evidence concerning the earlier land dispute as follows:

> "Prior to 1970 there were disputes between the owner of our property Mr. Sobers and Les Conley's father Joseph Yearwood. The dispute related to an area below the cliff which was a no-man's land. I am aware that the matter went before the court… It was only after Mr. Lucas's survey that we realized that there was a no-man's land between the two properties."

[41] The Court visited the locus together with the parties and their Land Surveyors Nigel Lucas and Gregory Walcott. Evidence taken at the locus confirmed and supplemented the other evidence taken in this matter, particularly as it related to the evidence of Land Surveyor Nigel Lucas. He gave pertinent evidence as it related to the location of the chain link fence, the location of the block wall and the reason for its re-location. This evidence was instructive:

> "In conducting this survey, what I found … is that I found two boundaries three feet apart and from my investigations, I found that there was a gap in the boundary between Mrs. Babb-Cadogan and Mr. Yearwood where it was like a triangular piece of land … it was coming from similar marks at the top but there was a triangle.

> The Court: So, in effect, you are saying there was a no man's land?
> The Witness: We call it a gap, a no man's land. So when I found that the contractor Mrs. Babb-Cadogan was using the outer mark, the most northern mark…pulling from the same common mark up there and I advised them to bring it back to the mark that was shown on her plan.
>
> Q: So they brought it down?
>
> A: which is where the wall is now
>
> Q: So, that in no way does her wall now encroach on either what I call the gap or on Yearwood's property?
>
> A: No, it doesn't"

[42] This evidence, as stated above is instructive for two main reasons. It is confirmatory of the evidence of the Defendant that there has always been either a picket fence, chain link fence and finally a block wall in this area, which evidence directly contradicts the Plaintiff's assertion of 53 years or for that matter 10 years, adverse possession.

[43] It was also evident, that the correction was not significant and was in fact to exclude what Lucas's survey showed to be an area that was not owned by either party, that is, the no man's land.

[44] This exchange occurred while he was being cross-examined:

> Q: Now, can you point out where the original wall, the wall you asked the parties to take down, can you estimate how far to the north it extended, based … from this wall now as it stands?
>
> A: It was about three feet from that wall at this end only, but it was basically zero up there (witness indicates)".

[45] It is also instructive that he stated in his oral evidence at the locus, that his survey in 2007, accepted by all parties in this matter, differed from the 1970 survey plan of Harold Went in only one particular, and that is, the location of the high water mark.

[46] Also instructive is his evidence that there was nothing observed by him in his survey in support of the sketch prepared by Land Surveyor Walcott. This exchange followed:

> "Q: Now, the plan by Mr. Walcott, which is this rectangular area in green, there is a line marked 17.06 and 279.01. Did you see anything on the ground to indicate that as a boundary, do you see any line marks?
>
> A: No, ma'am.
>
> Q: And, you are saying therefore looking at that plan, the plan of Mr. Walcott, the 33.7 square meters which he shows, would you agree that is part and parcel of Mrs. Babb-Cadogan's land?
>
> A: Yes, part of the plan that I would have prepared for Mrs. Babb-Cadogan."

[47] Mrs. Babb-Cadogan's evidence at the locus was also instructive when she stated as follows:

> "… that wall was set up where the fence taken down from because originally I told the workmen to look for all of the line marks on the cliff because of the history of the land and they did not. They just put up the wall where they took down the fence from. So that is what created the problem. And then when they look inside there was another line mark south…"

DISCUSSION

Estoppel Abandoned

[48] The Plaintiff's pleading of Estoppel is predicated on the assumption that the 33.7 square metres marked green on the sketch of Devere Walcott is the subject matter of suit no. 63 of 1965. When challenged on the evidentiary basis for the premise, counsel for the Plantiff conceded that the judgment does not identify the land. Counsel subsequently abandoned this first issue and submitted that he will be basing his claim solely in Adverse Possession.

Adverse Possession

[49] The law on Adverse Possession, both as it relates to statutory provisions and general principles (common law), was comprehensively rehearsed by our Court of Appeal in the case of **Clyde Browne v Michelle Moore-Griffith et al Civil Appeal No. 16 of 2009**, (unreported decision of July 2nd, 2012) and need not be repeated except in summary. This decision upheld the judgment of Kentish J. in a claim by the respondents for possession and title to disputed land, in the face of the appellants' claim to rightful possession by reason of Adverse Possession.

[50] Those relevant statutory provisions can be found in the **Limitation of Actions Act, Cap 231**, specifically at sections 25 (1) (which establishes the ten year time limit as the minimum period required to effectively dispossess

the holder of the paper title), section 31(1) (accrual by adverse possession) and (4).

[51] The relevant common law principles culled from the cases of **Powell v McFarlane (1979) 38 P & C R 452, Buckinghamshire County Council v Moran [1990] Ch 623, London Borough of Lambeth v Blackburn (2001) 82 P & C R 494 and Pye v Graham (Supra)** are usefully outlined by the Court at paragraph [37] of their judgment as follows:

> " (1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*animus possidendi')*
>
> (3) Factual Possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.
>
> Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.

> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.
>
> (4) The *animus possidendi*, which is also necessary to constitute possession, was defined by **Lindley MR** in **Littledale v Liverpool College [1990] 1 Ch 19** … 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 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 processes of the law will allow."

[52] Paragraph [60] is of particular relevance. It states as follows:

> "[60] All of the legal authorities indicate that a trespasser seeking to dispossess the legal owner has to adduce **compelling evidence** (my emphasis) that he had the requisite *animus possendi*. In addition his claim will fail in instances where his use of the land was equivocal in the sense that it did not necessarily by itself establish an intention on his part to claim the land as his own and so exclude the true owner."

[53] Stated differently, the burden of rebutting the presumption that the paper owner is in possession, falls to the person claiming title by adverse possession: see **Basildon v Charge [1996] CLY 4929**.

[54] Critical to the application of the above principles of law, is the determination from the facts of when time began to run against the owner of the disputed land.

THE SUBMISSIONS

[55] The Plaintiff's case for Adverse Possession (estoppel having been abandoned) was framed in the alternative. The first limb related to the area consisting of 33.7 square metres which the Plaintiff averred has been used as an access to the sea and a car park for in excess of 53 years, which said area he alleged had been excluded by the fence.

[56] In the alternative, counsel restricts his claim to the car park thereby shifting his frame of reference from 53 years to the period 1987 to 2007 (when the wall was erected). He claims in the alternative that the Plaintiff is entitled to a right to park motor vehicles on the said strip and/or a right of way over the said strip.

[57] In support thereof he argues that "Adverse possession kicked in the moment rent was not collected". Stated differently, he is stating that time began to run from the moment in 1987 that the Plaintiff's predecessor ceased paying rent. He argued that the Plaintiff continuing to park there after 2007 resulted in Adverse Possession. To prevent time running, the Defendant would have had to fence in the car park before 2007.

[58] Counsel relied on the following cases as espousing the relevant principles on Adverse Possession: **Hayward v Chaloner [1968] 1 QB 107**; **Mulcahy v Curramore Pty Ltd [1974] 2 NSWLR 464**; **The Mayor & Burgesses of the London Borough of Hounslow v Minchinton (1997) 74 P & CR 221**; **Moses v Lovegrove [1952] 2 QB 533**; **Buckinghamshire CC v Moran (supra); JA Pye (Oxford) Ltd et al v Graham et al (supra); Burns v Anthony et al (1997) 74 P & CR D41 and Williams v Jones [2002] EWCA Civ 1097.**

[59] Counsel for the Defendant argued, that for there to be a finding of Adverse Possession, there must be two criteria, (1) factual possession and (2) intention to dispossess. He submitted that at no time was 33.7 square meters of land ever in the Plaintiff's possession. At most, in the period 1987 to 2007, the Plaintiff has never been in the island for as much as four weeks and never consecutively. Between 1987 and 1990 there was no-one occupying the house and no-one using the car park. There were no acts of possession between 1987 and 1990. Between 1990 and 1994 the house was occupied by Warner's brother Terry who did not own a car. Even if it is accepted that he periodically borrowed a car, there is no evidence before the Court that he parked said car in the subject car park. The Defendant further submits that between 1994 and 2007 Warner could not have stayed at the

house as it was in a state of disrepair and all the utilities had been turned off (counsel at this juncture cross-referenced to the cross-examination of Warner when he was asked about the utilities).

[60] He urged the Court to accept the evidence of the Defendant and enumerated the many instances where, in his opinion, the credibility of Warner had been tested and lost.

[61] In summary, he submits that not only was there no evidence of factual possession by the Plaintiff, there was clearly no abandonment of possession by the Defendant as clearly evidenced by the fact that her gardener looked after the area, which was a clear expression of her intention to repossess after the tenancy ended. He argued that in so far as the Defendant is concerned the Court must look at the difference between 'dispossession' and 'discontinuance of possession'; the Plaintiff's use was discontinued in 1987 and the occasional visits by the Plaintiff were acts of trespass and not a display of 'animus', that is, the intention to dispossess. Parking a car for a few days a year did not in his submission establish sufficient physical control to lay claim to physical possession: See Megarry and Wade 4th ed Law of Property at page 1012 titled The Running of Time.

[62] In summary, he submits that there is no evidence of Adverse Possession.

[63] Counsel for the Defendant relied on the following authorities: **R v Secretary of State for the Environment ex parte Davies (1990) 61 P & CR 487; Buckinghamshire County Council v Moran (supra)**

FINDINGS OF PRIMARY FACT

[64] In light of the above, my conclusions are as follows:

1. The evidence does not support any nexus between the land the subject of the suit no. 63 of 1963 between Joseph Nathaniel Yearwood v Ivan Sobers (the predecessor of Clifford Clarke) and the 33.7 square metres of land the subject of this action. It appears to this Court that this was a different dispute concerning an area of land on which coconut trees were planted which said area was claimed by both parties (boundary dispute). There is therefore no evidential basis on which to ground the plea of "estoppel per rem judicatem". This dispute was settled by the time Clifford Clarke purchased in 1970 pursuant to a survey plan. This parcel to my mind is distinctly different from the platform built up by Joseph Nathaniel Yearwood on a level with the public road for the parking of vehicles.

2. That the Defendant is the paper owner of the disputed strip of land.

   It is indeed significant, in the opinion of this Court, that the Plaintiff, both orally and in his written submissions makes the following admission:

   > "The Defendant is one of the joint owners and the occupier of a parcel of land at Half Moon Fort, St. Lucy comprising 13,512 square feet and the dwelling house thereon situated south of and contiguous to the Plaintiff's property…"

   It is clear from the evidence that the strip of land consisting of 33.7 square metres is part of the above parcel. Conversely, it is clear, as also admitted by the Plaintiff, that he is the paper owner of 2620 square feet of land as shown on a plan certified the 4th September 1956 by Garnett Best, Land Surveyor as exhibited in the Affidavit of Warner sworn to and filed on 9th September 2007. This 2620 square feet is NOT inclusive of the 33.7 square metres being claimed.

3. The above mentioned platform does indeed provide a means of access to and from the public road, but not to and from the sea and the western side of the property as pleaded by the Plaintiff. There is a cliff on the Defendant's property which makes access to the sea at that point hazardous.

4. That an area (enough to facilitate the parking of one car) in the north east section of the Defendant's land was rented to the Plaintiff's predecessors in title, primarily during a time period when the Plaintiff's predecessor had rented the property to members of the United States Navy who were stationed at the United States Naval Base, and who used motor vehicles. This Court accepts as true the evidence of the Defendant as it pertains to the rental and the corroborative evidence of the rent book in spite of its evidential deficiencies (the Plaintiff points out that the rent book does not say what land the rent was related to). See also the Affidavit of Barbara Babb-Cadogan filed July 21st, 2008 at paragraphs 15 to 18. Significantly, counsel for the Plaintiff when pressed by the Court to address and analyse the evidence pertaining to the rent book conceded that there was a contractual arrangement between Clifford Clarke and the Plaintiff's father for rental of land. This effectively reduced the focus of the Court to the period 1987 to date.
5. That the platform above-mentioned has been used intermittently since that time for the parking of vehicles when the house is occupied, although no rent has been paid for these purposes since

1987. Sometime on or after 1987 the Defendant repossessed this parcel which was subsequently enclosed by the concrete wall in 2007.

6. That the evidence (both oral and affidavit) does not support the Plaintiff's assertion that the 33.7 square metres represents an area of land falling outside the Defendant's original fence. The evidence is supportive of the Court's finding that the only substantial areas falling outside the fence were firstly, the car park; and secondly, the no man's land. Paragraph 4 of the Nigel Lucas's Affidavit of July 21st 2008 is pertinent. It reads as follows:

> "During the course of my survey, I observed that a wall in the course of being erected was encroaching slightly northwards onto the adjoining land owned by one Joseph Yearwood and I pointed this out to the Defendant."

7. The only area with respect to which this Court must determine whether the Plaintiff became an adverse occupier, is the portion/strip of land adjoining the road constituting the car park.

DISPOSAL AND FINDINGS

[65] It is the conclusion of this Court, on a review and analysis of the totality of the evidence, that there was neither 'factual possession' of the disputed land nor the 'intention to dispossess' the Defendant. There clearly was not abandonment of the disputed land by the Defendant. This Court accepts on a

balance of probabilities, that use of the land was restricted to the use of the platform for the purpose of parking, a single vehicle. The infrequent use of the platform for parking was in and of itself, an equivocal act and not an "assertive expression of exclusive possession": see **Simon Brown LJ** in **Burns v Anthony (supra)**. In sum, the Plaintiff has failed to discharge the burden of proof placed upon him and his claim is dismissed.

[66] The Plaintiff shall pay to the Defendant her costs of this action, to be agreed or assessed.

[67] I will accept the parties' written submission on costs, if there is a failure to agree same within twenty-eight days of this decision.

Margaret A. Reifer
Judge of the High Court