THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA 1888 of 2005

CV 2009-02047

BETWEEN

ALBERT GODEN	**CLAIMANT**
AND	
N.H. INTERNATIONAL (CARIBBEAN) LIMITED	**FIRST DEFENDANT**
CLEAVER HEIGHTS DEVELOPMENT COMPANY LIMITED	**SECOND DEFENDANT**

BEFORE THE HONOURABLE MR JUSTICE RONNIE BOODOOSINGH

APPEARANCES:

Mr Terrence Bharath instructed by Mr Guy Hannays for the Claimant

Mr Jason Mootoo instructed by Mr Shiv Sharma for the Defendant

Dated: 19 February 2013

REASONS

1. The claimant lives with his family at 26 Cleaver Road Arima. On the west is a 62 parcel of land owned by the second defendant.

2. Included in that parcel is a piece of land comprising 5,982 square feet. This is adjacent to the claimant's home and property. This is the disputed land.

3. As at 6 August 2005, the claimant was in possession of part of the disputed land having erected various structures including a washroom, toilet and bedroom. These were an add-ons to the house at No. 26. He had also partially enclosed the disputed portion by a wire fence.

4. Between 6 and 12 August 2005, the defendants attempted to take possession of the disputed land as they were building a housing development on the 62 acre parcel.

5. The claimant began this claim on the basis that the defendants' title had been extinguished by his uninterrupted possession of over 16 years.

6. This is in my view is the critical issue to be decided. The issue is whether the claimant had been in uninterrupted possession of the disputed land during the period before the commencement of this claim.

7. The evidence of the claimant on this issue came from himself, his wife, Gale Huggins and his sister, Marlene Matthews. They were cross examined.

8. The evidence from the defendant was primarily that of a land surveyor, Mr Aldwyn Aqui, about a survey he had conducted in 1992/1993. Mr Emile Elias also gave evidence.

9. Ms Matthews' evidence was that around 1985, the claimant used the disputed land to conduct his electrical business. He started to store tools in a wooden shed. She said they built a galvanize fence enclosing the land. She said Gale Huggins came to live with the claimant in 1992. She would place clothes on a line on the land and place her potted plants there. In 1998 or so she says the claimant erected a shed and driveway on the land and placed a wire fence in 2003. She said she went to parties and gatherings on the disputed land.

10. Ms Huggins' evidence concerned from when she came to live with the claimant in 1992. Her evidence in chief was in similar vein. She noted there was a latrine and tool shed on the land. Her children would play on the land and the dogs would run around. In 1998 she says the claimant built a driveway and a shed for parking his vehicles. She said it was a recreational area and they held gatherings there. They built a concrete annex with washroom and a bedroom on part of the land.

11. The claimant also said he and his father would plant crops on the land. He built a concrete doghouse in the late 1990s on the south western boundary of the land.

12. He said he built a concrete structure on the land about 1998.

13. There was a significant inconsistency in the evidence contained in the witness statements compared to the claimant's affidavit filed in injunction proceedings in this matter. This related to when the shed was constructed. In earlier proceedings he said this was done in or about 1992. In cross examination he said he was "heated" then and probably confused by the events. The defendants say this inconsistency was because of the evidence of Mr Aqui who had said he found nothing on the lands to suggest occupation in 1992/1993.

14. Aldwyn Aqui's evidence is that he is a land surveyor for over 40 years. In December 1992, as part of Laughlin and Associates, a surveying firm, he was engaged by the second defendant to survey the larger parcel of lands. The specific purpose was to ascertain the extent of any encroachment – wooden or concrete structures, sheds, fences, cultivation of crops and other signs of occupation and possession. He said he saw no structures as set out on the sketch plan of the claimant's surveyor, Mr Moses, prepared in 2005, existing in 1992/1993. He noted that all encroachments found were noted on the lands. Mr Elias' evidence for the defendants was that proceedings were commenced against squatters on the lands.

15. The issue then was whether the claimant was in occupation of the lands for the requisite period and the extent of the occupation.

16. I preferred the evidence of Mr Aqui to that of the claimant and his witnesses.

17. The claimant had no independent evidence. It was his burden to prove his occupation of the lands. He produced no photographs to support his early occupation. He produced no evidence other than his family members. From his evidence there ought to have been several persons who could testify to his occupation of the entirety of the land over the requisite time. The fact that he brought none was to his disadvantage.

18. His obligation was to bring clear and cogent evidence of this occupation. It was his burden to prove. The claimant had said it was common knowledge in the area that he and his family had always occupied the land. In those circumstances, there was much more he could have done to establish his case on a balance of probabilities where he seeks to dispossess the paper owners of the property.

19. I found his shifting of the date of the construction of the shed to be significant affecting his credit. Further, while I accept he may have used the premises occasionally for a birthday party or to park vehicles from time to time, these acts do not constitute sufficient acts of control to establish exclusive possession as contemplated in the cases such as **JA Pye (Oxford) Limited v Graham [2003] AC 419**.

20. I considered Mr Aqui to be a more independent witness. His survey plan, a contemporaneous document, supported his assertions. I also accepted Mr Elias's evidence that if there was an encroachment of significance they would have taken steps to deal with it given their position in respect of other occupiers. Mr Aqui's engagement was specifically for this purpose.

21. What is also in contention is the extent of the occupation in any event. The evidence does not suggest there was complete occupation of the entire disputed land for the requisite period of time.

22. I found Ms Matthews' evidence to be somewhat undermined in cross examination.

23. Versions of witnesses can be similar because what is being said is true or because what is being said has been arrived at by collusion. My impression of the witnesses was that they had collaborated to have their evidence in chief synchronised.

24. In cross examination, Ms Matthews said she could not put a year to when the annex went up although she said so in her witness statement. I found her answers vague as to the events in cross examination.

25. Having regard to my findings, it is unnecessary to make a determination of all the other issues raised.

26. However, for completeness, I will address the likely status of the tenancy of the lands in question.

27. It is not disputed that the claimant's father, Alfred James, had a tenancy of Lot No. 26 on which the family home stood, at least up to his death. This is accepted in both the statement of claim and reply.

28. It is also not in dispute that Lot No. 26 Cleaver Road and the disputed lot were owned by the same landlord.

29. The first issue is whether the claimant's father's occupation of the disputed lot merged, as it were, with the tenancy of Lot No. 26. There is a presumption that any further occupation of land is intended to be for the benefit of the landlord's interest and not adverse to it. No evidence has been brought to displace that presumption. In accordance with **Smirk v Lyndale Developments Limited [1975] AC 317** and the cases cited in that case, I find that that was the case here. There was no possession adverse to the landlord's interest.

30. The second issue is what was the status of the tenancy of Lot No. 26 together with the occupation of the disputed lot on the death of the claimant's father? In my view, the tenancy did not die with his death. Rather it survived for the benefit of his estate in the absence of any act to end it. In other words, his estate would have been entitled to take

advantage of the tenancy had there been a desire to do so. This tenancy would have continued on.

31. The next significant act was the conveyance by the then owner of Lot 26, Setrock Limited, to Julia Goden, the claimant's mother, of what was expressed to be the unencumbered fee simple in the property (Deed No. 3153 of 1999). Julia Goden's interest was then conveyed to the claimant in March 1999 (Deed No. 5522 of 1999).

32. Two possibilities follow from this. Either the claimant's father's tenancy then ended or the conveyance was done subject to the tenancy. The correct position in my view is that the conveyance was done subject to the tenancy. Alfred James died without a will. Also, there is no evidence that any one was appointed as administrator of his estate. The claimant and his mother may have been beneficiaries of his estate but they would not have been the sole beneficiaries. Thus they could only act in their personal capacities and not on behalf of anyone else.

33. Alfred James, having occupied the disputed lot, would have acquired a leasehold interest in that disputed lot after 16 years which, as noted, would have merged with his tenancy of Lot 26.

34. Any occupation by the claimant of both properties after James' death, therefore, would have been prescribing against James' leasehold interest of the disputed lot. It is only after 16 years would this prescribing have ended James' interest. Only then could the claimant begin prescribing against the landlord or the second defendant's interest. This would have been from 2004.

35. It follows that time has not run to extinguish the second defendant's title. This is by virtue of the state of the law at present as expressed in the case of **Fairweather v St Marylebone Property Co. Limited [1963] AC 510**. This position has been acknowledged to be the law even though criticised by **Wylie** in **The Land Laws of Trinidad and Tobago** at pages 593 to 594. But it remains the law to date.

36. The effect of this is that the defendants were entitled to possession of the lands in question being the owners of it. They were entitled to use the remedy of self help. I also do not find that there was any untoward conduct in the process of using self help in the sense of using more force than was necessary.

37. The court's order therefore is that the defendants are entitled to possession of the disputed lot. Any injunctions previously granted against them are discharged.

38. The claimant's claim is dismissed. There is judgment for the defendants on the counterclaim. The claimant must pay the defendants' costs.

39. I would make the observation, however, that perhaps there may still be room for negotiation in respect of the part of the encroachment by the claimant on which his house extension and shed lies. But this is a matter for the parties, the court having decided the claim.

40. I am grateful for the extremely helpful legal submissions by counsel in this matter in what was not a straightforward case on the law.

41. There is an order in favour of the defendants for possession of the disputed land described more particularly in the statement of claim and as set out and coloured yellow in the plan of Brian Moses annexed to the amended Writ of Summons. The order is to take effect on 31 May 2013. The claimant is to pay the defendants' costs in the sum of $14,000.00. Stay of execution on costs: 28 days.

Ronnie Boodoosingh

Judge