THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2011 – 00977

BETWEEN

ADINA HOYTE **CLAIMANT**

AND

DONALD WOHLER **DEFENDANT**

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Mark Seepersad and Mr Terrence Davis for the Claimant

Mr Andre Rajkumar for the Defendant

Dated: 26 June 2013

JUDGMENT

1. The claimant seeks a declaration that the defendant's title, right and interest in lands known as Lots 11 and 12 Friendship Hall Estate, off Calcutta Road, No. 4 (the lots) has been extinguished by operation of law under **section 3** of the **Real Property Limitation Ordinance Chapter 5 No. 7**. She says she has been in occupation of the lots for over 16 years to the exclusion of all others. She claims she is entitled to possession of the lots, injunctive relief and damages for trespass.

2. The lots are part of a 1 and 7/8 acre plot of land (the plot) owned by the defendant by virtue of Deed No. 19143 of 1994. The plot was tenanted by the defendant's family to the claimant's father Claudius Ruben Hoyte for agricultural purposes. Many years ago the claimant's father had purchased an adjoining lot of land from the defendant's family. The contention is that they have always used the lots as an extension of their land and treated it as their own. This plot is part of a large estate, Friendship Hall Estate, which has been owned by the defendant's family for many years.

3. The defendant disputes the claim to possession and says he and his predecessors in title have been in occupation of the lands since about 1980.

4. The law is not in dispute. There are two elements necessary for legal possession. There must be a sufficient degree of physical custody and control (actual possession) and an intention to exercise such custody and control on one's own behalf and for one's own

benefit (intention to possess). Both elements must be satisfied: **JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419 para. 40**, per Lord Browne-Wilkinson. Under the Ordinance such possession must be for 16 years or more. The person who asserts adverse possession has the burden to prove their claim.

5. In the claimant's written submissions it is indicated at paragraphs 44 to 47 that the date of the determination of the tenancy of the claimant's father, CR Hoyte, is an important one. The claimant's case is that the tenancy expired in 1994 so the limitation period of 16 years ran from 1994 as against the defendant. The defendant's case is that he was in possession from about 1980 since the tenancy had in effect been abandoned. From the claimant's case, therefore, she would have to show she was in actual possession of the lots until at least 2010 and during that time she intended to possess it.

6. From the defendant's perspective he would have to show by his actions and conduct that he had retaken possession of the land. He has to show he intended to resume possession: **Adverse Possession, Second Edition, Stephen Jourdan, page 137, para. 7-70**.

7. It is in this context that the evidence is to be examined. The claimant filed a witness statement and was cross-examined. She also called her son, Fitzroy Fox, who lives with her in the house adjoining the lots. The defendant alone gave evidence.

8. The claimant gave a witness statement on 14 May 2012. It was 10 typed pages of single spacing comprising 27 paragraphs. It laid out in great details her claim and the history of her land and its occupation. A medical discharge summary from Medical Associates Limited was tendered to the court to show that on 11 June 2012 she was admitted and examined. This showed she was diagnosed with "Transient Ischemic Attack". The summary also showed uncontrolled diabetes mellitus; high cholesterol and thrombocytopenia. I was told she had suffered a stroke and this had affected her ability to communicate fully. At the time she gave her witness statement she was 83 years old. At the time of the trial on 15 January 2013 she adopted her witness statement and was cross-examined. The witness answered some questions and did not answer others. She appeared to me to be choosing some to answer.

9. It was clear to me, having had the opportunity to see and listen to her, that she was not fully lucid. I was left in much doubt about the extent to which I could rely on her evidence.

10. Given her position, counsel for the defendant, quite decently, did not press her in cross-examination as one would have expected he might have if she were not in the condition she was in. I was left in significant difficulty in assessing her evidence which was important in a case such as this. Given her age I could not know her position in May 2012 when the witness statement was filed. One option open to her attorneys, which was not exercised, was for the attorney who took the witness statement to have come as a

witness to explain the circumstances in which the statement was taken and the claimant's ability at that time to give the full and comprehensive account that her witness statement represented. Another option in a case with an elderly witness is to have a medical report taken close to the time of the witness statement. This was also not done. This assists the court in being in a position to assess the reliability of the witness statement in the event the witness cannot be properly cross-examined.

11. In her witness statement Ms Hoyte gave details of her father's dealings with the plot. She spoke of pens for the animals being on the lots. She said she took over seeing about the lots after her father died. She said she received a letter in 1994 addressed to the heirs of CR Hoyte, her father, that the tenancy had expired and they should vacate the land. She ignored it. She said nothing happened with the land until 2001. She said they continued to work and plant on the lots. She made concrete pens for the chickens. In 2001 men came and graded the plot but they did not interfere with the lots. By this time there were a few fruit trees, fig trees, cassava, cane and coconut on it. They used to plant short crops like peas on it.

12. After the grading she went to the Land Tenants Association and spoke to a Mr Wahab. He advised her. She then erected a fence on the eastern boundary of the two lots of land. At that time in 2003 her son, her witness, received a letter from the defendant's attorneys. This letter said that he, the claimant's son, had unlawfully erected a chain link wire fence on three lots of land without the defendant's consent. It noted that their client's agent,

Raavi Manick "on numerous occasions he requested that you remove the said chain link wire fence in order to continue development works at phase 2 of the Friendship Hall Estate" but he had refused to do so. He was requested to remove the fence within 14 days or legal proceedings would be taken.

13. I was in serious doubt about the claimant's ability in May 2012 to advance the level of details she was able to in the witness statement. In her cross-examination there were many occasions when she could not remember. To what extent that was due to her illness in June 2012 or was symptomatic of her condition the month before, I could not say.

14. In cross-examination she spoke a lot about her father's planting of the land. She said she could not remember whether she took an interest to establish any claim after 2001 when the 1 7/8 acres was graded by the defendant. She said after her father died they would maintain "the whole thing". Her brother Leslie did half and "we the other half". This was contradictory to her claim that it was only the lots that they maintained.

15. Of significance too, is that if I am to consider the prescription period as running from 1994, this would mean that the claimant was 66 years old then and she would have had to keep up with maintaining the land well into her 70s and early 80s.

16. The claimant called her son to give evidence. His evidence in his witness statement was generally consistent with the claimant's version. He said he had helped his mother to maintain the land.

17. In cross examination he asserted that he had assumed his grandfather, CR Hoyte, was the owner of the land. He did not know his grandfather was a tenant. In his witness statement at paragraph 3, however, he had said he knew from when he was growing up that his grandfather had rented the land from Friendship Hall Estate. He said he had asked the lawyer to correct it in his witness statement but he did not. He said he was a taxi driver. Planting the land was not a full time occupation for anybody. They all helped out.

18. In considering this witness' evidence I had to consider his close relationship to his mother. He lives with her. He probably stands to benefit most if this claim is successful given that his mother is now 84 years and he lives in the house with her adjoining the claimed lots.

19. The defendant, who is a medical doctor, lives in Switzerland now. He grew up in Trinidad. The Estate was bought by his parents and their predecessors in title in 1958. He knew CR Hoyte had bought 2 lots of land previously on which his house stood. Since his parents died in 1981 and 1984 respectively, he has been managing the estate. He lives

in Switzerland but he comes to Trinidad about twice per year and he visits the Estate. He always had fully employed agents for the Estate as well, as did his parents. He noted that the lots in question were never fenced in except temporarily in 2003 and 2005. The lots are low lying and marshy and he has had to bring in several hundred truckloads of sand to fill the low lying areas of the land including Lots 11 and 12. He also did drains and a road leading directly to the boundary of CR Hoyte's house. He has been engaged in developing the lands since at least 2001. He said was only in early 2010 that a shed and fowl pen was erected on Lot 11. He sent his agent to request the structures be removed. He has gotten approval from Town and Country Planning to develop the lands and he has gone to great expense to do so. He took action to deal with encroachments when they occurred.

20. The defendant was cross-examined. He noted that the 1 7/8 acre plot rented to CR Hoyte was abandoned. No one was planting it. Nobody was occupying Lots 11 and 12. He said having a pen on the boundary is not the same thing as occupying Lots 11 and 12. He took pictures but none directly of Lots 11 and 12. Development works took place on the lands from 2001 to the time of this claim. He said he couldn't say he personally visited Lots 11 and 12. He had sent letters through his lawyers objecting to encroachment on the lands formerly tenanted to the claimant's father.

21. He noted that the development was taking place on a much larger area comprising 113,126.6 square feet of land. The plot and Lots 11 and 12 are part of that development.

He said he or his agents have been on the development throughout since the grading started in 2001. Any encroachments would have been challenged.

22. It is important to consider the effect of these letters sent by the defendant and the grading of the plot in 2001. The 1994 letter stated clearly that as the tenancy had come to an end the heirs of CR Hoyte must vacate the tenanted land. The tenanted land was 1 7/8 acres which included the lots in dispute. When the grading was done in 2001, this must be seen as an entry onto the plot of land and use of it in keeping with an intention to possess it. The defendant was not required to step onto and to use every square metre of the land to show an intention to possess or to retake possession. He had evinced an intention to use the plot of land by conducting substantial grading of it and developing it. The lots must be seen as being part of a larger parcel. Further, when the claimant sought to construct a chain link wire fence on the land, the defendant reasonably promptly instructed his attorneys to write complaining about it and calling for its removal.

23. The defendant has contended that the intrusion by way of the construction of the pen was an act done lately. This is consistent with his position of complaining about the wire fence. In my view, had there been an early intrusion, it is likely that he would have sought to deal with it.

24. I have also concluded that the defendant was not an absentee owner in the crucial period from 1994 to 2010. He was in the process of developing the land. Through his attorneys he demanded the removal of the fence on Lots 11 and 12. I accept his evidence that he visited the lands as a whole and he staked his reclaiming of the plot inclusive of Lots 11 and 12.

25. Also of significance is that Lots 11 and 12 were part of the 1 7/8 tenancy plot. The creation of the demarcation of Lots 11 and 12 was because of the defendant's survey in developing the land. Even if there had been a small encroachment unto the plot with the pens, therefore, this does not mean that this would amount to the claimant being in possession of the both lots. The creation of the lots was a result of the defendant's own division.

26. I have also considered that there is no independent evidence in support of the claim. The claimant bears the burden of proof. There could have been evidence of visitors or neighbours about her use and possession of the lots. When a claimant seeks to establish possession of someone else's land, the quality of evidence must be adequate and credible. I have already set out my strong reservation about the reliability of the claimant's evidence. Notwithstanding any deficiencies in the defendant's evidence, it would still rest on the claimant the obligation to bring forward cogent and reliable evidence on which the court can make a finding. In this case I find the claimant has not come up to proof on a balance of probabilities.

27. I was urged by the claimant's attorney to look unfavourably on the defendant's evidence which it was submitted was inconsistent with his pleaded case of his occupation from 1980. The defendant continued to assert that he and his family maintained their interest in the lands from then. However, what was more significant were his acts from the 1994 period and the extent to which they demonstrated his retaking possession of the lots. I find that the acts done were sufficient to show that he reclaimed possession of the lots being part of the larger parcel of land being developed.

28. The claim is therefore dismissed. Costs follow the event. The claimant must pay the defendant's costs in the sum of $14,000.00.

Ronnie Boodoosingh

Judge