IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA 2319 of 2004

BETWEEN

HELEN CLARKE

Plaintiff

AND

MITCHELL MASTERSON
SHANTI MASTERSON

Defendants

BEFORE THE HONOURABLE MADAME JUSTICE A. TIWARY-REDDY

Appearances:

Mr. Gregory Armorer for the Claimant

Mr Phillip Lamont instructed by Ms. Beverly A Lushington for the Defendants

JUDGMENT

INTRODUCTION

1. The Plaintiff's claim is for, *inter alia*, an order for possession of a nine-acre parcel of land as well as an injunction restraining the Defendants from building, entering and/or remaining on the said land.

2. The Defendants deny the Plaintiff's claim, and counterclaim for a declaration that they are entitled to that parcel of land measuring 180 feet by 64 feet being part of the larger nine-acre parcel claimed by the Plaintiff and for an Order that the Plaintiff transfer same to them. The land in dispute is subject to the provisions of the **Real Property Act Chap. 56:02**.

3. The Defendants had been a married couple who separated prior to the trial. The First Defendant filed a Witness Statement but did not appear or give evidence at the trial.

THE PLAINTIFF'S CLAIM TO THE NINE ACRE PARCEL

4. The Plaintiff supports her claim for possession of the nine-acre parcel by relying on her documentary title as the registered proprietor of a half share as a tenant in common in the land, and also her entitlement as sole beneficiary, being the daughter of the registered proprietor, of the other half share.

5. The evidence of the Plaintiff is that under and by virtue of Memorandum of Assent No. 1 dated 29.8.75 and registered on 16.1.76 in Volume 2216 Folio 1, the Plaintiff in her personal capacity became seised of one undivided half share in the nine-acre parcel. The title to the half share is set out as follows:

    - By Royal Grant of Crown Lands dated 3.12.18 and registered in Volume 438 Folio 479, Willie Fabb became seised in fee simple of the said nine-acre parcel of land (the larger parcel);

    - By Warrant of Transfer No. 72 dated 4.5.66 registered in Volume 1787 Folio 33 from the Attorney General to Petronilla Forbes also called Petronilla Fabb and

Cashie Francis as tenants in common the said parcel of land became vested in the said parties, Petronilla Forbes also called Petronilla Fabb and Cashie Francis;

- By Memorandum of Assent No. 1 dated 29.8.75 registered on 16.1.76 in Volume 2216 Folio 1 the Plaintiff as the Legal Personal Representative of Cashie Francis assented to the Plaintiff in her personal capacity one undivided half share of and in, the larger parcel.

6. The Plaintiff is the endorsed registered proprietor of a half share as a tenant in common in the larger parcel. The Plaintiff's evidence is that she is the daughter and sole beneficiary of Petronilla Forbes also known as Petronilla Fabb and is therefore the owner of the half share belonging to Petronilla Forbes at the time of her passing. This is the Plaintiff's undisputed and accepted evidence of title to the larger parcel.

THE DEFENDANTS' CLAIM TO THE DISPUTED LAND

7. The Defendants do not challenge the Plaintiff's documentary title, but aver, *inter alia*, that the Plaintiff's title to the disputed portion has been extinguished by virtue of the Defendants' predecessors in title unbroken chain of possession since 1969.

8. The Defendants claim to possessory title is as follows. Mungal was the caretaker of the larger parcel belonging to Willie Fabb, and owned a small house on the larger parcel. Mungal sold the house to Doon Ramkissoon, who, in turn sold it to Walter Alleyne. According to the receipt dated 2.10.69 "AM1", the house was sold to Walter Alleyne along with "*the tenancy of the lot of land on which the said house stands*".

9. Walter Alleyne died intestate in 1980. His daughter, Antonia Alleyne occupied the house after his death. The administrators of Walter Alleyne's estate sold the house and

the rights he had acquired in the land to Jocelyn Alleyne in 1985. Jocelyn Alleyne, another daughter of Walter Alleyne, allowed her sister Antonia Alleyne and Antonia's husband to continue to live in the house and on the land from 1985 until sometime in 2002. A watchman was left to guard the property in 2002. In June 2003, Antonia Alleyne as the lawful Attorney of Jocelyn Alleyne sold the house and all the rights Jocelyn Alleyne had acquired from Walter Alleyne's estate, to the Defendants.

APPLICATION TO AMEND AFTER CLOSING SUBMISSIONS

10. On 14.10.08, at the close of the evidence of both parties the Court ordered that written submissions be filed and exchanged by 19.12.08 and submissions in reply to be filed by 23.1.09. On 9.3.09 the Court extended the time for the Plaintiff to file closing submissions to 20.3.09 and for the Defendant to reply by 1.05.09. The matter was adjourned to 9.10.09.

11. Meanwhile, on 5.03.09 the Defendants filed their closing submissions. The Plaintiff filed her submissions on 30.09.09 (7 months later) and the Defendants filed submissions in reply on 13.04.10 (6 months later). On 9.10.09 the Court had directed the Defendants to make an application to amend the Defence together with the proposed draft Defence and Counterclaim and submissions in support by 23.10.09. The Court also ordered the Plaintiff to file submissions in reply by 30.10.09. On 22.10.09 the Defendants filed their proposed Amended Defence and Counterclaim with submissions in support. The Plaintiff filed submissions in reply on 3.05.2010 (6 months later).

12. An amendment may be allowed "*at any stage of the proceedings without any limitation except the discretion of the Judge*": **Order 20 Rule 5 Orders and Rules of the Supreme Court 1975; Roe v Davies (1876) 2 Ch. D 729** at page 733. Generally, amendments are allowed for the purpose of determining the real question in controversy

between the parties to any proceedings or of correcting any defect or error in any proceedings[1]. However, leave to amend should not be granted where it is *unfair, prejudicial, or creates an injustice to the other party, for which he could not be compensated for by costs or otherwise.* This principle was stated by Bowen LJ in **Cropper v Smith (1884) 26 Ch D 700** at pages 710-711 as follows:

> "*… it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right …*"

13. In **Tildesley v Harper (1876) 10 Ch D393** Bramwell LJ stated at pages 396 – 397:

> "*My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fides, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.*"

14. And Brett MR in **Clarapede v Commercial Union Association (1883) 32 WR 262** at page 263, stated:

[1] *The Supreme Court Practice* 1997, Vol. 1 pg 362, para 20/5-8/9; **The Duke of Buccleuch (1892)** P. 201; **G L Baker Ltd v Medway Building & Supplies Ltd (1958) 1 WLR 1216**.

"*However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.*"

15. The Court has the power to allow the amendment of pleadings after the conclusion of evidence and even after the closing speeches of Counsel, where no injustice or prejudice would be occasioned to both parties and where it is necessary to formulate the real issues between the parties which did not appear from the original pleadings: **Smith v Baron 1991 The Times 1 February, 1991**. The main consideration for the Court is whether the proposed amendment will injure the other party or cause some prejudice to him which cannot be compensated for in costs or otherwise.

16. The Plaintiff submitted that the Defendants cannot now amend to plead the **Real Property Limitation Act Chap. 56:03** because of the decision in **Ketteman v Hansel Properties Ltd (1987) AC 189 (Ketteman)**. There the Court had a number of rather complicated issues, including the question of an amendment of the pleadings. At the end of the trial certain of the Defendants, who were architects, had applied for and been granted leave by the judge to amend their defence to plead the Limitation Acts.

17. The UK Court of Appeal in **Ketteman** set aside the judge's grant of leave to amend as coming too late. In the House of Lords their Lordships approved, by a majority of three of two, the decision of the Court of Appeal against the architects, disallowing their plea of limitation. The majority view was expressed by Lord Griffiths, who commented, at page 219D:

"*… I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of final speeches. Such an application would, in my view inevitably have been rejected as far too late. A defence of limitation permits a defendant to raise*

a procedural bar which prevents the Plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the Plaintiff; but as a matter of public policy Parliament has provided that a Defendant should have the opportunity to meet a stale claim … If a Defendant decides not to plead a limitation defence and to fight the case as the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits …."

18. The Defendants submitted that in **Ketteman** Lord Griffiths had stated that the limitation defence was a procedural bar. Once it has been established, then the merits of the case do not matter, and the Plaintiff can go no further. It is important to note that Lord Griffiths was concerned with the fact that the limitation defence was a fresh new defence in the matter, and that to allow it would be manifestly unjust to the Plaintiff at that late stage in the trial. It should be pointed out that at page 220 of **Ketteman** it was suggested that there is a clear distinction drawn between amendments to clarify the issues in dispute and those that provide for a distinct defence or claim to be raised for the first time.

19. Thus **Ketteman** may be distinguished from the instant case, since throughout their pleadings and even during the oral evidence the Defendants relied on the factual, undisturbed possession of the house and land from 1969 to present. Thus, to allow the amendment to plead a limitation defence does not prejudice the Plaintiff or cause her an unfair disadvantage. The limitation point, does not create a new defence per se, but clarifies or makes more defined the real issues between the parties. The Defendants are not seeking to "*fall back*" on the limitation defence because all else have failed.

20. This Court is of the opinion that the Defendants have led sufficient evidence to found a claim in adverse possession, and thus an amendment that allows the Defendants to make this claim clear, would not prejudice the Plaintiff in this matter.

21. The Plaintiff submitted that there was no cross-examination on the issue of "continuousness" and "exclusivity" of the Defendants or their predecessors in title. In **Easton v Ford Motor Co Ltd [1993] 1 WLR 1511**, the learned Judge stated whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. And as was stated in **G L Baker Ltd v Medway Building & Supplies Ltd [1958] 1WLR1216**:

> "*…it is a guiding principle of cardinal importance on [the question of amendment] that, generally speaking, all such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between* the *parties.*"

22. The above learning suggests that the Court, in exercising its discretion may allow the Defendants to amend the Defence to take into account the limitation defence as this would not prejudice the Plaintiff in any way, since evidence of possession to support a claim in adverse possession was led by the Defendants, and the Plaintiff had had opportunities to meet these allegations.

23. However, the Court is not prepared to allow the application to amend the Defence to plead estoppel since to allow such would put the Plaintiff in a disadvantageous position and would prejudice the Plaintiff in such a way that costs or any other Order could not compensate. The Defendants will, for the first time, be raising the issue of estoppel, and in effect would be given an unfair advantage as they change their case after hearing the evidence of the Plaintiff. Further, the Defence of estoppel needs to be specifically pleaded and this was not properly done in the proposed amendment. To allow the Defendants to amend their Defence at this stage to introduce estoppel and trust for the first time would clearly be to go outside the purview of the decided cases on this point.

24. In the exercise of its discretion this Court makes the following Order:

Leave is granted to the Defendants to amend the Proposed Draft Defence and Counterclaim filed on 22.10.09 as follows:

(a) By inserting the following at the beginning of paragraph 10 –

"*The Plaintiff well knew that the house was offered for sale to the public and the Plaintiff's son was offered the purchase of the said house but he refuse the offer*".

(b) By inserting the following as paragraph 10A -

"*10A. Further the title of the Plaintiff to the parcel of land upon which the house stands which are more particularly delineated in the sketch plan of Keith Scott dated 21st day of September 2004, entered into evidence has been extinguished by virtue of the Real Property Limitation Act Sections 3 and 22.*"

ANALYSIS OF THE EVIDENCE

25. In her Witness Statement the Plaintiff said that the land was formerly a cultivated estate and that one Mungal was employed as a caretaker by Willie Fabb. Willie Fabb erected a wooden structure/house upon the land and allowed Mungal to reside there while he was in his employ. Mungal, without the consent of Mr. Willie Fabb, purported to sell the small house to Walter Alleyne who added concrete walls to the house. The said Walter Alleyne then sold the house to one Joycelyn Morris. The said Joycelyn Morris, through her agent Antonia Alleyne sold the house and all the rights associated with it to the Defendants.

26. Both the Plaintiff and the Defendants agreed that from the year 1969 when Walter Alleyne purchased the property, rents were never paid in respect of that portion of land on which the house stood. Further, neither party could say with any degree of certainty

whether rents were ever paid by Doon Ramkissoon or even Mungal. In her evidence in chief and under cross-examination the Plaintiff was adamant that a tenancy of the land never existed.

27. What is of utmost significance is that the Plaintiff made the following admissions during cross-examination:

    i. That Mungal owned the house in October 1969;

    ii. That she (the Plaintiff) knew nothing of any transactions concerning the house or land from 1976 – 1987 as she resided abroad;

    iii. That she used to visit Trinidad every 2 years since she first visited in 1988;

    iv. That she did not visit the nine-acre parcel on her return in 1988;

    v. That she could not say whether any other structure was built on the land;

    vi. That she agreed that the Land and Building Taxes were paid by the Alleynes from 1969 until 2004;

    vii. That Walter Alleyne occupied the house prior to 1970 and remained there until he died in 1984;

    viii. That the Alleynes were in occupation from 1970 until 2002;

    ix. That she knew that the Alleynes earned revenue from renting the house out as a beach house;

    x. That she accepted the boundaries of the Alleynes' occupation to be as the witness Antonia Alleyne described.

28. The following admissions of the Plaintiff cut to the heart of her claim and support the Defendants' Defence and Counterclaim. The Plaintiff admitted that Mungal owned the house. There can be no dispute that Mungal transferred the house and his interest in the

house to Doon Ramkissoon. While the Plaintiff stated that she did not know Doon Ramkissoon, this Court accepts the Defendants' evidence that Mungal sold the house to Doon Ramkissoon. The Plaintiff's recollection is that Mungal owned the house and the receipt produced by the Defendants bore Mungal's signature.

29. The Plaintiff also admitted that Walter Alleyne owned the house from about 1970 and further that he was in possession from 1970 until his death in 1984. The evidence of the Defendants is that Walter Alleyne lived in the house until his death, with his children visiting him sometimes on weekends or during the school holidays. Further, after Walter Alleyne's death Antonia Alleyne remained in occupation of the house until 2002. Thereafter the house was rented out as a beach house until the sale to the Defendants in 2004. Accordingly, the Defendants have shown an unbroken chain of possession of the house from 1970 until 2004 (34 years). During these years the Alleynes farmed the land, fenced it and built a roadway leading from the house to the Toco Main Road. In the 1980's Antonia Alleyne and her husband re-built the fence which did not encompass the full extent of the land occupied by her father because it was too expensive for them to fence the entire area. However, Antonia maintained that they remained in possession of the unfenced portion of the land.

30. This Court accepts Antonia's evidence, noting that Antonia was very knowledgeable about the dealings with the land while, on the contrary, the Plaintiff knew very little of the history of the land. Further, the Plaintiff's interest in this portion of land only peaked when the Alleynes sold the house to the Defendants. It is interesting to note that the Alleynes first approached the Plaintiff through her son and lawful attorney, Sean Clarke, offering to sell the house to her. The Plaintiff's son refused the offer because he thought the asking price was too high. Both the Plaintiff and her son well knew the potential value of the house as they both admitted that the Alleynes often rented it out as a beach house.

THE LAW

31. **Section 3 of the Real Property Limitation Act Chap. 56:03** provides:

> "3. *No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.*" (my emphasis)

In **JA Pye Oxford Ltd v Graham [2003] 1 AC419**, Lord Brown-Wilkinson explained that in order to be in possession of land the squatter had to exercise the necessary degree of physical custody and control and to show an intention to possess the land. The squatter had to intend to exclude the world at large, including the paper title owner so far as was reasonably practicable. The requisite degree of physical control was dependent, inter alia, on the nature of the land and the manner of its usage. It was also necessary to demonstrate that the squatter had been treating the land in the manner of an occupying owner and that no other individual had done so. It was immaterial that the squatter would have been willing to pay to occupy the land if requested to do so. Furthermore, it was not necessary to demonstrate an intention to own or acquire ownership of the land. The said decision of the House of Lords in **Pye v Graham** was held to be applicable in Trinidad and Tobago by the Court of Appeal in **CA CIV 67/2007** and **CA CIV 68/2007 Smith v Benjamin.**

32. In considering the evidence, this Court is of the opinion that the Alleynes were in undisturbed possession of the disputed portion of land from October 1969 until 2004 when the house and the interest in the land were sold to the Defendants. The law of

adverse possession is grounded in the **Real Property Limitation Act Ch. 56:03** sections 3 and 4 which state that to succeed in a claim for adverse possession the Claimant must show:

(1) Factual possession of the land for sixteen years or more; and

(2) The animus possessendi, that is, the intention to exclude the world. Per Deyalsingh J in **Lyder v De Freitas HCA 1310 of 2001**.

The Court must next consider the interest in the land which the Alleynes transferred to the Defendants.

33. It is a fundamental principle of the system of registered conveyancing that the title of every proprietor registered thereunder is "*absolute and indefeasible*" and cannot be impeached or affected by the existence of an estate or interest which, but for the registration, might have had priority per Bereaux J, as he then was, in **HCA 75 of 2000 Dillon v Almondoz**.

34. The Privy Council has said that "*the sections making registered certificates conclusive evidence of title are too clear to be got over*": **Assets Co. v Mere Roihi [1905] AC 176** at 202 – "*The cardinal principle of the Statute is that the register is everything*": **Waimiha Sawmilling Co. v Waione Timber Co. [1926] AC 101** at 106. Indefeasibility of title is subject to certain stated exceptions in the Act. They include any rights of adverse possession subsisting at the time when the lands were brought under the ambit of the **Real Property Act. Section 45** which provides:

> "*Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such mortgages, encumbrances,*

estates, or interests as may be notified on the leaf of the Register constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor registered under the provisions of this Act, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of such land holding under a tenancy for any term not exceeding three (3) years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value."

35. **Section 45** enables a proprietor of land brought under the provisions of the **Real Property Act** to hold the parcel free from all encumbrances not notified on the Register, but subject to a number of exceptions including any subsisting rights of adverse possession. Thus there is an exception to the paramountcy or priority of the title of a registered proprietor in the case of adverse possession. As noted above, this Court finds that the Defendants are entitled to possession of the land by virtue of the adverse possession of the Alleynes from 1969 to 2004 and of the Defendants thereafter. It is to be noted that the Defendants went into possession immediately upon their purchase in 2004. Further, the Plaintiff's right to recover possession has been extinguished by virtue of **Section 3 of the Real Property Limitation Act Chap. 56:03**.

ORDERS

36. The Court therefore makes the following Declaration and Orders:

(1) A declaration that the Defendants are the owners of and entitled to possession of All and Singular that piece or parcel of land situate in the Ward of Manzanilla in the Island of Trinidad measuring 180 feet by 64 feet comprising Eleven Thousand Five Hundred And Twenty Square Feet and bounded on the North by an earthen drain and lands of the Plaintiff, on the South by the Toco Main Road, on the East by an access road, and on the West by lands now or formerly of SW Knaggs, which piece or parcel of land is shown coloured in pink on the Survey Plan prepared by Keith Scott dated 21.9.04, together with the building standing thereon;

(2) An injunction is granted restraining the Plaintiff, her servants and/or agents howsoever from transferring or dealing with the said property in any manner adverse to the Defendants' title, as set out in sub-paragraph (1) above; and

(3) The Plaintiff do pay the Defendants' costs of this trial to be taxed in default of agreement.

Dated this 27th day of May, 2011

Amrika Tiwary-Reddy
Judge