TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: 86 of 2009
Claim No: CV2007- 01279

BETWEEN

PAUL KATWAROO

Appellant/Defendant

AND

MAJID ABDUL KADIR

AND

MARTY KADIR

Respondents/Claimants

****

PANEL:

P. WEEKES J A

N. BEREAUX J A

R. NARINE J A

Appearances: Mr. G. Raphael for the Appellant/Defendant.
Ms. C. Mohan holding for Mr. H. Ramnath for the Respondents/Claimants.

Date Delivered: 25th July, 2013

I have read the judgment of Narine J.A. and agree with it.

P. Weekes
Justice of Appeal.

JUDGMENT

Delivered by Bereaux, J.A.

[1] I agree with Narine J.A. that the appeal should be allowed. I also agree that the appellant is the owner of the six lots of land being the western portion of lands described in the Deed of Conveyance registered as No. 4411 of 1983, for the reasons set out herein.

[2] The facts are as stated by Narine, J.A. in his judgment. The appellant was a yearly tenant of the respondents. They had purchased the freehold of the previous landlord. The respondents thereafter refused to accept the annual rent and returned the appellant's cheque for the payment of rent for the year 1983. By virtue of section 9 of the Real Property Limitation Act, Chap. 56:03, ("the Act") the respondents' right of recovery of possession shall have been deemed to have first accrued at the end of the first year after rent was last payable. In this case it was 1983. Thereafter, by the provisions of section 3 of the Act the sixteen year period began running in the appellant's favour. The limitation period would have run its course in 1999. Thereafter by the provisions of section 22 of the Act, the respondents' title would have been extinguished, once the appellant had been in continuous possession.

[3] The appellant testified that he was paying rent for four lots from 1973 to 1982 after which the respondents refused to accept his payment of rent. However they took no steps to assert their title or to regain possession. The second respondent testified to

migrating to the USA in 1987 and did not set foot on the land until 2007.

[4] In **J.A. Pye (Oxford) Ltd. & Anor. v. Graham & Anor. (2002) 3 WLR 221** identifies two elements necessary for legal possession:

(a) factual possession and

(b) an intention to possess.

The onus is on the party claiming possessory title to prove, on a balance of probability that he was in continuous possession for the requisite period, in this case, sixteen years from 1983. He must prove both elements.

[5] As a previous tenant it was not sufficient for the appellant to have stopped paying rent. He must also have continued to use the land as a true owner. The latter was not in dispute. The question in my judgment was whether the appellant had been in continuous possession for sixteen years and whether he exercised exclusive control with the required *animus possidendi* over six lots as opposed to two lots.

[6] The trial judge found that the appellant had proved *"his continuous and undisturbed possession of two lots that he had fenced from since the 1970's without paying rent for the same"* but that he *"failed to prove any continuous occupation of the other four lots at any time after 1983 when his claim for possessory title began".*

The judge added that the appellant's *"random planting of fruit trees in an open area (the four lots) can hardly be described as proof of occupation of the same". "Neither does his backfilling of the four lots at some indeterminate time prove his continuous occupation of the four lots".*

[7] In my judgment he was wrong in law. This was satisfactory evidence upon which the trial judge ought to have found for the appellant in respect of all six lots. The type of conduct which indicates possession varies with the type of land. In many cases adverse possession may not be continuous from day to day. The appellant in his viva voce evidence stated he planted fruit trees randomly on the four lots that were once rice

land and that these lots were enclosed by barbed wire. He backfilled the land in order to facilitate the planting of fruit trees. Pennycuick J, in a well known passage in **Bligh v Martin [1968] 1 WLR 804** at 811 (cited by Narine J.A.) states that possession depends on the circumstances of the case and it can subsist notwithstanding the sometimes long intervals between acts of user.

[8] Moreover, while enclosure of the property is normally the strongest evidence it is not conclusive. When looking at the acts of user, Cockburn CJ who gave the judgment of the court in **Seddon v Smith [1877] 36 LT 168** at 169 stated that:

> ***"the property (soils and minerals) has been acquired by an adverse possession of twenty years and upwards by a man who having only a right of way as over any road, has used it exactly as he would any other land on his own farm. I care not what he grew, he used it in all respects as if it were his own and such a user, I am of opinion, would at last give a title because the lord of the manor had many ways of putting an end to it had he chosen to do so…"***

He also added that

> ***"it makes no difference whether there be enclosure or not. Enclosure is the strongest possible evidence of adverse possession but it is not indispensible."***

[9] In **Red House Farms (Thorndon) Ltd v Catchpole [1977] 2 E.G.L.R 125** the court found that the land was useful for shooting over it and so they treated that activity as constituting possession. Cairns LJ at page 127 stated that:

> ***"if they were using the land for the only purpose which it was sensible to use it and there was no reasonable means of access to it, then it seems sufficient to constitute adverse possession on their part."***

[10] Therefore, based on the circumstances of this case, Mr. Katwaroo by planting

"random" fruit trees on the land had used the four lots exactly as if it were his own land. To my mind, his use of the four lots was very similar to his use of his second lot where he cultivated peas, bodi, corn and other crops as well as a kitchen garden, which the trial judge stated he had proved continuous possession of. Even though the trial judge found inconsistency as to the appellant's evidence of his fencing of the land, I consider that, enclosure was not the only evidence of ownership and in effect, all of the evidence provided by the appellant was sufficient to show his continuous possession of the other four lots. It follows therefore that the respondents' title to the entire six lots was extinguished in 1999 and the appellant acquired title to them.

[11] For these reasons I agree that the appeal must be allowed. I also agree with Narine JA's order for costs.

Nolan P.G. Bereaux
Justice of Appeal

Delivered by R. Narine J.A.

[12] In this matter the Respondents are the registered owners of a parcel of land situate at Waterloo Road, Carapichaima, comprising one acre one rood and twenty four perches. In 1967 the Appellant rented two lots of the land from the Respondents' predecessor in title. He has lived on the two lots since then. In 1972, the Appellant became a tenant of four more lots adjoining the two lots on which he lived.

[13] The Respondents bought the land in 1983, but refused to accept rent from the Appellant. In 2009 the Respondents brought a claim against the Appellant, claiming possession of the land save for one lot which they claimed was rented to the Appellant by their predecessor in title. The Appellant counterclaimed a declaration that he had

acquired possessory title to the six lots, not having paid rent since 1982, and having been in continuous possession since then.

[14] At the trial, the only witness for the Respondents was the second Respondent, who testified that she visited the land in 1983 when she had acquired title. She subsequently migrated to the United States in 1987. Upon her return to this country in 2007, she visited the land. The trial judge was not impressed with her evidence. He found that she was not familiar with the land. He found the Appellant was a more credible witness and was impressed with his familiarity with the land. However, having heard the evidence, he concluded that the Appellant had proved that he was in continuous possession of two lots, and not six lots as he claimed.

[15] The sole issue to be determined in this appeal is whether the Appellant's evidence established that he was in continuous possession of six lots, and not two lots as the judge found.

LAW AND ANALYSIS:

[16] The elements of adverse possession

1. The relevant sections of the Real Property Limitation Act Chap. 56:03 are:

> ***"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.*

9. *When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)."*

22. *At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished*.

[17] **In J.A. Pye (Oxford) Ltd. and anor. v. Graham and anor.** (2002) 3 WLR 221, the House of Lords reviewed the authorities on the legal concept of possession within the content of the English **Limitation Act 1980**, and concluded that there are two elements necessary for legal possession:

(1) a sufficient degree of physical custody and control ("factual possession") and

(2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess") per Lord Browne-Wilkinson at page 233 H.

[18] In his witness statement the Appellant deposed to the following facts in order to establish his continuous possession.

(1) He built his house on one lot and cultivated the other five lots with coconut, mango, cashew, tomatoes, pepper, peas, pommecythere, sapodilla and oranges.

(2) He paid the land and building taxes from 1987 to the present time.

(3) He fenced around the entire parcel since in the 1970's.

In cross-examination, the Appellant stated:

(1) He filled up the entire land after he rented it.

(2) He fenced the first two lots with chain link and the other lots with barbed wire and teak posts.

(3) There were cashew trees, coconut trees, cassava, pommecythere and a kitchen garden in the lot behind him, but he planted fruit trees randomly on the rest of the four lots.

[19] While the trial judge was impressed with the Appellant's credibility and familiarity with the land, he found his evidence with respect to the fencing of the land to be inconsistent. The judge's dissatisfaction with the evidence seems to be based on the following responses in cross-examination.

> *"I fenced the first two lots with chain link and the other lots with barbed wire. One side and the back. The western side alone was fenced. The front was fenced and the back. Three sides were fenced and the back. Three sides were fenced. The entire two lots were fenced".*

In re-examination, the Appellant stated:

> *"How to tell the difference between the first two lots and the other four lots is that the first two lots are fenced. I put barbed wire and teak in the 1970s. It is still there. I have changed a few posts".*

[20] It is difficult to conclude with any degree of certainty whether the Appellant's responses were in fact inconsistent without a record of the questions that were put to the Appellant. In addition, the evidence suggests that the Appellant was making a distinction in the re-examination between a chain link fence which enclosed the first two lots and barbed wire and teak posts which were used to enclose the remaining four lots. It must also be noted that the Appellant shared his eastern boundary with his father, possibly making it unnecessary to fence that side.

[21] Although I do not agree with the trial judge's conclusion on the evidence of the

fencing it is not necessary to set aside that finding for the purposes of this decision.

[22] The trial judge also found on the evidence that the Appellant could not rely on his backfilling of the four lots at some indeterminate time, as proof of possession of same. In my view, the judge cannot be faulted for arriving at this conclusion.

[23] The trial judge fell into error, however, when he made a finding of law that the random planting of fruit trees on the four lots was insufficient for the purpose of establishing continuous possession of the four lots.

[24] At the hearing of this appeal, Attorney for the Appellant submitted that in the case of a tenant continuing in possession without payment of rent, the onus was on the landlord to establish on a balance of probabilities that the former tenant was not in continuous possession of the four lots of land. The submission is clearly misconceived. The onus is on the party claiming possessory title to prove on a balance of probabilities that he was in continuous possession for the requisite period under the statute. It does not shift to the paper title holder in the case of a tenant who remains in possession without paying rent. However, in such a case, although the burden of proof remains on the tenant to prove continuous possession, the burden is not as onerous as that of a trespasser who claims adverse possession.

[25] In **Bligh v. Martin** [1968] 1 WLR 804 at 811 F, Pennycuick J opined:

> *"(1) Possession is a matter of fact depending on all the particular circumstances of a case. In very many cases possession cannot, in the nature of things, be continuous from day to day, and it is well established that possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user".*

[26] In **Hayward & ors. v. Challoner** [1967] 3 All E.R. 122, it was held by the English Court of Appeal that, once the period covered by the last payment of rent has expired, the possession of a tenant becomes adverse as against the landlord for the purposes of limitation. This case was applied by the English Court of Appeal in **Williams v. Jones & Ors.** [2002] 3 EGLR 69. However, Buxton L.J. (at para 21) accepted the submission of counsel that in the case of a former tenant, because the freeholder has permitted the tenant into possession, he will normally continue in possession just as he did before he stopped paying rent. However, the judge did not exclude the possibility that the tenant might have so feeble a connection with the land (as for example a tenant who goes off to Australia, leaving the door of the premises open) that on the determination of the tenancy he could not be said to be in possession at all.

[27] Accordingly, a tenant who remains in possession at the determination of a tenancy does not have as onerous a burden as a trespasser, in proving that he has continued in possession with the requisite intention to possess. The court will more readily infer from his continued possession that he has the requisite intention to possess.

[28] In this case the Appellant gave viva voce evidence that he had planted the four lots “randomly” with fruit trees and he had enclosed same with barbed wire and teak posts. Although the trial judge found some inconsistency in his evidence with respect to the fencing of the land, in my view, the Appellants’ evidence was sufficient in law to establish that he was in continuous possession of the land from 1982 onwards, paying no rent to anyone.

[29] It is to be noted that the trial judge found the Appellant to be a credible and reliable witness, whose evidence he found to be more reliable than the second Respondent’s. It is to be noted as well that the Respondents were abroad for some 20 years, from 1987 to 2007 when they brought this action. There is no suggestion that they ever retook possession of the four lots, nor was there any evidence that anyone (apart from the Appellant) was in possession. In the circumstances, the random

planting of the fruit trees, and no doubt the reaping of fruits from them, would be sufficient evidence of continuous possession on the part of the Appellant.

[30] The evidence was that the Appellant was a yearly tenant. He last paid rent in 1982. The period in respect of such payment would have expired in 1983. After 16 years of continuous and undisturbed possession by the Appellant, the Respondent's title would have been extinguished in 1999 by virtue of section 22 of the **Real Property Limitation Act** Chapter 56:03. It follows that the Appellant acquired possessory title to the entire 6 lots in 1999.

[31] Accordingly, this appeal is allowed. The orders of the trial judge are set aside. The court declares that the Appellant is the owner of the six lots of land being the western portion of the lands described in Deed of conveyance registered as No. 4411 of 1983. The Respondents will pay the Appellants costs in the court below and the costs of the appeal assessed as 2/3 of those assessed below.

Dated the 25th day of July, 2013.

Rajendra Narine
Justice of Appeal.