

COMMONWEALTH OF THE BAHAMAS

2016

THE SUPREME COURT

CLE/qui/01055

Common Law and Equity Division

BETWEEN

IN THE MATTER OF ALL that piece parcel or lot of land situated in the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas and being Lots Number Eleven (11) of a Subdivision called and known as Redland Acres Subdivision situated on the Southern Side of Soldier Road in the aforesaid Island of New Providence one of the Islands of the Commonwealth of The Bahamas

AND

IN THE MATTER OF The Petition of **PAULINE FERGUSON**

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Bridgette Ward for the Petitioner
Joseph D'Arceuil for the Adverse Claimant

Judgment Date: 9th November 2022

JUDGMENT

Background Facts

1. This Quieting action relates to property described as Lot Number Eleven (11) in a Subdivision called and known as Redland Acres Subdivision situated on the Southern Side of Soldier Road in the Eastern District of the Island of New Providence, ("**the Property**").
2. The Petition was filed on 8th July 2016 by the Petitioner, Pauline Ferguson ("**the Petitioner**") as owner in fee simple absolute in possession of the property. In support of the Petition, Pauline Ferguson filed an Affidavit on 8th July 2016 to support her claim to possessory title to the property.
3. In 1993, the Petitioner moved onto the Property with her now estranged husband, Eleazer Ferguson. In 1999 their relationship ended and Mr. Ferguson left the

property with all his belongings. Sometime thereafter he disconnected all utilities to the property. The Petitioner continued to occupy the property and paid to have the utility services installed and connected in her name. Since occupying the home on her own, the Petitioner has made substantial improvements to the home. She has repaired the cracked and crumbling interior and exterior walls of the home; 2) repaired and completely remodeled the kitchen; 3) tiled the living room, dining room and hallway; 4) carpeted the two smaller bedrooms and installed wooden floors in master bedroom; 5) painted and repainted the interior and exterior walls of the home on numerous occasions; 6) repaired the cesspit; 7) treated the home for termites and pests; 8) repaired the plumbing to some portions of the home; 9) remodeled the bathrooms; 10) upgraded all the electrical work to the home; 11) repaired the front exterior wall to the property and constructed a proper facility to the house; 12) installed security bars to the back portion of the home; 13) partial repair of the interior ceiling; 14) changed the interior doors; and 15) with the assistance of her estranged husband, had the roof repaired and re- shingled.

4. Since Mr. Ferguson left the home, his former wife, Laura Ferguson the Adverse Claimant, ("**the Adverse Claimant**") has approached the Petitioner claiming that she is the owner of the home and wants to receive rents for the home. On 4th July 1997, in divorce proceedings between Laura Ferguson and Eleazer Ferguson, Justice Osadebay ordered that:-

- i. Mr. Ferguson convey to Laura Ferguson his fee simple title in the property to be executed on or before 15th August 1997;
- ii. Mr. Ferguson pay all charges rates and taxes chargeable upon the conveyance as mentioned
- iii. In consideration of the conveyance, Laura Ferguson convey and release to Mr. Ferguson her undivided one- half fee simple interest in respect of Lot Number 1 Block Number 5 of the Regency Park subdivision.

This Order was not filed until August 7th 2000.

5. The Petitioner in these proceedings avers that she was previously unaware of Laura Ferguson's title to the property.

6. On 24th January 2013, Laura Ferguson obtained an order of eviction from the Magistrate Court to have the Petitioner removed from the property. The Petitioner appealed the order and on 18th May 2016 Hartman Longley, Chief Justice dismissed the vacant possession order and ordered that the matter be remitted to the Magistrate Court for rehearing.

7. The Petitioner maintains that she has been in full, free and undisturbed possession of the property from 1993 when she lived at the property with Mr. Ferguson and from 1999 on her own after Mr. Ferguson left having full possession and having carried out several acts of ownership.

8. The Petitioner claims to have never experienced any disturbance or interference with her possession to the property until approached by Laura Ferguson.
9. On 16th August 2018, the Adverse Claimant filed a Summons pursuant to Order 18 Rule (19) (d) of the Rules of the Supreme Court for an order to strike out on the grounds that:-
 - i. The Petition is an abuse of the Court process pursuant the Courts' inherent jurisdiction; and
 - ii. The Petition is scandalous, frivolous or vexatious
10. The Adverse Claimant also filed an Adverse Claim on 16th August 2018 claiming to be owner in fee simple absolute in possession of the property. Her Abstract of Title, filed on 16th August 2018, sets out her claim to the property in the following manner:-

29th July 1965

By Indenture of Conveyance dated 29th July 1965 and made between Adana Construction Company Ltd of one part and Eleazer Ferguson of the other part and not of record in the Registry of Records in the City of Nassau in the said Island of New Providence in Volume 945 at page 373 to 376. The Vendor became seised in fee simple in possession of the hereditaments "All that piece parcel or lot of land being Lot Number eleven (11) situate in the Subdivision called and known as Redland Acres on the South Side of Soldier Road in the Eastern District of the Island of New Providence and being bound by on the North by Lot Number seven (7) the property of Gertrude Taylor and running therein fifty (50) feet I the East by Lot Number thirteen (13) the property of the said Adana Construction Company Ltd. and running thereon one hundred (100) feet on the South by Shahs drive and running thereon fifty feet (50) and on the West by Lot Number ten (10) intended to be sold to Irvin Clarke and running thereon one hundred feet (100)" The said hereditaments subject as is therein specified but otherwise free from encumbrances.

4th July 2012

By Order of his Lordship the Honorable Justice Mr. Emmanuel Osadebay made the 4th July 1997 and filed on the 17th August 2000 in the Family Division Number 323 of 1990 ("the Order") Eleazor Ferguson agreed to convey his

fee simple title in the said hereditaments free from encumbrances to Laura Ferguson.

Adverse Claimant's Evidence

11. An Affidavit was filed by Laura Ferguson on 16th August 2018 in support of her Summons to strike out the Petition.
12. The property in question was previously owned by Laura Ferguson's now ex-husband and the Petitioner's now estranged husband, Eleazer Ferguson.
13. Laura Ferguson now possesses documentary title and possessory title to the property having obtained it by order of the court made July 4th 1997. On 4th July 1997, Justice Emmanuel Osadebay ordered that the Property be conveyed to Laura Ferguson.
14. The Petitioner was sent a notice of this Order by way of a letter dated 10th February, 2011, from the Adverse Claimant's Counsel, Patricia A. Roberts & Co. when she was requested to vacate the premises. The Petitioner refused to vacate the property. The Adverse Claimant also sought relief from the Magistrates Court and obtained an Eviction Order. The Petitioner was ordered by then Magistrate Gullimina Archer to vacate the premises. The Petitioner filed an appeal before Justice Hartman Longley and it was ordered that the matter be reheard before a new Magistrate.
15. At the second hearing before the Magistrate Court, the parties orally consented to a lease agreement for rent of \$800.00 per month which began on 1st November 2016. The Petitioner paid two months' rent and ceased payment of the oral lease agreement.
16. The Petitioner's attorney wrote a letter dated 8th May 2018 to the Adverse Claimant putting forward an offer for the sale of the subject property of this action. The offer was in the amount of \$63,000.00. The Adverse Claimant rejected the offer and made a counter offer of \$180,000.00 inclusive of rent and mense profit owed and reminded the Petitioner of the demand letter previously sent to the Petitioner.

Petitioner's Submissions

17. The Petitioner submits that although the Court has the power to dismiss an application under the Quieting Titles Act without investigation and enquiry, this power cannot be exercised unless and until an enquiry has been made as pursuant to **Section 17(1) Quieting Titles Act, 1959:-**
"After the Court has completed the hearing of an application made under section 3 of this Act it may-
 - a) Dismiss the application;
 - b) Dismiss the application and grant a certificate of title in the form prescribed by section 18 of this Act to any person who shall have filed an adverse claim in accordance with provisions of section 7 of this Act;

c) **Grant a certificate of title in the form prescribed by section 18 of this Act to the petitioner.”**

18. It is the Petitioner’s position that the Magistrate Court proceedings bear no weight on these proceedings as the Magistrate Court has no jurisdiction to deal with title to land. **Section 52 of the Magistrate Act, Ch. 54** states:-

“Subject to the provisions of section 15 and section 23 of this Act a magisterial court shall have no jurisdiction to try summarily any case in which title to land or any interest therein is direct or incidentally in dispute.”

19. The Petitioner is entitled to have her claim to the property investigated by the Court for pursuant to **Section 3 Quieting Titles Act “The Act”** which states:-

“Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted by the court in accordance with the provisions of this Act.”

The Adverse Claimant is also entitled to have her title investigated according to **section 7(1)** of the Act. The Court can only make a determination on title once a proper investigation has been completed. The Adverse Claimant should not be allowed to circumvent the Court’s process by making an application to strike out.

20. The Petitioner should be allowed to have the Court consider her petition pursuant to **Section 16** of the Act which states:-

“Without limiting the generality of the provisions of section 3 of this Act, the court shall have power to declare by a certificate of title in the form prescribed by section 18 of this Act that the petitioner is the legal and beneficial owner in fee simple of the land mentioned in the petition in any of the following circumstances —

(a) **Where the petitioner has proved a good title in fee simple to a share in land and has proved such possession as, under the Limitation Act, would extinguish the claim of any other person in or to such land;**

(b) **Where the petitioner has proved such possession of land as, under the Limitation Act, would extinguish the claim of any other person in or to such land;**

(c) **Where the petitioner has proved that he is the equitable owner in fee simple of land and is entitled at the date of the petition to have the legal estate conveyed to him.”**

After such investigations by the Court, the Court must then made a determination as to who has better title in accordance with **Section 17** of the Act.

21. The Adverse Claimant’s application to strike out is an abuse of the Court process pursuant to **Section 16(3) of the Limitation Act, Ch. 83** which states:-

“No action shall be brought by any person to recover any land after the expiry of twelve (12) years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person...”

The Adverse Claimant knew or ought to have known that the Petitioner was in occupation of the property since January 1996 to 2016 when this action was

commenced, some 23 years. The Adverse Claimant had the right to occupy the property as per the 4th July, 1997 Court order, but did not. The Petitioner says that the right of action accrued in 1997 and the twelve years has since expired. The Adverse Claimant also did not file her adverse claim to the property until 2018. The application to strike out filed by the Adverse Claimant is also an abuse of the Court process.

22. The Petitioner further maintains that she must be given an opportunity to prove that her possession of the property is sufficient to bar the prior title of the Adverse Claimant. This would not be possible if the Court opts to strike out the action. As indicated in **Bannerman Town, Millars and John Millars Eleuthera Association (Appellant v Eleuthera Properties Ltd (Respondent) (Bahamas)[2018] UKPC 27** per Lord Briggs at paragraph 50, page 16:-

“While occupation or use of land is a familiar non-technical concept, possession of land is a legal term of art. Possession, for however short a time, may be sufficient to found a cause of action in trespass against someone thereafter coming upon the land. But possession sufficient to bar a prior title (whether itself documentary or possessory) must be proved for the whole of the time prescribed by the relevant Limitation Act: see *Perry v Clissold* [1907] AC 73, per Lord Macnaghten at p 79:

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.”

Adverse Claimant's Submissions

23. The Adverse Claimant submits in order to have an action dismissed for want of prosecution, it must be proven that there has been more than inordinate and inexcusable delay of the matter, but also that the Applicant will be prejudiced if having to defend the matter.

24. In **Kemp v Cable Bahamas Ltd [2012] 3 BHS J. No. 83** Sir Michael Barnett, Chief Justice referred to **Icebird Ltd v Winegardner [2009] UKPC 24** where Lord Scott stated:-

“*Birkett v James* [1978] AC 297 remains, in their Lordship opinion, the leading authority for the approach to be taken to an application to strike- out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court practice, namely, that the power to strike-out should be exercised only where the court was satisfied... either (1) that the default has been intentional and contumelious eg. Disobedience to a peremptory order of the court or conduct amounting to an abuse of the court or (2)(a) that there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious

prejudice to the Defendants either as between themselves and the Plaintiff or between them and a third party.”

25. The Chief Justice further referred to certain facts in Icebird Ltd which are relevant for consideration in strike out applications and which facts speak to delay on the part of lawyers. The Court held:-
“The present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the Applicant cause by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible? This was a ground relied on in the respondents summons and although not the basis of the respondent’s success before Lyons J or before the Court of Appeal, their Lordships think it right to consider whether this might be so.”
26. The Adverse Claimant submits that the Petitioner in this case does not have the evidence required to bring a Quieting Action in light of the offer to purchase by letter and payment of rent to the Adverse Claimant, therefore the action is an abuse of the Court process.
27. There has been a delay of more than two years and the trial cannot proceed and be tried on a fair basis. The Petitioner is not inclined by her delay to proceed to trial as she does not have a desire to bring this matter to conclusion.
28. In Grovit v Doctor and others [1997] UKHL 13, Lord Woolf stated:-“Even without this surprising late development, I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the Appellant’s inactivity in the libel action for a period of over two years. This conduct on the part of the Appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff’s inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.”
29. The Adverse Claimant believes the same to hold in this case as in Grovit v Doctors, as the evidence shows that the Petitioner only intends to hold the action over the Applicant’s head to create anxiety and never bring the matter to conclusion.

30. The Adverse Claimant maintains that the Petitioner in commencing the action and then abandoning the action indicated that she was only interested in stalling or hindering the Adverse Claimant from enjoying her property pursuant to the order of the Magistrate's Court. This action was commenced on 8th July 2016, and two and a half years since filing the Petition, the Petitioner and her attorneys have failed to move the matter forward.
31. Similarly the Adverse Claimant is not alleging that there is inordinate and inexcusable delay, but that there is prejudice to the Adverse Claimant occasioned by the intentional delay due to the Petitioner's inactivity, and as such the Court is being used by the Petitioner as a shield which is an abuse of the Court's process. The fact that the Adverse Claimant suffers no obvious prejudice because of delay is not a reason to refuse the application to strike out.
32. The Adverse Claimant also submits that the Petitioner did not possess the land and never had possession of the property. She merely occupied the land with intention of acquiring ownership but she did not possess the same. If she wished to have the Adverse Claimant's title extinguished, the Petitioner would have to show that she physically possessed the land with the intention to possess and not to acquire title.
33. The Adverse Claimant also relied on in the matter of the **Quieting Titles Act, 1959 [2012] 1 BHS J. No. 26** where the Adverse Claimant was found to have superior documentary title to the property than the Petitioners as they were able to establish who held the legal estate by proof of letters acknowledging the ownership of the property. In that case, Barnett CJ stated:-
- “26. In my judgement, the letter was an acknowledgement of Clement's ownership of the property and Clement's sister keeping him abreast of what was happening to the property and asking him to provide supplies for his property. It is certainly inconsistent with any claim by Miriam to any occupation of the property to the exclusion of Clement.**
- 28. The Petitioners have failed to establish that they were in exclusive possession of the property for the 20 years period immediately preceding the presentation of the Petition. Although the Limitation Act, 1995 provides for a 12 year period, it is settled law that the 20 year period applied to actions commenced prior to 1st September 2007. See Long Island Real Estate v Rosen and Re Colin Archer.”**

Issues

34. The issues which must be addressed are:-
- i. Whether the Petitioner's adverse possession claim to the property outweighs the Adverse Claimant's title to the property.

- ii. Whether this action can be struck out pursuant to the Court's inherent jurisdiction and pursuant to Order 18 Rule 19(d) RSC as an abuse of the court process and being frivolous and vexatious.

DECISION

35. The Adverse Claimant has filed a Summons for an order to strike out the Petition pursuant to the **Rules of the Supreme Court Order 18 Rule (19) (1) (d)** on the grounds that :-

- i. The Petition is an abuse of the Court process pursuant to the Courts' inherent jurisdiction; and
- ii. The Petition is scandalous, frivolous or vexatious

36. Order 18 Rule 19(d) provides:-

“The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

- (a) it discloses no reasonable cause of action or defence, as the case may be ; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

And may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”

37. By Section 28 of the Act, the Rules of the Supreme Court apply to quieting actions.

38. The Adverse Claimant is not alleging that there has been inordinate and inexcusable delay, but that there is prejudice occasioned by the delay due to the inactivity of the Petitioner, which amounts to an abuse of the Court's process and also under its inherent jurisdiction.

39. By Order 18 Rule 19 or under its inherent jurisdiction the Court has the discretion to strike out proceedings which fall within any of the grounds contained therein or by its inherent jurisdiction where there is an obvious abuse of the court's process. Actions will only be struck out where it is plain and obvious to do so. It is therefore necessary to consider the evidence of the parties to determine whether the Petitioner's claim is scandalous, frivolous or vexatious or an abuse of the Court's process.

40. Having reviewed the evidence presented before me, it appears that the Adverse Claimant is alleging that the Petitioner is using these proceedings to her own advantage by creating delay which has prejudiced the Adverse Claimant. The Petitioner asserts that she has a valid claim to the property in question and subsequently should be allowed her time in Court to present her claim to possessory title and to have the same investigated. The Adverse Claimant on the

other hand asserts that she has a documentary title which has been confirmed by the Court.

41. The Petitioner avers that the Court's power to strike out cannot be exercised unless and until an enquiry has been made pursuant to Section 17(1) of the Act which provides:-

"After the Court has completed the hearing of an application made under section 3 of this Act it may-

- a) **Dismiss the application;**
- b) **Dismiss the application and grant a certificate of title in the form prescribed by section 18 of this Act to any person who shall have filed an adverse claim in accordance with provisions of section 7 of this Act;**
- c) **Grant a certificate of title in the form prescribed by section 18 of this Act to the Petitioner."**

42. However, according to Section 28 of the Act:-

"Subject to the provisions of this Act and of any of the rules made hereunder and except where otherwise provided, the practice and procedure under the Supreme Court Act and the rules made thereunder shall apply to proceedings under this Act."

Accordingly the Court has the jurisdiction to hear and determine this application without having to complete an investigation into the title claimed by the Petitioner.

43. Further, this jurisdiction was confirmed in Re: Harris, Mae (1998) BS SC 144; where Dunkley, J (Ag.) stated:-

"Section 28 is clear in its terms and was applied by this Court in Re Bodehn [1965-70] 2 LRB 17 where James Smith, J said at p. 18:-

"Proceedings under the Quieting Titles Act 1959 are by section 28 thereof to be conducted in accordance with the provisions of the Act, the rules made thereunder, except where otherwise provided, by the Supreme Court Act and the Rules of the Supreme Court. Neither the Quieting Titles Act nor the Quieting Titles Rules, 1959 provide for the procedure to be followed at the hearing of a petition and adverse claim. Thus we are to follow the Supreme Court Rules...."

He went on to say, "I have dealt in detail with the regime under the Quieting Titles Act and Rules because much argument before me concerned the power of this Court in matters where the Quieting Titles Act and Rules were silent. It is clear that in such circumstances I should look to the Rules of the Supreme Court and the inherent jurisdiction of this Court for the practice and procedure."

44. Although the beginning section of **Section 17(1)** seems to suggest that 'after a hearing of an application...the court may dismiss an application,' this section is inconsistent with the inherent jurisdiction of the court to prevent an abuse of process by striking out an application without a hearing. I am satisfied that this section does not limit the power to dismiss a quieting action without an investigation into the title in issue.

45. Unless provisions of the Act are expressly inconsistent with Order 18 Rule 19, or the principles governing the inherent jurisdiction of the Court to protect against an abuse of its process, it is permissible for the Court to exercise its power to strike out an action.

46. In **Birkett v James** it was stated that,

“The court should exercise its power to dismiss an action for want of prosecution only where the plaintiff’s default has been intentional or contumelious (e.g. by disobeying peremptory orders as to the time for taking steps in proceeding or conduct amounting to abuse of the court), or where there has been inordinate and inexcusable delay on his own or his lawyers’ part giving rise to a substantial risk that a fair trial will be impossible or to serious prejudice to the defendant.”

There has been a delay of six years on the part of the Petitioner or her lawyers in this case, which gives rise to a substantial risk that a fair trial will be impossible or that there will be prejudice to the defendant. It is also fair to accept that the Petitioner’s default in prosecuting the action has been intentional and contumelious and this default amounts to an abuse of the court’s process.”

47. Acts which can be considered vexatious are legal proceedings “brought for an improper purpose, and which are brought for purposes other than the assertion of legitimate rights.” **See Ferris v Meyler [2017] 10 WLUK 261.**

48. The Petitioner filed her petition knowing that the action could not be supported or completed without the submission of the necessary documents and without making any effort to obtain and submit those documents, thus effectively preventing an investigation from taking place. If the investigation cannot happen then it can be asserted that the Petitioner never intended for the matter to move forward and simply filed the petition for an improper purpose. When actions are commenced, which cannot proceed this can cause a delay in the delivery of justice and if there is a delay in the delivery of justice the courts are being abused.

49. There has been no submission or filing of the necessary documents by the Petitioner. There has been no plan of the land prepared from a survey thereof, no abstract of title. Further, there is no evidence of the Petitioner trying to obtain those documents to enable the matter to proceed. These documents are required by the Act to enable the Court to investigate the title.

50. Furthermore, one obvious prejudice which ensues from the delay is that no one can fully enjoy this Property in its entirety (e.g. the financial gains which could be obtained from the property because the property cannot be sold free and clear of encumbrances because the title to the land is being investigated.

51. I am satisfied that the Petitioner had no desire to move the matter forward due to her failure to file and submit certain documents and as a consequence of this, she would have commenced the action for an improper purpose which is also vexatious

and, which delays justice, and more importantly this failure would be an indicator that her actions or lack thereof are an abuse of the court as determined in Grovit v Doctor and others.

Adverse Possession

52. The Court must also examine the evidence of possession by the Petitioner in order for her to obtain a Certificate of Title. As stated previously, the Petitioner has not presented all the necessary documents to enable the court to properly consider her evidence of possession. The Court must however be satisfied that there was not only factual possession but also the intention to possess.
53. The Petitioner relies on a possessory title to the disputed property while the Adverse Claimant relies on a documentary title. The Court's role is to simply determine whether the Petitioner is able to establish a better title than the Adverse Claimant.
54. An appropriate starting point would be the Privy Council decision Ocean Estates Ltd. v. Pinder [1969] 2 A.C. 19 where Lord Diplock opined:-
"Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser.

The law therefore is that the plaintiff, in order to succeed in his claim, must demonstrate that, he or his predecessor went onto the land as trespasser and by virtue of such possession beyond the limitation period, had extinguished the documentary title of the defendant or its predecessors in title."

55. In Powell v McFarlane (1977) 38 P & CR p452 at 470, Slade, J considered the meaning of possession:-
“(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. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": *West Bank Estates Ltd. v. Arthur*, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. 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. On the particular facts of *Cadija Umma v. S. Don Manis Appu* the taking of a hay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the *Red House Farms* case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting: per Cairns, Orr and Waller L.JJ. 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 M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) 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 realise 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."

56. In *Ofulue v Bossert* [2009] UKHL 16, where a tenant spent a considerable amount of time and money repairing the flat, the Court of Appeal found that the Bossert's acts were sufficient to amount to factual possession. With a review of the evidence, it is noted that Mrs. Pauline Ferguson made improvements to the Property. These acts performed were not trivial, and can be considered acts which constitute a sufficient degree of exclusive physical control.

57. The Petitioner must demonstrate that she has had possessory title for twelve (12) years or more as required by **Section 16(3) of the Limitation Act, which provides** :-

“No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person.”

An important component is that this possessory title must also defeat the Adverse Claimant's documentary title.

58. I find on the evidence presented that the Petitioner has not deduced an uninterrupted possessory title exceeding the twelve year limitation period. The Petitioner claims that her time as an adverse occupant commenced 4th July 1997 when it was ordered by Obsadebay, J to have the property conveyed to the Adverse Claimant by Mr. Ferguson. However, it has been acknowledged that the title to the property was not transferred to the Adverse Claimant until 2012.

59. The question which must be determined on the facts of this case is who had the actual possession of the property, Mr. Ferguson or Laura Ferguson. The actual owner of the property would be the individual holding paper/documentary title to the land. Until, 2012 when the property was transferred by order of the Court, Mr. Ferguson would be deemed to be in possession of the property. The Petitioner has also admitted that her estranged husband, Mr. Ferguson has since leaving the home assisted her with repairing and re-shingling the roof. This act can be interpreted as his reasserting ownership of the property as between the Petitioner and himself, therefore leaving the Petitioner without exclusive possession of the property during this time.

60. Another issue which has to be considered is whether a wife can claim adverse possession against her husband as the Petitioner has again admitted that she and Mr. Ferguson have not divorced. An important component of adverse possession is that the adverse occupant's entry on the property is as a trespasser. The Petitioner moved onto the property in 1993 with her now estranged husband and has remained there since. She did not enter as a trespasser but as a wife of a person who had actual and legal possession and remained there after he left. Further, even after he left the Property, he continued to repair the same.

61. Based on the Petitioner's own evidence, she has not been in adverse possession of the Property in her own right against the Adverse Claimant during the years 1997 to 2016. Time would have only begun to run for her claim for adverse possession against the Adverse Claimant in 2012 when the documentary title was rightfully transferred to Laura Ferguson. Prior to 2012, Laura Ferguson only had an equitable title to the property. Also the Petitioner's estranged husband was the legal owner of the property prior to that and she lived on the property as his wife and not as a trespasser.

62. The Adverse Claimant asserts that the Petitioner received notice of the 1997 Court Order by letter on 10th February 2011. On 24th January, 2013 an eviction order was issued against the Petitioner by the Magistrate, which she appealed. On 4th August 2016 both parties orally agreed that the Petitioner would pay rent, which she began to pay for a short period of time. Also, on 8th May 2018 the Petitioner wrote a letter to Laura Ferguson enquiring about purchasing the property from her. These acts are clear indicators of the Petitioner's knowledge of Laura Ferguson's ownership over the property starting in 2011. The agreement to pay rent and the actual payments as well as the offer letter to purchase the property are sufficient acts of acknowledgement of Laura Ferguson's title. Time will cease to run against the Adverse Claimant from the first date of acknowledgement by the Petitioner of the Adverse Claimant's title, therefore leaving Pauline Ferguson without an adverse possession claim against Laura Ferguson.

63. Pauline Ferguson has not, based on the evidence before the court, been able to deduce a possessory title to the Property greater than the documentary title of Laura Ferguson. The statutory period required is twelve years. Pauline Ferguson has only been in adverse possession of the Property against Laura Ferguson at best for five years prior to the commencement of this action. Therefore, she has not met the requisite period needed to successfully claim a possessory title. Further, Pauline Ferguson's acknowledgement of title and conduct of paying rent bars an adverse possession claim against the property. Time stopped running for Pauline Ferguson when the true owner, Laura Ferguson granted her tenancy.

64. In **BP Properties Ltd. v Buckler (1987) 55 P & CR 337, [1987] 2 EGLR 168**, the title owner of the property wrote a letter to the Defendant's deceased parents stating:-

“As BP Properties is not obliged by the same constraints as the Pension Trust and since we wish to help you as much as possible, we are prepared to allow you to remain in occupation of the house and garden rent free for as long as you may wish and for the rest of your life if you so desire.”

Dillion, LJ said, “So far as Mrs. Buckler was concerned, even though she did not “accept” the terms of the letters, BP Properties Ltd would, in the absence of any repudiation by her of the two letters, have been bound to treat her as in possession as licensee on the terms of the letters. They could not have evicted her (if they could have done so at all) without determining the licence.

I can see no escape therefore from the conclusion that, whether she liked it or not, from the time of her receipt of the letters, Mrs Buckler was in possession of the farmhouse and garden by the licence of BP Properties Ltd, and her possession was no longer adverse (my emphasis).”

Laura Ferguson in granting a tenancy to Pauline Ferguson showed an intent to allow the Petitioner to remain on the property as her tenant and not as an adverse claimant.

65. The Petitioner's actual possession involved "a sufficient degree of exclusive physical control" over the land" (as per Slade J in Powell v McFarlane) and showed an intention to possess the land, but this was terminated when she accepted the tenancy and when she offered to purchase the property.
66. In consideration of all the factors and the evidence reviewed, I find that, there could not be adverse possession of the property for the required period.
67. Even if the Petition were fully investigated, the facts as sworn by the Petitioner would not change. When coupled with the failure to prosecute the claim, I find that this failure amounts to an abuse of the process of the court; and the Petition should be struck out.
68. I so order that the Petition be struck out and the Adverse Claimant is awarded her costs to be taxed if not agreed.

Dated this 9th day of November 2022



The Hon. Madam Justice G. Diane Stewart