

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/qui/00433

IN THE MATTER of All that piece parcel or lot of land containing by admeasurement four thousand five hundred and sixty one square (4,561.00) feet and bounded in the North by Cambridge Street and running thereon fifty three and ninety-three hundredths (53.93) feet East by property of Florence Cambridge and running thereon eighty-three and fifty-five hundredth (83.55) feet South by property now or formally owned by Kingsley Poitier and running thereon fifty-eight and seventy hundredth (58.70) feet West by property now or formally owned by David Solomon and running thereon seventy eight and sixty five hundredths (78.65) feet with such position marks shape boundaries and dimensions as are delineated on a plan prepared by Shurn Henry and is coloured PINK.

AND

IN THE MATTER of The Quieting Titles Act 1959 (Chapter 393 Statute Laws of the Bahamas Revised Edition 2001)

AND

IN THE MATTER of the Petition of Charlene Moxey and Janet Patricia Ferguson (Personal Representative of the Estate of Florence Cambridge and in her own capacity)

Before Hon. Chief Justice Ian R. Winder

Appearances:

Alton McKenzie for the Petitioners

Anthony Newbold for the Adverse Claimant Leon Farquharson

6 March 2020, 19 August, 2022, 15 September 2022 and 28 October 2022

JUDGMENT

WINDER, CJ

This quieting action relates to a parcel of land, measuring approximately 4,561 square feet on Cambridge Street. The Petitioners pray that their title to the tract of land be investigated under the Quieting Titles Act, 1959 and a Certificate of Title with respect to that land be granted to them.

[1.] The Petition was filed on 3 April 2017 along with affidavits to support the claim to a possessory title to the property. The Petitioners filed a survey plan on 3 October 2017 but the abstract of title was not filed until 11 October 2017. The Petitioners relied on the affidavits of:

- (1) Ruth Major dated 11 October 2017;
- (2) Persis Bullard dated 3 April 2017; and
- (3) Janet Ferguson and Charlene Moxey dated 3 April 2017 (joint affidavit).

[2.] Notice of the Petition was duly advertised pursuant to the Directions Order dated 21 March 2018.

[3.] A late Adverse Claim was filed by the Adverse Claimant Leon Farquharson (Farquharson) on 30 November 2021. He claim to be the documentary title owner having purchased from one Denver Taylor. The affidavits of Denver Taylor and Leon Farquharson were filed in support of the case for the Adverse Claim.

[4.] At trial, the Petitioners called Janet Ferguson, Persis Bullard and Charlene Moxey. Leon Farquharson gave evidence in support of the case of the Adverse Claimant.

The evidence

[5.] The evidence of Janet Ferguson and Charlene Moxey was contained in their joint affidavit. That evidence provided:

1. That we are Bahamian Citizens by birth.
2. That we are both over eighteen (18) years of age.
3. That JANET FERGUSON, is the Personal representative of the estate of Florence Cambridge (deceased).
4. That a Grant of Probate was issued from the Supreme Court of The Commonwealth of The Bahamas on the 25th day of April A.D. 2016 a copy of which is hereto attached EXHIBITED "FC 1".
5. That our mother Florence Cambridge along with us the Petitioners have kept and cleaned the said property for the past Thirty-two (32) years. At no time during the last Thirty-two (32) years did anyone challenged our occupation or asserted title, molested the property, or made any legal demands upon the Estate to vacate the property or to produce or prove documentary title thereto. Until sometime in early November of 2016, when we observed a neighbor, Mr. Leon Farquharson on the property, clearing debris, trees and brush that were felled after the passing of Hurricane Matthew the previous month. Upon observing Mr. Farquharson's actions we instructed our Attorneys Bowleg McKenzie Associates to send a Notice to Mr. Farquharson to quit his trespass on the property. A copy of the Notice of Trespass is hereto EXHIBITED and marked "FC 2".
6. That a few days after the notice was delivered to Mr. Farquharson we are advised that his attorney Mr. Anthony Newbold of the firm Newbold and Associates made contact with our attorneys who advised him of the situation of our and the estates interest in the property. Our attorneys requested that he produce title to the property which I am informed was never acceded to. A copy of email of the correspondence between our Attorneys and Mr. Newbold is hereto EXHIBITED and marked "FC 3".
7. That the Petitioners are the legal and beneficial owners in possession of the fee simple estate in the land described in the Petition by virtue of a long, unbroken, exclusive and undisturbed possession on our part for the last 32 continuous years, save as mentioned in paragraphs 5 and 6.
8. That we make this Affidavit in support of the Petition filed herein for the grant of the Certificate of Title to us in accordance with the Quieting Titles Act 1959.
9. That we make this Affidavit from our own personal knowledge and from information provided to us, and that to the best of our knowledge information and belief the contents of this Affidavit and the information contained in the Petition filed herein are correct and true.

[6.] Under cross examination, Charlene Moxey stated that:

- (1) She lived out of the area since 1995, and only her sister, now deceased, and her mother lived there. A shop was on the property which was rented to house a church about 35 years ago.

- (2) Early to the mid-nineties the church left and the building became dilapidated. The building was removed by people who claimed to be relatives of the Rolles. She stated:

"I can't give the dates but it was some time because after that they just clean it down, break it down, dig the trench and they never came back to the property. So at the time now this property now is vacant. No one is cleaning it. So my mother had to step in and clean this property, had to keep cleaning the property. And really at the beginning she was complaining about it. She say, "Oh, look how Ms. Edna leave this property for me to clean." So anyhow, after she realize now she have to do it so she just finally say well, "Okay, I will just take possession of this property and clean it." So I would say well over 30 years she was cleaning this property."

- (3) She confirmed that in 1995 her mother did not claim to be the owner of the property. She came by her mother daily and helped her mother to keep the yard clean.
- (4) She was told on occasions by Farquharson who told her to get off the property. An incident occurred between her and Farquharson, which involved the police in 2016. She was shown a conveyance 2 years ago. She took possession of the property about 2 years before her mother passed.

[7.] Leon Farquharson's evidence was he lives Cambridge Street and has lived there since 1987. He was taking care of the property since his purchase from Denver Taylor. He placed his Wrecker on the property. He produced a copy of his conveyance from Taylor.

[8.] Farquharson relied on the affidavit of Denver Taylor from whom he purchased. That affidavit was as follows:

I, DENVER DEVON TAYLOR of Coopers Terrace, Kemp Road in the Island of Nassau, New Providence, one of the Islands of the Commonwealth of the Bahamas make oath and say the following:-

1. That upon my birth on the 8th day of September, 1979 my father gave me my granddaddy's name – DENVER TAYLOR.
2. That John Rolle is my father and Stephanie Sweeting is my mother.

3. That Edna Arlean Rolle was John Rolle's mother.
4. Accordingly, Edna Arlean Rolle was my grandmother.
5. Ms. Edna Rolle was the owner of the property which is the subject matter of this Litigation. This fact was confirmed by Ms. Charlotte Ferguson one of the Litigants in her evidence.
6. During her lifetime, Ms. Edna Arlean Rolle, make a Will appointing Mr. Patrick Reginald Hepburn, our cousin, Executor.
7. It was Patrick and John (my father) who visited the property in the 1990s to demolish 2-3 wooden structures and start preparations for a duplex – evidence of which is visible to this day.
8. Regrettably Patrick died in September of 2012 leaving the property in the hands of John Rolle.
9. In June of 2016, John Rolle, my father, transferred the property that's been in my family since the 1800s to me Denver Taylor.
10. After consulting with my father, who is still alive, it was agreed to sell the property.
11. That is how Mr. Leon Farquharson came to be in possession of the property.

Denver Taylor did not give evidence and was therefore not subject to cross examination. In the circumstances I caution myself as to the reliability of his evidence.

Law, Analysis and Disposition

[9.] Section 3 of the Quieting Titles Act (the QTA) provides:

3. 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.

We must therefore investigate the competing claims. This *investigation* is being conducted by the Court pursuant to the QTA. By section 8 of that Act it is provided that:

8. (1) The court in investigating the title may receive and act upon any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby.

(2) It shall not be necessary to require a title to be deduced for a longer period than is mentioned in subsection (4) of section 3 of the Conveyancing and Law of

Property Act or to produce any evidence which by the Conveyancing and Law of Property Act is dispensed with as between vendor and purchaser, or to produce or account for the originals of any recorded deeds, documents or instruments, unless the court otherwise directs.

(3) The evidence may be by affidavit or orally or in any other manner or form satisfactory to the court.

[10.] The appropriate starting point in this case is the Privy Council decision in *Ocean Estates Ltd. v. Pinder* [1969] 2 AC 19. In that decision Lord Diplock opined at page 25 paragraph A, as follows:

"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."

[11.] The law therefore is that in order to succeed in his claim, a party must demonstrate a documentary title or that, he or his predecessor went onto the land as a trespasser and by virtue of such possession beyond the limitation period, had extinguished the documentary title of the defendant or its predecessors in title. In considering the meaning of *possession*, Slade J. in *Powell v. McFarlane* (1977) 38 P & CR p452 at 470 held that:

(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.

[12.] The principles enunciated in *Powel v. Mcfarlane* have been approved in the Bahamian Privy Council decision of *Armbrister et al. v. Lightbourn et al.* [2012] UKPC

40.

[13.] It is important also to indicate that the effective date of this investigation is the twelve year period leading to the date of the filing of the Petition in this claim, namely 3 April 2017.

[14.] The Petitioners do not assert a documentary title and accepts that they are the title holder for the neighboring property.

[15.] The Adverse Claimant say:

...

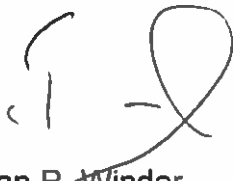
5. In order to succeed in a claim for adverse possession the claimant must show positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. See p.260 Commonwealth Caribbean Property Law excerpted in Judgment of 2005/CLE/00735.
6. Charlotte Ferguson in her testimony admitted that the property was in the Rolle family up to the time of Edna Arlean Rolle. In fact, she said that her mother Florence Cambridge, collected rents from the property for Ms. Edna. See p.7 of her evidence.
7. During their so-called possession in the late eighties (80's) to nineties (90's), structures on the property were demolished by the Rolles (see affidavit of Denver Taylor) and preparations were made for apartments which exists to this day... see p.9 of Charlotte Ferguson Evidence.
8. Her evidence, taken at its highest, is that she and others cleaned the property and thus possess it.
9. This can be (sic) hardly be said to be a case of positive intention to abandon by the Rolles. Perhaps the Petitioners assumed that because the apartments were not constructed, the Rolles must have abandoned the property.
10. However, abandonment must be positive. "The mere fact that the paper owner is shown to have made no use of the land during the period does not necessarily amount to discontinuance of possession" See p.260 Commonwealth Caribbean Property excerpted in Judgment of 2005/CLE/qui/00735.
11. To successfully dispossess the Rolles, the Petitioners should have done "... acts which are inconsistent with the enjoyment of the soil by the person entitled to the land. The land should have been used in a way which altered or interfered in a permanent or semi-permanent way with the land... for example fencing with substantial structures constructed on it... leaving in its trail substantial traces of use." See p.280 of Commonwealth Caribbean

[16.] I accept the case advanced by the Adverse Claimant.

[17.] My assessment of the evidence of the Petitioners is that their mother did clean the subject property but not for the purpose of taking it as her own but merely for the security and cleanliness of her own property. There was nothing done by her to be described as substantial, permanent or impermanent to the land. There was no enclosing of the property, no planting or any structures on the property.

[18.] The Petitioners recognize the title of the Adverse Claimant's predecessors in title to the property and in the circumstances I will dismiss their Petition.

Dated this 14th day of February 2023

A handwritten signature in black ink, appearing to be 'I. Winder', written over a horizontal line.

Sir Ian R. Winder

Chief Justice