



[2017] JMSC Civ 45

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014HCV03127

BETWEEN	CLEVEBERT HAYLES	CLAIMANT
AND	GLORIA MAY MCFARLANE	DEFENDANT

IN CHAMBERS

Mr. Glenroy Mellish instructed by Byfield, Mellish & Rushton for the claimant

Ms. Janene Laing for the defendant

Heard: 9th January, 2017 & 24th March, 2017

Adverse Possession – whether defendant’s title to part of her land was extinguished – whether there were sufficient unequivocal acts of ownership by the claimant – Registration of Titles Act

EVAN BROWN, J

Introduction and background

[1] Clevebert Hayles claims adverse possession for a land which he bought in 1970. The land is part of a parcel of land described as Roxbury Plantation, situated at Palmers Cross District in Clarendon. The Roxbury Plantation is registered in the name of Gloria May McFarlane at volume 1304 and folio 995, and she resides there. Mr. Hayles, however, never lived on the land as he resided in England for more than forty (40) years prior to 2012.

- [2] While he was in England, he visited Jamaica during the months of August and December. Whenever he did not visit during a year, he made sure to visit the following year. Upon his permanent return to Jamaica in or around 2012, he attempted to register the land in his name. His efforts, however, were defeated as he discovered the land forms part of Ms. McFarlane's registered property.
- [3] Ms. McFarlane has been the registered owner of Roxbury Plantation since 28th October, 1999 when she was registered on transmission. She was subsequently entered on the title as the registered owner on 3rd June, 2002. She inherited the land upon the death of her mother, Ena Thompson. Ena Thompson was the registered owner of Roxbury Plantation since 6th December, 1978, eight (8) years after Mr. Hayles bought part of it.
- [4] A dispute arose between Mr. Hayles and Ms. McFarlane as to the true ownership of the land. He brought this action, claiming that he acquired the land in 1970 on a visit from England, and that he has been in undisturbed possession of it since that time.

Case for the claimant

- [5] Mr. Hayles visited Jamaica from England in 1970. During this visit, he purchased one and a half square of land, which forms part of the Roxbury Plantation in the Palmers Cross District, Clarendon from Robert Adams. He paid the purchase price of \$600.00. He made a deposit of \$200.00 and paid the balance of \$400.00 over a six (6) months period. The receipts he received for the payments were written by a lady that resided at Mr. Adam's premises. There were six receipts in total. The receipt for the deposit bore the date "9th January, 1970".
- [6] Thereafter, he was immediately put in possession of the land and began to pay the taxes. He was not issued with a Deed of Conveyance by Mr. Adams before he returned to England in 1970. On each of his subsequent visits to Jamaica, he made numerous attempts to initiate the drafting process of the Deed of

Conveyance. His attempts to effect it proved futile as he was unable to locate Mr. Adams.

- [7] In an attempt to exert his ownership of the land, he commissioned a survey of it in 1975. Also at that time, he cleared the land and erected a fence. In 2010, he instructed Curtis Ricketts to erect a concrete wall on the land. Mr. Hayles remitted funds from England to cover the cost of the construction of the wall and the clearing of the land. He did not see the need to do anything on the land prior to 2010 as he considered himself to be its true owner.
- [8] Mr. Ricketts, and four other persons with him, entered the land and commenced the construction of the wall. The wall was 6 ft high and 70 ft long, and it was built on one side of the disputed land. According to Mr. Ricketts, the construction lasted one week. During that time, he saw Ms. McFarlane and her son on the adjoining land and they did not impede his work.
- [9] In addition to the construction of the wall, Mr. Ricketts said he cleared the land of trees and bushes five times between 2010 and 2012. He did this on further instructions from Mr. Hayles. He cleared the land by using a machete and chain saw to hew down trees, and removing the weeds that grew on the fence. Mr. Ricketts, however, contradicted himself under cross examination when he said he “bushed the land once”.

Case for the defendant

- [10] Ms. McFarlane, on the other hand, said that she has never seen Mr. Hayles on the land prior to 2010 and knew nothing about him. She recalled that a survey was done on the land on 20th May, 2010. It was on this occasion that she saw Mr. Hayles for the first time. She, however, did not enquire of him or the surveyor their reason for being on her land.
- [11] She gave evidence that her ownership of the land was unchallenged prior to late 2009 and early 2010. This period, according to her, was the period of the

construction of the wall on the land by Mr. Hayles' agents. At the time of the construction, she was informed by the workmen that the project was commissioned by the National Works Agency to prevent flooding of the property when it rained.

[12] Ms. McFarlane said that she had no reason to disbelieve them as that area of the land was flood prone. In the past, she made complaints to the Member of Parliament about the flooding. As a result she thought that the construction of the wall was in response to those complaints and not an attempt to dispossess her.

[13] The construction of that wall was done on a single occasion and the wall was built on one side of the disputed area. The property was not otherwise fenced. Ms. McFarlane said that since the construction of the wall on that single occasion, Mr. Hayles' agents returned in January 2016 to 'bush' the land. She remonstrated with these agents and instructed her son to report the matter to the police. They continued to enter the premises and she insisted that they desist from entering.

The claimant's submissions

[14] Mr. Mellish for the claimant submitted that Mr. Hayles demonstrated his intention to possess the land to the exclusion of all others. This was shown in Mr. Hayles' acts of ownership. Those acts, he argued, were evidenced in the survey of that land which Mr. Hayles said took place in 1975.

[15] Additionally, Mr. Hayles' continuous possession of the land was displayed in the following: (i) his numerous visits from England, (ii) the funds he remitted for the 'bushing' exercises, (iii) the defendant acquiesced in the construction of the wall on the land, and (iv) the defendant did not object to the survey of 20th May, 2010. Counsel submitted that these events supported the fact of Mr. Hayles' continuous possession of that portion of the Roxbury Plantation since 1970. Mr. Hayles, counsel concluded, has dispossessed the defendant and her predecessors.

The defendant's submissions

- [16] Ms. Laing for the defendant submitted that Mr. Hayles' claim is unmeritorious and should be dismissed. Mr. Hayles did not show: (i) That a right accrued to him over the portion of the land being claimed, (ii) that his right accrued for a period extending beyond twelve years, and (iii) that Ms. McFarlane's right to recover the land expired by the operation of section 3 of the ***Limitation of Actions Act***.
- [17] Counsel argued that Mr. Hayles' claim for adverse possession lacked a definite commencement date of his possession. While he averred that he was placed in possession in 1970, Mr. Hayles has not shown custody and control of the land since that year. He did not indicate when the fence was constructed and what steps he took during the forty year period to show possession.
- [18] Ms. Laing further submitted that the commencement of Mr. Hayles' *animus possidendi* is misplaced and confusing. This is so as he regarded his ownership rights as being derived from R. Adams. Mr. Hayles therefore must show when this intention to dispossess first commenced.
- [19] Counsel placed reliance on ***Archer v Georgiana Holdings Ltd*** (1974) 21 WIR 431, to make the submission that fencing is not always an unequivocal act. Where it is held to be an equivocal act, fencing will as not be given much weight. It is for the claimant, she said, to prove that the fence was in existence during the entire statutory period.
- [20] Ms. Laing placed further reliance on ***JA Pye (Oxford) Ltd v Graham*** [2002] 3 All ER, for the point that a squatter and the true owner cannot possess the land at the same time. Mr. Hayles did not lead any evidence to show that Ms. McFarlane was dispossessed of the portion of land which he claims.
- [21] She concluded that his evidence under cross examination was that he returned to Jamaica approximately four years ago. That time period is below the statutory

period of twelve years which he must show possession. The statutory requirement of twelve years continuous possession was not made out.

The issue for determination

[22] The issue for determination is: did Mr. Hayles enjoy a period of twelve years possession of the disputed land to the exclusion of Ms. McFarlane?

A brief statement on the law

[23] The concept of adverse possession is rooted in the theory that the basis of title to land is possession. The fact of possession gives a title to land which is good against all persons except one who has a better right to possession. To prove title by adverse possession, two elements are necessary to establish. These are: “(1) a sufficient degree of physical custody and control (‘factual possession’); (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 in ***JA Pye (Oxford) Ltd and Another v Graham and Another*** [2002] 3 ALL ER 865, page 876.

[24] Factual possession in this context must be open, peaceful and adverse. The requirement of openness means that the possession of the claimant must be “notorious and unconcealed”: ***Lord Advocate v Lord Advocate*** (1880) 5 App Cas 273, 291, 296. This requirement is also a necessity as the paper owner would not be made aware of the need to challenge the adverse possessor before the expiry of the limitation period.

[25] The factual possession must be “adverse” in the sense that it must not be concurrent with that of the paper owner. That is to say, possession should not be with the consent of the paper owner: ***Ramnarace v Lutchman*** [2001] 1 WLR 1651, paragraph 10. Consequently, a person who has a licence or a lease to land, would not have possession that is adverse to that of the paper owner.

[26] Along with factual possession, there must exist the intention to possess the land on the part of the claimant. It is unnecessary to show that there was a deliberate intention to exclude the paper owner. The only intention which has to be demonstrated is an intention to occupy and use the land as one's own: Per Lord Hope in **JA Pye (Oxford) Ltd and Another v Graham and Another**, *supra*, at page 886.

[27] The assessment of these factors is usually a matter of inference from the act of possession and the conduct of the dispossessor after being in possession. The nature of the factual possession, the type of property in question, the common use of the property and the like, are important factors in the analytical process: **Lois Hawkins v Linette McInnis** [2016] JMCA Civ 14, at paragraph 24.

[28] Those factors are important points of examination as the more unequivocal the nature of the physical possession the easier it will be to infer the intention to possess. Conversely, the more equivocal the nature of the physical possession the more difficult it is to infer the intention to possess. It follows then that acts which amount to sufficient unequivocal acts of possession in one case may not necessarily be sufficient in another.

[29] A dispossessor who satisfies these requirements will obtain a good title if the true owner fails to assert his superior title within the requisite limitation period. The relevant period and the consequence of its expiration are outlined cumulatively in sections 3 & 30 of the **Limitation of Actions Act**.

[30] Those sections, so far as is relevant, read as follows:

3. No person shall make an entry, or bring an action ...to recover any land... but within twelve years next after the time at which the right to make such entry, or to bring such action ..., shall have first accrued...

....

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

It is clear from these provisions that they may operate together to bar a true owner with a superior title. He would be barred from making entry or bringing any claim to recover the property after the expiration of twelve years if certain conditions exist: ***Winnifred Fullwood v Paulette Curchar*** [2015] JMCA Civ 37, McDonald-Bishop, JA (Ag), as she then was, at paragraph 37. Those conditions, in the context of adverse possession would clearly be where the dispossessor had factual possession and the intention to possess.

[31] Also, the fact that a person's name is on a title is not conclusive evidence that that person cannot be dispossessed of his land. ***Registration of Titles Act***, section 68, so far as it relevant reads:

*68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application of same, ...and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, **subject to the subsequent operation of any statute of limitations**, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power. (My Emphasis)*

It is evident from this provision that the indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is subject to a subsequent operation of the statute of limitations which could pass title to someone else: ***Winnifred Fullwood v Paulette Curchar***, *supra*.

Analysis and findings

[32] Mr. Hayles' burden is to show that he extinguished Ms. McFarlane's title for the one and a half square of land that he claims. He must prove unequivocal acts of ownership of that land, and that those acts coincided with the intention to possess to the exclusion of all others. His evidence must also demonstrate that these two criteria were present for a period not less than twelve years before Ms. McFarlane began to assert her superior title.

- [33] I accept the evidence of Mr. Hayles that he made the payments for the purchase price of the land. These payments, in my view, were sufficient to indicate his intention to exercise custody and control of the land for his own benefit. The receipt of the deposit bearing the date “9th January, 1970” signified that that intention extended to this date. I find that Mr. Hayles had the *animus possidendi* since 9th January, 1970. The gravamen of this claim then is the issue of factual possession.
- [34] It was undisputed that Mr. Hayles did not have physical possession of the land, in that, neither he nor his agents resided there. He had the onus of proving factual possession without having physical possession. The acts he relies on to show ownership of the land must be unequivocal acts of possession.
- [35] To show acts of possession, Mr. Hayles said he commissioned a survey of the land in 1975, and in 2010 he instructed Mr. Ricketts to ‘bush’ the land and build a wall. However, he submitted no report to prove that the survey was done in 1975. Mr. Hayles has placed it beyond this court to consider that purported act of ownership to show possession. I therefore reject that a survey was done in 1975.
- [36] The consequence of that finding is that there is no need to consider whether surveying the land was an unequivocal act of possession. Since Mr. Hayles did not have physical custody of the land, it also follows that there was no commencement date of possession prior to the year 2010. Besides his unsupported assertion of having the land surveyed in 1975, Mr. Hayles gave no evidence of doing anything else on the land prior to the year 2010.
- [37] His evidence was that he resided in England for over forty (40) years and during that time the land was left idle. There was no evidence that he erected a fence during this time, neither was there evidence that he did any act that was notorious and unconcealed on the land. He did no open act to prompt the paper owner to challenge him before the expiration of the limitation period.

- [38]** Mr. Mellish submitted that Mr. Hayles' acts of possession were seen in his numerous visits from England. However, there was not a scintilla of evidence to suggest his visits involved the land. Mr. Hayles' evidence did not demonstrate that his visits to Jamaica were to facilitate him tending to the land as its owner. He gave no evidence about what he did to the land while he was visiting Jamaica. Contrary to Mr. Mellish's submission, Mr. Hayles did not see the need to do anything with the land as he considered himself to be its true owner.
- [39]** The subsequent series of acts relied upon by Mr. Hayles as having sufficient degree of physical custody and control were: (i) the 'bushing' of the land, and (ii) the construction of the wall. At this juncture, the evidence of Mr. Ricketts became pivotal as he was primarily responsible for the execution of those tasks.
- [40]** However, Mr. Ricketts' evidence concerning the 'bushing of the land' contained unresolved inconsistencies. He said that he cleared the land of trees and bushes five times between 2010 and 2012, and he did so with the use of a machete and a chain saw. But he later contradicted himself under cross examination when he said he "bushed the land once".
- [41]** One is left to ask; why did he testify of clearing the land of bushes five times? Why did he later abandon that testimony to say he cleared the land once? This conflicting evidence, in my view, undermined Mr. Ricketts' credibility. It did not assist Mr. Hayles in proving that he has sufficient degree of control and custody of that land.
- [42]** In relation to the construction of the wall in 2010, it was undisputed that Mr. Ricketts built it. That wall however, did not enclose the land. It was 6ft high and 70 ft long, and it was built on one side of the disputed land. The construction of this wall lasted for a week. I find that this evidence also did not assist Mr. Hayles in proving a sufficient degree of control and custody of the land.
- [43]** I am compelled to say that even if this court should accept those acts as proving possession, they still could not extinguish Ms. McFarlane's title. Those acts

began in the year 2010 which is well below the statutory limitation period of twelve years. Ms. McFarlane is therefore well within her right to recover her land as sections 3 & 30 of the *Limitation of Actions Act* have not yet taken effect.

Conclusion

[44] The claimant Mr. Hayles has failed to satisfy the elements of adverse possession, that is, he has not shown on a balance of probability that he had factual control of the land. Accordingly, his application for a declaration of his interest in the land and the lodging of a caveat on the property is denied.

[45] Costs are awarded to the defendant, to be taxed if not agreed.