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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. G175/1991

BETWEEN	EDWARD GLICKMAN	PLAINTIFF
A N D	VIOLET FRAY	DEFENDANT

Mr. C. Dennis Morrison Q.C. for Plaintiff
Mr. P. Foster

Mr. C. Miller
Mrs. K. St. Rose
Miss M. Anderson for Defendant

HEARD: 19,21,22,23rd September, 20th October 1994

EDWARDS J.

In this action the plaintiff Edward M. Glickman has filed a Writ claiming against the Defendant Violet Fray damages for trespass to land and for possession of the said land situated at Norman Manley Boulevard, Negril in the parish of Westmoreland and registered at Volume 1032 Folio 506 of the Register Book of Titles.

The Defendant states that she has acquired title and ownership of the said land by virtue of her possession of same for over 12 years, in keeping with the provisions of the Limitation of Actions Act.

The title shows that the land containing by survey two roods nine perches and eighty-seven hundredths of a perch was transferred on the 4th April 1967 to Rosemary Ward Tyson of Bernardsville, New Jersey U.S.A. a housewife.

On her death the land passed by transmission to Charles Lucien Vendryes of No. 5 Long Land, Constant Spring, a Solicitor, on the 21st August 1968. Mr. Vendryes later transferred all his title in the land to Nevill J. Ward, Junior of Middleburgh, Virginia U.S.A., a farmer and Edward M. Glickman of Wynewood Pennsylvania U.S.A., as joint tenants. Mr. Ward died on the 22nd October 1982 and the fact of his death was recorded on the title on the 3rd September 1984.

In so far as the Title is concerned, Mr. Glickman is now the sole owner of the land.

On the 27th December 1991 Mr. Glickman together with a Lowell H. Dubrow - both being Attorneys-at-Law practising in the same firm in Philadelphia U.S.A., executed a power of Attorney in which they described themselves as Trustees serving under the will of Rosemary W. Tyson deceased, the owner of lands registered at Volume 1032 Folio 506 of the Register Book of Title, and they appointed a Mrs. Holly J. Gilpin of Key West Florida as Attorney to carry out certain action on their behalf in respect of the said land.

These include instituting an action in the Supreme Court of Judicature of Jamaica, giving evidence for and on their behalf in any action to recover possession of the said land, and to take whichever action was necessary to ensure the removal of all illegal and unauthorized structures on the said land. Mrs. Gilpin was also to oversee the property and ensure that no one place any structure on the land without first obtaining consent, approval and permission.

Mrs. Gilpin gave evidence at the trial and she says that she is the daughter of Rosemary Tyson. She is described in paragraph 2 of the Statement of Claim as being the beneficial owner of the property. She herself states that the property was willed to her and her brother by her mother. The land is along the Norman Manley Boulevard in Negril - a main road - and it runs from the Norman Manley Boulevard to the Beach.

Mrs. Gilpin says that when her mother bought the property she Mrs. Gilpin was 20 years old and she visited the property several times with her parents. It was in thick bush and in order to get to the beach they had to go down a little path on the neighbouring land.

The family was based in Jamaica at the time. Later on in 1967 her mother and father died within six weeks of each other and she moved to the U.S.A. to live. She got married in 1968 and came back to Jamaica on her honeymoon and visited the property then. She came back to Jamaica two or three times after that with her husband - the last time being in 1976.

After that she did not return to Jamaica for 14 years until August 1990. She said she still had a lot of incentive to visit Jamaica but was raising a family and didn't have much money to go travelling.

Mr. Nevill J. Ward whose name appears on the title as joint tenant with Mr. Glickman was her uncle and she said he used to keep any eye on the property up to the time of his death in 1980. He lived in the U.S.A. but would visit Jamaica from time to time for vacation. He died in 1982. Mrs. Gilpin said that ever since she knew the land it was in thick bush. No buildings were on it.

She said when she went there in 1990 she found a well developed property - developed in such a way that she could not recognise it. She had to seek the services of a Surveyor to identify the land.

The land was cleared and there were houses on it. A Mr. Ray Arthurs who lived on the disputed land as a child with his parents and who testified for the Plaintiff said that eventually they sold the property and he went to live in England. He said that the woodland that he knew after his family had moved from the land, had been transformed into a well developed tourist business which was now operated by Mrs. Fray.

He said that Mrs. Fray cleared the land in 1985 but before doing so she made enquiries of him as to the ownership of the land,

and he told her that Mrs. Tyson owned the land. He did not know this as a fact he said but was told so. She asked him if he knew where the boundaries were and he pointed them out to her.

Mrs. Fray who was the sole witness on behalf of the Defendant said that in 1976 she acquired a property along the Norman Manley Boulevard in Negril known as Seascape. That property had a building on it which she rented out. It was about 10 minutes walk from the land in dispute but was on the opposite side of the road and had no access to the beach. She became aware of the disputed land and wanted to acquire it - largely because of its access to the beach. She made enquiries as to the owner but nobody could assist her.

The land was heavily wooded. This was in 1976. She had someone underbush the land in 1976 and planted some trees on it - breadfruit, star apple, naseberry and coconuts, which have since grown to bear fruit.

She continued to make enquiries as to who owned the land after doing the planting of the trees. Her enquiries took her to the tax office in Savanna-la-mar, the capital of Westmoreland the parish in which the disputed land is situated.

The tax office could not tell her who owned the land. Persons from a Government Department came and inspected the land but could not tell her who was the owner. Arrangements were however made for her to pay the taxes and she has continued to do so.

She said that three years after 1976 i.e. in 1979 she underbushed the property again and in her own words "leave the property to see if anyone would come forth." This waiting to see if anybody would show up after the clearing followed the earlier pattern because under cross-examination she said that in 1976 she

underbushed the property - planted some fruit trees "to see if anybody would show up to claim it." She also said under cross-examination that about three years later towards the end of 1979 she did a second clearing and "was still waiting for somebody to come forward to claim the property." She said that by 1985 i.e. six years later it grew up again.

She said that in 1985 Mr. Arthurs and herself went on to "Whistling Bird" the adjoining property and he showed her the boundaries of the land. She said that in 1985 she completely cleared the disputed land - had it bull dozed to get out tree stumps - the entire property from road to beach was cleared. Nobody interfered with her when she was doing this, and the land was not in a hidden location. It was along a highway in Negril.

She said it was after the bull dozing that she asked Mr. Arthurs to show her the boundaries and he pointed them out to her.

It was then that she started building on the land.

She said that in 1976 when she first saw the disputed land she "formed an intention towards it." She intended "to own a piece of beach front and this was a piece of beach front land" - but and again in her own words "It was not my intention to capture the land. It was my intention to buy it."

In 1985 she put cottages on the property and said that she was "in possession before." She put four Board Cottages with concrete base on it, a concrete toilet and shower. The cottages are used to accommodate tourists. She also has some tents on the land which tourists use for camping. There is also a rent-a-car business on the land which is operated by a tenant who rented a spot of the land from her and built an office.

She said that in December 1990 she got a letter from Mr. Michael Erskine - a lawyer but nobody came forward. She

contends that by virtue of possession since 1976 she now owns the land. In other words she is saying that by virtue of undisputed possession for over 12 years she now owns the land by virtue of the Limitation of Actions Act.

Sec 12 of the Limitation of Actions Act states that

> "No person shall be deemed to have been in possession of any land merely by reason of having made an entry thereon."

Sec 3 which deals with the right of entry, or the bringing of any action to recover land provides in part that:

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

Sec 4 states when the right to make an entry or bring an action will be deemed to have first occurred and in so far as is relevant, it provides in part that.

(1) " The right to make an entry or bring an action to recover land or rent shall be deemed to have first accrued at such time as hereafter is mentioned, that is to say -

(a) When the person claiming such land or rent or some person through whom he claims shall,

> in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt or such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

It is clear from Sec 4 that possession simpliciter will not disentitle the owner from ownership of his land as time only begins to run from the time when he was "dispossessed" or he "discontinued" his possession.

1. "The difference " says Fry J in RAINS v BUXTON (1880) 14 CH. D. 537 also quoted by SWABY J. A. in ARCHER v GEORGIANA HOLDINGS LTD. Vol 21 W.I.R. at p. 456" between "dispossession" and the "discontinuance" of possession might be expressed in this way: The one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by others."

As regards "discontinuance." "If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue possession of it" per Cockburn C.J. in Leigh v Jack 5 Ex. D p.271. "The mere fact that the true owner does not make use of his land does not necessarily mean that he has discontinued possession of it. Leigh v Jack. Non-user is equivocal. To establish discontinuance it must be shown

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" per Swaby J.A. in Archer v Georgiana Holdings Ltd. at p.436.

In the instant case it was not argued that the plaintiff had discontinued the use of the land. What the Defendant was saying is that she was in undisturbed possession of the land for fourteen years i.e. more than the 12 years statutory period.

She had planted trees on it and that was strong evidence of ownership. In Marshall v Taylor 1 ch 1989 p.650 A.L. Smith L.J. said "the Defendant planted oak, rose and other trees upon a portion of this strip. That ..... is as strong and act of ownership as one man can exercise over a piece of land; and the trees have been allowed to remain unmolested by his neighbour the plaintiff for a period of sixteen or seventeen years." A fowl house was also built on the land. "Now what is the law applicable to such a state of facts as this. It is this there must be actual possession by the one and a discontinuance of possession by the other. Or in other words it must be proved by the Defendant who is setting up the statute of Limitations that there has been an actual possession of the land in dispute by him for the statutory period, and during that period a discontinuance of possession by the Plaintiff. These two facts must be always proved to constitute a defence under the statute."

The land is what might be described as "building" land. A house was on it before the Plaintiff acquired it. The Plaintiff's witness Mr. Arthurs testified that he lived there as a boy. The Defendant in 1985 constructed buildings on it. The adjoining land "Whistling Bird" had buildings on it.

The cases show that in the case of building land it is more difficult to acquire a squatters title through mere non-user by the owner. For example in Williams Bros sellers L.J. said.

> "The land in question was idle. Its owners were waiting for an opportunity to build on it. There are unhappily, in our country many vacant plots of land due to enemy bombing which, for economic and planning reasons have not yet been, and cannot yet be built upon. The true owners can in the circumstances make no immediate use of the land and as the years go by, I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user."

As regards dispossession the cases show that the person endeavouring to obtain title through this method must be possessed of the necessary "animus possidendi" i.e. that at the time when the statutory period of limitation begins to run in his favour he must have formed the intention then, to drive out the true owner and take possession for himself.

In Littledale v Liverpool College 1 ch 1899 p.23 where the Plaintiffs were trying to get title to land owned by the defendants by claiming dispossession.

Lindley M.R. said:

> "They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi - i.e. occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiff never had any such intention is extremely strong ..... when possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all important. See Leigh v Jack."

In the present case the Defendant clearly did not intend to oust the true owner in 1976.

She herself said that she did not intend to capture the land. "It was my intention to buy it" she said.

The evidence shows that her actions up to 1985 were aimed at flushing out the owner. To that end she underbushed the land and planted fruit trees in 1976 "and sit to wait to see if anybody would show up to claim it." She also contacted the tax office and other officials who

might know who owned, the land. These efforts were not successful. Three years later in 1979 the underbush grew up again, and once more she underbushed the land. In her words "I was still waiting for somebody to come forward to claim the property."

It is clear that up to 1979 she did not have the animus possidendi - she was still waiting for somebody to show up, with whom she could negotiate for the purchase of the land.

By 1985 - six years later the bush grew up again.

It was at this stage that she appears to have formed the animus possidendi.

She contacted Mr. Ray Arthurs a friend at the time, and asked to be shown the boundaries of the land. She said she cleared and bull dozed the land before she asked Mr. Arthurs to show her the boundaries. After it was cleared she erected some buildings on the land.

It is abundantly clear from her evidence that up to 1979 the Defendant had not formed the necessary animus possidendi - she wanted to buy the land and was hoping to find the owner with whom she could negotiate a sale.

In 1990 she received a notice to quit from the Plaintiff i.e. 11 years after the second clearing when she was still waiting to see if the true owner would show up.

In the absence of the necessary animus possidendi in 1979 and the fact that only 11 years had run from that date to when she received the notice to quit in 1990 she would not be in a position to take advantage of the statutory period of 12 years provided by the Limitation of Actions Act.

But in any event the evidence given by the Defendant strongly suggests that it was only in 1985 that she had formed the intention to "dispossess" the owner if indeed she had formed such an intention.

In that year she cleared the land, bull dozed it from the road to the beach removed tree stumps and built cottages and other permanent structures on it. Rented out a part of it to someone to whom she gave permission to operate a rent-a-car agency and for that purpose, to erect a building on the land.

In the absence of any evidence of discontinuance on the part of the true owner, and failure on her part to possess the necessary animus possidendi for the requisite 12 year statutory period, the Defendant cannot succeed.

Judgment is therefore given for the Plaintiff on the claim and counterclaim.

It is therefore declared that

(1) The Plaintiff is the lawful owner of the said land.

(2) Delivery up and possession of the said land must be given to the Plaintiff.

(3) An injunction is granted to restrain the Defendant whether by herself, her servants or agents or otherwise from entering upon the said lands save in so far as it is necessary to remove buildings already erected thereon.

As regards damages, there is no evidence that the Plaintiff has suffered any loss. The Plaintiffs witness described the land as being transformed.

There is no evidence that either the Plaintiff or his predecessors have done anything to the land since its acquisition in 1967. But this court is only concerned with the period since 1976. In 1990 the Plaintiffs representative visited Jamaica after 14 years absence and did not know where to find the land. She had to employ the services of a Surveyor to find it. She said she had a particular plan for the property - she wanted to develop it. But the nature of these plans were not disclosed in anyway to the court.

In William Brothers Direct Supply Ltd. and Raftery 1985 1 Q.B. at page 170/171 Hudson L.J. in giving Judgment for the Plaintiff said

> "I think that if the plaintiff desires an order for possession in accordance with the precedent of Leigh v Jack they are entitled to it, although it would seem unnecessary. What they really require is an order for the pulling down of the sheds, and damages, which in my judgment should be nominal, for the trespass. Those damages will be 40s."

In my judgment having regard to the behaviour of the plaintiff, in particular the lack of interest shown in the land for a prolonged period, I am of the view that the award of damages should be as in Williams Bros Direct Supply Ltd. nominal.

I award nominal damages of $100 for the trespass.

Costs to the Plaintiff to be agreed or taxed. Stay of execution granted for six weeks from the date hereof.