Privy Council Appeal No. 30 of 1967

Ocean Estates Limited – – – – – – – *Appellants*

v.

Norman Pinder – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL FOR THE BAHAMA ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1969

Present at the Hearing:
LORD GUEST
LORD UPJOHN
LORD DIPLOCK
[*Delivered by* LORD DIPLOCK]

This is an appeal from a majority judgment of the Court of Appeal for the Bahama Islands (Sinclair P. and Hallinan J. A., Bourke J. A. dissenting), reversing a judgment of Smith J. in favour of the appellants for damages for trespass to land and an injunction restraining further trespass.

The action was started by the appellants as plaintiffs by writ dated 20th December 1963. They claimed as owners of the land under a documentary title which they duly proved at the trial. By his defence the defendant relied upon a possessory title which he alleged that he had acquired under section 1 of the Real Property Limitation Act 1874 and the consequent extinction of the plaintiffs' title under section 34 of the Real Property Limitation (No. 1) Act, by virtue of his having been in full free and undisturbed possession of the land by farming thereon continuously for more than twenty years prior to the date of the writ.

The land in question consisted of a plot of land of 144 acres on the coast of New Providence Island but separated from the seashore by a road reservation 66 feet wide. The part nearest the sea was swamp which was unfit for cultivation and would require reclamation for use for building development which was the purpose for which the parcel had been purchased by the plaintiffs. Further inland the land consisted of poor quality scrub land on which, however, it was possible to grow some vegetables and fruit trees.

The plaintiffs, who are a development company, acquired the fee simple of the land under a conveyance of 30th March 1950 from a Mr. Whiteway. Their root of title went back to a conveyance of 3rd May 1937 of the fee simple of the land by a Mrs. Key to the Chipper Orange Company Ltd. of which a Mr. Howard Nelson Chipman was a director and substantially the only shareholder. The intermediate conveyances of the fee simple were one of 24th June 1946 from the Chipper Orange Company Ltd., to the British Bahamian Land Company Limited, one of 12th February 1949 from Mrs. Key to the British Bahamian Land Company Limited, and one of 14th February 1949 from the latter company to Mr. Whiteway.

It is unnecessary to examine these conveyances in detail for it is conceded that they all related to and purported to convey the fee simple in the land in suit. At the trial the plaintiffs also relied upon a number of earlier conveyances included among their documents of title and in particular upon one of 6th February 1922 whereby a Mr. Knowles conveyed a parcel of land to Mrs. Key. It was conceded on the appeal

that the description of the parcels in these earlier conveyances does not sufficiently identify the land thereby conveyed with the land in suit. Such identification was however made in a Statutory Declaration of 28th February 1948 by Mr. Howard Nelson Chapman included among the plaintiffs' documents of title produced at the trial.

The devolution of the plaintiffs' freehold title from the conveyance of 3rd May 1937 was duly proved at the trial. No point was taken as to its sufficiency and the trial proceeded on the footing that the only remaining issue was whether or not the defendant had established that the plaintiffs and their predecessors in title had been dispossessed of the land or had discontinued possession thereof for more than twenty years before 20th December 1963 (See: Real Property Limitation (No. 1) Act, section 3).

The relevant facts found by the learned judge as to the respective activities of the defendant and of the plaintiffs and their predecessors in title in relation to the land in dispute were that from 1940 until the date of the hearing the defendant had cultivated and grown vegetables on various plots on the land none of which at any one time had exceeded 20 acres. Between 1954 and 1956 he had also planted some fruit trees on part of the land. His system of farming vegetables was to clear a piece of land, grow vegetables on it for a year or eighteen months then give it up, let it go back to scrub and in due course return and clear the land and cultivate it again. According to the findings of the learned judge no single area of land was cultivated by the defendant more than three times in the 27 years during which he had carried on this peripatetic system of farming. On occasions he had stopped people taking sand from the beach but it did not appear whether this was on the road reservation which never formed part of the plaintiffs' land.

As regards the use made of the land by the plaintiffs and their predecessors in title the learned judge found that between the years 1941 and 1946, when the fee simple was vested in the Chipper Orange Company Limited fruit trees were planted and harvested on parts of the land by Mr. H. N. Chipman. This use of the land by the plaintiffs' predecessors in title ceased after the land had been conveyed to the British Bahamian Land Company Limited on 24th June 1946 and there was no evidence as to any activity in relation to the land by that Company or by its successor in title, Mr. Whiteway. When the plaintiffs in 1950 bought the land in suit together with other land also included in the conveyance of 30th March 1950 it was for the purpose of building development. They decided to develop the other land first and to postpone development of the land in suit. In 1957, however, an architect instructed by the plaintiffs visited the land on three or four occasions for the purpose of producing a scheme for development. No one impeded his access. Again at the end of 1959 or the beginning of 1960, a surveyor surveyed the land on behalf of the plaintiffs with a view to advising on its development. He recommended that this should be left in abeyance for the time being. This advice was accepted and nothing more had been done by the plaintiffs in relation to the land up to the date of the writ.

On these findings the defendant's claim that he had acquired a possessory title to the whole or any part of the land in suit or, what is the same thing, that the plaintiffs' title was extinguished must fail. So far as any claim to the whole parcel of land is concerned he established no dispossession of the plaintiffs or their predecessors in title in respect of the uncultivable swamp, and his own occupation of the cultivable scrub land was not exclusive during the period up to 1946 when Mr. Chipman in the right of the Chipper Orange Company Limited was concurrently cultivating fruit trees on the land or inconsistent with the purpose for which the plaintiffs held the land after 1950, when they exercised powers of dominion over it in 1957 and 1959–60 by going on to the land for the purposes of inspecting and surveying it for future development. So far as concerns any claim to any individual plot which the defendant cultivated from time to time under his peripatetic system of market gardening, his occupation of the plot, though it may have been exclusive while the plot was under actual cultivation, was not continuous. During any period when he was not cultivating any particular plot the owners of the land would

have no continuing cause of action against him. When he returned to any plot a fresh cause of action would arise and the limitation period of twenty years would start anew.

The above-mentioned were two of the grounds upon which the learned judge rejected the defendant's claim to a possessory title to the whole of the land. He advanced no alternative claim to any part of the land as distinct from the whole. The learned judge also considered that there was a third ground upon which the claim should be rejected, *viz.*, that until 1947 the defendant's entry upon the land was not made with intent to oust the true owner. This was based upon an admission of the defendant at the trial when he said:

> " I would have paid rent on the land in dispute if anyone had come along. Nobody showed up. I didn't try very hard to find the owner. If somebody had come along I would either have taken a lease or got off the land. After I had been on the land for seven years I started claiming the land."

Their Lordships do not consider that an admission of this kind which any candid squatter hoping in due course to acquire a possessory title would be almost bound to make indicates an absence of the *animus possidendi* necessary to constitute adverse possession. But the other grounds relied on by the judge are valid and in themselves sufficient to defeat the defendant's claim to a possessory title.

Before the Court of Appeal the point was taken for the first time that the plaintiffs had failed to prove a sufficient documentary title because their title could not have been forced upon an unwilling purchaser under section 3(4) of the Conveyancing and Law of Property Act, as it commenced with the conveyance of 3rd May 1937 which was less than thirty years before the date of the writ. The contention was accepted by the majority of the Court of Appeal who regarded the plaintiffs as being in no better position than if they had no documentary title at all. They accordingly treated the action as if it were one between competing trespassers each relying upon his own actual occupation of the land and held that the plaintiffs had failed to establish a possessory title. On this ground they allowed the appeal.

In their Lordships' view the question of what documentary title a vendor is entitled to insist on forcing upon a purchaser has no relevance to the present action. At common law as applied in the Bahamas which have not adopted the English Land Registration Act 1925 there is no such concept as an " absolute " title. 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 twenty year period of continuous and exclusive possession by the trespasser.

In the present case, where the defendant made no attempt to prove any documentary title in himself or in any third party by whose authority he was in occupation of the land it would have been sufficient for the plaintiffs to rely upon the conveyance of the land to themselves of 30th March 1950; for where a person has dealt in land by conveying an interest in it to another person there is a presumption, until the contrary is proved, that he was entitled to the estate in the land which he purported to convey. In fact, however, the plaintiffs went further than was strictly necessary. They proved a devolution of title going back through a series of intervening conveyances to the conveyance of the fee simple in the land by Mrs. Key to the Chipper Orange Company Limited of 3rd May 1937.

Before their Lordships the respondent has not sought to uphold the judgment of the Court of Appeal upon the grounds which commended themselves to the President and Mr. Justice Hallinan. It has, however, been contended on his behalf that notwithstanding that the plaintiffs

showed a sufficient documentary title to the land the particular form of action which they selected, *viz.*, one of trespass to land was not available to them because they failed to show that at the time that the action was brought they had sufficient possession of the land to maintain an action for trespass.

This contention is based upon a relic of the ancient law of seizin under which actual entry upon land was required to perfect title and to enable the owner to bring a personal action founded on possession such as ejectment or trespass. In *Bristow v. Cormican* (3 A.C. 641) Lord Blackburn at p. 661 explains how in the development of the action of ejectment the entry ceased to be actual and became a mere legal fiction. It is in their Lordships' view unnecessary to consider to what extent at the present day, more than a century after the abolition of forms of action, actual entry by the person having title to the land is necessary to found a cause of action in trespass as distinct from ejectment or recovery of possession. Put at its highest against the plaintiffs it is clear law that the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired (see *Bristow v. Cormican* (*ubi sup*) Lord Hatherley at p. 657. *Wuta-Ofei v. Danquah* [1961] 3 All E.R. 596).

In the present case the plaintiffs can rely upon the entry on the land by Mr. Chipman on behalf of the Chipper Orange Company Limited from 1941 to 1946 and his use of it for growing fruit trees, and upon their own entries by their architect in 1957 and by their surveyor in 1959–60. In addition to being enough in themselves to establish sufficient possession to bring an action for trespass these later entries negative any intention on the part of the plaintiffs to abandon possession, having regard to the purpose, *viz.*, that of eventual building development, for which the plaintiffs held the land.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of Mr. Justice Smith restored. The respondent must pay the costs of this appeal and in the Court of Appeal.

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In the Privy Council

OCEAN ESTATES LIMITED

v.

NORMAN PINDER

DELIVERED BY
LORD DIPLOCK

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