

THE SUPREME COURT OF BELIZE A.D. 2020

CLAIM NO 507 OF 2020

BETWEEN

(COURTNEY ARNOLD

(TIFFANY ARNOLD

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(AND

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(DANIEL TUN

CLAIMANTS

DEFENDANT

Before: The Hon Westmin R.A. James

Date delivered: 14th July 2021

Appearances: Mr Jaraad Ysaguirre for the Claimant

Mr Ravell Gonzalez for the Defendant

JUDGMENT

Factual Background

1. The Claimants, on the 4th January, 2006 became the registered proprietors with title absolute for the property known as Parcel No 921, Consejo Road, SE Block No 1. The Claimants claim an order of possession of the said property, an injunction restraining the Defendant, whether by his servants, agents or otherwise howsoever from trespassing on the property, a mandatory injunction requiring the Defendant to restore the property to the condition it was in prior to his trespass and/or in the alternative damages equal to the costs of restoring the property, mense profit and costs.
2. The Defendant disputes the right of the Claimants to possession to the property on the basis that the Defendant has been in open and peaceful possession of the property since 1999 and counterclaims that pursuant to section 138 of the

Registered Land Act that the Claimant's title and interest in the property has been extinguished. The Defendant further claims for a declaration that the Defendant is the equitable and legal owner of Parcel No. 921.

Whether the Defendant has acquired ownership of the land by open, peaceful and uninterrupted possession for a period of twelve years and without permission of any person lawfully entitled to such possession.

3. Once the title of the paper owner is established as in this case, it is for the squatter to prove adverse possession: *Solling v Broughton [1893] AC 556*.
4. **Section 138- (1) of the Registered Land Act Cap 194** states that:

Subject to subsection (2), the ownership of land may be acquired by open, peaceful and uninterrupted possession for a period of twelve years and without the permission of any person lawfully entitled to such possession.

5. **Section 12(2) of the Limitation Act** states:

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

6. It is settled law in this jurisdiction that the guidance in the English House of Lords decision in *J A Pye (Oxford) Ltd et al, v Graham et al [2003] 1 AC 419* on the two elements necessary for legal possession is applicable. They are (a) a sufficient degree of physical custody and control ("the factual possession") and (b) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("an intention to possess").
7. Lord Browne-Wilkinson stated at paragraphs 36 and 40 in *Pye* that:

“36... The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.” ...

“40... To be pedantic, the problem could be avoided by saying there are two elements necessary for legal possession: 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”).”

8. Lord Browne-Wilkinson further opined at paragraphs 41 and 43, that:

“41. In Powell’s case Slade J said, at pp. 470-471:

“(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] 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 . . . 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.”

42. Slade J reformulated the requirement (to my mind correctly) as requiring ‘an 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.’”

9. Lord Browne Wilkinson further opined at paragraph 45, that:

“... The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ’s heresy led directly to the heresy in the Wallis’s

Cayton Bay line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory reversal but in the Moran case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had not intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think that there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."

10. In ***Bligh v Martin*** [1968] 1 WLR 804 at 811 F Pennycuick J opined that: "(1) *Possession is a matter of fact depending on all the particular circumstances of a case. In very many cases possession cannot, in the nature of things, be continuous from day to day, and it is well established that possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user.*"
11. The onus was on the party claiming possessory title, in the instant case, the Defendant to prove, on a balance of probabilities that he was in continuous exclusive possession for at least 12 years prior to 12th August, 2020. He had to prove the two elements of factual possession and the intention to possess. To me a squatter's intention requires clear and affirmative evidence of both factual possession for the 12 years and the intention and that it was made clear to the world at large. The difficulty is, of course, that intention has to be inferred from the acts themselves, and the paper owner will get the benefit of the doubt (see Slade J in *Powell*).
12. The evidence provided by the Defendant was himself, his wife, the person who built the house and his neighbour. The Defendant gave evidence that a person by the name of Rubisella Fernandez visited him at his parent's home to sell a lease land in the area Finca Solana. He paid her \$2,000.00 for the purchase of the lease and the lease document was handed over to him. He said that the lease was never

transferred to him at the registry since Ms Fernandez left the country and he was unable to contact her again. The Claimant then indicates that he retained Manuel Manzanilla to construct the house and in December 1999 he had completed the construction of a house measuring 24 feet by 36 feet with zinc roof and upon its completion moved in with his family in December 1999. He indicated in cross examination that construction was daily and it took close to a month to complete.

13. The Claimant testified that in June 2000 his house was bulgarized and all the documents relative to this transaction and payment to the builder were stolen. In cross examination he testified that no formal report was made of this to the police. Further in August 2007 with the passages of Hurricane Dean, he said that his house was damaged. He said he received the assistance of NEMO and retained Mr Chimal to install the zinc roof. He contends since 1999 he has lived on the land and have been in open and peaceful possession of the said land. The Defendant attached recent photos of his house not indicating when they were taken. He has testified that to date there is no water and electricity services to where he lives.
14. He indicated that in 2015 he went to the Lands Department to determine how he could arrange the application for title but was informed that where he had constructed his house was on a different parcel of land. He also testified that he received letter dated 5th February, 2018 from the Claimants requiring him to quit occupancy of the land. In his second Affidavit the Defendant seem to suggest that it was after the letter he then went to the Lands Department and requested a copy of the map of the property where he lived and requested a certified copy of land register report for the land. In cross examination he said it was in 2018 he learnt that the Claimants were the registered owner for the parcel of land since 2006 and that his neighbour occupied Parcel 924. The Land Register Report he attached to his evidence however was produced on the 25th January, 2021.
15. The Defendant admitted that he did offer to purchase the land from the Claimants but the amount of \$40,000.00 was too much for him to pay.
16. The Defendant's wife Maricela Tun also said that few days before Christmas in 1999, she the Defendant along with their baby daughter moved into the house

located on the property. She indicated that she had become good friends with Mrs Chimal their neighbour who would sometimes babysit for her. She indicated in cross examination that she did not include the burglary in her evidence because it was a problem for her husband. She also testified that they don't have pictures of the house or family photos for the period.

17. The other witness for the Defendant was Manuel Manzanilla. Mr Manzanilla testified that he was retained by the Defendant to build a house on the property in 1999. He stated he commenced work in early November 1999 and he took 7-8 weeks to do what work he could complete before the Defendant ran out of money. He said he would work alternative weeks and days until the end of December 1999. In cross examination he said that in reality he worked every day and when he said alternative weeks in the statement, he understood that to mean he did not work on holidays and days like that.
18. Another witness for the Defendant was Mr Angel Chimal a neighbour of the Defendant who had a property adjacent to the Defendant. Mr Chimal said that he built his house by the end of the 1998. He said that the Defendant approached him in November 1999 for permission to allow the Defendant to leave his material on his land which was to be used to build his house. He testified the Defendant commenced the building of his house in early November and by the end of December 1999, the Defendant moved in with his wife Maricela Tun and their young baby daughter. He testified that ever since the Defendant moved in, he and his family have been their neighbours. In his Affidavit evidence he said that there is water and electricity on the street where he lives but no light and water in the street where the Defendant lives. In cross examination he said that he has no electricity at his house nor water.
19. The witnesses for the Claimants the 1st Claimant, Ms Dorla Oxley and Patrick Sebastian a licensed land surveyor who were hired by the Claimants to go find the piece of land. The Claimant did not however produce a receipt. Mr Sebastian said that he, the Claimant and the Claimants' grandmother, Dorla Oxley visited the property in 2006 and the three of them visited the property again in 2010 and all said that the property was undeveloped and there was no existing structures on it

at those two times. He also says that his son owns the property adjoining Parcel 921 and has a house on his property so he knows the area well. They testified that it was only in 2017 that the Defendant started to occupy the premises.

20. Ms Dorla Oxley testified that she did visit the property in July 2006 and in June 2010 with Mr Sebastian and the land was unoccupied and there was no structure there. The 1st Claimant testified that she visited the property in 2006 and 2010 and the land was vacant. She testified that in 2016-2017 she discovered that someone was developing a structure on the property. She testified that when she discovered that the person was the Defendant, she had a letter sent to the him informing him of his trespass and that he should immediately quite his possession.

21. The 1st Claimant did say that she would not have agreed to have her father transfer the property to her and her sister if it was occupied but cross examination showed that by that time it was already transferred. The Claimant in support of her contention that the land was undeveloped all these years attached a Land Tax Statement which shows that during the time the Defendant purportedly occupied the property it was assessed by the Lands Department as unimproved. It states that the property was first assessed on the 1st April, 2007 and thereafter in 2008, 2009, 2010, 2011 and 2012 and the property was assessed on the unimproved value for all those years.

22. In these circumstances where is equally compelling conflicting evidence the Court can look at other documentary evidence before the Court to help determine the case. No matter however many witnesses of fact are called, the best evidence in disputes like this is photographic and documentary evidence. In an adverse possession case, it may be necessary to determine exactly when it was that the occupier began his occupation so it is important to know how the land looked historically. In this regard aerial photographs evidence of the state of land, can be illuminating and decisive. Historic aerial photography can play an important part in the evidence especially when the issue is how long the disputed land has been occupied. Aerial photographs are widely available including Google Earth images of the same place historically and there are available images over the last 20 years

that could have assisted the Court in showing the state of the land but none was produced.

23. Further photographic evidence is frequently produced in proceedings of this nature because it could provide evidence of the physical features of the land the subject of the proceedings, existing at the date the photograph was taken. The Defendant took pictures recently of the house for the purposes of the case but indicated that he has no other pictures of the property over the twenty-year period saying they could not afford it. Pictures of neighbours who may have captured his structure in the background could also be helpful.
24. Besides photographic evidence documentary evidence would have been also helpful. A bill, a bank statement or receipts, anything to show proof of address would have been helpful but none was produced. The Defendant indicated that he has a bank account but showed no statements with his address. He indicated that he purchased the lease from Ms Fernandez but has shown no receipt for any rent or taxes he would have paid on the lease property after the hurricane or the robbery. The Defendant said a robbery occurred when he lost his documents but could not produce a police report to show the date and the time and address. The Defendant indicated that he did not have any receipts for anything that he purchased in the house that might have been able to assist the Court in placing him in the property at the relevant time or at least before.
25. The only documentary evidence that was produced relative to the state of the land was the Land Department Tax Report by the Claimant which showed that the land was assessed by the Lands Department and there was no improvement of the land to warrant a higher tax for improved value. This with the lack of any documentary or ariel pictures that supports the Defendant's case.
26. Based on the totality of the evidence I therefore find that the Defendant has not made out his case for possession for 12 years prior to August 2020 to satisfy his burden that more probably than not than he was in occupation. In the result, I hold that the Claimants are entitled to possession of the Parcel 921 and dismiss the Defendant's counter claim.

27. The Claimants who have not been using the property and have not provided any evidence of mesne profit and so entitled to no more than nominal damages. The only evidence of rental value was annual land tax value of \$12.05.
28. I therefore hold that the Claimants are entitled to mesne profit assessed at \$12.05 per month from a reasonable time after her request to the Defendant that he give up possession. I took into account that a house was placed on the parcel of land and a reasonable time for removing it or making alternative arrangements ought to be allowed. The Defendant received notice in February 2017 to vacate by March 2017 and I hold in the circumstances three months was more a reasonable time within which he ought to have given up possession.
29. In the premises I therefore order that the Claimants are entitled to possession, the Defendant is given 3 months from today's date to give up possession and restore the land to its original state. The Claimants are entitled to mesne profits at \$12.05 per month from May, 2017 to date of giving up possession together with interest at 6 %.
30. The Defendant is legally aided and so there shall be no orders as to costs.

/s/WJames

Westmin R.A. James

Justice of the Supreme Court (Ag)