2, 1969

IN THE PRIVY COUNCIL No. 30 of 1967

ON APPEAL FROM THE COURT OF APPEAL FOR THE BAHAMA ISLANDS

B E T W E E N :

OCEAN ESTATES LIMITED Appellants (Plaintiffs)

- and -

NORMAN PINDER Respondent (Defendant)

CASE FOR THE RESPONDENT

HATCHETT JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

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1. This is an Appeal from a Judgment of the Court of Appeal for the Bahama Islands (Sinclair P. and Hallinan J.A., Bourke J.A. dissenting) dated the 20th day of June 1967 allowing the Respondent's appeal against a Judgment of the Supreme Court of the Bahama Islands (James A. Smith J.) dated the 1st day of November 1966 whereby the said Supreme Court awarded the Appellants £100 damages for trespass to the land the subject-matter of the action and granted them a perpetual injunction restraining the Respondent, his agents and servants, from continuing the trespass and from entering upon the said land at any time in the future. The Court of Appeal, in allowing the Respondent's Appeal, set aside the said Judgment of the Supreme Court and directed that judgment be entered for the Respondent, the defendant in the Court below, with costs.

pp.52-85

pp.43-48

2. The principal issues that arise in this Appeal are:

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(a) whether the Court of Appeal were right in holding that the Appellants had failed to establish a good title to the said land;

(b) whether the Court of Appeal were right in holding that the Appellants had failed to establish prior possession by them or their predecessors in title of the said land or that they had a better possessory title than the Respondent;

(c) whether the suit of the Appellants was not barred by operation of section 1 of the Real Property Limitation Act of 1874 (Chapter 150 of the Laws of the Bahama Islands). 10

3. The following statutory provisions are relevant to this Appeal.

Conveyancing and Law of Property Act (Cap. 115) Section 3

"(3) Recitals, statements and descriptions of facts, matters and parties contained in deed, instruments, Acts or declarations, shall, unless and except so far as they shall be proved to be inaccurate, shall be taken to be sufficient evidence of the truth of such facts, matters and descriptions. 20

(4) A purchaser of land shall not be entitled to require a title to be deduced for a period of more than thirty years, or for a period extending further back then a grant or lease by the Crown or a Certificate of title granted by the court in accordance with the provisions of the Quieting Titles Act, whichever period shall be the shorter." 30

Real Property Limitation Act of 1874 (Cap.150) Section 1

"After the commencement of this Act no person shall make an entry or distress or bring an action or suit, to recover any land or rent, but within twenty years 40

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next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

Evidence Act (Cap. 42)
Section 42

"Hearsay evidence may not be admitted except in the following cases :-

(7) where the statement was made by a person, since dead, in the ordinary course of business, in discharge of a duty incumbent upon such person for the purpose of recording or reporting something which it was the duty of the person toperform, at or near the time when the matter stated occurred and of his own knowledge.

Provided that evidence of such statement shall not be admitted in order to prove any fact mentioned therein which it was not the duty of the person making it to embody in such statement."

4. The Appellants commenced THE PRESENT PROCEEDINGS by writ of summons dated the 20th December 1963, claiming against the Respondent damages and an injunction in respect of his alleged acts of trespass upon a "tract of land situate in the Eastern District of the Island of New Providence and bounded on the North by the Yamacraw Road, on the East by Sand's (Sans) Souci and land granted to Henry M. Dyer on the South by a road reservation bordering the sea, and on the West by the Fox Hill South Side Road." pp.1-4

The Respondent in his Defence dated the 25th March 1963 pleaded that he was "in p.4

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p.5 possession of the premises by himself" and in his Further and Better Particulars dated the 8th March 1966 pleaded that he had "been in full free and undisturbed possession of the land the subject matter of this action by farming thereon continuously from about the year 1938 up to the present time."

p.6, ll.15-20 / p.44, ll.17-23 5. At the trial the procedure adopted was that the Appellants called evidence to establish a documentary title to the land. The Respondent then called evidence in support of his plea of possession. The Appellants were then allowed to call evidence in rebuttal of this, which evidence however in the event proved to be not limited to rebutting the Respondent's evidence of his own possession but appeared also to be directed to making a further case for the Appellants founded upon a plea of possession by their predecessors in title. At the close of the Appellants' evidence in rebuttal, the Respondent applied for leave to call further evidence to meet what it his Counsel alleged was and it is respectfully submitted was in fact a new case which had not been pleaded by the Appellants or indicated in their cross-examination of the Respondent's witnesses. This application was refused.

p.34, l.30 - p.37, l.34

p.6, l.28 - p.9, l.34 6. To prove their title the Appellants relied on a number of conveyancing documents which were produced by their secretary Eleanor Joan Christianson (P.W.1.)

pp.93-118, 120-130 These were Exhibits O.E. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 and 13.

pp.109-110 Exhibit O.E.7. was a conveyance dated the 1st May 1937 by which the land in dispute was conveyed by Elsie May Key to the Chipper Orange Company Limited

pp.111-118, 120-130 Exhibits O.E.8, 9, 11, 12 and 13 were conveyances which showed a devolution of the title thereafter to the Appellants, the last document

pp.127-130 Exhibit O.E.13. being a conveyance dated the 30th March 1950 from Alfred John Roy Whiteway to the Appellants.

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Since the present proceedings were commenced on the 20th December 1963, it follows that if Exhibit O.E.7. was the first document which showed the Appellants' title, they could not show a good root of title at least thirty years old. pp.1-4

Exhibits O.E.1, 2, 3, 4, 5 and 6, by which it would appear that the Appellants sought to show a title back to 1890, were, it is submitted, ineffectual to constitute a good root of title in respect of any part of the land in dispute.

Exhibit O.E. 1. was a Crown Grant dated the 4th December 1890 to Thomas Dodd Milburne of a tract of forty seven acres of land in the Eastern District of the Island of New Providence which from its description appeared to be part of the land in dispute and to be included in the conveyance dated the 1st May 1937 from Elsie May Key to the Chipper Orange Company Limited (Exhibit O.E.7). pp.93-95

Exhibit O.E.2. was a conveyance dated the 28th August 1919 from the Executors and Trustees of the Will of Thomas Dodd Milburne to Minnie Beatrice Albury of a tract of land in the Eastern District of the Island of New Providence of two hundred and thirty nine acres. pp.95-98

Exhibits O.E.3, 4, 5 and 6 were subsequent conveyancing documents relating to this same tract of land of two hundred and thirty nine acres, (therein described in precisely the same terms as in O.E.2) showing a devolution of the title thereto (by February 1922) to Elsie May Key. pp.99-108

Each of the documents Exhibits O.E.2-6 refers to a plan, which was not in evidence, and the documents contain only a general description of the land. It appears from this however that this tract did not include the forty seven acres granted to Thomas Dodd Milburne by Exhibit O.E.1, although this latter was included in the later conveyances starting with the conveyance of the 1st May 1937 (Exhibit O.E.7). Hence, it is submitted, no good root of title was shown in respect of those forty-seven acres which form part of the land in dispute. p.57, ll.23-35

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p.57, l.38 - p.58, l.22

Moreover, Exhibits O.E.2-6 do not define the land to which they relate by metes and bounds, and no plan was produced to identify the land. The only boundary referred to is "to the North on a Public Road", which road is un-named. The only possible connecting link between these earlier deeds and the conveyance of the 1st May 1937 (Exhibit O.E.7) is that in these earlier deeds the land, or part of it, is described as "now called 'the Pen'" and in Exhibit O.E.7. and subsequent deeds the land in dispute is described as being "part of the Pen Tract". It is submitted that this is not sufficient to identify the land dealt with by Exhibits O.E.2-6 as being the same land as was conveyed by Exhibit O.E.7. and the later documents.

p.8, l.1

7. The witness Eleanor Joan Christianson also produced "on the question of the boundary and of ownership" a Notarial Declaration by Howard

pp.119-120

Nelson Chipman (since deceased) dated the 28th February 1948 (Exhibit O.E.10).

In this the Declarant stated that he had acted as real estate agent for Elsie May Key for over 35 years and had acted as agent for her in 1922 in the purchase of a parcel of land being a part of the "Pen Tract" in the Eastern District of New Providence. He purported to describe the extent of this parcel of land and its subsequent history.

He further stated:

p.120, ll.4-12

"5. In my capacity as Real Estate Agent and Manager for the said Elsie May Key I managed the said land running from the Yamacraw Road to the Sea until it was conveyed by the said Elsie May Key to Chipper Orange Company Limited on the First day of May in the Year of Our Lord One thousand nine hundred and thirty-seven, after which date I managed and developed a portion of the same for Chipper Orange Company, Limited.

...

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"7. From the Year 1922, when the said parcel of land was purchased by the said Elsie May Key from the said Edmund Dorsett Knowles, up to the present time, I have not heard of any other than the said Elsie May Key, Chipper Orange Company, Limited and now British Bahamian Land Company, Limited making any claim to title in and to the said parcal of land. These last three named owners exercised full rights of ownership over the said parcel of land without interference on the part of any person or persons, and to my personal knowledge they enjoyed undisturbed, uninterrupted and undisputed possession and used the same as their absolute property and were recognised as the sole owners thereof." p.120, ll.20-33

The admission of this document was objected to by the Respondent on the ground that it was hearsay evidence, but the learned trial Judge admitted it, seemingly upon the view that Section 42(7) of the Evidence Act made it admissible, It is respectfully submitted that this was a wrong view and that Section 42(7) had no application. The document, it is submitted, was not admissible - "on the question of the boundary" or "of ownership" or to show that any use of the land in suit by the Declarant was as agent of the Chipper Orange Company Limited, or for any other purpose, and it ought to have been excluded. p.8, l.8 p.8, ll.19-26

8. The Respondent called a considerable body of evidence to show that he has possessed the land at least since 1938.

He testified himself that he had first cut down the land in 1927 or 1928 and farmed for two years. He had then gone to the United States of America but had returned to the land in 1938 since when he had farmed consistently every year. He did not cultivate the whole of the land at any one time, but cleared it piece by piece, farming on any piece cleared for a year or eighteen months, then giving it up and moving to the next p.10, ll.15-27 p.11, ll.12-13 p.12, ll.21-26

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p.13, ll.27-28 p.14, l.30 p.10, ll.21-24 p.10, l.39-p.11, l.4. piece, and so making his way eastwards to the Yamacraw Road before going back and cutting again. However between 1938 and 1940 all the land was cut down. He grew tomatoes, pigeon peas, corn and other crops and planted fruit trees of various sorts every year.

p.11, l.34 The Respondent said that he stopped people going on the beach and also gave evidence, which was uncontradicted and unchallenged, that he repaired and maintained walls on the north, east and west sides of the land (the south boundary of the land was a road reservation bordering on the sea). His evidence as to this was as follows :

p.11, ll.4-10 "There is a wall about 700 feet on the east of the land and the same on the west and on the north 2,500 feet along Yamacraw Road. There were some walls there in 1938 in bad condition. I had them mended up. I maintained the walls every year because the rain breaks it down."

The Respondent was cross-examined as to his state of mind when he first came on the land and as to this he said:

p.14, ll.4-11 "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 an 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. I had farms through the land all the time."

pp.16-19 9. The witnesses who gave evidence in support of the Respondent's case included Charles Vincent Mortimer (D.W.3), Thomas Davis (D.W.4) and Maud Rahming (D.W.5), all of whom testified that the Respondent had been farming on the land since 1938, and Augustus Knowles (D.W.6), who said:

p.19, ll.29-43 "In 1938 defendant started farming tomatoes there. I did no farming myself. I helped defendant along. I did all his trucking

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and fertilisers. I wouldn't know the size - about 18 acres when he started to grow tomatoes for the markets. I think by 1940 the farming land was cut down. I took the produce to the packing house. There was a packing house in Yamacraw Road. I trucked produce to the packing house all the years from 1938 to 1961. There were few fruit trees when I went along there - Yamacraw Road. Defendant planted fruit trees right along from 1938."

Palestine Michael (D.W.7) was a Senior Agricultural Officer formerly in the service of the Board of Agriculture who spoke as to a recent visit to the land in dispute, when he had examined the fruit trees. The majority of these were from 10 to 12 years old but some were 20 to 25 years old. They were in little blocks of 100 feet by 100 feet, which blocks were 150-200 feet apart scattered through the land. The witness added that he had known the Respondent since 1939, that the Respondent was farming there when he first knew him, that in the earlier days he farmed tomatoes and "was looked at as one of the big tomato growers". pp.21-22

Crown land aerial photographs, of the land in dispute were tendered in evidence, and these appeared to have shown that in 1941 or 1942 patches of the northern portion of the land were under cultivation. pp.22-24 p.24, ll.22-36

10. In rebuttal, the Appellants recalled their secretary Eleanor Joan Christianson (P.W.1), who said that the Appellants held the property for development and the cultivation of land (presumably by the Respondent) would not interfere with that purpose. p.26, ll.31-34

Several witnesses were called to testify as to the planting of fruit trees on the land by Howard Nelson Chipman. These were Ethelyn Taylor (P.W.4), Frederick Carl Claridge (P.W.5) and Howard Nelson Chipman, Junior (P.W.6), his eldest surviving son. P.W.6 said that he was pp.28-33

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p.32, l.41 - p.33, l.19

born in 1924, that he used to go on the land in the middle thirties and forties and his father taught him on the land how to bud and plant fruit trees. He and his father planted various fruit trees on the land, "roughly between 1936 and 1942" and he "used to go there and collect fruits". As to the Respondent; the witness said that he had seen him but he was not a caretaker "and he could not have been farming there when my father was farming there". 10

p.34, ll.8-11

pp.132-137

The Appellants also produced certified copies of the annual returns of the Chipper Orange Company Limited for the years ending October 1938, April 1944 and May 1947. These showed that during these years Howard Nelson Chipman (senior) was the majority shareholder and the president of the Company. However no evidence, either documentary or oral, was adduced to show that any use or cultivation of the land by Howard Nelson Chipman (senior) was authorised by or was on behalf of the company, or was accounted for by him to it. The Notarial Declaration of the 28th February 1948 (Exhibit O.E.10), previously admitted, had stated, in paragraph 5, that after 1937 Howard Nelson Chipman (senior) "managed and developed" a portion of the land for the company, but, as it is respectfully submitted, this Declaration was improperly admitted and should be excluded from consideration. 20

pp.119-120

pp.43-48

11. On the 1st November 1956 the Supreme Court gave Judgment for the Appellants with costs, assessing the damages at £100 and ordering that there be a perpetual injunction restraining the Respondent his agents and servants from continuing the trespass and from entering upon the land at any time in the future. 30

p.46, ll.8-17

The learned Judge in his Judgment held that the Appellants had shown a good title as against the Respondent and that the onus of proof then shifted to him to show that he had dispossessed the Appellants and barred their title by operation of the Limitation Acts. Upon this issue he held on "the preponderance of the evidence" that tomatoes and other vegetable crops 40

p.47, ll.5-9

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were in 1941 or 1942 being cultivated on the land by the Respondent. As to the planting of fruit trees, he held that the Respondent had planted some in about the years 1954-1956, but that the older ones, planted 1941-1946, had been planted by Howard Nelson Chipman (senior). His conclusion was that both the Respondent and Howard Nelson Chipman (senior) were on the land at the same time, "the one farming tomatoes, the other planting fruit trees and gathering fruit in season. Thus in the period 1941-1946 defendant [Respondent] did not have exclusive occupation of the land and in those years the growing of vegetable crops by defendant was not inconsistent with the use of the land by the true owner for growing fruit trees." p.47, ll.20-27 p.47, ll.28-37

The learned Judge appears to have accepted the veracity and reliability of the Respondent's witness Augustus Knowles (D.W.6) who "had a clear recollection of the year" [1938] "because that was the year he came to live in Nassau and to work for defendant [Respondent]". The learned Judge however, while accepting that the witness worked for the Respondent in 1938, held that he was not working on the land in dispute and that cultivation started in 1940. He concluded that the Respondent's possession "was not adverse to Chipper Orange Company whose president, H.N. Chipman (senior) grew fruit trees on the land up to 1946. Defendant on his own story was still a trespasser when plaintiffs bought the land in 1950, They bought the land for the purpose of development and in the meantime made no use of it. Thus defendant's farming was not inconsistent with the purpose for which plaintiffs held the land. p.47, l.44-p.48, l.8 p.48, ll.10-36

But on his own admission in evidence defendant did not enter on the land with the intent to oust the true owner. 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

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the land. After I had been on the land for seven years I started claiming the land.'

I take this as an admission by defendant that it was not until he had been on the land for seven years that he formed the intent to oust the true owner. That being so time would not have started to run against the true owner in 1938 or 1940 when defendant said he first grew tomatoes on the land but in 1945 or 1947 that is seven years later when he said he 'started to claim the land'." 10

12. As to the reasons upon which the learned Judge founded his decision upon the issue of possession the Respondent makes the following submissions :-

(a) the learned Judge wrongly treated acts of cultivation of the land by Howard Nelson Chipman (senior) as being identical with or proving possession by the Chipper Orange Company Limited. There was no evidence justifying this and no evidence before the Court of possession by 20 this Company, or any other of the Appellants' predecessors in title.

(b) there was overwhelming evidence that the Respondent had taken possession of the whole land by 1940. In particular the Respondent's unchallenged evidence as to the reinstatement by him at the commencement of his period of occupation and his maintenance every year thereafter of the walls which were so situated as to indicate the extent of the holding (to which the learned Judge 30 made no reference in his Judgment) showed a taking of possession by the Respondent of the whole tract.

(c) the learned Judge was in error in appearing to think that the mere intention of the Appellants after they bought the land in 1950 to develop the land in the future without making any present use of it (with which purpose the Respondent's farming was said not to be inconsistent) was sufficient to prevent the Respondent's possession from being adverse and 40 the statutory period of limitation from running.

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(d) the Respondent's evidence that he only started to claim the land (i.e. claim the title to the land) when he had been on it for 7 years, which the learned Judge considered prevented the period of limitation from running until the end of the 7 years, was immaterial to the question of whether the Respondent had an animus possidendi. In any event, having regard to the unequivocal evidence of user by the Respondent and maintenance by him of the outer walls which pointed out the whole tract of land, it was not necessary for him to adduce any further proof of animus, which was necessarily to be inferred from the nature of his acts upon and in relation to the land.

13. By Notice of Appeal dated the 10th December 1966 the Respondent appealed to the Court of Appeal, which on the 20th June 1967 by a majority (Sinclair P. and Hallinan J.A.; Bourke J.A. dissenting) allowed the appeal and directed that Judgment be entered for the Respondent with costs. pp.49-51 pp.52-85

14. Sinclair P. in his Judgment held, it is submitted rightly, that the Appellants had failed to show a good title to the land extending back for a period of 30 years, as required by Section 3(4) of the Conveyancing and Law of Property Act and accordingly had not shown a good root of title. p.53, l.38-p.59, l.15

So far as a possessory title was concerned, the learned President held, it is submitted correctly, that there was no evidence to justify a finding that the Appellants or their predecessors in title had been in prior possession, that any possession of a part of the land by the Appellants or their predecessors in title could not be regarded as a constructive possession of the whole, since such possession had been neither exclusive nor continuous and that the Respondent's possession was "adverse". p.63, l.46-p.66, l.19 p.66, ll.20-38

Hallinan J.A. delivered a Judgment to the same effect, observing in the course of it that "the evidence of acts of possession and user by the Appellant [Respondent] is much stronger

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(than that of acts of possession and user by the present Appellants), given by five witnesses besides himself."

p.82, l.39 - p.83, l.12 / p.83, ll.24-45

Bourke J.A. in his dissenting Judgment held that the Appellants had shown a sufficiently good title, that the Appellants' predecessor in title, the Chipper Orange Company Limited "acting through its president and virtual owner, Howard Chipman senior, was in open possession in 1940 of part of the land .... until 1946", and that there was no actual adverse possession by anyone else, the Respondent not having an animus possidendi.

p.62, l.6 / p.71, l.33 / p.78, l.23

All three of the Judges of the Court of Appeal held that the Notarial Declaration of the 28th February 1948 had been wrongly admitted in evidence.

pp.86-87 / pp.91-92

15. On the 21st June 1967 the Appellants were given Conditional Leave to Appeal and on the 27th October 1967 Final Leave.

16. The Respondent humbly submits that this Appeal should be dismissed with Costs for the following amongst other

R E A S O N S

1. BECAUSE the Appellants failed to establish a good title to the land in suit.

2. BECAUSE the Appellants failed to establish prior possession by them or their predecessors in title of the said land or that they had a better possessory title than the Respondent.

3. BECAUSE there was no evidence of any possession of the said land by the Appellants or their predecessors in title.

4. BECAUSE the Respondent established that he had been in continuous possession of the said land for more than 20 years.

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5. BECAUSE the Respondent established that his possession was adverse to the title (if any) of the Appellants and their predecessors in title.

6. BECAUSE the Respondent established a good possessory title to the said land.

7. BECAUSE the Appellants' suit was barred by operation of Section 1 of the Real Property Limitation Act of 1874 (Chapter 150).

8. BECAUSE the Judgments of the majority in the Court of Appeal were right for the reasons therein stated.

DINGLEFOOT

MONTAGUE SOLOMON

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