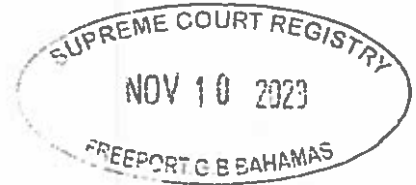


**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2019/CLE/gen/FP/00093**

BETWEEN

**JOHN W. RUSSELL
(in his capacity as Administrator
Of the Estate of William Russell)
Plaintiff**



AND

**BAHAMAS AGRICULTURAL AND INDUSTRIAL CORPORATION
Defendant**

BEFORE: The Honourable Justice Petra M. Hanna-Adderley
APPEARANCES: Mr. Edmund Russell for the Plaintiff
Ms. Kenria Smith for the Defendant

ADDENDUM

Hanna-Adderley, J

Introduction

1. This ruling is to serve as an addendum to my Ruling dated and delivered on August 2, 2023.
2. In that Ruling I identified two discrete issues at paragraph 15 as follows;
“15. The issues to be determined by the Court in this application are (1) whether this is a clear and obvious case where it is possible to say, at this interlocutory stage and before full discovery, that a particular allegation set out in the statement of claim is incapable of proof and that there is no need for a trial and (2) whether the Plaintiff’s claim is statute barred.”
3. On the face of the written Ruling no consideration was given to or ruling given on the second discrete issue, namely, whether the Plaintiff’s claim should at this stage be struck out because it is statute barred.

4. By Notice of Application filed August 18, 2023, supported by the Affidavit of Nevado Frazer filed August 17, 2023, the Defendant seeks leave to appeal the Ruling to the Court of Appeal. The application for leave to appeal is opposed by the Plaintiff who relies on the Submissions and Skeleton Arguments filed November 2, 2023.
5. Exhibited to the Affidavit of Navado Frazer and marked "N.F.1" is the draft Notice of Motion containing the proposed grounds of Appeal. Among its grounds of appeal is the issue of Limitation. They read as follows:

"...AND FURTHER TAKE NOTICE THAT the grounds of this appeal are:

- (1) The Learned Judge erred in facts and in law when she failed to accede to the Defendant's application to strike out the Plaintiff's Writ endorsed with a Statement of Claim filed 29th April, 2019, and dismissed the application to strike.
- (2) The Learned Judge erred in facts and in law when she failed to find that the action was brought outside the limitation period pursuant to the Limitation Act Ch. 83
- (3) The Learned judge erred in facts and in law when she awarded costs to the Plaintiff."

6. The gravamen of the proposed appeal is ground (2). In order to render a ruling of this court which the Court of Appeal can consider, and to avoid the possibility of the Court of Appeal having to remit the matter to me for that purpose should an appeal proceed upon the grant of leave, I set out below my consideration and Ruling on the limitation issue. This will save time and costs.

The Defendant's case re Limitation

7. The overarching claim by the Plaintiff in this Action is for recovery of land. The Plaintiff claims "recovery of possession of property" in paragraph 4 of his Writ of Summons filed April 29, 2019.

8. The Defendant relied on Section 16(3) of the Limitation Act which provides that no action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person.
9. The Defendant also relied on Section 41 of the Limitation Act which provides that where in the case of an action for which a period of limitation is prescribed by the Act either ;(a) the action is based upon fraud of the defendant; or (b) the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence could have discovered it.
10. The Defendant argued that its Plea under the Limitation Act was unanswerable because:
 - 1) The Plaintiff claims in the Writ of Summons filed April 29, 2019 that on or about 2013 the Defendant forged a document of title setting out a Lease made between the Defendant and Statoil but has not exhibited the alleged forged documentation nor does the document appear on the face of the Writ.
 - 2) There was notice as far back a 1981 that Burmah Oil, the predecessor of Statoil was in occupation of the land in question, and the Witness Statement of Rocky Nesbitt the General Manager of the Bahamas Agricultural and Industrial Corporation (BAIC) filed December 7, 2022 swears to the details of the Lease dated March 13, 1981 between Sir Gerald Cash, Governor General of the Bahamas and the Bahamas Development Corporation the predecessor of BAIC, and there were subsequent sub-leases in January 1994 and the latest lease of the land on October 21, 2009 for 40 years.
 - 3) The 12 years limitation period was satisfied by 1993, and the Writ by the Plaintiff claiming recovery of the lands was not issued by the Plaintiff until 26 years later on April 29, 2019.

11. The Defendant therefore claims that the limitation defence is unanswerable and it is an abuse of the process of the court to bring and prosecute the action.

The Plaintiff's case re Limitation

12. The Plaintiff answers among other things:

- (1) That there is no evidence that the 1981 Lease is recorded in the Registry of Records and by virtue of s10 of the Registration of records Act the 1827 William Russell Crown grant through which he claims was recorded and therefore takes priority over the unrecorded Leases and subleases starting with the 1981 Lease.
- (2) That the disposition of the property to Statoil was in any event made with intent to defraud.
- (3) That the late William Russell entered into exclusive possession and occupation of the property as the owner with the paper title and remained in exclusive possession of the property until his death.
- (4) That BAIC never had the intention to possess the property nor acquire a title to the property by adverse possession, but claims to have a documentary title being a Crown Lease. It was never in exclusive possession and sole occupation of the property, which vested in a Justice of the Supreme Court after the death of the late William Russell and the property was not fenced in on all sides by BAIC and is bounded on the South by the Sea at the high water mark and contains a harbour and waterway.
- (5) That this is the action for the recovery of land which was commenced in accordance with Section 30 of the Limitation Act, 1995 and that time does not begin to run against the estate until the claimant is granted Letters of Administration. Section 30 states that an administrator of the estate of a deceased person shall be deemed to claim as if there had been no interval of time between the death of the deceased person and the grant of the Letters of Administration. He claims that date was April 23, 2012, the date of the Grant of Letters of Administration to him in the Estate of William Russell and further that he only had notice that the property formed a part of the late William Russell's Estate when a title search was conducted during the Probate proceedings in the Supreme Court.

The Law

13. In my August 2, 2023 Ruling I gave my reasons for dismissing the application to strike on the first issue. I now do so on the limitation issue.
14. Identical provisions to those contained in s 16(3) the Limitations Act relied on by the Plaintiff above were discussed by the Law Reform Commission of England. A useful summary of the law is set out in the Report : The Law Commission: Limitation of Actions Part II [2001] EWLC 270(2) (09 July 2001) as follows:

“2.52 The limitation period applicable to a claim to recover land is twelve years from the date on which the right of action accrues.

2.53 The circumstances in which a right to recover land accrues are set out in section 15 of, and the first schedule to, the 1980 Act. The overriding requirement for the right to recover the land to be treated as having accrued, so the limitation period begins to run, is that the land is in adverse possession. If the land ceases to be held in this way, the right of action will cease to be treated as having accrued.

2.54 To be in adverse possession both factual possession of the land in question, and an intention to possess it (*animus possidendi*) must be demonstrated. Factual possession signifies an appropriate degree of exclusive physical control according to all the circumstances of the case, particularly the nature of the land and the manner in which land of that nature is commonly used or enjoyed. The *animus possidendi* involves an intention to possess the land to the exclusion of all other persons, including the owner with the paper title, so far as is reasonably practicable and so far as the process of law permits. Possession pursuant to a lawful title is never adverse.

2.55 Section 17 of the 1980 Act states that the expiry of the limitation period extinguishes the title of the person entitled to maintain the action to recover land [*This result has been confirmed in the Bahamas Court of Appeal in Rolle v Meadows SCCiv App No 128 of 2020 per Sir Michael Barnett P where he stated at paragraph [33]: “The combined effect of sections 16(3) and 25(1) of the Limitation Act 1995 extinguishes a landowner’s title if he has been dispossessed by the adverse possession of a trespasser.”*]. The effect of this, and the nature of the title thereby passed to the squatter, varies according to whether the land is

freehold or leasehold, registered or unregistered (*Information in square brackets inserted*).

2.56 Where the freehold estate is unregistered, the person in adverse possession does not succeed to the old title, but is entitled to a separate possessory title in the land...”

Limitation in connection with claims based on Fraud

15. Similarly, Section 41 of the Limitation Act relates to Fraud, Mistake and Deliberate Concealment, namely:

“ 41. (1) Subject to subsection (4), where in the case of an action for which a period of limitation is prescribed by this Act either —
(a) the action is based upon the fraud of the defendant; or
(b) the action is for relief from the consequences of a mistake,
the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

16. This is discussed in the Commission’s Report as follows:

“Section 32 (1) (a) of 1980 [English Limitation Act 1980] provides that where a claim is based upon the fraud of the defendant, the limitation period does not begin to run until the claimant discovers the fraud, or could with reasonable diligence discover it. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take...”

‘2.82 In *UCB Home Loans Corporation v Carr*, Crane J cited this test but, stating that the remarks were made obiter, suggested that the word “exceptional” should be omitted since it raises the standard too high...”

17. Evidence will be required to make a determination as to how to apply these principles to the facts of this case. Such evidence will likely emerge after discovery and the production of other evidence.

Conclusion and Disposition

18. Based on the above authorities which in my judgment fairly interpret the equivalent provisions of Sections 16(1) and 41 on which the Defendant relies, it

is evident that in order to make a determination on the issue of limitation there is a need to explore and examine the evidence **after discovery** for the same reasons that preclude a successful strike out of the main application on the merits. There are other relevant questions in the main action, for example, the notice by physical occupation of the property by the various Lessees, and other questions of fact. Simply put, we are not there yet. I therefore refuse a strike out on the limitation ground as well (Emphasis mine).

Dated this 9th day of November, 2023

Petra M. Hanna-Addelley
Petra M. Hanna-Addelley
Judge

