COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 12 of 2020

BETWEEN

GEORGE NATHANIEL HALL

1ST APPELLANT

AND

BRUNO B. HALL

2ND APPELLANT

AND

RAQUEL DAVIS

3RD APPELLANT

AND

ANTHONY DEAN

RESPONDENT

BEFORE: **The Honourable Mr. Justice Roy Jones, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Madame Justice Bethell, JA

APPEARANCES: **Ms. Christina Galanos, Counsel for the Appellants**
Mrs. Tanya Wright, Counsel for the Respondent

DATES: **28 January 2021; 8 March 2021; 11 November 2021**

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Civil appeal –- Trespass to land - Claim to recover land -damages – First appellant claiming adverse possession as a defence to a claim of trespass – Challenge to a finding of fact by the trial judge – section 16(3) of the Limitation Act

On 19 December 2019, Winder, J determined that an erection of a fence around the subject property in 2012 by the 1st appellant George Hall, amounted to trespass and that the appellants were ordered to pay the respondent, Anthony Dean, the sum of $10,000 in damages. On 27 January 2020 the appellants filed a Notice of Motion seeking to appeal the judgment of the learned trial judge on the grounds that, *inter alia*, the judge erred when he found the respondent to have documentary title to the property and erred when he rejected the 1st appellant's evidence that he farmed on the property and acted with intention to possess the property. The Court heard submissions from the parties and reserved its decision.

Held: appeal dismissed. The appellants are ordered to pull down and remove the fence from the respondent's property forthwith. The appellants are to pay damages awarded in the sum of $10,000 to the respondent. Costs are awarded to the respondent to be taxed if not agreed.

There is no reason to interfere with the learned judge's finding that the erection of a fence in 2012 amounted to trespass and there was no *animus possissendi* prior to 2012. Further that the acts of trespass were not continuous, exclusive, and enough to dislodge the respondent's documentary title. The fence erected enclosed the respondent's property, extending the properties occupied by all three appellants. It was well within the remit of the judge to make an award for damages.

Bahamasair Holdings Ltd. V. Messier Dowty Inc [2018] UKPC 25 considered
Housen v. Nikolaisen 2002 SCC 33 considered
JA Pye (Oxford) Ltd. and another v Graham and another [2003] 1 AC 419 considered
Lord Advocate v Lord Lovat 1880 5 App Cas 273 considered
Powell v McFarlane [1977] 38 P&CR 452 considered

JUDGMENT

Judgment delivered by The Hon. Madam Justice Carolita Bethell, JA

This is an appeal by George Hall, Bruno Hall, and Raquel Davis (The appellants) against a judgment of Winder J. in which he found the appellants had trespassed on the respondent, Anthony Dean's land. The appellants were ordered to pull down and remove the fence. They were also ordered to pay damages in the sum of $10,000 (ten thousand dollars). Costs were awarded against them.

BACKGROUND

1. Anthony Dean, the respondent before this Court, filed a Writ of Summons in the Supreme Court in January 2014 against George Hall, Bruno Hall and Raquel Davis,

the appellants, for trespass to an area of land situate south of lots 52 and 53 Seabreeze. He also claimed damages for trespass and the removal of a chain link fence erected on his property.

2. The respondent claimed he became seized of the property along with his now deceased brother, Jerome Dean, by a Deed of Gift executed on the 9th July, 1960 by their brother John Dean. The property is a portion of a larger tract of 3 acres.

3. The first named appellant George Hall is the owner of lot 52. He purchased lots 52 and 53 in 1984. He lives on lot 52 Seabreeze. Bruno Hall and Raquel Davis are the son and daughter in law of George Hall. They acquired lot 53 from George Hall and built their home on it. Anthony Dean is the title holder to the area of land south of lots 52 and 53.

4. The appellant, George Hall, acknowledges he trespassed on the land south of lots 52 and 53 Seabreeze. He claimed he farmed on the land since 1986. In 2012, he erected a fence on the respondent's property next to lots 52 and 53 enclosing a section of just under half an acre.

5. The respondent's property was land locked prior to the construction of the Charles Saunders Highway. The respondent's case is that he, along with his nephew Julian Dean, approached the appellant, George Hall, and his now deceased wife, to access his property. He proposed that there be an exchange of land. The appellant was at first receptive to the exchange resulting in the respondent commissioning a surveyor in 1991 to lay out a plan showing a 30-foot accessway along the boundary of lot 52 Seabreeze for the respondent and a portion of the respondent's land abutting the southern boundary to the appellants' properties. That plan did not come to fruition as the appellant, George Hall, later declined the proposal as his family was concerned that the new access would interrupt their peaceful occupation of the land.

6. In 2001, the Government of the Bahamas issued a notice of its intention to compulsorily acquire property for the construction of the Charles W Saunders Highway. The Government acquired a part of the respondent's property for the construction of the said highway. He is still in negotiations with the Government regarding compensation for the same.

7. It is the respondent's case that in 2001, the 1st appellant sought to revive the proposal but as he was uncertain how much land was going to be acquired by the government, he could not consider the proposal.

8. In 2013, the respondent decided to sell the property and commissioned Jack Isaacs, a realtor, to have a plan drawn of the property. It was then that he noticed the fence which the first appellant admitted to erecting. It had been well concealed by foliage and only visible by aerial photography. He demanded that the fence be removed. The first named appellant refused to remove the fence. Resulting in the initiation of the matter by way of Writ of Summons in the Supreme Court.

9. The appellant, George Hall, counterclaimed in his defence that the respondent's title has been extinguished through his undisturbed occupation of the land, which he claimed to have farmed from 1986. He further sought a declaration that he is the legal owner of the said land and sought an injunction restraining the respondent from interfering with his occupation of the land.

10. After a hearing in the Supreme Court, the learned judge found that the activity claimed by the 1st appellant prior to the erection of the fence in 2012 did not amount to an intention to possess the property. He merely cleared the land and maintained the property in order **"to stop robbers from coming into the area."** There was no *animus possisendi*. The presence of "a banana tree does not amount to farming." He did not accept the 1st appellant's claim that he had been farming the disputed land from 1986.

11. The learned judge did not find the 1st appellant to be truthful.

12. The respondent, now well on in age, did not give evidence at the trial. However, he called three witnesses, his daughter Lisa Thompson, his nephew Julian Dean, and Jack Isaacs, a realtor.

13. The first named appellant George Hall testified and call three witnesses. The 2nd and 3rd named appellants did not participate in the trial.

14. The learned judge found that the erection of the fence in 2012 amounted to a trespass and was not defeated by effluxion of time.

15. He granted the reliefs sought by the respondent and awarded damages in the sum of $10,000.

THE APPEAL

16. The appellants have appealed the judgment of the learned judge by Notice of Motion filed on the 27th January, 2020. They seek the following orders:

> **1. A declaration that the respondent has no interest or title in the subject property; OR**
>
> **2. A declaration that by virtue of the 1st appellant's exclusive, continuous, undisturbed, and open possession of the subject property for the requisite period as prescribed in section 16(3) of the Limitation Act, 1995, the title (if any) of the respondent has been extinguished;**

3. An injunction restraining the respondent from trespassing, molesting or in anywise interfering with the 1st appellant's occupation and possession of the subject property;

4. An order that the learned trial judge's award of damages in the sum of $10,000.00 be set aside in any event as the learned trial judge did not hear from the parties on the issue of damages;

5. An order that the respondent be made to pay the 2nd and 3rd appellants' costs in any event as the respondent did not establish a cause of action against the 2nd and 3rd appellants;

6. An order that the respondent pays the 1st appellant's costs.

The grounds of this appeal are:-

l. The learned trial judge erred when he found that the respondent has sufficient documentary title to the property to be considered the documentary title holder;

2. The learned trial judge erred when he took into consideration the respondent's evidence that the 1st appellant's wife, now deceased, kept a lookout with respect to the subject property on his behalf and that through his nephew, the respondent maintained a cordial relationship with the Halls and he would visit their property to visit Hall's wife;

3. The learned trial judge erred when he rejected the 1st appellant's evidence that he was farming on the property as the respondent never challenged this evidence;

4. The learned trial judge erred when he only considered the nature of the acts of possession and he failed to consider the intention with which the 1st appellant did the acts of possession;

6. The learned trial judge erred when he took into consideration that there was an indication by the Halls in 1991 that they would consider an exchange of land and that the Chee-A-Tow plan was commissioned as a result of this indication and further that in 2001, the 1st appellant sought to revive the proposal to permit the respondent access to the subject property;

7. The learned trial judge erred when he refused to permit the 1st appellant's key witness to take the stand; (this ground was abandoned.)

8. The learned trial judge erred when he stated that the claim was pursued against the 1st appellant only and not the 2nd and 3rd appellants, as the respondent never withdrew the claim against the 2nd and 3rd appellants;

8. The learned trial judge erred when he did not consider the appellants' submission that as the respondent did not establish a cause of action against the 2nd and 3rd appellants, the respondent ought to be made to bear the costs of the 2nd and 3rd appellants in any event;

9. The learned trial judge erred when he awarded the respondent damages in the sum of $10,000.00 in the absence of hearing from the parties on the issue of damages;

10. The learned trial judge erred when he awarded costs to the respondent;

11. The learned trial judge's findings were not based on the evidence before him;

12. The learned judge did not support his decision with reasons.

The issues before the Court

1) Does the respondent have a better documentary title than the appellants to be deemed the documentary title holder?

2) Were the appellants' acts of trespass continuous, exclusive, and sufficient to dislodge the respondent's documentary title?

3) Is the respondent entitled to damages from the appellants' trespass?

4) Was the respondent's claim in trespass against the first appellant and not against the second and third appellants? If not, should the respondent meet the costs of the second and third appellants? Should the trial judge grant costs to the respondent against the first appellant?

5) Did the trial judge award damages to the respondents without receiving submissions from the parties on that issue?

DISCUSSION

Does the respondent have a better documentary title than the appellants to be deemed the documentary title holder? (Ground 1)

17. The appellants' claim the respondent failed to prove documentary title and relied on a Deed of Gift which did not reflect the location. The description of the property in the Deed of Gift is:

> **"ALL THAT tract of land containing Three (3) acres of situate South of Soldier Road in the Eastern District of the said Island of New Providence being bounded Westwardly by land**

> **originally granted to Robert T. Henzell but now called Nassau Village and on all other sides by land now or lately Crown Land which said tract of land has such position shape boundaries marks and dimensions as are shown on the Plan drawn on a Grant dated the 17th day of February A.D. 1927 from The Crown to John Butler and now of record in the Registry of Records in Book 1 11 at page 488 and is delineated on that part of the Plan which is coloured PINK."**

18. The respondent did not lay over the 1927 plan in court, as it could not be located.

19. Several other plans were tendered into evidence and laid over in the trial Court namely the 1991 plan commissioned by the respondent and surveyed by Chee-a-Tow Ltd.; a 2013 plan also commissioned by the respondent and surveyed by Donald Thompson, a plan placed into evidence by the respondent's daughter, Lisa Thompson recorded in Vol 2229 page 39 and a 2014 plan commissioned by the 1st appellant surveyed by AB Campbell

20. What is striking about these plans is that they all refer to the area south of the appellants' properties as an area being part of Crown Grant A1-214.

21. Indeed at paragraph 9 of his judgment, the learned trial judge had this to say:

> **"It is worth noting that the survey plan prepared by AB Campbell reflects that it was a portion of a grant made to John Butler, as does the 1991 Chee-A-Tow Co. Ltd. Plan. John Butler is identified as the crown grantee in the plaintiff's Deed of Gift from whom the plaintiff's predecessors in title is said, by the plaintiff, to have obtained the Property."**

22. As noted above, the respondent called 3 witnesses and the appellants called 4 witnesses.

23. Both Lisa Thompson and Julian Dean testified how they became acquainted with the disputed property which was landlocked prior to the construction of the Charles Saunders Highway.

24. At paragraphs 12 and 13 of his Judgement, the learned trial judge made the following findings:

> **"12. Having observed the witnesses as they gave their evidence, I have no hesitation is (sic) indicating that I prefer the evidence of the plaintiff's witnesses. I did not find Hall to be truthful. I accept that there was an indication by the Halls in 1991 that they would consider an exchange and that the Chee-A-Tow plan was commissioned as a result of this indication. I also accept Dean's evidence that in 2001 Hall sought to revive the proposal. I therefore rejected Halls evidence that he did not hear from the plaintiff since 1986."**

> **13. Hall sought to challenge the plaintiff's title to the Property based upon the description in the Deed of Gift. He complained about the proximity to Soldier Road. The property in the Deed of Gift was said to be south of Soldier Road. In 1960, it is quite likely that Soldier Road was the nearest land mark. [Emphasis added]. I take judicial notice that Soldier Road is a long road which curves and is quite capable of running north to south at some points but runs east to west for a considerable period. The property is indeed south of Soldier Road. At this stage of the development of Bahamian land law there remains no such thing as a perfect title. I accept that the plaintiff had some documentary title to the property and have been acting since 1990 under colour of such title. This was reflected in their dealings with Hall and the Government of the Bahamas. I am satisfied that the Plaintiff has sufficient documentary title to the property to be considered the documentary title holder as against the Defendant who admittedly has no documentary title."**

25. The proper approach to the review by an appellate court of the trial judge's finding of fact is that the appellate court should only interfere with these findings if it is satisfied that the trial judge was patently wrong. This is particularly so when the findings are based on disputed evidence and the credibility of witnesses whom the trial judge had the benefit of observing is material. In **Bahamasair Holdings Ltd. V. Messier Dowty Inc. [2018] UKPC** the Privy Council detailed the proper approach to the review by an appellate court of the findings of a trial judge.

26. In the Canadian case of **Housen v. Nikolaisen** 2002 SCC 33 the Supreme Court of Canada held that :

> **"The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a 'palpable and overriding error.' A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing testimony. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter**

> **standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion."**

27. Bearing the above in mind, there is no basis for interfering with the finding by the trial judge that the plaintiff had sufficient documentary title to the property to be considered the documentary title holder as against the defendant who admittedly had no documentary title.

Were the appellants' acts of trespass continuous, exclusive, and sufficient to dislodge the respondent's documentary title? (Grounds 2, 3, 4 and 5)

28. The appellant, George Hall, states that he went onto the respondent's property and farmed it since 1986.

29. The trial judge was entitled to reject the evidence of the appellant that he was farming.The trial judge heard the testimony of the witnesses. He qualifies whose evidence he prefers. He preferred the evidence of the respondent "without any hesitation". He did not find Hall to be truthful. The evidence of Hall's own witnesses was that Hall maintained the land to stop robbers from coming into the area. The learned judge found that there was not any farming done. He qualified his finding at paragraph 14 of his judgment. Namely that none of the witnesses spoke to any farming of the property and he accepts that there wasn't any farming done. He further qualifies his finding that one banana tree which Julian Dean testified to seeing on the respondent's property does not amount to farming.

30. The trial judge gives further reasoning in paragraph 15 of his judgment:

> **"In a letter to the Director of Land and Surveys, in March 2004, Hall speaks of clearing the property for years *"to prevent robberies, break ins and any other form of illegal activity from taking place in the surrounding neighborhood."***

31. I find no basis for interfering with the learned trial judge's finding of fact on this aspect of the case.

32. Moreover, at paragraph 14 of his judgment the learned trial judge found that although there was activity done on the property by the appellant that did not amount to possession prior to the erection of the fence. He found that such activity was merely incidental to his ownership of his own property. He held the view that there was no *animus possisendi,* no intention to possess it against the world. See paragraph 30 above.

33. In **JA Pye (Oxford) Ltd. and another v Graham and another (Oxford) Ltd. v Graham** [2003] 1 AC 419 the House of Lords stated that legal possession by an adverse possessor requires (i) a sufficient degree of physical custody and control namely factual possession, and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit namely the intention to possess, or *animus possidendi*.

34. In paragraph 16 of his judgment the learned judge was satisfied that the erection of the fence in 2012 amounted to trespass and was not defeated by effluxion of time. It is that act of trespass which amounted to an intention to possess.

35. The factual possession required must be *nec clam, nec precario nec vi.* In other words, it must be open and unconcealed, not by permission of the owner or with his consent and not acquired by force. "*Open*" being described in **Lord Advocate v Lord Lovat** 1880 5 App Cas 273 at page 296 as *"notorious and unconcealed*", for otherwise the paper owner would not be made aware of the need to challenge the adverse possessor before the expiry of the Limitation period. Although the fence was erected in 2012 it only came to the attention of the respondent when an ariel photograph was taken by the realtor. It had been concealed by foilage. Time began to run from the time the respondent became aware of the fence in 2013 the very same year that action was brought for trespass in the Supreme Court. Hence the learned judge's finding that the respondent's title was not defeated by effluxion of time, namely the 12 year period of continuous, exclusive and open possession by the trespasser immediately preceding the issue of the Writ. Section 16(3) of the Limitation Act.

36. The learned trial judge found at paragraph that even in his letter to the lands and survey department he requested title of the land because he cleared it for years "in order to prevent robberies, break ins and any other form of illegal activity from taking place in the surrounding neighborhood."

37. In **JA Pye,** Lord Browne-Wilkinson approved the following passage from the judgment of Slade J in **Powell v McFarlane** [1977] 38 P&CR 452

> **"The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstance, 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.**"

38. The judge made a finding of fact in paragraph 15 of his judgment that although George Hall claims he has been farming the land for some 15 years, in his letter to the land and survey department he only speaks of clearing the land which the learned judge found was consistent with the evidence of Hall's witnesses.

39. I have no reason to interfere with the learned judge's finding that the erection of a fence in 2012 amounted to trespass and there was no *animus possissendi* prior to 2012. The fence encompassed the respondent's land south of lot 52 occupied by George Hall, the

first named appellant but also the respondent's land south of lot 53 occupied by the second and third appellants. Further that the acts of trespass were not continuous, exclusive, and enough to dislodge the respondent's documentary title.

40. The appellants claim that the learned judge erred when he took into consideration the respondent's evidence that the appellant's wife, now deceased, kept a look out of the property after having developed a cordial relationship with the nephew of the appellant , Julian Dean.

41. As stated in the discussion in ground one, the learned judge made a finding of fact having had the benefit of hearing the testimony of the witness Julian Dean. He stated that he had no hesitation in indicating that he prefers the evidence of the respondent's witnesses.

42. I find no basis for interfering with the learned trial judge's finding that the appellants' act of trespass in 2012 did not amount to continuous, exclusive, open, and sufficient to defeat the respondent's documentary title through the effluxion of time, namely 12 years as stipulated in section 16(3) of the Limitation Act. [Emphasis added]

43. Ground 6 was abandoned.

Was the respondents' claim in trespass against the first appellant and not against the second and third appellants? If not, should the respondent meet the costs of the second and third appellants? Should the trial judge grant costs to the respondent against the first appellant?(Grounds 7, 8 and 10)

44. The appellants claimed the judge erred in coming to a finding that the claim was pursued against Hall only and not the second and third appellants. The claim against the second and third appellants was not withdrawn. It is noteworthy that the judge did not make an award of costs against the second and third defendant. Having stated that the claim against the second and third defendants was not pursued at trial and having failed to make an award of costs against the second and third defendant, it is apparent that the judge was of the view that the claim against the second and third defendants had been discontinued. However, the second and third defendants are parties to the Notice of Motion to Appeal. This unequivocally suggests that they are still asserting an interest in the subject property and, as the appeal has failed, they must be held accountable for the cost here and below, along with the first appellant/defendant.

***(a) Did the trial judge award damages to the respondent without receiving submissions from the parties on that issue? (b) Is the respondent entitled to damages from the appellants' trespass? (Ground 9*)**

45. As to (a): The assertion by the appellant that the trial judge did not receive submissions on damages is incorrect. In the Court below, the respondent had asserted a claim for damages and laid over arguments why he was entitled to damages. It is clear from the Record that the appellants made no attempt in the Court below to meet the respondent's claim for damages, whether by evidence or argument before the judge.

46. As to (b):The learned judge found that that the first appellant Hall had erected the fence in 2012 that amounted to trespass. That fence enclosed the respondent's property, extending the properties occupied by all three appellants. It was well within the remit of the Judge to make an award of damages. The findings of the judge are that the appellants had taken possession of the respondent's property and deprived him of its use and enjoyment. In such circumstances, the respondent is entitled to an award of damages by way of mesne profits. I have no reason to interfere with the learned judge's assessment of damages.

47. Grounds 11 and 12 have both been covered in the discussions above and I see no merit in the same.

DISPOSITION

48. For the reasons set out above, I would dismiss the appeal and order that the appellants pull down and remove the fence from the respondent's property forthwith.

49. Further that the appellants pay damages awarded in the sum of $10,000 to the respondent.

50. Costs are awarded to the respondent to be taxed if not agreed**.**

The Honourable Madam Justice Bethell, JA

51. I agree.

The Honourable Mr. Justice Jones, JA

52. I also agree.

The Honourable Mr. Justice Evans, JA