IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 197 of 2017

ENGELBERT LINCOLN TIABO	**CLAIMANT**
AND	
CLARENCE FLOWERS	**1st DEFENDANT**
HELEN BULLER	**2nd DEFENDANT**

CLAIM NO. 722 OF 2017

CLARENCE FLOWERS	**1st CLAIMANT**
HELEN BULLER	**2nd CLAIMANT**
AND	
ENGELBERT LINCOLN TIABO	**DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings
2018
16 & 17.4.2018

Written Submissions
Claimant – 7.5.2018
Defendant – 4.5.2018

Decision
21.6.2018

Mr. Oscar A. Sabido, SC for the Defendants in Claim No. 197/ 2017 & for the Claimants in Claim No. 722/2017.

Mrs. Nazira Myles for the Claimant in Claim No. 197/2017 and the Defendant in Claim No. 722/2017.

Keywords: Land Law – Overriding Interest – Actual Occupation – Adverse Possession – Registered Land Act Cap. 194 (the RLA) – Limitation Act Cap. 170

JUDGMENT

1. This matter concerns two claims which were heard together. The first in time was brought by Engelbert Tiabo for possession of land (the Property) to which he has registered title under the RLA. Clarence Flowers and Helen Buller (together I shall refer to them as the Flowers) say they reside on the back half portion of the Property (the Portion) and have been in adverse possession of it before Mr. Tiabo got title thereto.

2. Mr. Flowers was the original owner of the Property. Sometime in 1991, he says he sold the front portion only to a Findley Monsanto. Mr. Monsanto was supposed to have the Property surveyed and sub-divided. The entire lot was transferred instead. That transfer was the subject of separate court proceedings (Previous Matter) filed in 1996 by Mr. Flowers. It was apparently dismissed in July 1998 and he appealed. No action of consequence was taken to determine the matter otherwise since June 13th, 2000 when the Court of Appeal apparently gave certain directions. There is evidence that a letter was sent to the Registrar by counsel for Mr. Flowers in March, 2009. It requested directions for a retrial, unsurprisingly, to no avail. The original order remains.

3. Mr. Monsanto transferred the Property to his wife who in 2000 transferred it to the Belize National Building Society from whom Mr. Tiabo bought it in 2016. Mr. Tiabo says once he became the registered owner he immediately

contacted Mr. Flowers' daughter, Curlene, (with whom he was acquainted) and informed her. He then proceeded to take measures to have the Flowers vacate the premises. He intimated that Curlene requested some time to secure alternate accommodation for the elderly couple. He granted same until December, 2016, but Ms. Buller and Mr. Flowers have simply refused to leave.

4. In their claim, against Mr. Tiabo, the Flowers recount the history of their presence on the Property. They allege that they were in actual occupation of the Portion when the Property had been bought by Mr. Tiabo. They claim an overriding interest in the Portion based on their adverse possession of it since either 1991 or 1995 and seek a declaration to this effect. They add, that by the time Mr. Tiabo's predecessor in title transferred the Property to him, the predecessor's title to the Portion had in fact already expired and could not be transferred. They explained that had Mr. Tiabo only asked, they would have outlined the precise nature of their presence on the Portion. They urge that their title to the Portion now be declared and the Defendant be made to surrender his title thereto.

5. In his defence Mr. Tiabo explains that the issue of Mr. Flowers' legal title had already been determined by the court in the Previous Matter and he had been ordered to vacate the Property. Furthermore, Belize National Building Society had, since gaining title, served a number of notices to vacate on the Flowers. He himself had made various efforts and held discussions. But despite his best endeavours they adamantly refuse to leave. He says all this demonstrates that the couple has not been in uninterrupted possession for twelve years and they have no right whatsoever to remain in possession. Their claim ought to be dismissed in its entirety.

There is but one real issue in these matters:

6 1. Whether the Flowers have an overriding interest in the Portion.

A. Were the Flowers in actual occupation of the Portion.

B. Do the Flowers have an interest in the Portion through adverse possession.

Whether the Flowers and have an overriding interest in the Portion:

A. Were the Flowers in actual occupation of the Portion:

7. The Property is registered land and Mr. Tiabo is its registered proprietor. The presumption is that he is in possession. However, his title, though absolute, remains subject to any registered or overriding interests. Section 26 of the RLA establishes that:

> "26. Subject to section 30, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatever, but subject-
> *(a)* to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
> *(b)* unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 31 not to require noting on the register:.."

8. The Flowers claim such an unregistered but overriding interest through their very presence on the Portion. Section 31(1)(g) of the RLA protects the rights of persons in actual occupation of registered land even where those rights are not registered. It provides:

> "*31.-(1) Subject to subsection (2), unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect it, without their being noted on the register-*

(g) "The rights of a person in actual occupation of land or in receipt of the rents and profits thereof except where inquiry is made of such person and the rights are not disclosed."

9. Although Mr. Tiabo testified that Mr. Flowers and Ms. Buller were not in actual occupation of the Portion when he bought it, I find this impossible to believe. They were clearly living there when his predecessor in title owned it and they say they have never moved. This court therefore finds that when Mr. Tiabo bought the Property the Flowers were in actual occupation. Mr. Tiabo admits that he never inspected the land before purchase and he certainly never asked either Ms. Buller or Mr. Flowers the nature of their right (if any) to occupy. As such they may have an overriding interest which, if proven, would oblige Mr. Tiabo to recognize their interest even though he now holds the registered title.

Do the Flowers have an interest in the Portion though Adverse Possession:

10. Actual occupation does not create rights. As Counsel for the Flowers submits: *"(a)ctual occupation then sets the stage for the second consideration as to what equitable right or interest flows out of the actual occupation of Clarence Flowers and Helen Buller at the time of the disposition of Parcel 318 to Englebert Tiabo on July 15th, 2016."*. He rightly contends that whatever interest the Flowers have must be *"capable of enduring through different ownership of land according to normal conceptions of title to real property"* – as adopted in ***National Provincial Bank v Ainsworth [1965] 2 All ER 472 at 481***.

11. The Flowers set the foundation of their claim on section 31(1)(f) of the RLA which specifically protects the rights which persons have acquired or are

acquiring by virtue of the Limitation Act or prescription as an overriding interest.

12. The Limitation Act by sections 12 and 22 respectively, limits the time in which actions to recover land must be brought (12 years generally or 30 years for crown land) and extinguishes title at the expiration of that period. Section 18 explains that time, in relation to the limitation, begins to run from the moment the land goes into adverse possession. Where the land ceases to be in adverse possession, time may begin to run afresh if it is taken again.

13. Counsel for Mr. Tiabo also referred to sections 138 and 139 of the RLA and contended that:

> *"while it is not denied that section 31 of the Registered Land Act makes provision for overriding interests which may not be noted on the Register such as adverse claim* (sic) *we submit that for such a claim to supersede that of the registered proprietor it must still satisfy the provisions of section 138 of the same Act."*

14. This Court does not agree entirely. Prescription, of which section 138 speaks, deals with acquiring ownership of land and applying to be registered as the proprietor:

> "*138.-(1) 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.*
> *(2) In the case of national land other than the foreshore, the period of such possession shall be 30 years. Prescription shall not lie with regard to the foreshore.*
> *(3) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar to be registered as proprietor thereof."*

15. As ***Megarry & Wade*** explains in ***The Law of Real Property (6th ed) at paragraph 21-002***, prescription and limitation must be distinguished. Prescription is a common law doctrine which has now been put into statute

form. It deals with a *"presumption of a grant from the owner of the land and title is derived through him."* The Registrar, once she is satisfied, is empowered by section 142(1)(b) of the RLA to rectify the register to reflect the right of ownership acquired. Limitation is different. There is no possibility of acquisition of registered title through operation of the Limitation Act. Title of the dispossessed owner is merely extinguished and any action by him to recover the land is barred. Title to registered land can only then be derived by the adverse possessor through registration on the basis of prescription. The very use of the word '*may'* in section 138 (3) of the RLA indicates that there is nothing mandatory about the application for registration. Your existing right to ownership is not lost simply because you fail to register.

16. Accordingly, the Flowers must meet the requirements of section 138 if they wish to be registered as proprietors through prescription under the RLA. However, even without registration as proprietors, any rights they have acquired whether through limitation or prescription may continue as an overriding interest and the registered proprietor is bound to recognize same.

17. By their claim, the Flowers have indicated quite clearly that they intend to make an application to be registered as proprietors if they are successful in securing a declaration of an overriding interest. This makes good sense. Since many of the ingredients for limitation and prescription are the same this court finds no difficulty in making a determination as to whether the requirements of section 138(1) have been met. To do this properly, section 139(6) must also be considered. It provides that:

"Possession shall be interrupted-
(a) by dispossession by a person claiming the land in opposition to the person in possession;
(b) by the institution of legal proceedings by the proprietor of the land to assert his right

thereto; or

(c) by any acknowledgement made by the person in possession of the land to any person claiming to be the proprietor thereof that such claim is admitted.

Were the Flowers in open peaceful and uninterrupted possession for a period of twelve years without the permission of the registered owners:

18. In order to make a determination the Court must consider the entire history of the Flowers' occupation. This is because possession of this nature is always a question of fact where one must not only establish the requisite factual possession, but the intention to possess as well.

19. In ***Powell v McFarlene (1977) 38 P & CR 252*** Slade J in discussing these ingredients explained that:

"If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi)."

20. He continued;

"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 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 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."

21. Lord Browne–Wilkinson in JA ***Pye (Oxford) Ltd v Graham [2002] UKHL 30, [2003] 1 AC 419*** further clarified that:

"(a) The factual possession required depends upon the land in question: …
It is not permissible to import into the definition a requirement that the paper owner must be inconvenienced or otherwise affected: Treloar v Nute, although it obviously helps the squatter evidentially if he can establish that the paper owner did suffer and yet did nothing to recover the land. Nor does it matter that both the squatter and the true owner believed (wrongly) that the squatter had always enjoyed legal title to the land: Pulleyn v Hell Aggregates (Themes Valley) Ltd. (1992) 65 P & CR 276.

(b) The requisite intention to possess is the intention to do so in the squatters' own name and to exclude the world at large (and the paper owner, as far as it is legally possible for the squatter so to do). It is not necessary that he intends this or all future circumstances, an intention to possess for time being is enough … A squatter's intention requires clear and affirmative evidence of both 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).

There are a few acts which by their very nature are so drastic as to point unquestionably, in the absence of evidence to the contrary, to an intention – on the part of the person doing them – to appropriate the land concerned. The enclosure of land by a newly constructed fence is another. As Cockburn CJ said in Seddon v Smith, "Enclosure is the strongest possible evidence of adverse possession', though he went on to add that it is not indispensable. The placing of a notice on land warning intruders to keep out, coupled with the actual enforcement of such notice, is another such act…"

22. Mr. Flowers says he built his home on the Property between 1991 and 1992. He was living there when he agreed to sell the front portion to Mr. Monsanto. He has never moved and his claim, like that of Ms Buller, continues to be ownership of the Portion. They maintain that their possession has always been inconsistent with the title of any of the true owners over the years. Their witnesses support them in all material particulars. But amazingly, neither Ms. Fuller or Mr. Tiabo acknowledge seeing him or Ms. Buller on the Property. when they purchased.

23. Ms. Fuller said she never walked the land prior to purchase she, therefore, is in no position to disclaim their presence. Mr. Tiabo himself says he only saw Mr. Buller there after he had purchased. I do not believe him. For many years he and his mother have jointly owned the property across the road from the Portion. He admitted under cross examination that his mother is acquainted with the Flowers. He also stated that before purchasing the Property he enquired of the vendor what the position was with the Flowers being there. How did he know they were there? Moreover, it defies logic that

he would not have made the same enquires of his mother as well; particularly because he says he discussed the purchase with her.

24. This court finds that the Flowers have been in factual possession and exercised physical control over the Portion by living and maintaining their household there every day since 1998. The court also finds that they had the necessary intention to possess – *"To exclude the world at large."* Even after a court order Mr. Flowers refused to move. Neither he nor Ms Butler entertained any conversations with any of the titled owners and he was adamant in his testimony that the Portion belonged to them. In these special circumstances, their factual possession on its own, for this length of time, to my mind, is quite sufficient to prove the requisite animus.

Was this possession interrupted:

25. As stated before, this adverse possession could be interrupted in one of three ways by dispossession, institution of legal proceedings by the proprietor or acknowledgement of another's proprietorship by the possessor. The first two are of no importance to us in this matter as there is no evidence whatsoever to support either since Mr Monsanto's success at trial in 1998.

26. The court order, in the Previous Matter, as the court finds it, determined the owner of the Property as Mr. Monsanto. So, on the date of that decision, time stopped running. If indeed Mr Monsanto was serious he would have taken some action to enforce that judgment for possession. The Appeal filed by Mr Flowers was not a stay. This means that the original order was still valid and enforceable. Rather, Mr. Monsanto remained inactive, allowed the Flowers to remain in possession and time began to run again. When he transferred the Property, the Flowers were still in occupation. The person to

whom he transferred it also remained inactive and it was then bought by Ms Fuller's Company. To my mind even Mr Flowers' appeal is indicative of his belief in his ownership.

27. Mr. Tiabo and his witness testified that they did not just let time pass. They asserted their claim to title. It must be made clear, here, that a demand for possession does not stop time running as demonstrated in **Mount Carmel Investments Ltd. v Peter Thurlow Ltd (1988) 1 WLR 1078**. Nor does the issuing of proceedings which are later dismissed – **Markfield Investments Ltd. v Evans (2001) 1 WLR 131**. However, any acknowledgment of another's title would stop time running as it is evidence that the squatter did not have the necessary intention for possession: **Paveledes v Ryebridge Properties Ltd (1989) 58 P & CR 459.** But, if the squatter remains after the acknowledgment, time begins to run again. Once the limitation period has expired any subsequent acknowledgment does not revive the owner's right of action.

28. Ms. Fuller explained that when her company owned the Property she rarely went there. It was bought solely as an investment to be resold. Her company gained title in 2000 and she said she only realized the Flowers were on the Property in 2005 because their home was located behind another structure on the Property and she had never seen it. That is a matter for her. She did not seek to dispossess the Flowers. Rather she issued letters for them to vacate and on one of her visits to the Property she met Ms. Buller briefly and left her number for Mr Flowers or his son to give her a call. She said she even received requests, from Mr. Buller's son, for more time for the Flowers to leave the Property. She herself offered to pay Mr. Buller $30,000 to leave which he initially accepted then changed his mind. There was no evidence

purportedly provided of when these negotiations took place or when he accepted. This glaring gap is significant because immediately following this the Flowers once again refused to move and have never moved. The Court had difficulty accepting this particular piece of testimony. This difficulty only increased when she exclaimed that if Mr. Flowers had only spoken to her she would have given him his property back.

29. Ms. Fuller also testified that at some point she obtained a Court Order but the Flowers were not evicted by the police because she gave Mr Flowers permission to remain on the premises until he could find somewhere to go. This is not supported by the facts either. Although she exhibits eviction notices, no Court Order whatsoever was presented. Under cross-examination she revealed that she was referring to the order made in the Previous Matter. In any event, even if the Flowers were there with her consent, when did this consent expire or why didn't she revoke it and have them removed pursuant to a Court Order before she sold the Property. In my view, her offering money for their removal tells a strikingly different tale. By her own admission she knew there existed no injunction or other court order which allowed them to stay in possession, offering to pay indicates that she recognized some right they may have had outside any of that. It also strengthens the Flowers' allegation of their consistent denial of the title of the registered owner.

30. In none of this has Ms. Fuller proven that the Flowers, themselves acknowledged her Company as the owner. She seems to have spoken to the son and one Hudson Carr about their moving but never directly to the Flowers who were the ones in actual occupation. And while she may have

assumed those persons to be the Flowers' agents there is no evidence provided by her to prove that they were. The occupiers should have been dealt with directly to ensure that their possession was in fact interrupted. They never were. For these reasons I do not believe that the Flowers ever acknowledged the true ownership of the Parcel by Ms Fuller's company. Time, therefore, continued to run uninterrupted.

31. Eventually, in 2016, Ms Fuller's Company, Belize National Building Society sold the Property to Mr Tiabo. The Flowers were still there and had by then been in adverse possession for more than twelve years. Any claim for recovery of possession was accordingly statute barred and Belize National Building Society's title had already been extinguished. The court therefore need not consider anything which Mr Tiabo did subsequent to becoming the registered proprietor as no title to the Portion existed to be transferred to him and no subsequent acknowledgement could revive ownership. However, for completion only it will be considered briefly.

32. It was Mr. Tiabo's own evidence that once he became proprietor, he contacted Mr. Flowers' daughter. She gave him certain assurances and requested time in which to move the Flowers off. He said he preferred to speak to the daughter because he knew her and felt more comfortable speaking to her. Significantly, he never once said he spoke to her because she was the Flowers' agent. She, apparently, stopped communicating with him after a while and the Flowers continued in possession. He said he considered the daughter unreliable.

33. So he visited the Property to discuss the matter with the Flowers themselves, but they were never there. He found that the yard was overgrown and unkept. Making no progress otherwise, he decided to bring this claim. By the date of institution of this claim, he was already statute barred. Again there is no evidence whatsoever provided by Mr. Tiabo that the Flowers themselves ever acknowledged his proprietorship or sought his consent to be on the premises. So time continued to run until this claim was instituted.

34. Counsel for Mr. Tiabo raised that the twelve years should be calculated only against Mr. Tiabo's proprietorship but there is no merit in this. In the Flowers's submissions counsel relied on ***Recreational Holdings (Jamaica) Ltd. v Carl Lazarus and the Registrar of Titles Appeal No. 127/2012 at paragraph 82*** where Justice Morrison JA rejected a similar submission by Queens Counsel:

"that a squatter in possession of registered land for the statutory period obtains an equitable interest only and that if this interest is not converted into a legal interest by way of the procedure set out in section 85 – 87 it will be defeated by a transfer of the property to a bona fide purchaser for value of the legal interest …"

"In the first place, section 30 of the LAA provides that, upon the expiry of the 12 year limitation period, the title of the owner "shall be extinguished." As Cozens-Hardy MR stated in ***In re Atkinson and Horsell's Contract*** *[1912] 2 Ch D 1, 9* ***(****discussing the impact of section 34 of the Real Property Limitation Act 183****3,*** *the statutory precursor to section 30 of the LAA),* ***"…*** *that explains how the person who has been in possession for more than the statutory period does get an absolute legal estate in the fee, and there is nobody who can challenge the presumption which his possession of the property gives*." *It is clear that this position is unaffected by the ROTA, since, although section 2 of that Act repeals all laws and practice inconsistent with its provisions, as has been seen, section 70 makes registered title expressly subject to rights acquired "under any statute* of *limitations".*

35. He continued at paragraph 8:

"And, although the point now under discussion was not directly in issue in the case, the illuminating judgment of Harris JA in ***Broadie & Broadie v Allen*** *(RMCA No 10/2008, judgment delivered 3 April 2009), a case concerning registered land, may also be relevant. That was a case in which the learned judge considered the meaning of sections*

*3 and 30 of the LAA in the light of the guidance given by the House of Lords in **JA Pye (Oxford) Ltd and another v Graham and another** and by the Privy Council in **Willis v Willis**. Having found that the appellants were in possession of the disputed land for the statutory limitation period with the requisite intention, Harris JA (with the concurrence of the other members of the court) concluded (at para. [38] that "[t]they had acquired a possessory title to the disputed land …[and the respondent's] title has been extinguished by the effluxion of time thus barring him from possession of the land."*

36. Now although Recreational Holdings found that registered land is subject only to rights acquired over land by limitation since first registration, that is peculiarly so by virtue of section 70 of Jamaica's Registration of Titles Act. The proviso of which reads:

> *"Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land **since** the same was brought under the operation of this Act under any statute of limitations …"* (emphasis mine).

37. Belize's legislation makes no such distinction. In fact, it is so wide that it speaks not only of *"rights acquired but rights being acquired."* This, to my mind, enables time to run prior to first registration and to continue thereafter as if there was no interruption. I am strengthened in this view because of section 26 which outlines the effects of registration with absolute title (which a first registration is). Ownership is absolute, free from all other interests and claims whatever but subject to registered encumbrances, conditions and restrictions and unregistered overriding interests as declared by section 31.

38. This Court finds that the Flowers were in adverse possession of the Parcel for a period exceeding 12 years. A declaration to this effect will accordingly be made. Their actual occupation of the Parcel coupled with this right created an overriding interest which is recognized and protected by the RLA. On the strength of the court's declaration the Flowers may now apply for registration as proprietors of the Portion.

39. Much to do was made about Mr. Flowers not having filed a caution against the Property. It seems no one was aware that the Flowers' mere open occupation could protect any interest they may have in the land and although it was open to them to take some action they did not have to do anything more. That is the nature of an overriding interest.

40. Further, the paper owners also failed to realize that once the Flowers continued in possession it did not matter what was done with the title. Its transfer from person to person made no difference whatsoever if their possession was not interrupted in accordance with the law. The acknowledgment of the registered owner by anyone (Police, City Council etc.) other than the adverse possessor themselves was of even less consequence. Their time began to run from the moment they went into adverse possession in 1998 and continued to run for a period in excess of twelve years uninterrupted.

Disposition:

Claim No. 197 of 2017 Engelbert Lincoln Tiabo v Clarence Flowers and Helen Buller

It is hereby ordered that:

1. The claim for possession of the back half portion of the property described as Registration Section Lake independence Block 45 Parcel 318 is dismissed as being statute barred.

Claim No. 722 of 2017 Clarence Flowers and Helen Buller v Engelbert Lincoln Tiabo

It is hereby declared that:

1. Clarence Flowers and Helen Buller have been in open peaceful and uninterrupted possession of the back half portion of the property described as Registration Section Lake Independence Block 45 Parcel 318 for a

continuous period of twelve years without the permission of any person lawfully entitled to possession.

2. Clarence Flowers and Helen Buller have an overriding interest in the back half portion of the property described as Registration Section Lake Independence Block 45 Parcel 318.
3. Engelbert Lincoln Tiabo's title to the back half portion of the property described as Registration Section Lake Independence Block 45 Parcel 318 has been extinguished.

It is hereby ordered:

1. Costs to Clarence Flowers and Helen Buller in the sum of $10,000 as agreed.

SONYA YOUNG
SUPREME COURT JUDGE