Michaelmas Term
[2014] UKPC 34
Privy Council Appeal No 0038 of 2011

JUDGMENT

Baldwin King and Hariette Richardson (Appellants) *v* Gershon Robertson (Respondent)

From the Eastern Caribbean Court of Appeal (St Vincent and the Grenadines)

Before

Lord Mance
Lord Kerr
Lord Sumption
Lord Reed
Lord Hughes

JUDGMENT DELIVERED BY LORD HUGHES ON

27 October 2014

Heard on 24 June 2014

Appellants
R Andrew Cummings QC
A Anique Cummings
(Instructed by Simons
Muirhead & Burton)

Respondent
Kevin Pettican QC
Emery Robertson
(Instructed by Harding
Mitchell Solicitors)

LORD HUGHES : (with whom Lord Mance, Lord Kerr, Lord Sumption and Lord Reed agree)

1. This appeal arises out of a disputed claim to land in Little London, Evesham in St Vincent and the Grenadines. In December 2004 the land was occupied as to part by the defendant Baldwin King and as to the remainder by the defendant Harriet Richardson. The claimant, Gershon Robertson ("Gershon") brought an action in that month claiming the land and asserting that neither Mr King nor Miss Richardson had any title to the parcels of it which they occupied. The dispute raises questions relating to a suggested entail and to adverse possession.

2. Gershon's claim to an interest in the whole of the land derives from the will of William Robertson ("William"), who died in either 1856 or 1857. Gershon's case is that by that will, William created an entail in the land which was still effective 150 or more years later and that he, as a great great great grandson of William, was one of a large number of people entitled to a share in it.

3. Mr King's claim to the land derives from his having purchased it in March 1996 from the executors of one Edward Albert Robertson ("Edward"). He had therefore not been in occupation himself for 12 years before Gershon's action was brought in 2004, and so his case depended on Edward or his executors having had good title to pass to him. Miss Richardson is a sub-purchaser from Mr King and so her case stands or falls with his.

4. The trial judge dismissed Gershon's claim, holding that by the time Mr King purchased the land his vendors, the estate of Edward, had acquired a good possessory title, which they had successfully passed to Mr King. The Court of Appeal reversed that decision on the grounds that under the Limitation Act 1988 there could be no adverse possession as between beneficiaries of the same trust, and hence neither Edward nor his executors had acquired a title which they could pass to Mr King. This is the appeal of Mr King and Miss Richardson from that appeal decision.

William's Will

5. The known history of the disputed land does not go back beyond William's will of 1856. The case has been conducted throughout on the basis that he died seised of the disputed land in fee simple. On its face, his will set out to leave a life interest in the land to his widow, Catherine, and thereafter to leave the land to

his four named children, and after them to five named grandchildren. He died in 1857, about a year after making the will. Its relevant parts read as follows:

> "I give and bequeath unto my beloved wife Catherine all the residue of my property both real and personal for her lifetime, and it is my will that after the death of my said wife Catherine the said residues….to devolve unto my four children (namely) John, William, Maryann and Elizabeth Robertson….
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> …it is also my wish that should it so happen that the above mentioned four children die and after their deaths the said property to devolve entirely unto my grandchildren, namely Robert Alexander Robertson, Caroline Medica, Charles Robert Sinclair, William Sinclair and Louise Ann Robertson all of them respectively are the progeny of my aforementioned children….
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> …It is also my earnest and anxious wish and desire that my said children as aforesaid shall only have possess and enjoy the said property and residues only for the term of their natural lives and after their deaths the said property and residues to devolve entirely unto my aforementioned grandchildren for their heirs and assigns forever in fee tail."

1857-1947

6. There was no direct evidence of the actions of any of William's four named children, nor of those of his five named grandchildren. Nor is it known which of the children of William was the parent of which of his named grandchildren. It is however clear that of those grandchildren one, named Robert Alexander, himself had a son, Edward Albert ("Edward"), born in 1881. Edward married Adriana and himself died in 1947, having left a will which figures large in the present dispute. That will refers to a brother of Edward's called Clement. Meanwhile, evidence given by Gershon, and supported by some birth certificates, suggested that Robert Alexander also had at least two other children, of whom one was Berthold, born in 1886. Berthold was shown to be Gershon's grandfather, Gershon having been born to Berthhold's son Adolphus in 1942. Thus, Edward and Berthold were brothers and both were the great grandsons of William.

Edward's will and thereafter

7. Edward made a will dated 1 September 1947, and seems to have died shortly afterwards. In his will he asserted that he was the freehold owner of the disputed land, and he purported to dispose of it as such. His will recited the assertion that the disputed land had devolved upon him as the heir at law of William. He went on to grant a life interest in it to his wife Adriana, and to provide that thereafter it should pass to four named grandchildren, whom he described as resident in Trinidad. There was provision for a gift over to three nephews (sons of his brother Clement) if the gift to his grandchildren failed.

8. Although he thus described himself as William's "heir at law", it is clear that Edward cannot have inherited the fee simple in the disputed land from William in that capacity. Even if he was the eldest son of the eldest son of the William's eldest son (which is not known), William's will did not purport to devise the disputed land to such an heir. It purported to leave the land to his grandchildren "for their heirs and assigns forever in fee tail". The cases of both sides to this appeal have been presented to all three courts on the basis that this created some form of co-ownership amongst the grandchildren, and thereafter amongst their successors. There are in fact considerable difficulties about the proposition that William's will created a valid entail. First it is difficult to envisage an entail in which there are multiple co-tenants for separate lives, each of whom is succeeded by all his or her issue. Second, the terms of the will, in speaking of a devise of the land to the grandchildren "for their heirs and assigns forever in fee tail" is arguably internally inconsistent. If there is a valid entail, the tenant for life for the time being cannot assign the land, but at best his life interest. Nevertheless, it has never been suggested that the will should be read as creating a conventional entail under which each first-born or nearest heir becomes successively the tenant for life, and even if such a suggestion were now to be raised, there is wholly inadequate evidence that Edward was such a person. Thus the case for Mr King and Miss Richardson depends upon the proposition that the title which they bought from Edward's executor was a possessory title rather than one deriving from William's will.

9. Edward's will, however, is clearly some evidence that as at 1947 he was asserting sole ownership of the disputed land. The judge found, having heard a good deal of evidence, that Edward had died in possession of the land, and he was clearly entitled so to find. He also heard evidence from the 97 year old executor of Edward's will that, although he had little personal knowledge of the land himself and scarcely visited it, he knew that Edward's widow, Adriana, had controlled it after Edward died, until her own death in 1969, and that after that another family member, one Berkeley Samuel, had been in charge of it. This control of the land had included, according to some of the evidence which the judge heard, being paid rent by those who were allowed to cultivate it. The only evidence to the

contrary was that of Gershon himself. He asserted that a man nicknamed 'Jericho' (otherwise 'Westfield John') had been another member of the Robertson family, the son of a sister of Edward (Tilly), who had cultivated the land in his capacity as one of the many successors of William who had some shared interest in it. But the judge rejected this evidence, on the basis of the evidence of Jonathan Samuel, who was close enough to 'Jericho' to regard him as a father, and did not believe he was a Robertson at all. The judge found, as he was clearly entitled to do on this evidence, that 'Jericho' worked on the land under the overall control of the estate of Edward, as did others.

10. The Court of Appeal did not disturb these findings of primary fact. Redhead JA, giving the lead judgment, correctly held at para 25 that the judge's conclusion as to the obtaining of a possessory title was one of law and not of fact, but on the primary facts it upheld the judge. Redhead JA summarised the position at paras 69 and 70 thus:

> "69. The evidence is that after Edward's death Berkley Samuel was in charge of the lands in question from 1947 to 1996, some 49 years. Edward Robertson would have been in possession for an indeterminate number of years.
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> 70. There is no evidence that anyone apart from the Robertsons were in possession of the lands in question before the purported sale to Baldwin King. It is therefore safe to assume that the Robertsons were always in possession of [the land]."

11. Thus on the judge's findings of primary fact, reached after hearing disputed oral evidence, and confirmed by the Court of Appeal, Edward had died in possession of the disputed land and regarding himself as sole owner of it, his widow had controlled it for twenty two years after he died, and his executor had continued to do so through Berkeley Samuel up to the time in 1996 when it was sold to Mr King. That is possession, adverse to any legitimate claim through William's will, for considerably more than 12 years.

12. On the basis of these facts, the reason why the Court of Appeal reversed the judge was that it held that under the Limitation Act 1988 ("the 1988 Act"), no one beneficiary could propound adverse possession against another beneficiary under the same trust. There is no doubt that that is the effect of that statute, and it is not surprising that the Court of Appeal applied it, because the case for the defendants Mr King and Miss Richardson was conducted on the assumption that this was the operative legislation. It alone was listed in the defendant's written argument when it identified the law of limitation. However, this Act was not in force at the material time, and the legislation which was in force was to the opposite effect.

13. The law of possessory title derives from the statutory limitation rule that no action can be brought to recover land after the expiration of twelve years from the date on which the right of action accrued either to the claimant or to a person through whom he claims. The 1988 Act, when passed, contained in Part I of its Schedule an exception from this rule for the case of a beneficiary under a trust who is in possession. Paragraph 9 provides:

> "Where any settled land or any land held on trust for sale is in possession of a person entitled to a beneficial interest in the land or in the proceeds of sale (not being a person solely or absolutely entitled to the land or the proceeds), no right of action to recover the land shall be treated for the purposes of this Act as accruing during that possession to any person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale."

14. This was, however, a reversal of the previous position. The preceding legislation was the Real Property Limitation Act 1851 (no 84 of 1851) ("the Act of 1851"), which statute was incorporated without alteration into successive revised editions of the entire St Vincent and the Grenadines statute book in 1912, 1926 and 1966. The Real Property Limitation Ordinance No 1926 rev ed C 86, cited to the Board, was the appellation attributed to the 1851 Act by one such edition of the statute book. This legislation contained no exception such as was later enacted in the 1988 Act, and it was settled law that one beneficiary could indeed set up a title based on adverse possession against another beneficiary. This represented one stage in what has proved to be some long-term oscillation in the law. Whilst the early common law of England had held that possession of one beneficiary was possession on behalf of others, and so not adverse, this had proved unsatisfactory and had been explicitly reversed by the English Real Property Limitation (No 1) Act 1833: see *Paradise Beach and Transportation Co Ltd v Price Robinson* [1968] AC 1072, *Bolling v Hobday* (1882) 32 WR 9 and many other cases. The St Vincent and the Grenadines legislation prior to 1988, viz the 1851 Act, exactly mirrored in its sections 4, 12 and 31 the language of the English Act of 1833 and for as long as it remained in force adverse possession was perfectly possible as between beneficiaries. Moreover, section 21 of the 1851 Act (again mirroring the English legislation) expressly provided that where adverse possession was established against a tenant for life holding under an entail, it was good also against any subsequent interest which the tenant for life might have barred – ie any against any subsequent tenant for life under the entail.

15. After a little over a hundred years, the 1833 Act rule was eventually abandoned in England by section 7(5) of the Limitation Act 1939, but the same change was not made in St Vincent and the Grenadines until the passing of the 1988 Act,

coupled with the repeal of the 1851 Act by the Statute Law Repeal Act 1989. The position was similar in other jurisdictions, including Trinidad and Tobago: see *Rosseau v Rosseau* [1960] 3 WIR 291. It follows that twelve years' adverse possession prior to the commencement of the 1988 Act established a possessory title for Edward and those claiming through him. On the judge's findings, there had been amply more than twelve years of such adverse possession before 1988. The effect of such adverse possession was explicitly described in section 31 of the 1851 Act, exactly mirroring the terms of section 34 of the English Act of 1833,:

> "At the determination of the period limited by this Act to any person for making an entry or distress or bringing an action or suit, the right and title of such person to the land…for the recovery whereof such entry…might have been made or brought within such period, shall be extinguished."

16. The Board was concerned to inquire whether the present appellants, Mr King and Miss Richardson, ought to be given leave to argue their appeal on the basis of the (correct) 1851 Act (or 1926 Ordinance) when it had been accepted or assumed below that the relevant statute was the 1988 Act, and it heard such argument only *de bene esse*. In particular it has considered whether, if the correct statute had been cited before the Court of Appeal, it might have been open to Gershon to attempt to re-open the judge's findings of fact. It was, however, clear that the conduct of the case for Gershon had not been in any manner adversely affected by the misapprehension as to the relevant statute. Mr Robertson, for Gershon, fairly accepted, as is apparent, that the factual enquiries before the judge into the exact status of relevant persons' acts in relation to the disputed land were precisely the same as they would have been if it had been realised that the 1851 Act (or 1926 Ordinance) was the governing legislation. Indeed, all the evidence relating to adverse possession was most fully developed on both sides without adverting to the fact that the statute assumed to be applicable made such evidence irrelevant. Accordingly, since the submission was one of pure law, as to which there could be no contrary argument, it is just to permit the argument to proceed on the basis of the correct legislation.

17. The consequence is that Edward, or if not him then those claiming under him, established a good possessory title to the disputed land comfortably before 1988, and were thus able to pass it to Mr King when the land was sold to him in 1996. Conversely, any claim which Gershon, or anyone through whom he claimed, may have had, had been extinguished.

18. That is sufficient to demonstrate that the appeal of Mr King and Miss Richardson must be allowed. Their title to the disputed land is good.

19. The Board ought not to leave the case without adverting to difficulties which may well have stood in the way of Gershon establishing any title to a share in the disputed land, if the points had been taken against him. He was always constrained to accept that he could claim no more than an undivided share in the land in common with everyone else descended from William, of whom there may well have been hundreds unknown. But even establishing that might not have been possible, although none of the possible obstacles were addressed. There may well have been great difficulty in construing William's will as establishing a valid or effective entail, for the reasons touched on in para 8 above. Quite apart from that, if, as seems probable, the common law rule against perpetuities is part of the law of St Vincent and the Grenadines, it seems distinctly possible that it stands in any event in the way of Gershon establishing any title deriving from William's will. The Board has not, however, investigated this, since it would be unfair to Gershon to do so at the stage of a second appeal when the point had never been adverted to before. Gershon had had no notice of it, and it was raised by the Board itself. Investigating it might, moreover, involve inquiry into whether, if William's will created no valid entail, Gershon might nevertheless be able to mount any claim to an interest in the land by succession; that would mean investigating the wills or intestacies, as the case may be, of all intervening generations between William and himself, as to which there has been no evidence.

20. For the reasons set out the Board will humbly advise Her Majesty that the appeal ought to be allowed. It invites written submissions on the appropriate form of order and upon any consequential matters, including costs.