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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 193 OF 1989

IN THE MATTER OF BLOCK 41A PARCEL 1

AND

IN THE MATTER OF THE LAND TITLE SETTLEMENT LAW

AND

IN THE MATTER OF THE SPECIAL LANDS DISPUTES TRIBUNAL

BETWEEN: THE ESTATES OF TIDYMAN MACALTRIC EBANKS AND HENRY EBANKS

AND: THE ESTATE OF KENNETH CHISHOLM (ESTATE OF EDWIN CHISHOLM)

For the estate of Kenneth Chisholm: Norman Hill Q.C and Mr. W. W. Connolly

For the Crown: Mr. Michael Marsden

As amicus curiae: Mr. Charles Adams.

JUDGMENT

The origin of this appeal by the Chisholm Estate lies in a land adjudication process carried out in 1976, and involves two families with a long historical connection with land on the North side of Grand Cayman.

In Cause No. 135 of 1979 the Grand Court remitted a finding of the adjudicator appointed under the Land Adjudication Law 1971 to the Special Tribunal constituted under the Land Title Settlement Law as an underdetermined appeal as defined in that Law. The adjudicator had awarded land situated in Block 41A Parcel 1 to "the Ebanks family". Most of that block was also included in a larger claim by the present Appellant to some 1000 acres of swamp known as Duckpond which extends

from dry land known as Forest Glen westward to the North Sound.

In its judgment the Tribunal described its function as being to decide whether ownership of Block 41A Parcel 1, or any part of it, should vest in the Ebanks estate or in the Chisholm estate. The Ebanks' claim succeeded in respect of a portion of Block 41A Parcel 1 amounting to approximately 267 acres. That area is shown edged yellow on the plan which will appear as the final page of this judgment. It is referred to as shaded yellow in the judgment of the Tribunal. The Tribunal also awarded an area of some 136 acres to the representatives of the estate of Kenneth Chisholm. That area is edged orange on the plan, and referred to as shaded orange by the Tribunal. Appurtenant to each of these awards was a right of way running westward from the area awarded to the North Sound.

It was the view of the tribunal that it followed from its awards that the remainder of Block 41A parcel 1, which is edged blue on the plan, vested in the Crown by virtue of S.7 of the Land Title Settlement Law. That is the land described in the grounds of appeal to which I shall shortly refer as being shaded in purple. It is that consequence of the decision which is the subject of this appeal. The grounds are as follows –

1. "The Tribunal erred in law when it awarded to the Crown that part of Block 41A Parcel 1 shaded in Purple on the Plan attached to the decision in the light of:

   (i) the prior award to the Appellant of Block 46A Parcel 1 in the earlier adjudication proceedings;

   (ii) the Tribunal award to the Appellant of that part of Block 41A Parcel 1 shaded in Orange on the Plan attached to the decision which included approximately 136 acres of dry land, cays and mangroves; and

   (iii) notwithstanding the unchallenged evidence that members of the Arch family and Chisholm family had cut timber from the swamp and had trailed the swamp to carry the timber to the North Sound for use in their ship building trade and notwithstanding the fact that no claim had been made to Block 41A Parcel 1, by the Crown.

2. The Tribunal misdirected itself in law on the

issue of the existence and applicability of custom relating to the possession of swamp land adjacent to dry land belonging to the Appellant."

Ground 1 calls for consideration of the factual findings of the Tribunal, and the evidence upon which it was based, in some detail. I am satisfied that the Tribunal did take account of the evidence given in the earlier adjudication proceedings, insofar as it related to questions of possession and user of the land in dispute, and custom. They sufficiently referred to that evidence in their judgment.

While the appellants now concede that there was evidence that members of the Ebanks family penetrated into the interior of what is now Block 41 Parcel 1 from time to time (and the award by the Tribunal based on that evidence is not the subject of this appeal) their position is that at best those incursions were concurrent with those of the Chisholm family and the Tribunal was arbitrary in the light of the evidence in dispossessing the Chisholms of all but an additional small portion (the orange portion) of the Parcel when the Chisholms had used the whole of it including the portion awarded to the Crown, and treated it as their own. If the Tribunal was compelled to go as far as it did, they ask why it declined to go further without clear evidence that the activities of the Chisholms stopped at that point.

The Tribunal referred in its judgment to the claim by the Chisholms to have taken timber from the dry land Cays for boat building and trade, planted and reaped coconuts on those Cays, allowed their cattle to roam free throughout the swamp and used it as a right of way to the North Sound; and that this wide ranging open and peaceful possession established their wider claim to the whole of Block 41A Parcel 1 because they did not have to establish actual use of the whole area.

At the hearing by the Tribunal, the depositions of seven witnesses were relied on by Mr. Hill. Among the other witnesses whom he called were Mr. Kay Slack, a Government Surveyor who surveyed both the dry land and the swamp in 1968 and Mr. Clarence Thompson who had also

surveyed the North Boundary of the swamp land in 1967. He testified that at that time Mr. Kenneth Chisholm had a trail right out to the North Sound.

Mr. Slack said that he had been employed by Mr. Kenneth Chisholm to do his survey. He also found and surveyed the trail on the North Boundary.

The deposition of Richard Heath, who was also a Government Surveyor was that he flew over the whole area in a helicopter on 17th November 1975 at a height of between 300 and 500 feet. The only evidence of possession of the land presently in dispute which he said he saw was a cut line in the South, leading out to sea.

As the judgment of the Tribunal acknowledges, the deposition of Ivan Bodden corroborated that of Kenneth Chisholm as to the taking of timber from and planting and reaping on the Cays and at the edge of the swamp, the taking of coconuts in it, the free-roaming grazing of their cattle throughout the swamp and the use of it to reach the North Sound. He also said that Chisholm claimed from Forest Glen to the sea from the time he came to knowledge. He was born in 1911 and lived with Edwin Chisholm, Kenneth's father until 1940.

The appellants do not dispute the analysis of the relevant law as to open and peaceful possession by the Tribunal. Having reviewed it, I am of the same opinion and adopt the record of the Tribunal in that regard. It reads as follows –

(i) "the mere use of land without any unequivocal act or acts that the person using it was asserting a right to the land for the statutory period cannot found a claim by him. There must be unequivocal evidence of the Animus Possedendi.
Convey v. Regan and Regan [1952] 1.R. 56
Victor and others v. West Bank Estates Limited [1960] W.I.R. 325 Buckinghamshire County Council v. Moran. The Times Law Report Feb. 16 1989.

(ii) there is no general principle that, to establish possession of an area of land, the claimant must show that he made physical use of the whole of it, provided

the boundaries are known and undisputed - Higgs and another v. Nassauvian Ltd [1975] A.C. 464 P.C.

(iii) in order to establish adverse possession the claimant must show "open and peaceful possession" to the exclusion of the public at large for the requisite period of time - section 16 (2) (a) of the Land Adjudication Law or against the Crown - in accordance with relevant provisions of The Limitation of Actions Law.

(iv) in determining whether a claimant has shown effective use and occupation with a view to "open and peaceful possession" regard must be had to the nature and condition of the Land and generally to the circumstances of the case.
- Ocean Estates Ltd. v. Pinder [1969] A.C. (P.C.) 19
- Williams Brothers Direct Supply Stores Ltd v. Raftery [1957] All. E.R. 593.
- Leigh v. Jack (1879) 5 Ex. D. 264.

(v) use concurrent with that of some other competing claimant is by itself insufficient
- Ocean Estates v. Pinder (supra)

Within those principles, the cases show that the courts have been faced with a diversity of facts within different social environments falling one way or another.

We are dealing here with an area of inhospitable swamp, a residue left after other claims had been determined, and after an executive decision by Government affecting ownership of part of it was made. It was not a cohesive and identifiable unit. While proof of use of the whole land is not necessary, unequivocal evidence of an assertion of a right to the whole is. The tribunal regarded the evidence as equivocal, havng heard and assessed the witnesses. I cannot conclude that they erred.

It has to be acknowledged that the basis on which they drew the line where they did in relation to the Chisholm entitlement is unclear. Indeed the Tribunal acknowledged that just how far open and peaceful possession into what is now Block 41A Parcel 1 by the Chisholms had been established was not clearly discernible. This was a point which was rightly and strongly relied on by the appellants.

In the end, however, the Tribunal had to take a view of the evidence as a whole, making their analysis, as I have done, by comparison with the view of other facts taken by other Courts. In my judgment they came to a reasonable and sustainable conclusion, erring, if at all, on the side of generosity to the Chisholms' claim, having been "just barely persuaded" that the necessary elements of open and peaceful possession over the area which they awarded had been established.

The second ground on which the Chisholm estate claims the whole of the swamp land is custom. That is the basis of Ground 2 of the appeal. A custom is a particular rule which has existed actually or presumptively from time immemorial and obtained the force of law in a particular locality in respect of some particular matter or matters. As well as having existed without interruption from time immemorial, such custom must be reasonable, and certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. All these attributes involve findings of facts in accordance with evidence. It is necessary therefore to look at the evidence which was before the Tribunal. The following is an extract from the record of the evidence of Mr. Black.

Question: "Would you say there has been a Custom in Cayman in respect of Swampland insofar as Surveying such Land is concerned?

Answer: Yes, there is supposed to be.

Question: Does this custom involve the allocation of Swamp between dry land owners?

Answer: As I have said the Custom holds sometimes but not always - sometimes as I understood the custom the Dry Land owner claims all the way to the sea.

If there was Dry Land on two ends of the Swamp then they would split the Swamp.

It is correct that the Swampland going to the sea falls within the boundaries of Forrest Glen Dry Land.

Question: Would the Cays go with the Swamp in that situation?

Answer: I cannot answer that Sir."

Ivan Bodden is recorded as having said this about custom in the area

with regard to ownership of swamp –

> "If I own one side of cliff and you on other side, we own half and half, customary. (If dry land on one side and swamp to the sea.) I would claim it all."

Kenneth Chisholm also gave evidence of the local custom, which is recorded as follows –

> "The Arch's and his father, John Chisholm, took up that body of land some part of the early 1050's by custom. Any time there was dry land on each side of cliff or swamp each took half. If there was only one party that owned that party went to salt water using custom."

William Chisholm, who was 65 at the time, is recorded as having said that he "Knew custom about shared boundary:

By contrast, Mr. Cyril Fenton, the Director of Lands and Survey, Registrar of Lands and Chief Surveyor of the Cayman Islands Government and Mr. Kearney Gomez, who was Deputy Registrar at the material time, both described a practice whereby Government would own, on the seaward side, half of any swamp stretching from the sea to a dry land area, and Mr. Cyril Ebanks, a man of 61 who had lived in North Side all his life and worked at Forest Glen for about 15 years, said that Chisholms claimed half the land to the sea and he never heard them claim the whole.

In Stanshal Eden (Estate of James M. Eden) v. The Crown, Cause No. 652 of 1976, Appeal No. 45 of 1976 Sir John Summerfield CJ considered the effect of custom in a dispute which also concerned swamp between dry land and the North Sound. Many of the observations of the learned Chief Justice, albeit obiter, are of great assistance in consequence and indeed reflect my own view. The time from which the custom must be presumed to have been in existence from time immemorial has long been fixed in England as the year 1189. That clearly would be inapplicable to the Cayman Islands but it matters little because the evidence on which such presumption must be based is evidence showing

existence as far back as living testimony can go. Any such evidence needs to be looked at critically and recent fiction passed off as custom disregarded, especially as it is in the nature of the development of society in the Cayman Islands over the last century or so that the oldest testimony in relation to local matters such as this is unlikely to come from people who are disinterested strangers to the issues.

There is another feature which this matter has in common with the Stanshal Eden case. In each case the boundaries of the land adjoining that claimed by virtue of custom were defined in a written instrument. While that does by any means exclude the applicability of custom to adjoining swamp or cliff land it does render the existence of this custom less inherently probable for the reasons set forth in the following passage from the judgment of the former Chief Justice which I adopt -

> "If there were any such custom one would have expected the parties to have been aware of the custom and reflected it in the instrument - taking in the half or whole as the case may be of the swamp or cliff in the boundaries recited in the instrument. Why leave ownership of the additional area outside the instrument to be determined by custom? Furthermore, having regard to the limited use and value of swamp and cliff land in the remote era "preceding the memory of man" it would have appeared more likely that swamp, for example, would normally have been used as common grazing ground and a common area for the hunting of birds and cutting timber without anyone wishing to exercise exclusive rights over it - unless, of course, exclusive dominion is apparent from a documentary title."

That passage as a whole bears upon the reasonableness of the custom claimed, and The Tribunal quite rightly also attached importance to the authoritative evidence to which I have referred which tended to show the existence of another custom in the same area of Grand Cayman involving ownership half- and- half as between the Crown as owners of the foreshore and the owner of the dry land at the other end of the swamp. Evidence of two such conflicting customs must throw doubt on the substance of either.

It remains to endorse the view of the Tribunal in which they were clearly mindful of the judgment in the Stanshal Eden case, as to the signifance of the proviso to section 16 (2) paragraph (a) of the Land Adjudication Law in relation to custom. The paragraph reads as follows -

> "A person is deemed to be in possession of land if he does not acknowledge the title of any other person to that land and by himself, his agent, tenant or servant actually uses or has used the land to the exclusion of the public:
> PROVIDED that where it is established (whether by local custom or otherwise) that any parcel of land includes an area of swamp or cliff land occupation of the other areas of such parcel shall be deemed to imply possession of the swamp or cliff land also."

The only part custom plays in that proviso is in determining whether a parcel includes an area of swamp or cliff. It says nothing about the determination by custom of ownership of swamp or cliff lying outside that parcel. The Tribunal was, in my judgment, quite right in concluding that section 16 (2) (a) does not give legislative recognition to the purported custom upon which the Chisholm claim relies, and that the evidence presented to it fell far short of establishing the existence of any such particular custom. Adopting again the words of Sir John Summerfield -

> "A firmer claim by the Crown could be made to the whole swamp where a proper title cannot be shown in any subject or where the proviso to section 16 (2) (a) of the Land Adjudication Law does not operate in the subjects favour."

In conclusion, and arising from that, the fact that no claim had actually been made by the Crown to the land awarded to it is of no significance. All land in the Cayman Islands was originally at common

law Crown Land and the ownership by the Crown of the part of the swamp not otherwise awarded is simply consequential. See Stanshal Eden v. The Crown (Supra) per Sir John Summerfield CJ at page 6. In that connection I should observe that the learned Chief Justice found, in the appeal under section 23 of the Land Adjudication Law 1979 (Cause 135/79) which led to the hearing before the Tribunal and the present appeal that a Land Registration Certificate which had been issued pursuant to subsections (1) and (2) of section 4 of the Registration (Land) Law did not give the estate of Tidyman and Henry Ebanks good title any part of the land in dispute.

For these reasons the appeal is dismissed and the judgment of the Tribunal affirmed.

The Crown has indicated that it makes no application for costs.

G.E. Harre 5th March, 1992

Judge