FOSTERS

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Article

Long Possession & Prescriptive Rights – August, 2018

Should you apply to the court *or* the Registrar of lands if you've occupied someone's land for thirty years and over and now wish to be registered as proprietor?

This seems like a straight forward question. Indeed in St. Lucia, many believed if A occupied [squatted] on B's land for at least 30 years and has been in open, undisturbed and peaceful possession of B's Land as owner, A could seek to oust B as the *registered owner* of the land and take steps to become registered as the proprietor or owner of B's land.

A would either:

1. Apply to the High Court of St. Lucia for a declaration of title [to B's property] **or**
2. Apply to the Registrar of Lands to be registered as proprietor [of B's property].

Regardless of the route taken, if A is successful, A would ultimately be registered as proprietor of B's Land and B would be removed from the land register as the proprietor. In St. Lucia this is formally known as acquisition of title by prescription.

Quite straightforward isn't it?

Well perhaps it was not as straight forward as we thought. The recent decision of the High Court of St. Lucia, **Ferdinand James v (1) Planviron (Caribbean Practice) Limited (2) Rodney Bay Marina Limited** (hereinafter called "the Ferdinand James case") has shifted the status quo as we know it into a slight frenzy.

In the Ferdinand James case, Mr. Ferdinand James applied to the High Court and obtained a declaration of title in his favour. That is, that he is the registered owner of all that parcel of land registered in the Land Registry of St. Lucia as Block 1255B Parcel No. 743 (hereinafter "Parcel No. 743"). At the time Planviron was registered as proprietor with absolute title to the said Parcel No. 743. Not surprisingly, Planviron subsequently filed an application to set aside the order of the High Court declaring title to Mr. James. Planviron argued that the proceedings were not instituted in accordance with the Land Registration Act of St. Lucia ("LRA") which had impliedly repealed the Supreme Court-Prescription by 30 years (Declaration of Title) Rules (hereinafter "The Rules").

It is important to note that when one applies to the court for a declaration of title, one must do so in accordance with The Rules which stipulates that the Applicant must file a Petition, Affidavits and other supporting documents at the High Court of St. Lucia. The said Petition is heard by a Judge of the High Court. On the other hand, a person who applies under the LRA applies to the Registrar of lands not for a declaration of title but to be registered as proprietor of the land. In other words, an application under The Rules is heard and determined by a Judge of the High Court while an Application under the LRA is determined by the Registrar of lands.

The question of whether The Rules which was promulgated in 1970 was impliedly repealed by the LRA which came into force in 1985 became the issue for determination in the Ferdinand James Case. If yes, then the declaration of title to Ferdinand James is null and void as The Rules for the said declaration as of 1985 was no longer in force. Smith J in considering both the LRA and The Rules held that The Rules was impliedly repealed by the LRA, granted Summary judgment to the Applicants Planviron and reversed the Order of the Learned Judge declaring title to Parcel No. 743 to Mr. James.

Smith J in his reasoning held that The Rules was repugnant with the LRA for the following reasons and was impliedly repealed:

i. A High Court Judge considers the application under The Rules while the Registrar of lands considers the application under the LRA.
ii. Under the rules, the Judge if satisfied that the applicant has obtained title by 30 years prescription may issue a declaration of title while the Registrar of lands may register the applicant as proprietor of the land claimed.
iii. The judge under The Rules is limited to issuing a declaration of title and has no power to rectify the land register while under the LRA the Registrar of Lands has the exclusive power to rectify the register where prescriptive title is proven. The court under the LRA can only rectify in instances of mistake or fraud.
iv. It is possible for the Registrar to assume her jurisdiction to determine an application for prescription on her own and to conclude differently than the High Court Judge and in essence reverse the judgment of the High Court Judge.

Commentary on the decision of the Learned Judge

At FOSTERS we have had much debate on the Judgment of the Learned Judge. I am of the view that the LRA could not have been impliedly repealed by The Rules.

For a legislation to be impliedly repealed the provisions of the later Act must be so inconsistent or repugnant to the provisions of the earlier Act that the two cannot stand together (See *Church and Overseers of West Ham v Fourth City Mutual Building Society [1892] 1 Q.B. 654*.). It should be noted that there is a presumption against implied repeal (see *R v Governor of Holloway Prison, Ex p Jennings [1983] 1 AC 624*).

Firstly, the LRA at section 94(1) under the heading *"Acquisition of land by prescription"* states:

> *"Any person who claims to have acquired the ownership of land by positive prescription* ***may*** *apply to the Registrar* ***in accordance with rules of court*** *for registration as proprietor thereof."*

It is clear from section 94 of the LRA that the applicant is not mandated to apply to the Registrar as the language of the said section is "may" instead of "shall" or "must". Therefore, the Applicant has a choice. More importantly, the said section 94 of the LRA refers to "the rules of court for registration as proprietor thereof". The only rules of the court regarding an application for prescription is The Rules. How could the LRA have impliedly repealed The Rules if the application under the LRA must be in accordance with The Rules?

Secondly, section 115 of the LRA headed *"Jurisdiction of courts"* provides among other things that civil suits and proceedings relating to ownership or possession of land or to any interest in land shall be tried by the

High Court. If The Rules was impliedly repealed, the High Court cannot try prescription disputes as there would be no procedure to bring claims for prescription before the High Court. Therefore, section 115 of the LRA would be useless. Why would the legislature insert this section if it intended to impliedly repeal The Rules?

Thirdly, I am not sure section 80 of the LRA was brought to the Learned Judge's attention. Once there is a judgment of the court and the applicant applies to the Registrar relying on the judgment, the Registrar **must** register the applicant as proprietor.

Section 80 of the LRA headed *"Transmission by compulsory acquisition or Judgment of court"* provides that where the crown or any person has become entitled to any land by law or by an Order, the Registrar **shall** on the application of any interested person supported by such evidence as he or she may require, register the crown or the person entitled as the proprietor. The Registrar has no discretion to refuse to register the applicant once the judgment is shown. The Learned Judge considered that only the Registrar can rectify and I am not sure it was brought to his attention that the Registrar only *rectifies* if the application for prescription was made to him or her under section 94 of the LRA. Section 97 (b) provides that the Registrar may *rectify* the register where any person has acquired an interest in land by prescription under Part 9. Prescription under part 9 deals exclusively with the application to the Registrar only. In other words, the Registrar has no power to rectify pursuant to a judgment of court. Therefore, when the court declares title to A, the Registrar is not called upon to "rectify" the land register but to do a "transmission" [i.e. to pass land from one person to the other] under section 80 of the LRA. The Registrar has no discretion in the latter.

For the above reasons, I do not think the LRA expressly or impliedly repealed The Rules. The Registrar of Lands has a purely administrative function while the High Court Judge resolves disputes. There may be instances where an applicant for title by prescription will not face any challenge to his application for e.g. where the registered proprietor is dead and there is no one that can challenge title. In such a case, the applicant instead of going to court and upon receiving the declaration of title then applies to the Registrar of Lands for transmission could simply directly apply to the Registrar who would advertise his application and then rectify the register upon being satisfied by the application.

Yes, the applicant would be able to choose between applying to the court or the Registrar, however, the Court has an original and supervisory jurisdiction as ultimately if there is any challenge to title the Registrar must refer the matter to the court for determination (see section 104 of the LRA). Yes, only the Registrar can rectify the land register [in the absence of fraud or mistake], however, where there is a declaration of title the Registrar is not called upon to "rectify" but to do a "transmission". Both give the same result by the way.

The fact that there are two ways to achieve a desired result does not mean The Rules are repugnant. Both can co-exist and operate together and has done so for several decades.

You may apply to either the Court or the Registrar of Lands to acquire title by prescription. If your application is unlikely to be challenged, then apply to the Registrar. If it is likely to be challenged then for good measure apply to the court since if you apply to the Registrar and there is an objection, the Registrar will in any event refer the matter to the High Court.

The Ferdinand James case was appealed and was heard by the Court of Appeal where judgment was reserved. Let's hope the Court of Appeal agrees with me!

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