IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2017/003
Guyana Civil Appeal No. 106 of 2006

BETWEEN

KOWSAL NARINE	**APPELLANT**
AND	
DEONARINE NATRAM	**1ST RESPONDENT**
ASHBOURNE LIPTON CHAN	**2ND RESPONDENT**
FOSTER GILFORD CHAN	**3RD RESPONDENT**

Before The Honourables **Mr. Justice Adrian Saunders**
Mr. Justice David Hayton
Mr. Justice Winston Anderson
Mme. Justice Maureen Rajnauth-Lee
Mr. Justice Denys Barrow

Appearances:

Mr. C.V Satram, Mr. R. Satram, Mr. Mahendra Satram and Mr. Visal Satram for the Appellant

Mr. Mohabir Anil Nandlall and Mr. Manoj Narayan for the 1st Respondent

JUDGMENT
of
The Honourable Justices Saunders, Hayton, Anderson, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mme. Justice Rajnauth-Lee
on the 10th day of May 2018

Introduction and Background

[1] This appeal raises an important issue in Guyanese land law: can time begin to run for the purpose of prescriptive title acquired under section 3 of the Title to Land (Prescription and Limitation) Act[1] ("the Act") in favour of a purchaser of land who is let into possession with the agreement of the vendor/landowner but who has not paid the full purchase price? Another important question has been argued in this matter: whether a litigant can obtain a declaration of title without approaching the Land Court and complying with the Rules of the High Court (Declaration of Title)[2] ("the Rules")?

[2] The Appellant, Kowsal Narine, ("Kowsal") and the First Respondent, Deonarine Natram, ("Deonarine") are brothers. Kowsal is the executor of the will of their father, Nateram also known as Natram ("the deceased"). Kowsal obtained probate of the deceased's will on 18th December 1992, No. 905 of 1992.

[3] In 1959, the deceased had entered into an agreement for sale to purchase all rights, title and interest in land[3] comprising 5.21 acres situated at Cultivation block numbered 62 in Section C, Golden Fleece, Essequibo ("the land") from the Second and Third Respondents, Ashbourne Chan and Foster Chan ("the Chans") at $360.00 per acre. According to the statement of claim, the deceased paid a deposit of $100.00 and was put into possession of the land by the Chans on 4th April 1959. The balance of the purchase price was to be paid off in six years with interest running at the rate of 10% per annum.

[4] Between August 1959 and August 1965, the deceased made five payments towards the purchase price totalling $1630.00:

(a) on 22nd August 1959 - $260.00
(b) on 13th January 1960 - $300.00
(c) on 4th August 1961 - $370.00
(d) on 18th April 1964 - $200.00; and
(e) on 31st August 1965 - $500.00.

[1] Cap. 60:02.
[2] Cap. 3:02.
[3] The trial judge noted in her judgment that the land was described in transport number 521 of 2002 – transport from the Chans to Deonarine.

[5] Accordingly, the deceased paid $1,730.00 in total to the Chans. Thereafter, no further payments were made, except for the sum of $950.00 made in 1981, by Kowsal, on the deceased's behalf. Kowsal received a receipt from the Chans for the sum paid and agreed to pay them the balance of $4000.94 within two years. In the statement of claim, Kowsal alleged that the deceased had exercised dominion over the land until his death to the exclusion of all others. Kowsal's evidence before the trial judge was that he had assisted the deceased with the cultivation of the land from 1973 until 1981, when the deceased gave him exclusive possession of the land, and that he paid to the deceased the sum of $75.00 per acre as rent until the deceased's death on 31st May 1991. His evidence was that he remained in exclusive possession of the land without disturbance from anyone until this action.

[6] On 7th April 1994, Mr. Poonai, the deceased's then Attorney, sent a letter (which was not exhibited at trial and does not form part of the record) to Ashbourne Chan. Mr Agard, Attorney for Ashbourne Chan, responded on 21st April 1994, and that letter forms part of the record. Mr Agard's letter revealed that he had written to the deceased in 1975 demanding payment of the balance of the purchase prices, and the deceased's Solicitors at the time replied in 1977 stating that the deceased remained ready and willing to complete the purchase.

[7] On 30th July 1989, the deceased signed an agreement by which he gifted the land to Deonarine. By the agreement, possession of the land was to be given to Deonarine and transport passed from the deceased to Deonarine. Deonarine, however, approached the Chans and they agreed to sell the land to him for $9950.00 on the said 30th July 1989. Thereafter, Deonarine instituted claim No. 4490/1989 against Kowsal and another brother, Narine Nateram (also called Narine Natram) in which he sought damages, an injunction restraining them from working the land and an order that they yield up possession of the land. Deonarine discontinued the claim in March 1990.

[8] By the terms of his will, dated 8th May 1990, the deceased devised the land to Kowsal. In his will, the deceased stated that 'the balance of the purchase price shall be paid by him and have transport passed to him'. As mentioned earlier, the deceased died on 31st May 1991.

[9] On 21st June 2002, Deonarine obtained Transport Number 521/2002 from the Chans and on 20th August 2002, he came onto the land, burnt six bags of seed paddy and

warned Kowsal not to enter the lands anymore. It was this action by Deonarine which prompted Kowsal to commence these proceedings in the High Court. Deonarine has conceded that he was never in possession of the land at any time.

[10] On 29th October 2003, Kowsal instituted these proceedings, personally and in his capacity as executor of the deceased's will, wherein he sought, *inter alia*, a declaration that the title of the owner of the land had been extinguished, and a declaration that the deceased's estate was entitled to a declaration of title having acquired prescriptive title under section 3 of the Act.

Judgment of George J

[11] The judgment of the High Court was delivered by the Honourable Madame Justice Roxanne George (as she then was) on 15th November 2006. The High Court gave judgment for Kowsal and granted the following declarations:

i. A declaration that the title of the Chans was extinguished pursuant to section 13 of the Act before Deonarine acquired title on 21st June 2002;
ii. A declaration that the deceased and his estate were always in possession of the land and had been in adverse possession since 1978;
iii. A declaration that Kowsal in his personal capacity has been in adverse possession in relation to Deonarine whose title became barred as at March 2002; and
iv. A declaration that the right to recovery of possession of the land by Deonarine had been barred by the operation of sections 5 and 13 of the Act.

Accordingly, the trial judge found that Kowsal had made out a case of trespass against Deonarine. She made final the interlocutory injunctions granted against Deonarine on the 12th April 2005, awarded special damages against Deonarine for the loss of the seed paddy in the sum of $18,000.00 and general damages for trespass to the land in the sum of $100,000.00. Costs in the sum of $50,000.00 were awarded.

[12] George J accepted the evidence of Kowsal on all material aspects. She found that the deceased had acquired prescriptive title from 1978 on the basis that he had become a tenant at will one year after the final payment made in 1965 in accordance with section 9(1) of the Act. She applied the reasoning of Crane JA in the case of *Ramlakhan v Farouk*[4]*:*

[4] [1974] 21 WIR 224 at p. 238.

> "… when anyone enters possession in pursuance of an agreement of sale, the right to legal possession as distinguished from possession in fact passes to him. He enters in adverse possession to his vendor, for he is a person in whose favour the period of limitation can run. And provided his possession, user or enjoyment is obtained neither by force, by underhand means nor by permission, he who enters under an agreement of sale is considered as holding adversely to the true owner, because he holds "as of right". He does not hold in recognition of the *title* of anyone else. His possession is said to be adverse in the sense that it is inconsistent with the *title* of the true owner for the reason that it is taken with the intention of his claiming *title*."

She found therefore that time had begun to run in the deceased's favour from 1966, one (1) year after the last payment, and that his possession crystallised into title twelve (12) years later, in 1978.

[13] The trial judge held that the deceased's failure to pay the full purchase price was not "a bar to his adverse possessory rights continuing to accrue to him". She again relied on *Ramlakhan v Farouk* and the judgment of Bollers CJ:

> "I would wish to make it clear, as pointed out by counsel for the petitioner (respondent), that there is no evidence whatsoever on the record which disclosed that the petitioner had not paid the full purchase price when she entered into possession, but even if that were not so and a balance of the purchase price remained unpaid, the authorities show that on entering into possession her possession was adverse to the legal owners …"

[14] George J rejected the argument that Kowsal's payment in 1981 was an acknowledgment of title as she found that there was no authority in writing given by the deceased to Kowsal as required by section 19 of the Act. She found further that even if Kowsal had had the written authority of the deceased to acknowledge the Chans' title, their title had already expired at the date of the alleged acknowledgement in 1981 pursuant to section 13 of the Act. There could therefore have been "no acknowledgement of title of any person to whom the right of action had accrued"[5].

[15] The trial judge also considered the effect of the deceased's gift of the land by agreement in writing to Deonarine. The trial judge found that the deceased who was in adverse possession since 1978, had the power to give, sell or devise the land as he pleased. She held that Deonarine's agreement with the Chans did not negate the devise in the

[5] See the trial judge's judgment at page 173 of 206 of the Record of Appeal at paragraph 3, applying *Ramlakhan v Farouk* at p. 231 and *Richardson v Lawrence* (1966) 10 WIR 234 at p. 239F.

deceased's will to Kowsal. It was not a deed for the purposes of the Deeds Registry Act[6] so as to permit it to be considered a binding document that evidenced a transfer of title to Deonarine. She also relied on the case of *Bhoolai v Girwar and Sadiq*[7] which held that an agreement to make a gift of immovable property would not vest title or ownership in the donee without transport being passed to the donee. The trial judge noted that in the instant case, the deceased took no steps to have transport passed to Deonarine. The will and probate to Kowsal were never challenged by Deonarine. Accordingly, she found that the devise in the will to Kowsal was valid. The trial judge further concluded that since the deceased's prescriptive rights accrued in 1978, the sale of the land by the Chans to Deonarine was ineffectual, their title having been extinguished by section 13 of the Act.

[16] The trial judge further found that Kowsal, in his own right, had acquired prescriptive title from 1990. Time began to run in his favour when Deonarine discontinued the action for possession which was filed in 1989. The trial judge further noted that Deonarine had never been in possession of the land and after discontinuing the action in 1990, never sought to retake possession of the land until the counterclaim was filed in 2003. At that time, Kowsal was already in adverse possession against him and under the provisions of the Act, his right to recovery against Kowsal was statute barred. George J found that Kowsal had satisfied the two elements necessary for possession. In her view, there was a sufficient degree of physical custody and control (factual possession) and an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess).

Judgment of the Court of Appeal

[17] Deonarine appealed the decision of the trial judge. The Court of Appeal comprising Acting Chancellor Singh, Justice of Appeal Roy and Acting Chief Justice Cummings-Edwards, rendered its decision on 22nd July 2016. The appeal was allowed, the order of the trial judge was set aside and Kowsal was ordered to vacate the land by 30th September 2016.

[18] The principal issue on appeal was whether a purchaser of land who was put into possession by his vendor entered in adverse possession. In the view of the Court of

[6] Cap. 5:01.
[7] [1943] LRBG 84.

Appeal, there was no doubt that the deceased was a purchaser under a contract of sale who was given exclusive possession pending completion of the contract. The court did not agree with the trial judge that the deceased was a tenant at will. The court declined to follow the older authorities which treated a purchaser in possession pending completion of the contract of sale as a tenant at will. The court agreed that "the trend of recent decisions is to regard the purchaser as a licencee (sic)"[8].

[19] The Court of Appeal was also critical of the trial judge's reliance on the reasoning in *Ramlakhan v Farouk*. In that case Bollers CJ and Crane JA expressed the views that in order for possession to be consensual within the meaning of section 3 of the Act, the agreement must be made for the purpose of user and enjoyment and not for the purpose of sale. In the view expressed in *Ramlakhan v Farouk,* a purchaser who entered into possession of land pursuant to an agreement of sale and purchase, title to which is to be conveyed at a subsequent date, did so under the right of ownership and his possession could not be considered as consensual. The Court of Appeal questioned whether this reasoning was sound[9]:

> "But what of the situation where in a contract for the sale of land, there is a term of agreement that the vendor will give possession to the purchaser? It seems to us that such a situation would be caught by section 3 for the reason that possession would have been taken by agreement given for that purpose. We note the words in section 3 "made or given for that purpose" relate not only to user and enjoyment" but also to "possession."

[20] The court held that the pleadings supported the contention that the deceased was "put into possession" by the Chans and that it was not unreasonable to conclude that he did so with their permission and therefore could not acquire prescriptive title. The court found support for their position in the South African case of *Malan v Nabygelegen Estates*[10]. The court also relied on the Sri Lankan case of *Lebbe Marikar v Sainu et al*[11] which held that a person who entered on to land under an agreement with the owner to sell the same to him could not acquire a prescriptive title since his possession was not adverse to the true owner. The court concluded that those authorities led to the

[8] See page 5 of the Court of Appeal judgment citing the Law of Real Property by Megarry and Wade, 6th edition, at page 793 and *Street v Mountford* (1985) AC 809 at pp. 826 – 827 per Lord Templeman.
[9] See page 8 of the Court of Appeal judgment.
[10] (1946) AD 562 at p. 574 per Watermeyer CJ "In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as lease or usufruct which recognises the owner of another". Cited with approval by Wit JCCJ in *Bisnauth v Shewprashad* (2009) 79 WIR 339 at [44].
[11] (1907) 10 NLR 339.

inevitable conclusion that the deceased's entry on the land was not a forcible one but rather the result of agreement with the Chans.[12] Accordingly, Kowsal could not acquire prescriptive title to the land through his father.

[21] The court also disagreed with the trial judge's finding that Kowsal had acquired prescriptive title in his own right. The evidence was not of the quality that should have satisfied the trial judge that he had the requisite intention to possess and his payment to the Chans in 1981 demonstrated that he recognized the Chans as the true owners.

[22] The court further found that Kowsal could not succeed in his claim due to non-compliance with the Rules. Citing *Mendonca v Bartica NDC*[13] and *Paul v Thomas*[14] the court was of the view that applicants seeking a declaration of title by prescription were not entitled to succeed in their applications where they failed to comply with the Rules. The appeal was therefore allowed and costs awarded to Deonarine agreed in the sum of $100,000.00.

Appeal to the Caribbean Court of Justice

[23] Kowsal appealed against the decision of the Court of Appeal to the Caribbean Court of Justice ("the Court") seeking the following relief:

(i) An order reversing the judgment of the Court of Appeal and restoring the judgment and orders of the trial judge;

(ii) An Order that the transport No.527 of 2002 held in the name of Deonarine should be declared to have passed no title to him; and

(iii) Costs in this Court and in the Court of Appeal.

Issues to be determined

[24] The key issue before the Court is whether time can run for the purpose of prescriptive rights in favour of a purchaser who enters into possession with the agreement of the vendor/landowner but who has not paid the full purchase price. In the circumstances of this case, therefore, did the deceased acquire prescriptive rights against the Chans? The Court must also consider whether Kowsal possessed the land in his own right and so acquired prescriptive title following the death of the deceased. The last issue

[12] See page 10 of the Court of Appeal Judgment.
[13] (HCT No. 28 of 2005).
[14] (HCT No. 4775 of 1995).

concerns the effect of non-compliance with the Rules. Could this claim be maintained if the Rules were not complied with?

The First Issue

Can time run for the purpose of prescriptive rights in favour of a purchaser who enters into possession with the agreement of the vendor but who has not paid the full purchase price?

[25] The Court must be satisfied that the deceased fulfilled the relevant requirements of sections 3 and 10(1) of the Act. The provisions of section 3 read as follows:

> "**3.** Title to land (including State land or Government land) or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for thirty years, if such possession, user or enjoyment is established to the satisfaction of the Court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose:
>
> Provided that except in the case of State land or Government land, such title may be acquired by sole and undisturbed possession, user or enjoyment for not less than twelve years, if the Court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has been extinguished ...
>
> **10.**--(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession") and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land."

[26] Mr Satram, counsel for Narine, also relied on two further provisions of the Act; sections 5 and 6(1) which read as follows:

> "5. No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
>
> 6. (1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued on the present date of the dispossession or discontinuance."

[27] As mentioned earlier, the trial judge found that the deceased was a tenant at will and that time ran against the Chans one year after the date of the last payment in 1965. The Court of Appeal however did not agree with the trial judge and found that the deceased was a licensee in whose favour time could not run.

[28] It was common ground that an agreement was entered into between the deceased and the Chans, the deceased paid a deposit and was put into possession of the land by the Chans on 4th April 1959. In addition, Mr Satram conceded before us that the deceased entered into possession by the agreement of the Chans and not under the agreement for sale. He submitted that having paid the deposit and having been put into possession of the land, the deceased was either a licensee, a tenant at will or an adverse possessor. He contended that the deceased could not be a licensee or a tenant at will but was an adverse possessor because he entered into possession of the land in his own right. Mr Satram advanced an interesting argument that unlike the purchaser under English law who is put into possession by the vendor pending payment of the full purchase price and who acquires an equitable interest, the purchaser in Guyana under Roman-Dutch law in such a situation enters into possession of the land in his own right. The purchaser in Guyana therefore acquired no equitable interest in the land[15] and the vendor retained no lien over the land for the balance of the purchase price. Further, he pointed out that under English law, the position changed once the full purchase price was paid and the vendor no longer had a lien on the land but became a bare trustee of the legal estate[16]. Under English law, at that stage, time began to run against the vendor[17]. These principles, he argued, were not applicable to Roman-Dutch law.

[29] Mr Satram placed heavy reliance on the well-known Guyanese case of *Ramlakhan v Farouk*. While he conceded that conceptually *Ramlakhan* was difficult to understand, he urged the Court to consider that the Court of Appeal in *Ramlakhan* sought to reconcile the obvious tensions between the English and Roman-Dutch land law systems in Guyana and to reinforce principles which had been consistently applied in Guyana for over 80 years[18]. In his view, English cases were not instructive on this point because, he argued, in that jurisdiction full payment of the purchase price was required for time

[15] See this Court's judgment in *Ramdass v Jairam* (2008) 72 WIR 270 where the Court concluded that equitable interests in immovable property were not recognized and could not be acquired in Guyana.
[16] *Alphat Ali Mohammed v Guerra and Another* (2002) 67 WIR 211.
[17] *Bridges v Mees* [1957] Ch 475.
[18] Starting with *Gondchi v Hurrill* (1937) LRBG 509.

to begin to run against the vendor, whereas in Guyana, the full payment of the purchase price had no effect on the acquisition of possessory rights by the vendor.

[30] Briefly, the facts of *Ramlakhan* are as follows. In 1952, Farouk entered into a written agreement with two joint owners for the purchase of a certain plantation. Upon the execution of the agreement, Farouk and her husband went into occupation of the plantation and were in continuous occupation for twelve years. Farouk obtained transport from one of the owners, and upon his death, his successor purported to sell his portion of the plantation to Ramlakhan. Prior to the sale to Ramlakhan, Farouk's husband entered into an agreement with the successor to purchase that which his wife had agreed to purchase in 1952. Farouk then applied for prescriptive title of the property whereupon Ramlakhan entered opposition.

[31] The Court of Appeal, comprising Bollers CJ, Crane JA and Cummings JA, held that when Farouk went into possession in 1952 pursuant to the agreement of purchase, her possession was adverse to the legal owner and she was in possession *nec vi, nec clam, nec precario*. She was in possession for the statutory period and acquired title by prescription. At page 229, Bollers CJ expressed the view (on which Mr Satram relied) that whether or not the full purchase price was paid was immaterial to the court's finding:

> "I would wish to make it clear, as pointed out by counsel for the petitioner (respondent), that there is no evidence whatsoever on the record which disclosed that the petitioner had not paid the full purchase price when she entered into possession, but even if that were not so and a balance of the purchase price remained unpaid, the authorities show that on entering into possession her possession was adverse to the legal owners who, in 1956 after the declaration of title, were Dixie Mortimer and Hannah de Camp. The judgment of Harman J. in *Bridges v Mees* [1957] 2 All ER 577, when scrutinized, discloses that when the claimant entered into possession under the contract to purchase, he did so not **as of right under the contract, but by the permission of the vendor as a concession,** the latter retaining a lien on the property for the purchase money. It was for this reason that that learned judge held that there was no doubt that when the possession was originally taken it could be referred to the vendor's leave and licence, but the position was altered when the final instalment was paid and the vendor's lien disappeared." (emphasis mine)

[32] *Ramlakhan* was endorsed by this Court in the well-known case of *Toolsie Persaud Limited v Andrew James Investments Limited and Others*[19] but only to the extent that

[19] (2008) 72 WIR 292 at [47].

the Court agreed that the purchaser could be said to have taken possession of the vendors' land as of right, when the purchaser had paid the vendors the full purchase price for their possessory rights. The Court noted further that in *Ramlakhan* the purchaser was able to rely upon twelve years undisturbed possession in her own right.

[33] The Court in *Toolsie Persaud* also endorsed the remarks of Lord Browne-Wilkinson in the leading case of *J A Pye (Oxford) Limited and another v Graham and another*[20]:

> "Much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Act. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner……"

[34] The Court in *Toolsie Persaud* also recognized that the Latin phrase *nec vi, nec clam, nec precario* had no place in Guyanese land law on the basis that section 3 of the Act focused upon "sole and undisturbed possession" that was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose."[21] The Court went on to observe, however, that it remained true that the prescriptive possession must be openly enjoyed so that the true landowner could know that he must take action to recover his land; that the prescriptive possession must not be pursuant to the landowner's permission; and that it could be based upon a forcible taking and retention of land, so that the *"nec vi"* portion of the phrase has become an anachronism.[22]

[35] Further, this Court in the case of *Bisnauth v Shewprashad*[23] considered the question whether time ran in favour of Lackram who sought ownership by prescription of four lots of land in Berbice, Guyana. Lackram had been allowed into possession in 1957 by his mother, Janki, the owner of part of one lot and had constructed a wooden house which he occupied with his family. Around 1960, Lackram entered into possession of three further lots with his mother's permission and sought ownership of the four lots by prescription in 1998. In the judgment delivered by Pollard JCCJ and Bernard JCCJ this Court was of the view that even if Lackram had been in exclusive, continuous possession of the four lots for a period in excess of 12 years, such possession was referable to an implied licence and to the continued consent of Janki in the absence of

[20] Ibid at [27]; [2003] 1 AC 419 at [36].
[21] Ibid at [30].
[22] Ibid at [30].
[23] (2009) 79 WIR 339.

evidence to the contrary. Time could therefore not run in his favour for the purpose of prescriptive rights.

[36] In a scholarly concurring judgment, Wit JCCJ considered whether the *nec vi, nec clam, nec precario* mantra, not having survived in any of the Roman-Dutch based mixed legal systems in legislative form, might have survived in some other way. As to "nec precario", he observed that the original *precarium* was a prayer on the part of the suppliant to use the owner's property until the permission, if given, was revoked. Such a precarious consent or revocable permission would in England law be called a licence. In Roman-Dutch law as it originally developed in South Africa, a broader concept of nec precario was used: the right must have been exercised adversely and as of right, without permission and without consent in the wider sense.

[37] Wit JCCJ also traced the abolition of tenancies at will in England. He noted that the English Real Property Limitation Act 1833 (section 7) rather arbitrarily introduced the fiction that in the case of a tenant at will, the owner's consent was deemed to have ceased one year after the tenant had taken possession. Wit JCCJ observed that this provision became rather problematic in England from the 1950s prompted by the fact that the line between a licence and a tenancy at will had become rather thin as it was gradually accepted that licensees could be given exclusive possession of land and that regular payments by the licensee to the licensor would not as such always be at odds with characterizing the relationship as a licence. This therefore created a favourable position only for the tenant at will and not for the licensee, making it rather easy for the tenant at will to become the owner of land, but not the licensee. By section 3(1) of the English Limitation Amendment Act 1980 the provision as to tenancies at will was abolished so that tenants at will are now in the same position as licensees were before that Act came into being. Wit JCCJ noted however that the provision as to tenancies at will had never been a part of Roman-Dutch land law. He therefore concluded:

> "In Guyana, however, the provision, which was alien to the existing system of land law from the very start, is still part of the law. Seen against the light of the developments in the land law, especially with regard to the fading borders between licences and tenancies at will, there is at least a presumption that, in the case of doubt, the relationship with the land owner and the person occupying the land with his permission should, as a rule, be categorized as a licence. This is the more so where the parties are closely related and the relationship appears to be a family arrangement as in the case before us."

[38] The court in *Ramlakhan* relied on the 1937 judgment of *Gondchi v Hurrill*[24]. In that case, from 1918 to 1921, the defendant occupied the disputed piece of land by leave of Roopchand, his grandfather. In 1921, Roopchand agreed to sell the land to the defendant and he entered into possession of the land in pursuance of such agreement, paying then a portion of the purchase money and completing payment in 1925. Verity J found that the defendant had been in adverse possession since 1921. At page 510, the judge observed that:

> "It appears, therefore, that the defendant had been in occupation of the land in question since 1918 and that this occupation has been adverse to that of the legal owners since 1921 when he entered into possession, **not by leave of Roopchand**, but in furtherance of the agreement for sale then entered into. He has been in possession adverse to that of the legal owners therefore for a period of fifteen or sixteen years prior to the issue of the writ in this case." (emphasis mine)

[39] There is no dispute that the deceased entered into possession with the agreement of the Chans. In fact, as mentioned earlier, that was conceded before us. What was created therefore was a gratuitous licence independent of the agreement to purchase from the Chans to the deceased. Thus, in 1959 when the deceased was put into possession, he did so as a licensee of the Chans. Time could not run in his favour for the purpose of prescriptive rights. In addition, the paying of the deposit did not entitle the deceased to enter into possession in his own right. Time could only begin to run in favour of the deceased when either the license was terminated by the Chans or when the purchase price was paid in full. We therefore agree with the Court of Appeal that the trial judge was wrong to find that the deceased was a tenant at will and entitled to the protection of section 9(1) of the Act. In addition, we are of the view that Mr Satram's reliance on sections 5 and 6 of the Act was also misplaced. Once entry onto the land was by leave, agreement or consent of the landowner, there could be no dispossession of the landowner. We therefore agree with the decision of the Court of Appeal that the deceased's possession of the land did not satisfy section 3 of the Act.

[40] As to the case of *Gondchi v Hurrill*[25] and the passage cited at [38] above, we understand the first proposition of Verity J to be that time cannot run in favour of a purchaser who is put into possession with the leave of the vendor/landowner. We agree. His second proposition, however, suggests that where the purchaser enters into possession in

[24] Supra (n20).
[25] Supra (n20).

furtherance of an agreement for sale, his possession is as of right and adverse to the vendor/landowner. In our view, this may not be necessarily so. Where a purchaser who has paid the full purchase price enters into possession pursuant to an agreement for sale, he enters into possession as of right and time begins to run in his favour on his entry. Where however he enters into possession under an agreement for sale, but has not paid the full purchase price, the question of whether that purchaser's possession is as of right, is in our view, a matter of construction of the agreement for sale having regard to the circumstances of each case. We are thus of the view that *Ramlakhan v Farouk* was incorrectly decided to the extent that it has determined that time automatically and necessarily runs in favour of a purchaser who enters into possession under an agreement for sale, but who has not paid the full purchase price.

[41] Since on the facts of this case, time never ran in favour of the deceased, we do not consider it necessary to decide whether (a) the payment of $950.00 made by Kowsal in 1981 towards the purchase price[26] (b) Mr Agard's letter of 21st April 1994 recording the reply of the deceased's Solicitors in 1977[27] and (c) the devise in the deceased's will in 1990 which recognized that a balance of the purchase price was to be paid by Kowsal[28], either amounted to an acknowledgement of title under section 19 of the Act or was evidence that the deceased never intended to possess the land adversely to the title holders.

[42] As to the written agreement in 1989 whereby the deceased sought to gift the land to Deonarine[29] we need only say that such agreement could not pass any rights, interest or title to Deonarine, since the deceased had not at that time acquired any rights, interest or title in the land which he could have lawfully transferred to Deonarine.

The Second Issue

Did Kowsal possess the land in his own right and so acquire prescriptive title following the death of the deceased?

[43] In *Toolsie Persaud*[30] this Court held that to succeed in a claim to land by adverse possession, a claimant needs to show that for the requisite period he (and any necessary predecessor) had:

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[26] See [5] of this judgment.
[27] See [6] of this judgment.
[28] See [8] of this judgment.
[29] See [7] of this judgment.
[30] Supra (n21) at [28].

(i) a sufficient degree of physical custody and control of the claimed land in the light of the land's circumstances ("factual possession"), and

(ii) an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land ("intention to possess").

[44] The Court went on at [29] to state that:

> "This latter requirement serves to make it clear that the factual possessor is not merely the landowner's licensee or tenant or trustee or co-owner but is independently in possession, so that it is obvious to any dispossessed true owner (or any true owner who has discontinued possession of his land) that he needs to assert his ownership rights in good time if he is not to lose them. Intention to possess thus extends to a person intending to make full use of the land in the way in which an owner would, whether he knows he is not the owner or mistakenly believes himself to be the owner …"

[45] Kowsal in his statement of claim at paragraphs 6 and 7 pleaded:

> "6. The deceased rented the Plaintiff the land in 1981, at a rental of $75.00 … per acre. The deceased has been exercising dominion and control over the land to the exclusion of all others up to the time of his death and has enjoyed exclusive possession of same and thereafter the Plaintiff exercised dominion and control over same.
>
> 7. Nobody interfered with the Plaintiff's possession of the land from 1981, save and except that in 1990, the first named Defendant brought action No. 4490 of 1989, against the Plaintiff and his brother for trespass."

[46] In his evidence in chief Kowsal testified that between 1973 and 1981 he assisted the deceased in working the land. In 1981, the deceased gave him exclusive possession of the land and that he had been on the land since 1981 without disturbance from anyone. He testified that he never paid rent to the Chans or to Deonarine but that he paid rent of $75 per acre to the deceased from 1981 until his death. He contended that he had never been put out of possession of the land. In August 2002, Deonarine came onto the land and burnt six bags of seed paddy and warned Kowsal not to enter the land anymore. Kowsal never yielded up possession of the land. This incident caused him to make enquiries into the title to the land and he obtained a copy of the Transport in Deonarine's name. It was then that he commenced these proceedings. Under cross examination, he testified that he planted on average two crops a year and would reap approximately 120 bags per crop. He contended that he was entitled to the land. Narine Nateram, Kowsal's

brother, supported his evidence and testified that Kowsal planted the land from 1976/1977 onwards.

[47] It is not disputed that Kowsal continued in possession of the land after his father died on 31st May 1991. What is clear is that the nature of the possession changed on the deceased's death when the licence was automatically terminated. It must have been obvious to the Chans after the death of the deceased that Kowsal was now in possession in his own right and that to in order to stop time running in his favour, they ought to commence legal proceedings to recover the land. This they failed to do. Even if the Chans were unaware of the death of the deceased, the law would regard them as having discontinued or abandoned possession with the result that time would begin to run in Kowsal's favour.

[48] It is also common ground that Deonarine has never been in possession of the land. Indeed, in his evidence in chief Deonarine admitted that Kowsal was planting and cultivating the land from 1989 to the time that he gave evidence before the trial judge. In 1989, he instituted High Court Proceedings No. 4490 claiming against Kowsal and Narine Nateram damages, an injunction restraining them from working the land and an order that they yield up possession of the land. Deonarine filed a notice of discontinuance of that claim in March 1990. This Court in *Toolsie Persaud* explained that if the dispossessed landowner is to stop time running in favour of the person in undisturbed possession, he must bring proceedings against that person in possession or he must physically re-enter the land and take possession thereof.[31] Proceedings for the recovery of land that were not pursued, however, but were dismissed for want of prosecution or were discontinued, were no more relevant than a mere demand for possession which was not pursued[32]. Accordingly, Deonarine ought to have commenced proceedings for the recovery of land within twelve years after Kowsal entered into possession on the death of the deceased in May 1991. In addition, the earlier 1989 proceedings commenced by Deonarine, but discontinued did not stop time running in favour of Kowsal.

[49] When Kowsal commenced these proceedings on 27th August 2002, he had not yet been in possession for twelve years. When, however, he filed his statement of claim on 29th

[31] Ibid at [43] and applied by this Court in *Ramlagan v Singh (No. 2)* (2015) 86 WIR 332 at [33].
[32] Ibid at [11] relying on the observations of Simon Brown LJ in *Markfield Investments v Evans* [2001] 1 WLR 1321 at [20].

October 2003, he had acquired the statutory twelve-year period and the title of any paper owner had been extinguished. Deonarine filed his counterclaim on 13th November 2003. By that time, Kowsal had been in possession, subsequent to the deceased's death on 31st May 1991, for more than twelve years. The counterclaim was ineffective to stop time running in Kowsal's favour.[33] Further, it is noteworthy, as pointed out by Mr Satram, that in the counterclaim Deonarine never sought to recover possession of the land but merely pleaded that by virtue of Kowsal's wrongful and unlawful occupation of the land from April 1993 and continuing that he had suffered loss and damage. He therefore claimed for loss and damage in excess of $1,000,000.00 for the wrongful and unlawful occupation and trespass of the land and for loss of profit of $75,000.00 per crop.

[50] A further question needs to be answered, and that is, whether the passing of Transport No. 521/2002 on 21st June 2002 from the Chans to Deonarine stopped time running in favour of Kowsal. This Court in *Ramlagan v Singh No. 2*[34] fully considered this issue and concluded that the passing of transport, though vesting full and absolute title in the title holder[35], did not have the effect of overriding any title or rights acquired under the Act. The Court endorsed the judgment of Savary J in the case of *Abdool Rohoman Khan v Boodhan Maraj*[36]. As to the argument that a person who had acquired or who had begun to acquire rights under the limitation sections of the Civil Law Ordinance, 1916, would be deprived of them by the later Deeds Registry Ordinance, 1919, Savary J observed that no clear words had been found in the Deeds Registry Ordinance to lead to the conclusion that pre-existing rights were swept away. Savary J also pointed out that Dalton's work on the Civil Law of British Guiana, published in 1921, did not call attention to any such effect. We are therefore of the view that the passing of transport from the Chans to Deonarine did not stop time running in favour of Kowsal nor did it override rights that were acquired by Kowsal.

[51] We are therefore satisfied on the evidence which was before the trial judge that Kowsal was in sole and undisturbed possession of the land for over twelve years and accordingly, in the words of the statute, the right of every other person to recover the

[33] Somewhat of a similar situation arose in the Privy Council appeal of *Ramnarace v Lutchman* [2001] 1 WLR 1651 at [5].
[34] Supra (n31) at [29].
[35] Under the Deeds Registry Act Cap. 5:01.
[36] (1930) LRBG 9.

land or interest had expired or been barred and the title of every such person thereto had been extinguished.[37]

The Third Issue

Whether a litigant can obtain a declaration of title without approaching the Land Court and complying with the Rules?

[52] Mr. Nandlal submitted that there was total non-compliance with the Rules on the part of Kowsal and that he had failed to comply with Rules 3, 4 and 5 of the Rules. Rule 3 mandates that an application to the court for a declaration of title under section 4(1) of the Act shall be made by petition which shall contain a statement of all the material facts on which it is based, and shall describe with particularity the property to which it relates, setting out the boundaries of the property. That rule also requires a plan to be annexed to the petition (unless dispensed with by the court) and an affidavit or affidavits verifying the facts stated in support of the petition. Rule 4 requires the publishing of the notice in the Gazette and a daily newspaper circulating in the county in which the land is situated. Rule 5 governs the service of the petition on each owner and occupier of lands adjacent to the subject land.

[53] Mr. Nandlal conceded that Kowsal's failure to approach the Land Court and to comply with the Rules was not fatal because the High Court had jurisdiction to hear the matter. He urged this Court, however, to find as a matter of policy that litigants should not be able to choose the court they can go to when Parliament has created a Land Court specifically and exclusively designed to discharge certain duties in relation to matters of prescription. He argued that the application did not adhere to the statutory requirements and that it was not clear whether all the interested parties were before the court.

[54] In response, Mr. Satram relied on section 4(1)(a) of the Act. He also relied on Rule 12 of the Rules which states that nothing in the Rules shall affect the rights of any person to institute a suit for a declaration of title to property by prescription. He further argued that the objection to non-compliance with the Rules should have been raised before the trial judge, so that it could have been rectified at that stage. Failure to raise it before

[37] Supra (n1), section 3.

the trial judge, he submitted, resulted in a waiver and therefore relief should not be refused because of non-compliance.

[55] Mr. Satram also submitted that no party could show that they were prejudiced by the procedural missteps. The boundaries of the land were clear and reflected the boundaries recorded in the Transport to Deonarine, and the former and current paper title holders were before the court. In his view, therefore, the Court has the jurisdiction to grant declarations *in personam* in such circumstances.

[56] In *Toolsie Persaud* this Court at [42] observed that section 4(1)(a) of the Act "provides for the Court to make a declaration of title in *any* case brought by or against the owner, provided that all the interested parties are before the Court". The Court therefore concluded that there was nothing to prevent the first and second respondents in that case from claiming declarations as to title (with concomitant possessory rights) as part of the relief obtainable in the constitutional motions they had brought against the State, the registered owner, if only they had joined the appellant as a party. At [66] of that judgment, this Court observed:

> "It is, of course, important to keep to the Rules of Court as much as possible for such Rules are deliberately designed to ensure that the courts deal with cases fairly and expeditiously so as to achieve a just result which is the "overriding objective" expressly recognized by Rule 1.3 of the CCJ (Appellate Jurisdiction) Rules. To this end, the Rules may provide express dispensing powers for particular circumstances (eg Rule 5(2) of the Rules of the High Court (Declaration of Title) which empowers a court to dispense with service satisfying Rule 5(1)) or, as in the case of Rule 54 of the Rules of the High Court, provide a general discretionary power to deal with non-compliance with the Rules in such manner and upon such terms as the Court shall think fit eg by ordering payment of costs by a party in breach. In deciding whether a breach is egregious enough to warrant striking out a party's case or sufficiently remediable for matters to be allowed to proceed, it is vital for a court to focus upon the purpose of the broken Rule and to consider whether, despite the breach, that purpose has been or can be achieved so that the matter can still be fairly and expeditiously determined on the merits."

[57] Whilst we agree that the High Court has jurisdiction to make a declaration of title in accordance with section 4(1)(a) of the Act, we bear in mind that a declaration of title by prescription is a declaration against the whole world and that the court should ensure that all persons who are likely to be affected by such a declaration are afforded an

opportunity to be heard should they wish to oppose the application.[38] We are not satisfied that all the interested parties are before the Court in the instant appeal and we do not consider it appropriate to grant declarations *in rem*. We note that this was the approach taken by the trial judge who stopped short of granting a declaration of title in Kowsal's favour and concluded that Kowsal can take such action to vest title in himself. Kowsal can therefore file a petition for a declaration of title pursuant to section 4(1) of the Act and Rule 3 of the Rules.

Disposition of the Appeal

[58] It is ordered and declared that:

(i) The appeal is allowed.

(ii) The Appellant, Kowsal Narine, has been in sole and undisturbed possession of the land comprising 5.21 acres situated at Cultivation block numbered 62 in Section C, Golden Fleece, Essequibo ("the land") for more than twelve years since 1st June 1991.

(iii) Any title, right or interest of the First Respondent, Deonarine Natram, in the land has been extinguished pursuant to the Title to Land (Prescription and Limitation) Act Cap. 60:02.

(iv) The parties will be heard on the issue costs.

/s/ A. Saunders

The Hon Mr Justice A Saunders

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow

[38] *Mendonca v Bartica Neighbourhood Democratic Council* (HCA #28-W of 2005) - see the judgment of the Acting Chief Justice Mr Ian Chang at [12].