[2022] CCJ 6 (AJ) GY

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No GYCV2020/009
GY Civil Appeal No 40 of 2016

BETWEEN

SHEKEELA KANHAI
EVIE ANNE KANHAI
MIGUEL GURCHURAN **APPELLANTS**

AND

BASANTIE PERSAUD (substituted by Order of Court dated 8th day of April 2013) **RESPONDENT**

Before the Honourable: **Mr Justice J Wit, JCCJ**
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice P Jamadar, JCCJ

Appearances

Mr Rajendra N Poonai, SC, Mr Sohan Poonai, Mr Naresh Poonai for the Appellants

Mr John Lindner for the Respondent

Land – Declaration of title – Adverse possession – Whether acts resulted in factual possession and intention to possess – Whether anything interrupted the running of time – Landlord and Tenant Act, 61:01 s 6(3) – Title to Land (Prescription and Limitation) Act, Cap 60:02, ss 3, 9(2),10(1).

SUMMARY

Iris, the mother of Fletchman (the common law husband of the Respondent), signed a written Agreement with her brother Carlton Sobers in 1965 to lease Sublot X, a portion of Sobers' Property on the West ½ of Lot 80 Duncan Street, Newtown, Kitty. The Agreement was said to be for a term of ninety-nine (99) years, but it took effect and remained as a tenancy from year to year pursuant to s 6(3) of the Landlord and Tenant Act as it was never executed. From the time of the Agreement to now, Sublot X has been in the consecutive possession of Iris, Fletchman (both now deceased) and the Respondent.

In 1992 Gladstone Alert, who appears to have obtained the Property from Sobers, sold it to Mr Kanhai, the husband of the First Appellant. After Mr Kanhai died, the First Appellant conveyed the Property to her daughter and son-in-law, the Second and Third Appellants. After the dismissal of an action for possession of Sublot X brought in 2007 by Mr Kanhai against Fletchman, the latter sought a Declaration of Title to Sublot X, which was granted by the Commissioner of Title to the Respondent after Fletchman's death. The Court of Appeal dismissed the appeal of the Appellants against that decision, and the Appellants then appealed to this Court.

The Court found that Iris had been given possession of Sublot X by Sobers under the Agreement and that this possession was maintained by Iris and continued by Fletchman and the Respondent. In such a case, where possession held by a tenant moves from being a possession with the consent of the landlord to one without such consent, the nature of the possession does not change except that, for limitation purposes, it becomes adverse. In that context it is therefore not required to establish factual possession and intention to possess. Though s 9(2) of the Title to Land (Prescription and Limitation) Act provides that, for adverse possession, time begins to run after the first year where there is a tenancy from year to year without a lease in writing, the Court, in light of s 3 of that Act, did not assume that Iris' possession had ever been adverse. She was always in possession with the consent of Sobers (as impliedly acknowledged by her in her last will). Further, since she was never required to pay rent, there was nothing to indicate to Sobers when a right of action would have begun to accrue against him. Strict application of s 9(2) may in such a case, therefore, lead to arbitrary deprivation of property contrary to art 142(1) of the Guyana Constitution.

The Court held, however, agreeing with the Court of Appeal, that the Agreement between Iris and Sobers – being a personal contractual relationship – expired upon Iris' death in 1990. As such, time at least began to run in 1990 and, since there was nothing to interrupt the running of time prior to 2002, the title of Sobers in relation to Sublot X expired in that year and Fletchman became entitled to a declaration of title to Sublot X.

The Court thus dismissed the appeal and ordered that the Appellants pay the Respondent's costs.

Cases referred to:

Bisnauth v Shewprashad [2009] CCJ 8 (AJ) (GY), (2009) 79 WIR 339; *Narine v Natram* [2018] CJ 11 (AJ) (GY); *Price v Hartley* [1995] EGCS 74; *Ramnarace v Lutchman* UKPC

25, [2001] 5 LRC 239 (TT); *Thakur v Ori* [2018] CCJ 16 (AJ) (GY); *Williams v Jones* [2002] EWCA Civ 1097.

Legislation referred to:

Guyana – Constitution of the Co-operative Republic of Guyana Act, Cap 1:01; Landlord and Tenant Act, 61:01; Title to Land (Prescription and Limitation) Act, Cap 60:02; **United Kingdom** – Limitation Act 1939.

Other Sources referred to:

Ramsahoye F, *The Development of Land Law in British Guiana* (Oceana Publications 1966).

JUDGMENT
of
The Honourable Mr Justice Wit, and The Honourable Justices Anderson, Rajnauth-Lee, Barrow, and Jamadar

Delivered by
The Honourable Mr Justice Wit
on 18 February 2022

Introduction

[1] This case zooms in on the process, and some essential elements, of obtaining land through prescription in Guyana, a messy area of the law often made even messier by factual obscurities. This case is no exception. It is based, as it should be, on a petition for a declaration of title.

[2] The requested declaration of title concerns a portion of land referred to as Sublot X, which is the northern portion of the West ½ of Lot 80 Duncan Street, Newtown, Kitty in Georgetown ("the Property"). The Property has passed through different hands over the years, producing some blind spots along the way, which may have some bearing on the circumstances that gave rise to this matter.

Sublot X

[3] On 2 January 1965 Carlton A Sobers, then owner of the Property, signed a written agreement of lease ("the Agreement") agreeing to lease what was described as the South ½ of the Property to his sister, Iris Porter, who appears to be Iris Belle, born Iris Sobers,

the mother of Frederick Fletchman. The Agreement was said to be for a term of ninety-nine (99) years commencing on that date, "which term shall include where the context so permit their heirs, executors, administrators, representatives and/or assigns." It was said to be done out of love and affection, but rates and taxes were to be paid by Iris. The Agreement also included that "The LESSEE", Iris, would have access to "free ingress and egress" and that "The LESSOR", Carlton Sobers, would allow the LESSEE "to enjoy a peaceful occupation of the said property." Thereby it was expressly stated that "[p]ossession of the said property is hereby given at the signing of this agreement." Mr Fletchman was one of the witnesses.

[4] Iris thereafter took possession of the northern half of the Property, Sublot X, built a wooden house on it and lived there with her family until her death in December 1990. By her Will dated 14 December 1989, she devised her house erected on Sublot X, together with the 99-year Agreement which the Will stated as being in relation to the North ½ of the Property. Following her death, Mr Fletchman continued to occupy Sublot X until his death in January 2013. The Respondent, Persaud, Mr Fletchman's common law wife who substituted as petitioner for him upon his passing, still resides on Sublot X.

The Property

[5] Gladstone Alert appears to have obtained the Property from Mr Sobers, and he then sold it to Mr Ram Kanhai pursuant to an Agreement of Sale dated 16 December 1992 which was enforced by an Order of Court dated 13 December 2004. Transport No 918 of 2007 was passed to Mr Kanhai on 25 April 2007, more than 14 years after his purchase.

[6] A special clause of the Agreement of Sale stipulated that it was the responsibility of the Vendor, Mr Alert, to take the necessary action to remove the occupants and building "from the northern half of" the Property (Sublot X). That, however, did not happen: Mr Fletchman, his wife and children remained, seemingly undisturbed, on their part of the Property. It was only after he had finally obtained the transport of the Property, in 2007, that Mr Kanhai brought an action against Mr Fletchman for possession of Sublot X.

[7] That action was, however, dismissed for want of prosecution by Order of Court dated 19 February 2010, and it is then, on 25 February 2010, that Mr Fletchman filed his petition for a declaration of title to Sublot X under the Title to Land (Prescription and Limitation) Act[1]. After Mr Kanhai's death in 2011, his wife, the First Appellant, conveyed the

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[1] Cap 60:02.

Property to her daughter and son-in-law, the Second and Third Appellants respectively, on 27 June 2012 by Transport No 1094 of 2012, pursuant to an Agreement of Sale dated 15 December 2011.

What happened in the courts below?

[8] Given the developments above, Mr Fletchman's petition was opposed by the Appellants on 9 May 2012 after which the petition was further pursued by Ms Persaud. Both the Commissioner of Title and the Court of Appeal ruled in favour of the petitioner, albeit on partly different reasons. Ms Persaud was granted the requested declaration of title to Sublot X. The Appellants remain dissatisfied with that decision and now seek to challenge some aspects of this decision before this Court.

The legal issues before this Court

[9] The Notice of Appeal lists five (5) grounds of appeal but there are basically two legal issues that require resolution at this point:

(a) Were Ms Persaud, and her predecessors, who were living on Sublot X, genuinely in possession of it, that is to say: did their acts amount to factual possession and did these acts reveal a genuine intention to possess this part of the Property and, if so, were they at any given time in adverse possession?

(b) If they were in adverse possession, were there any acts that effectively and timely interrupted the running of time preventing the caterpillar of adverse possession to turn into the butterfly of ownership?

An issue of fact

[10] Before entering into these legal issues that have remained at the heart of the discussion before this Court, it is apposite to deal here with one issue of fact which needs to be clarified and ascertained: the apparent discrepancy between the Agreement and all the other events and documents that followed it, the Agreement identifying the southern part of the Property as the part that was to be leased to Iris while she took possession of and built her house on the northern half of the Property. The Commissioner of Title concluded that Iris had not acted under the Agreement while the Court of Appeal, on the basis of all that had happened after the signing of the Agreement, assumed that the mentioning of

the southern half in the Agreement must have been a mistake and that Iris therefore had indeed taken possession of the northern half of the Property under the Agreement.

[11] We think it is pellucid that the Agreement contained an obvious clerical mistake. One look at the Plan of the Property and its surroundings, dated 24 May 2005, an Exhibit before the Court, makes this clear. It shows that the southern half of the Property borders Duncan Street and that it does not require a right of way or access to "free ingress and egress", while the northern half which lies behind the southern half does require such. This puts beyond doubt that the Agreement intended to identify the northern half of the Property as the part Iris would be allowed to use.

Possession, continued and adverse possession

[12] It is clear, therefore, that Iris went into possession of the northern half of the Property under an agreement for a lease made in writing. In law, this possession took effect and must be construed as a tenancy from year to year from the date of the entry into possession (1965) until the lease would actually be executed (s 6(3) Landlord and Tenant Act). In accordance with s 3(2) of that Act, such a tenancy is a holding of land under a contract, express or implied, for the *exclusive possession* thereof for a term which may be determined at the end of the first year or any subsequent year of the tenancy either by the landlord or the tenant by a regular notice to quit.

[13] The lease to which the parties agreed has never been executed nor has there ever been a notice to quit. The relationship between the landlord Sobers and the tenant, his sister Iris, being basically of a personal contractual nature[2], only ended upon the death of Iris in 1990. As the Court of Appeal rightly found, the tenancy thus subsisted from 1965 until 1990. Mr Fletchman and Ms Persaud who had been living together with Iris for many years, remained in the house and lived there as before, for many years uninterrupted. Without the legal basis of the Agreement, they nevertheless kept using "their" part of the land in the way one would expect it to be used in a residential area of the city. In other words, they continued living there in the same house and in the same manner as they and Iris had been doing for many years before Iris' demise.

[14] The major grounds of appeal seek to challenge that use and those acts as equivocal and therefore not amounting to possession, lacking both a sufficient degree of physical

[2] F Ramsahoye, *The Development of Land Law in British Guiana* (Oceana Publications 1966) 78.

custody and control of the claimed land (factual possession) and the intention to possess. This challenge, however, is conceptually and practically misconceived.

[15] It must be realised that this is not a "trespasser case" but a "former tenant case". In the former both factual possession (or acts that would amount to that) and the *animus possidendi,* the intention to possess, would be required to establish "sole and exclusive" possession by the litigant who wishes to invoke adverse possession to obtain a title of the land he occupies. However, this is not necessary in a "former tenant case" because the landlord/owner of the land had allowed the tenant into possession, necessarily and by definition as against the landlord, albeit with his consent, which situation does not change upon the determination of the tenancy. The possession held by the tenant moved "from being possession with the landlord's consent to being possession held without his consent, and thus, for limitation purposes, adverse."[3]

[16] Although this already sufficiently answers the challenge, we also agree with the courts below that building a house on a sublot in a residential area and living there for years in the context of a tenancy is far from equivocal and in a practical sense more than enough to establish possession of that sublot.

<u>When did the possession become adverse?</u>

[17] It follows that time started to run in favour of the former tenants in any event from the moment their continued possession of Sublot X was no longer supported by the legal basis that had carried their possession before December 1990.

[18] We must pause here because the Commissioner had concluded that in fact the time would have started to run in January 1966, one year after the Agreement had come into effect. This conclusion was based on the Commissioner's interpretation of the law, in particular s 9(2) of the Title to Land (Prescription and Limitation) Act, which reads:

> A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:

[3] *Williams v Jones* [2002] EWCA Civ 1097 at [18]-[21]. See also *Narine v Natram* [2018] CCJ 11 (AJ) GY) at [47].

> Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued at the date of the last receipt of rent.

[19] This provision is usually applied in cases where there is an oral tenancy. In this case there was no oral tenancy. There was an agreement for a lease *in writing* which, in accordance with s 6(3) of the Landlord and Tenant Act, must be read as a tenancy from year to year. On the other hand, there was no *lease* in writing. So, as no arguments were presented about this point, we will for now assume that s 9(2) would apply to this case.

[20] The provision remains, however, problematic. It is one of the provisions copied from the English Limitation Act 1939, which only dealt, as the title indicates, with limitation and not, as the Guyanese legislation (also) does, with prescription. One such other provision is s 10(1) of the Act, which reads:

> 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 were under the foregoing provisions of the 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.

[21] In the English common law context, provisions as ss 9(2) and 10(1) are understood to say that as soon as time starts to run and the person, in whose favour the period of limitation (in Guyana 12 years) can run, is and remains in possession, that possession is adverse. As Millet LJ (as he then was) stated in *Price and Hartley* (1995):

> It is the policy of the Limitation Acts that owners of land should not be able to claim possession of land if they have failed to collect the rent for more than twelve years from a tenant whose possession is attributable to an informal oral periodic tenancy.[4]

> And in the Trinidadian case of *Ramnarace v Lutchman* (2001) he, now Lord Millet, reemphasised:

> It was the deliberate policy of the legislature that the title of owners who allowed others to remain in possession of their land for many years *with their consent* but without paying rent or acknowledging their title should eventually be extinguished.[5]

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[4] [1995] EGCS 74.

[5] [2001] UKPC 25, [2001] 5 LRC 239 (TT).

[22] Lord Millet made it clear that if no action is taken by the owner, his title is extinguished after expiration of the limitation period "even though the possession of the occupier is *permissive throughout*." In the Guyana context, this line of reasoning is, however, problematic considering the overarching prescription provision of s 3 of the Title to Land (Prescription and Limitation) Act stipulating that title to land may be acquired by "*sole and undisturbed possession*, user or enjoyment for not less than twelve years", *not taken or enjoyed* by fraud or *by some consent or agreement expressly made or given for that purpose*.

[23] If the tenant is required to pay rent but doesn't comply, there is no problem. As soon as he stops paying the rent, the consent given by the landlord/owner is considered to have ended and so, time starts running and the owner knows that he must take action or else he might lose his property. If the tenant then starts to pay rent again, which is a clear acknowledgement of the landlord's title, the time will stop running. This much is evident. However, if the tenancy does not require the tenant to pay rent or to provide some other visible *quid pro quo*, it may become difficult to decide if and when exactly the tenant's possession has become adverse, in the additional sense of being exercised *independently* of the owner or anyone else. In such a situation, the rule in s 9(2) could perhaps be read as a rebuttable presumption or be approached through the lens of purposive interpretation. In any event, given the background of s 3 seeking to capture the elements of the Roman-Dutch prescription, ss 9(2) and 10(1) should not be understood in an absolutist manner lest such would lead to arbitrary deprivation of property against which art 142(1) of the Constitution offers protection.[6]

[24] In this case, we would not assume that Iris was ever in adverse possession. Although she did not pay rent as this was not part of the Agreement, in her last will and testament, a document of some legal formality signed before a Justice of the Peace in the presence of witnesses, she gave and bequeathed to her son her house on Sublot X together with the Agreement of Lease with respect to that sublot, thereby indicating that her possession of that part of the Property was as far as she was concerned still based on the consent of the owner of the Property and thus an acknowledgment of his title.

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[6] See also *Bisnauth v Shewprashad* [2009] CCJ 8 (AJ) (GY), (2009) 79 WIR 339 at [53] and *Thakur v Ori* [2018] CCJ 16 (AJ) (GY) at [47]-[48].

[25] It is true, of course, that at a later stage, Mr Fletchman initially also sought to invoke the Agreement as a justification for his continuous possession of Sublot X but as this Agreement had been determined by the death of his mother Iris, it did not affect the independency and thereby the adversity of his possession. In the face of legal action by Mr Kanhai (that came to naught), he remained defiant, and he was right to do so. In the course of time he and his wife, untrained in the law as they obviously were, may have come to see the sublot as their property and the Agreement as evidence of ownership. Be that as it may, after 2002 they were, in law, in a position to become title holders unless it could be shown that their possession of Sublot X between 1990 and 2002 had not remained adverse or had been disturbed and interrupted by legal action or otherwise.

Was the possession undisturbed?

[26] There is no evidence of any disturbance with respect to Mr Fletchman's possession until 2007. Nor is there any evidence that Mr Fletchman had been allowed first by Mr Alert and then by Mr Kanhai to remain on Sublot X until further notice or that he had consented in vacating the sublot as soon as Mr Kanhai was ready to extend the church building which he, Kanhai had built since he purchased the Property in 1992. These were mere allegations launched by Mr Kanhai in his court action of 2007, which were vehemently denied by Mr Fletchman, and nothing more had come of it. This clearly strengthens the proposition that, from 1990 on, Mr Fletchman and Ms Persaud were, independent from the owner or anyone else, in sole and undisturbed possession of Sublot X "not taken or enjoyed by some consent or agreement expressly made or given for that purpose."

[27] Both an actual and a legal disturbance were caused by Mr Kanhai in 2007 when he extended his church building 4 feet into Sublot X and also filed his court case to "dispossess" Mr Fletchman and his family. Both disturbances were clearly too late to be able to affect or undo the rights produced by Fletchman's adverse possession of Sublot X. They cannot stand in the way of granting the petition for a declaration of title. This is equally so with the transports of 2007 and 2012 and the mortgage on the Property in favour of the Bank of Nova Scotia. None of these could have been validly procured after the expiration of the limitation period as the title of the then title holder of the Property had been extinguished in relation to Sublot X and it follows that from then on all the formal acts with respect to the Property were nothing else but legal castles in the air.

[28] We conclude that the judgments of the courts below stand and that the appeal must be dismissed.

Disposal

[29] The following are the Orders of the Court:

(a) The appeal is dismissed.

(b) The Appellants shall pay to the Respondent costs in the sum of GY$750,000, as agreed by the parties.

(c) The Registrar of the Supreme Court of Guyana is directed to release this sum, lodged by the Appellants as security for costs, to the Respondent.

/s/ J Wit

The Hon Mr Justice J Wit

/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

/s/ P Jamadar

The Hon Mr Justice P Jamadar