

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. 2016-01665

IN THE MATTER OF THE PROPERTY COMPRISED INA DEED OF CONVEYANCE DATED THE 21ST DAY OF JUNE 1985 AND REGISTERED AS NO 12220 OF 1985 AND MADE BETWEEN EDWARD LEE LING AND CARMEN LEE LING, VENDORS OF THE ONE PART AND MALVIN LEE AND SYLIA LEE, PURCHASERS OF THE OTHER PART

AND

IN THE MATTER OF THE CONVEYANCING AND THE LAW OF PROPERTY ORDINANCE, CHAPTER 27 NUMBER 12

BETWEEN

**MALVIN LEE
SYLVIA LEE
(BY HER DULY APPOINTED POWER OF ATTORNEY SUZETTE LEE SMITH)**

Claimants

AND

**TERRY SOOKLALSINGH
TARAMATIE SOOKLALSINGH
ANNARISA SOOKLALSINGH
DARIUS SOOKLALSINGH**

Defendants

Before the Honourable Madam Justice Margaret Y Mohammed

Dated the 28th July, 2017

APPEARANCES:

Mr. Sheldon Prescott Attorney at law for the Claimants.

Mr. Anthony Manwah Attorney at law for the Defendants.

JUDGMENT

1. The Claimants are the owners of the property situated at No. 40A Jarvis Street, Vistabella (“the property”). The First Defendant (“Terry”) is the Second Claimant’s brother. They have instituted the instant action against the Defendants for vacant possession of the property and declarations to the effect that they are the bona fide owners and are entitled to possession of it.
2. The Claimants’ case is that they bought the property jointly in 1984 and took possession of it. To finance the purchase they obtained a mortgage (“the mortgage”). The First Claimant (“Malvin”) left Trinidad and Tobago with his two daughters Melanie Lee and Suzette Lee (“Suzette”) in August 1989. The Second Claimant with the consent of Malvin made oral proposals to Terry, for him to take up residence and look after/maintain the property until the Claimants returned to Trinidad. It was also orally agreed between the parties that Terry would not pay rent for the occupation of the property but that he pay the monthly installment on the mortgage on behalf of the Claimants.
3. The Second Claimant later left Trinidad in October 1989 to be with her family and Terry moved into the property with his wife, and his family to reside with him. During the time the Claimants were away they kept in contact with Terry via telephone calls at least twice per year to ensure that the property was maintained as they had agreed. The Claimants never received any negative updates since Terry assured them that all was well.
4. Suzette returned to Trinidad in 2000 and found that the property was in a state of disrepair and communicated this to the Claimants. Malvin returned to Trinidad on the 25th June 2015. In the first week of July 2015, Malvin told Terry that he had returned to Trinidad with the intention of giving him enough notice to make alternative living arrangements. However, the Defendants threatened Malvin and he was driven out of the property.
5. The Claimants averred that Malvin observed that the property was not well kept and maintained by Terry. They pleaded that there was plastic draped over the roof to prevent water from entering it, the outdoor staircase had collapsed and several adjustments and installations were made to the property without the Claimants’ consent.

6. The Second Claimant furnished a letter dated 25th September 2015 which highlighted the terms of the oral arrangement between the Second Claimant and Terry. The Defendants have refused to vacate the property and they are currently in possession of it.
7. The Defendants case is that Terry was living at his mother's home in San Fernando up to March 1990 and the Second Claimant approached him in October 1989 and indicated that she was migrating to the USA. She asked him to watch over the property and told him that there was the mortgage and that she would pay the mortgage installments.
8. In March 1990, the mortgagee informed Terry that the mortgage was in arrears and that it was going to sell the property. Terry averred that he had no way of contacting the Claimants nor did they contact him.
9. The Defendants moved into the property in March 1990 after he started making the mortgage payments. He paid off the arrears and continued to pay the installments with the intention of possessing and owning the property. He pleaded that the house was in a total state of disrepair and almost incomplete when he went into possession. The Defendants averred that Terry paid the mortgage since that time and he has treated the property as his own. They also averred that Terry paid all the rates and taxes, the WASA and T&TEC charges and he renovated and expanded the existing structure at a cost of \$100,000.00.
10. The Defendants denied that Terry asked the Second Claimant to occupy the property. They denied that there was an oral agreement or understanding as alleged by the Claimants. They averred that the renovations of the property began prior to the filing of the claim form.
11. The Defendants counterclaimed that Terry has been in adverse possession of the property since March 1990 to the 16th May 2016. He also sought a declaration that the Claimants' estate and interest of the property have been extinguished and he sought an injunction to restrain the Claimants from entering the property or from evicting the Defendants.
12. There are two issues which arose for determination namely:

- (a) Under what circumstances did the Defendants come into possession of the property?
 - (b) Have the Defendants extinguished the title of the Claimants?
13. At the trial Malvin and his daughter Suzette gave evidence on behalf of the Claimants and Terry gave evidence on behalf of the Defendants.

Under what circumstances did the Defendants come into possession of the property?

14. It was submitted on behalf of the Claimants that the Defendants are licensees since they came into possession of the property with the permission of the Second Claimant. The Defendants have disputed this assertion on the basis that there was no admissible evidence in support thereof.
15. It is a dispute of fact how the Defendants came into possession of the property. In **Winston McClaren v Daniel Dickey and ors**¹ Rajnauth–Lee J (as she then was) repeated the approach the Court should adopt where there are different versions of the events as:

*“12. Where there is an acute conflict of evidence, the Judicial Committee of the Privy Council has laid down the following principles in the case of **Horace Reid v Dowling Charles and Percival Bain** Privy Council App. No. 36 of 1987. At page 6, Lord Ackner delivering the judgment of the Board examined the approach of the trial judge”:*

“Mr James Guthrie, in his able submissions on behalf of Mr Reid, emphasized to their Lordships that where there is an acute conflict of evidence between neighbours, particularly in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless

¹ CV 2006-01661, unreported

this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.”

13. Accordingly, the trial judge must check the impression that the evidence of the witnesses makes upon him against

(i) contemporary documents, where they exist;

(ii) the pleaded case; and

(iii) the inherent probability of improbability of the rival contentions.

14. The Judicial Committee of the Privy Council adopted a similar approach in the case of the Attorney General and another v Kalicklal Bhooplal Samlal (1987) 36 WIR 382. Lord Ackner who delivered the judgment of the Board made the following statement at page 387:

*“The trial judge may well have reached his decision entirely as a result of the impression made upon him by the manner in which the witnesses gave their evidence. Indeed, it is difficult to draw any other conclusion. But a judge must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (see *Yuill v Yuill* [1945] P 15 at page 20). In this case the Court of Appeal were fully entitled to conclude that he did not balance demeanour against the rest of the evidence and had thus not taken proper advantage of having seen and heard the witnesses. It is essential when weighing the credibility of a witness to put correctly into the scales the important contemporaneous documents (the brochure and the letter of 12th October 1981) and the inherent improbability, as the Court of Appeal percipiently pointed out, that the licence would have been granted without samples of those tiles which were not depicted in the brochure, being produced. Thus the balancing operation, which is of the very essence of the judicial function, was not properly carried out.” (Emphasis added).*

16. The evidence of how the Defendants came into possession of the property was from Malvin and Terry. In my opinion Suzette’s evidence on this issue was hearsay since she said in her

witness statement that it was based on conversations she overheard between Malvin and the Second Claimant.

17. According to Malvin's witness statement around 1984, he and the Second Claimant became the owners of the property. To finance the purchase of the property Malvin and the Second Claimant obtained a Mortgage in favour of Scotiabank Ltd. After the purchase Malvin the Second Claimant and their two daughters, occupied the property. However due to financial challenges Malvin and the Second Claimant agreed in August 1989 that Malvin should migrate to the United States of America to work. The Second Claimant then decided to join Malvin and the children in the United States of America.
18. However Malvin and the Second Claimant were concerned about who would look after the property in their absence. According to Malvin, the Second Claimant suggested that her brother, Terry would look after the property in their absence. At that time Terry lived at his mother's residence in a one room together with his family.
19. Malvin stated that he and his wife, the Second Claimant orally agreed that Terry would stay on the property to look after it until he and/or the Second Claimant returned from the USA. They also agreed that Terry would not pay them a monthly rent as he was somewhat impecunious. It was further agreed that Terry would take all Malvin's tools and stock in trade from his garage at the property where he did straightening and painting work, work equipment (such as gallons of thinner, sheets of sand paper and a machinery), as well as everything in the house (furniture, stove, refrigerator), and sell them to pay towards paying off the balance of the mortgage/loan on the property. They further agreed that if after selling all those things, the funds were not enough to liquidate the balance of mortgage/loan, only then would Terry start paying a monthly installment towards liquidating the balance of the mortgage/loan. However up until that time, Terry would be living rent free.
20. According to Malvin, Terry orally agreed with him and the Second Claimant that he would sell these things and pay the proceeds of sale towards clearing off the Mortgage/Loan balance and also if there was any extra monies from the sale, that he would utilize it to upgrade the property. Malvin's evidence on how the parties i.e. Malvin, the Second Claimant and Terry entered into

this oral agreement was that the Second Claimant brought Terry to the property, she then called him by telephone overseas in Dallas Texas, and Malvin and the Second Claimant informed Terry of the aforesaid agreement and made the offer to him. He accepted the proposal via telephone.

21. Malvin further stated that sometime thereafter, the Second Claimant informed him via another telephone call that Terry, in keeping with the oral agreement, had started moving into the property about two weeks before she left Trinidad.
22. In my opinion, most if not all of the evidence in Malvin's witness statement was based on matters which were told to him by the Second Claimant and which were not within his own knowledge.
23. Malvin's evidence was tested in cross examination. He stated that the Second Claimant is still his wife and that they have not been separated. He admitted that it was the Second Claimant who made the decision to have Terry move into the property to take care of it and that he was not part of the said decision since she only told him what she had decided. He confirmed that after he left Trinidad between 1987-1988 he did not have any conversations with Terry but that his wife spoke to Terry and she told him about the said conversations. He stated that he spoke with Terry about 5 years after he left Trinidad via telephone.
24. According to Malvin's evidence in cross examination, the Second Claimant told him that Terry was supposed to pay rent and not the mortgage payments. He understood that Terry had to pay rent and it was to be paid to the Bank which would have been the mortgage payment. He confirmed that he never made this arrangement with Terry but it was the Second Claimant who made it. He stated that he never sent money to pay the mortgage but the Second Claimant told him that she sent money to pay the mortgage. He admitted that he never saw any receipts where the Second Claimant transferred money to pay the mortgage installments.
25. Terry's evidence on how he came into possession of the property as set out in his witness statement was that in August 1989 Malvin and his two daughters, Melanie and Suzette, left Trinidad and went to the United States of America to live, leaving the Second Claimant to live

at the property alone. He and the Second Claimant were close and in about October, 1989 she told him that she was keen on joining her family abroad. She said that she knew that the property would be unoccupied and asked him if he would stay there to maintain it when she left. At that time, the Second Claimant informed him that there was mortgage on the property and that she would handle the mortgage payments from abroad. As such, there was never any discussion regarding Terry paying mortgage installments in lieu of rent only that he live on and maintain the property. The Second Claimant left in October, 1989.

26. According to Terry, after the Second Claimant left he periodically visited the property to check on things but he did not go there to live as the house comprised of two bedrooms, living room and kitchen, but it was in a total state of disrepair and/or almost incomplete. There was no toilet or even an outhouse and a pipe enclosed by pieces of galvanize constituted the shower at the back of the property. At that time he, his wife and one of his children were living with his mother at her home and he paid no rent. He was a mechanic and he had his garage at his mother's home. Terry denied that he was asked to occupy the property and at that time he did not occupy it.
27. Terry also stated that sometime in or around March, 1990, he was approached by persons whose names he did not now recall, who held themselves out as officers of the Bank of Nova Scotia, High Street, San Fernando. The officers informed him that the Claimants were not making payments towards the liquidation of the mortgage for the property and that it was in arrears. Further, the said officers informed him that the Bank was going to foreclose and sell it as the mortgage was in arrears.
28. According to Terry, he became extremely concerned and worried. He had no way of contacting the Claimants and acting on advice from the bank's officers, he began religiously paying \$863.87 per month towards the liquidation of the mortgage. His initial payments were approximately \$1,200.00 per month and it was made to cover both the mortgage installments and to liquidate the arrears and thereafter he paid \$863.87 per month. On the 2nd July, 1996 the entire mortgage was settled. He annexed a payment coupon book which he received from the bank which showed when payments were made. Terry stated that since the bank was going

to sell the property he decided to get it for himself. When he started to make the mortgage installments he and his family move into the property.

29. In cross examination, Terry denied that he had any conversation with Malvin about the property. He stated that prior to the Second Claimant migrating, she told him to take care of the property and that she would send money to pay the mortgage. He denied that there was any conversation with Malvin about selling Malvin's tools to pay the mortgage installments. According to Terry, Malvin sold the tools before he migrated since he used the funds to migrate. He accepted that the first reason he came unto the property was to look after it. He denied that he was aware that Malvin and the Second Claimant intended to return to Trinidad to live. He also denied that the Second Claimant told him so. According to Terry all the Second Claimant told him was to look after the property since she did not know when she was returning to Trinidad. He confirmed that he only brought his family onto the property when he started to pay the mortgage installments. He denied that he entered into any agreement with Terry and the Second Claimant to pay rent for his occupation of the property. He also denied that he spoke with Malvin after the latter migrated. He admitted that he only spoke with the Second Claimant once after she migrated and that his discussions with her was after the mortgage was paid off. He stated that the Second Claimant called him to enquire if the mortgage was paid off. He admitted that when the Second Claimant returned to Trinidad she visited him. He stated that after he paid of the mortgage the Second Claimant visited Trinidad for one week and she asked him if he wanted the money or the property.

30. In my opinion, Terry went into possession of the property when he assumed the payment of the mortgage installments and not with the permission of Malvin and the Second Claimant. I have arrived at this conclusion for the following reasons. Firstly, there was no evidence that Terry agreed with the Claimants that he would pay rent for his occupation of the property. The Second Claimant who made all the arrangements with Terry did not give evidence in this matter and Malvin admitted in cross examination that she made all the arrangements since he was not in Trinidad. Secondly, there was no evidence to support the Claimants assertion that the Second Claimant remitted money to Trinidad to liquidate the mortgage on the property. On the other hand, Terry's evidence that he assumed the payments of the mortgage and the liquidation of

the arrears was corroborated by the contemporaneous document namely, the receipt book which he exhibited to his witness statement. Thirdly, there was no evidence from Malvin that he spoke with Terry after he migrated to enquire about the status of the property. Malvin also did not dispute Terry's evidence that the former never contacted Terry after he migrated.

Have the Defendants extinguished the title of the Claimants?

31. Section 3 of the **Real Property of Limitation Act**² prevents the paper title owner from the right to recover lands either by action or entry within 16 years from the time when the right to bring the action or make an entry first accrued. Section 22 provides that where after the expiration of the limitation period prescribed by section 3 (i.e. 16 years) the person entitled to do so has not brought an action or made an entry for the recovery of the land his right and title to the land shall be extinguished. The conjoint effect is the person making the claim extinguishes the right of the title of the paper title owner to the land at the end of the statutory period. Time stops running when the owner either makes an effective entry on the land or takes legal proceedings.
32. The Defendants case is that by virtue of their undisturbed possession of the property since 1990 the right of the Claimants to make an entry to recover it is barred and their title has been extinguished.
33. It is settle law in this jurisdiction that the guidance in the English House of Lords decision in **J A Pye (Oxford) Ltd and anor, v Graham and anor (2002) WLR 221** on the two elements necessary for legal possession is applicable. They are (a) a sufficient degree of physical custody and control ("the factual possession") and (b) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("an intention to possess").
34. In **Bligh v Martin** [1968] 1 WLR 804 at 811 F, Pennycuick J opined that:

² Chapter 56:03

“(1) Possession is a matter of fact depending on all the particular circumstances of a case. In very many cases possession cannot, in the nature of things, be continuous from day to day, and it is well established that possession may continue to subsist notwithstanding that there are intervals, and sometimes long intervals, between the acts of user.”

35. The onus is on the party claiming possessory title, in the instant case the Defendants to prove, on a balance of probability that they have been in continuous undisturbed possession for the 16 years prior to 2016. They must prove the two elements of factual possession and the intention to possess.

36. Slade J in **Powell v Mc Farlane** described “factual possession” as³:

“Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances of the case in particular, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so”.

37. Slade J in **Powell v Mc Farlane**⁴ described the “necessary intention to possess” as:

“3. ‘intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow”.

³ [1977] 38 P& CR 452 at page 470-471

⁴ [1977] 38 P&CR 452 at page 470

38. It was not in dispute that the Claimants are the paper title owners of the property. Did the Defendants have factual possession of the property? According to the evidence of Terry, he and his family moved onto the property in 1990 when he started to pay the mortgage installments. He also carried on his mechanic garage on the property but due to ill health he no longer do so. The aforesaid evidence by Terry was not challenged by the Claimants in cross examination.
39. Suzette's evidence was that in the year 2000 she returned to Trinidad. She went to the property where she was greeted with subtle hostility. She was surprised to see that the property had remained the same for the period of two decades. She observed that the fence was not in place and that the house on the property was in a state of disrepair. The back step was broken down and there was even a plastic covering over a hole in the ceiling and the floorboards were shaky. She observed that Terry had a garage where he was doing mechanic work and it was the same garage Malvin had erected. According to Suzette, although the Defendants knew of her intention to return they had not sourced alternative living arrangements. As a result she was unwilling to stay on the property because she had children and she had managed to secure other living arrangements.
40. Suzette also stated that in and around July 2015 Malvin returned to Trinidad and Tobago. He went to the property and informed her that he was verbally accosted by Terry and that the Third and Fourth Defendants were incensed and brandished a cutlass. As a result Terry had no choice but to flee and take up residence with his sister. Suzette also stated that, upon being served with notice of court proceedings in and about November 2015, she observed that the Defendants began repairs on the property, which continued to date. Suzette's evidence on this matter was not challenged in cross examination.
41. In my opinion Suzette's evidence corroborated the Defendants' case that they were in possession in 2000, and they remained in possession thereafter. She also corroborated Terry's evidence that he operated his mechanic business on the property in 2000.
42. Malvin's evidence was that Suzette returned to Trinidad in 2000 and she told him that she visited Terry and his family at the property. She explained that the property was dilapidated in

that the back step was broken down, there was a plastic covering under the ceiling and the boards on the flooring were shaky. Terry was doing his mechanic work in the area that he had built for his own business. Malvin also stated that in and around July 2015, he returned to Trinidad and Tobago to the property since he knew he and the Second Claimant owned it. Upon arriving at the property, Terry and his children became angry, verbally abusive and threatened to kill him with a cutlass. As a result, he had no choice but to run from the property to save his life and he took up residence at his sister's home. Malvin's evidence on this matter was not challenged in cross examination.

43. I concluded that Malvin's evidence supported Terry's evidence that the latter was in possession of the property in 2000 to 2015 and it did not challenge Terry's evidence that he was in possession since 1990.

44. I therefore find that the Defendants satisfied the evidential burden of proving that they had factual possession from 1990 to present.

45. Did the Defendants demonstrate the necessary intention to possess the property to the exclusion of the world?

46. Terry's evidence was that when he began making the mortgage payments in March, 1990 it was his intention to acquire an interest in the property. He was in occupation of the property since 1990. He has paid off the mortgage, all the rates and taxes, the WASA and T & TEC charges and he has renovated and expanded the existing structure at a cost of approximately \$100,000.00 and he has maintained it. He annexed copies of paid utility bills for 2015 and 2016 and some bills from various hardware stores and other suppliers of construction materials, amounting to \$13,638.80 for material he spent in renovations and repairs.

47. According to Terry, Suzette was deported to Trinidad in 2000. She visited the Defendants at the property and attended family functions, however, she has never mentioned any issues regarding the Defendants occupation of the property. Terry also stated that Malvin returned to Trinidad in June 2015 and he has been residing at his sister's home at No. 32, Jarvis Street, Vistabella. His sister owns a very popular bar on Jarvis Street known as "the Pink Bar" and

which is very close to the property. In or about July, 2015 when Malvin demanded that the Defendants leave the property and this caused him and the Fourth Defendant to have an argument. He did not have any argument or confrontation with Malvin. Terry's evidence on this matter was unshaken in cross examination.

48. In my opinion, the Defendants satisfied the evidential burden that when they took factual possession of the property it was their intention to treat it as their own. In my view the actions by Terry of paying off the mortgage installments without any assistance from the Claimants; paying the utilities bills and the land and building taxes; and his undertaking of renovations and repairs demonstrated that Terry intended to treat the property as his own. The Claimants did not challenge Terry's evidence that Malvin has a sister who operated a bar close to the property where Malvin is staying. In my opinion it is highly plausible that his sister may have told Malvin about the Defendants occupation of the property but he did nothing between 1990 to 2015 to have them removed. What is even more puzzling, Suzette admitted that since 2000, some 15 years before Malvin's returned to Trinidad that she told the Claimants that the Defendants were in occupation of the property and in effect treating it as theirs but the Claimants did nothing to have the Defendants removed from the property. In my opinion, given that the Claimants had migrated in 1989, they did not pay the mortgage and the other bills from since 1990 it was reasonable for Terry to conclude that they had abandoned the property.

Order

49. The Claimants action is dismissed.
50. The Court declares that the First Defendant has been in adverse possession of the property since March 1990 to 16th May 2016.
51. The Claimants estate and interest in the property have been extinguished.
52. The Claimants, their servants and/or agents are restrained from entering and/or remaining on the property and/or from evicting or attempting to evict the Defendant from the property.

53. The Claimants to pay the Defendants costs in the sum of \$14,000.00.

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Margaret Y Mohammed
Judge