THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006-00918

BETWEEN

NEIL HORACE SAMUEL

ROBIN GREGORY SAMUEL

Claimant

AND

DOLLY RAMKHALAWANSINGH ALSO KNOWN AS DOLLEY RAMKHALAWANSINGH

ADMINISTRATIX ON THE ESTATE OF CARL RAMHKAHAWANSINGH ALSO KNOWN AS ROBERT CARL RAMKHALAWANSINGH

AND

RYAN SINGH

Defendants

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Joseph Camacho instructed by Mr. Terrence M. Milne.

Mr. Kelvin Ramkissoon for the defendants instructed by Mr. Kiel Taklalsingh.

REASONS FOR DECISION

Facts

1. The claimants are the owners of a plot of land, Lot 6 which is situated to the east of the defendant's land – Lot 7. The land was swamp to the rear of each parcel. The claimants claim to have adversely possessed a portion of the defendant's land by acts of reclamation thereon since and thereby extinguished the defendant's title to that portion. Needless to say the defendant denies that this occurred, and asserts that they conducted their own acts of reclamation thereon, which the claimants deny.

Issue

2. The issue is one of fact as to whether the claimants indeed carried out acts of reclamation and occupation on the defendant's land without objection for a period of 16 years so as to extinguish the defendant's title to any such portion so reclaimed and occupied by the Claimants.

Disposition

3. It is ordered as follows:

    1. A mandatory order is granted compelling the claimants to forthwith pull down, and remove the buildings, and/or structures inclusive of walls and foundations erected on lot 7 and the alleged encroachment and to further remove all equipment, parts, tools and storage of trucks or vehicles therefrom within twenty eight (28) days.

2. an injunction is granted restraining the Claimants and each of them whether by themselves, their servants, agents and/or agents or howsoever or otherwise from entering upon or remaining upon Lot 7 and/or the alleged encroachment and from erecting or constructing any structure, and/or extending any structure or building thereon, or from carrying out any works on lot 7 and/or the encroachment.

3. An order is granted that damages be paid by the Claimants to the Defendants for trespass to be assessed by this Court.

4. a. The claimants are to pay the Defendant's costs of the claim in the sum of fourteen thousand dollars ($14,000.00) based upon the costs prescribed by the Civil Proceedings Rules 1998, as amended.

b. The Claimants are to pay the Defendant's costs of the injunction in the sum of six thousand three hundred dollars ($6,300.00) and

c. The Claimants are to pay the Defendant's costs of the counterclaim in the sum of fourteen thousand dollars ($14,000.00)

Analysis and Reasoning - The Evidence

Evidence of the Surveyor - Paul Williams

4. Significant research was conducted by Mr. Williams into the surveys and aerial photographs relating to both parcels of land, Lot 6 and Lot 7, over time. These were of immense value in the context of this case, and were largely determinative of the factual

issue. The interpretation of the photographs by Mr. Williams from the perspective of a photogrammetric engineer was less helpful.

5. **In particular Mr Williams produced a 1980 Aerial Photograph. After identifying the western plot of land as lot 7 he testified in elaboration of his evidence in chief that most of the reclamation at that time was on the western portion of the land.**

6. In cross examination Mr. Williams confirmed that the majority of reclamation was on lot 7 and it begins about ¾ way into lot 7. In any event the 1980 aerial photograph speaks volumes and I find as a question of fact, that from that photograph it would be highly unlikely that the reclamation being shown there, mostly on lot 7, would have been carried out by the owners of lot 6 .

7. This is highly unlikely because of the concentration of reclamation on lot 7, extending throughout the entire width of lot 7, and because any such reclamation, if by the owners of lot 6, would have necessarily rung very loud alarm bells with the owners of lot 7. It would have required no survey for that owner, the defendant, to strongly suspect that such reclamation, as clearly shown on that photograph, was well over the boundary between lot 6 and lot 7.

8. The degree of reclamation on the western lot 7 is totally inconsistent with the evidence of the deceased claimant, and is far more consistent, on a balance of

probabilities, with the defendant's evidence of the defendant's own reclamation. It is inconceivable that the extent of reclamation on lot 7 attested to by Mr Williams could have been carried out **by the claimants** on the defendant's land without observation, complaint or protest by the defendant or his predecessors.

9. In any event that is inconsistent with the evidence of the deceased claimant, whose case began as one of inadvertent encroachment over an unsurveyed boundary line and progressed to one of greater encroachment.

10. In cross examination Mr. Williams confirmed that he was unable to say who was doing the reclamation in 1980, whether claimant or defendant.

11. Mr. Williams also testified regarding a 1986 aerial photo. He claims it showed 11 pieces of equipment on lot 6 and lot 7. Having seen the photograph I am not at all convinced. These were not clearly identifiable as equipment on the screen set up in the courtroom. In fact they appeared as blurs. If these were so identifiable as equipment, with special lenses, as Mr. Williams suggested, such evidence was not offered, so that the court and all counsel could see if that were in fact so. I reject that evidence as the blurs observed by all in court could have been anything.

12. He was unable to respond as to whether the objects he stated to be earthmoving equipment were actually pieces of junk, or explain why some of them were in the same position one year later in the 1987 aerial photo.

13. I especially find that Mr. Paul Williams' assertion as to the much greater area of encroachment is not to be accepted. In fact The Claimant's re-amendment on April 24 2007 changed the area claimed from 1808 square feet to 8611 square feet. His alleged encroachment is based upon what he believed to have been reclamation by the deposit of land fill by the claimants on lot 7 and as a question of fact I find this is not the case.

Mr Sturge

14. The methodology of his survey was compromised by the fact that one of the iron markers that he would have had to use as a reference point was under water. He worked out where it should be and then sent one of the claimants' workers – a mason - to search for it and then a hold a surveying pole over it. He could not say whether that person held the pole level. If it were not held level it would have affected the accuracy of the survey. Further there is evidence that there could have been other pieces of iron. The claimants stored old equipment on the land – and there is a real possibility that the iron that the mason found may not have been a boundary marker. Rather than measurements being taken from a fixed established iron boundary marker the mason was directed to where the iron was expected to be. But no one saw this marker and Mr Sturge did not feel that marker himself, even to confirm that the mason had even actually located an iron marker at all under the water. I am not satisfied that the methodology of this survey was such that it can be relied upon, especially in the context that there are three surveys, including two by the claimant, that give conflicting results as to the area of encroachment, and they cannot all be right.

15. I do note that Mr Sturge said that his measurement of 168 square metres was not the entire encroachment but rather his instructions were to show the encroachment of Mr Samuel's building.

Evidence of the Claimant

16. The evidence of the Deceased Claimant **appears from his witness statement as follows:-**

*6. Upon the original conveyance dated 7th July **1978, I took possession of Lot 6,** which at that date comprised two dwelling houses (viz. a three bedroom house and a two bedroom house) situate in proximity to the road on the northern boundary of the land, (i.e. Sadhoo Trace now called Don Miguel Road0 while the remainder of the land was swamp. These two houses which still exist today are each about 40 feet in length and 28 feet in width and therefore at that date extended about 80 feet towards the southern boundary.*

*8. On or **about July 1978 I began filling** the swamp with soil and continued doing so up until about 1987, in the process filling up or reclaiming 380 feet of the swamp **towards the southern boundary of the land**, leaving about 126 feet in swamp.*

*9. I recall specifically on or **about 1987, obtaining a substantial amount of land fill** at no cost from the work site of the Ambassador Hotel, Long circular road, St. James I also recall hiring Jadulal Autocare & Trucking Service of Johnny King Street, Aranguez to transport the fill to Lot 6 and to level it with a backhoe, and actually saw them do so.*

10. The land belonging to Defendant (1) known as Lot 7 ("Lot 7") is situate on my western boundary. As at July 1978 Lot 7 comprised two dwelling houses in proximity to the roadway on its northern boundary, one behind the other. To the

hest of my knowledge, the second dwelling house for about twenty (20) years, been occupied by the Deceased's son, Andrew Ramkhalawansingh and/or his wife, Beverly Ramkhalawansingh.

11. *From or about 1978 up until his death in 1991, I knew the Deceased very well and considered him to be a good friend. I knew him to be a coconut vender and regularly bought coconuts from him and saw him selling in the central market, Port of Spain. I also* ***recall on a weekly basis*** *that* ***he would dump used coconut shells in the swamp beyond the second dwelling house on Lot 7. However, I did not see him or any other persons fill the swamp beyond that part of the land with soil or other land fill up until his death.***

13. *On or about 1998, Defendant (1) caused the construction of a wire fence separating the dwelling houses on Lot 7 from the dwelling houses on Lot 6. When I first saw the wire fence I went to Defendant (1) and told her that it was cutting into my boundary since the space between the fence and the buildings on Lot 6 was wider at different points along the boundary. Defendant (1) told me that the fence was placed correctly and that this was verified by her surveyor. I did not know who her surveyor was and never received a notice of any survey in that year or at all up to this date.*

14. ***Up until about 2004 I used the reclaimed land on Lot 6 as a garage for parking my trucks and storing my equipment, tools and parts which I used in my business. This garage was enclosed by a fence and covered by a galvanized roof.***

15. *In 2004 I partially demolished the garage by removing the roof and used the walls and foundation and further extended it to construct a building which comprises four warehouses which are each 40 feet in length and 28 feet in width, all of which have been tenanted up to the present date. I am also currently in the process of constructing a fifth warehouse measuring 80 feet in length and 28 feet in which extends the building to 320 feet on the land.*

Paragraph 16

When in 2004 I constructed the building comprising the warehouses on lot 6 ***I was unable to have a survey done since there wasn't anyone willing to work in the swamp. I therefore ran a line from the wire fence on the western boundary along which I constructed the said building in a southerly direction.***

Paragraph 18

On or about April 2006 I therefore retained the services of Mr. Kenneth Sturge, Trinidad and Tobago Land Surveyor who prepared a survey plan dated 28th April 2006 which does in fact show that part of my building and my reclaimed land had encroached on lot 7("the encroachment")

Paragraph 19

On or about April 2006, is the first time that I became aware that Mr. Nasser Abdul had conducted a survey for the defendant (1) in 1998 or at all. On or around April 2006 I did speak to defendant (2) and Mr. Abdul separately on the telephone and when Mr. Abdul told me that I was encroaching on Lot 7 ***I told him that he was either drunk or crazy because I was doing no such thing.***

Paragraph 20

On or about April 2006 for a period of about two weeks, I saw about fifty (50) or sixty (60) loads of land fill brought and dumped by heavy trucks into the swamp beyond the pig pen on Lot 7. During this time, I also saw a tractor levelling the land fill and recall that

at one point it broke down a portion of the wall on the northern boundary of Lot 7. This is the first time that the swamp beyond the pig pen on Lot 7 was filled or reclaimed up to and beyond the southern most part of Lot 6.

17. When the Deceased states in his witness statement that he did not see the defendants fill their lot 7 with soil until April 2006, although the defendant's predecessor did fill lot 7 with used coconut shells from at least 1978, I expressly find this statement to be untrue. I instead accept the contrary testimony of the defendants, as the 1980 aerial photograph produced by his own expert demonstrates that reclamation on lot 7 was far more advanced than on lot 6 – consistent with the defendants' evidence that they were reclaiming their own land for 35 years prior to 2007 with soil/earth and not biodegradable used coconut shells, and totally inconsistent with the claimants' evidence that they were not doing so.

18. While Mr. Sturge's survey may have revealed to the claimant that part of his building had encroached on lot 7 it certainly could not have revealed that his reclamation activities had so encroached. That is because I find that the defendant had also reclaimed his land and on a balance of probabilities I find it more likely that reclamation / earth filling on lot 7 was in fact conducted by the defendants and not the claimants .It would be incredible if the claimants were to have filled the entire width of the defendants land without exciting protest, and I do not at all accept this as a possible scenario.

19. His building however, extended in 2004, and further extended thereafter, did so encroach on Lot 7, according even to his own surveyor Mr Sturge.

20. His witness statement also shows the deceased claimant's cavalier attitude to the boundary between lot 6 and lot 7. As I disbelieve the claimant on the issue of no reclamation being undertaken by the defendants, so also I disbelieve him when he states that he was never aware of the survey by the defendants' surveyor Mr. Abdul in 1998.

The Defendant's evidence

21. Dolly Ramkhalawansingh says that for 35 years prior to 2007 she lived there with her husband and **they continuously filled and reclaimed their lot 7.**

22. In mid 1990s after the death in 1994 of Carl Ramkhalawansingh, the deceased defendant, the claimant encroached on lot 7 by construction of a warehouse thereon. They complained and he ignored them. They had a survey conducted, it revealed encroachment, they informed him and he ignored them.

22. In her witness statement Dolly Ramkhalawansingh states as follows:-

At paragraph 5:

In or about the mid-1990's, following the death of the Deceased, my family and I observed that the owner of Lot No. 6 which adjoins and/or abounds our property namely lot No. 7 to the East appeared to be encroaching on Lot No.7 by way of the construction of a Warehouse thereon. We notified the first Claimant of our observations and requested

verbally that he desist from encroaching onto Lot NO. 7 and stay within his boundary. The first Claimant denied that he was encroaching on lot no. 7 and ignored our protestations in this regard.

Paragraph 6

I therefore commissioned a survey of Lot No. 7 to be done by Licensed land survey Nasser Abdul in April 1998 in order that a plan of lot No. 7 could be produced, the demarcation of the boundaries thereof revealed (si) as well as to ascertain whether there was any encroachment thereof by the first claimant on the Eastern boundary of Lot 7.

Paragraph 7

Mr. Abdul conducted the survey of Lot No. 7 and produced a survey plan to me …which revealed an encroachment on the Eastern boundary of Lot No. 7 by the owners of Lot No. 6.

Paragraph 8.

I notified the first Claimant verbally of the said encroachment but he failed and/or refused to desist and/or vacate lot no. 7.

Paragraph 9

The first claimant continued in late 2004 and early 2005 to further encroach on the Eastern boundary of Lot No. 7 by way of the construction of a building thereon divided into four (4) separate warehouses and despite my and my family's objections the First

Claimant insisted that he was constructing the building within the boundary of Lot No. 6 and informed us that he had relied on a line of sight to satisfy himself that he was not encroaching on Lot No.7.

[This is confirmed by the Deceased Claimant himself in his witness statement]

Ryan Singh

Further Paragraphs 7 and 8 of the witness statement of Ryan Singh are corroborated by the witness statement of the deceased claimant himself as follows:-

Paragraph 7

Despite being notified of such the first Claimant refused to accept that he was encroaching on Lot No. 7. ***Indeed he insisted that he had relied on a line of sight and was certain that our survey plan was wrong.***

Paragraph 8

The first Claimant continued to ignore the family's protests and continued with his construction insisting all along that he was constructing his building within the boundary of Lot No. 6 ***and that our survey is wrong and that our Surveyor is crazy.***

23. In light of my findings about reclamation on Lot 7 being by the defendant and not attributable to the claimants, any encroachment by the claimants' building will not have been for a sufficient period to permit extinction by adverse possession of the defendants' title to the land on which it stands.

Mr. Abdul

24. Defendants surveyor Abdul says 77.2 square meters is the area of encroachment. Mr. Sturge, Claimants' surveyor says 168 square meters is area of encroachment of the building. Mr. Williams says it is far greater.

25. It is possible that the difference is accounted for by Mr Abdul's taking into account only encroachment by the claimants' buildings.

26. It is not in dispute that there is such an encroachment. I note Mr Sturge's comments on Mr Abdul's survey and were it not for the issues regarding methodology of his own survey would have been prepared to have accorded them greater weight. In the circumstances however, as there is no dispute that there is an encroachment, and as Mr Sturge's 168 square meter encroachments must incorporate Mr Abdul's 77.2 square meter encroachments, I find that there is undisputed evidence of encroachment of at least 77.2 square meters by the claimants over the defendant's lot 7. Were I to have accepted Mr Sturge's survey plan the area of trespass by the claimants would be 168 square meters. Similarly were I to have accepted Mr Williams measurements, which I do not, the area of the claimants' trespass would be even greater.

Findings of Fact

27. Conclusion

a. The defendant's survey by Mr. Abdul showed encroachment.

b. This was communicated to the deceased claimant.

c. The deceased claimant did no survey but rather used a line of sight.

d. He ignored complaints by the defendant of his trespass.

e. Apart from adopting this cavalier approach he then made complaints to the police to stop the defendants from building a wall to prevent further encroachment by him.

f. He progressively increased the amount of land claimed.

28. Further I find that even if the deceased claimant had been dumping landfill on the defendant's land in the mistaken belief that it was his and the requisite period of 16 years had elapsed, and he had inadvertently encroached on the defendant's land [which I do not accept]. There has not been demonstrated on the evidence any intention by the claimants to possess any portion of lot 7, as to result in the acquisition of title of any portion thereof, or the disposition or discontinuance of possession, of the defendants.

29. I do not accept that he used the land as he claimed. I find that his evidence is untruthful as regards the defendant's reclamation activities and his own reclamation activities in 1980. I note his cavalier attitude in ignoring protests by the Defendant I therefore equally disbelieve his assertion that he made use of the alleged encroachment.

In this regard see **Grace Latmore Smith v David Benjamin Civ Appeal No. 67 of 2007**

See Extracts set out in the appendix.

Conclusion

29. I find

(i) There has been trespass by the claimants as set out in the survey plan of Nasser Abdul dated May 1 2006.

(ii) That the claimants have not established the extinction of title by the defendants, or the acquisition of title by themselves, over any portion of lot 7.

30. Accordingly the Claimants claim is dismissed.

1. A declaration is granted that Lot No. 7 Don Miguel Road, San Juan inclusive of the alleged encroachment forms part of the Estate of Carl Ramkhalawansingh also known as Robert Carl Ramkhalawansingh.

2. A mandatory order is granted compelling the claimants to forthwith pull down, and remove the buildings, and/or structures inclusive of walls and foundations erected on lot 7 and the alleged encroachment and to further remove all equipment, parts, tools and storage of trucks or vehicles therefrom within twenty eight (28) days.

3. an injunction is granted restraining the Claimants and each of them whether by themselves, their servants, agents and/or agents or howsoever or otherwise from entering upon or remaining upon Lot 7 and/or the alleged

encroachment and from erecting or constructing any structure, and/or extending any structure or building thereon, or from carrying out any works on lot 7 and/or the encroachment.

4. An order is granted that damages be paid by the Claimants to the Defendants for trespass to be assessed by this Court.

    a. The claimants are to pay the Defendant's costs of the claim in the sum of fourteen thousand dollars ($14,000.00) based upon the costs prescribed by the Civil Proceedings Rules 1998, as amended.

    b. The Claimants are to pay the Defendant's costs of the injunction in the sum of six thousand three hundred dollars ($6,300.00) and

    c. The Claimants are to pay the Defendant's costs of the counterclaim in the sum of fourteen thousand dollars ($14,000.00)

Dated this 23rd day of June 2010

Peter A. Rajkumar
Judge

Appendix

Paragraphs 38 – 40

It is well settled that except in the case of joint possession, possession is single and exclusive. Therefore where the paper title owner was at one time in possession of the land but a squatter's subsequent occupation constitutes in law possession for the purpose of the Limitation Act then he would have dispossessed the paper title owner (see Pye at para.88).

> *What constitutes possession in this area of law was discussed in Pye. In the judgment of Lord Browne-Wilkinson with which the other Law Lords agreed…*

He went on to say (at para. 40) that there are two elements necessary for legal possession and these are:

> *"(1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that without the requisite intention, in law there can be no possession."*

He stated that old notions of adverse or non-adverse possession are not part of the modern law. It is therefore not necessary, for example, for the squatter to show ouster, ie the knowing removal of the paper title owner from the land. Nor is there any necessity to establish that the squatter's occupation is not consistent with the paper title owner's

present or future enjoyment of the land. "Adverse possession" is a convenient label which recognizes only that the squatter's possession is adverse to the interest of the paper title owner.

44-48

44. Nothwithstanding what was said in Richardson v Lawrence the Privy Council in Goomti Ramnarace v Harrypersad Lutchman [2001] UKPC 25 without referring to Richardson v Lawrence stated (at para. 9) that the concept of adverse possession is incorporated into the Limitation Act. Lord Millet who delivered the judgment of the Board said with reference to the Limitation Act:

> *"Neither the [Limitation Act] nor the 1833 Act contains any reference to the concept of adverse possession, which became enshrined in the English statute by section 10(1) of the Limitation Act 1939, but this was no more than a statutory enactment of the case law on the earlier English Limitation Acts (see Moses v Lovegrove [1952] 2 QB 533 at 539, per Sir Raymond Evershed MR) In those circumstances, their Lordships do not doubt that the concept is incorporated into the [Limitation Act] also"*

45. In the very next paragraph Lord Millett however stated:

> *"Generally speaking adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by lawful title, or with the consent of the true."*

46. He seems to suggest that what he meant by adverse possession was not the concept as it existed before the 1833 English Act but simply possession that is not consistent with the title of the paper title owner, a position entirely consistent with Pye. In Privy Council Appeal No. 50 of 2002 Wills v Wills the Board considered the remarks of Lord Millett at paragraph 9 of Ramnarace v Lutchman quoted above and stated that the expression "adverse possession" was not used in "any very technical sense" and saw no conflict between Ramnarace v Lutchman and Pye. The Privy Council went on to apply the principles enunciated in Pye in the Jamaican context.

47. In my judgment therefore there is no conflict between Ramnarace v Lutchman and Pye as counsel for the appellant contended. There is no cogent reason why the principles in Pye should not apply to this jurisdiction. Indeed in Civil Appeal 99 of 2006 Santo v Jones the Court did apply Pye.

48. As was stated in Pye, and to which I have already made mention, for there to be possession under the Limitation Act there must be absence of consent of the paper title owner or where relevant his predecessor in title, factual possession and an intention to possess.

58-60

58. In view of the above, there was no consent or permission to occupy the lands that is relevant for the purposes of the Limitation Act. The Respondents' occupation was

adverse to the interest of the Appellant. The next question then is that of factual possession. Were the Respondents in factual possession of the lands. Lord Browne Wilkinson in Pye approved the statement of Slade J in Powell v Mc Farlane (1977) 38 P and CR 452 where he said (at pp 470 to 471):

> *Factual possession signifies an appropriate degree of physical control. It must be single and [exclusive] possession, though there can be a single possession exercised by and on behalf of several 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 of what acts constitute a sufficient degree of <u>exclusive</u> physical control must depend on the circumstances, 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.**

60. *The next submission relates to the intention that the squatter must have. Counsel for the Appellant submitted that the intention the Respondents must have in order to be in possession is an intention to own the lands and dispossess the true owner.* ***It is however very clear as a consequence of Pye that the necessary intention is not an intention to own but to possess and exclude the paper title owner so far as is reasonably practicable.*** *In Pye Lord Browne Wilkinson state (at paragraph 42):*

> *"…it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess…Slade J reformulated the requirement (to my mind correctly) as requiring an intention in one's 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 process of law will allow.*

The intention as was said in Pye (at paragraph 40) is frequently deduced from the acts of physical possession. In assessing the significance of the acts of possession, it was said by the Privy Council in Bissessar v Lall [2004] UKPC 48 (at para. 7) that "the nature of the land in question and the character of the actors are highly relevant"

64. ***In Pye, Lord Hutton was of the view (at paras. 75 and 76) that where a squatter enters land and makes <u>full use</u> of it in the way in which an owner would that would normally be sufficient to establish that he had the intention to possess. Similarly Lord Hope stated that the only intention which has to be demonstrated is an intention to occupy and use the land as one's own. This evidence in this case in my judgment clearly establishes that David Benjamin, Joan and Leroy used the lands as their own. They did everything which an owner of the lands would have done. In my judgment the only reasonable conclusion which can be drawn from the evidence is that they had the necessary intention.***