REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2011-01525

BETWEEN

FAZAL HOSEIN

Claimant

AND

RAJINDRA MAHARAJ
NARINDRA MAHARAJ

Defendants

Before the Honourable Madame Justice Rajnauth-Lee

Appearances

Miss Vindra A. Dass for the Claimant
Mr. Anand R. Singh instructed by Mr. Jason Nathu for the Defendants

Dated the 5th June, 2012

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JUDGMENT

INTRODUCTION:

1. This action was commenced by the Claimant against the Defendants on the 21st April, 2011 seeking inter alia a declaration of ownership of a certain parcel of land on the ground of adverse possession. The Claimant also sought damages for trespass. The Defendants have defended the claim on the grounds that they have a paper title to the lands[1] and they say that the Claimant has not been in possession of the lands for sixteen (16) years prior to the claim being commenced.

CLAIM FORM AND STATEMENT OF CASE:

2. By his original Claim Form filed on the 21st April, 2011, the Claimant sought a declaration that the Claimant has obtained possessory title to the two parcels of land comprising thirty five thousand four hundred and twenty three square feet be the same more or less delineated and coloured pink on the plain registered as Volume 1761 Folio 87 being portion of the lands described in the Crown Grant in Volume 1254 Folio 193 and shown as Lot 5 in the General Plan filed in Volume 1761 Folio 79 and bounded on the North by the Access 10 feet wide, on the South by lands of Hootooram on the East by Lot 6 and on the West by a Road Reserve 50 links wide ["the said parcels of land"]. The Claimant also sought a declaration that he was in lawful occupation of the said parcels of land.

INTERIM INJUNCTION:

3. The Claimant also filed an application for an interim injunction on the said 21st April, 2011. An interim injunction was granted on the 21st April, 2012. In addition, the Claimant filed

[1] Pursuant to Memorandum of Transfer registered on the 23rd March, 2007.

his Statement of Case on the 28th April, 2012. According to paragraph 2 of his Statement of Case, around 1974 the Claimant began to clear lands behind his home [which home is situated at Lot 24, Richards Trace, Malabar, Arima]. These lands were heavily forested at the time and over a period of about two (2) months, the Claimant cleared the lands behind his home and started to cultivate vegetables. He also planted several trees including fruits trees.

4. At paragraph 3 of the Statement of Case, the Claimant alleged:

> The area of land behind Lot 24 was approximately 35,000 square feet and comprised two parcels being a portion of the lands described in the Crown Grant in Volume 1254 Folio 193 and shown as Lot 5 in the General Plan filed in Volume 1761 Folio 79. The lands, howsoever bounded and abutted, are described as bounded on the North by an Access Road 10 feet wide, on the South by lands of Hootooram, on the East by Lot 6 and on the West by a Road Reserve 50 links wide.

5. By a supplemental affidavit filed in the injunction proceedings on the 29th April, 2011, the Claimant sought to explain that the lands were incorrectly described through inadvertence. According to the Claimant's affidavit, he was illiterate. He had gone to the Lands Registry in Port of Spain and spoken to one Mr. Samaroo. He had informed Mr. Samaroo that he had been in occupation of certain lands behind his home at Richards Trace, Malabar. He had described the lands to Mr. Samaroo and had explained that the lands were situated behind his home and that Richards Trace was off Tumpuna Road.[2]

6. According to the affidavit, the Claimant also told Mr. Samaroo that the lands were an area measuring in or around 246 feet from west to east and 125 feet from north to south; and that they were bounded on the north by a track extending from Solid Gold Avenue on the south by Lots 23, 24, 25 26 and 27, on the West by lands of Harris Anderson and Maharaj and on the east

[2] Paragraph 5 of the Claimant's supplemental affidavit.

by a mango tree and lands of Rodney. According to the Claimant's affidavit, Mr. Samaroo did a search, gave him a document and told him that it was the Certificate of Title.[3]

MR. RAMCHARITAR'S SURVEY PLAN AND THE AMENDMENTS:

7. In the meantime, there was agreement between the parties on the appointment of Mr. Ganeshdath Ramcharitar, licensed land surveyor, ["Mr. Ramcharitar"] and on the 15th June, 2011, the parties and their attorneys were present at a survey which was conducted on the disputed lands by Mr. Ramcharitar.[4] On the 18th July, 2011, the parties and their Attorneys appeared before the Court and the Court heard the findings of Mr. Ramcharitar regarding the survey of the disputed area conducted on the 15th June, 2011. In the circumstances, the Court continued the injunction and also directed inter alia the filing of an Amended Claim Form and Amended Statement of Case. By the said order [paragraph 8] the parties agreed to be bound by the description of the parcel of land identified and shaded on the draft plan of Mr. Ramcharitar dated the 18th July, 2011. According to the order, the parcel of land claimed by the Claimant against the Defendants is bounded to the NORTH partly by the lands of Rajindra Maharaj and partly by a concrete drain; to the EAST by the lands of Rajindra Maharaj; to the SOUTH by an undeveloped access road; and to the WEST by lands now or formerly of Cade J. Mathura. [This parcel of land which is the subject of the amended claim is referred to as "the disputed lands" in this judgment]. The draft plan of Mr. Ramcharitar was finalised on the 25th July, 2011 and used in these proceedings.

8. On the 3rd October, 2011, the Amended Claim Form and the Amended Statement of Case were filed. At paragraph 5 of the Amended Statement of Case, the Claimant alleged that in or around 1976, he began selling fruits and vegetables which he had cultivated in the garden, but he found it difficult to support himself and his family, as not all of the land was arable. Parts of the garden were not suitable for cultivation, as those parts had previously been used to burn coals.

[3] Paragraph 6 of the Claimant's supplemental affidavit.

[4] See paragraph 2 of Miss Dass' affidavit filed on the 30th August, 2011.

He began to fill the coal pits in order to make the land arable. Sometime in or around the year 1977, he began to work at the Amalgamated Assembly Plant but every evening and weekend he worked at his garden, either cultivating vegetables or on filling the indentations. At paragraph 6 of the Amended Statement of Case, the Claimant alleged that since in or around 1974 he has been in exclusive possession and control of the garden and that the garden has either in whole or in part been in cultivation with various crops, continuously since in or around the year 1974.

DEFENCE AND COUNTERCLAIM:

9. The Defendants filed their Defence and Counterclaim on the 17th October, 2011, denying inter alia that the Claimant's garden included the disputed lands.[5] At paragraph 6 of the Defence and Counterclaim, the Defendants also denied that the Claimant occupied, had use of, or cultivated or had been in exclusive possession of and control of any part of the disputed lands. They also denied that the Claimant had been in continued undisturbed possession of the disputed lands from 1974 to 2007 or that he had been in continuous undisturbed possession of the disputed lands for sixteen (16) years preceding the commencement of this claim.

10. In addition, by paragraph 7 of the Defence and Counterclaim, the Defendants set out the following reasons for their denials:

a. The survey plan of Winston Ramcharan dated the 28th March, 1978 did not show any indication of the disputed lands being occupied by anyone;

b. The Claimant's plea at paragraph 7 of his Statement of Case established the northern edge of the garden as where the public had access; the Defendants shall aver this was not on the disputed lands but along the road reserve now known as Pereira Road;

[5] Paragraph 6 of the Defence and Counterclaim.

c. The valuation report for crop damage supported that the damages were south west of the road reserve known as Pereira Road and therefore could not be any part of the disputed lands.

d. The Claimant described the parcel of land that he was in occupation to a person at Lands and Surveys and that description was consistent with the parcel numbered 5 on the survey plan of Ganeshdath Ramcharitar and not the Defendants' land.

e. The Defendants' predecessor in title Mr. Fareed Mohammed had exclusive possession of the disputed lands between the period 1999 to March 2007 and on or about 2005 it was he who cut and removed trees from the disputed lands;

f. That the lands that the Claimant may have entered upon and occupied are at best the lands shown as numbered 5 on the survey plan of Ganeshdath Ramcharitar and not the Defendants' land;

g. That the Defendants and their immediate predecessor in title prior to their respective purchases of the larger portion of land of which the disputed lands form part inspected the disputed lands and there were no signs of occupation or cultivation or use by anyone;

h. There were no signs of occupation or any entry by the Claimant upon the disputed lands prior to 2007;

i. Any form of the Claimant's occupation on the disputed lands was by way of trespass by recent unlawful entry and that occurred sometime after 2009.

REPLY AND DEFENCE TO COUNTERCLAIM:

11. On the 3rd November, 2011, the Claimant filed a Reply and Defence to Counterclaim, alleging that he had been in adverse possession of the garden since 1974[6]. At paragraph 1 of the Reply and Defence to Counterclaim, the Claimant averred that the disputed lands formed part of a larger parcel of lands referred to as the garden. At paragraph 1, the Claimant further alleged that the garden was located on the lands behind Lot 24 [the Claimant's home] and was more specifically identified as **E,D,C&B** on Mr. Ramcharitar's survey plan which contained the accompanying note that **E,D,C&B** were the dimensions given via e-mail dated June 16th 2011.[7]

ISSUES:

12. The central issue for determination is whether the Claimant has been in possession of the disputed lands for more than sixteen (16) years prior to the commencement of the claim and had thereby acquired title to the disputed lands by adverse possession. A further issue for determination by the Court is whether the Defendants trespassed upon the disputed lands. It is noteworthy, however, that Miss Dass, Attorney for the Claimant, has conceded that the Claimant's witness statements do not address the issue of damages for trespass and that no expert evidence on this issue has been filed.

13. In addition, by her written submissions filed on the 14th March, 2012, Miss Dass submitted inter alia that the report of Mr. Paul Williams ["Mr. Williams"] dated the 8th December, 2011, was not admissible in these proceedings on the grounds inter alia that the contents of the instructions given to him by the Defendants were not known to the Court or to the Claimant and that Mr. Williams' independence had been necessarily compromised; and that Mr.

[6] See paragraph 3.

[7] Unfortunately, the circumstances surrounding that e-mail were not explored in evidence, and I shall make no further reference to it.

Williams was appointed by the Court on the 7th December, 2011, yet his Report stated at paragraph 16 that he had visited the disputed lands on the 3rd November, 2011.

14. The Court will consider these objections and other objections as to Mr. Williams' evidence first since the Court's determination of them will fundamentally affect the Court's consideration of the evidence adduced by the parties as a whole.

15. This is also an appropriate stage to mention that at the commencement of the trial the parties had agreed to a relaxation of the rule in **Browne v Dunn** (1893) 6 R. 67 [H.L] and the parties were not deemed to have accepted the other parties' case although not formally having put their respective cases.

THE EVIDENCE:

The admissibility of Mr. Williams' evidence:

16. Subsequent to the objections raised by Miss Dass as to the admissibility of Mr. Williams' evidence, the Court received further written submissions of the parties and also heard oral addresses. Consequent upon the further submissions and oral addresses, the Court gave permission **by consent** to the Defendants to file and serve the affidavit of Mr. Jason Nathu, Attorney–at-Law, ["Mr. Nathu"] as to the context in which the applications were made for the appointment of a single expert and exhibiting inter alia the relevant orders and e-mails passing between the Attorneys. During oral addresses, Miss Dass confirmed that Mr. Nathu had spoken to her indicating that he did not wish to have any conversation with the expert without the Claimant's consent.

17. Mr. Nathu's affidavit was filed on the 23rd April, 2012, and it described in detail the circumstances of the appointment of Mr. Williams. In his affidavit, Mr. Nathu recounts that on the 30th September, 2011, the Court varied the order of the 18th July, 2011 and inter alia gave permission to the Claimant to adduce expert evidence at the trial by an Aerial Photogrammetrist

and the parties were directed to file an application appointing a joint expert for this evidence on or before the 31st October, 2011.[8]

18. According to Mr. Nathu's affidavit [paragraph 5], he had a conversation with Miss Dass on the 30th October, 2011 in relation to the time for the filing of the application for the joint expert. According to him, he explained to her that they would have to speak to Mr. Williams and in the light of the time, they would have to seek an extension of time.

19. According to Mr. Nathu's affidavit [paragraph 6], he telephoned Mr. Williams on the 30th October, 2011 with a view to determining whether he would be available to adduce expert evidence at the trial as a joint expert. Mr. Williams indicated that he would be available, but would require further information about the matter. Mr. Nathu promised to revert to him after speaking to Miss Dass. Further, Mr. Nathu deposed that he had no other discussion with Mr. Williams.

20. Mr. Nathu further went on to depose [paragraph 7] that by an application dated the 31st October, 2011, the parties agreed that Mr. Williams be appointed as the joint expert for the purpose of interpreting certain aerial photographs and requested by consent that the time to file an application appointing a joint expert to adduce evidence at the trial be extended to the 7th November, 2011. Mr. Nathu annexed a copy of the application filed on the 31st October, 2011, which exhibited e-mail communication between the Attorneys on the 31st October, 2011.

21. I have perused the notice of application filed on the 31st October, 2011 headed notice of application by consent and without a hearing. By the application, filed by Mr. Nathu, the Claimant and the Defendants sought inter alia that the time for the parties to file an application appointing a joint expert to adduce evidence at the trial be further extended to the 7th November,

[8] Paragraph 4.

2011. According to Ground 2 of the application, the parties had agreed to appoint Mr. Williams as the joint expert for the purpose of interpreting aerial photographs. The application was signed by Mr. Nathu on behalf of the Defendants.

22. I have perused the e-mail communication between Miss Dass and Mr. Nathu which was exhibited to the application. By his e-mail of the 31st October, 2011, Mr. Nathu wrote to Miss Dass as follows:

> *As discussed by telephone, we are seeking your consent for an extension of time for the parties to file the application appointing Mr. Paul Williams a joint expert, to adduce evidence at the trial. Would you consent to November 07, 2011 for this purpose?*

Miss Dass responded on the said 31st October, 2011 as follows:

> *Dear Jason,*
> *As discussed, consent granted.*

23. At paragraph 8 of Mr. Nathu's affidavit, he deposed that on the 4th November, 2011, Miss Dass informed him by telephone that she was in conference with her clients and that her clients had changed their instructions with regard to the appointment of an aerial photogrammetrist. Further on the 7th November, 2011,[9] Miss Dass telephoned him and indicated that her clients would not consent to the appointment of the joint expert. Mr. Nathu then explained to Ms. Dass that he was put in a difficult position as he did not want to speak with Mr. Williams without her consent. Miss Dass' position was confirmed by her e-mail of the 7th November, 2011 in which she indicated [in answer to Mr. Nathu's enquiry whether she could confirm her client's position on appointing the aerial photogrammetrist] that further to their conversation earlier that day, her clients were initially not averse to the idea but they were at that time definitely not in favour of consenting to the application.

[9] Paragraph 9 of Mr. Nathu's affidavit

24. Mr. Nathu further deposed that in the above circumstances his clients were forced to make an application on the 7th November, 2011 for an order appointing Mr. Williams as a single expert pursuant to Part 33.6 of the Civil Proceedings Rules, 1998 (as amended) ["the CPR"].

25. Further, Mr. Nathu deposed at paragraph 12 of his affidavit that in those circumstances and in light of the time, he telephoned Mr. Williams on 8th November, 2011, to ascertain whether he would be able to still complete the report. Mr. Williams remarked at that time that he had not heard anything from the parties and he needed someone to take him for a site visit. Mr. Nathu explained to him that an application was made to the Court to appoint him as a single expert in the matter, and that the Defendants would bear the cost of his professional fees in connection with same. Mr. Williams asked for arrangements to be made for him to visit the premises, and Mr. Nathu explained that he would not be in a position to accompany him on the site visit without the presence of Miss Dass. Mr. Nathu went on to depose[10] that on the 29th November, 2011, Mr. Williams telephoned his office stating that his report was concluded. Mr. Nathu told him that he would send to him the particulars of whom his report was to be addressed. In addition, Mr. Nathu swore[11] that by e-mail correspondence dated 7th December, 2011, he wrote to Mr. Williams, attaching a copy of the Court's order dated 7th December, 2011, and he outlined in that email the rules regarding expert evidence.

26. By the Court's order dated the 7th December, 2011 [the date of the Pre-trial Review] it was ordered as follows:

1. Mr. Paul Williams be appointed as a single expert by the Court, pursuant to part 33.6 of the CPR, and the Court directs that Mr. Williams do provide all available aerial photogrammetrical records in relation to the disputed lands and to report to the Court thereon;

[10] Paragraph 13 of Mr. Nathu's affidavit

[11] Paragraph 14 of Mr. Nathu's affidavit

2. Mr. Williams do address his report to the Court pursuant to part 33.9 of the CPR and provide copies of the same to the parties' Attorneys on or before the 9th December, 2011;

3. Mr. Williams do attend on the 14th December, 2011 at 9.30 a.m. at the Hall of Justice, Second Floor in Courtroom POS 20 for cross-examination;

4. There be no order as to costs; and

5. The Defendants shall bear the cost of Mr. Williams' fees for his report and attendance at court.

27. By the e-mail communication referred to at paragraph 14 of Mr. Nathu's affidavit, Mr. Nathu inter alia requested that Mr. Williams send his report by e-mail addressed to the Court pursuant to the relevant provisions of Part 33, which provisions were set out in the e-mail. This e-mail was copied to Miss Dass and to the Court's Judicial Support Officer. The Court's order was attached.

28. After Mr. Nathu had filed and served his affidavit of the 23rd April, 2012, the Court's Judicial Support Officer received correspondence from Miss Dass dated the 25th April, 2012, in which she indicated that Mr. Nathu had filed his affidavit without her approval of its contents [contrary to the Court's directions]. Thankfully, this issue had been resolved between Miss Dass and Mr. Nathu by the filing of a supplemental affidavit by Mr. Nathu on the 27th April, 2012, in which he deposed that Miss Dass' position by telephone on the 25th April, 2012, was that she never consented to the appointment of a joint expert, but rather that the consent was limited only to an extension of time.[12]

[12] See paragraph 9 of Mr. Nathu's supplemental affidavit

29. These were the circumstances in which Mr. Williams' report dated December, 2011 was forwarded to the Court along with the *curriculum vitae* of Mr. Williams. Accordingly, Mr. Williams gave evidence at the trial as a single expert appointed by the Court.

The Law on Part 33 of the CPR:

30. Part 33 of the CPR governs the use of expert evidence before the court. Part 33.1 provides that it is the duty of an expert witness to help the court impartially on the matters relevant to his expertise. This duty overrides any obligations to the person from whom he has received instructions. Part 33.2 also requires inter alia that expert evidence presented to the court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation. An expert witness must provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness must state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded view. Part 33.5 provides that a party cannot call an expert witness or put in an expert's report without the permission of the court.

31. Part 33.6(1)(b) provides that where the court gives permission to call an expert witness or put into evidence an expert's report, it may direct that evidence is to be given by a single expert appointed by the court. Part 33.6(2) provides that if the court gives such a direction the parties must, so far as is practicable, agree-

(a) the questions to be submitted to the expert;
(b) the instructions to be given to him; and
(c) arrangements for –
    (i) the payment of the expert's fees and expenses; and
    (ii) any inspection, examination or experiments which the expert wishes to carry out.

Pursuant to CPR Part 33.6(3), if the parties cannot agree these matters any party may apply to the court to decide them.

32. Part 33.7 of the CPR provides as follows:

(1) The general rule is that parties must give instructions to a single expert.

(2) Where, however, experts are instructed by two or more parties such experts must seek to carry out any examination jointly.

(3) A party instructing an expert must provide him with a copy of this Part and give every other party notice of –

(a) the name and address of the expert; or

(b) the names and addresses of a number of experts one of whom the party intends to instruct; and

(c) the nature of the instructions to be given to him.

(4) Notice under paragraph (3) must be such as will give the other party enough time and information –

(a) to instruct the same expert;

(b) to instruct another expert to carry out an examination with the expert names in the notice; or

(c) to instruct another expert to prepare a report jointly with that expert.

33. In accordance with CPR Part 33.9 an expert must address his report to the court and not to any person from whom he has received instructions.

34. Part 33.10(1) of the CPR sets out the contents which an expert's report should contain:

(a) details of the expert's qualifications;

(b) details of any literature or other material which the expert has used in making his report;

(c) who carried out any test or experiment which the expert has used for the report;

(d) details of the qualifications of the person who carried out any such test or experiment; and

(e) where there is a range of opinion on the matters dealt with in the report –

(i) summarise the range of opinion; and

(ii) give reasons for his opinion.

35. Pursuant to CPR Part 33.10(2), at the end of an expert's report there must be a statement that –

(a) the expert understands his duty to the court as set out in rules 33.1 and 33.2;

(b) he has complied with that duty;

(c) his report includes all matters within his knowledge and area of expertise relevant to the issue on which his expert evidence is given; and

(d) he has given details in his report of any matters which to his knowledge might affect the validity of his report.

36. Part 33.10(3) provides that there must be also attached to an expert's report copies of –

(a) all written instructions given to the expert;

(b) any supplemental instructions given to the expert since the original instructions were given; and

(c) a note of any oral instructions given to the expert,

and the expert must certify that no other instructions than those disclosed have been received by him from the party instructing him, his attorney-at-law or any person acting on behalf of the party.

37. Miss Dass placed much reliance on the case of **Peet v Mid-Kent Healthcare NHS Trust** [2001] EWCA Civ 1703 [2002] 3 All ER 688. In proceedings for medical negligence brought on behalf of the claimant, a child born with cerebral palsy, the court approved a settlement where by the defendant NHS trust agreed to pay 95% of the damages which were to be assessed. With the consent of the parties, the court subsequently made an order for the joint instruction of seven non-medical experts to deal with different issues in relation to quantum. CPR 35.7 gave the court power to direct that evidence in relation to a particular issue be given by one expert only, while other provisions of Part 35 dealt inter alia with the mutual disclosure of instructions given by the instructing parties to a single joint expert and the putting of written questions to such an

expert by a party. The claimant's parents and their lawyers wished to have a conference with the joint experts, in the absence of the trust's representatives, so that they could discuss the experts' evidence and test its strength. After the trust objected, the master ordered that no such conference should take place without the trust's written consent. The claimant appealed.

38. The Court of Appeal held that where the parties had instructed a single joint expert, it was not permissible for one party to have a conference with the expert in the absence of the other party without the latter's prior written consent. A conclusion to the contrary would be inconsistent with the whole concept of the single expert. The framework found in CPR Part 35 was designed to ensure an open process so that both parties knew what information had been placed before the single expert. It would be wholly inconsistent with that structure to allow one party to conduct a conference where the evidence of the experts was in effect tested in the course of discussions with them. There could be no point in a unilateral meeting or conference unless what transpired between the party enjoying sole access and the expert was, at least in part, intended to be hidden from the expert's other client. That was necessarily inconsistent with the very concept of a *jointly-instructed expert*, owing an equal duty of openness and confidence to both parties [emphasis mine]. Accordingly, the appeal was dismissed.

39. On the other hand, Mr. Singh submitted that **Peet's** case was not helpful since it dealt with one party convening a meeting with a single joint expert without the presence of the other party. Mr. Singh further submitted that **Peet's** case did not assist where there was no joint appointment. It was therefore argued on behalf of the Defendants that Mr. Williams' visit to the disputed lands on the 3rd November, 2012 could not in any way be connected with a breach of the right to a fair trial as alleged by Miss Dass. Mr. Singh also relied on the dicta of Lord Woolf C.J. at paragraph 21 of the **Peet's** case:

> *One of the experts whose expertise is nursing has interviewed the parents of the claimant for the purposes of the preparation of her report. There can be no objection to that. A single expert is perfectly entitled to interview the parents for the purposes of preparing a satisfactory report. There was no suggestion, as I understand it, for the defendant to be*

represented when instructions of that sort were being taken by the expert, and I would not expect the defendant to raise any objection to what happened in this case. That is one thing; but the idea of having an experts' conference including lawyers without there being a representative of the defendant present, as was suggested by the claimant's solicitors, in my judgment is inconsistent with the whole concept of the single expert. The framework to which I have made reference is designed to ensure an open process so that both sides know exactly what information is placed before the single expert.

40. In addition, Mr. Singh submitted that fair play had not been demonstrated by the Claimant's approach in objecting to Mr. Williams' evidence. Mr. Singh contended that a consideration of the Court's order and of paragraph 16 of Mr. Williams' report[13] showed that no influence could be exerted by the Defendants on Mr. Williams. He also contended that there was no suggestion to Mr. Williams during his evidence at the trial that his independence had been compromised and that that suggestion should have been made and could not fall within the relaxation of the rule in **Browne v Dunn** as agreed by the Attorneys.

41. In her further submissions made by letter dated the 25th April, 2012, Miss Dass also considered the transcript of the Court of Appeal in the case of **Rhonda Taylor v Andy Sookhoo and others** [Civ. App. No. 216 of 2011]. She submitted that in the instant case the Defendants had failed to plead any facts about the occupation/possession of the disputed lands for the sixteen (16) years next after 1974. According to Miss Dass' submissions, Kangaloo J.A. had suggested in **Rhonda Taylor** that expert evidence could be admitted if there was a pleading to support same. Miss Dass submitted that in the instant case there was no pleading by the Defendants which supported such evidence and accordingly such expert evidence was not admissible.

42. I do not accept Miss Dass' last submission. By paragraphs 6 and 7 of the Defence and Counterclaim [set out at paragraphs 9 and 10 of the judgment] the Defendants not only deny the

[13] At paragraph 16 of Mr. Williams' report, he deposed: "I visited the site on Sunday November 03, 2011 in order to confirm that I can identify the disputed lands correctly in the aerial photography. During my visit I took GPS observations using a Hand Held instrument and I took photographs of the area."

Claimant's claim but positively aver in effect that from 1974 up to 2007, there were no signs of occupation or entry by the Claimant upon the disputed lands. In my view, paragraphs 6 and 7 of the Defence and Counterclaim are sufficient to support Mr. Williams' evidence especially having regard to the fact that the onus of proving that the Claimant was in possession of the disputed lands for the requisite sixteen (16) years rested with the Claimant.

43. In addition, I have considered **Peet's** case and Mr. Nathu's affidavit. The Court is of the view that the facts of **Peet's** case are distinguishable from the facts of the instant case. **Peet's** case presented a different scenario where there was a jointly appointed expert and a request by one party to hold a conference with the expert without the other party. On the other hand, the facts deposed to in Mr. Nathu's affidavit disclose circumstances where Mr. Williams visited the disputed lands without Mr. Nathu or his clients, the Defendants. According to Mr. Nathu's affidavit, when he spoke to Mr. Williams on the 8th November, 2011, Mr. Williams had expressed his desire for someone to take him for a site visit and for arrangements to be made for the site visit. The Court notes that quite properly Mr. Nathu distanced himself from any further dealings with Mr. Williams until Mr. Williams telephoned him to say that the report was concluded. I am therefore of the view that the date of the site visit of the 3rd November, 2011, is on a balance of probabilities a simple error. I also agree with Mr. Singh that fairness dictated that in the special circumstances of this case, the issue of the date of Mr. Williams' site visit ought to have been explored in cross-examination by Miss Dass. I am of the further view that since Mr. Williams was in essence the Court's witness pursuant to Part 33 of CPR, Miss Dass owed a duty to the Court to raise this issue when Mr. Williams was before the Court.

44. In these circumstances, and in the light of the facts disclosed in Mr. Nathu's affidavit, I do not consider that Mr. Williams' evidence and independence have been compromised by the fact that he visited the site on the 3rd November, 2011 or on any date prior to his appointment as an expert. I have also observed that Mr. Nathu approached this difficult issue with great propriety to ensure that Mr. Williams' independence was not compromised. Indeed, during oral addresses, Miss Dass confirmed to the Court that Mr. Nathu had spoken to her, indicating that he did not wish to have any conversation with the expert without the Claimant's consent.

Accordingly, I find no breach of the right to a fair trial and I see nothing in the circumstances of this case to suggest that Mr. Nathu or the Defendants had sole access to the expert. I am therefore of the view that Mr. Williams' report was the independent product of an expert uninfluenced by Mr. Nathu or the Defendants.

45. Miss Dass has also raised the issue that Mr. Williams' report did not comply with CPR Part 33.10(3). The Court is of the view that in the circumstances of this case and in view of Mr. Nathu's affidavit, the instructions given to Mr. Williams, both oral and written, have been fully disclosed to the Court. Accordingly, I am of the view that the dictum of Dean-Armorer J. in the unreported case of **Martin Phillip Revenales v Eric Charles** CV 2006/03842 [paragraph 14] that the failure to provide information required by Part 33.10 of CPR was fatal and would result in the Court's rejection of the expert report would be inapplicable to the instant case. In my judgment, Mr. Williams' evidence is admissible.

ADVERSE POSSESSION: ANALYSIS OF THE EVIDENCE:

The Claimant's case to prove:

46. The Claimant has consistently alleged in these proceedings that over a period of in or around two (2) months in the year 1974, he cleared an area behind his home [which includes the disputed lands], started to cultivate vegetables and also planted several trees including fruit trees. Indeed, in his affidavit filed on the 21st April, 2011, the Claimant deposed inter alia that the area of land [which includes the disputed lands] was heavily forested when he began to live at Richards Trace, Malabar, Arima, and that people in his neighbourhood called him *"**AXE**"* because they knew that he was the one who cut down the forest.[14] Further, he deposed that over a period of two (2) months he cleared the area of land [which includes the disputed lands] and began to plant a variety of trees.[15]

[14] See paragraph 2.

[15] See paragraph 3.

Mr. Williams' Evidence:

47. On the other hand, in addition to his report, Mr. Williams gave evidence before the Court and examined aerial photographs for the years 1975, 1986, 1998, 2001 and 2003 with the aid of computer aided screen projections set up in the courtroom.[16] In his report, Mr. Williams set out in detail how he identified the disputed lands and how he arrived at his findings. During his oral evidence, Mr. Williams identified the disputed lands shown on Mr. Ramcharitar's survey plan as the lands which he considered. According to his evidence, the aerial photographs for the years 1975, 1986, and 1994 showed no clearing of the disputed lands and no evidence of horticulture (gardening) taking place on the disputed lands. Indeed, the projected aerial photographs for the years 1974, 1986 and 1994 showed clearly and definitely the disputed lands as a largely forested area with no clearing whatsoever. The disputed lands were covered with medium trees. According to Mr. Williams, the classification of medium trees was done not by him but by the Lands and Surveys Department; medium trees are trees that are about thirty (30) feet tall.

48. According to Mr. Williams' evidence, the 1998 aerial photograph, on the other hand, showed a slight or small clearing but no sign of agriculture and no furrows. His evidence further revealed that the 2001 aerial photograph showed the same area cleared and no evidence of horticulture or agriculture.

49. When questioned by Miss Dass, Mr. Williams clarified paragraph 13 of his report. He also explained that he used the term "horticulture" to mean plants as against the farming of animals and said that in order to assess whether there was horticulture, one looked for furrows and clearing on the lands in dispute. When asked by Miss Dass what would be the position if someone was planting land in a more informal manner without the presence of furrows or beds,

[16] See the positive comments of Bereaux J. (as he then was) as to the use of a computer aided screen projections in similar circumstances in the unreported case of **Arvin Ajodha v Frank Holman and another** in the consolidated claims of CV 2005-00189, CV 20005-00536 and CV2006-01452.

Mr. Williams' answer was that there still had to be a clearing of the lands in dispute, even if there were no furrows or beds.

50. Miss Dass made the following submissions as to the weight to be attached to Mr. Williams' evidence:

(i) Mr. Williams was not an agriculturist and his method of detecting horticultural activity was based on whether or not he could see furrows;

(ii) The evidence of the Claimant and Mr. Terry George was that the method of cultivation was not ordered;

(iii) Detecting this type of informal farming technique from an aerial photograph might prove difficult for someone who was not an agriculturist;

(iv) There was a margin of error involved where photographs were taken from great height.

The case of **Martin Phillip Revenales v Eric Charles** (supra) was again relied on by Miss Dass and the dicta of Dean-Armorer J. at paragraphs 56 and 57 thereof as follows:

> *56. Mr. Williams produced an aerial photograph which captured the building which stood on the land. However, Mr. Williams testified that the photograph suggested that there was no surrounding vegetation. Mr. Williams admitted that an aerial photograph is taken from an altitude of 12,500 feet and that there is a margin of error.*
>
> *57. In my view, the failure of the aerial photographs to capture vegetation has not affected the evidence of the Claimant. Mr. Williams does not purport to state categorically that there was no vegetation but simply provides a report as to the content of a photograph. In my view, this does not displace the evidence of both the Claimant*

and Ms. Stewart who testified that they actually planted crops on the land. More significantly, however, is the fact that the evidence of Mr. Williams does not address any time period before 1998. The result is that the Claimant's evidence remains unchallenged from 1968 to 1998. By virtue thereof the Claimant would have satisfied the sixteen (16) year requirement of the ***Real Property Limitation Act*** *and would be entitled to resist any actions brought by the title owner of the property.*

The Evidence adduced on behalf of the Claimant:

51. In the Claimant's witness statement, the Claimant repeated the allegation that he cleared the whole parcel of land in the year 1974 over a period of two (2) months. The Court notes with concern that the Claimant in his Amended Statement of Case sought a declaration that he had obtained possessory title to the disputed lands, yet in paragraphs 2 and 4 of the Amended Statement of Case, the Claimant alleged that the garden extended from behind his home and included the disputed lands. In fact, by the Claimant's witness statement [paragraph 3] the Claimant stated that he had not agreed with Mr. Ramcharitar's survey as to the area of land occupied by the Claimant. According to him, his garden extended from the line behind Lot 24 shown on the survey plan to the land under the property of Paasaram and stopped near the concrete drain on the south side and extended to the line shown on the survey plan which bounded the western edge of the lot marked 2. According to the Claimant's witness statement, [paragraph 3] his garden included the whole of Lot B shown on the survey plan, that is, the entire parcel owned by the Defendants. The Court also notes with concern that on the 18th July, 2011, when the Court received Mr. Ramcharitar's survey plan and made the order which reflected the agreement of the parties as to the area occupied by the Claimant and recorded at paragraph 7 of this judgment, the Claimant raised no objection to Mr. Ramcharitar's survey plan. Yet in his witness statement [paragraph 3] he accused Mr. Ramcharitar of behaving in a most unseemly manner, shouting at Miss Dass, his Attorney, and shouting at everyone present at the survey.

52. The Claimant was supported in his evidence by his witnesses, Terry George ["Mr. George"] and Tajmool Hosein, his son. Mr. George's evidence focused on events which

occurred between the years 2009 to 2011. According to his witness statement, in 2009, he was introduced to the Claimant and since then has maintained the lands planted by the Claimant. Mr. George also knew about the Claimant when he, Mr. George, was a young boy. He confirmed that the Claimant was called ***Axe*** because he was the man who cut down the forest. Mr. George was present on the 4th April, 2011, when according to him, the Defendants trespassed on the garden. He called CCN TV6, the television station. A copy of a DVD containing footage taken by CCN TV6 was produced to the Court and upon the written application made by the Claimant's Amended Hearsay Notice filed on the 13th December, 2011 pursuant to CPR Part 30.3, the Court gave permission for the DVD to be shown at the trial.

53. The DVD was played in the courtroom during the trial on the 15th December, 2011. Mr. Singh did not consent to the application and pointed out that the incident took place on the 4th April, 2011 but for some unexplained reason the date of the DVD was the 25th May, 2011. He also submitted that the DVD appeared to contained selective footage of the event and that without the assistance of the maker the DVD by itself could not establish what lands the DVD related to. Having looked at the DVD, the Court observed that it focused on some bearing tomatoes plants and pepper plants, some of which had been uprooted; one (1) young coconut tree and one (1) chataigne tree were identified; one (1) bearing barbadine vine was shown and some banana plants were also seen. The earth looked newly bulldozed and the young coconut tree and some banana plants looked as if they had been recently bulldozed. The Court agrees with Mr. Singh's submissions and notes that the DVD provides little assistance to the Court in the determination of the central issues before the Court.

54. The Claimant was cross-examined after Mr. Williams had given his evidence. He acknowledged that he had been present in court when Mr. Williams gave evidence of the aerial photographs and that he had seen that in 1975 there were full trees all the way up to the back of his house. His explanation was that these were the fruit trees which he had planted after he had

cleared the land in 1974 and that by 1975 these trees had grown to that height. The Claimant also testified that he had planted coconut trees in 1974 and by 1975 they had grown very tall.

55. The Court observed that during cross-examination the Claimant's story changed. He changed his evidence. Although he had been known as ***Axe*** having cut down all the trees behind his house, he then testified when cross-examined that he did not cut all the trees. He said he did what is called "***TALA***", that is, you clear below, plant and then cut the big trees. He then described how he cleared cedar and hardwood trees and other trees, working all by himself, morning and evening.

The evidence adduced on behalf of the Defendants:

56. The Defendants gave evidence, as did their witnesses, Mr. Fareed Mohammed ["Mr. Mohammed"] and Mr. Rodney Lamsee ["Mr. Lamsee"]. Mr. Mohammed was the previous owner of the lands owned by the Defendants [which lands include the disputed lands] and knew the lands from approximately 1999. According to him, when he first visited the lands to see what was being offered for purchase, he recalled that the lands were forested and covered with trees; the lands were also covered with brush and shrubbery.

57. Mr. Lamsee, an Attorney-at-Law, testified that he lived at the corner of Pereira Lane and Tumpuna Road, Arima. He had known the Claimant for the past twenty (20) years and was familiar with the Claimant's home. According to Mr. Lamsee, he had had several encounters with the Claimant, all concerning Lot 5 for which Mr. Lamsee had permission to occupy.[17] According to Mr. Lamsee's evidence, in 1990, the Claimant authorised an individual to build a shack on Lot 5 and Mr. Lamsee had cause to demolish the shack. In another incident, the

[17] Lot 5 is shown on Mr. Ramcharitar's survey plan as situate north of the Claimant's home at Lot 24 and south of the disputed lands and Lot B.

Claimant alleged that Mr. Lamsee had damaged crops that he, the Claimant, had planted on Lot 5. The Claimant subsequently brought proceedings against Mr. Lamsee for damage to his crops at the Arima Magistrates Court. Those proceedings were not served and were eventually dismissed. Mr. Lamsee's evidence was that in all the years that he knew Lot 5 and the lands surrounding Lot 5, that is over thirty (30) years, he never observed the Claimant or anyone for that matter planting or cultivating the parcel of land identified as Lot B on the Ramcharitar plan, that is, the parcel of land owned by the Defendants, which parcel includes the disputed lands.

ADVERSE POSSESSION: CONCLUSIONS:

58. Having considered all the evidence, I find on a balance of probabilities that the Claimant has failed to prove his case. In the view of the Court, the case of **Revenales** and the findings of Dean-Armorer J. have to be distinguished from the circumstances of the instant case. In the **Revenales**, Mr. Williams' evidence was that there was no vegetation and Dean-Armorer J. found that, given the altitude at which the aerial photograph was taken and the margin of error, that evidence did not affect her view of the weight of the direct evidence advanced on behalf of the claimant which she accepted without hesitation. The instant case provides a wholly different situation. Not only did Mr. Williams say that he found no evidence of horticulture (that is gardening), he also said that there was no clearing on the disputed lands and that in the years 1975, 1986 and 1994, the aerial photographs showed that there were trees some thirty (30) feet in height on the disputed lands. I therefore accept Mr. Williams' evidence without reservation.

59. I wish to add that the Court adopts the approach of Hamel-Smith J.A. in the case of **Himraj Bandhoo v The Registrar General of Trinidad and Tobago** CvA. 123 of 2001 that the maxim *a picture tells a thousand words* was apt to describe the effect of the pictures shown by the aerial photographs presented to the court. Hamel-Smith J.A. remarked on the clarity of the aerial photographs, that they were seen under magnification and that anyone with knowledge of that feature would appreciate the clarity of what was revealed. Hamel-Smith J.A. further remarked that if there had been occupation of that parcel of land to the extent to which the appellant described in **Bandhoo** it would have been apparent in those photographs. I too

observed the clarity of the aerial photographs shown to the Court by Mr. Williams and seen under magnification through the computer aided screen projections. I have also observed that the Claimant's case found no support in those photographs. In addition, I adopt the approach of Bereaux J. in **Ajodha** (supra) and in my view the evidence of Mr. Williams alone would be sufficient to discredit the claim of the Claimant.

60. In the circumstances, the Court does not accept on a balance of probabilities the Claimant's evidence that he had cut down all the trees on the lands he claimed as the garden[18] [which included the disputed lands] in two (2) months in the year 1974 and that he had planted fruit trees which had grown to thirty (30) feet in height by the year 1975. That is an obvious fabrication. Further, it is my view that the Claimant attempted to change his case and to fabricate evidence in order to fit his case into Mr. Williams' evidence by suggesting to the Court that he could have been planting under the trees in a process he referred to as "***TALA***". This was also seen by Miss Dass' suggestion to Mr. Williams that if one were planting under the tress one would not be able to see that vegetation. I am also of the view that Mr. Singh has correctly submitted that if the Claimant was in occupation of the garden or the disputed lands, as he has claimed, when he obtained his deed of ownership for Lot 24 – his home – from Attorney Mr. Garnet Mungalsingh, he would have obtained such a deed for the garden or the disputed lands. The Court notes that this deed recites that the Claimant had been the owner in possession of Lot 24 for more than sixteen (16) years.

61. I wish to add that I have formed the view that the Claimant and his witnesses were not witnesses of truth. They were hesitant, evasive and unhelpful in their answers and attempted to change their stories when they found it convenient to do so. Indeed, in a simple matter as who was instrumental in pursuing enquiries as to the documents of ownership, the Claimant and Mr. George contradicted each other, the Claimant not wishing to admit that it was Mr. George who encouraged him to go into town to get the documents. Accordingly, I do not accept their evidence. On the other hand, I observed that the Defendants and their witness, Mr. Mohammed, were not cross-examined. Mr. Mohammed had known the disputed lands since the year 1999

[18] Approximately 17,000 square feet of land.

and I accept his evidence that when he first visited the disputed lands in the year 1999, the disputed lands were covered with trees and in brush and shrubbery. The Court also regards Mr. Lamsee as a witness of truth and I accept his evidence that for the thirty (30) years he had known the disputed lands, he had never observed the Claimant or anyone for that matter cultivating the disputed lands.

62. Mr. Singh has also submitted that the Claimant has changed his case as to the area of land that he alleged he occupied: from his original claim and statement of case to his amended claim and amended statement of case and his witness statement. Miss Dass submitted that the Court should draw no adverse inferences since the Claimant was an illiterate person who relied on third parties to assist him in locating the boundaries of the lands which he occupied. Miss Dass has conceded by her written submissions filed on the 14th March, 2012 that "***the parties were able to agree that the shaded area on the survey plan of Ganeshdath Ramcharitar was the area in dispute***".[19] That is how the Court understood the order of the Court made on the 18th July, 2011 when the parties agreed to be bound by the description of the parcel of land identified and shaded on Mr. Ramcharitar's survey plan, set out at paragraph 7 of this judgment and referred to in this judgment as the disputed lands. In these circumstances, I cannot accept Miss Dass' explanation for the position taken by the Claimant as to his occupation of the whole of the garden – Lot B. I am of the view that in these circumstances, the Court should draw adverse inferences therefor.

63. In the circumstances, the Claimant has failed on the first issue of adverse possession. The Claimant has failed to prove on a balance of probabilities that he has been in occupation of the disputed lands for more than sixteen (16) years prior to the commencement of the claim. Accordingly, I will grant the declaration sought by the Defendants in their Counterclaim. The Defendants however have not produced any evidence to support their claim in damages. I propose to make no order as to the costs of the Counterclaim.

[19] Paragraph 4 of the written submissions filed on behalf of the Claimant on the 14th March, 2012.

THE ISSUE OF TRESPASS:

64. In all the circumstances, I also find that the Claimant has failed to prove that he was lawfully in occupation of the disputed lands or that he had a better title to the disputed lands than the Defendants. Accordingly, his claim for trespass also fails. The Court notes that Miss Dass has conceded that only nominal damages for trespass could have been awarded since the Claimant's witness statements did not address the issue of damages for trespass and that no expert evidence as to damages for trespass had been adduced.

COSTS:

65. Mr. Singh has argued that the Court should order that the Claimant pay the Defendants' costs on a prescribed scale pursuant to section 31(3) of the Legal Aid and Advice Act Chapter 7:07. By section 31(3), the Court can order a party to pay costs to the other party where it appears to the Court that the legally aided person acted improperly in bringing the claim. The Court is empowered to so declare and order the aided person to pay the costs of the Director, the Attorney-at-Law who acted for him or the cost of the other party. The Court agrees that the Claimant has fabricated his case against the Defendants, and has acted improperly in bringing this claim; and I consider that this is an appropriate case to make the declaration pursuant to section 31(3) of the Legal Aid and Advice Act and to order that the Claimant pay to the Defendants their prescribed costs.

ORDER:

IT IS HEREBY DECLARED AND ORDERED AS FOLLOWS:

1. The Claimant's Amended Claim filed on the 3rd October, 2011 is hereby dismissed.

2. The Court hereby declares pursuant to section 31(3) of the Legal Aid and Advice Act Chapter 7:07 that the Claimant being an aided person has acted improperly in bringing these proceedings against the Defendants. Accordingly, the Claimant shall pay to the Defendants prescribed costs of the Amended Claim in the sum of $14,000.00.

3. The Court hereby declares that the Claimant has not been in possession of the lands identified and shaded on the survey plan of Mr. Ganeshdath Ramcharitar dated the 25th July, 2011 and bounded on the NORTH partly by the lands of Rajindra Maharaj and partly by a concrete drain; to the EAST by the lands of Rajindra Maharaj; to the SOUTH by an undeveloped access road; and to the WEST by lands now or formerly of Cade J. Mathura for sixteen (16) years prior to the commencement of this action or at any time between the years 1974 and 2007.

4. There shall be no order as to the costs of the Counterclaim.

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MAUREEN RAJNAUTH-LEE

JUDGE