

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2009-02696

Between

CLIVE GILL

Claimant

AND

JUDE MOSES

(also known as JULIE MOSES)

Defendant

AND

JUDE MOSES

(also known as JULIE MOSES)

Ancillary Claimant

AND

SELWYN MOSES

Ancillary Defendant

Before The Honourable Mr. Justice Seepersad

Appearances:

1. Mr. K. Sagar and Mr. Y. Ahmed for the Ancillary Claimant
2. Mr. C. Blaize for the Ancillary Defendant

Date of Delivery: 8th December, 2015

1. Before the Court for its determination is the Ancillary Claimant's claim filed on the 20th March, 2013. This matter involves the ownership of a parcel of land namely ALL AND SINGULAR that certain piece or parcel of land situated in Mausica Road, D'abadie, in the Island of Trinidad, comprising Three Acres One Rood and Twenty Perches (being part of a larger portion containing Seven Acres Two Roods and Three Perches described in Deed registered as No. 784 of 1948) and bounded on the North by lands now or formerly of J. Maharaj on the South partly by lands of the Estate of S. Harragin and partly by a drain reserve 5 feet wide and partly by another drain 6 feet wide on the East partly by lands now or formerly of F. Subera and partly by a drain 6 feet wide and on the West partly by Cleaver Road partly by a drain reserve 5 feet wide and partly by another drain reserve 6 feet wide (hereinafter called "the said D'abadie Lands").

2. The following reliefs were prayed for:
 - a) An order setting aside the Deed registered as No. 19914 of 1984 by virtue of which the said D'abadie lands were vested in the Ancillary Defendant and that the Registrar be notified accordingly.

 - b) A Declaration that the Ancillary Claimant is the lawful owner of the said D'abadie Lands.

 - c) An Order directing the Registrar General to expunge the Deed registered as No. 19914 of 1984 from the records of the Land Registry.

 - d) Alternatively to (a) and (c) that the Ancillary Claimant be paid the market value for the portions of the said D'abadie Lands that have been sold by the Ancillary Defendant and that the remaining portions as described in Deed No. DE200502698840D001, be reconveyed to the Ancillary Claimant.

 - e) Damages.

- f) A Declaration that the money received by the Ancillary Defendant in the sum of \$920,000.00 from the purported sales of Lots 13, 14, 15 and 16 to Javan Lewis, Alicia James and Allan Joseph and Donna Joseph is being held on trust for the Ancillary Claimant.
 - g) An Order that the Ancillary Defendant do pay the Ancillary Claimant the sum of \$930,000.00 together with interest at the rate of 12% per annum from the 12th December, 2008 to date of payment.
 - h) Damages for Fraud.
 - i) Costs.
 - j) Such further and/or other relief.
3. The Ancillary Defendant filed an Amended Defence and Counterclaim on the 3rd May, 2013 and a Reply and Defence to Counterclaim was filed on the 13th November, 2013.

The Ancillary Claimant's case

4. The Ancillary Claimant did not testify but her daughter Julie gave evidence on her behalf. By virtue of the pleadings filed and the evidence adduced, the Ancillary Claimant relied on the following facts:
- a) That she is the widow and legal personal representative of the Estate of Milton Moses and the beneficiary of the said D'abadie Lands by virtue of the last will and testament of Milton Moses.
 - b) That the Ancillary Defendant is her lawful son and that his father was the deceased Milton Moses.

- c) On 12th October 1984 by Deed registered as No. 19914 of 1984, she executed a transfer of the said D'abadie Lands to the Ancillary Defendant.
- d) By Deed dated and registered as No. 18529 of 1985 she assented to and conveyed the said D'abadie Lands unto herself.
- e) By deed dated 2nd August 2001, registered as DE2001 020001 06D001 and by deed dated 12th November 2001 registered as DE2001 028087 88D001, the Ancillary Defendant purported to convey the entire D'abadie Lands to one Colvin Blaize.
- f) By deed dated 17th December 2004 and registered as Deed No. DE2005 026988 40D001 the said Colvin Blaize purported to reconvey to the Ancillary Defendant, portions of the said D'abadie Lands including a parcel of land comprising 2279m².
- g) The Ancillary Defendant purported to convey a portion of land comprising 471.3m² out of the 2279m² portion to one Javan Lewis for \$230,000.00.
- h) By Deed of Conveyance dated 27th March, 2007 and registered as No. DE2007 014018 93D001 the Ancillary Defendant purportedly sold a portion of land comprising 530.7m² out of the 2,279m² portion to Alicia Elizabeth James for the sum of \$200,000.00.
- i) By Deed of Conveyance dated 15th December, 2005 and registered as No. DE2006 000457 14D001, the Ancillary Defendant purportedly sold to Allan Crispin Joseph and Donna Theresa Boynes-Joseph a parcel of land comprising 650m² being a portion of the larger parcel comprising 2,279m² for the sum of \$230,000.00.

- j) The Ancillary Claimant further contended that Deed No. 19914 of 1984 is null and void and of no effect and ought to be set aside on the grounds of mistake and/or illegality and that the money received by the Ancillary Defendant in the sales of the portion of land of the said D'abadie Lands namely the sum of \$920,000.00 is being held by him on trust for her.
- k) She further alleged that the Ancillary Defendant knew that the said D'abadie Lands were devised to her by will and notwithstanding this knowledge, he dealt with the said D'abadie Lands as his own and he sold portions for valuable consideration and neglected to give her the said proceeds of sale.

The Ancillary Defendant's pleaded case

5. The case for the Ancillary Defendant is as follows:

- a) The Ancillary Defendant says that at all times he was the owner or occupier and the person entitled to and in possession of the said D'abadie Lands.
- b) He further contended that by Deed registered as No. 19914 of 1984, the Ancillary Claimant conveyed the said D'abadie lands to him and that he occupied the said D'abadie lands prior to 1984 and always treated same as his own.
- c) His case was that he initially operated a horse farm and after the horse farm was closed he continued to occupy the said D'abadie lands, planting crops thereon and reaping the benefits of the crops so planted.
- d) In addition he stated that he rented out the said D'abadie lands from time to time to persons either to stay in the building on the property or to plant and reap crops.
- e) The Ancillary Defendant stated that during his occupation and ownership of the said D'abadie lands, the Ancillary Claimant never challenged his ownership and/or occupation of same until the present proceedings were instituted.

- f) He further contended that the D'abadie lands were conveyed by him to a purchaser for value without notice of any claim of the Ancillary Claimant when in 2001 he sold same for \$300,000.00 to the land Developer Colvin Blaize and that the Attorneys-at-Law for the land developer, Hamel Smith and Company confirmed the legal title in relation to the said lands.
- g) He also asserted that in order to facilitate the sale of lands as aforementioned by the developer, financial institutions provided mortgage financing for individual purchasers and that the title in the said D'abadie lands was confirmed as a result.
- h) He testified that he always treated the land as being his own and that he never acknowledged the Ancillary Claimant as having any interest in the D'abadie lands. He also said that even if the Ancillary Claimant did have a right or interest in the said D'abadie lands, then she knew or ought reasonably to have known that the said lands were being developed and that houses were being built on it since 2000 and she failed to assert her rights in a timely manner.
- i) Additionally he denied that Deed No. 19914 of 1984 is void. In the alternative he contended that in the event that Deed No. 19914 of 1984 is declared to be void, that the title and right of the Ancillary Claimant to make an entry or to bring any action or suit for the recovery of the said land has been extinguished by virtue of his adverse occupation of same for a period in excess of 16 years.

6. Based on the facts as outlined, the Ancillary Defendant counterclaimed and sought the following reliefs:

- a) A declaration that by virtue of deed dated 12th October 1984 and registered as No.19914 of 1984 and/or all the acts and transactions thereafter, the Ancillary Claimant has divested herself of all her title share and interest in the said D'abadie lands.

- b) Alternatively, a declaration pursuant to the provisions of the Real Property Limitation Ordinance Chapter 5:7, that the rights of the Ancillary Claimant to the said D'abadie lands or some persons through whom she claims and or any and all other persons through who may have had or do have any such right to make an entry or distress or bring an action to recover the said land has been extinguished by virtue of the adverse occupation of the said lands by the Ancillary Defendant and his successors in occupation for in excess of 16 years.
- c) Costs
- d) Such further and/or other relief as the Court deems just.

Ancillary Claimant's Reply and Defence to Counterclaim

7. By virtue of the amended Reply and Defence to Counterclaim filed the Ancillary Claimant stated as follows:
- a) That the Ancillary Defendant occupied the said D'abadie lands from 1978 or 1979 to on/or about 1981 with the permission of his father Milton Moses. It was pleaded that the Ancillary Defendant moved out of the property in 1981 after Milton Moses purchased another property situate at Anna Street, Cleaver Road, Mausica, D'abadie, for him to reside.
 - b) The said D'abadie land was used as a horse farm from the 1970's to the mid 1980's and that she and her husband were the owners of the horse farm as well as a family business called Milton Moses and Sons Company Limited (hereinafter called "the Company"). It was pleaded that the company utilized part of the said D'abadie lands to store scavenging trucks and that the family business was also responsible for the maintenance of the horse farm and up keep of the said D'abadie lands.
 - c) The Ancillary Defendant, she pleaded was one of the shareholders of the Company and his involvement on the lands was mainly as a result of his affiliation with the company and pursuant to his responsibility as a son.

- d) It was further pleaded that the Ancillary Defendant only started planting and reaping peppers on the D'abadie lands in the late 1990's and that at all material times, after the death of Milton Moses, the Company was fully in charge of and in control of the said lands.

The Evidence

8. The following persons testified before the Court in support of the Ancillary Claimant's case:
 - a) Flora Moses
 - b) Irma Moses
 - c) Norris Moses
 - d) Faizal Hosein

Summary of Ancillary Claimant's evidence:

Flora Moses

9. This witness is the lawful attorney of the Ancillary Claimant and is her youngest child. She testified that the Ancillary Defendant moved out of the D'abadie lands in 1982 and went to live at Ana Street. At paragraph 13 she deposed to the fact that her mother executed as Deed No. 19914 of 84 and vested the D'abadie lands to the Ancillary Defendant. Although she shared a close relationship with her mother, she was not aware of the said transaction. She further testified of the existence of the 85 Deed, but again had no knowledge relative to the details surrounding same. At paragraph 16 of her witness statement, her evidence was, that her mother always treated the D'abadie lands as her own and that the management of the lands was left to Norris who was in charge of the family business. She said that the issue of the title to the lands arose around the mid to late 2000's and a decision was taken to challenge the Ancillary Defendant's claim to the said land. This witness gave her evidence in a very clear and cogent manner and there were no material contradictions between her responses in cross examination and her evidence as contained in her witness statement. However, she was unable to provide any assistance as to the Ancillary Claimant's state of mind and/or her reasons for the execution of either the 84 or 85 Deeds. The Court did not accept her position that the Ancillary Claimant always treated the lands as her own, since this position did not accord with the reality given

that same was sold by the Ancillary Defendant to Colvin Blaize and subsequently developed without any objection from the Ancillary Claimant.

Norris Moses

10. This witness gave a factual account of the history of the D'abadie lands, the horse farm and the operation of the scavenging business. He sought to minimize the Ancillary Defendant's involvement on the lands and said that he worked as a driver for the company. At paragraph 33 of his witness statement he said that the Ancillary Defendant was allowed by the family to use the horse farm for his own benefit. After the death of his father he said that the Ancillary Defendant made the decisions for the horse farm. He also said that there were differences of opinion as to how the farm was being run but to keep the peace the Ancillary Defendant was allowed to continue to run the horse farm until it closed and that save for 2 lots of land upon which the trucks and parts from the scavenging company were stored, the lands were left unoccupied. The witness testified that in the late 1990's, the Ancillary Defendant planted the land for one next year.

11. During the course of his evidence the Court found that this witness was somewhat evasive and based on his responses, the Court formed the view that he was not engaged in the active management of the D'abadie lands. He was also not able to say when and by whom the Ancillary Defendant was given permission to use the horse farm for his own benefit. The Court did not accept his evidence that the lands were abandoned for any substantial period of time as he alleged and preferred the Ancillary Defendant's evidence on the said issue.

Irma Moses-Roach

12. This witness had very little interaction with the lands and save for her evidence that her mother is not in good health, her evidence provided little assistance to the Court.

Mr. Faizal Hosein

13. This witness is a Valuator and he gave evidence as to his opinion of the market value of the parcels of land, namely Lot 17 and Lot A as outlined at paragraph 14 of his witness statement and in his valuation report.

Summary of the Ancillary Defendant's Evidence

14. In support of his case the Ancillary Defendant testified and the following witnesses were called:

- a) Kirk Lewis
- b) Shermain Williams

Selwyn Moses – The Ancillary Defendant

15. In cross examination the Ancillary Defendant accepted that he did consult with his father and that he did so even when he purchased a truck, as his father was his best friend. He accepted that he left for the United States of America in the 1970's and returned in 1976. On his return to Trinidad he said he had no accommodation and stayed in the groomer's quarters on the farm with his father's consent and then he moved to Anna Street in 1981. He also said that he loved horses so he looked after them and his father would give him money. Although he moved to Anna Street, the Ancillary Defendant said that he stayed on the farm occasionally to birth foals and testified that after his father's death in 1982 he continued to work on the estate and he had control of the horses until 1986.

16. After the farm ceased operation, he said that he started to plant crops on the land and that in the 90's, he rented portions of same to Shermain Williams. He accepted that there was a mix up in his evidence as to the years when he planted the lands as well as errors in relation to the sums paid by Williams on account of the monthly rental and he accepted that the rent was between \$700.00 to \$800.00 and not \$3,000.00 as was indicated by his lawyers in their response to a request for particulars.

17. The witness further stated that his father had a trucking business and accepted that the trucks were serviced on the farm during the weekends and he never stopped this. He accepted that his

father's company occupied a portion of land upon which the trucks were serviced and parts were stored.

18. The witness said that he only became aware of the 1984 deed when he saw an advertisement in the paper for the sale of the lands and as a result he confronted his mother and then obtained documents from the Red House. He also accepted that under his father's will the said D'abadie lands were not left to him but said that his father always told him that the lands were for that and that his mother the Ancillary Claimant was merely carrying out his father's wishes when she executed the 1984 deed.

Kirk Lewis

19. This witness stated that he lived on the farm from 1988 to 1990 and testified that he knew Selwyn Moses for over 25 years and he said that he was a professional race horse ferrier and a hoof care specialist. His evidence was that he paid the Ancillary Defendant a rent to stay on the farm and at times his professional services were utilised.
20. In cross-examination the witness said that he lived on the farm around the mid to late 1980's and that he stayed there on a barter basis as he provided his service when the horses needed new shoes, however, when he did not do work, he would pay the Ancillary Defendant a sum as rent. He further testified said that Shermain Williams is Selwyn Moses's neighbour and said that when he was living on the farm, he would see Shermain Williams every day. He also testified that he saw old parts and outdated equipment on the farm and that while he lived there he did only dealt with the Ancillary Defendant. The Court was not particularly impressed by this witness and placed little or no reliance upon his evidence.

Shermain Williams

21. This witness said that in the early 1990's he lived in the USA and returned to Trinidad and Tobago permanently in 1994. Between 1996 to 1997 he said he rented a portion of the farm situate at Cleaver Road, Arima from the Ancillary Defendant for \$700.00 per month and that during this period, he planted short crops like cabbage and cauliflower on approximately one and a half acre of the said land.

22. He testified that he knew that the Ancillary Defendant had horses on the land but stated that when he went unto the farm lands in 1996, there were no horses. He also said that he could not remember whether the Moses family were in the scavenging business but did recall seeing parts on the land. The Court was impressed by this witness and accepted his evidence.

Analysis of the evidence

23. The evidence in this case was clear and unequivocal with respect to the fact that the Ancillary Claimant's husband, by his last will and testament, left the lands to her and that by **Deed No. 19914/84** she purported to transfer the said D'abadie lands to the Ancillary Defendant. Attorney at Law for the Ancillary Claimant invited the Court to consider whether the 84 deed was capable of transferring the lands to the Ancillary Defendant and suggested that in order to determine this issue the Court should consider whether the Ancillary Claimant was able in law to convey the lands to the Ancillary Defendant when he was not the beneficiary of same under the deceased's will.

24. From the evidence the following facts were not disputed:

- a) Milton Mosses (deceased) died testate.
- b) That Letters of Administration with the Will annexed was granted by the High Court on 21st September, 1984.
- c) That by the provisions of the Will of the deceased the property at 74B Anna Street, Cleaver Road, Arima was devised to the Ancillary Defendant.
- d) That under the deceased's Will the residuary of his estate was bequeathed to the Ancillary Claimant.
- e) That the D'abadie lands formed part of the residuary of the deceased's estate.

25. The Court was impressed by the manner in which the Ancillary Defendant and his witness Williams testified and found them to be witnesses of truth. The Court found that the Ancillary Claimant's witnesses did not have actual knowledge with respect to material events in relation

to the said land save for Norris Moses and as stated earlier the Court was not impressed with his evidence as the Court found him to be evasive and further found that his evidence contradicted with the Ancillary Defendant's evidence of use and occupation of the lands. In the circumstances the Court found that the Ancillary Defendant's version of events was more probable and plausible.

26. Accordingly, the Court found as a fact that save for the portion of land upon which the scavenging company's trucks and parts were stored, that the Ancillary Defendant occupied, with the permission of his father, the D'abadie lands and that he continued to use same after his father's death and further that he rented out a portion of same to Shermain Williams between 1996 and 1997.

Issues

27. The issues that arose for the Court's determination were as follows:

- a) Whether the Deed dated 12th October, 1984 Reg. as No. 19914/84 is valid or whether same should be set aside.
- b) If the said Deed is found to be invalid, whether the Ancillary Defendant holds the lands described in the schedule to Deed 19914/84, on trust for the Ancillary Claimant;
- c) Alternatively whether the Ancillary Defendant occupied the lands adverse to the interest of the Ancillary Claimant.

The Law

28. Section 94 of the Wills and Probate Act Chapter 9:03 of the laws of Trinidad and Tobago provides:

"94. (1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power disposes by his Will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by Will inconsistent with this

enactment is void as against the creditors, and the court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This subsection takes effect without prejudice to the rights of encumbrancers.”

29. The parties cited various texts as well as the case of **Re West, West and Roberts (1909) 2 Ch 180** so as to provide guidance as to the powers of an executor. Section 94 provides guidance as to the manner in which an executor or legal personal representative ought to discharge their responsibility and the overriding obligation is to ensure that debts and liabilities are discharged.

30. Section 6 of the Act provides:

“6. Every executor of any Will which shall be proved after the commencement of this Act, and every administrator to whom any administration of the estate of any person shall be granted after, the commencement of this Act, shall take and have the same estate and interest in and control over the estate of his testator or of the intestate, and shall have the same rights, actions, powers, and authorities, and be subject to the same actions, suits, and liabilities, in respect of such estate, as any executor or administrator would take, have, and be subject to in respect of personal estate according to Ute Law of England; and all actions and suits and rights of action and suit which, by the law of England, would go to the executor or administrator or heir of any-person dying in England and all actions and suits to which any executor or administrator or heir would be subject according to the law of England, shall, in Trinidad and Tobago, in like manner go to and be maintainable against every representative who, after the commencement of this Act, shall prom the Will or obtain administration of the estate of any person dying and leaving effects within Trinidad and Tobago.”

31. **Halsbury’s Law of England First Edition Volume 14, pp1 296 at paragraph 685** states:

“685. The personal representative has a complete and absolute control over the personal property of the deceased, and he can dispose of the effects, whether they

be legal or equitable, by mortgage or pledge as well as by sale, notwithstanding that the property disposed be specifically bequeathed or limited in trust by the will. He may give to the mortgagee a power of sale over the mortgaged assets.

The mortgagee or purchaser from the representative has the right to infer that the representative is acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies or the application of the money. The property aliened cannot be followed into his hands by either creditor or legatee. The title of the alienee will not be affected by the fact that a long time had elapsed between the death and the date of the alienation, nor by the fact that the alienation does not purport to be made for administrative purposes not to be executed by the representative in his character or representative.

686. But if the nature of the transaction affords intrinsic evidence that the representative is not acting in the execution of his duty, but is committing a breach of trust, or if the mortgagee knows that there are no administrative purposes for which the money is required, he holds the property subject to the claims of creditors and beneficiaries. It rests, however, upon the person seeking to impeach the validity of the transaction to prove that the purchaser or mortgagee had notice of the true state of facts; the mere fact that an executor, who is also a devisee, includes property of his own in the security, or give a security for an originally unsecured advance, is not sufficient to rebut the ordinary presumption that the money has been raised for administrative purposes.

32. In **Attenborough & Son v. Solomon and another (1913) AC 76, at 82** Viscount Haldane said:

“.....The position of an executor is a peculiar one. He is appointed by the will, but then, by virtue of his office, by the operation of law and not under the bequest in the will, he takes a title to the personal property of the testator which vests in him the plenum dominion over the testator’s chattels. He takes it by virtue of his office. The will becomes operative so far as its dispositions of personalty are concerned

only if and when the executor assents to those dispositions. It is true that by virtue of his office he has a general power to sell or pledge for the purpose of paying debts and getting in the money value of the estate. He is executor and he remains executor for an indefinite time.... That is true as a general principle, and I have no comment to make upon it except that it is qualified by another principle, which is this: The office of executor remains, with its powers attached, but the property which he had originally in the chattels which devolved upon him, and over which his powers extended, does not necessarily remain. So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of his assent.”

33. In the instant case, the Ancillary Claimant directed the Court to what was suggested as being glaring errors in the recitals to the said 1984 Deed which can be summarised as follows:

That the Ancillary Defendant was erroneously described as “The Beneficiary” of the D’abadie lands and recited that Milton Moses gave, bequeathed and devised unto the Beneficiary the lands described in the Schedule to the said Deed.

34. The Court is empowered to go behind what is stated in the recitals to a deed and can ascertain what the true facts are. In the 1984 Deed it was stated that the Ancillary Claimant was desirous of conveying the property to the Ancillary Defendant however the Ancillary Defendant was not the beneficiary of the said lands under the deceased’s will.

35. It is accepted that an executor cannot alter the intention of a testator, however, although the deceased left the property under his will to the Ancillary Claimant, she was free to divest herself of the said interest. Under the 1984 Deed, the Ancillary Claimant as the personal representative was duly empowered to deal with the said lands and she elected not to assent the property to herself but instead conveyed same to the Ancillary Defendant. The recital which

recorded that the Ancillary Claimant was the beneficiary of the lands under the Will was clearly not accurate and it cannot be disputed that the D'abadie property fell into the residuary of the estate. However, the Ancillary Claimant unilaterally and without coercion elected to deprive herself of the said benefit and interest in the said lands and she elected to convey the beneficial interest in same, to the Ancillary Defendant. There was no evidence adduced before the Court that could have led the Court to conclude that the 84 Deed was executed as a result of a mistake of fact or that the Ancillary Claimant was the victim of fraud, or deception, undue influence or coercion.

36. The proper process that should have been adopted, should have been an assent of the lands to herself as beneficiary and then a conveyance of same to the Ancillary Defendant. The failure to follow that process did not however invalidate the conveyance. There is no evidence that can lead the Court to conclude that the material time that the Ancillary Claimant was unaware that she was the actual legatee of the D'abadie lands as the wording of the Will was quite clear and unequivocal.

37. Once the debts and liabilities of a deceased has been addressed the legislation mandated that she as the Legal Personal Representative had to distribute the estate. In this case, the Ancillary Claimant wore two hats, one as the representative of the estate and the other as a beneficiary and she voluntarily elected to divest herself of the interest in the D'abadie lands. The Court also considered the effect of the Deed #18529/85, by virtue of this Deed the Ancillary Claimant, after executing the 84 Deed again assented and conveyed the D'abadie lands to herself. This 85 Deed was done in the absence of the 84 Deed having been declared null and void by a Court. At the time the 85 Deed was executed, the D'abadie lands could not have been transferred by her as the said lands were no longer vested in the estate nor did she have any authority over same. The Court also noted that both the 84 and 85 Deeds appear to have been prepared by the same Attorney and the 85 Deed made no mention of the 84 Deed.

38. The Court did not have the benefit of having the Ancillary Claimant testify. Flora Moses in her witness statement stated that the Ancillary Claimant was not in good health and that her memory was 'very poor' and this position was also supported by the evidence of Irma Moses-Roach. Evidence of the state of mind of the Ancillary Claimant at the time that the 1984 and

1985 Deeds were executed would have provided great assistance to the Court. While the Court based on the unchallenged evidence as to her age and state of health was not prepared to draw an adverse inference from her failure to testify, the evidence presented by on behalf of the Ancillary Claimant was deficient and the Court was unable to find on a balance of probabilities that at the time the 84 conveyance was executed that she operated under any misapprehension. The Court had no evidence as to the reasons why she executed the 84 Deed and there was also no evidence upon which the Court could conclude that there was a clear intention as between her and the Ancillary Defendant, so as to create a trust. Further the fundamental elements of a trust, as outlined in **Knight v. Knight (1840) 49 ER 58**, were not been established on the evidence. The Court also had insufficient evidence as to the Ancillary Claimant's state of mind when the 85 Deed was executed so as to lead it to conclude that same was done as a clear and unequivocal act that demonstrated that the 1984 Deed was executed in error. In the circumstances the Court cannot hold that the Deed Reg. No. 19914/84 is null and void and of no legal effect.

39. The Court wishes to point out that while the issue of delay was not properly pleaded, the said issue may have been relevant on the facts of this case. The evidence clearly demonstrated that subsequent to 1984, several transactions occurred with the D'abadie lands and there were visible signs of development but no legal action was taken by the Ancillary Claimant for a substantial period of time.
40. In the alternative, the Ancillary Defendant contended that the Ancillary Claimant's right to bring this action has been extinguished by virtue of his adverse possession of the said D'abadie lands for a period in excess of 16 years. The Court accepted the Ancillary Defendant's evidence that he occupied the land because his father permitted him to do so and he did not enjoy exclusive possession of same at least up to 1997, since the company was also storing equipment on the land. Based on his evidence the Court could not conclude on a balance of probabilities, that the Ancillary Defendant's occupation of the D'abadie lands was characterised with the requisite intention to dispossess as he clearly said that his entry unto the land and subsequent occupation of same was with his father's consent. Accordingly, the

Ancillary Defendant cannot properly advance a claim that he has been in adverse possession of the said lands.

41. For the reasons that have been outlined the Ancillary Claimant's claim is hereby dismissed. On the Ancillary Defendant's counterclaim, the Court declares that by virtue of Deed No. 19914/84 the interest in the said lands described in the schedule thereto was properly vested in the Ancillary Defendant.

42. The parties shall be heard on the issue of costs.

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FRANK SEEPERSAD
JUDGE