

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv 2007-01451

Cv 2007-01452

Between

**IAN ROACH
MARJORIE ROACH**

Claimants

And

**HUGH JACK
SIMEON ROBERTS
ALDRIS ROBERTS**

Defendants

Before the Honourable Mr. Justice Gregory Smith

Appearances:

Ms. Berkley for the Claimants

Ms. Pallackdarrysingh for the Defendants

REASONS

INTRODUCTION:

1. These consolidated actions began as a boundary dispute. The dispute was between the Claimants and the Defendants over a triangular piece of land that lay between their respective parcels of land.

These actions matured into a claim by the Claimants against the Defendants for adverse possession of the same triangular piece of land.

2. I find that:

(i) the triangular piece of land (the disputed triangle) belongs to the Defendants

(ii) the Claimants are not entitled to claim adverse possession of the disputed triangle

3. As a result I dismiss the Claimants' claim. On the Counterclaim, I declare that the Defendants are the rightful owners of their portions of the disputed triangle. I also order the Claimants to pay the prescribed costs of the First Defendant and of the Second and Third Defendants. I assess those costs in the sum of \$14,000.00 for the First Defendant and \$14,000.00 for the Second and Third Defendants.

HISTORY:

4. In October 1988 the Claimants purchased a parcel of land. This parcel of land was surveyed in November 1988. The Claimants erected a fence around their parcel of land in January 1989.

5. The Claimants' parcel of land shares a common boundary with the Defendants' parcels of land. This boundary is the Western boundary of the Claimants' land which is the Eastern boundary of the Defendants' parcels of land.

6. The Defendants' parcels of land were formerly under the common ownership of one Lionel Morton. The Second and Third Defendants purchased their parcel of land from Mr. Morton around July 1996. The First Defendant purchased his parcel of land from Mr. Morton around March 1997. Both of these parcels are of equal size. They lie North and South of each other. Their common Eastern boundary is the land of the Plaintiffs.

7. In June 1997 the Defendants procured a survey of their respective parcels of land. This survey showed that the Plaintiffs' land encroached on their parcels. The encroachment is triangular in shape. The apex of the triangle is in the North and it widens to a base in the South. The Northern part of the triangle encroaches upon the First Defendant's land. The Southern part of the triangle encroaches upon the lands of the Second and Third Defendants.

8. In January 1998 the Defendants had an attorney write to the Claimants about the encroachment. In June 1998 the Second and Third Defendants brought a High Court action against the Claimants (the prior action). They brought the prior action to obtain and enforce their possession of the disputed triangle. This action came on for hearing before me on the 14th May 2002. It was resolved by a consent order. This consent order was based upon a recognition that this was a boundary dispute which would be referred to an independent surveyor for determination. The Claimants and the Second and Third Defendants agreed to be bound by the survey findings. The Claimants and the Second and Third Defendants also agreed that the 'loser' of the boundary dispute would reimburse the 'winner' for the costs of the survey.

9. One Lyndon Antoine conducted the survey that the Court had ordered. He produced a plan dated 6th September 2002. This plan recognized the disputed triangle. The Claimants' Attorney wrote to Mr. Antoine asking for clarification of the plan in June 2003. Specifically, he wanted to know who owned the disputed triangle. In June 2003 Mr. Antoine responded to the Claimants' attorney and said that the Court would have to decide the issue. The Claimants themselves did not know about this exchange of correspondence between their Attorney and Mr. Antoine till sometime in March 2007. The Defendants only found out about this correspondence after the current matter had started.

The Defendants seemed to know of Mr. Antoine's survey. From some time in 2002 the Second Defendant began to request that the Claimants move their fence and other structures that were on the disputed triangle. The Claimants appeared to have

agreed to do so. In November 2006 the Second and Third Defendants had an Attorney (Ms. Lawson) write to the Claimants demanding that they move the fence and mini mart which were located in the disputed triangle.

10. Around January 2007 the First Claimant took down the fence and that part of the mini mart which was located in the disputed triangle.

11. Around March 2007 the First Defendant dug a trench in the area of the new boundary line and started to build a fence there. The Second and Third Defendants also started to build a fence on the new boundary line around March 1997. In June 2007 the Defendants obtained a survey report from one Mr. Winston Doyle.

12. In May 2007 the Claimants commenced this action against the Defendants. In this action, the Claimants seek possession of the disputed triangle on the grounds that:

- (i) they are the owners of the disputed triangle, alternatively
- (ii) they are entitled to the disputed triangle by virtue of their uninterrupted adverse possession of the same for more than 16 years.

A PRELIMINARY POINT:

13. The Claimants sought to dispose of this action before the trial by arguing a Preliminary Point. The preliminary point was doomed to fail.

The Claimants argued that as a matter of law, the prior action did not stop time from accruing in favour of the Claimants for the purpose of adverse possession. This, they submitted would put an end to this matter. On the date fixed for the hearing of the Preliminary Point, both parties agreed that the issue of adverse possession could not be determined as a Preliminary Point. The Court had to make a finding of fact that the Claimants did have the necessary intention to occupy the disputed triangle as adverse possessors (the animus possessendi). This animus possessendi was going to be a hotly disputed issue of fact. A full trial was necessary.

ANALYSIS:

(i) The disputed triangle belongs to the Defendants:

14. Both parties felt that the disputed triangle belonged to them. There were four survey reports in evidence. However, no surveyor gave evidence at the trial. The first survey report was done by Mr. Kenneth Sturge. It is dated 18th November 1988. That report was prepared for the Claimants. The report only defined their parcel of land. The second survey report was done by Michael Jones. It is dated 30th June 1997. That survey report was done for the Defendants. It highlighted the disputed triangle as an encroachment on the Defendants' land. The third survey report was done by Lyndon Antoine. It is dated 6th September 2002. It was prepared on the joint instructions of the parties. This report noted the disputed triangle but made no conclusive statement as to whether the disputed triangle was within the boundary of the Claimants or the Defendants. (I will discuss this report later in my reasons, see paragraph 22 below). The

fourth survey report was done by Mr. Winston Doyle. It is dated 11th June 2007. This survey report established a boundary line which put the disputed triangle squarely within the Defendants' parcels of land.

The first report (Mr. Kenneth Sturge) and the third report (Mr. Lyndon Antoine) did not assist me in the boundary dispute. The second report (Mr. Michael Jones) and the third report (Mr. Winston Doyle) placed the disputed triangle within the Defendants' boundaries.

On the evidence before me there was little to contradict the case that the disputed triangle was indeed within the boundaries of the Defendants and I so find as a fact. The disputed triangle belongs to the Defendants.

(ii) The Claimants are not entitled to claim adverse possession of the disputed triangle

Adverse Possession:

15. The Claimants have not proved that they are adverse possessors of the disputed triangle for the required statutory period of sixteen years.

16. "The law of adverse possession is grounded in the Real Property Limitation Act Ch.56:03 sections 3 and 4 which requires that to succeed in a claim for adverse possession the Claimant must show (1) factual possession of the land for sixteen years or more. (2) The animus possessendi, that is, the intention to exclude the world." (Per Deyalsingh J.A. Lyder v De Freitas H.C.A. 1310 of 2001 at pages 20 and 21 and see Poyer v Freitas Cv 2005-00632 at page 17-19).

17. In the present matter there is no dispute about factual possession. The Claimants had occupied the disputed triangle for eighteen years starting from when they erected their fence in January 1989 till they removed the fence and part of a mini mart in January 2007.

The dispute in this case centers around the animus possessendi or their intention.

18. The animus possessendi to establish adverse possession is an intention possess property in one's own right without the consent of the owner (see Ofulue -v- Bossert [2008] EWCA Civ 7 at paragraphs 58-63 and see generally Pye v Graham [2002] 3 WLR 221 P.C.).

19. In the present matter, the Claimants have not established this animus possessendi for the required 16 years. While they did have the required intention at the time they erected the fence in January 1989, this only lasted until either (a) the consent order in the prior action in May 2002 or (b) until they knew the results of Mr. Antoine's survey in September 2002. This was only about thirteen years. After these events they did not have the intention to possess because either (a) they were in possession of the disputed triangle conditionally upon the results of a survey. This conditional intention is not in my view an intention to possess as of right or (b) the evidence establishes that soon after the survey in 2002 they knew that they were in possession only by the consent or grace of the Defendants, the true owners of the disputed triangle. This possession by the consent or grace of the true owners negatives an animus possessendi.

The evidence shows that the Claimants did not have the animus possessendi:

20. Having heard and seen the witnesses I prefer the evidence presented by the Defendants. The First and Second Defendants presented their evidence in a forthright manner and their testimonies were consistent and credible.

I formed the view that the evidence of the Claimants was not credible because of their overall demeanour and the inconsistencies in their testimony.

On a balance of probabilities, I find as a fact that the Claimants did not have the animus possessendi in respect of the disputed triangular for the required period of sixteen years.

The evidence of the Defendants:

21. The evidence of the Defendants was consistent and straightforward. They presented their testimony in a forthright and truthful manner.

There were only minor inconsistencies in the testimony of the Second Defendant.

Firstly, he was not sure whether an Attorney-at-law, Ms. Lawson, saw Mr. Antoine's plan before she wrote a letter on behalf of the Defendants to the Claimants. This letter was written in November 2006. The letter demanded that the Claimants give possession of the disputed triangle to the Defendants (see paragraph 9 above).

Secondly, the Second Defendant suggested that he built his fence in March 2007 only after he saw Mr. Doyle's survey plan confirming the boundaries. But this could not be so. Mr. Doyle's plan is dated 12th June 2007. The Second Defendant was mistaken about this. He was not in my view, trying to mislead the court.

In any event the Second Defendant's testimony was bolstered by the testimony of the First Defendant. The First Defendant's testimony was unshaken in all material particulars. He also presented his testimony in an open forthright manner. The First Defendant confirmed that he had seen Mr. Antoine's plan soon after its completion. This plan, he felt, confirmed his opinion about the Claimants' trespass on to the disputed triangle. It was he who told Ms. Lawson about Mr. Antoine's plan before she wrote the letter of November 2006.

22. Based on the testimony of the Defendants, I felt comfortable in finding the following facts on a balance of probabilities:

- (a) By the consent order of May 2002 in the prior action, the Parties agreed to be bound by the results of Mr. Antoine's survey. The common understanding was that if the disputed triangle was found to be on the Defendants' land, the Claimants would remove the fence and other structures back to the rightful boundary and would reimburse the Defendants for the money they spent on the survey. On the other hand, if the disputed triangle was found to be on the Claimants' land, the Defendants would accept this and reimburse the Claimants for the money they spent on the survey.
- (b) After Mr. Antoine's survey in 2002 the Claimants knew that the triangular strip belonged to the Defendants and they promised to move their fence and structures back to the rightful boundary. The Claimants recognized the right of the Defendants to the land and were only requesting some time to move.

- (c) The Claimants did eventually move the fence, mini mart and an outhouse upon their understanding that they were bound to do so after the consent order in the prior action and the survey of Mr. Antoine. After these events, the Claimants were holding on to the disputed triangle by the consent or grace of the Defendants.

The evidence of the Claimants:

23. Having heard and seen the Claimants in the witness box, I find that their overall demeanour was not convincing. They presented their testimony in a faltering manner and very often needed to think and rethink for extended periods before giving their answers. In any event their testimony contained serious inconsistencies and was not credible.

24. I noted the following serious inconsistencies in the evidence of the First Claimant.

- (a) He stated early in cross-examination that if Mr. Antoine's survey was not in his favour he would have moved his fence. Later on in cross-examination, he stated that he would not have moved his fence based on Mr. Antoine's survey unless a court told him to do so. Yet later on in cross-examination he admitted that he asked for a survey since only a surveyor could bring clarity to the dispute.
- (b) He stated in cross-examination that he agreed to be bound by the consent order. Later on he stated that the consent order would bind him only after a survey and after going back to Court. Even later on he said that he felt that the survey would have settled this case without having to come back to court.

- (c) He stated in cross-examination that the Defendants fooled him into believing the prior action was finished and that is why he took down his fence in January 2007. However, he tried to say later in cross-examination that his Attorney-at-law had informed him earlier that the case was not finished but he still took down his fence. This statement even contradicted that of the Second Claimant who said that she only discovered that there was an outstanding issue in the prior action after the First Claimant had taken down the fence (see paragraph 19 of the witness statement of Marjorie Roach).
- (d) In answer to questions from me, this Claimant stated that he did not know what the overlap on Mr. Antoine's plan represented (the triangular parcel), yet he was able to say soon after that a line on the plan was the boundary line. This line was to the East of where his fence was located and proved the "trespass" by the Claimants

25. I noted the following serious inconsistencies in the evidence of the Second Defendant.

- (a) She stated at first in cross-examination that by the prior action, the parties had agreed to resolve the boundary dispute by getting another survey. Further, if that survey showed she was wrong, she would move the fence. She later categorically denied saying this. When confronted with the inconsistency she simply shrugged it off by saying that she did not know what she would have done if the survey showed she was wrong.

- (b) At paragraph 19 of her witness statement she stated that she only discovered Mr. Antoine's inability to determine the boundary dispute in March 2007. In cross-examination she said she discovered this soon after the survey in September 2002. When this inconsistency was pointed out to her she glibly replied that she did not pay much attention to what she had said in her witness statement.
- (c) In cross-examination she denied having any conversation with the Second Defendant between June 2003 and November 2006. This contradicted what she said in paragraph 22 of her witness statement. When the inconsistency was pointed out to her she again glibly replied that she did not remember such a conversation. She then proceeded to deny the conversation.
- (d) In cross-examination she stated that she could not remember when the First Claimant had moved the fence and mini mart. She was referred to paragraphs 25 and 26 of her witness statement which stated that this was January 2007. She then stated that she still could not remember the dates.
- (e) In answer to questions by me about certain lines on Mr. Antoine's plan she stated categorically that she did not know what these lines represented as she was not a surveyor. Yet right after this in answer to her attorney she purported to say that one of the lines represented her boundary.

The findings on the evidence

26. The testimony of the Claimants was discredited by virtue of the material inconsistencies in their testimonies. They were prepared to change their stories on the drop of a hat. They contradicted each other and in the case of the Second Claimant she

paid little attention to her witness statement which was her evidence in chief. Further, the demeanour of the Claimants in the witness box was far from positive or convincing.

I find their testimony lacks credibility.

27. On the other hand the testimonies of the Defendants were consistent. Specifically, the testimony of the First Defendant remained unshaken. The Defendants also presented their evidence in a forthright and convincing manner. I accept their testimonies as credible evidence. On a balance of probabilities I find they have proved their case and more specifically they have established the facts as set out in paragraph 22 above.

These facts establish that the Claimants did not have the animus possessendi over the disputed triangle from either (a) after the consent order in the prior action in May 2002 or (b) soon after the survey report of Mr. Antoine in September 2002. Both of these periods fall short of the required 16 years for adverse possession, namely, from January 1989 – 2002 (roughly 13/14 years).

An Alternative Argument:

28. My decision that the Claimants did not have the required animus possessendi for 16 years over the disputed triangle is enough to dispose of the case.

However, the Claimants' attorney again raised an argument of law to assert a conclusion that the Claimant's did have adverse possession of the triangular strip of land for the required period of sixteen years.

Due to my findings on the facts this argument of law is now academic. However, in deference to the attorneys who spent a great deal of pre-trial and trial time on the issue, I will deal with this argument of law but in a summary manner.

29. The attorney for the Claimants again argued as a matter of law that the prior action did not stop time running for the purposes of adverse possession. Therefore, by some time after January 2005 the Claimants obtained adverse possession of the disputed triangle. By this action filed in 2007, the Claimants can now assert a right to possession of the disputed triangle.

The Claimants attorney cited several authorities in support of this proposition, the main one being Markfield Investments Ltd v Evans [2001] 1 WLR 1321 C.A. In that case the Plaintiffs had brought a prior action for recovery of land. This action was dismissed for want of prosecution. The Plaintiffs subsequently brought another action for the recovery of the same land. The Plaintiffs tried to argue that the mere commencement of the prior proceedings was sufficient to stop time from running for the purpose of adverse possession. The Court of Appeal rejected that submission.

Relying on this and other similar authorities, the Claimants argued that the consent order in the prior action did not stop time from running for the purposes of adverse possession.

This argument is based on an incomplete statement of the law.

30. While the mere commencement of a prior action does not stop time from running, a prior action which vindicates the title of the owner does stop time from running. This is stated in the very decision of Markfield (see e.g. paragraph 16 and the case St. Marylebone Property Co. Ltd. v Fairweather [1963] AC 510, at 535 which is cited).

Returning to the present matter, a consent order was entered in the prior action. Whether or not a consent order vindicates the rights of a true owner depends on the terms of the consent order. So, for instance, one could hardly argue that a consent order whereby a person in possession of land agrees to give possession to the title owner does anything other than vindicate the title of the true owner.

In the present case, I find as a fact that the consent order in the prior action was intended to vindicate the true owner's right to the disputed triangle, whoever the true owner was found to be. (See paragraph 22(a) above). Therefore, the consent order did stop time running for the purpose of adverse possession.

In any event, even after the consent order the Claimants did agree to give possession of the disputed triangle to the Defendants soon after Mr. Antoine's survey report in September 2002 (see paragraph 22(b) above). From that time, the Claimants were in possession of the disputed triangle by the grace of the Defendants. They no longer had the animus possessendi over the disputed triangle. Therefore, even if the consent order by itself did not stop time from running, on the present facts the Claimants did not have the required animus possessendi over the disputed triangle from soon after Mr. Antoine's survey report in September 2002. This fact, either on its own or in

combination with the consent order, did stop time from running for the purpose of adverse possession.

31. Even though it is not necessary to consider the alternative argument for the determination of this case, it does not, in any event affect the right of the Defendants to succeed in their claim for the disputed triangle.

The Order:

32. The Claimants' claim is dismissed.

On the counterclaim I grant a declaration that the Defendants are the rightful owners of the disputed portion of land as delineated in the survey plan of Michael Jones dated 30th June 1997.

The Claimants are to pay the prescribed costs of the First Defendant and the prescribed costs of the Second and Third Defendants.

The prescribed costs of the First Defendant and of the Second and Third Defendants are assessed in the sum of \$14,000.00.

By consent of all parties I grant a stay of execution on the order for costs for 42 days.

**Justice Gregory Smith
JUDGE**