REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 132 of 2009
H.C.C. No. CV2007-01451/01452

BETWEEN

(1) IAN ROACH
(2) MARJORIE ROACH

Appellant/Claimants

AND

(1) HUGH JACK
(2) SIMEON ROBERTS
(3) ALDRIS ROBERTS

Respondent/Defendants

PANEL: A. YORKE-SOO HON, J.A.
N. BEREAUX, J.A.
R. NARINE, J.A.

APPEARANCES: R. Rajcoomar for the appellants
D. Pallackdharrysingh for the respondents

DATE DELIVERED: 29 July 2013

I agree with the judgment of Bereaux, J.A. and have nothing to add.

A. Yorke-Soo Hon
Justice of Appeal

JUDGMENT

Delivered by Bereaux, J.A.

[1] Three issues arise in this appeal:

(a) Did a survey ("the Antoine plan"), conducted pursuant to a consent order, clearly identify the appellants as having encroached on the second and third respondents' land?

(b) If it was inconclusive, did its inconclusiveness permit time to continue running in favour of the appellants' occupation of the second and third respondents' portion of the disputed area, despite the consent order.

(c) The first respondent not being a party to the consent order, did the appellants' occupation extinguish the first respondent's title to his portion of the disputed area?

The claim concerns a disputed triangular portion of land located on the east/west boundaries of the parties' properties. On 30th April 2009 the judge dismissed the appellants' claim and gave judgment for the respondents on their counterclaim. He also awarded costs in the amount of fourteen thousand dollars ($14,000.00).

[2] The consent order was entered in an earlier High Court Action, No. 84 of 1998 ("the prior action") between the appellants and the second and third respondents. It related to adjoining properties of the parties on Milford Road which share a common boundary. The second and third respondents are husband and wife. They brought the prior action against the appellants for trespass in respect of the appellants' encroachment of the eastern boundary of their property. The appellants are also husband and wife. Like the second and third respondents, the appellants are joint owners of the parcel they occupy. The south western boundary of the appellants' parcel is the second and third respondents' eastern boundary.

[3] The first respondent was not a party to the prior action. He was therefore not a party to the consent order. His parcel is located immediately north of the second and third respondents' parcel. He also shares a common boundary with the appellants. His eastern boundary is the appellants' north western boundary. The first respondent's parcel and the second and third respondents' parcel were once one composite parcel. It was subdivided into two parcels by Mr. Lionel Morton, the previous owner, who then sold it to the respondents. The second and third respondents purchased in July 1996, while the first respondent purchased in March 1997. The first respondent is also involved in a boundary dispute with the appellants, because the appellants' encroachment encompassed their entire western boundary i.e. the entire eastern boundaries of the respondents' respective parcels. Unfortunately, the first respondent did not join in the prior action but chose to await its outcome. Other than instructing his attorney-at-law, in November 2006, to write to the appellants, he took no action until early 2007, at best.

[4] The appellants' encroachment of the respondents' boundaries, commenced in November 1988 when they constructed their fence. Time did not stop running against the first respondent and would ordinarily have expired in late 2004 which would have extinguished the first respondent's title. However the judge found that the appellants did not have any intention to possess the respondents' land after September 2002. The question as to whether the first respondent's title to his portion of the disputed area was extinguished by the appellants' occupation, turns on whether the judge's finding that the appellants had no intention to possess the disputed area after September 2002 was correct.

Summary of the decision in this appeal

I find as follows:

(1) The Antoine plan clearly indentified the appellants as having encroached on the second and third respondents' parcels. The appellants are therefore bound by the terms of the consent order and should have adjusted their

boundary within a reasonable time after September 2002, when, at latest, the Antoine plan had been brought to their attention. They are bound by that consent order and are estopped from pursuing further action in respect of the same subject matter. See **Kinch v. Walcott [1929] AC 482.**

(2) In light of the decision at (1) above the second issue does not arise.

(3) The appellants had extinguished the first respondent's title. The first respondent not being a party to the prior action could not claim the benefit of the consent order. Time started running in 1988 and continued running against him after the prior action had been initiated. After the Antoine plan, in September 2002, revealed the appellants encroachment, the first respondent ought to have taken unequivocal action to remove them, either by legal proceedings or by forcibly removing the appellants' fence**.** He took no action until early 2007 by which time his title had already been extinguished in late 2004.

The Facts

[5] Following a survey in November 1988 by Kenneth Sturge, land surveyor, conducted at their request, the appellants erected a fence around their parcel some time later in 1988. In 1990, they built a fruit stall on the lands and operated a business. In or about 17th January 1996 they received a letter, from Mr. Lawrence des Vignes, attorney-at-law for Mr. Morton, indicating that they had trespassed unto what later became the respondents' parcel.

[6] Soon after the second and third respondents purchased their lot in July 1996, they commissioned a survey by Mr. Michael Jones, land surveyor. The survey showed that the appellants had built their fruit stall on the second and third respondents' parcel.

[7] On 13th January 1998, Mr. des Vignes wrote to the appellants, on behalf of the respondents, informing them that the respondents were now the owners of the

parcels situate to the immediate west and informing the appellants that they had encroached on these parcels. The letter enclosed a copy of the Jones survey plan ("the Jones plan").

[8] The appellants continued their possession of the disputed portion. The second and third respondents then filed the prior action. The first respondent did not join in the action neither did he bring a separate suit against the appellants. He was of the mistaken belief that any positive outcome for the second and third respondents would also oblige the appellants to address their encroachment on his parcel. The prior action proceeded in the High Court and on 14th May 2002, the parties entered a consent order. By virtue of the order, the lands were to be surveyed by Antoine and Associates. It was expected that the survey would show once and for all whether or not the appellants had encroached. The parties agreed to be bound by its results. They also agreed that the appellants would pay for the survey and would be reimbursed by the second and third respondents if the survey revealed that the appellants had not encroached.

[9] Antoine and Associates produced the Antoine plan on 6th September 2002. The plan required no expert evidence to explain or identify the encroachment. It showed, quite plainly, that the appellants had encroached, not only on the second and third respondents' parcel but also on the first respondent's parcel. Indeed it corroborated the Jones plan in all material respects. The area of the encroachment is a narrow strip of land and, like the Jones plan, is demarcated on the Antoine plan as a hatched triangular area. The northern most portion of the triangle demarcates the encroachment onto the first respondent's parcel starting, at its apex, at its north-eastern boundary. The encroachment widens southward along the first respondent's eastern boundary onto the second and third respondents' parcel also along its eastern boundary, extending at its base onto the south eastern boundary of their parcel. Except for an error in its description of the second and third respondents' parcel, the Antoine plan corroborates the Jones plan. The second and third respondents relied on this plan in the prior action. The area of encroachment is identical in all material respects to that identified by the Jones plan.

[10] Despite the conclusiveness of the survey, the appellants' attorney-at-law, Mr. Rajcoomar, wrote to Antoine and Associates, by letter of 24th June 2003, asking that they *"advise both Mr. des Vignes and myself as to the status of the shaded [hatched] parcel".* Mr. Antoine responded by letter of 30th June 2003 advising that *"the court will ultimately have to decide who has the superior interest in the portion of land".* Based on this letter the appellants somehow seek to assert that Mr. Antoine indicated that the survey was inconclusive and that the matter would have to be determined by the court.

[11] By letter of 14th November 2006, Samantha Lawson who was then the Attorney-at-Law for the second and third respondents, wrote to the first appellant. The first respondent's evidence is that she also wrote on his behalf. Miss Lawson asserted (correctly) that the Antoine survey revealed that the appellants' fence and mini mart had encroached onto the second and third respondents' parcel, that the appellants had failed to remove their fence and that they were in breach of the consent order. She also contended that they were in contempt of court and threatened legal proceedings if the fence and shop were not removed.

[12] In January 2007 the appellants removed their fence. They allege that they did this because they were afraid of being held in contempt of court. At the trial there was an issue of fact as to whether the fence removal was confined to the portion of lands owned by the second and third respondents or extended to the first respondent's boundary as well. The appellants contended that the first respondent demolished and removed their fence on or about 22nd March 2007. The first respondent alleged that the appellants removed ninety percent of the fence in January 2007, even before he constructed his own fence in March 2007. The judge accepted the first respondent's evidence.

[13] The appellants then filed two separate actions CV2007-01451 and CV2007-01452, the first against the first respondent and the second, jointly against the second and third respondents. These actions were consolidated and are now the subjects of this appeal.

The law - adverse possession

[14] It is convenient to address the relevant law before addressing the issues of fact and the judge's findings of fact and law.

Section 3 of the Real Property Limitation Act provides as follows:

> ***"No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."***

Section 22 provides:

> ***"At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."***

[15] The effect of sections 3 and 22 is that the squatter or trespasser in possession extinguishes the right and title of the paper title owner to the land at the end of the sixteen year statutory period. In that sense therefore the squatter's possession during that period is *adverse* to the true owners title. Adverse possession thus means possession inconsistent with the title of the true owner. (See **Megarry and Wade**, sixth edition page 1308, paragraph 21.016.) Slade J

examined the term *"adverse possession"* in **Powell v. Mc Farlane** 179 38 P. and C.R. 452 at 469 In a passage subsequently approved by the House of Lords in **JA Pye (Oxford) Ltd. v. Graham**, **[2002] W.L.R. 221**, he said:

> ***… "Possession of land, however, is a concept which has long been familiar and of importance to English lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession. In the absence of authority, therefore, I would for my own part have regarded the word "possession" … as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise I would have regarded the word "dispossession" in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent; …"***

[16] To establish adverse possession, the squatter must demonstrate that he has taken exclusive control of the property in question. He must also have *"an intention for the time being to possess the land to the exclusion of all other persons including the owner with the paper title"* (per **Slade L.J. in Buckinghamshire County Council v. Moran [1990] Ch 623** at 643). **Megarry and Wade** (supra) from which that latter authority and passage were drawn, adds at page 1310 paragraph 21-019 that:

> ***"An intention to own or acquire the ownership of the land is not required, nor is it necessary that the squatter should intend to exclude the true owner in all circumstances. The <u>animus</u> can be sufficiently established even if both the true owner and the squatter mistakenly believe that the land belongs to the latter …***

The intention to possess must be manifested clearly so that it is apparent that the squatter was not merely a persistent trespasser but was seeking to dispossess the true owner.

[17] **JA Pye (Oxford) Ltd. v. Graham** (supra) is the leading authority on adverse possession. In summary, it was held:

(a) that (approving Slade J's dicta set out at paragraph 15 above) the words *"possession"* and *"dispossession"* bore their ordinary meaning, so that *"possession"* as in the law of the trespass or conversion, connoted a sufficient degree of occupation or physical control coupled with an intention to possess and *"dispossession"* occurred where the squatter assumed *"possession"* as so understood;

(b) that the phrase *"adverse possession"* was directed not to the nature of the possession but to the capacity of the squatter. In order to establish factual possession the squatter had to show absence of the paper owner's consent, a single and exclusive possession and such acts as demonstrated that he had dealt with the land as an occupying owner might normally be expected to do and that no other person had done so;

(c) that the requisite intention was not to own or acquire ownership but to possess and on one's own behalf, in one's own name, to exclude the world at large including the paper title owner, as far as reasonably possible; and that it was not therefore inconsistent for a squatter to be willing, if asked to pay the paper title owner while being in possession in the meantime.

Issues and legal submissions

[18] There is no dispute that the appellants were exercising control over the disputed area as owners and to the exclusion of the respondents. They constructed their fence in late 1988 and the appellants did not vacate the disputed area until

2007. Therefore, the appellants would ordinarily have extinguished the respondents' title in late 2004. If the consent order did not stop time from running because of the inconclusiveness of the Antoine plan, then the appellants are entitled to succeed against all of the respondents. If it was conclusive of the appellant's encroachment, then the second and third respondents are entitled to succeed.

[19] The judge found that the appellants did not have the *animus possidendi* for the requisite sixteen years. That finding settled the question of adverse possession in relation to all of the respondents. Because of that finding, the fact that the first respondent did not join in the prior action was not fatal to his claim and was not addressed by the judge. It follows that if the judge is wrong (as we have found) and the appellants are found by this court to have had the animus (as we also have found) then, even if the Antoine plan were conclusive in its findings, the first respondent is out of court because his title would have been extinguished in late 2004, he not having been a party to the consent order. It is a mixed question of fact and of law.

[20] One of the questions to be answered in this case is whether the Antoine survey was in fact inconclusive. Mr. Rajcoomar argued that it was and that the appellants had acquired title to the entire disputed portion in late 2004, long before the trial of the action. Relying on the case of **Markfield Investments Limited v. Evans [2001] 1 WLR, 1321 CA**, he contended that the consent order in the prior action was *"inconclusive"* because the survey did not determine whether the appellants had encroached. As such, the consent order was ineffective and did not stop time from running in the appellants' favour for the purposes of adverse possession. I consider **Markfield** to be distinguishable having regard to the facts.

[21] In **Markfield**, the action, for recovery of land, was merely filed and not further prosecuted. In those circumstances, the English Court of Appeal rejected the submission that the mere commencement of prior proceedings was sufficient to stop time from running. The decision requires careful reading. In that case the

respondent had been in occupation exclusively since 1977. In 1990, the appellant's predecessor in title commenced an action for recovery of possession which was dismissed in January 1999, for want of prosecution. In July 1999, the appellant company brought a fresh action for recovery. The company contended that the mere issuing of the 1990 writ had stopped time from running in the respondent's favour. It contended that the respondent could not rely on time which had accrued before the 1990 writ in support of their claim for adverse possession in the second action.

[22] It was held that where the proceedings for the recovery of land had been dismissed for want of prosecution but the party holding the paper title subsequently brought a fresh action for recovery of that land, the issue of the writ in the first action did not, for the purposes of the second action, prevent time running in favour of the person in adverse possession. Rather, the writ merely prevented the true owner from being time-barred for the purposes of the action which it had commenced, providing twelve years adverse possession had not already accrued. The period in possession after the issue of the writ in the first action was not to be ignored in the second action merely because that same period would have been ignored in the first action. For the purposes of any particular action, the issue of a writ in earlier proceedings was no more relevant than a demand for possession, and such a demand did not stop time running afresh. A conclusion to the contrary would mean that all the true owner would have to do to avoid adverse possession claims was issue (and perhaps serve) a writ every 12 years without more.

[23] The dictum of Simon Brown LJ, who delivered the judgment of the court, bears extensive review, not only for its cogency but also for the authorities cited therein. He said at page 241-243:

> ***12. ....the true owners' cause of action accrues once his land is in adverse possession, and continues to be treated as accrued unless and until the land ceases to be in adverse possession. Adverse possession may cease (a) by the occupier vacating the***

premises, (b) by the occupier giving a written acknowledgment of the true owner's title (see ss 29 and 30 of the Act) (in Trinidad and Tobago section 15), (c) by the true owner's grant of a tenancy or licence to the occupier (even a unilateral licence (see* BP Properties Ltd v Buckler *(1987) 55 P & CR 337), or (d) by the true owner physically re-entering upon the land. Once, however, the land has been in continuous adverse possession for 12 years, the owner is barred by s 15 [section 3 of our Real Property Limitation Act] from bringing an action to recover it and, indeed, his title to the land (assuming, as here, that it is registered) becomes held in trust for the adverse possessor who may himself apply to have the title registered in his own name.

13. On the face of the legislation, therefore, the true owner can succeed in an action to recover land provided he brings his action within 12 years; otherwise not. Apply that approach to this case. Had the appellants pursued the first action and proved that it had been brought before the respondent had enjoyed a continuous period of 12 years' adverse possession, they would have been held entitled to recover the land. Because, however, they did not pursue and succeed upon that first action, they must now depend upon a second action and prove that it in turn was brought before the respondent had been in continuous adverse possession for 12 years.

14. How, then, does Mr Treneer for the appellants seek to benefit from the abortive first action? As I understand his argument, it is that adverse possession ceases not only in the four ways I have already identified, but also by the issue (or perhaps issue and service) of a claim for possession. Such a proceeding, he submits, is equivalent to re-entry onto the land: it constitutes a form of constructive possession by the true owner, sufficient at any rate to bring to an end the occupier's exclusive possession of the land.

15. In support of this argument Mr Treneer relies upon a passage in Cheshire and Burn's* Modern Law of Real Property *(16th edn, 2000) p 987 reading:

> *Time which has begun to run under the Act is stopped, either when the owner asserts his right or when his right is admitted by the adverse possessor.*

A. assertion of owner's right

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry onto the land.'

16. No authority is cited for that proposition but I have no doubt that it is intended to reflect the views of this court expressed by Dillon LJ in* Buckler*'s case:

> *'If proceedings to recover land are begun before there has been 12 years' adverse possession—e.g. if they are begun in the eleventh year—then the right of action is, on the wording of ... section 15 of the 1980 Act, unaffected by the subsequent expiration of the 12-years period while the proceedings are pending. If that is so, it could not, in my judgment, be a correct reading of [s 17 of the 1980 Act], to hold that the title of the plaintiff to the land is extinguished while an action for the recovery of the land, launched in due time, is still pending ... the title can only then be extinguished if or in so far as it cannot be established and vindicated by* the action *which has been brought in due time. So again, if an action to recover land is brought within the 12 years and judgment for possession is given* in that action, *albeit after the expiration of the 12 years, it would be idle to suppose that the judgment for possession could, because of the expiration of the 12 years, never be enforced. The judgment must be enforceable if* the action *was started in*

due time.' (See (1987) 55 P & CR 337 at 344; my emphasis.)

17. In short, both Cheshire and Burn, and Dillon LJ, are making the point that, once proceedings are brought in time, the occupier cannot then seek to rely on the subsequent passage of time to establish within those proceedings a defence by way of adverse possession.

18. Nor is any support for the appellants' argument to be found in Nicholls LJ's judgment in* Mount Carmel Investments Ltd v Peter Thurlow Ltd *[1988] 3 All ER 129 at 135, [1988] 1 WLR 1078 at 1085:

'... no one, either lawyer or non-lawyer, would think that a householder ceases to be in possession of his house simply by reason of receiving a demand that he should quit ... On [the owner's] argument, time starts to run afresh by making a demand for possession. That is in flat contradiction to the long-recognised position and the statutory scheme where a squatter is in possession of another's land. Unless the squatter vacates or gives a written acknowledgment to the owner, the owner has to issue his writ within the prescribed time limit. Otherwise he is barred, because by s 15(1) he is barred from bringing any action to recover the land after the expiration of the 12-year period.'

19. None of these writings address the situation arising on the instant appeal where the owner fails in his action but nevertheless seeks to rely upon the mere fact of having brought it to make good a second action.

20. That seems to me impossible on the plain wording of the statute. With regard to any particular action the relevant time, and the only relevant time, for consideration of adverse

possession is that which has expired before such action is brought. That is the language of s 15 and, as Dillon LJ explained, that is the effect of the legislation. The fallacy in Mr Treneer's argument is in supposing that because one ignores in the first action any adverse possession which follows the writ, so too that same adverse possession falls to be ignored in the second action. That is just not so and there is nothing in the statute or authorities to suggest that it is. For the purposes of any particular action, the issue of a writ in earlier proceedings is no more relevant than a demand for possession. In the **Mount Carmel Investments** ***case such a demand was held not to start time running afresh; no more would the service (still less the mere issue) of some earlier writ. Were it otherwise, as the respondent points out, all the true owner would have to do to avoid adverse possession claims is issue (and perhaps serve) a writ every 12 years without more.***

21. In summary, there is no question of the issue of a writ 'stopping time from running' (itself a non-statutory concept and perhaps a misleading rather than helpful expression). The issue of a writ, for the purposes of the action which it begins, prevents the true owner from being time barred under s 15 providing 12 years' adverse possession have not already accrued. It serves no other purpose.

[24] I draw from those statements of law, the following conclusions:

(a) An action, once filed within the limitation period, is sufficient to stop time running for the purposes of that action, provided it is pursued and concluded in the owner's favour. Any judgment successfully obtained in respect of that action would be valid, effectual and enforceable even if obtained after the limitation period had run its course.

(b) Once proceedings are brought in time the occupier cannot then seek to rely on the subsequent passage of time to establish within those proceedings a defence of adverse possession.

(c) Where the owner fails in his initial action he cannot seek to rely on the

mere fact of having brought it to make good a second action. For the purposes of any particular action, the issue of a writ in earlier proceedings is no more relevant than a demand for possession. Such a demand does not start time running afresh nor would the service of such earlier writ.

Speaking for myself, I consider that, if the Antoine plan were inconclusive, then the facts of this case would fall within the principle set out at (a). The second and third respondents pursued their claim to the finality of a consent order. This was effectively a judgment which bound the parties. My reasons for saying this are more fully set out at paragraphs 45 and 46 herein.

Findings of the Judge

[25] The judge rejected the appellants' evidence as lacking credibility, pointing to a number of inconsistencies in the appellants' evidence. At the same time, he accepted the respondents' evidence and found the following facts:

(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 respondents' land, the appellants would remove the fence and other structures back to the rightful boundary and would reimburse the respondents for the money they spent on the survey. If however the disputed triangle was found to be on the appellants' land, the respondents would accept this finding and would reimburse the appellants for the money they spent on the survey.

(b) After Mr. Antoine's survey in 2002, the appellants well knew that the triangular strip belonged to the respondents. They promised to move their fence and structures back to the rightful boundary. The appellants recognized the right of the respondents to the land, requesting some time to move.

(c) The appellants did eventually move the fence, mini mart and an outhouse

upon their understanding that they were bound to do so by the consent order and the Antoine plan.

(d) These facts showed that the appellants did not have the *animus possidendi* over the disputed triangle from either:

(i) after the consent order in the prior action in May 2002 or

(ii) soon after the survey report of Mr. Antoine in September 2002

(e) Both of these periods fall short of the required sixteen years for adverse possession.

The appellants have challenged the judge's findings of fact and findings of law on several grounds. The grounds of appeal in effect contend that there was no evidential basis upon which the findings of fact can be made. Those findings were essential to the conclusion to which the judge came.

They must first be examined before we can address his conclusions.

Was the judge right in his findings

The Evidence

[26] Having reviewed the evidence and the judge's findings I consider that he was entitled to accept the respondents' evidence. Both appellants submitted witness statements, as did the first and second respondents. The third respondent did not give evidence. Curiously, although the second respondent's witness statement is referenced to in the judge's notes during his cross-examination, it is not included in the record. Even more curiously his affidavit in interlocutory proceedings has been reproduced. But there has been no objection or issue taken by any of the parties, certainly not by counsel for the appellants. All four deponents were cross-examined. I shall produce the relevant extracts from their written evidence.

[27] The first appellant's relevant evidence, starting from paragraph 13 of this witness statement, was as follows:

> ***"(13) In and around November-December 2006 my wife and I decided to carry out some renovations to our mini-mart by extending our concrete structure more to the west and to replace the wooden part with concrete. We managed to carry out part of this and replaced the wooden parts with concrete. However we did not manage to carry out our plans for an extension as the following events took place.***
>
> ***(14) In and around November 2006 when I had sight of Ms. Lawson's letter … I was very worried. Prior to that I recall Mr. Roberts saying to me that the case was over and that I should remove our fence. My wife told me that Mr. Rajcoomar said to not remove the fence as the case was still going on. However I thought that there was a mistake in that Mr. Roberts said the case had finished and I thought that Mr. Rajcoomar may not have known this. I got really concerned about the letter and Mr. Roberts' kept telling me I should take down the fence. In and around January 2007 I started to take down the fence and part of our mini mart on the western side adjoining the Robert's property. I remember my wife was not at home and when she came back she was very upset with me.***
>
> ***(15) Later we had notice of a survey to be done by the Roberts and we asked Mr. Sturge to attend. On the day of that survey which was in and around February 2007 Mr. Sturge was present and spoke with the Roberts' surveyor. They were in disagreement. A month later in and around March 2007 Hugh Jack took down the remaining portion of our fence which separated our two properties. The***

Roberts also took a backhoe and removed the concrete flooring we had in place for our shop on the western side of our property. Both defendants then started digging a trench and building their own fence. My wife and our son decided to seek further legal advice straightaway.

(16) I am told that this action was then filed to protect our interest and that the defendants have acted unlawfully. I just would like things to go back to the way it was. I want to have the whole of my shop back and I realize I was mistaken in believing what the defendant, Roberts has told me and mistaken in removing part of my fence in January 2007. I believe due to what has happened the cost of erecting a fence by us including labour and materials would probably now cost in the region $15,000.00. The concrete flooring will be likely to cost approximately $12,000.00 for labour and materials."

[28] The second appellant's evidence, starting at paragraph 16 of his witness statement, was:

"(16) With respect to the action in court filed by the defendant it was eventually agreed that another, a third, survey would be carried out to determine the relative boundary lines of both adjoining pieces of lands. This was formalized in an consent order dated 14th May 2002 by the Honourable Justice Gregory Smith. This was the final order of the court in the matter …

(17) A survey was then carried out by Antoine and Associates Land Surveyors to decide what were the disputed boundaries between the lands and the disputed piece of land which was being claimed by the defendants …

(18) I found out, in March 2007 when I sought further legal advice, that my attorney-at-law who acted for me in H.C.A. No. 84 of 1998, Mr. Ravi Rajcoomar had written a letter dated 24th June 2003 asking for the surveyor's opinion as to ownership of the shaded portion as indicated on the plan exhibited as MR4-A above …

(19) I later found out also in March 2007 that by correspondence dated 30th June 2003 from Lyndon Antoine land surveyors, they had been unable to determine the rightful owners …

(20) During all this time we always left our fence in place and was now living on the property and had continued running our vegetable mart. We remained and continued our absolute possession of the lands we know as 158 Milford Main Road, Canaan as bounded by our erected fence since 1989.

(21) In and around 14th November 2006 we received correspondence from Samantha Lawson, attorney-at-law stating that we were in breach of court order dated 14th May 2002 and that we were to remove our fence within 14 days …

(22) I recall that one day a few months before this letter was received us Mr. Simeon Roberts came to me and brought a copy of the order "MR3-A" and stated to me that the case was finished and that I should remove my fence. I said to him but the order states that I should be re-imbursed my money for the survey and he said not on my life. He said we would have to go back to court for that.

(23) ***We then later received Ms. Lawson's letter (MR7-A) and sought advice the following day from our attorney-at-law, Ravi Rajcoomar who told us not to remove our fence as the case was still going on.***

(24) ***In and around November-December 2006 we decided to carry out some renovations to our mini-mart and so removed a wall and some flooring on the western side of the mini-mart. Our plan was to extend the shop to the west and to also build concrete wall and flooring to the back of the shop was in wood. We demolished it in part by Christmas that year.***

(25) ***In January 2007, however, my husband grew increasingly worried about the warning in the letter about imprisonment and decided to go ahead and take down part of the fence which was boundary between the property owned by the Roberts and ourselves on the western side. I remember my husband proceeded to do this in my absence and it was when I returned home later one day that I saw him and the workmen taking down part of the fence. I stopped him but the fence between ourselves and the Roberts was already taken down. My husband also dismantled part of our shop which was on the western side of our property.***

(26) ***We later found out that Mr. Rajcoomar, attorney-at-law had sent a letter dated 24th January 2007 suggesting to Ms. Samantha Lawson that another survey by done. We found this out in March 2007 when we went to seek further legal advice as the defendants had by then taken down the rest of our fence on the western side and had***

started building their own fence."

[29] The second appellant penultimate paragraph of her witness statement adds:

> ***"(30) I sought legal advice and instituted these proceedings in order to rightfully claim our lands as possessed by us since in and around 1989. I believe that the defendants are trespassers and have sought by their correspondence ((MR7-A) to mislead us when it was clear to them that they failed to show ownership of the disputed lands. They did this to cause us to act contrary to our legal rights to claim title and ownership of our said lands as bounded by our fence erected since 1989."***

[30] For the purposes of this appeal, the relevant paragraphs of the first respondent's evidence are paragraphs 3 to 8 of his witness statement. He said:

> ***3. After we purchased our land from Mr. Morton, both Simeon Roberts and I had our mutual attorney write to the Claimants by letter dated 13th January, 1998 informing the Claimants that they were encroaching on our respective properties. When the Claimants failed and or refused to remove their fence Simeon Roberts, together with this wife, filed High Court Action No. 84 of 1998. I did not file an action because I knew of the High Court Action begun by Simeon Roberts and this action concerned the entire strip of land formerly owned by Lionel Morton. The survey plans drawn also included my portion of land. There was no need for me to start another action since the issues were the same and I thought it would be resolved by High Court Action 84 of 1998. I attended Court with Simeon Roberts every time***

the matter was called as the matter affected both of us.

4. ***High Court Action No. 84 of 1998 came up before the Honourable Mr. Justice Smith on 14th May, 2002. As I recall, on that day and a consent order was entered whereby the disputed land was to be surveyed by Antoine and Associates and the parties were to be bound by the said survey. I remember the Claimants' attorney stating that he had conceded and that a survey was needed to show where to move the fence back to and that is whey another survey was agreed.***

5. ***When the Claimants failed to remove the fence, I went to Ms. Samantha Lawson, and a letter dated 14th November, 2006 was sent to the Claimants.***

6. ***I did not break or remove the boundary fence which separates the two parcels of land in or around 22nd March, 2007 or at all. I was not at home when the fence was removed. When I returned home I noticed that the fence was about 90 percent removed which led me to believe that they had finally done what they had promised to do which is why I started to erect my fence. I even made enquires of Simeon Roberts and he told me something.***

7. ***In March 2007 I had a backhoe come unto my property which was after the [appellants] had already taken down part of the shop and about 90 percent of the fence. The [appellants] rebuilt their mini mart in their boundary even before Mr. Doyle re-surveyed and the [appellants] are operating their mini mart at present. The backhoe did inadvertently knock over a flimsy piece of wire fence that***

was just pulled between two posts and not planted into the ground. My contractor went across and informed both of the [appellant] of what had happened with the fence and had undertaken to repair it and the [appellant] said that was okay. The first [appellant] even offered the contractor some extra wire to fix the fence when they were ready. There was absolutely no malicious destruction of their fence by me or any of my workmen. The [appellant] did not express any concern or object to me to the construction of my fence at this time.

8. The second [appellant] even asked the contractor when the backhoe was digging the trench for the fence if we had no use for all the dirt if we would throw the remainder over by her. The [appellants] filed this action before I deposited any of the dirt on her property."

[31] The relevant paragraphs of the second respondent's evidence (the third respondent did not give evidence) are paragraphs 6 to 9 of his affidavit. He said:

"6. On 10th June, 1998 my wife and I filed a High Court action against the [appellants] for trespass. It is correct that by consent an order was entered that the land be surveyed by Antoine and Associates and that the parties would have been bound by the survey and that the party in default would bear the cost of the survey.

7. I was unaware of the letter dated 24th June, 2003 by the [appellants] Attorney to Mr. Antoine … and the letter dated 30th June, 2003 from Lyndon Antoine to the [appellants] Attorney … I was not informed that in fact Mr. Antoine claimed, nine months after the survey plan was done that the was unable to determine who the owners of the disputed portion of land were by letter

dated 30th June, 2003. In fact, the Antoine plan dated 6th September, 2002 looked to me like, a lot like the Michael Jones plan with the same hatched area. In addition, no one asked me to pay for any part of the survey costs.

8. In response to paragraph 14 of the [second appellant's] affidavit, I did ask the [appellants] on several occasions to move the fence and remove the portion of the shop that was on my land. I saw both [appellants] regularly as I would go over and buy my newspapers from their mini mart. The [appellants] in response would casually tell me that they would move the fence 'just now'. The [appellants] had already removed an outhouse that they had built on the disputed portion at my request. I believed that they would have moved the fence as well.

9. In or around November, 2006 I realised that the [appellants] were not prepared to move their fence as promised after all these years. In reply to paragraph 15 I did go to Ms. Lawson and gave her certain instructions as I honestly understood them at the time and then she wrote the letter to the [appellants] exhibited to the [second appellant's] affidavit marked "M.R.7". The [first appellants] came to me after he received the letter and asked for some more time to remove the fence and I agreed. Not once did the [appellants] ever point out that they were informed that the results of the court ordered survey was inconclusive up to this point and even promised to remove their fence and mini mart over the period.

10. About a week after the [appellants] asked for more time, they broke down their fence and part of the shop."

[32] The statement in paragraph 14 of the second appellant's affidavit to which Mr. Roberts responded at paragraph 8 of his affidavit was a statement by the

second appellant that the status quo from 2003 to 2007 remained the same i.e. that the appellants continued their *"absolute"* possession of the disputed area.

[33] Having heard and seen the witnesses, the judge concluded that the appellants were unreliable witnesses. He found the respondents to be credible. He found the first respondent to have been unshaken during cross-examination. I refer in particular his comments at paragraph 26 of his judgment that *"the testimony of the [appellants] 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 [appellant] she paid little attention to her witness statement ... Further, the demeanour of the [appellants] in the witness box was far from positive or convincing."*

[34] I have reviewed that evidence, including the judge's notes of evidence. There was a proper basis for his rejection of the appellants' evidence. The inconsistencies of which he spoke are borne out in the notes of evidence. The judge was well placed to assess the credibility of the witness. He had the advantage of seeing and hearing the witnesses give their evidence. That advantage was not wasted and there is no basis upon which we, sitting in an appellate jurisdiction, can interfere.

I turn then to the three issues which fall to be decided in this appeal.

(a) Was the Antoine plan inconclusive?

[35] The judge found that the Antoine plan did not assist him in the boundary dispute. He appeared to rely on the survey plan of Mr. Michael Jones and Mr. Winston Doyle both of whose surveys were conducted on the respondents' behalf. He held that on the evidence *"there was little to contradict the case that the disputed triangle was indeed within the boundaries of the [respondents]".*

[36] As to the Antoine plan the judge stated that the plan *"noted the disputed*

triangle but made no conclusive statement as to whether the disputed triangle was within the boundary of the [appellants] or the [respondents]". He then added that he would discuss the report later at paragraph 22 (in his findings of fact). The contents of paragraph 22 are set out at paragraph 25 above. In those findings the judge states that, the appellants well knew that the triangular strip belonged to the respondents after the Antoine survey in 2002.

[37] The finding is somewhat confusing if not inconsistent. The judge made no finding that the Antoine plan was inconclusive. His findings summarised at paragraph 24 suggest that the Antoine plan was clear enough for the appellants to know that the disputed triangle belonged to the respondents. This is so even though he held that the Antoine plan did not assist him.

[38] The judge's findings are challenged by the appellants. They are thus open to review on appeal, subject of course to the advantage the trial judge would ordinarily have in his conduct of the trial. In this case however no surveyor gave evidence. It was simply a question of reviewing the survey plans. The judge thus enjoys no advantage over us in this regard. The conclusiveness of the Antoine plan is very relevant to the efficacy of the consent order which is a live issue in this appeal.

[39] Consequently, we can review the judge's finding in respect of the Antoine plan to the extent that he found it to be of no assistance. I have looked at the plan and the entire documentary evidence. In my judgment the Antoine plan was unambiguous in its identification of the appellants' encroachment. The plan is clear on its face. No rocket science is required to identify the appellants' encroachment. The fact that there was no blunt statement that the appellants had encroached, does not detract from the clear identification of the encroachment on the plan. It is plain as plain can be. The hatched triangular area on the Antoine plan unambiguously identified the encroachment as plainly within the respondents' parcels. It required no further interpretation from Antoine and Associates. The appellants had obviously encroached. The plan corroborated the findings of the Jones plan which formed the basis of the respondents' initiation of

the prior action.

[40] Both the Antoine plan and the Jones plan identified the area of encroached by hatching. The Antoine plan described the hatched portion as the *"area of overlap"*. The Jones plan plainly referred to the hatched portion as *"Encroachment"*. It was unnecessary for Mr. Rajcoomar to seek any interpretation from Antoine and Associates. He was wrong to describe their response to his request as a statement that the plan was inconclusive. That response, if he had doubts about the plan's conclusiveness, ought to have caused Mr. Rajcoomar to apply to have the matter re-opened before Smith J, either to determine the "*ambiguity"* of the survey or to re-open the entire proceedings between them. In my judgment it ultimately would not have assisted his clients (serving only to drive up costs) since the plan did clearly show his clients to be trespassers.

[41] The judge's finding that the appellants were aware that the triangular strip belonged to the respondents, suggests that the appellants knew that the Antoine plan has shown them to have encroached. That finding obviously flowed from the second respondent's evidence that the appellants had promised to move the fence after the Antoine plan had been produced and shown to them. It was also a rejection of the appellants' evidence that they had been intimidated into moving the fence. The second respondent was specifically cross-examined on this issue. His assertion that the appellants promised to move the fence was set out at paragraph 8 of his affidavit which is quoted above at paragraph 31. Under cross-examination he repeated this assertion:

> ***I asked the Claimants to remove the fence. Many times. More than five times, every time I went to buy papers. Between the last court date in the prior matter in 2002 and Ms. Lawson's letter 2006, I asked them to move the fence often. Ian Roach sells in the mini mart and sometimes Mrs. Roach is there too. We were on friendly terms. I heard the Claimant's evidence. They are not friendly now that the case is going on. They are not speaking the***

truth at all when they say we were not friendly. The fence stayed there for those four years. They did not move the fence and I asked them to. I did not go back to my Attorney-at-Law to get advice because I was waiting for them to move and we were on friendly terms. I was patient. I was concerned about the encroachment. I got legal advice. We ended up in court. I sued them. I understood the meaning of the consent order. I was hoping they would comply with the consent order and move.

[42] In my judgment, not only was the judge as the fact finder, entitled to reject the respondents' evidence, he was plainly right to do so. Moreover, the plan spoke for itself. The surveyors were not to be expected to make some formal pronouncement on the encroachment as would a court of law. The consent order envisaged that the plan of itself, without more, would reveal (as it did) any encroachment. The appellants, certainly by September 2002 were bound by the consent order. That they were aware of the results of the survey is reflected in the second respondent's evidence (accepted by the judge) that they had earlier removed an outhouse from the second and third respondents' parcel.

[43] The Antoine plan having determined that the appellants had encroached, meant that the prior action was in fact conclusive of the parties' legal rights. The second and third respondents were the true owners of that portion of the disputed area which lay on their parcel. The appellants were obliged to remove their fence and other structures back to the original boundaries. The consent order is binding on the appellants.

[44] The dictum of Herschell L.C. in the re **South American and Mexican Company, ex parte Bank of England [1895] 1 Ch. 37, 50**, is instructive:

"The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very

mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action."

It would also act as an estoppel barring the appellants from asserting title against the second and third respondents in this case. In light of the conclusiveness of the Antoine plan therefore, the appellants continued occupation after September 2002, albeit in breach of the consent order, would simply have begun a fresh cycle of adverse possession.

(b) Did the consent order stop time running in any event?

[45] This second question, that is to say, whether the consent order stopped time running even if the Antoine plan was inconclusive, no longer falls for consideration in light of my decision at (a). While the judge did go on to consider, the question, summarily, I do not consider that we have been given sufficient assistance to finally decide the point. In any event it is unnecessary to address it. But speaking for myself, I find it difficult to accept that a consent order which was entered with a view to bringing litigation to an end, does not have the effect of stopping the running of time in respect of the adverse possession at which the action was directed. The second and third respondents' filing of the prior action was an unequivocal assertion of their rights of ownership. **Markfield** in my judgment is distinguishable, primarily because in that case the earlier action was unsuccessful and thus did not stop time from running. The mere filing of the earlier action in those circumstances, more so one which was not prosecuted, could not stop time from running and had no effect on factual possession.

[46] Unlike **Markfield**, the second and third respondents, as paper title owners, pursued their rights to the finality of a consent order. That, in my judgment, was sufficient exercise of ownership rights to stop time running. Any inconclusiveness in the Antoine plan could not detract from the unequivocal

nature of the second and third respondents' assertion of their rights of ownership. Moreover, the entry of the consent order was akin to the entry of a judgment in favour of the second and third respondent's right of ownership, inchoate though that right might have been at that time. Possession was affected because the losing party was bound to give up possession.

[47] At best, if the survey was in fact inconclusive, the parties should have returned to court to vacate the consent order and continue the trial. In my judgment, when they did not do so, and the appellants continued in possession, at worst, it meant simply that time began running afresh.

(c) Did the appellants extinguish the first respondent's title?

[48] The judge found that once the Antoine plan had been brought to their attention in 2002 the appellants were aware that they had encroached and no longer had the intention to possess the disputed area. As such, their occupation did not satisfy the sixteen year statutory period which would have elapsed in 2004.

[49] I consider that the judge was wrong in his conclusion that the appellants no longer had the intention to possess after the Antoine survey was brought to their attention in 2002. It does not follow that because the appellants were aware that the survey showed them to have encroached, they did not have the *animus possidendi*. The appellants continued factual possession of the first respondent's portion of the disputed area for over four years after the survey was produced. They ignored his and the second respondent's requests to remove their fence until January 2007. During that time they continued to exercise ownership over the disputed area to the first respondent's exclusion. This satisfies the two requirements necessary for legal possession which are:

(1) a sufficient degree of physical custody and control; and

(2) an intention to exercise such control on one's own behalf and for one's

own benefit.

Per Lord Brown Wilkinson in **Pye** (supra) at page 233 paragraph 40H**.**

[50] The first respondent did not join in the prior action and cannot claim the benefit of the consent order. After the Antoine plan was produced in September 2002 he did nothing until November 2006 when he instructed Miss Lawson, to write to the appellants. By then his title to his portion of the disputed area had already been extinguished. In any event, a written demand for possession is not sufficient to prevent the squatter/trespasser from obtaining title by adverse possession. Such a demand does not have the effect of causing the squatter/trespasser to cease to be in possession for the purposes of acquiring title by adverse possession. See **Mount Carmel Investments Ltd. v. Peter Thurlow Ltd.** (supra) at page 133 f-h, 135 b to d, **[1988] 1 WLR 1078** at 1083 H to 1084 A - B, 1085 G - H to 1086 A.

[51] Moreover, even if the appellants were aware that the first respondent had title to the disputed area and had promised to move their fence, such awareness of the first respondent's title, was not inconsistent with their intending to possess the disputed area on their own behalf and for their own benefit. Knowledge of the first respondent's title and oral promises to move their fence would not defeat that intention to possess. In **Pye** the squatter was willing to pay for the use of the disputed land. The House of Lords held that this willingness was not inconsistent with the intention to possess. Lord Brown Wilkinson at page 241, paragraph 60 H to 242 paragraph 60A:

> ***"As the judge pointed out, there was independent evidence that Michael Graham "treated the [disputed] land" as his own. When all the evidence is looked at in my judgment it is wholly consistent with the judge's view that, although the Grahams would have been willing to pay for the use of the disputed land if asked, such willingness is not inconsistent with them intending to possess the land in the meantime …"***

[52] It was for the first respondent to have taken decisive action to recover his property. Even if he were awaiting the outcome of the prior action then certainly he ought to have acted decisively after the Antoine survey was completed in September 2002. Had he acted after that survey, the appellants would not have extinguished his title in late 2004.

[53] The appellants' appeal against the judge's decision in respect of the second and third respondents is dismissed. The appeal in respect of the first respondent is allowed.

[54] I shall order the first respondent to remove his fence and any other construction from the disputed area back to his pre 2007 occupation. I shall make no order for the assessment of damages. The judge accepted the first respondent's evidence that the appellants voluntarily removed the majority of their fence from the disputed area. I thus can see no resulting damage to the appellants in respect of their voluntary removal of their own fence. They are entitled simply to recovery of possession. Neither do I consider, on the facts of their case, that damages should be awarded or assessed. It is sufficient redress in this case that the first respondent be directed merely to give up his portion of the disputed area and to remove his fence back to his pre 2007 area of occupation.

The order for costs, however, has been complicated since the appellants have succeeded in their appeal against the first respondent only. They should also succeed against the first respondent at the trial. The costs of the appeal are normally two thirds the assessed costs of the trial below.

The order for costs is as follows:

(i) The first respondent will pay half of the appellants' costs of the trial below. He shall also pay the appellants' costs of the appeal assessed at two thirds their trial costs;

(ii) The appellants will pay the second and third respondents costs of the trial

below. The appellants shall also pay the second and third respondents' costs of the appeal assessed at two thirds the costs of the trial below.

Nolan P.G. Bereaux
Justice of Appeal