REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal 156 of 2005

IN THE COURT OF APPEAL

BETWEEN

GARVIN SIMONETE

ALLISON DEMAS

APPELLANTS

AND

MARJORIE AHOY **RESPONDENT**

PANEL:

I. Archie, C.J.
M. Warner, J.A.
P. Weekes, J.A.

APPEARANCES:

Mr. S. Francis for the appellant
Mr. A. Fitzpatrick for the respondent

DATE DELIVERED: 10th July, 2009

I have read in draft the Judgment delivered by Warner, J.A. I agree with it and I have nothing to add.

I. Archie, C.J.

I also agree

P. Weekes, J.A.

JUDGMENT

1. This appeal arises from a dispute between the appellants and the respondent, adjacent landowners, in respect a parcel of land comprising 2,594 square feet situated at Sydenham Avenue, St. Ann's, hereinafter referred to as "the disputed land."

2. The case raises issues of adverse possession and limitation. The relevant statute is the Real Property Limitation Ordinance Chapter 5 No. 7. ("the Ordinance"). The primary question to be determined is whether the appellants acquired statutory title to the disputed land, by adverse possession, by virtue of section 3 of the Ordinance.

3. Best J. dismissed the appellants' claim and granted the respondent relief on her counter claim in the form of a declaration that she was the owner of the disputed land; an order for possession; an injunction; damages and costs.

Background facts

4. By Deed dated 17th May 2002, the appellants became entitled to a parcel of land comprising 10,996 square feet situated at No 33A Sydenham Avenue, St. Anns (hereinafter referred to as " 33A").

5. They trace their title from a deed of conveyance between Iris Deeble of the first part and Frederick Morris and Suzanne Parris of the second part, dated 21st October, 1975. By deed dated 1st May 1992 Frederick Morris then transferred his interest to his wife Suzanne after their marriage ended. By deed dated 30th April 1993, Suzanne Parris sold the parcel of land to John and Wendy Lloyd and in 2002 they, in turn, sold it to the appellants.

6. The Respondent became seized and possessed of the adjacent parcel of land, as Executrix of the estate of Arthur John Magin who died in August 1994 (the deceased). That parcel of land comprised 11,303 square feet and is hereinafter referred to as "33 B."
It had been conveyed to the deceased by Deed dated 30th December 1965.

7. When the appellants went into occupation of 33 A, they met a chain link wire fence separating 33A from 33B. In the year 2003, the first appellant authorised a licensed land surveyor, Mr. Michael Boucaud to carry out a survey of the parcel of land conveyed by their deed. It was discovered that the disputed land which had been 'fenced off' as part of 33 A, and which they had occupied, in fact, formed part of 33B.

8. In 2004, Mr. Boucaud, acting on the authority of the respondent, prepared a plan of the parcel of land conveyed by the respondent's deed. It was confirmed that the disputed land was in fact part of No. 33 B.

9. The controversy arose when the appellants began to erect a wall, dig a trench and do other work on the western boundary of 33A in the vicinity of the chain link wire fence. The respondent objected strenuously, claiming that the chain link wire fence had been erected by Frederick Morris on the deceased's land with the consent of the deceased; that he had been permitted by the deceased to erect it as a temporary measure in order to contain his (Mr. Morris') dogs.

10. The appellants claimed that they had acquired title to the disputed land by adverse possession since time had begun to run in their favour from the year 1976 when the fence was erected and that they and their predecessors in title had continued in undisturbed possession of the disputed land for twenty-eight years. Each party alleged that the other had committed acts of trespass on the disputed land.

11. In their grounds of appeal, the appellants challenged the trial judge's finding that their predecessors in title were granted a licence to occupy the disputed land. There are a number of other factual issues which the appellants have raised, but this finding lies at the heart of the case.

The disputed land– topography

12. The disputed land is situated towards the western boundary of 33 A. It is hilly and sloping with a sharp drop towards the appellants' driveway on the north western side, but sloping gently to the south western side. There are a number of fruit trees and bay leaf trees on the disputed land. It is not in dispute that the appellants and their predecessors in title maintained it, but the respondent claimed that although the fence excluded her entry, her employee, a Mr. Phillip Lall was able to prune the trees and pick fruit using a long rod. Mr. Boucaud described 33A as "flatland" and 33 B as "hilly." He further stated, that according to the deed, the boundary of 33A falls on the flat. He located that boundary after he had taken "surveying measurements" since he had found no boundary irons demarcating the lots.

13. The respondent began with the advantage that she had paper title to the disputed land. This gave rise to a presumption that she was in possession. This presumption is however is rebuttable. She relied principally on a conversation between the deceased and Frederick Morris, (also deceased,) allegedly made in her presence and that of Phillip Lall, her long time employee to establish that the deceased gave to the latter a bare licence to occupy the disputed land.

14. Except for the evidence of the respondent, and her witness Phillip Lall, the appellants would have had a strong case of rebuttal, based on the act of the "fencing off" of the disputed land. The appellants were however clearly placed at a grave disadvantage, since they entered

the picture at a late stage, and had not taken the precaution of having the parcel of land conveyed by their deed, surveyed.

15. The respondent testified critically, that Frederick Morris sought the deceased's permission to erect the fence as a temporary measure. She said in examination-in-chief:

> ***"My husband, myself and Phillip Lall came up and told us Mr. Morris wanted (Phillip Lall not party to action) to see Mr Magin. We both went down, also Phillip Lall. Mr. Morris asked Mr Magin that he brining some dogs and want permission to put a fence around behind the Bougainvillea trees (I met them there) – Mr Magin is who put it front of Bougainvillea trees as boundary goes down (indicates) there. He, Magin gave temporary permission to Mr Morris.***
> ***The fence was built. The fence was in front of Bougainvillea trees as roots tough and the land was sloping – needed support of Bouganvilleas – if put any lower fence would have flatten. The fence was made of chain link wire – it had iron bars with concrete – the chain link fence was in front of Bouganvillas trees. No space between Bouganvilla trees and fence – it provided support for the fence. On disputed land there were trees before fence put. Rose mango tree (parent of tree on my land)"***

Mr. Lall, her witness, supported her. He said in examination - in -chief.

> ***"I know how fence came to be there. I was working on slope at the time (a Thursday in 1976. I can't recall the month) – it was the later part of the year. A gentleman name Mr. Morris, came up at me. (Mr. Morris, he was the new owner of Ms Debbie's home.) He said he wanted to see my boss. (I understood he was speaking of Defendant and her husband Magin.)***
> ***I went up and call the boss, Mr. Magin, Defendant also came by the dispute land. Mr. Magin asked my boss, Mr Magin if he know where the boundary running? (Mr. Magin) he said that the boundary way down. (Mr. Morris) He said to Mr. Magin he wanted to put a temporary chain link fence. He said if he could put it at back of 2 Bay leaf trees on north side, at back. These Bay leaf trees, they run (if on road looking a land) straight like 10ft between each other. If you leave the road you will meet two together with one first and then the other. If on roadway watching Ms Debile's land, these 02 trees are on left.***
> ***I meant at left of trees when I said chain link fence at back of trees.***
> ***Mr. Magin told him to put it on right on north side.***
> ***We agree to put it here. I can't remember anything else said."***

16. The evidence of Suzanne Parris who testified on the appellants' behalf was to the effect that no permission was granted to erect the fence. She could not however confirm or deny the reported conversation between her husband and the deceased. There was no evidence of any dispute between any of the occupants of 33A and 33B, prior to 2003.

17. There is ample authority for the proposition of law that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the

evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, then the suggested doctrine becomes absurd. (See **Re Garnett;Gandy v Macaulay 31 Ch. D p.8** and **Stauble v Bholai H.C.A. 803 of 1976** (unreported) ;judgment of Ibrahim J. as he then was)

18. In this setting the following situations were possible:

i. Firstly, that none of the occupants of 33A and 33B knew where the true boundaries were, and they were content to occupy their respective lots on that basis;

ii. A second possibility was that the occupants mistakenly believed that each was occupying the correct area conveyed - the mistake only came to light after the surveys were completed in 2003 and 2004;

iii. Thirdly, that the occupants knew where their correct boundaries were, on the ground, and that the deceased granted a tenancy at will or a licence to Mr. Morris in the year 1976 to occupy the disputed land.

19. The evidence of the respondent and Phillip Lall brings the case within the third category. Although they did not plead it, the appellants argued that if the respondent's case was put at its highest, only a tenancy at will would have been created, with the result that after the expiration of one year that tenancy would have been deemed determined (See section 8 of the Ordinance.)

20. Best J. however accepted that the conversation between the deceased and Frederick Morris did take place in 1976 when Mr. Morris sought and was granted permission by the deceased to erect the fence; that the evidence did not portray an intention to create legal relations or grant an interest in the disputed land. He found that Mr. Morris obtained a "licence to possess the disputed lands."

21. In **Ramnarace v Lutchman [2002] UK PC 25** a limitation case, the Privy Council made a historical comparison between the law in Trinidad and Tobago and the law in England. Lord Millett, speaking for the Board confirmed that where a person is in occupation of land with the consent of the true owner that person cannot obtain a title by adverse possession so long as his licence has not been revoked. The position is the same Jamaica where the Limitation Acts were found to be substantially the same. (See **Wills v Wills [2003] UK PC 84 (01 December 2003)** and **Clarke v Swaby Jamaica [2007] UKPC 1 17 January 2007**.)

See also Buckinghamshine C.C.V Moran 1990 1 Ch. 623 at 636 where Slade L.J said:

> *"**Possession is never adverse ……if it is enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title and his licence has not been duly determined, he cannot be treated as having been in "adverse possession" as against the owner with the paper title."***

22. Difficulties sometimes arise in distinguishing a licence from a tenancy at will, since both may sometimes share the characteristic of a grant of exclusive possession. A person cannot however be a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations (See Ramnarace at paragraph 17). Whether the parties intended to create legal relations was a question of fact.

23. As to the appellants' challenge to the trial judge's findings of fact, they contend that the trial judge erred in rejecting the evidence of their witnesses and in holding that the alleged grant of permission did not evince an intention to create legal relations.

24. The appellants can however speak to nothing that happened before they purchased 33A. They had to rely on the evidence of their predecessors in title. Suzanne Morris could however not testify about the alleged conversation between the deceased and Frederick Morris. Mr. Lloyd could take the case no further, save to say that he and his wife had occupied the disputed land without hindrance and that neither the respondent nor Mr. Lall picked fruit from the disputed land.

25. In their written submissions the appellants argued that the trial judge failed to evaluate the evidence of Mr. Boucaud who confirmed that the boundary between 33A and 33B had not been plotted. It was argued that this went to show that the parties to the alleged conversation, that is, the deceased and Frederick Morris, did not have this information, and could not have agreed to any demarcation. I disagree. Failure to have carried out a survey does not inexorably mean that the parties could not have had knowledge about the extent of the land conveyed by their respective deeds.

26. It is well established that a Court of Appeal ought not to interfere with a trial judge's conclusions on factual issues unless the trial judge has failed to weigh in the balance matters of substantive evidence which bear on the question of whether a particular witness was or was not telling the truth. Then, the Court of Appeal will substitute is own decision for that of the trial judge. (**See Ramsaran v Hoodan, Privy Council Appeal No. 5 of 1997**)

27. The trial judge was left with the evidence of the respondent and Mr. Lall about the alleged conversation. There was little or no challenge to this evidence. It was never argued that this was a case of mistake about where the boundaries were. The respondent Lall testified that Mr. Morris sought "permission" from the deceased to erect the fence and while Mr. Lau did not use that word his evidence is not inconsistent with that sate of affairs. The trial judge accepted this evidence and was satisfied upon a balance of probabilities that Mr. Morris

recognised the deceased as the true owner and that the deceased consented to the erection of the fence at the back of the two bay leaf trees. The trial judge regarded this evidence as indicative of arrangements between neighbours, as opposed to an intention create legal relations.

28. While it is true that there was no evidence that the deceased and Mr. Morris were other than strangers, this feature did not prevent the creation of a licence, if indeed the conversation took place. I am in agreement with the trial judge that there was nothing which could be deduced from the surrounding circumstances that would suggest an intention to create legal obligations.

29. The basis upon which the trial judge made a finding that a licence was created cannot be faulted. Even if the licence had been revoked with the deceased's death, in 1994, the sixteen year period of limitation upon which the appellants relied would not have expired. I would therefore dismiss this appeal with costs.

Margot Warner
Justice of Appeal