REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No. 43 of 2010

IN THE COURT OF APPEAL

OF

CLYDE DIPNARINE
STEVE ANDERSON DIPNARINE
CHRISTOPHER ANDERSON DIPNARINE

APPELLANTS

AND

ESTHER DIPNARINE

RESPONDENT

PANEL: **Mendonça, JA**
Jamadar, JA
Pemberton, JA

APPEARANCES: **Ms. Bullen for the Appellants**
Mr. Seepersad for the Respondent

DATE OF DELIVERY: November 20th 2017

JUDGMENT

Delivered by A. Mendonça, J.A.

1. The parties to this appeal are all related either by blood or by marriage. The first Appellant, Clyde Dipnarine, is the father of the second and third Appellants, Steve and Christopher Dipnarine. The Respondent, Esther Dipnarine, was married to Cyril Dipnarine, now deceased. He was the brother of Clyde Dipnarine, the first Appellant.

2. The dispute between the parties relates to the entitlement to possession of a parcel of land comprising 443.7 m^2 in the ward of Chaguanas.

3. The Appellants by these proceedings, which were commenced on June 05th 2003, claimed that they were paper title owners of a parcel of land comprising 20,000 square feet in the ward of Chaguanas. In their statement of claim, they say that the Respondent owns adjoining lands. That is not disputed. But they claim that in January 2003, the Respondent erected a fence on their lands, i.e. the 20,000 square feet parcel, and not her land, thereby enclosing a portion of their land and thereby depriving them of the use and enjoyment of the said portion. They averred that despite protests the Respondent refused to vacate the portion of their lands. Accordingly, they claim, *inter alia*, an order for possession of the lands comprising 20,000 square feet and an injunction restraining the Respondent whether by herself or servants or agents, from entering upon the said lands.

4. The Respondent filed a defence and counterclaim. She admitted that she erected a fence but claims that the portion of lands on which the fence was erected belongs to her, not the Appellants. She identified the portion of the lands as comprising 443.7 m^2. There has been no dispute that that is the area of the portion of land in dispute and we shall refer to this portion of land as the disputed lands. It is also not in dispute that the disputed lands are a portion of the 20,000 square feet parcel, which the Appellants claim belong to them.

5. The claim by the Respondent that the disputed lands are hers is made essentially on the basis that she has been in possession of the disputed lands since 1980. She averred in her defence and counterclaim, that she and her husband, Cyril Dipnarine, (now deceased), did a number of acts on the disputed lands over the years, namely, built a two-bedroom house, together with an outhouse on a portion of the disputed lands, and on other portions planted crops and reared animals and also earth filled a portion of the disputed lands. She accordingly claimed possession of the disputed lands, a declaration that she acquired possessory title to them and an order vesting them in her.

6. In their reply and defence to counterclaim, the Appellants say that prior to the Respondent's act of trespass in 2003, when she erected the fence, the Respondent was never in occupation of the disputed lands.

7. The action came on for trial before Best, J. He held that the Appellants had not made out their claim to be the paper title owners of the 20,000 square feet parcel. Accordingly, the Appellants claim to possession of that parcel of land, of which the disputed lands form part,

failed. He then considered the Respondent's counterclaim, based on her long possession of the lands and held that that claim also failed. He, therefore, dismissed both the claim and counterclaim and ordered that the Appellants be paid their costs of the counterclaim and the Respondent be paid her costs of the claim.

8. The Appellants have appealed and the Respondent has cross-appealed. They say that the Judge erred in dismissing their respective claims to the lands and they seek an order that they be granted the relief sought by their claim and counterclaim.

9. It is clear from the Appellants' pleadings that they are contending they are the paper title owners of the 20,000 square feet parcel and the disputed lands form part of it. That is the basis of their claim. They deny that the Respondent was ever in possession of the disputed lands. Their claim to ownership of the 20,000 square feet parcel rested on the basis that it was conveyed to them in 1997.

10. There was in evidence before the Judge certain title deeds and transactions relating to the 20,000 square feet parcel as well as adjoining lands, the paper title to which is vested in the Respondent. The effect of these deeds may be summarised as follows:

    (i) By deed dated May 13th 1959, registered and as No. 6292 of 1959, a parcel of land comprising two acres was conveyed to Esther Dipnarine and her husband as joint tenants. This Esther Dipnarine is not the respondent but the respondent's mother-in-law and the mother of the respondent's deceased husband as well as the mother of the first appellant. I shall refer to this Esther Dipnarine, as did the Judge, as Esther, [the elder]. It is not disputed that Esther [the elder's] husband died on January 7, 1977, leaving Esther [the elder] as sole owner of the two acres of land;

(ii) On October 4th 1982, Esther [the elder], out of her two-acre parcel of land conveyed 10,000 square feet to the Respondent and the respondent's late husband, Cyril Dipnarine, as joint tenants;

(iii) On January 3rd, 1983, by deed registered No. 284 of 1983, Esther [the elder], out of her two-acre parcel of land, conveyed to her son, Clarence Dipnarine and his wife, Cynthia Dipnarine, the 20,000 square feet parcel;

(iv) By deed dated December 6th 1983, and registered as No. 28350 of 1983, a further 10,000 square feet parcel of land out of the two-acre parcel of land was conveyed to the Respondent and her husband, Cyril Dipnarine, as joint tenants by Esther [the elder];

(v) By deed dated September 12th 1994, and registered as No. 15262 of 1994, a further 6,500 square feet out of the two-acre parcel of land was conveyed to the Respondent and her husband as joint tenants by Esther [the elder];

(vi) In 1993, Clarence and Cynthia Dipnarine mortgaged the 20,000 square feet parcel to Republic Bank Limited;

(vii) In 1997, Republic Bank Limited sold the 20,000 square feet parcel under its power of sale to Kumarie Dipnarine; and

(viii) In 1997, Kumarie Dipnarine conveyed the 20,000 square feet parcel to the Appellants.

11. The Appellants' title to the 20,000 square feet parcel is evidenced by the deeds and transactions identified in (iii), (vi), (vii) and (viii) above. The 20,000 square feet parcel was originally part of the larger two-acre parcel that was vested in the name of Esther [the elder] and her deceased husband. The 20,000 square feet parcel by the various dealings at (iii), (vi), (vii) and (viii) became vested in the name of the Appellants.

12. The Judge, however, was of the view that Esther [the elder] held only 20,000 square feet of land at the time she conveyed the lands to the Respondent and her late husband by the deed identified at (ii) above. He was therefore of the view that when in 1982, Esther [the elder] conveyed 10,000 square feet to the Respondent and her late husband, Esther [the elder] did not have more than 10,000 square feet left of her land, and so could not convey 20,000 square feet to Clarence and Cynthia Dipnarine, who are among the Appellants' predecessors in title. That reasoning, however, is clearly based on an erroneous construction of Esther [the elder's] title deed. It is clear from that deed, which is at (i) above, that Esther [the elder] and her late husband, became the owners of two acres of land as joint tenants. It is not disputed that Esther [the elder's] husband died on January 07th 1977, leaving her the sole owner of the two-acre parcel of land, which she was free to deal with as she saw fit. When, therefore, Esther [the elder] conveyed 10,000 square feet on October 4th 1992 to the Respondent (the deed at (ii) above), there was more than ample land left over from the two-acre parcel of land from which she could have conveyed 20,000 square feet to Clarence and Cynthia Dipnarine.

13. The Judge, therefore, erred in holding that the Appellants had not established that they were the paper title owners of the 20,000 square feet parcel of which, there is no dispute, that the disputed lands are a portion. Of course, that conclusion does not by itself entitle the Appellants to the relief sought by their claim. Whether they are entitled to such relief depends on whether the Respondent has established her claim based on her long possession of the disputed lands.

14. Before turning to that issue, there are certain averments in the defence and counterclaim of the Respondent to which we would like to refer briefly. They relate to the description of the boundaries of the lands conveyed by Esther [the elder] to the Respondent. In the 1982 and 1983 deeds ((ii) and (iv) above) Esther [the elder] conveyed to the Respondent two parcels of land each said to comprise 10,000 square feet. The lands, according to the deeds measure a total of 400 feet along the southern boundaries which were said to be along the southern boundary of the two-acre parcel of land. The difficulty for the Respondent was that the southern boundary of Esther [the elder's] two-acre parcel land was significantly less than 400 square feet. The parcels of land conveyed to the Respondent, therefore, could not physically be accommodated along the southern boundary of the two-acre parcel land. In her defence and counterclaim, the Respondent stated that the boundaries in her title deeds were wrongly described. She referred to a survey conducted in July 1985, which she said disclosed that the boundaries to her lands "needed to be adjusted and corrected" and that the surveyor "redrew" the boundaries and produced a survey plan showing the redefined boundaries. The implication might have been that the disputed lands fell within the redefined boundaries. But there was no claim for rectification of the Respondent's deeds. Any such claim for rectification would no doubt have been met by the objection that the redrawn and readjusted boundaries sought to incorporate a portion of the 20,000 square feet parcel that by then had been conveyed to Clarence and Cynthia Dipnarine, and subsequently mortgaged to the Republic Bank Limited. These averments do not amount to a claim by the Respondent that she has any paper title to the disputed lands. Indeed it has been conceded by the Respondent

that the 20,000 square feet parcel is vested in the Appellants. However, the 1985 survey is of some relevance to the Respondent's claim to possession of the land and it is to that claim that we now turn.

15. The Respondent's contention is that the Appellants' title to the disputed lands has been extinguished and that she is entitled to possession of the disputed lands. To succeed, the Respondent must establish that she has been in continuous adverse possession of the disputed lands for at least 16 years from the date the Appellants' right to bring an action for their recovery first arose. This is so by virtue of section 3 of the **Real Property Limitation Act** which is as follows:

> **3.** 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.

Generally speaking, adverse possession is possession which is inconsistent with and in denial of the right of the true owner (see **Ramnarace v Lutchman** [2001] UKPC 25 at para 10). Therefore, possession with the consent of the true owner or by a lawful title would not be adverse.

16. As to the date that the cause of action first arose, it was common ground between the parties that that date is January 3rd 1983, being the date on which the Appellants' predecessors in title first acquired title to the disputed lands.

17. The Respondent, to succeed, therefore, must establish that she was in continuous adverse possession of the disputed lands for at least 16 years from January 3rd 1983, and which must expire before these proceedings were commenced on June 5th 2003. The period of 16 years does not, however, have to be a period ending immediately before the proceedings were commenced.

18. If the Respondent establishes continuous adverse possession of the disputed lands for a period of 16 years before the commencement of these proceedings, then the Appellants' title to the disputed lands is extinguished. That is so provided by section 22 of the **Real Property Limitation Act** which is as follows:

> **22.** 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.

19. It is well settled that possession in law has two elements which must be established by the alleged possessor: (i) there must be a sufficient degree of physical custody and control (factual possession); and (ii) an intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess) (see **J. A. Pye (Oxford) Ltd v Graham** [2003] 1 AC 419 and **Latmore Smith v Benjamin** 78 WIR 421). The Respondent must establish both of the elements of possession. The Respondent's possession must also be exclusive. The paper title owner is deemed to be in possession of the lands vested in him or her. The Respondent must, therefore, show that she dispossessed the Appellants and was in exclusive possession of the disputed lands for the requisite period.

20. At the time of this action, the first Appellant, Clyde Dipnarine, gave evidence on his own behalf and on behalf of the other Appellants. Mr. Clarence Dipnarine, the brother of the first Appellant, and one of the Appellants' predecessors in title to the 20,000 square feet parcel, also gave evidence on behalf of the Appellants. The Respondent gave evidence on her own behalf and called two witnesses, namely, her son, Kevin Dipnarine and one Lionel Emmanuel.

21. There is no record of the evidence in chief of the first Appellant on the record of appeal. The parties made no point of this. There is, however, a note of his cross-examination. In the course of his cross-examination, it was put to him, that the Respondent and her late husband planted crops and kept animals on the disputed lands. His response was that that is not true. It was also put to him that the Respondent and her family used an outhouse on the disputed lands. He responded by saying that only Clarence Dipnarine used the outhouse.

22. Clarence Dipnarine testified that he lived on the 20,000 square feet parcel from 1982 to 1988 when he migrated to Canada. He was shown a plan that identified the disputed lands and stated that he acquired title to the 20,000 square feet parcel (of which the disputed lands form part) in 1983, and in that year mortgaged the 20,000 square feet parcel to Republic Bank Limited. He planted crops on the disputed lands. He explained that the lands sloped towards the southeast corner of the two-acre parcel and that portion was prone to flooding. The greater part of the land that was prone to flooding was on the 20,000 square feet parcel and the rest was on the Respondent's lands. It is clear from that description that part of the lands prone to flooding would be within the disputed lands. He planted dasheen on the disputed

lands. He did not see the Respondent and her husband plant anything on the southeast portion of the land. He testified that there was planting "more to the west side of the land – the higher portion of the land". But he denied that any planting on the disputed lands was done by the Respondent and her husband. He knew the Respondent and her husband to have animals but they were "kept no place at all. They were tied all over the land and neighbour land". He further stated that "when members of family planted on the western portion, nobody planted any particular portion of land – anybody plant anywhere." He stated that there was an outhouse on the disputed lands but when it was put to him that the outhouse was built alone by the Respondent and her late husband and used only by them, he denied that to be so. He testified that the outhouse was built by him, the Respondent's late husband and the first Appellant.

23. The gist of the Respondent's evidence, as was telegraphed in her pleadings, was that from 1980, she and her late husband were in possession of the disputed lands performing a number of acts. She said that they planted patchoi and lettuce and "mine" cows, chickens and goats. She stated that they planted on half of disputed lands and kept cows on other parts of the disputed lands. She testified that in 1983, she had topsoil deposited on the disputed lands and spread by a gentleman using a backhoe. This was to fill the lands and alleviate the flooding and thereafter, she tethered her cows there. She also stated that prior to the fence she built in 2003, there was no fence enclosing the disputed lands. She built her house apparently not on the disputed lands but to get to her house, she had to drive across a bridge on the disputed lands. She referred to the survey, which was done in 1985. She said that it was done by Mr. Ramlakhan and he realised that the southern boundaries of her lands as described in her title

deeds were too long. She referred to a plan drawn by Mr. Ramlakhan. That plan shows two parcels of land each measuring 100 feet along the northern and southern boundaries and 100 feet along the eastern and western boundaries. According to the evidence of the Respondent, the boundaries of the lands as described in her 1982 and 1983 title deeds were redrawn, so that the area of land said to be conveyed to the Respondent by the deeds could be accommodated along the southern boundary of the two-acre parcel of land. According to the Respondent, by having Mr. Ramlakhan redefine the boundaries, she "thought" that she "would get the parcel of land" she "is in". There is a plan in evidence that shows an outhouse constructed on the western boundary of the disputed lands and the lands adjoining them. The outhouse protrudes fractionally onto the disputed lands. According to the Respondent, she used the outhouse.

24. The Respondent's son, Kevin Dipnarine, at the time he gave evidence at the trial in 2006 was 23 years old; he was born on November 1st 1982. His evidence largely supported that of his mother, the Respondent. He stated that his parents used to plant vegetables and "mine" animals on the disputed lands. They kept cows, goats, chickens, and ducks. He said he remembered seeing the animals on the land when he was 6 years old. He testified that the cows were kept on the disputed lands and next to them as well. They were kept there all the time. They grazed there and got water there. He further stated that he used the outhouse on the disputed lands. He said that the lands were filled up by the Respondent in 2000.

25. Lionel Emmanuel was a survey technician and he assisted Mr. Ramlakhan in the conduct of the survey which he said was in 1982. His evidence is of no real relevance to the possession claim.

26. The following paragraphs of the Judge's judgment are relevant to the claim in possession:

> "**14.** The evidence of Clarence, which I accept, is to the effect that the disputed portion of land was subject to flooding. As a consequence, an outhouse was built on higher ground for common use. Further cattle was reared on the disputed portion of land and that whenever a member of the family wished to involve himself in agriculture, he was free so to do on any area without disharmony. In addition, he testified that a ravine ran through the disputed portion of land but did not then exist when the court visited the disputed portion of land.
>
> ....
>
> **20.** Upon hearing the evidence herein and reading the respective deeds, I have come to the conclusion that the overarching intention of Esther [the elder] was to endow her son, Cyril and his new bride, Esther [the younger] with four lots of land in one block in her glee, failed to have her land adequately surveyed.
>
> **21.** Added to this is the extent of land Esther [the younger] believed that Esther [the elder] conveyed to her
>
> …….
>
> **24.** Clarence testified and I have accepted that prior to Cyril and Esther [the younger] exchanging vows on 23rd October 1981; the brothers, Clarence, Clyde, and Cyril in 1980 constructed an outhouse for common use on the disputed portion of land.
>
> **25.** I accept the testimony of Esther [the younger] that the happy couple, prior to their vows, moved into their matrimonial home and plunged themselves into animal husbandry and agriculture. Between the years 1980 to 16th August 2000 when Cyril unfortunately passed, the defendant made use of the disputed portion of land for in excess of 16 years but with the blessing of Esther [the elder].
>
> **26.** The defendant's testimony that she and her husband were peasant farmers was held under the microscope of cross-examination; but the testimony stands unshaken.

…….

28. She continued and, I accept, that she had built a bridge to access the disputed portion of land and further in 2003 she built a wall around the disputed portion of land. She indicated that she was ordered by the court to break the said wall, which she, her son and a carpenter did in 2003. Did the defendant acquire the disputed portion of land by virtue of adverse possession as claimed in her counterclaim?

29. To show adverse possession, in law, a claimant must show:-

(1) Factual possession and
(2) An animus possidendi

30. It is without doubt from the evidence that Esther [the younger] had the necessary *animus possidendi* [the intention to possess] that encompassed the whole of the disputed portion of land.

31. However, did she have factual possession of the disputed portion of land? In the view of this court, this is a mixed question of law and fact.

32. In order to establish her possession, sufficient for a prescriptive claim the defendant testified honestly as to grazing of her cattle upon the disputed portion of land; agricultural cultivation thereon from time to time; and the deposit of earth-fill thereon and the construction of an outhouse on the eastern boundary of the disputed portion of land.

…….

34. … I have found Esther [the younger] to be a simple but truthful witness.

35. I have accepted the evidence of Esther [the younger] that she and her deceased husband were peasant farmers rearing cattle, goat, and poultry. I have accepted her evidence that the dairy animals were let loose on the north at the front part of the disputed portion of the land to graze according to their desires.

36. Further, there is no doubt that Esther [the younger] had an outhouse constructed by her relative on the disputed portion of land in 1980, prior to her marriage to Cyril, and to coincide with the construction of her matrimonial home. Further, that in 2003 she fenced the disputed portion of land.

…….

> **38.** Further, I accept the testimony of Esther [the younger] that she and her husband carried our earth work on a certain portion of the disputed portion of land. Esther [the younger] testified that around 1983 a school was being constructed in the area and certain earth works were being carried out at the school-site. She requested the driver of a bull-dozer to drop the top soil that he had removed from the school site onto the disputed portion of land. She had a backhoe level the said topsoil, upon which she tethered her cattle."

27. From the evidence which he accepted, the Judge concluded that Esther [the elder] had the necessary intention to possess that encompassed as the whole of the disputed lands (see para 30 of his judgment referred to above). He, however, concluded that she had not established that she was in factual possession of the disputed lands. He stated:

> "**39.** In the view of this court, neither the itinerant grazing of cattle nor limited use of part of the disputed portion of land for agricultural purpose nor the dumping of top soil on a part of the disputed portion of land nor the construction of an outhouse on a boundary of the disputed land amount to acts inconsistent with the enjoyment of the land and a denial of the title of the true owner".

28. Ms. Bullen, counsel for the Appellants, submitted that on the evidence, the Respondent's claim to possession of the disputed lands must fail and the Court should hold that the Appellants are entitled to possession of them. She argued that the Respondent had not established that she was in exclusive possession of the disputed lands. She further contended that the Respondent had failed to establish that the acts which she claimed were done on the disputed lands were in fact done there. Ms. Bullen also argued that the trial Judge was wrong to find the Respondent had the intention to possess the disputed lands. The finding by the Judge that the Respondent had established the necessary intention to possess was not one that was supportable on the evidence.

29. Counsel for the Respondent submitted that the Judge was correct to find that the Respondent had the intention to possess the disputed lands. He, however, submitted that the Judge erred on the issue of factual possession. He had failed to consider the acts done by the Respondent's cumulatively and had used the wrong test.

30. We will first consider the issue of exclusive possession that was raised by Ms. Bullen. The underpinning of the submission was the evidence of Clarence Dipnarine. According to him, he was in possession of the disputed lands from 1983 to 1988 and he planted dasheen on the disputed lands. Counsel submitted that at paragraph 14 of his judgment, the Judge accepted the evidence of Clarence Dipnarine. As he was in possession of the disputed lands up to 1988 and these proceedings were commenced in 2003, the Respondent had not established her claim to possession of the disputed lands for a period of 16 years before the commencement of these proceedings.

31. The Respondent and the Appellants (referring also to their predecessors in title) cannot both be in possession of the disputed lands. If, therefore, the Judge did accept the evidence of Clarence Dipnarine that he was there up to 1988 planting on the disputed lands, then that would be highly material to the Respondent's claim that she was in possession of the lands for the requisite period. It is true that the Judge did say at paragraph 14 of his judgment that he accepted Clarence Dipnarine's evidence. But I do not believe that it is correct to read the paragraph as meaning that the Judge accepted the totality of the evidence of Clarence Dipnarine. An obvious example that he did not accept the evidence in its totality relates to the acts done by the Respondent on the disputed lands. When it was put to Clarence

Dipnarine in cross-examination, that the Respondent and her husband occupied the disputed lands with crops and animals between 1980 and 2000, his response was "not on the disputed lands". The Judge, however, found that the Respondent did use the disputed lands for agriculture and the grazing of animals. So, we think, it is clear that the Judge did not accept the entirety of Clarence Dipnarine's evidence.

32. We believe that at paragraph 14 the Judge was careful to identify the aspects of the evidence of Clarence Dipnarine which he did accept. Clarence Dipnarine plainly put before the Court the fact that he was in physical possession of the disputed lands up to 1988 by planting on the southeast portion of the lands. If that were accepted by the Judge, he would have said so, especially in the light of the fact that that would have been dispositive of the Respondent's claim. Paragraph 14 is best construed as a reflection of the evidence of Clarence Dipnarine which the Judge did accept.

33. It is not difficult to understand why the Judge did not accept the evidence of Clarence Dipnarine that he planted on the disputed lands. The Judge viewed the Respondent as an honest and truthful witness. Her evidence was to the effect that the area of the disputed lands that was prone to flooding was filled by her in 1983 and she thereafter tethered her cows there. The evidence of Clarence Dipnarine was to the effect that it was in that area that he planted dasheen. He stated that he left the lands in 1988 and at that time they were as he had known them. According to him, therefore, the lands were not filled in with earth up to that time. The Judge, however, accepted the Respondent's evidence that in fact in 1983, that portion of the disputed lands was filled in and thereafter her cows were tethered there. That

seems to us to be inconsistent with the notion that Clarence Dipnarine would have planted dasheen there on the disputed lands.

34. In the context of exclusive possession, Ms Bullen also referred to the outhouse that was built on the disputed lands and this must be considered. There is no dispute that the outhouse was built on the western boundary of the disputed lands but protrudes fractionally onto the disputed lands. According to Clarence Dipnarine, that outhouse was built by him, the Respondent's late husband and the first Appellant and "at one time" was used by all of them. The Respondent gave no evidence in relation to the outhouse. Consequently, the Judge accepted the evidence of Clarence Dipnarine that the outhouse was built by him, the Respondent's late husband and the first Appellant for their common use. If the outhouse was used by the first Appellant and/or Clarence Dipnarine within 16 years of the commencement of these proceedings that would provide some evidence that the Respondent had not dispossessed the Appellants or their predecessor's in title. The Judge, however, makes no finding as to who actually used the outhouse and for what period of time. This too is understandable because Clarence Dipnarine did not say during what period of time it was used by him or the first Appellant. He simply says "at one time". Further, his evidence is inconsistent with that of the first Appellant, Clyde Dipnarine. According to him, he never used the outhouse and Clarence Dipnarine alone used it. The evidence was not sufficiently safe for the Judge to make any finding regarding the use of the outhouse. In these circumstances, the construction and use of the outhouse do not provide any evidence from which the conclusion could be drawn that the Respondent was not in exclusive possession of the disputed lands for the requisite period.

35. The submission of Ms Bullen that the Respondent did not establish that the acts on which she relied were done on the disputed lands, we do not consider to be of any merit. There was no disagreement as to the area that represented the disputed lands and the Respondent was clear that the acts on which she relied were done on the disputed lands. For example, early in her evidence in chief, she was shown a survey plan (which was marked 'A 9' and which is dated May 20th 2003) prepared by Iqbal Mohammed and proceeded to give evidence regarding the filling of the lands. The Judge found that this related to the disputed lands and he was entitled to do so. The Respondent went on to testify as to her planting of the lands and the keeping of animals, all of which she specifically said occurred on the disputed lands. In our view there is ample evidence from which the trial Judge could find, as he did, that the acts occurred on the disputed lands.

36. Before we turn to discuss Ms Bullen's final submission which deals with the intention to possess, it would be appropriate to consider the Respondent's challenge to the Judge's finding that the Respondent had not established factual possession.

37. The Respondent's contention is simply that the Judge did not consider the acts relied on by the Respondent cumulatively and had used the wrong test, in that he erroneously thought that the acts had to be "inconsistent with the enjoyment of the land".

38. The Judge's conclusion on the element of factual possession is set out at paragraph 39 of his judgment, which has been quoted above. We think that it is apparent from that paragraph that he did not consider the cumulative effect of the finding he made in relation to the acts

done on the disputed lands by the Respondent. But the question still remains, whether cumulatively they amount to factual possession of the Respondent.

39. In **Pye v Graham, (supra)**, the House of Lords approved (at para 41) the following statement of factual possession from the judgment of the Court in **Powell v McFarlane** (1977) 38 P & CR 452;

> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed… Everything must depend on the particular circumstances but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

40. To establish factual possession, the Respondent must therefore have a sufficient degree of exclusive physical custody and control of the disputed lands. This may be established by the Respondent showing that she dealt with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.

41. It is not the law as the Judge seemed to suggest at paragraph 38 of his judgment that the alleged possessor must have used the land in some way that is inconsistent with the enjoyment of the land. This seems to suggest that the Judge was of the view that the use of the land by the alleged possessor depends on the intentions of the paper title owner with respect to the use of lands. This was expressly considered by the House of Lords in the **Pye** case. In the judgment of Lord Browne-Wilkinson, which the other Law Lords agreed, he

considered that the suggestion that the enjoyment of the land by the alleged possessor must be inconsistent with the purposes for which the paper title owner intended "heretical and wrong". He continued:

> "It reflects an attempt to revise the pre 1833 concept of adverse possession requiring inconsistent user… The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could properly be drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."

42. From that, it seems that the use of the land by the person claiming possession that is not inconsistent with a special purpose for which the paper title owner uses or intends to use the lands of which the alleged possessor is aware may touch on the question of the intention to possess and not on factual possession. It is, however, sufficient to say at this stage that there is no evidence that the Appellants as the paper title owners, used or intended to use the disputed lands for any special purpose, and even if there were such evidence, there is no evidence that the Respondent was aware of any such purpose. In so far as the Judge thought that the use of lands by the Respondent had to be inconsistent with the intentions of the Appellants, he was plainly wrong

43. The Respondent's case was that she has been in possession of the disputed lands for at least 16 years before the commencement of these proceedings. She planted the lands, kept animals on them, she "dug out a ravine" on the disputed lands, and filled them with earth. She also had her outhouse on a portion of the disputed lands. The Judge accepted this

evidence. The Respondent also testified that to get to her house she would have to drive across a bridge which is on the disputed lands. The Judge did not accept the evidence of Clarence Dipnarine that he planted on the disputed lands up to 1988. While the Judge accepted the evidence that the outhouse was built by Clarence Dipnarine, the first Appellant and the Respondent's late husband for common use, there is no reliable evidence that it was used by the first Appellant or Clarence Dipnarine or any evidence that it was used during a period of time that would defeat the Respondent's claim that she was in possession of the disputed lands for 16 years prior to the commencement of these proceedings. According to the Respondent, she did not see the first Appellant on the disputed lands until after the commencement of these proceedings. Significantly, the Judge made no finding that anyone else used or dealt with the disputed lands, though it was clear that that was an element of the Appellants' case. In our judgement, the evidence viewed as a whole establishes that the Respondent had exclusive physical control of the disputed lands. She dealt with the disputed lands as an occupying owner might have been expected to deal with them and no one else was in possession. In our judgment, the Judge was wrong not to have concluded that the Respondent satisfied the element of factual possession.

44. We turn now to consider Ms Bullen's final submission which relates with the intention to possess.

45. The intention to possess, as indicated earlier, is one of the elements that the alleged possessor must establish in order to show that he or she was in possession of the lands in question. It is not an intention to own the property (see para 46 of **Pye**). In **Pye**, Lord Browne-Wilkinson approved (at para 43) the following formulation of the Court in **Powell v McFarlane** as to what is required to be shown with respect to the intention to possess:

> "[An] intention, in one's own name and in one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

46. Other Law Lords in **Pye** also made observations on the intention to possess. Lord Hope stated:

> "**70.** …The acquisition of possession required both an intention to take or occupy the land ("animus") and some act of the body ("corpus") which gives effect to that intention. Occupation of the land alone is not enough, nor is an intention to occupy which is not put into effect by action. Both aspects must be examined, and each is bound up with the other. But the acts of the mind can be, and sometimes can only be, demonstrated by acts of the body. In practice, the best evidence of intention is frequently found in the acts which have taken place.
>
> **71.** …But it is reasonably clear that the animus which is required is the intention to exercise exclusive control over the thing for oneself: … The important thing for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor…The only intention which has to be demonstrated is an intention to use and occupy the land as one's own…So I would hold that if the evidence shows that the person using the land in the way one would expect him to use it if he were the true owner, that is enough."

47. Lord Hope had this to say:

> "**75.** In the present case from August 1984 onward, the Grahams made full use of the disputed lands as if they were the owners – they did everything which an owner of the land would have done and when an experienced chartered surveyor called on behalf of the plaintiffs, was asked in cross-examination what an

occupying owner of the disputed lands might have done over and above what was done by the Grahams between 1984 and 1997, he was unable to think of anything.

> **76.** I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the Claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full of use of it in the way in which an owner would, I consider that in the normal course he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation, that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded."

48. These observations were made with reference to a person claiming title under the **Limitation Act**, 1980 of England. But they apply equally to someone claiming to have extinguished the paper title owner under the **Real Property Limitation Act**. From the above, it is clear that although the necessary intention as formulated by Lord Browne-Wilkinson is to exclude the world at large including the paper title owner, it is not necessary to show a deliberate intention to exclude the paper title owner. The intention to possess can be demonstrated where the evidence establishes that the alleged possessor has used the lands as his own in the way in which one would expect him to use it if he were the true owner. That is sufficient to establish the intention to possess.

49. In our judgment the Respondent's actions make it clear that she intended to exercise exclusive control of the disputed lands on her own behalf and to exclude the world at large including the paper title owners. She occupied and dealt with the disputed lands in the way an occupying owner might have been expected to deal with them and that no one else did.

That is sufficient to establish that the Respondent had the necessary intention to possess. Ms Bullen has, however, submitted that the Respondent did not have the intention to possess as she entered into possession of the disputed lands with the consent of Esther [the elder] and continued in occupation under a family arrangement that every family member was free to use any portion of the two-acre parcel, including the disputed lands. In those circumstances, the Respondent's use and occupation of the disputed lands was under the umbrella of a general permissiveness that any family member could use any portion of the land.

50. There are two findings of the Judge that are relevant to these submissions. The Judge found that if any member of the family wished to involve himself in agriculture, he was free to do so on any area without disharmony. In doing so the Judge accepted the evidence of Clarence Dipnarine. This relates to the family arrangement to which Ms Bullen referred. As to the submission that the Respondent was in possession with the consent of Esther [the elder], the Judge found (at para 25 of his judgment reproduced above), that between the years 1980 to August 16th 2000, when the Respondent's husband died, the Respondent made use of the lands for in excess of 16 years but with "the blessing" of Esther [the elder].

51. Clarence Dipnarine gave no particulars of the arrangement of which he spoke, more than to say that anybody could plant anywhere and this "arrangement did not create a problem in the family". Whether this was a reference to the western portion alone of the disputed lands is not clear from his evidence. He, however, gave no further particulars of the arrangement. Was this something that was mandated by Esther [the elder] or an arrangement to which all members of the family agreed? Was the Respondent part of this arrangement? Nothing of this arrangement was pleaded nor was it or anything relating to it put to the Respondent in

the course of cross-examination. Without more, in those circumstances, it would be difficult and inappropriate to put any reliance on the "arrangement". But there is more. Significantly, the Judge found that the Respondent had the intention to possess and did not, other than in paragraph 14 of his judgment, refer to the family arrangement. Surely, if the Judge found that the arrangement to which he referred to at paragraph 14 of his judgment was of significance, he would have referred further to it, especially in relation to his findings at paragraphs 29 and 39 of his judgment. If the Respondent were in occupation under such an arrangement, it would be difficult to understand how the Judge could have found that the Respondent had the intention to possess. The fact that he so found and did not again refer to this arrangement after paragraph 14 strongly suggest that he did not think it of any relevance or importance to the Respondent's possession and use of the disputed lands. We too cannot and do not assign any relevance or importance to that arrangement in relation to the Respondent's use and possession of the disputed lands.

52. It seems that the Respondent went into possession before any portion of the two-acre parcel was conveyed to her. To that extent, we can understand the Judge saying that she was there with the blessing of Esther [the elder]. That may have been so initially. But we do not accept that Esther [the elder's] consent could be in any way relevant to the occupation of the disputed lands after they were conveyed as part of the 20,000 square feet parcel to Clarence Dipnarine and his wife. In 1983 they became the true owners of the disputed lands and Esther [the elder] could not then or at anytime thereafter lawfully give her consent to the Respondent to occupy the disputed lands. There has been no allegation in these proceedings

that Clarence Dipnarine, his wife or any of their successors in title gave any consent or permission to the Respondent to occupy the disputed lands.

53. A relevant question in view of the submissions of Ms. Bullen might be if the Respondent erroneously believed that the permission of Esther [the elder] was necessary for her to occupy the disputed lands and had such permission, whether it can be said that she had the necessary intention to possess.

54. A similar issue arose in the case of **Wretham v Ross** [2005] EWHC 1259. In that case, the appellant's predecessor in title believed that he was using the premises in question with the permission of the owner, but in fact had no such permission. The question arose whether the fact that he believed he had the permission of the owner meant he did not have the intention to possess. It was held that was an insufficient basis to conclude that he did not have the intention to possess. The Judge stated (at para 41):

> "…The relevance of the actual consent of the owner is that it prevents the occupier from being in "adverse possession"… Likewise, an erroneous belief by the occupier that he has the consent of the owner does not mean that he is in possession of the property. On the contrary, the missing element of the owner's consent will mean that he is in adverse possession.'

We are in agreement with that observation. The fact that a person erroneously believes he has the owner's consent when in reality he does have not have such permission, does not prevent him from being in possession. What is necessary is that the person in factual possession intends to exercise exclusive control for himself and to exclude the world at large including the paper title owner so far as is practicable. The fact that the person in factual possession might have erroneously believed he had the owner's permission does not defeat that intention.

55. In **Jourdan on Adverse Possession** (2nd edition) at paragraph 9-48, the question was asked whether a person who believes that he has a licence to occupy the land has the intention to possess. At paragraph 9-51 the authors refer to the **Wretham** case and express the view that they believe it was correctly decided. They then state:

> "A person who intends to exercise exclusive control over property, for his own benefit, for the time being, does have the intention to possess, and is in possession. The fact that he believes that he has the owner's permission, when in reality he does not have such permission, does not prevent him from being in possession. If he did, in reality, have such permission, then the permission would have the effect of making his possession vicarious on behalf of the true owner:… However, if there is no such permission, then there is no basis for treating the possession as vicarious. It is clearly established that a person who wrongly believes themselves [sic] to be a tenant does have the intention to possess:… There is no practical difference between the intention of a tenant holding under a tenancy which can be determined at any time by notice from the landlord and a licensee entitled to exclusive possession. Both intend to possess for the time being for their own benefit, and both know that they may be required to vacate at any time."

We also agree with those observations.

56. The relevance to this case is clear. Even if the Respondent erroneously believed that she required the permission of Esther [the elder] to enter and use the lands and obtained that permission that does not prevent her from having the necessary intention to possess.

57. In our view, the Respondent has established both elements of possession and we hold the Respondent to have been in adverse possession of the disputed lands for the requisite period and has extinguished the title of the Appellants to the disputed lands. In the circumstances, we shall allow the Respondent's cross-appeal and dismiss the Appellants' appeal. The orders of the Judge are set aside. The Appellants' claim is dismissed. A declaration is hereby

granted that the Respondent is entitled to possession of the disputed lands which are shown as the hatched area on the plan dated May 20th 2003, prepared by Iqbal Mohammed.

58. Subject to any submissions as to costs received within 21 days of this judgment, the Appellants shall pay the Respondent's costs here and below to be taxed.

A. Mendonça
Justice of Appeal

P. Jamadar
Justice of Appeal

C. Pemberton
Justice of Appeal