THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P023 of 2014
Claim No. CV2007-03780

Between

CHARLES EDWARD PORTER
MARY BERNADETTE PORTER

Appellants

And

ROBERT EDWARD STOKES
(PERSONAL REPRESENTATIVE OF THE ESTATE OF WALTER EDWARD STOKES, DECEASED)

Respondent

PANEL:

P. JAMADAR J.A.
N. BEREAUX J.A.
C. PEMBERTON J.A.

Date of delivery: 26 June, 2019

APPEARANCES:
Mrs. D. Peake SC, Mr. K. Garcia and Ms. K. Peterson Attorneys-at-law for the Appellants
Mr. R.L. Maharaj SC, Ms. V. Maharaj and Ms. N. Badal Attorneys-at-law for the Respondent

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

/s/ P. JAMADAR J.A.

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

/s/ C. PEMBERTON J.A.

JUDGMENT

Delivered by Bereaux J.A.

Introduction

[1] The question in this appeal is whether it was the common continuing intention of the parties to include in a deed of conveyance dated 18th August, 1982 (the 1982 deed), a small parcel of land measuring some four hundred and thirty (430) square metres, through which passes a road which serves as a right of way to the lands of both parties to this appeal. If there was such an intention then, subject to the appellants satisfying the other rectification requirements, they are entitled to a deed of rectification so as to correct the exclusion of the parcel on which the right of way passes. There was an agreement for the sale of two parcels of land, one of which included the small parcel through which the road passes (the smaller parcel). It was struck between Walter Stokes (the respondent's late father) and the appellants. It was in writing and was signed by the appellants and Walter Stokes on 15th May, 1982. The other parcel (the larger parcel) measured five thousand three hundred and forty point three five (5340.35) square metres. The road on the smaller parcel provides sole access to that larger parcel on which the appellants have their home.

[2] Walter Stokes and the respondent were close friends with the appellants. They visited each other's homes. Walter Stokes regarded the Porter children as his grandchildren. The Porters like all of Walter Stokes' close friends called him Da-da. So shall I. I shall also call him "Walter" or "Walter Stokes" where appropriate.

[3] The judge dismissed the appellants' claim on 17th December, 2013. They had sought a declaration of their entitlement to the conveyance of the smaller parcel. In addition to providing sole access to the Porter home, the road also provided access to Da-da's tenants who occupied houses on an

adjoining parcel of land which he also owned.

[4] The appellants contend that the smaller parcel should have been included in the 1982 deed consistent with the agreement for sale. Only the larger parcel was conveyed. They allege that this was a mistake, common to all the parties to the 1982 deed. The appellants sought an order for the execution of a deed of rectification to correct the error by conveying the smaller parcel.

[5] They also contend that they acquired, by adverse possession, a strip of land measuring sixteen point three (16.3) square metres (the triangular parcel) located on the respondent's adjoining parcel.

[6] The respondent denies any entitlement of the appellants to either the smaller parcel or the triangular parcel. He counter-claimed, inter alia, in private nuisance for damages alleging that the appellants had obstructed his use of the road on the smaller parcel by dumping on it a large amount of garbage and gravel which they refused to move. He also claims damages for trespass to the triangular parcel.

[7] The appellants say that, because of his close relationship with them, Da-da had reduced the purchase price of the larger and smaller parcels from the two hundred and twenty-five thousand dollars ($225,000.00) offered by the first appellant, to one hundred and eighty thousand dollars ($180,000.00). The respondent alleges, however, that the written agreement for the sale wrongly included the smaller parcel and was orally varied by the parties to reflect the real agreement, which was the sale of the larger parcel only, for the sum of one hundred and eighty thousand dollars ($180,000.00). The respondent agrees that Da-da did reduce the price because of the close relationship of the parties but it represented a significant undervalue. He said that when the error was discovered (by him) Da-da agreed with the appellants to allow the agreement for sale to *"expire"* and the conveyance would then be

executed for the larger parcel only.

[8] The judge rejected Mr. Porter's evidence as being untruthful and found that the appellants had failed to provide the *"convincing proof"* necessary to prove rectification.

[9] As to the triangular parcel, she accepted the respondent's evidence that the Porters did not begin to encroach until 2006. She ordered damages be assessed for private nuisance and for trespass on the smaller parcel and the triangular parcel respectively. The respondent has cross-appealed seeking, inter alia, injunctive relief against the appellants from hindering or obstructing the use of the right of way and from entering and remaining on the triangular parcel.

[10] In coming to her decision the judge considered the *viva voce* evidence of both parties. She also considered two survey plans - A2 and the plan attached to the deed of conveyance at A4 (A4) - which reflected surveys done by Mr. Winston Sylvester of the smaller and larger parcels as well as the adjoining parcel. She focussed on what she considered were inaccuracies in Mr. Porter's evidence. She then drew adverse inferences in respect of his evidence, concluding that the parties never intended to include the smaller parcel in the 1982 deed. The judge found that survey plan A2 reflected what the parties really intended which was that only the larger parcel of land was to be sold. She held that Mr. Porter had told a deliberate untruth when he said that the delay in executing the 1982 deed was to insert the drain reserve. This untruth was proffered because he was attempting to conceal the real reason for the delay in completing, which was to allow the agreement for sale "to expire" as the parties had agreed.

[11] The broad question is whether she was right in coming to that decision.

Summary of Decision

[12] As to the claim for rectification of the deed this appeal is allowed. The appellants are entitled to the deed of rectification conveying to them the smaller parcel. The trial judge failed to consider, or to properly consider, the documentary evidence in particular the 1982 deed. In not considering or not properly considering the provisions of the 1982 deed, the judge failed to consider relevant evidence. Further, although she did consider the survey plans A2 and A4, she misconstrued the purport of the corrections set out in the amended survey plan A4 and drew wrong inferences on Mr. Porter's credibility. The appellants are entitled to the declaration of their entitlement to the conveyance of the smaller parcel, and as a result, to a rectification of the 1982 deed to reflect same.

[13] As to the claim for the triangular parcel, the appeal is dismissed. It cannot be said that the trial judge was plainly wrong. Despite her wrongful rejection of Mr. Porter's evidence, there was additional evidence upon which she could, and did, found her decision on the triangular parcel.

[14] Da-da is dead. He died on 25 April, 1990. Both parties produced witnesses who purport to know what Da-da contemplated because of what he allegedly told them in conversation. Mr. Porter deposed to dealing directly with him. The respondent filed two hearsay notices in respect of witnesses who deposed to what he told them. It all goes to the intention of the parties. In my judgment the documentation speaks loudest of all. That is the key to the intention of the parties at the relevant time.

The appellants' case

[15] The appellants are Charles and Mary Porter. I shall refer to them as the appellants or the Porters. They allege that they entered into the written agreement for sale on May 15, 1982 with Da-da. By the agreement, the Porters

were to purchase the two freehold parcels of land for one hundred and eighty thousand dollars ($180,000.00). The sale of the smaller parcel was subject to a right of way over that parcel being granted to Da-da by the Porters. The 1982 deed was prepared by the appellant's attorney, Mr. Robert Sellier, an experienced solicitor at the firm of J.D. Sellier & Co. It conveyed the larger parcel but not the smaller parcel.

[16] The appellants allege that it was not until around February 2006 that they discovered the omission. Their attorneys prepared a deed of rectification but the respondent has refused to execute it.

The respondent's case

[17] The respondent says that there was no need to rectify. The 1982 deed is a true representation of the parties' intention. The error was in the written agreement for sale. While the written agreement referred to the sale of the smaller parcel, the parties had actually agreed only to the sale of the larger parcel. The smaller parcel was never in Da-da's contemplation to sell because he had tenants who used the road on the smaller parcel to access their homes, some of which were on the adjoining parcel which Walter Stokes retained.

[18] The respondent deposed that he discovered the error before the 1982 deed was executed and told his father. Da-da brought the error to the attention of the appellants. They agreed with him that steps should be taken to correct it. Da-da asked for the agreement to be cancelled and a new agreement prepared but the appellants told him that the agreement had already been submitted to a financial institution in order to finance the sale. Any cancellation could cause delay in the grant of the loan. The parties therefore orally agreed that the agreement for sale would be allowed to *"expire"* and after its expiry, a deed of conveyance (conveying only the larger parcel) would be executed a few days later.

[19] The respondent alleges that pursuant to that oral agreement, the written agreement for sale was thus allowed to *"expire"* on 15th August, 1982. This was ninety days after it was signed. On 18th August, 1982, the 1982 deed, transferring only the larger parcel of land to the appellants, was executed.

[20] As to the counterclaim, the respondent contended that the appellants on at least two occasions had dumped a large amount of material on the access road. This was done close to the gate of the home of Mr. Odai Ramischand whose property is located immediately south of the smaller parcel. The appellants refused to remove the dumped material. In 2006, the appellants unlawfully took possession of the triangular parcel. They were never before in occupation of it.

Judge's findings

[21] The judge's decision is set out at paragraphs 50 to 69 of her judgment. On the issue of rectification the judge found that:

(i) The appellants had not satisfied her on a balance of probability that the common intention of the parties was the sale of both parcels of land. She expressly rejected the evidence of Mr. Porter as unreliable and accepted the evidence of Robert Stokes, Mr. Pechenik, Mr. Ramischand and Mr. Victor that Da-da had no intention of selling the second parcel because all the other tenants on the property needed to access it and that he had informed the appellants of this on numerous occasions.

(ii) The appellants had not extinguished the respondent's title to the triangular parcel. There were several surveys conducted of the parcels at which both sides were present. The appellants never openly asserted any ownership of the triangular parcel, certainly not from the year 1999. She accepted the evidence of Messrs. Ramischand and Victor that the appellants took possession of the parcel in 2006. Further she found Mr. Porter's evidence to be inconsistent and contradictory. He was not a reliable witness.

(iii) She accepted the evidence of the respondent and Mr. Ramischand that the appellants (on two occasions) dumped debris, gravel and stone on the right of way, thereby obstructing its use by Mr. Ramischand in particular. The appellants' actions were wrongful and amounted to a private nuisance.

(iv) The appellants having failed to prove their case on rectification, it was not necessary to consider laches, acquiescence, waiver or limitation.

Appellate review

[22] The judge's findings of fact are subject to reversal by this Court if, (as per Lord Hodge in **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd [2014] UKPC 21, [2014] 4 All ER 418** at paragraph 12) we are able *"to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine [her] conclusions"*, and to lead us to conclude that the judge was plainly wrong.

[23] We are, of course, well aware that the trial judge had the advantage of seeing, hearing and assessing the witnesses as they gave their evidence. But on the issue of rectification I consider that any such advantage was minimal for the reason I give at paragraph 26.

[24] Generally any reversal of a judge's finding of fact will be on the basis that the conclusion:

(i) was one which there was no evidence to support,

(ii) was based on a misunderstanding of the evidence or

(iii) was one which no reasonable judge could have reached.

See Lord Neuberger in **In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911** at paragraph 53.

[25] A trial judge's advantage varies from case to case depending on the type of evidence upon which the findings of fact are based. See Lord Hodge in

Beacon at paragraph 17. He added:

> ***"The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in Whitehouse v Jordan [1981] 1 All ER 267, [1981] 1 WLR 246, 269-270:***
>
> > ***'[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision.'…***
>
> ***… Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."***

[26] The decision on the issue of rectification, turns primarily on the documentary evidence; that is to say, the 1982 deed, the agreement for sale and documents A2 and A4. There is also deed number 6152 of 1967, which fortifies my conclusion that the reservation of a right of way to Walter Stokes (as vendor) in the 1982 deed, reflected the intention of the parties to sell the smaller parcel to the appellants. We are thus at the latter end of the spectrum.

The appeal court can re-examine the evidence presented at the trial to arrive at a decision.

Errors of the judge

[27] The judge made several errors, among them:

(i) She failed to consider or properly to consider the documentary evidence and in particular the provisions of the 1982 deed.

(ii) She misconstrued the survey plan A4, and in particular the corrections made to it and failed to reconcile all the corrections on it with the provisions of the 1982 deed. She placed too much emphasis on the fact that the parties to the conveyance did not sign it.

(iii) She drew wrong inferences about Mr. Porter's evidence (based on her misunderstanding of document A4) and wrongly rejected his evidence.

[28] The errors of the judge entitle us to look at the entire matter afresh.

Rectification - Legal Principles

[29] In **Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] AC 1101,** Lord Hoffman speaking on the question of rectification stated at paragraph 48:

> ***"The requirements for rectification were succinctly summarized by Peter Gibson LJ in Swainland Builders Ltd. v. Freehold Properties Ltd. [2002] 2 EGLR 71, 74, paragraph 33:***
>
> ***The party seeking rectification must show that:***
>
> ***(1) the parties had a common continuing intention whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;***
>
> ***(2) there was an outward expression of accord;***
>
> ***(3) the intention continued at the time of the execution of the instrument sought to be rectified;***

(4) by mistake, the instrument did not reflect that common intention."

[30] The decision in **Persimmon** turned on the construction of a clause in a contract. Rectification was a subsidiary and consequential issue which arose only if the respondent were right in its interpretation of the agreement. As it turned out Persimmon succeeded without the need for rectification but Lord Hoffman proceeded to express his opinion of the issue because *"it [had] been very well and fully argued"*.

[31] Lord Hoffman then gave a brief review of the principles of law which govern rectification:

(i) The terms of the contract to which the subsequent instrument must conform, must be objectively determined in the same way as any other contract.

(ii) The common mistake must necessarily be as to whether the instrument conformed to those terms and not to what one or other of the parties believed those terms to have been.

(iii) Rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified.

(iv) Whether there is a prior binding agreement or there is no such agreement but a common continuing intention in respect of a particular matter in the instrument, in both cases the question is what an objective observer would have thought the intentions of the parties to be.

[32] See also Mustill J in **Etablissements Georges et Paul Levy v. Adderley Navigation Co Panama SA, The Olympic Pride [1980] 2 Lloyd's Rep 67, 72** (cited by Lord Hoffman at paragraph 61):

"The prior transaction may consist either of a concluded

agreement or of a continuing common intention. In the latter event, the intention must have been objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter."

[33] There is also the dictum of Lord Denning in **Frederick E Rose (London) LD. v. William H. Pim Jnr. & Co. LD. [1953] 3 WLR 497** at 504. In that case the issue was whether contracts drawn up for the sale and purchase of *"horsebeans"* should have been rectified to include after *"horsebeans"* the word *"feveroles"* (which are a specific type of horsebean).

[34] The English Court of Appeal found that the concluded oral agreement was for horsebeans and the written contracts were in the same terms. It held that the remedy of rectification was available only where there was clear proof that a written agreement did not correspond with the contract into which the parties entered, as expressed by their outward acts. Rectification was not available to make new contracts for feveroles between the parties. Lord Denning stated at page 504:

"The buyers now, after accepting the goods, seek to rectify the contract. Instead of it being a contract for "horsebeans" simpliciter, they seek to make it a contract for "horsebeans described in Egypt as feveroles" or, in short, a contract for "feveroles." The judge has granted their request. He has found that there was "a mutual and fundamental mistake" and that the defendants and the plaintiffs, through their respective market clerks, "intended to deal in horsebeans of the feverole type"; and he has held that, because that was their intention — their "continuing common intention" — the court could rectify their contract to give effect to it. In this I think he was wrong. Rectification is concerned with contracts and documents, not with intentions. In order to get

> ***rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, one does not look into the inner minds of the parties — into their intentions — any more than one does in the formation of any other contract. One looks at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compares it with the document which they have signed. If one can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then one rectifies the document; but nothing less will suffice."***

[35] In this case the appellants rely on a prior written agreement with which the conveyance did not conform. However the respondent says that there was a subsequent oral agreement which corrected an error in the written agreement by making it clear that only the larger parcel was to be sold.

[36] The conclusion of the oral agreement is based purely on the *"say so"* of the respondent who was not present when his father allegedly varied the written agreement. It is based entirely on what Da-da allegedly told him.

[37] It is a question of the common intention of the parties and it involves an initial finding of fact whether the written agreement stood by itself or was in fact varied by the oral agreement to exclude the smaller parcel from the 1982 deed. That required an acceptance of the version of facts of either the appellants or the respondent. But in doing so the judge also had to have regard to the documentary evidence and in particular the provisions of the 1982 deed.

The Evidence

[38] The appellants filed three witness statements - Charles Edward Porter (the first appellant), Emerick Brown and Winston Sylvester. The respondent filed five witness statements – Robert Edward Stokes (the respondent), Robert Edward Stokes Jr., Carl Victor, Nigel Pechenik and Odai Ramischand.

Evidence on behalf of the appellant

[39] Mr. Porter's evidence together with Mr. Sylvester's was intended to buttress his documentary evidence as to rectification. Mr. Emerick Brown's evidence went to adverse possession of the triangular parcel.

Charles Edward Porter

[40] Mr. Porter deposed that the sale of the smaller parcel was not a mistake neither was it a mistake that the smaller parcel was included in the agreement for sale. Da-da had been very clear in his discussions concerning the sale of the land that he was selling to the Porters the smaller parcel as well. Mr. Porter stated that he had lived with his wife in the *"The Glen"* since they had been married on 25 February, 1972. After they were married they moved into a house which they referred to as bungalow No. 3. In or around August 1972, they moved into a second house on that same parcel. Like bungalow No. 3 they also rented this house from Da-da. This continued up until they purchased from him, in 1982, the land on which it stood along with other land. When they initially moved into Bungalow No. 3 in February 1972, they met in place a road or track which curved around the south-western end of Bungalow No. 3 and continued in a north-westerly direction towards the second house. That road or track is represented as an existing road three metres wide, on a topographical map drawn by Mr. Sylvester in January 1989 and admitted into evidence as WS2, running in a north-westerly direction next to Bungalow No. 3. The area over which that road or track curved at the south-western end of

Bungalow No. 3 was the triangular parcel which is shown in a survey plan prepared by Camille Fortune-Rollock dated 30 July, 2009, as measuring 16.3 square meters.

[41] They used the triangular parcel from the moment of occupation of bungalow 3 in 1972 and from the time of their relocation to the second house.

[42] Mr. Porter engaged Mr. Sylvester to prepare a plan depicting clearly the extent of the land to be sold. That plan dated 23 March, 1982 is document A2 in the agreed bundle. A formal agreement for sale was prepared by Mr. Porter's attorney-at-law, Robert Sellier of the firm of J.D. Sellier & Co. Mr. Porter had a vague recollection of Da-da giving him a copy of the agreement he had entered into to buy the lands from Mrs. Janet Stanhope-Lovell in 1967 and telling him that J.D. Sellier could use it as a precedent.

[43] Mr. Sylvester's survey plan of 23rd March, 1982 was attached to the agreement. The agreement fixed ninety (90) days from 15 May, 1982 to 15 August, 1982 for completion of the sale. A few days before the date fixed for completion, the Porters and Da-da went to Mr. Sellier's office to execute the deed of conveyance. Mr. Sellier enquired as to where waste water drained from the lands into the Maracas river. He advised that that area should be formally depicted on the survey plan as a drain reserve and that the terms and conditions of its use should be formally included in the 1982 deed. Mr. Sellier's draft of the deed of conveyance did not, at the time, contain such terms and conditions. Having agreed that they would follow Mr. Sellier's advice, they did not execute the 1982 deed on that day as originally planned. About two days later Mr. Sylvester presented the survey plan, amended to formally depict the drain reserve.

[44] Document A4 was put in by consent as being the amended plan but it is dated 21st April, 1982 as opposed to a date in August 1982 when the amended plan was supposed to have been drawn. It is that discrepancy which

led the judge to view Mr. Porter's evidence with skepticism.

[45] They returned to Mr. Sellier's offices on 18th August, 1982 where they executed the 1982 deed. Attached to the 1982 deed was the amended survey plan A4 showing the drain reserve and which contained, in the third part of the schedule thereto, the terms and conditions of its use. 15th August, 1982, the final date for completion, fell on a Sunday so they met at Mr. Sellier's offices on the following Wednesday 18th August, 1982.

[46] Mr. Porter's evidence, in effect, therefore is that the written agreement was never varied orally or otherwise and it never expired before the 1982 deed was executed.

[47] From the time of execution of the 1982 deed to the time of his death, Da-da, Mr. Porter and Mrs. Porter conducted themselves in relation to the lands exactly as they had contemplated in the agreement for sale; that is to say, Da-da recognised them as the owners of the right of way and the other lands shown in the amended survey plan forming part of the 1982 deed and they allowed Da-da, his tenants, heirs and successors to pass and re-pass upon the smaller parcel as they had agreed.

[48] Mr. Porter said he discovered the omission of the smaller parcel from the conveyance in 2005. He and his wife had contracted the services of architects/draftsman to design new residences for them on the lands. The architects requested the deed to the property and in perusing the deed, he, Mr. Porter, noticed the omission. He eventually consulted Mr. Brian des Vignes of J.D. Sellier & Co. and instructed him to take up the matter with the respondent.

[49] Since Da-da's death in April 1990 and, in particular, since Mr. Ramischand purchased land south of the right of way, they had been having difficulty with persons using the right of way (and in particular, Mr.

Ramischand's use of it). They had also had difficulty with the respondent himself concerning their ownership of the smaller parcel. They have been unable, despite several attempts, to sort out their differences.

Winston Sylvester

[50] Mr. Winston Sylvester confirmed that he prepared the plans following surveys of the parcels in March 1982 and January 1989. He also confirmed that he received further instructions from Mr. Porter and Mr. Stokes to amend the plan in order to show on it, a drain reserve and he did so. He could not recall the exact date on which he received those further instructions from Mr. Porter but believed it was some time towards the middle of August 1982. The amended survey plan dated 21st April, 1982, was attached to the 1982 deed (A4). The January 1989 topographical plan showed, inter alia, an existing road three metres wide, running in a north-westerly direction, next to three buildings north of the smaller parcel.

[51] At the time of preparation of the January 1989 plan, that road was used as an access road or track, in particular, to access the larger parcels of land shown on the western part of that plan (bounded by the Maracas River). That road was there as far back as March 1982 and was being used in that manner.

Emerick Brown

[52] Mr. Brown was brought to corroborate the Porters' allegation that they were using the triangular parcel to access their home. He had lived at *"the Glen"* from 1988 to 2004 in a rented house next to the smaller parcel. He confirmed that there was an existing road three metres wide accessing the Porter's home. He met this road there in 1988. It was already in use as an access road or track, in particular, to access the Porter property. There was no other way to access the Porter house. He understood the access road to have been controlled or owned by the Porters. When he and his family used the

road to access their home, it was with the Porters' acquiescence. He also understood that an area over which the access road was located measured some 16.3 square metres as shown on a survey plan prepared by Camille Fortune-Rollock dated 30th July, 2009.

Cross-examination of Porter and Sylvester

[53] Both Mr. Sylvester and Mr. Porter were cross-examined by Mr. Maharaj on document A4 in particular. Mr. Sylvester (who was cross-examined after Mr. Porter) conceded that if A4 was dated 21st April, 1982 then he must have signed it in April 1982. Mr. Maharaj, quite fairly, reminded the witness that he was giving evidence of a transaction which occurred some thirty years ago. Mr. Sylvester admitted that he had no contemporaneous notes to refresh his memory and he was proceeding purely from memory.

[54] Mr. Porter when questioned by Mr. Maharaj accepted that the date on A4 was 21st April, 1982. But he insisted that the instructions to amend survey plan A2 which resulted in the amended survey plan A4, were given in August 1982 and not in April 1982. He also accepted that the request to amend A2 was solely to insert the drain reserve. He could not explain on what basis other changes appearing on A4 were made.

[55] In my judgment the lapse of time of thirty years guaranteed that the memories of both Mr. Porter and Mr. Sylvester would not fully recall the events leading up to the amendment of A2 and the production of the resulting amended plan A4. Mr. Porter's lack of recall and the inconsistency between the date of A4, and the date of the meeting at Mr. Sellier's office, did not necessarily mean that he was an untruthful witness. The judge needed to reconcile, as far as possible the contemporaneous documents with the oral evidence. This she did not do. Rather, she fell into error by wrongly imputing an improper motive to Mr. Porter.

Evidence on behalf of the respondent

[56] The purport of the evidence on behalf of the respondent was to show that it was never the intention of the parties to sell the smaller parcel. The respondent purported to give evidence of his father's intention, by speaking to what his father allegedly told him about the sale. But he also deposed that he was present when his father identified the larger parcel to Mr. Sylvester, during the March 1982 survey, as the only parcel to be sold.

[57] He also relied on Messrs. Victor, Pechenik and Ramischand to show that he exercised control over the smaller parcel by giving from time to time, permission to Mr. Ramischand to use the right of way to construct a fence and to access Ramischand's premises. Mr. Ramischand's evidence is that he actively sought out the respondent's permission. Their evidence was also brought to show that the Porters were aware and acknowledged that Da-da had never sold the smaller parcel to them in separate conversations at which they, Pechenik and Da-da or they and Ramischand, were present. Objection was taken by the appellants to Mr. Pechenik's evidence as not having been pleaded. I do not agree. In my judgment Mr. Pechenik's evidence is exactly that - evidence. It went to proving the facts pleaded by the respondent.

[58] Mr. Victor died before he could testify. Mr. Maharaj served a hearsay notice to admit his evidence. Because there was no cross-examination it is a question of weight.

[59] Mr. Ramischand's witness statement chronicles his encounters with and observances of the Porters and his interactions with the respondent. Both he and Mr. Pechenik also depose to the Stokes' use and maintenance of the smaller parcel and the access road. The evidence of Robert Stokes Jr. was adduced simply to put into evidence photographs he took of the rubble which had been allegedly dumped by the Porters.

Robert Edward Stokes

[60] The respondent's evidence requires a little more detail. Mr. Stokes deposed that Da-da purchased the larger and smaller parcels of land by deed of conveyance no. 6152 of 1967. In 1970 by Deed Number 12491 of 1970, his father also became the owner of the adjoining parcel (the adjoining parcel) located north of the smaller parcel and north east of the larger parcel.

[61] He and his father always discussed their financial and personal affairs. In or about 1982, his father informed him that he had orally agreed to sell the larger parcel to the appellants for the sum of one hundred and eighty thousand dollars ($180,000.00).

[62] The respondent was present at the Sylvester survey which was conducted as agreed in March 1982. So were his father and the appellants. His father informed Mr. Sylvester that he had agreed to sell to the appellants the larger parcel of land. The respondent said that the appellants, in his presence asked his father to also sell them the smaller parcel. His father refused because there were tenants of certain buildings on the adjoining property who used the smaller parcel to access their homes. He assured the appellants that they would have access over the smaller parcel. His father then identified the larger parcel to Mr. Sylvester.

[63] He was out of the country when the agreement for sale was signed. Sometime after, he read the agreement for sale and discovered that it had erroneously recorded that the sale included the smaller parcel. He drew the error to his father's attention.

[64] A few days later, his father told him that the first appellant apologised and said it was an error. His father also told him the appellants proposed that the written agreement for sale be allowed to *"expire"* rather than be cancelled as he had requested. They asked that the 1982 deed be executed a few days after the *"expiration"* of the agreement and that the deed of conveyance not

be made pursuant to the agreement but to convey to the appellants only the larger parcel of land. His father added that Mr. Sellier had been informed of this decision and it was agreed to exclude the sale of the smaller parcel from the 1982 deed.

[65] I pause to note that I understand allowing the agreement to "expire" to mean allowing the ninety day period for completion to run out. But that did not mean that the agreement expired or that it came to an end in any way.

[66] The respondent said that his father further told him that the reason the appellants gave for not wanting to cancel the agreement was that they had already submitted the agreement for sale to a financial institution in order to get a loan to purchase the land. They feared that cancellation of the agreement might prejudice their loan application.

[67] The respondent added that the appellants were well aware that the smaller parcel was not sold to them. They were witnesses to his father's will. Mrs. Porter assisted him in having the will probated. The inventory of his father's estate, in respect of the probate application, included the smaller parcel. In 1988 he and his family relocated to a house on the northern side of the adjoining parcel. He and his wife continuously used and maintained the smaller parcel by cutting the grass which grew on the parcel itself and at the side of it. The appellants on the other hand had only since 2007, after these proceedings were filed, begun to brush cut some of the grass on the smaller parcel.

[68] Since 1992, he had frequently given permission to Mr. Odai Ramischand to use the smaller parcel to access his property. On numerous occasions, the appellants had approached him to stop Mr. Ramischand and his workers from using the right of way. They complained that Mr. Ramischand's workmen were trespassing on their land.

[69] Between 2006 and 2007, shortly after Mr. Ramischand constructed a gate on his northern boundary, in an attempt to obstruct Mr. Ramischand from using the smaller parcel, the appellants deposited a huge amount of debris in front of the gate making it impossible for Mr. Ramischand to use the gateway onto the smaller parcel. They did the same in 2009 - 2010.

[70] In or about 2006, the appellants entered and took possession of the triangular parcel. The appellants had not encroached on the triangular parcel prior to 2006. Ms. Fortune-Rollock produced five survey plans dated 28th December, 1999. None of the survey plans showed any encroachment on the triangular parcel. During the surveys, at which the appellants were present, they did not claim to be in occupation of any of the lands which were being surveyed.

Analysis

Rectification

[71] The judge's decision on the issue of rectification turned on the adverse impression she formed of Mr. Porter under cross-examination and her rejection of his evidence. That itself turned on her consideration of two survey plans of the two parcels of land, admitted into evidence as *"A2"* and *"A4"*. Survey plan *"A2"* was attached to the written agreement for sale. *"A4"* was attached to the deed of conveyance dated 18th August, 1982.

[72] In my judgment, the judge paid far too much attention to the *viva voce* evidence of Mr. Porter. She ought to have paid more attention to the provisions of the 1982 deed and ought to have attempted to reconcile the corrections on the amended plan A4 with the provisions of the deed of conveyance and the agreement for sale. Another relevant document not considered or not properly considered was deed number 6152 dated 20th June, 1967 (Document A1) between Walter Stokes and Janet Stanhope-Lovell by which the larger and smaller parcels were sold to Walter Stokes. Also

relevant was deed number 2695 dated 11th September, 1924, but only as a background to Mr. Stokes' ultimate acquisition of both parcels. The documentary evidence provided strong evidence that the common intention of the parties was for the two pieces of land to be conveyed.

The provisions of the 1982 deed

[73] The final recital and the habendum of the 1982 deed are relevant. Both speak to the reservation of the right of way to the vendor. The recital speaks to it being *"agreed"*. They provide as follows:

> **"And whereas the Vendor has agreed with the purchasers for the sale to them of the said lands together with the privileges and with the benefit of the covenant <u>but subject to the right of way</u> excepting and reserving unto the Vendor the rights of drainage set out in the third part of the schedule hereto (hereinafter called "the Drainage Rights") at or for the price or sum of one hundred and eighty thousand dollars. (emphasis added)**
>
> **Now this deed witnesseth as follows:**
>
> **(i) That in pursuance of the said agreement and in consideration of the sum of one hundred and eighty thousand dollars paid by the purchasers to the vendor on or before the execution of these presents (the receipt whereof the vendor hereby acknowledges) the vendor as beneficial owner hereby conveys unto the purchasers All and Singular the said lands together with the privileges and the covenant excepting and reserving unto the vendor the Drainage Rights to hold the same unto and to the use of the purchasers in fee simple as joint tenants <u>subject to the right of way</u>." (emphasis added)**

[74] The reservation of a right of way to the vendor in the habendum of the 1982 deed, provides a critical indication that the intention of the parties was to convey the smaller parcel to the appellants.

[75] The history of the sale of lands comprising "*the Glen*" provides a perspective of how the smaller parcel came to be used as a right of way. It is contained in the deeds of title which have been exhibited in evidence. The two parcels of land were themselves part of a larger three acre parcel which was owned by Janet Stanhope-Lovell a relative of Da-da. That parcel, comprising three acres, one rood and twenty-eight perches, originally formed part of a plantation known as *"Guiria Estates"*. That three acre parcel was excised from the estate by deed number 2695 of 1924, when it was sold to one Audrey Emily Zurcher Jardine. Janet Stanhope-Lovell subsequently acquired the three acre parcel. Up until that time, there was no need for a right of way because Janet Stanhope-Lovell owned the entire three acre parcel.

[76] The necessity for a right of way occurred in 1967 when, by deed number 6152 dated 20th June, 1967, Stanhope-Lovell conveyed one acre, three roods and four perches to Da-da, retaining for herself a little over two acres of the three acre parcel. The two acre parcel which Stanhope-Lovell kept is the adjoining parcel. Walter Stokes later acquired this adjoining parcel in 1970. The parties had a common boundary. Stanhope-Lovell's western boundary was Da-da's eastern boundary. There was an access road to the Maracas Royal Road by which Stanhope-Lovell accessed the entire three acre parcel. It is the same access road being used as the right of way.

[77] By the same deed number 6152 of 1967, Stanhope-Lovell sold the parcel of land, comprising 17 perches (on which stood the same access road) to Walter Stokes. That 17 perch parcel is the smaller parcel which is now the subject of this appeal. Because she retained the two acre parcel (which is the adjoining parcel), she now needed a right of way along the 17 perch parcel (i.e. the smaller parcel) to access the adjoining parcel to and from Maracas Royal

Road. A right of way was thus reserved to her in deed number 6152 of 1967.

[78] Walter Stokes later acquired the adjoining parcel in 1970 by deed of assent number 12491 of 27th November, 1970, Janet Stanhope-Lovell having bequeathed it to him by will. The entire 3 acre parcel then belonged to Da-da. He was now in exactly the same position as Stanhope-Lovell prior to the 1967 deed (except that it was now held by two separate deeds of title).

[79] In my judgment, the reservation of a right of way to Da-da in the 1982 deed is indicative of his intention to sell the smaller parcel to the Porters, just as Janet Stanhope-Lovell did in 1967. Like Janet Stanhope-Lovell, he needed access to the adjoining parcel which he had retained possession of and he did so by reserving the right of way over the smaller parcel.

[80] One further point: if as is contended by the respondent, Da-da intended to keep the smaller parcel, there was no necessity to reserve a right of way to him as the vendor in the 1982 deed. Yet this is precisely what was provided.

[81] The reservation of a right of way to Walter Stokes cannot make sense, unless it is that the parties intended that the smaller parcel be conveyed to the Porters.

[82] Further, if the intention were to sell only the larger parcel then it was necessary to reserve a right of way to the appellants as purchasers as opposed to the vendor. Their home would have been landlocked by the vendor's continued ownership of the second parcel and the adjoining parcel. It cannot be seriously argued that what was really intended was a reservation of the right of way to the purchasers. Indeed, as Mrs. Peake submitted, the habendum would then have provided for the sale of the larger parcel *"TOGETHER with a right of way to pass and repass…"* over the smaller parcel rather than *"subject to…"*.

[83] Mrs. Peake submitted that the error occurred in the failure of the conveyance to include the smaller parcel in the definition of *"the said lands"*. I agree. What was required was a collective reference in the recitals, of Walter Stokes' ownership of both parcels and their collective reference as *"the said lands"*. Thereafter when the 1982 deed conveyed unto the Porters as purchasers *"All and Singular the said lands … to hold the same unto and to the use of the Purchasers in fee simple as joint tenants …"*, both parcels would have been conveyed.

Survey plans A2 and A4

[84] The judge placed great emphasis on the fact that the amended survey plan *"A4"* was dated 21st April, 1982 rather than a date in August 1982. That date had to be looked at against the agreement for sale which was signed on 15th May, 1982 and the 1982 deed which was dated 18th August, 1982.

[85] Mr. Porter stated that the draft of the 1982 deed was amended so as to include the drain reserve. There were other changes included such as the acreage of the smaller parcel (430 square metres) and the change in the certificate on A4 of the word *"parcel"* to *"parcels"*. That latter correction was done by hand rather than by print. Mr. Porter was unable to explain those changes. In my judgment the changes were all consistent with an agreement to sell the smaller parcel for the following reasons:

(i) The first survey plan dated 23rd March, 1982 which was attached to the agreement for sale was inaccurate. It ought to have identified the smaller parcel, in particular the acreage. The agreement for sale spoke to the sale of two parcels. A2 ought to have identified both parcels and not just the larger parcel. At the time of the execution of the agreement for sale, there was no controversy that both parcels were being sold.

(ii) The date 21st April 1982 which appeared on A4 was in all likelihood an error on Mr. Sylvester's part. It is strange that although it corrected the omissions on the survey plan A2 and was dated 21st April, 1982, A4 did not appear as an attachment to the agreement for sale, which was signed

on 15th May, 1982 (after plan A4 was supposedly drawn). Up until that time there was no contention between the parties that both parcels were for sale, so it is logical that A4 and not A2 should have been attached to the agreement for sale. Its attachment to the agreement for sale would have strengthened Mr. Porter's contention that the smaller parcel was agreed to be sold. It is to Mr. Porter's credit that he insisted that A4 was drawn after 21st April, 1982 even though that earlier date may have strengthened his case. It is more probable therefore that A4 was in fact drawn in August 1982 as Mr. Porter stated and that the error as to the date, was made by Mr. Sylvester. Indeed Mr. Porter's explanation for the delayed execution of the 1982 deed is more plausible.

(iii) Further, the amended survey plan A4, was properly attached to the 1982 deed. Its correction to read *"parcels"* is consistent with an intention to sell both parcels as set out in the agreement for sale. It is also consistent with the reservation to the vendor of a right of way over the smaller parcel. Since A4 was to be attached to the conveyance for sale it was necessary to correct the certificate to refer to two parcels of land. The identification of the size of the smaller parcel as being of four hundred and thirty (430) square metres was necessary to link it with the acreage of the same parcel in the second part of the schedule to the 1982 deed.

(iv) There was nothing untoward about the absence of the signatures of Walter Stokes and the Porters on A4. Their signatures on A2 simply certified the agreement of the parties to the sale of both parcels identified by acreage on the survey plan A2 (except that A2 was inaccurate because it properly identified only the larger parcel of land). Their signatures were not required on A4. It was sufficient that A4 conformed to the description of the parcels set out in the recitals and the habendum of the 1982 deed, so as to clearly identify the parcels being conveyed. The judge was wrong to draw adverse inferences against Mr. Porter from their absence. The judge was also wrong to infer that Mr. Porter told an untruth.

(v) At the time of hearing of the matter in 2012, the execution of the agreement for sale and the deed of conveyance had occurred more than thirty years prior. Mr. Porter's memory (and Mr. Sylvester's) of all that would have transpired at the meeting with Mr. Sellier (at which the changes to A2 were proposed) would have faded. It is not surprising that he could not have recalled that other changes to the deed – the change to *"parcels"* and the inclusion of the acreage of the second parcel – would also have been made. The imputation of improper motives to witnesses should not be made except on the clearest of evidence.

(vi) Mr. Porter's evidence that a correction was required (but this was clearly not the only correction required) to show the drain reserve, is reflected in both the conveyance and the amended survey plan A4.

(vii) As I stated earlier, I have understood the contention by the respondent that the agreement was allowed to "expire" as meaning that they agreed that the ninety day period for completion was allowed to run its course without executing the deed of conveyance. But that did not terminate the agreement. Clause 6(a) and (b) gave both parties the option to rescind the agreement. Neither party exercised that option. In my judgment that shows a clear intention to continue to be bound by the agreement, contrary to the evidence of the respondent. Indeed, the conveyance was signed three days later. The agreement remained a valid and binding agreement right up to the date of execution of the conveyance.

[86] As to the contention that the parties agreed that because the Porters had already approached a financial institution to provide finance for the project, they could not cancel the agreement, I say this: it is more than likely that any such financing would have required that a mortgage be secured on both parcels as security for the provision by the financial institution of the moneys for the purchase price. The arrangement, as put forward by the respondent would have been a fraud on the financial institution perpetrated by the parties. The respondent's evidence does not suggest that the solicitor

was complicit. I find the respondent's account of this arrangement to be highly incredible. Further, Mr. Porter's reason for the delay in executing the agreement is far more plausible and persuasive.

[87] The evidence of Mr. Pechenik was to the effect that long after the execution of the 1982 deed the Porters admitted in conversations with Da-da at which he was present, to knowing that the smaller parcel was not conveyed by the 1982 deed. Mr. Ramischand's evidence is that the Porters, during a 1997 survey which he (Ramischand) had commissioned and, at which he (Ramischand) was also present, accepted that their boundary stopped short of the smaller parcel.

[88] None of those alleged admissions was put to Mr. Porter during cross-examination. Further, Mr. Porter denied in cross-examination that he complained to the respondent about Mr. Ramischand's use of the right of way. He stated that he spoke directly with Mr. Ramischand. At the end of the day however, the statements of parties, made subsequent to the 1982 deed, though relevant to whether there was oral variation of the written agreement for sale, are not determinative of the issue in this case. It is an objective rather than a subjective test and it is to the documentary evidence that we must first look (as per Lord Denning in **Frederick E Rose supra**). In this case, we are dealing with a deed of conveyance which was executed more than thirty seven years ago. At the time of the filing of this action it was over twenty-five years old. The greater the lapse of time, the greater becomes the importance of the documentary evidence.

[89] In my judgment, the documents bear out Mr. Porter's version of events which I accept. It was always the parties' intention to convey the smaller parcel. It also follows that the respondent's evidence was untruthful in so far as he alleges that there was an oral agreement to vary the agreement for sale. The appellants are entitled to succeed and to have the deed rectified. Their case is in line with the requirements for the rectification of a deed - a prior

agreement between the parties, which was still effective when the instrument was executed, that by mistake the instrument failed to carry out the agreement and, if rectified as claimed, the instrument would carry out the agreement.

The triangular parcel

[90] The judge ruled that the appellants had not established a sixteen year possession of the triangular parcel. She rejected the appellants' submission that surveyors only show an encroachment when invited to do so during the conduct of the survey. She noted that during several surveys *"both sides"* were present. But the appellants did not assert their ownership of the triangular parcel during those surveys.

[91] The judge's assessment of Mr. Porter as unreliable also led to her rejecting his evidence in respect of the triangular parcel and the respondent's counter-claim. The judge's finding that the appellants did not prove adverse possession of the triangular parcel was a finding of fact. To the extent that the judge was wrong to find that Mr. Porter was unreliable, her conclusion is open to criticism. But she also relied on the surveys (which did not show encroachment) and the fact that the appellants never appeared to assert ownership of the triangular parcel during those surveys. It was open to the judge to reject the appellant's claim on that basis, even if she had chosen not to reject Porter's evidence for the reasons that she did.

[92] But additionally, I am not satisfied that, consistent with the decision of the House of Lords in **JA Pye (Oxford) Ltd v. Graham [2003] 1 AC 419**, the appellants enjoyed a sufficient degree of physical control of the parcel to claim ownership. Continuous user of a road to access one's home over a period of years may be sufficient to acquire an easement but I am not persuaded that, without more, it would be sufficient to acquire the fee simple, particularly when other persons are also using the road to access their homes. Mr. Brown's evidence was that he and his family used the tract albeit with the

permission and acquiescence of the Porters. The Porters' assertion that they also maintained it is not disputed by the respondent.

[93] I am not satisfied that the judge was plainly wrong in rejecting the appellants' claim to the triangular parcel.

Limitation and Laches

[94] The respondent pleaded that the appellants' claim for rectification was statute barred by virtue of section 3 of the Real Property Limitation Act Chap. 56:03 and that their right, if any, to the second parcel was extinguished by virtue of section 22 of that Act. They also raised laches, acquiescence, delay and waiver. The trial judge did not consider these issues because she found that the appellants had no entitlement to the smaller parcel for the reasons she had given and it was unnecessary to look at those issues.

[95] The respondent did not appeal the judge's failure to consider these issues. In his written submissions, however, Mr. Maharaj asked us to invoke section 39 of the Supreme Court of Judicature Act Chap, 4:01 and to consider these issues because both sides addressed those questions in their written submissions before the judge.

[96] Our preliminary view is that the pleas would not have assisted the respondent. Firstly the dictum of Narine J.A. in **Anirudh Mahabir v**. **Alim Mohammed, Civil Appeal No P-066 of 2015** at paragraph 18 suggests that statutes of limitation bar legal rights not equitable relief and what the appellant seeks in this case is equitable relief. See also **Menary v. Welch (1974) 1 O.R. (2d) 393**. But in any event, we do not consider that we have been sufficiently assisted on these issues to give a firm and final decision. It is therefore a request we must deny.

[97] The respondent's counter-claim is, inter alia, in nuisance for the

blocking of the right of way over the second parcel. The appellants however were entitled to the second parcel but it does not follow that they were entitled to block it. The respondent was entitled to a right of way under the 1982 deed. The blocking of the right of way however does not found in nuisance. It more than likely was a breach of covenant which was not pleaded. The judge's finding that the appellants were liable in private nuisance cannot stand. The respondent's counterclaim in nuisance in respect of the smaller parcel is therefore dismissed. As to the counter notice the respondent was entitled to the injunction enjoining the appellants from entering the triangular parcel.

Order

[98] The judge's orders at paragraph 70 (a), (b) and (c) are set aside. Her other orders in relation to the triangular parcel are affirmed. I direct the parties to execute, within 28 days, the deed of rectification to convey the smaller parcel of land to the appellants subject to a right of way to the respondent. The deed of rectification must make clear that the right of way is reserved to Walter Stokes, his tenants, heirs and successors as agreed (see paragraph 24 of Mr. Porter's witness statement). The appellants are restrained from entering the triangular parcel.

[99] The counter notice of appeal is allowed insofar as it relates to the injunction restraining the appellants from using the triangular portion of land.

[100] The appeal and the counter notice of appeal are both allowed in part. We will hear the parties on costs.

/s/ Nolan Bereaux
Justice of Appeal