

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P014 of 2016

Claim No. CV2014-04701

Between

JODY GOBERDHAN-WATTS

Formerly Jody Goberdhan-Baccus

Appellant

And

GANNESS BOODOO

ANGELA BOODOO

Respondents

Panel: A. Mendonça J.A.

J. Jones J.A.

P. Rajkumar J.A.

Date of delivery: February 19, 2020

Appearances: Ms. M. King appeared on behalf of the Appellant

Mr. H. Seunath S.C. appeared on behalf of the Respondents

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

J. Jones J.A.

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

P. Rajkumar J.A.

JUDGMENT

Delivered by A. Mendonça J.A.

1. The core issue in this appeal is whether the Appellant's title to premises at Lot 92 Tarouba Road, San Fernando (the subject property) has been extinguished by operation of the Real Property Limitation Act (RPLA).
2. The relevant background facts that have given rise to this appeal are as follows.
3. The Appellant's father was Ronald Goberdhan (Mr. Goberdhan). He died on July 20, 1989 and at the time of his death was seised of the subject property. He died intestate and on January 25, 1991 letters of administration were granted to his wife, the Appellant's mother, Wilma Goberdhan (Mrs. Goberdhan).
4. The Appellant was one of three beneficiaries of Mr. Goberdhan's estate – the other two being Mrs. Goberdhan and the Appellant's brother, Jason Goberdhan.
5. On February 26, 1991 Mrs. Goberdhan, as the legal personal representative of Mr. Goberdhan, entered into an agreement with the Respondents' parents, Samaroo and Carmen Boodoo (hereinafter together referred to as the Boodoos), for the sale of the subject property to them at and for the price of \$75,000.00.
6. Notwithstanding the agreement for the sale of the subject property to the Boodoos, by deed of assent dated March 5, 1991 and registered on March 8, 1991 Mrs. Goberdhan, in her capacity as the legal personal representative of Mr. Goberdhan conveyed the subject property to her, Jason Goberdhan and the Appellant as tenants in common.

7. Despite having transferred the subject property by the deed of assent. Mrs Goberdhan by deed of conveyance dated May 31, 1991 registered on July 2, 1991 and made between Mrs. Goberdhan and the Boodoos (the 1991 deed of conveyance) conveyed the subject property to the Boodoos. By deed of rectification the 1991 deed of conveyance was amended so as to read that the subject property was conveyed to the Boodoos as joint tenants.
8. On the death of Carmen Boodoo, SamarooBoodoo, the surviving joint tenant, by deed of gift conveyed the subject property to the Respondents.
9. At the time of the 1991 deed of conveyance there was an old two-storey house on the subject property made partly of wood and partly of concrete. One Batie Sookraj was in occupation of the house. She continued in occupation of the house until about 1995 when it was broken down by the Boodoos and a new house constructed on the subject property. The evidence is that the construction of the new house was completed in 1996 and from that time Ganness Boodoo, the First Respondent, has lived in it. He has from that year paid all rates and taxes due in respect of the subject property.
10. The Appellant lived with her mother, Mrs. Goberdhan, on lands at Ramsaran Street, San Fernando. In 1995 she travelled to England and stayed there for approximately six months before returning to this jurisdiction. In 1996 she migrated to England with her three children and resided there for many years, only infrequently visiting Trinidad, until she returned in 2014. She has lived in this jurisdiction since then.
11. Mrs. Goberdhan died on January 13, 2000. The Appellant claims that up to the date of death Mrs. Goberdhan had not told her that she (the Appellant) had any share or interest in the subject property. The Appellant alleges that she was unaware that Mrs. Goberdhan had applied for letters of administration of Mr. Goberdhan's estate and had executed the deed of assent or the 1991 deed of conveyance. The Appellant alleges that it was

only in 2002 on a visit to Trinidad and having spoken to relatives, she caused a property search to be done and discovered that Mrs. Goberdhan “had registered the said deed of assent and had purported to sell the [subject] property to Samaroo and Carmen Boodoo...fully knowing that she had already transferred the [subject] property by the said Deed of Assent.”

12. The Appellant then in November 2002 caused her attorney-at-law to write to the Boodoos seeking the reconveyance of her share or interest in the subject property. The Boodoos’ attorney-at-law responded refusing to reconvey any interest in the subject property and denying any liability to do so. There the matter rested until 2014 when the Appellant returned to this jurisdiction. The Appellant then again made contact with her attorney-at-law and again caused her attorney-at-law to write to the Boodoos.
13. By letter dated May 14, 2014 the Appellant’s attorney-at-law wrote to the Boodoos on behalf of the Appellant and the estate of Jason Goberdhan, who had died in 1996. The letter called upon the Boodoos to convey “their one third share and/or interest” in the subject property which was conveyed to them by the 1991 deed of conveyance.
14. By the date of that letter the subject property was already vested in the Respondents. Attorneys-at-law for the Respondents responded to the letter denying any liability to reconvey any share or interest they held in the property. It was further indicated in the letter that the Respondents were in possession of the subject property since 1990.
15. On December 12, 2014 the Appellant commenced these proceedings seeking to set aside the deed of gift of the subject property to the Respondents as well as the 1991 deed of conveyance to the Boodoos. The Appellant also claimed possession of the subject property. The Appellant by her pleading relied on the fact that the deed of assent conveyed an interest in the subject property to her and that it was made and registered prior in time to the 1991

deed of conveyance by which the subject property was conveyed by Mrs. Goberdhan to the Boodoos.

16. The Respondents filed a defence and counterclaim. They averred that Mrs. Goberdhan sold the subject property to the Boodoos and “save for the legal implications with respect to registration of [the deed of assent] [they] deny that the Boodoos had any notice of the said deed”. The Respondents further averred that they have been in exclusive possession of the subject property since 1991. They counterclaimed for (i) a declaration that they are the owners in fee simple of the subject property; (ii) alternatively, a declaration that they are the owners of a one third share or interest in the subject property and the absolute owners of the dwelling house erected on the subject property; and (iii) a declaration that the Appellant’s right if any to bring this action is barred by Section 3 of the RPLA. In the Appellant’s reply and defence to counterclaim, the Appellant averred, inter alia, that the Respondents and/or the Boodoos did not reside on the subject property.
17. The Trial Judge identified as the central issue before her whether the Appellant’s entitlement to bring this claim is barred by the provisions of the RPLA. She answered that question in the affirmative and accordingly the Trial Judge dismissed the Appellant’s claim, gave judgment for the Respondents on the counterclaim and granted the following relief:
 - a. a declaration that the Respondents are the owners in fee simple of the subject property; and
 - b. a declaration that the Appellant’s right to bring these proceedings is barred by Section 3 of the RPLA.
18. The Appellant has appealed. She contends that the Trial Judge erred in fact and in law and asks the Court to declare that the 1991 deed of conveyance and the deed of gift null and void. She further asks for an order granting her

possession of the subject property and an order for payment of damages for trespass.

19. The Respondents contend on this appeal, as they did before the Trial Judge, that the Appellant's entitlement to bring this action is barred by the provisions of the RPLA. This is the central issue in this appeal and I will return to it shortly. However, before I do so I wish to address two collateral issues.
20. The first is whether this claim was brought by the Appellant on her own behalf only or on her own behalf as well as on behalf of her deceased brother, Jason Goberdhan. The second issue relates to the order sought by the Appellant that the 1991 deed of conveyance and deed of gift be declared null and void.
21. On the first issue, as I mentioned the Appellant's brother, Jason Goberdhan, died in 1996. According to the Appellant, Jason left as his sole surviving next of kin, his son, Andre Phillip Goberdhan. This is pleaded in the statement of case and it is also pleaded that Andre by a power of attorney dated June 12, 2014 appointed the Appellant as his lawful attorney to act on his behalf in this claim. However, the claim as framed does not mention that it is brought by the Appellant on behalf of Andre. On its face, the claim presents itself as a claim brought by the Appellant on her behalf only.
22. Further, Ms. King, counsel for the Appellant, appears to have accepted that Jason Goberdhan as far as is known to her died without leaving a will and in any event there has not been a grant of probate or letters of administration in respect of his estate nor has the court made any order appointing anyone as the representative of Jason Goberdhan's estate. In those circumstances, Andre is not capable of maintaining this claim on behalf of his father's estate and it follows that he cannot by a power of attorney appoint the Appellant to do so on his behalf.

23. In view of the above, the only claim properly before this court is the claim of the Appellant on her behalf only.
24. The second issue relates to the relief claimed by the Appellant that the 1991 deed of conveyance and the deed of gift in favour of the Respondents should be declared null and void. This is informed by Ms. King's contention that the 1991 deed of conveyance by which the subject property was conveyed to the Boodoos as joint tenants and the deed of gift by which, Samaroo Boodoo, the surviving joint tenant, conveyed the subject property to the Respondents were not capable of passing any title or interest to the Respondents. Ms. King's argument is that as the deed of assent vested the subject property in the Appellant, Mrs. Goberdhan and Jason Goberdhan and was made and registered prior to the 1991 deed of conveyance there was nothing that the 1991 deed of conveyance could pass to the Boodoos and consequently nothing, Samaroo Boodoo could transfer to the Respondents by the deed of gift.
25. Mr. Seunath for the Respondents accepted that the 1991 deed of conveyance was made and registered after the deed of assent. In those circumstances, he accepted that the 1991 deed of conveyance could not serve to pass the interest of the Appellant and her brother who were not parties to the 1991 deed of conveyance. He however, submitted that the 1991 deed of conveyance served to pass whatever interest Mrs. Goberdhan had in the subject property, which interest was eventually passed to the Respondents by the deed of gift. In support of this submission Mr. Seunath referred to Section 17 of the Conveyancing and Law of Property Act (CLPA) which provides as follows:

“17.(1) Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or

which they respectively have power to convey in, to, or on the same.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies to conveyances made after the 1st of January, 1885.”

26. Ms. King’s rebuttal was that the section did not assist the Respondents because in the 1991 deed of conveyance Mrs. Goberdhan conveyed as the legal personal representative of Mr. Goberdhan and by then she held no interest in the subject property as legal personal representative having already transferred the subject property by the deed of assent.

27. Section 17 of the CLPA requires little explanation. It applies to every conveyance made after January 1, 1885 and provides at 17(1) that a conveyance passes all the estate, right, title, interest, claim, and demand which the conveying parties have or have power to convey in the property conveyed. The object of the section is to render unnecessary the insertion in a conveyance of the all estates clause, which at one time it was the practice to do. The effect of the section is that whatever estate, title, interest, claim or demand the conveying party has in the lands conveyed will pass by the conveyance. That applies only if and as far as a contrary intention is not expressed in the conveyance and has effect subject to the terms and conditions of the conveyance (see section 17(2)).

28. It is true, as Ms. King has argued, that in the 1991 deed of conveyance to the Boodoos Mrs. Goberdhan was named as the legal personal representative of Mr. Goberdhan and conveyed the subject property to the Boodoos as legal personal representative. However, that cannot in my view take the matter outside of section 17. In **Stirrup v Foel Agricultural Co-Operative Society Ltd**

[1961] 1 WLR 449 a conveyance of lands by a bank as personal representative when it was not the personal representative was effectual to pass the interest the bank held in the lands. The fact that the character or capacity in which the bank held the lands was incorrectly described in the conveyance did not prevent the conveyance from being effectual to pass the interest the bank held in the lands. As was noted in **Cedar Holdings Ltd v Green and another****[1979] 3 All ER 117, 122** when referring to a similar section in the Law of Property Act 1925:

“The purpose of that section was clearly to ensure that a conveyance should operate to convey all that the grantor could convey in relation to the subject-matter, notwithstanding that the language of the conveyance might not be in every respect apt to produce that result, and to eliminate the need for an ‘all estate’ clause of the kind which conveyancers had previously been accustomed to include in conveyances.”

29. As I mentioned earlier, section 17 applies only if contrary intention is not expressed in the conveyance and has effect subject to the terms of the conveyance and the provisions therein contained. The 1991 deed of conveyance recited the death of Mr. Goberdhan, that Wilma Goberdhan was his legal personal representative, and for the purpose of the administration of his estate had agreed with the Boodoos to sell to them the subject property. The deed then conveys the entirety of the subject property to the Boodoos. The 1991 deed of conveyance was amended by deed of rectification the effect of which was to amend the 1991 deed of conveyance to read that the subject property was conveyed to the Boodoos “to hold the same unto and to [their use] in fee simple as joint tenants”. The manifest intention of the 1991 deed of conveyance was that Mrs. Goberdhan would pass the title or interest she then had in the subject property to the Boodoos. It is not possible to construe the 1991 deed of conveyance as containing a contrary intention but to pass to the Boodoos the title or interest Mrs.

Goberdhan had in the subject property. At the time of the 1991 deed of conveyance Mrs. Goberdhan held a one third share or interest in the subject property. In my judgment, the effect of section 17 would be to pass that share or interest to the Boodoos which was subsequently conveyed by the deed of gift to the Respondents. I therefore accept Mr. Seunath's submission on this issue.

30. In view of the above, the Respondents are the legal owners of a one third share or interest in the subject property. In those circumstances even if the Appellant can succeed in her claim for possession, she cannot exclude the Respondents from the subject property, and the most, it seems to me, she can hope for is an order that may entitle her to possession together with the Respondents. But as I have mentioned, it is the Respondents' contention that the Appellant cannot bring a claim for possession of the subject property since such a claim is barred by the provisions of the RPLA. It is to that issue that I now turn.

31. Section 3 of the RPLA provides that the right of the owner of land to bring an action for the recovery of the land, which includes an action for possession, expires sixteen years after the right of action first accrued. Where the period of sixteen years is allowed to run without such an action being brought the title of the owner is extinguished (see section 22 of the RPLA).

32. The Respondents contend that they have been in possession of the subject property since 1991 and that is when the cause of action first accrued. As these proceedings were commenced in 2014 that means the Appellant's claim is barred by section 3 and her title to the subject property is extinguished by section 22.

33. The Appellant's case on the other hand, is that the Respondents were not in possession of the subject property as the law requires and cannot on that basis rely on the provisions of the RPLA. In any event, the Appellant

submitted that time began to run for the purposes of section 3 of the RPLA in 2002 and accordingly she is entitled to an order granting her possession of the subject property as the legal owner of a share or interest in it.

34. In the context of this appeal there are therefore two issues:

- i. Were the Respondents in possession as the law requires for the purpose of the RPLA; and
- ii. When did the Appellant's right to bring an action first accrue for the purposes of the RPLA.

35. It is well settled that a person claiming to be in possession of lands so as to bar a claim for possession of the lands by the owner and extinguish his title as provided for in the RPLA must establish that he has been in factual possession of the lands and that he has the necessary intention to possess.

36. Factual possession connotes a sufficient degree of physical custody and control (see **JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419**). The possession must be single and exclusive and without the consent or licence of the owner. The intention to possess is an intention to exercise such custody and control on one's own behalf and for one's own benefit. The intention can be established by the person in possession demonstrating that he was using the lands in a way one would expect him to use them if he were the true owner (see Lord Hope in **JA Pye (Oxford) Ltd v Graham (supra)** at para 71).

37. In the context of this case where both the Appellant and the Respondents are legal owners of an undivided one third share in the subject property, a relevant question is whether the possession of one co-owner can be considered to be the possession of the other. Section 14 of the RPLA is relevant in that regard and provides that the possession of one co-owner is not to be regarded as possession of the other if the owner in possession establishes that he has been in possession of more than his undivided share

in the lands and that his possession was for his own benefit or for the benefit of any person other than the other co-owner.

38. In view of the above, for the Respondents to establish that they were in possession of the subject property they would need to show (and the onus is on them to do so):

- i. They were in factual possession of the subject property;
- ii. They were in possession without the consent or licence of the Appellant;
- iii. They had the necessary intention to possess; and
- iv. They were in possession of more than their undivided share of the subject property and their possession was for their own benefit and not for the benefit of the Appellant.

39. It cannot reasonably be disputed that the Respondents have established these matters. The Respondents' evidence, which the Trial Judge accepted, as she was entitled to do, was that the First Respondent has been in exclusive possession of the subject property since 1995. It was in that year, the subject property having been acquired by their predecessors in title in 1991, that they physically entered the subject property, broke down the existing structure and built a new house. The First Respondent has made this house his home and has lived in it and on the subject property since 1996. There is no issue of the First Respondent's possession being with the consent or licence of the Appellant and I think it is clear that he occupied the entirety of the subject property and used it as an owner would for his own benefit and not for the Appellant's benefit.

40. Ms. King argued that the Respondents could not have had the necessary intention to possess since they believed themselves to be owners of the entirety of the subject property. But that submission is without merit. If, as is

the case, that the person in possession can establish the necessary intention to possess if he demonstrates that he has used the lands as one would expect him to do as if he were the owner, then believing himself to be the owner is entirely consistent with the intention to possess. In any event, there is clear authority on the point. I do not think I need do more than refer to **Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd** [2018] UKPC 27 where Lord Briggs speaking on behalf of the Privy Council said (at para 51):

“Possession of land is generally described as having two elements, factual possession and the intention to possess: see *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. In the present case there is no difficulty about a general intention to possess by the various Descendants who gave evidence, since they believed that they were coowners of the land pursuant to Ann Millar’s will. Such a belief, even if mistaken, is sufficient for the purposes of intention to possess: see *Roberts v Swangrove Estates Ltd* [2008] Ch 439. All that is common ground.”

41. In the circumstances, the Respondents have established that they were in possession of the subject property from at least 1995. Ordinarily the right of the Appellant to bring an action for possession would first have accrued in that year or in other words, the moment the Respondents went into possession of the subject lands. If that is so, in this case the Appellant’s claim would be barred and her title extinguished. She, however, places reliance on section 21 of the RPLA and argues that the right to bring an action first accrued in 2002. Section 21 is as follows:

“21. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or

discovered: Provided that nothing in this section contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.”

42. The section as can be seen deals with cases of concealed fraud. It provides that in every case of concealed fraud the right of any person to bring an action to recover any land of which he may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered. The section goes on to exempt from its application a bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud and who at the time he made the purchase did not know and had no reason to believe that any such fraud had been committed.
43. The Trial Judge held that the Respondents were not bona fide purchasers for two reasons. First, the Trial Judge stated that to be regarded as bona fide purchasers the Respondents or their predecessors in title needed to acquire the legal interest in the entirety of the subject property. However by the 1991 deed of conveyance only one third share or interest came to be vested in them. Second, the registration of the deed of assent prior to the 1991 deed of conveyance would have put the Respondents and their predecessors in title on notice of the interest of the Appellant and her brother, Jason. There has been no appeal by the Respondents from the Trial Judge’s conclusion that they are not bona fide purchasers and Mr. Seunath took no issue with that finding in the course of the appeal. In the circumstances, I intend to proceed on the basis that the Respondents are not bona fide

purchasers and accordingly the exemption in section 21 of the RPLA is not relevant to this appeal.

44. To bring herself within section 21 of the RPLA the Appellant must establish: (i) there has been a fraud; (ii) the fraud must be that of the Respondents or someone through whom they claim; (iii) the fraud must have deprived her or someone through whom she claims of the subject property; (iv) the fraud must have been concealed; and (v) the fraud was not discovered or could not with reasonable diligence have been discovered before sixteen years prior to the commencement of these proceedings (see **Williams v Howe [1893] 2 Ch 545, 551**).
45. The question is therefore whether the Appellant has satisfied these conditions. I will consider them together.
46. The first consideration is what is the concealed fraud that the Appellant claims has occurred. Where fraud is alleged it is the obligation of the party alleging fraud to specifically plead it. Of course that party is the Appellant and it was her obligation to plead the alleged fraud and also to plead sufficient facts to show that her case is within section 21 of the RPLA. The only reference to fraud in the Appellant's claim form and statement of case appears in the relief where she asked for the setting aside of the 1991 deed of conveyance on the ground of fraudulent misrepresentation. There is however nothing in the pleadings of the Appellant that can support her claim in fraudulent misrepresentation and that is not an issue in this appeal. The Trial Judge however found that the "plea" of fraudulent misrepresentation was sufficient to put in issue section 21 of the RPLA. The Trial Judge went on to find that the fraudulent misrepresentation was the execution by Mrs. Goberdhan of the 1991 deed of conveyance having previously executed the deed of assent.

47. I do not agree with the Trial Judge's conclusion that the Appellant's pleading contained a sufficiently pleaded case to allow the Appellant to raise section 21 of the RPLA. However, the Respondents have not appealed from that decision and Mr. Seunath in answer to a direct question by this court indicated that he was not taking any issue with the Judge having considered the applicability of section 21 on the facts of this case.
48. Before this court Ms. King submitted that the fraud within the meaning of section 21 is the execution by Mrs. Goberdhan of the deed of assent and her concealing that the deed was made and consequently the concealment of the fact that by that deed the Appellant became a part owner of the subject property. Mr. Seunath contended that that cannot amount to fraud as there was no fraudulent intention on the part of Mrs. Goberdhan to deprive the Appellant of the subject property.
49. The execution of the deed of assent cannot by itself constitute fraud for the purposes of section 21. It is clear that the execution of the deed of assent could not have deprived the Appellant of her share or interest in the subject property. It is in fact that deed that gave her an interest or share in the subject property. If the deed of assent is a fraud on anyone, it would be the Respondents in view of the earlier agreement made by their predecessors in title with Mrs. Goberdhan for the purchase of the subject property. Be that as it may, the deed of assent has not been challenged. But while the execution of the deed of assent cannot amount to a fraud within section 21, the concealment of it might.
50. Fraud within the meaning of section 21 is not limited to fraud at common law. It captures fraud that would give rise to a cause of action in equity. The person claiming concealed fraud need establish facts so affecting the conscience of the person seeking to rely on the limitation bar or someone through whom he claims that he ought not be allowed to avail himself of the

time generally fixed by the limitation statute. Unconscionable conduct would therefore be sufficient to being a case within section 21 (see **McCallum v McCallum [1901] 1 Ch 143**, **Willis v Howe [1893] 2 Ch. 454** and **Petre v Petre (1853) 1 Drew 371**).

51. The facts in **McCallum v McCallum (supra)** provide a useful illustration. A mother executed a conveyance in favour of her daughter and purposely concealed it from her. By the time the daughter discovered the conveyance, the defendant and his predecessors in title had been in possession for a sufficiently long period that allowed the defendant to claim that the daughter's claim for possession was barred by the limitation statute. The daughter however sought to rely on the English provision identical to section 21 and the question arose whether the concealment of the deed was a concealed fraud within the meaning of the section. It was held by the majority that the concealment by the mother of the conveyance amounted to a concealed fraud.
52. Lord Alverstone CJ who was in the majority, was of the view that there was an intentional concealment of the deed by the mother, He was unsure of the motive by the mother for not disclosing the existence of the conveyance to the daughter and stated that "however good the motive which prompted her action this was a case of concealed fraud." The intentional concealment from the daughter that she was the real owner which would have enabled the daughter to take steps to recover her property was sufficient to establish a concealed fraud within the meaning of section 21 of the RPLA.
53. According to the Appellant, she was not told of the deed of assent and there is no evidence to the contrary. We do not know the reason that Mrs Goberdhan did not tell the Appellant of the deed of assent but it is difficult to say that it was not intentional. The effect of the deed of assent was to give to the Appellant a share or interest in the subject property. Had Mrs.

Goberdhan disclosed the existence of the deed to the Appellant that would have enabled her to take steps to secure her interest. Put another way the non-disclosure would have enabled the Respondents to remain in possession of the subject property without any challenge by the Appellant. In my view, the non-disclosure of the deed of assent is unconscionable conduct sufficient to amount to a concealed fraud within the meaning of section 21.

54. There is no evidence that the Respondents or their predecessors in title had known of or anything to do with the fraud. However, as Mrs. Goberdhan is the perpetrator of the fraud the Respondents may be regarded as claiming through her and fraud may be raised against them.

55. In view of the above, it seems to me that the Appellant has established that there was a fraud, the fraud was concealed, the fraud was that of a person through whom the Respondents claim and the fraud could deprive her of the subject property if she is unsuccessful in this claim. The last consideration is therefore whether the fraud was not discovered or could not with reasonable diligence have been discovered before sixteen years prior to the commencement of these proceedings. These proceedings were commenced in 2014 so the question is whether the fraud was discovered or with reasonable diligence could have been discovered before 1998.

56. The Appellant's case is that she knew nothing of the deed of assent until 2002 when she spoke to relatives and then conducted a property search in relation to the subject property. She then discovered the deed of assent and the 1991 deed of conveyance.

57. As I mentioned the onus is on the Appellant to establish that the fraud was not discovered or with reasonable diligence could not have been discovered before the expiration of sixteen years prior to the commencement of these proceedings. According to the Appellant she was unaware of the deed of assent until 2002 and there is no evidence to the contrary. The question

therefore is whether the Appellant might with reasonable diligence have discovered it.

58. The Trial Judge's findings do not all address that issue as in the main they seem to focus on whether the Appellant could have with reasonable diligence discovered the 1991 deed of conveyance. This was likely because of the submissions before the Trial Judge but was aided and abetted by the fact that section 21 was not pleaded so that the issues were not clearly defined. Be that as it may, it seems to me that the Trial Judge's findings on whether the Appellant might with reasonable diligence have discovered the 1991 deed of conveyance are equally relevant to the question whether the deed of assent might with reasonable diligence have been discovered more than sixteen years before the commencement of these proceedings.

59. The standard of diligence which the Appellant needs to prove is high (see The Laws of England Volume XIX (1911) para 279, **Chetham v Hoare** (1870) LR 9 EQ 571 and **Laurance v Norreys** (1890) 15 App Cas 210). The Trial Judge was however correct to refer to the following paragraph appearing in Halsbury's Laws of England, Limitation Periods (Vol. 68 (2008)) para 1223:

“In order to prove that a person might have discovered a fraud, deliberate concealment or mistake with reasonable diligence at a particular time, it is not, it seems, sufficient to show that he might have discovered the fraud by pursuing an inquiry in some collateral matter; it must be shown that there has been something to put him on inquiry in respect of the matter itself and that if inquiry had been made it would have led to the discovery of the real facts. If, however, a considerable interval of time has elapsed between the alleged fraud, concealment or mistake and its discovery, that of itself may be a reason for inferring that it might with reasonable diligence have been discovered much earlier.”

Was there then something that would have put the Appellant on inquiry as contemplated by the paragraph quoted above which if made would have led the Appellant to discover the real facts.

60. The subject property was at one point owned by the Appellant's paternal grandparents. They however, conveyed it to Mr. Goberdhan in 1974. He was not their only son. The grandparents after conveying the property to Mr. Goberdhan continued to live in it until 1984 when the grandmother, after the death of the grandfather, migrated to Canada. After that at some point before the Boodoos purchased the subject property, one Batie Sookraj lived at the subject property. Batie Sookraj remained in possession for a time after the subject property was conveyed to the Boodoos.

61. The Trial Judge found that the subject property would have been within the consciousness of the Appellant such that she would have wondered about its ownership and that it could be part of Mr. Goberdhan's estate. The judge found that the Appellant had sufficient knowledge to consider whether Mr. Goberdhan would have made a will, and if not, how and when his estate would have been administered and make appropriate enquiries.

62. Ms. King submitted that the Trial Judge erred in arriving at those findings. She argued that Mr. Goberdhan was not the grandparents' only child. The Appellant lived with her mother in different premises. Ms. King asked the court to infer that the Appellant would not have known of the subject property and would not have been put on inquiry in relation to its ownership and whether it could have been part of Mr. Goberdhan's estate.

63. In my view, it was open to the Trial Judge to come to those findings. The Appellant in her reply and defence to counterclaim pleaded that her mother in 1990 after the death of her father, Mr. Goberdhan, gave Batie Sookraj a licence to occupy the subject property. The Appellant was therefore aware of the subject property and that her mother had some control over it. The

Judge was entitled to infer on that basis that the Appellant would have been aware that the subject property could have been part of her father's estate. There is however more to this point.

64. In cross-examination when asked by Mr. Seunath if she knew who owned the subject property the Appellant's response was "yes". She does not say whom she knew to be the owner of the subject property and there was no re-examination on this point. Left hanging like that, it is difficult to avoid the conclusion that she would have known her father to be the owner of the subject property as the undisputed evidence is that the subject property was conveyed to him since 1979.

65. In view of the above, I cannot fault the Trial Judge when she concluded that the Appellant would have been aware that the subject property could be part of her father's estate.

66. The Trial Judge was also entitled to find that the Appellant had sufficient knowledge to enquire whether her father left a will or, if not, how his estate would have been dealt with. As the judge pointed out, the Appellant was at the date of her father's death in her thirties. She was an educated person having successfully attained A level passes. The Trial Judge also referred to the Appellant's evidence that shortly after Mr. Goberdhan died she made a point of telling her mother, Mrs. Goberdhan, that she should get her affairs in order. The Trial Judge found that the Appellant would have had the same concerns after her father, Mr. Goberdhan, died. I believe that is an inference that the Trial Judge could have properly drawn.

67. In the circumstances where the Appellant would have been aware that the subject property belonged to Mr. Goberdhan, or could have belonged to him and therefore could have formed part of his estate, the question arises what enquiries did the Appellant make to determine what happened to it.

68. The Appellant's witness statement is devoid of any evidence that the Appellant made any enquiries about the subject property or her father's estate or took any step that might have resulted in her discovering what happened to the property after the death of her father. This is likely a direct result on the failure of the Appellant to properly identify the relevant issues.

69. Ms. King however points to the cross-examination of the Appellant and asked the court to conclude that she exercised reasonable diligence but got nowhere in discovering that she had a share or interest in the subject property. According to the cross-examination the Appellant was asked the following questions and provided the following answers:

Q: Now, between the date of the death of your father, that is in 1989...

A: That's right.

Q: And 1996, when you left the country, you lived with your mother?

A: That's right.

Q: And during that time you did not know anything about her dealings with whatever your father may have left?

A: No. All we knew...

Q: No. No.

A: Oh. Sorry.

Q: You didn't know anything about it?

A: No, I didn't know anything about that.

Q: And I take it you never enquired of your mother what your father may have left?

A: I did.

70. The Appellant however does not say what her mother's (Mrs. Goberdhan's) response was. In circumstances where the onus is on the Appellant to show that she might not with reasonable diligence have discovered the fraud it is

not sufficient to simply say that she asked her mother. The evidence of the Appellant is that she did not ask anyone other than Mrs. Goberdhan until 2002. That cannot amount in my view to reasonable diligence. In other words, before the court can say it was reasonable diligence to make no further enquiries other than of Mrs. Goberdhan it should know what was Mrs. Goberdhan's response. Was her response sufficient to say that it was reasonable for the Appellant to make no other reasonable enquiry? There is however no evidence on which the court can draw such a conclusion.

71. There is no doubt that the Appellant could have discovered the fraud by making other enquiries. Indeed the evidence is that after speaking to relatives she conducted a property search and discovered the deed of assent and the 1991 deed of conveyance. There is no evidence for the court to conclude that it was reasonable not to make these inquiries sooner. There is nothing to indicate why she was unable to contact these relatives sooner and given she was put on inquiry reasonable diligence would have demanded that she do so.
72. In my judgment and in agreement with the Trial Judge, the Appellant has not shown that the fraud could not with reasonable diligence have been discovered sooner than it was and before 16 years prior to the commencement of these proceedings. The Appellant has not discharged the onus on her to bring herself within section 21 of the RPLA.
73. In view of the above, I would dismiss the appeal subject to one adjustment to the relief granted by the Trial Judge. The court made declarations that (a) the Respondents are the owners in fee simple of the subject property; and (b) the Appellant's right if any is barred by Section 3 of the RPLA. In so far as the legal title as to one third share would have been vested in the Appellant's brother, Jason, now deceased, and his estate is not a party to these proceedings the court cannot grant a declaration that the Respondents are

the owners of the entirety of the subject property. I think the most that can be said is that the Appellant's right to bring an action for the recovery of the subject property is barred by the RPLA. I would therefore set aside the declaration at (a).

A. Mendonça J.A.