REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

PORT OF SPAIN

Civ. Appeal No. S375 of 2018
Claim No. CV. 2017-01145

BETWEEN

ROBERT GORMANDY

First Appellant/Claimant

SHAUN SAMMY

Second Appellant/Claimant

AND

THE TRINDAD AND TOBAGO HOUSING DEVELOPMENT CORPORATION

Respondent/Defendant

Before: **Pemberton J.A.**

APPEARANCES:

For the Appellant:	**Mr. R.L. Maharaj, S.C. leading Mr. R. Bissessar and Ms. V. Maharaj, instructed by Mr. V. Gopaul-Gosine**
For the Respondent:	**Ms. D. Peake, S.C. leading Mr. R. Heffes-Doon, instructed by Mr. A. Rudder**

DATE OF DELIVERY: April 11, 2019

INTRODUCTION

[1] The First Appellant/First Claimant, Robert Gormandy ("Mr. Gormandy"), claimed that he was the owner of a parcel of land located in Couva, adjacent to those lands belonging to the Trinidad and Tobago Housing Development Corporation ("HDC"). Prior to filing this action, Mr. Gormandy agreed to sell a portion of the land to the Second Appellant/Second Claimant, Shaun Sammy ("SS"), for the sum of $500,000.00. He received $100,000.00 as a deposit and SS took possession of the land.

[2] On April 4, 2017 Mr. Gormandy and SS filed this action against HDC, ("the first action"), asking the court to declare that they were entitled to be in possession, and to remain in possession, of the subject lands.[1] On April 5, 2017, HDC filed a claim against Mr. Gormandy and SS, seeking a declaration that they did not have any rights, title or interest in the lands. HDC also sought an injunction against Mr. Gormandy and SS ("the HDC action")[2].

[3] On August 16, 2017, the trial judge ordered that the HDC action, be stayed pending the determination of the first action. On November 9, 2018, the first action was determined in HDC's favour.

[4] On November 21, 2018, Mr. Gormandy and SS appealed the trial judge's decision. They also filed the following interim applications:

- A stay of execution of the trial judge's order and an interim injunction against HDC; and
- That the matter be deemed fit for an expedited hearing.

[1] CV 2017-01145.
[2] CV 2017-01152.

ISSUES

[5] The issues to be determined are as follows:

a. Whether the First Appellant has successfully satisfied the requirements for a Stay of Execution/Interim Injunction?

b. Whether the hearing of this appeal should be expedited?

[6] **TRIAL JUDGE'S FINDINGS AND REASONS**

In this case, after carefully setting out the pleaded cases for both parties, the trial judge identified the main issue as, **"*whether Gormandy was in possession of the occupied lands based on the doctrine of adverse possession*"[3].**

The trial judge made findings that,

1. Mr. Gormandy was a farmer and he was familiar with the land.
2. Mr. Gormandy was planting on the subject land.
3. The extent of the lands, which he occupied, was smaller than four point six (4.6) acres.
4. Further, although there is evidence that Mr. Gormandy was in possession of a smaller area within the four point six (4.6) acres, he failed to sufficiently identify the boundaries of the portion of land upon which these acts of possession were carried out.
5. As a result, Mr. Gormandy's claim that he was in adverse possession of the acreage that he claimed, four point six (4.6) acres according to the Survey Plan which he commissioned from Surveyor Mohammed or wanted to court to declare as his, a smaller three (3) acre parcel, failed.

As against SS, the trial judge found *inter alia* that,

6. Since Mr. Gormandy has no right, title or interest in the land, he was not entitled to sell the land to SS. The agreement for sale, dated March 14, 2014, as executed between them is void and of no effect.

[3] Judgment of Rahim J. para. 20. Nov. 9, 2018.

[7] The reasoning of the trial judge for his decision that Mr. Gormandy only cultivated a part of the land summarized in paragraph 408 included:

a. the differences in Mr. Gormandy's estimate and Surveyor Mohammed's survey;

b. the inconsistency between Mr. Gormandy's witness statement and his admission during cross-examination that in 1985 he did not occupy the entire subject land;

c. that when he began cultivating he did so as a hobby and the inference by the trial judge was that it was highly improbable that someone would cultivate four point six (4.6) acres of land as a hobby;

d. Mr. Gormandy's admission during cross-examination that he did not cultivate upon lands contiguous to the boundaries of the Julin lands (part of the disputed parcel) as that was maintained as a fire break; and

e. his pointing out to the Surveyor, the western boundary of the disputed lands was the Julin lands.

f. witness testimony that the area of Keskadee Avenue, within the disputed lands was used for dumping refuse;

g. documentary evidence, that is, a letter from the Ministry of Agriculture dated August 2, 2013, indicating that Mr. Gormandy was cultivating two point five (2.5) acres of land; and

h. the Land Surveyor's evidence, which *inter alia* demonstrated that different parcels of the area were cultivated at different times and at no time was the entire

parcel clear and further, there was no evidence of the precise size of the plots which were planted on a rotational basis and the length of occupation of the several plots.

Further, the trial judge found that Mr. Gormandy and SS *"failed to provide any evidence to identify the dimensions of a smaller portion of land and/or exactly where on the subject land the acts of possession were carried out."* In any event, after a review, the trial judge rejected the "plan"/"sketch" evidence and concluded that Mr. Gormandy and SS did not prove possession since 1984. These findings were in keeping with the legal principles enunciated in the **INEZ CHARLES-SARJEANT** and **QUINTIN PADIA** cases.[4]

APPLICATION FOR THE STAY OF EXECUTION AND INJUNCTION

[8] Relevant factors to be considered in this application for a stay of execution are:

1. Good prospects of success on appeal;
2. Special circumstances justifying the stay of execution;
3. Risks of injustice to either party;
4. Should the stay be refused and the Appeal succeeds, what are the risks to the Appellant.[5]

The guidelines for the exercise of the discretion in determining an injunction are:

1. serious question to be tried;
2. inadequacy of damages;

[4] **QUINTIN PADIA v. MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF PORT OF SPAIN & ANOR CV 2007-01562 affirmed by the Court of Appeal in Civ. App. No. 54 of 2012** and **INEZ CHARLES-SARJEANT v. THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO CV 2017-00876 per Kokeram J.**

[5] See **NATIONAL STADIUM (GRENADA) LTD v NH INTERNATIONAL (CARIBBEAN) LIMITED AND OTHERS Civ App No 48 of 2011.**

3. balance of convenience; and
4. special circumstances.

[9] I propose to deal with the following requirements together: a good prospect of success and a serious question to be tried; whether special circumstances requirements in both applications for stay and injunctions have been satisfied; and the risk of injustice and balance of convenience issues.

GOOD PROSPECTS OF SUCCESS/SERIOUS QUESTION TO BE TRIED

APPELLANTS' SUBMISSIONS

[10] Mr. Maharaj submitted that Mr. Gormandy and SS have demonstrated that they have a "strong" prospect of success in the appeal. These are the reasons:

1. Mr. Gormandy was engaged in rotational farming on the lands for the applicable period of sixteen (16) years. This was corroborated by his witnesses.[6]

2. SS was the contracting purchaser for value, in the amount of $500,000.00. The 999-year lease under which HDC claims title, was granted pursuant to a statutory provision which came into force in 2005, and is subject to Mr. Gormandy's possessory title.[7]

3. The trial judge's findings that:
   a) Mr. Gormandy occupied part of the lands for the purpose of farming;
   b) That the cultivation of the lands was continuous; and
   c) That there was no dispute that Mr. Gormandy was a *bona fide* farmer occupying lands in the area

[6] Written Submissions on Behalf of the Appellants. Para. 20. Jan. 18, 2019.
[7] Id. at para. 22.

ought to have resulted in Mr. Gormandy's success in his claim that he was in adverse possession of the disputed lands.

4. The trial judge's reason that the extent of the land was in issue, based on Mr. Gormandy's Statement of Claim and witnesses' testimony (three (3) acres), as opposed to the testimony of the Licensed Surveyor (four point six (4.6) acres), was not enough to displace his claim.

5. The letter of August 2, 2013, upon which the trial judge relied in support of the finding that Mr. Gormandy overstated his acreage of occupation, was not put to Mr. Gormandy and *"there was no evidence at all of how the 2.5 acre figure came to be inserted into that letter"*[8]. Had that letter been put to him, it would have been consistent with Mr. Gormandy's mis-estimates of the size of the land.[9]

6. Further, the trial judge's reliance on the Respondent's witnesses' testimony on the dumping of rubbish in the area of Keskadee Avenue, was plainly an insufficient basis for depriving Mr. Gormandy of his claim in adverse possession.

7. The trial judge's referral to the subject lands not being under Mr. Gormandy's control in 1985 is irrelevant. The evidence is that the lands were under his control in 1989, which is enough time for the limitation period to run. Further, the Licensed Surveyor, Ms. Mohammed's evidence, the series of aerial photographs, show G1 and G2 under cultivation. The trial judge therefore failed to take

[8] Id. at para. 47(c).
[9] Id.

this and a number of material matters into consideration in the assessing the evidence.

8. The trial judge ought to have accepted the explanation that Mr. Gormandy was simply mistaken as to the acreage and ought not to have rejected the Licensed Surveyor, Ms. Mohammed's, evidence.

9. The trial judge ought not to have taken judicial notice of the expertise of farmers in Trinidad and Tobago in averaging weights and differences in land areas in assessing the evidence and coming to his decision, as this did not form a valid basis to reject Mr. Gormandy's claim.

10. There was no requirement in law for the whole of the land to be used continuously or that the boundaries be defined with absolute precision. Counsel referred to a *"well-established principle especially in rotational farming cases that acts in parts of the land will amount to possession of the whole of it."*[10] Mr. Maharaj stated that these *"flexible set of principles"*[11] were not considered by the trial judge, but were considered in English cases, which he drew to the court's attention.

11. The trial judge did not exercise his discretion to carry out a site visit *"to determine the boundaries of the land which he found was adversely possessed by the Appellant".*[12] Counsel submitted that, *"an inspection is just as much part of the evidence as the testimony of the evidence".*[13]

[10] Id. at para. 46(c).
[11] Id.
[12] Id. at para. 47(j).
[13] Id. at para. 47(o).

12. Counsel argued that adverse inferences ought to have been drawn against HDC for failing to call witnesses who would have been able to produce relevant evidence in the matter.[14]

13. HDC cannot rely on allegations relating to boundaries of the land, as it did not plead this in its defence. HDC's pleaded defence focused on Mr. Gormandy never having possession of the land. In addition, the question of the boundaries being claimed was not raised in the pleadings or raised on cross-examination and Mr. Gormany's witnesses were not given the opportunity to comment on the alterative basis of the defence.[15] Counsel asserts that this was contrary to Part 10.5 of the **CIVIL PROCEEDINGS RULES ("CPR"),** where it is clearly stated that a defendant has a duty to set out his case.[16]

14. As relates to SS's appeal, the trial judge wrongly found that the agreement for sale was tainted. This issue was not pleaded and ought to have been. Also, the issue was not put to SS and ought to have been and there is no basis in law for rendering the agreement void.[17]

HDC's SUBMISSIONS

[11] Mrs. Peake submitted that, the appeals have no prospect of success and the trial judge was plainly right to dismiss the claim and to allow HDC's claim, as Mr.

[14] Id. at para. 51.
[15] Id. at para. 35.
[16] See also **M.I. INVESTIGATIONS LTD. v. CENTURION PROTECTIVE AGENCIES LTD. C.A. 244 of 2008. TOP HAT YACHTS LTD. v. PETERSEN and ORS. CV 2006-3677**, as well as **CHARMIANE BERNARD v. RAMESH SEEBALACK [2010] UKPC 15.**
[17] *Op. cit*. Written Submissions at para. 57.

Gormandy failed to prove that he was in adverse possession of the disputed parcel.

[12] Counsel advanced the following reasons, which showed that the trial judge was not plainly wrong in concluding that Mr. Gormandy did not discharge his burden of proving that he was in possession of either the three (3) acres of land or the four point six (4.6) acres claimed:

1. The argument that it was not open to the trial judge to consider whether he had proven the matters, which he had the burden of proving, to sustain his case, is without merit.[18]

2. Contemporaneous documents and other documents admitted into evidence at the trial, describe the land as around three (3) acres and in one case less than three (3) acres. These were the Statement of Case, Mr. Gormandy's Witness Statement, the Agreement of Sale between Mr. Gormandy and SS and Mr. Gormandy's instructions to the Land Surveyor; the letter from the Ministry of Agriculture dated August 2, 2013, indicating that Mr. Gormandy was a *bona fide* farmer of two point five (2.5) acres.

3. Mr. Andy Dubay, who helped Mr. Gormandy on the land for many years revealed in cross-examination, that Mr. Gormandy was planting on a significantly smaller area than the four point six (4.6) acres shown on the cadastral plan, which was the basis of the claim.[19]

4. Witnesses who testified on behalf of Mr. Gormandy stated that the land occupied by Mr. Gormandy was around three (3) acres. This

[18] Submissions of the Respondent. Para. 20. Feb. 8, 2019.
[19] Id. at para. 9(c).

included the Executive Director of a real estate company and purchaser of an alleged interest in the land for $500,000.00.[20]

5. Mr. Dubay's evidence in relation to the area used for dumping by the residents, which stated that the dumping *"stopped four, five years ago"* and the dumping was *"limited and intermittent",* is *"simply wrong"*.[21]

6. The trial judge also questioned whether the claim to four point six (4.6) acres was an exaggeration on Mr. Gormandy's part because of Mr. Gormandy's inability to state the exact area of land which he claimed. This approach was a *"plain common sense approach to the assessment of weight and credibility"* of the witness.[22]

7. In answer to the Appellants' argument that HDC was not entitled to rely on any allegations relating to boundaries, since the challenge to the boundaries was not pleaded in the Defence, that is without merit. The Defence was not a bare denial. HDC pleaded a positive case that the lands were overgrown and in bush. Even if Mr. Gormandy planted on the lands, it was not to an extent, nature, or duration to amount to possession or to extinguish HDC's title.[23]

8. The trial judge's finding that Mr. Gormandy occupied less than four point six (4.6) acres is correct, after he considered that the boundaries were determined by,

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[20] Id. at para. 9(a).
[21] Id. at para. 9(b).
[22] Id.
[23] Id. at para. 18.
See paragraphs 10-13 of the Molligan Affidavit. (1) the Appellant did not have *"exclusive continuous, sole or effective possession and control of the subject lands since 1984 or at all."*; (2) the subject lands were overgrown, with thick bush and no structures; (3) if it found that the Appellant carried out cultivation or clearing of the land, it does not constitute continuous exclusive possession sufficient to extinguish the title of the paper title owner of the lands; and (4) the aerial photographs do not show the land under cultivation and are capable of proving same.

> *an alleged 'occupation' survey carried out <u>after</u> the claims were filed in the High Court and <u>after</u> all evidence of Gormandy's alleged occupation had been bulldozed by Sammy and his company Junior Sammy Contractors Limited. The evidence of the surveyor is that she drew the boundaries based on where Gormandy pointed out on the ground that he had occupied. She saw no evidence of occupation by Gormandy. A copy of the cadastral plan of the lands Gormandy claimed he occupied dated 27 April 2017 is annexed to these submissions as Appendix A…*[24]

9. Such an objection will not succeed, since it seeks to shift the burden of proving that the squatter is in possession, from the squatter, to a person who has to meet the claim in adverse possession.

10. Further, it was open to the court to consider whether Mr. Gormandy had discharged his burden of proof and clearly he had not, and this proved fatal to his claim.

11. Unless there is evidence of clear demarcation of boundaries or unless the boundaries are *"reasonably precise",* an adverse possession claim will fail.[25] Counsel submitted like the **JOBS** case, the Appellants did not plead, nor did they provide any evidence of the size or boundaries of the smaller area of land that Mr. Gormandy may have occupied.[26]

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[24] *Op. Cit.* Submissions.

[25] Id. at para. 27.

See also **PORT OF LONDON v. PAUL MENDOZA** [2016] EWL and RA 2011_0751. Paragraph 52 states that *"adverse possession claims…are rarely concerned with defining boundaries with degree of precision involved in determining a boundary application made to the land registry"*. However, it goes on to say at paragraph 53 in the case of adverse possession,

> *If a person is clearly and openly in adverse possession of an area of land an incorrect claim to a greater area does not prevent an application from being successful in respect of a more limited area, <u>provided that that area can be defined with reasonable precision.</u>*

See also **GLORIA JOBS ET. AL. v JOSHUA ALEXANDER ET. AL.** CA No.075 of 1987

[26] *Op. cit.* Submissions at para. 32.

12. The principle governing "*acts upon the lands*" only applies in disputes where the boundaries are *"known and undisputed".*[27] In **CLARK**, there was insufficient evidence of the establishment by agreement, on a defined boundary for the claim to be met with success. The lack of a defined boundary makes the principle of "*acts upon the lands*" inapplicable, as there is no way to determine whose lands the acts would have been performed. Similarly, the principle does not apply to the matter at bar.

13. Judges are entitled to rely on common sense and judicial experience in the assessment of a matter before them. The trial judge, by making the reference that farmers are good at averaging, implied that it would be improbable that someone claiming to be a professional farmer and who was selling on the land for *"donkey years"* would underestimate the area by over 50%.[28] The trial judge questioned whether Mr. Gormandy would sell three (3) acres of land for $500,000.00 in error, when the adjoining parcel, half that size was sold for $14.2 million in 2010.[29]

That reasoning of the trial judge led the court to believe that Mr. Gormandy cultivated only one part of the land.

14. Though Mr. Gormandy complained that no site visit was conducted, it was open to him to request this but he never requested or contended that a site visit ought to be conducted. Further, any evidence of the agricultural activities would have been removed by the levelling of the lands. A site visit would not have been of any evidential value.

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[27] Id. at para. 34.
See **CLARK v. ELPHINSTONE** (1880) 6 APP.CAS. 164, 170. and **HIGGS v. NASSAUVIAN** [1975] AC 464.
[28] *Op. cit.* Judgment at para. 402.
[29] *Op. cit.* Submissions at para. 23.

ANALYSIS

[13] When assessing whether a stay should be granted a basic principle is that an appeal court will not overturn a trial judge's finding of fact unless he was plainly wrong. It does not matter if an appeal court may hold a different view of the facts, so long as the view held by the trial judge could be maintainable on the pleadings and evidence led at the trial. Mr. Maharaj's submissions contained views that could be derived from the evidence at the trial, but that is what it is, another view of the facts and evidence.

[14] Since this is not a mini trial, my role is simply to assess whether the grounds of appeal have good prospects of success, or reveal serious issues to be tried on appeal, while keeping in mind the principle adumbrated above. What are the grounds of appeal? I shall adopt Mr. Maharaj's statement of the grounds to wit,

> *(a) this finding was not open to the Judge in view of how the Respondents pleaded their case and put their case to the Appellants' witnesses;*
> *(b) the Judge's reasoning depends entirely on an impermissible use of the doctrine of judicial notice to justify the outcome; and*
> *(c) the outcome is against the weight of the evidence and fails to take into account the relevant evidence that was before the Court.*[30]

THE GROUNDS

1. THE TRIAL JUDGE'S REASONING DEPENDS ENTIRELY ON AN IMPERMISSIBLE USE OF THE DOCTRINE OF JUDICIAL NOTICE TO JUSTIFY THE OUTCOME

[15] I shall start with the second ground first. Whilst assessing facts, a trial judge can hardly lock off himself from his particular knowledge of, and experience in, the society in which he lives. I dare say that it is necessary for judges to bring their

[30] *Op. cit.* Written Submissions at para. 29.

knowledge and experience to bear, so as to effect meaningful justice. One does not judge in a vacuum. Judges are entitled to take cognizance of societal and cultural norms to make decisions relevant. I must however sound a note of caution, that matters which judges are entitled to take judicial notice of, must measure up to the yard stick of relevance to the issues before them. It may be useful to refer to the trial judge's words at paragraphs 402 and 403. Paragraph 402 states,

> *In the court's view, the resolution of this issue presents no real difficulty. Gormandy is a farmer. It is a matter of public knowledge and the court takes judicial notice of the fact that famers are very good at averaging. They do so quite skillfully with weight and distance. The agricultural history of Trinidad and Tobago along with the average person's experience in the markets and on the roadways throughout the length and breadth of the nation demonstrates that the average farmer is well acquainted with his land and produce. Far more so for farmers who would have been involved in the business to such a large scale as Gormandy claimed to be.*

[16] I find it passing strange that Counsel sought to rely on *"well-established principles"* associated with rotational farming cases in the U.K. to buttress his client's claim, but focuses on the trial judge using his knowledge of our local circumstance to assist in the deliberating process. I do not think that the reliance on this argument will suffice to establish that Mr. Gormandy has a good prospect of success on the appeal or that it is a serious issue to be tried on appeal, which justifies the grant of a stay of execution or an injunction.

2. THE FINDING WAS NOT OPEN TO THE JUDGE IN VIEW OF HOW THE RESPONDENTS PLEADED THEIR CASE AND PUT THEIR CASE TO THE APPELLANTS' WITNESSES

[17] Part 10.5(4) of the **CPR** provides that to be compliant, a defence must set out the reasons for denying an allegation in the statement of claim. Having said this, it

cannot be asserted that this acts as a bar to the trial judge to assess evidence which is relevant to the pleaded parameters of the case. The evidence will be admissible and will fall for consideration at trial. This speaks nothing about the legal requirement of the burden of proof. HDC pleaded in its Defence that the land usage was not consistent with possession, in that the land was overgrown and there were no structures or buildings, whether shacks or otherwise, on the disputed lands. Even if planting occurred on the land, it was not proved to be of the nature and duration to extinguish that of the paper title owner and satisfy a claim in adverse possession. Further, HDC contended that Mr. Gormandy was not in possession of the parcel of land in its entirety or any part thereof for the requisite period. Mr. Gormandy, who alleged adverse possession, was charged with the responsibility of leading his evidence to prove his case.

[18] In a claim for adverse possession, the facts of physical possession and control, together with an intention to possess, predicated upon the requirement that the statutory period of 16 years must be satisfied. The person must be clear on the pleadings and lead evidence to show the nature of his physical possession, that is the acts of "ownership" which he exercised over the area claimed, (in this case farming activities) and the extent of his physical possession, speaking to the boundaries of the area which he claims, since such a claim is against a paper title holder and is not against the world at large. In other words, Mr. Gormandy had the burden to prove the constituent parts of the relief sought. Does this ground of appeal have any prospect of success or form the basis of a serious issue to be tried?

[19] The pleaded case and the evidence revealed that there was some confusion as to the acreage in terms of its usage to support the acts of ownership, the size of the disputed area and the boundaries. This was admitted by Mr. Gormandy when he submitted that the trial judge should have regarded the discrepancy with respect

to the size of the disputed area as a mistake and declare him to be in adverse possession of the smaller parcel. It was open to the trial judge based on the evidence, to refuse to follow this lead. Even if Mr. Gormandy took issue with the pleadings, or the way that HDC conducted its case at the trial, he could not rely on any perceived lacuna - whether in pleadings or cross-examination – to deflect his duty.

[20] Mr. Maharaj raised the issue of procedural irregularity, since the way in which HDC conducted its case, neither Mr. Gormandy nor his witnesses were given the opportunity to explain certain parts of the evidence, which proved inimical to his case. This, Counsel asserts may amount to procedural irregularity. To my mind, unless the trial process was found to be either tainted by the trial judge's bias, real or apparent, or the witnesses were prevented from giving evidence and this is evident on the face of the record, this as a buttress for a ground of setting aside a trial judge's decision will fail.

3. THE OUTCOME IS AGAINST THE WEIGHT OF THE EVIDENCE AND FAILS TO TAKE INTO ACCOUNT THE RELEVANT EVIDENCE THAT WAS BEFORE THE COURT.

[21] An application for a stay does not operate as a dress rehearsal for the hearing of an appeal. The court should look to whether there are such blatant errors in the trial judge's reading and assessment of the evidence to conclude that there is a good chance of success. In an application for an injunction, a court is mandated only to look at the relative strengths and weaknesses of a party's case, as this needs to be considered as a factor in granting an interim injunction. At this stage, the court is not expected to conduct a detailed analysis of the evidence.

[22] In this case, what did the trial judge do? From the record as supplied, the trial judge looked at the evidence in the round, taking what he found relevant from Mr Gormandy's witness statement, his cross examination, those of his witnesses and

the documentary evidence, in particular the several sketches and survey plans and HDC's witness statements. The trial judge then assessed whether Mr. Gormandy and SS were able to demolish that collective testimony in cross-examination, that is, whether their testimony was so inconsistent and incredible that it did not accord with contemporaneous and other documentary evidence. Further, the trial judge had the advantage of seeing the witnesses and assessing them in person.

[23] To me, that was the correct methodology to employ, and it was employed by the trial judge as revealed in his detailed treatment of the evidence in his judgment. I should note here is well, that the trial judge is not obliged to take and comment on every piece of evidence presented. The trial judge chose to believe HDC's evidence and that was the basis of his findings and decision, upon the proper application of the law. I cannot say that an appeal court will overturn these findings easily given the stated practice of the court when hearing appeals, not to cast doubt on a trial judge's findings of fact save when those findings are plainly wrong. From the evidence, this was a course that was open to the trial judge.

[24] The cases relied on by the trial judge in arriving at his decision, **PADIA** and **INEZ CHARLES-SARJEANT,** set out the law. They were pointed and relevant to this case and properly applied to these facts. For these reasons, I do not think that this ground has good prospects of success or can form the basis of a serious question to be tried.

[25] I did not mention every point raised in Counsel's submissions but I examined them all and chose to highlight only some of them. Having examined Counsel's submissions and the trial judge's judgment reflecting the law of this jurisdiction, I cannot agree that this appeal has a good prospect of success or that there is a serious issue to be tried. The applications for relief fail on these grounds.

RISK OF INJUSTICE/BALANCE OF CONVENIENCE

[26] Weekes J.A. (as she then was) addressed this head in this way, *"At the end of the day a successful litigant is entitled to the fruits of its success unless the applicant (for a stay or injunction) can show that in the particular circumstances of the case there is a risk of injustice to it if the Respondent is allowed to access those fruits…".*[31] There is no dispute that in assessing this head, that the determination on whether the appeal has good prospects of success, is important. In the case of the interim injunction, one must consider if there has been success in convincing the decision maker that there is a serious issue to be tried.

[27] Mr. Maharaj submitted, that if the stay and/or injunction are not granted, the HDC will be permitted to dispose of the lands as they saw fit. This would render the appeal futile and Mr. Gormandy and SS would suffer irreparable harm and damage. Further, the Court is entrusted to ensure that Mr. Gormandy should not be deprived of his property, save by due process of law. Counsel noted that the disputed lands have been vacant and HDC is now contending that the lands would be used for development in June 2019. On the other hand, Mrs. Peake asked the court to consider that in this case where the appeal has no merit, the risk of injustice weighs heavily against the HDC, being kept away from the judgment seat. She reminded the court that the usual rule is that there should be no stay but the *"perceived strength of the appeal"* must be considered where the "*justice of the approach is in doubt…"*.[32] The learning is similar when the grant of an interim injunction is up for contemplation.[33]

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[31] *Op. cit.* **NATIONAL STADIUM** at para. 45.

[32] See **LEICESTER CIRCUITS LTD. v COATES BROTHERS PLC [2002] EWCA Civ 474 para. 13 per Potter LJ** as quoted in **BMW v COMMISSIONER FOR HM REVENUE AND CUSTOMS [2008] EWCA Civ 1028.**

[33] See **ERINFORD PROPERTIES LTD. v CHESHIRE COUNTY COUNCIL (1974) 2 All E.R. 448 per Megarry J at p 454** *"… There may of course be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal may be frivolous".*

ANALYSIS

[28] I state quite categorically that the constitutional protections afforded to Mr. Gormandy and SS are observed by this court. Due process does not provide a guarantee of success. The process by which any matter is attended by the court must be procedurally fair and legally sound. That will discharge any constitutional duty and ensure that those protections are maintained. The mere fact that both gentlemen can approach the court is testament to the fact that due process is at work.

[29] Whilst I am of the view that this appeal is not frivolous, I must be concerned that there is no serious issue to be tried and take this into account in assessing whether to grant the interim injunction as prayed for by Mr. Gormandy. Having concluded above, that the prospects of success on appeal are slim and that there is no serious issue to be tried on appeal to warrant interim injunctive relief, I am of the view that justice will not be served by keeping HDC from the judgement seat. The nature of the harm likely to be suffered by Mr. Gormandy if the stay is not granted was not identified. Further, this is essentially a commercial transaction between two businessmen, Mr. Gormandy and SS. The profit motive by one person, Mr. Gormandy, and the other person, SS's, willingness to accept the land as is, when put in the mix, do not match up to the fact that HDC will not be permitted to consider using the land for the public good in the face of the stay of execution or the grant of the interim injunction. The risk of injustice to HDC if the stay of execution or the interim injunction is granted, is clear. Neither a stay of execution nor the grant of an interim injunction is justified.

SPECIAL CIRCUMSTANCES/EXCEPTIONAL CIRCUMSTANCES

[30] Mr. Marahaj has not argued any special circumstances in this matter, which would justify the granting of a stay of execution or interim injunctive relief. In fact, Mrs.

Peake argues that there are none. There is no need to factor this into my decision on either application.

II. APPLICATION THAT THE APPEAL BE DEEMED FIT FOR URGENT HEARING

LAW

[31] The requirements for an application for an appeal to be deemed fit for an urgent hearing are laid out in **TRINIDAD AND TOBAGO CIVIL RIGHTS ASSOCIATION v. PATRICK MANNING**[34] in which, taking guidance from Sir Thomas Bingham in **UNILEVER PLC v. CHEFARO PROPRIETARIES LIMITED**[35]**,** Nelson J.A. advanced,

> *'Since most appeals are scheduled to be heard on dates fixed well in advance, and since court sittings are so far as possible planned a long time ahead, the expediting of an appeal other than the shortest is likely to have one or other of two consequences, usually both. One is that a fixture already made for the hearing of another appeal has to be cancelled. The other is that the hearing of another appeal, which may well have been awaiting hearing for about 18 months, has to be deferred.'…'Both these consequences are highly distasteful both to the court and the parties in the displaced appeal or appeals.' I would endorse that statement and say that it applies equally here.*
>
> *So that* ***the court is very sparing in its grant of applications for urgent hearing*** *especially in view of the fortunate position in which our Court of Appeal list stands. Secondly, that* ***the court in fixing a date for an early hearing would give weight*** *not so much to the wishes of the parties to that appeal,* ***but to the interest of other parties who would be adversely affected by the cancellation or postponement of their appeals.*** *One has to consider that all persons who filed appeals feel that those appeals ought to be heard urgently.* ***It would therefore require some exceptional case to be made out for an urgent hearing to be granted*** *especially in view of the relatively short time-lag*

[34] C.A. No. 147 of 2004.
[35] [1995] 1 ALL ER 587.

> *between setting-down and hearing of an appeal in this jurisdiction.*[36] (Emphasis mine).

ANALYSIS

[32] In the examination of this application, the court must consider ***whether Mr. Gormandy and SS have demonstrated that the case is an exceptional case and that the matter ought to be expedited***. Counsel submitted that the appeal qualifies to be expedited as it involves *"a case in which the execution of a possession order is imminent"* and the appeal will become nugatory if the interim relief is not granted. However, is there any evidence that *"the execution of a possession order is imminent"*?

[33] I have read HDC's evidence, as contained in Ms. Kimberly Molligan's affidavit which says at paragraph 55,

> *The subject lands is one of the sites that has been identified for the HCIP. (Housing Construction Incentive Programme). I am informed….**that the HDC is desirous of starting work on suitable sites, like the subject lands, by June 2019.*** (Emphasis Mine).

This reading did not reveal a definitive date of June 2019 as the start date upon which any works may begin on the subject lands. In addition, neither party produced evidence that an execution of the possession order is imminent. If the land has been merely identified as suitable for development by June 2019 and no steps have been taken to further those plans, where does the urgency lie? There is no reason to justify either altering the Court of Appeal's previously scheduled matters or canceling or postponing the appeal of other parties to facilitate this request. This will fly in the face of the overriding objective of dealing with cases justly.

[36] Id. at p. 8.

[34] This case involves Mr. Gormandy's trespass upon HDC's lands for such an extended period of time, claiming that he has an entitlement to the subject lands through adverse possession. There is nothing exceptional about the claim of entitlement to lands through the passage of time. With regard to the transaction between Mr. Gormandy and SS, this is a purely commercial transaction. There is nothing about this transaction which elevates the claim to one which may qualify as exceptional.

[35] Notably, I indicated in court, that I may consider the fact that HDC is a public authority and that the matter, under that premise, may be considered exceptional, so as to be deemed urgent. HDC has indicated that they have no issue with waiting their turn in the cue. Armed with the knowledge that following the regular course shall not affect the timeline for development of the subject lands, so as to adversely affect the public, the application for an expedited hearing is denied.

CONCLUSION

[36] The Application for a stay of execution of the judgment of the trial judge and for the interim injunction is refused on the grounds of:

1. No good prospect of success at appeal and no serious issue to be tried on appeal since:

    a. The findings of fact by the trial judge are not likely to be overturned at trial.

    b. The fact that the trial judge did not employ certain steps in managing his case, not going on a site visit, was not inimical to the outcome of the trial and did not produce conclusions and findings that were plainly wrong. This inaction is not likely to impact

negatively a Court of Appeal's assessment of the trial judge's conclusions.

c. The trial judge's application of the law of adverse possession cannot be faulted. The trial judge made the correct use of legal principles regarding the legal burden of proof in adverse possession, that the burden lies on the person claiming adverse possession.

d. That the trial judge's taking judicial notice of facts and applying them to his deliberations was derived from the testimony of witnesses, was relevant and did not produce any finding that was not plainly wrong.

e. That when all of the evidence was taken in the round, the trial judge's assessment and his findings of fact and his application of the law were not plainly wrong.

2. There are no special circumstances to warrant the grant of a stay of execution or an interim injunction.

3. There is no demonstrated risk of injustice to either party, should the stay of execution or the interim injunction not be granted.

4. With respect to the grant of the interim injunction, there is no demonstration that damages would not be an appropriate remedy should Mr. Gormandy and SS be successful on the appeal in the event that the HDC disposes of the land to third parties.

5. **EXPEDITED APPEAL**

The Appellant has not made out a case for an expedited appeal, as there is no concrete evidence to show urgency.

I now order as follows:

ORDER

1. The Applications filed on November 21, 2018 be and are hereby dismissed.
2. The Appellants to pay the Respondent's costs, certified fit for one Senior Counsel and one Junior Counsel, to be assessed in default of agreement.
3. The Appeal to take its usual course.

_____

CHARMAINE PEMBERTON
COURT OF APPEAL JUDGE