

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. #2007-02343

BETWEEN

RAMPARTAP RAMESH DOON PUNDIT

RAMKUMAR DOON PUNDIT JR.

RAMONA DOON PUNDIT

Claimants

AND

RAMSEWAK DOON PUNDIT

KRISTENDAYE DOON PUNDIT also called

OMARPARTHIE DOON PUNDIT

Defendants

BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER

APPEARANCES

Ms. Kim Berkely for the Claimant.

Mrs. Annabelle Sooklal-Boynes for the First Defendant.

Ms. Leandra Ramcharan for the Second Defendant.

JUDGMENT

Introduction

1. This is an application for an order for partition in respect of a parcel of land comprising some twenty-seven acres. The defendants were the siblings of the deceased, father of the claimants.
2. The defendants and the claimants hold the land in varying proportions as joint tenants. The defendants have resisted the claim on the ground that the claimants committed destructive waste to the land. In the course of this judgment, the Court considered

whether there had been destructive waste of the subject lands and what the appropriate consequences which flow therefrom were.

Procedural History

3. On 5th July, 2007, the Claimants commenced proceedings by way of a fixed date claim form against the defendants seeking an order for the sale or partition of a parcel of land comprising some twenty-seven acres and located in the Ward of Caroni.
4. The fixed date claim was supported by the affidavit of the first claimant.
5. The claim was resisted by the affidavits of the first defendant filed on 22nd May, 2009, and of the second defendant filed on the 13th November, 2008 and the 20th September, 2007 respectively. Early in these proceedings parties made an unsuccessful attempt at mediation. There was also an attempt to join the Agricultural Development Bank of Trinidad and Tobago (the ADB) who refused to give their consent to an order for partition until the mortgage was fully liquidated. The mortgage was fully liquidated in mid 2008 and the ADB was relieved from further attendance.
6. The first defendant also relied on the affidavit of licensed land surveyor, Mr. Michael Boucaud. Mr. Boucaud swore two affidavits for use in these proceedings. The first was filed on 15th June, 2009. The second was filed just prior to trial on 18th October, 2010.
7. Altogether the following affidavits were before the Court:
 - Rampartap Ramesh Doon Pundit filed July 5th 2007
 - Rampartap Ramesh Doon Pundit filed October 4th 2007
 - Rampartap Ramesh Doon Pundit filed August 7th 2009
 - Ramsawak Doon Pundit filed June 15th 2009
 - Michael Boucaud filed June 15th 2009

- Michael Boucaud filed October 18th 2010
- Kristendaye Doon Pundit also called Omarparthie Doon Pundit filed September 20th 2007
- Ramsawak Doon Pundit filed May 22nd 2009
- Rampartap Ramesh Doon Pundit filed 17th December 2010

All deponents were cross-examined.

Facts

1. The subject lands were owned by Mr. Doon Pundit, who was the father of Ramsawak (the first defendant), Ramkumar, (father of the claimants), Omarparthie (the second defendant), Rampartap and Bissoodaye. Mr. Doon Pundit died on 28th August, 1958. His executor, by Deed of Assent #7340 of 1958, transferred the land to his children to hold same as joint tenants. The transferees were Kristendaye (the second defendant) Ramsawak (the first defendant), Ramkumar (father of the claimants) Bissoodaye Sookool and Rampartap.
2. Ms. Bissondaye Sookool by Deed No. 760 of 1980 conveyed her one fifth interest of the subject lands to all of the other four tenants except the first Defendant, thereby severing the joint tenancy in respect of her share. The claimants' father (Ramkumar Senior) by deed No 19096 of 2000 conveyed his four fifteenths interest in the subject lands to the claimants and their sister Rohini Doon Pundit to hold as joint tenants. The claimants' father therefore severed the joint tenancy in respect of his interest.

3. Rampartap died in or about 2005. Up to the time of his death, Rampartap continued to hold his original 1/5th share jointly with the defendants. He held as well, though separately, the share which had been transferred to him by Bissoondaye in 1980.
4. At the date of the commencement of these proceedings, the subject lands were held in the following proportions:
 - 8/30 share to the claimants
 - 9/30 share to the first defendant
 - 11/30 share to the second defendant
 - 2/30 share to the estate of Rampartap
5. The claimants seek an order for the sale or partition of the subject lands in accordance with the rightful shares of the joint tenants.
6. In the late 1970s the Doon Pundits collaborated in establishing a poultry farm. The first defendant expended considerable sums, levelling the land and constructing buildings for the poultry farm.
7. In 1979, the siblings, with the exception of Bissoondaye Sookool entered a partnership agreement to become partners in the business of poultry dealers. The partnership agreement was annexed to the May, 2009 affidavit of the first defendant and marked RDP 1.
8. The siblings also entered a mortgage agreement with the ADB. The ADB mortgage remained undischarged for at least two years after these proceedings were instituted. The Court directed that the proceedings be served on the ADB who refused to grant their consent to the order for partition until the mortgage was fully liquidated. In June, 2008,

the mortgage debt was fully liquidated and the ADB was relieved from further attendance.

9. The first defendant alleged without contradiction that Ramkumar, the claimants' father earned \$150,000.00 per grow out, at least five times per year. The first defendant alleged further that no monies were remitted to him pursuant to the partnership agreement. It is significant however that the first defendant indicated that he did not press his brother as he knew that the mortgage had to be repaid and the farm maintained.
10. The first claimant entered the land when he was eighteen, while his father Ramkumar ran the poultry farm. He continued to work on the land for the following four (4) years, until the death of his father.
11. The first claimant alleged that after the death of his father he was thrown off the land by his uncle Rampartap, who took over the management of the farm.
12. Rampartap died in 2005. Ramsawak, the first defendant returned to Trinidad after having lived abroad since 1956. He fell ill shortly after Rampartap died and had to be hospitalised intermittently over the following six months.
13. At this time, the first defendant entrusted the management of the farm to the second defendant. In his affidavit of 22nd May, 2009, the first defendant complained bitterly of mismanagement on the part of the second defendant, complaining also that she rented the farm without his permission. From the first defendant's responses in cross-examination however it appeared that the second defendant had been absolved of all her misdeeds.
14. Much of the defendants' objection to an order for partition arose from their complaint that the first claimant had carried out excavation works on the subject lands, had sold the excavation soil and had damaged and reduced the value of the land. It is from this

allegation that the principal issue of fact arises since the claimant responded by contending that excavation took place on a parcel of land which was distinct from the subject lands.

15. The court resolved this issue of fact by considering the evidence of the expert, Mr. Michael Boucaud in the light of the responses of all four witnesses under cross-examination. In this fact-finding exercise, the Court was mindful that it was the defendants who alleged the illegal excavation of the land and that the burden of proof was theirs.
16. The first defendant, though magnanimous in all his responses, was hazy and unclear in his answers. He was unable to assist as to events which occurred between 1956 and 2005, since he was abroad.
17. The first defendant was also unsure as to the boundaries of the disputed parcel. While admitting that the parcel was twenty-seven acres, he insisted that his father left a 40 acre parcel of land, and this was the parcel which he pointed out to the surveyor Mr. Boucaud. The evidence of the first defendant left the court with the impression that the claimant's explanation was probably correct and that a contiguous six acre parcel was really the object of the excavation¹.
18. In my view the evidence of Mr. Boucaud was equally unhelpful in that Mr. Boucaud fell short in both his written evidence and in his answers in cross-examination to confirm that the excavated land was the same land which was the subject of these proceedings.
19. In fact, some aspects of Mr. Boucaud's evidence appeared to support the claimant's case, at paragraph 6 of his affidavit filed on 15th June, 2009, Mr. Boucaud testified as follows:

¹ See the affidavit of Rampartap Ramesh Doon Pundit filed 7/08/2009.

“The excavation has taken place on the portion of the lands comprising about six acres shown on the attached plan which is bordered red but not coloured pink ...”

20. Moreover at paragraph 7 of his 15th June, 2009 affidavit, Mr. Boucaud stated that the disputed lands originally comprised thirty-four acres.² Mr. Boucaud omitted however, in both his written evidence and in the annexed survey plan to depict the twenty-seven acre parcel which is the subject of these proceedings and the excavated portion in relation to the twenty-seven acre parcel.
21. Under cross-examination, Mr. Boucaud confirmed that the excavation took place on a six acre parcel. He also admitted under cross-examination by Ms. Ramcharan learned attorney-at-law for the second defendant that there was a possibility that there had been excavation on lands other than the six acre parcel. This remained however no more than a possibility.
22. The most helpful aspect of Mr. Boucaud’s testimony was his answer given in cross-examination to learned attorney-at-law for the claimant. I have set out below an extract of the court’s record of the question and answer sequence:

Question: In your earlier affidavit a survey was produced in respect of land which is the subject lands.

Answer: Yes.

Question: In your later affidavit you referred to “the said lands ...” inferring that you were dealing with the subject land ...

Answer: Yes.

Question: Please clarify.

² See the affidavit of Michael Boucaud filed 15th June 2009

Answer: The original parcel was thirty-four acres my job was to survey the twenty-seven acre parcel.

Question: At paragraph 3 you referred to the "said lands".

Answer: The excavated portion of the land is shown on the western boundary.

Question: Is the excavated land a six acre parcel.

Answer: Yes ..."

23. In my view, Mr. Boucaud again fell short of testifying that the excavation took place on the twenty-seven acre parcel, which is the subject of these proceedings. If his evidence was valuable at all it provided some remote and hazy support for the claimant who contended that the excavation took place on a separate six acre parcel.

24. The evidence of the second defendant provided a refreshing relief from the uncertainty of the first defendant and his expert. The second defendant admitted that the claimant's father enjoyed a share in the twenty-seven acre parcel of land and that there had also been a six acre parcel. The second defendant admitted that the claimant carried out excavation works on the six acre parcel but insisted:

"... he excavated on other lands too ..."

25. Ms. Berkley, counsel for the claimant put to the second defendant the following :

"Question: The claimant excavated on the six acre parcel and not the twenty-seven acre parcel ..."

The second defendant insisted:

Answer: He excavated the twenty-seven acre parcel ..."

26. I considered the evidence of the claimant, who having admitted that he carried out excavation works, contended that the works were carried out on lands which were not the subject of these proceedings. The claimant, under cross-examination admitted that he made a decision to excavate the subject parcel. The claimant admitted that he hired Anand Persad for the excavation of the land at a charge of \$3000.00 per day. The claimant indicated that the first defendant agreed to take away the soil as payment³.
27. Learned counsel, Mrs. Boynes presented the claimant with photographs exhibited to the affidavit of the first defendant⁴. The photographs which were shown to the claimant were alleged to represent the excavated land. The claimant having seen the photograph admitted that he recognised the land and that they were the very lands on which he had carried out excavation works. In my view, this admission solved the mystery since the first defendant had identified the lands depicted in the photograph as part of the subject lands.
28. By his evidence under cross-examination the claimant admitted that following the filing of these proceedings he employed Mr. Anand Persad to carry out excavation works on the land. By his unequivocal and candid responses under cross-examination, the claimant must be regarded as having departed from the explanation provided in his affidavit of 7th August, 2009.
29. I considered the available documentary evidence, consisting of:
- i. The survey plan of Mr. Boucaud⁵.
 - ii. The Royal Crown Grant in respect of a six acre parcel which had been transferred by the late Ramkumar to the claimants⁶.

³ See notes of cross-examination on 14th October, 2010.

⁴ RDP 4 exhibited to the affidavit sworn by first defendant and filed on 22nd May, 2009.

⁵ See M.B. 2 exhibited to the affidavit of Michael Boucaud filed herein on 15th June, 2009.

30. In my view the latter supported the claimant's allegation that his late father had transferred a six acre parcel of land to him and the other claimants.

The plan annexed to the Royal Crown Grant though similar to that of Mr. Boucaud was not perfectly congruent and did not support the claimant's case that excavation was carried out on the six acre parcel as distinct from the subject twenty-seven acre parcel.

31. It is therefore my view and I find that by the claimant's admission in cross-examination, he caused excavation works to be done on the subject land. The excavated soil was given to Mr. Anand Persad as payment for the excavation works.

Issues

Issues of Fact

1. Whether the excavation of the soil was done on the subject lands or on adjoining lands as stated by the first named claimant?
2. Whether the first named claimant received remuneration from the poultry farm?

Issues of Law

3. Whether the claimants' are lawfully entitled to an order for the sale or partition of the subject lands?
4. (Providing that the first factual issue is answered in the affirmative) Whether the excavation works done on the land constitutes waste and if so, what remedies are available to the defendants as a result of the said waste.

⁶ Exhibited as RRDP1 to the 7th August, 2009 affidavit of the Claimant.

5. Whether the court can lawfully reduce the claimants' interest in the subject lands to set off the profits obtained by their father from the poultry farm, which were not shared with the first defendant?

Law

Partitioning

6. **Section 3** of the **Partition Ordinance**⁷ states:

In a suit for partition, where, if this Ordinance had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.

Waste

7. **Halsbury's Laws of England**⁸ defines waste as "any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land. The obligation not to commit waste is an

⁷ Partition Ordinance of Trinidad and Tobago Chapter 27 No. 14

⁸ *Halsbury's Laws of England Volume 27 (1) 2006 Reissue par 431*

obligation in tort, and is independent of contract or implied covenant.” *Halsbury’s Laws of England*⁹ goes further to describe voluntary waste as “the doing of some act which tends to the destruction of the premises”.

Paragraph 432 states:

“ It seems that an act does not constitute waste unless it is in fact injurious to the inheritance, either by diminishing the value of the estate, or by increasing the burden upon it, or by impairing the evidence of title. At any rate, in the case of acts which may be technically waste but in fact improve the inheritance ('meliorating waste'), the court will not interfere to restrain them by injunction, nor will they be a ground of forfeiture under a proviso for re-entry on commission of waste.”

As to a tenant’s liability for committing acts of waste **paragraph 435**¹⁰ reads:

“Whether the liability of the tenant is founded on waste or on implied contract, it may be enforced either by an injunction or damages. Damages may be given for waste completed at the time of the beginning of the proceedings; and an injunction may be granted against further waste... A claim for waste is a claim in respect of a tort. The measure of damages is accordingly the injury to the reversioner, and it is measured by considering the depreciation of the selling value of the reversioner's interest.”

⁹ *ibid*

¹⁰ *Halsbury’s Laws of England Volume 27 (1) 2006 Reissue par 435*

8. The defendants relied on the cases of *Jacobs v Seward*¹¹ and *Job v Potton*¹² to support the contention that the plaintiff had committed waste. In *Jacobs v Seward*¹³ A and B were tenants in common. C held the land under A and B demised the premises to D. D cut, carried away and stacked grass from the lands to make hay. The Lord Chancellor (Lord Hatherly) indicated that so long as a tenant in common exercises his rights lawfully as a tenant in common no action can lie against him by his co-tenant. However, where the co-tenant has done something which has destroyed the common property, such acts would be actionable. The making of hay was a lawful use of the land and so an action in trover was not maintainable by C. The only remedy was to proceed for an account.
9. In *Job v Potton* the plaintiff was a tenant in common of a coal mine with two others. In 1865 the co-tenants leased two undivided thirds of the coal with license to work the coal to another (licensee). Under this license some coal, but much less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the Plaintiff filed the bill against his co-tenants and the licensee, seeking an inquiry as to the value of the coals raised and an account against all the Defendants as trespassers for an injunction and receiver and for damages:-

The court came to the conclusion that:

¹¹Jacobs v Seward (1871-72) LR 5 HL 464

¹²Job v Potton (1875) L.R. 20 Eq. 84

¹³Jacobs v Seward (1871-72) LR 5 HL 464

*“It was not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coals, he, the working tenant, not appropriating to himself more than his share of the proceeds.”*¹⁴

Account for Profits

10. The defendants also cited the cases of *Leigh v Dickeson*¹⁵, *Job v Potton*¹⁶ and *Re Pavlou*¹⁷ in support of their contention that the claimant's should be made to account for the profits.

11. In *Leigh v Dickeson*¹⁸ the plaintiffs, trustees of a lady named Eyles sought to recover from the defendant the sum of 24*l.* 9*s.* 6*d.*, which they alleged were due to them from the defendant for the use and occupation by him of a house.

12. Mrs. Eyles was entitled to an undivided three-fourths of the house as tenant in common with another. She, by lease let her interest in the said house. This lease was subsequently assigned to the defendant. The defendant later purchased the one-fourth interest of the other tenant in common. The lease expired, but the defendant continued in possession. Pollock, B., came to the conclusion that the occupation by the defendant, which occurred after the expiration of the lease must be referred, not to his right as tenant in common, but to his continuing in occupation as tenant at sufferance. He therefore gave judgment for the plaintiffs for 24*l.* 9*s.* 6*d.*, the amount claimed for use and occupation.

¹⁴ Job v Potton (1875) L.R. 20 Eq. 84 at page 84

¹⁵ Leigh v Dickeson (1884-85) LR 15 QBD

¹⁶ Job v Potton (1875) L.R. 20 Eq. 84

¹⁷ Re Pavlou [1993] 1 W.L.R 1046

¹⁸ Leigh v Dickeson (1884-85) LR 15 QBD

13. The defendant by way of set-off and counter-claim sought to recover from the plaintiffs 80l., which, he allegedly expended in substantial repairs and improvements to premises since the expiration of the lease. Pollock, B., was of opinion that the set-off and counter-claim could not be sustained in law, and gave judgment upon it for the plaintiffs.

14. On appeal by the defendant the court held that:

“Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common who was lessee continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor. One tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution.”¹⁹

15. In *Re Pavlou*,²⁰ a husband and wife were joint tenants of a house and resided there for 10 years, after which the husband left. The wife continued to live in the home and paid the mortgage and effected major repairs. Three years after the husband’s departure the wife petitioned for a divorce and obtained a decree nisi. One year later a bankruptcy order was made against the former husband and the joint tenancy was thereby severed. It was agreed that there must be an equitable account to determine the wife’s fair share. On the question from what date the accounting should begin, the court held that:

“For the purposes of equitable accounting there was no distinction to be made between beneficial tenancy in common and beneficial joint tenancy; that the

¹⁹ Leigh v Dickeson (1884-85) LR 15 QBD at page 60

²⁰ Re Pavlou [1993] 1 W.L.R 1046

guiding principle was that an allowance should be made for expenditure by one of the co-owners which resulted in an increased value of the property held by them at the time of the partition suit or order for sale; that the wife was entitled to credit for one half of the increase in value of the home, if any realised as a result of her expenditure before and after the bankruptcy order on repairs and improvements , or half her actual expenditure if less, and for one half of the increase in the value of the equity of redemption resulting from the capital element of the mortgage payments; that, in relation to the interest element of the mortgage payments and the wife's sole occupation of the home after her husband had left, in the absence of agreement between the parties, there would have to be an inquiry whether an occupation rent should be set off against the mortgage interest payments; and that accounts and inquiries would be ordered accordingly."²¹

Reasoning and Decision

1. On the date of the commencement of these proceedings, the claimants and the defendants held the subject parcel of land as joint tenants. In determining whether the claimants are entitled to the order of partition which they seek, the court considered whether they were responsible for waste on the subject land.

2. Destructive waste has been defined in this way in ***Job v Potton***²² at page 92 in this way:

*"Destructive waste is not the mere taking of the inheritance it means taking it unseasonably and improperly ..."*²³.

²¹ Re Pavlou [1993] 1 W.L.R 1046 at page 1046

²² Job v Potton (1875) L.R. 20 Eq. 84

²³ Job v Potton (1875) L.R. 20 Eq. 84 at page 92

3. Similarly in *Jacobs v Seward*²⁴ at page 474, Lord Chancellor Hatherly referred to cases where something has been done which “*destroyed the common property or where there has been a direct and positive exclusion of a co-tenant in the common property he seeking to exercise his rights therein and being denied the exercise of such rights...*”²⁵
4. I considered whether the defendants had succeeded in substantiating either of the two allegations which were made in these proceedings that the claimants had committed destructive waste:
 - i. that the father of the claimants had reaped all the profits accruing to the farm between 1976 and his death.
 - ii. that the value of the land was diminished by the excavation works carried out by the first claimant.
5. In respect of the monopolising of profits, it is my view that this did not amount to an exclusion of the defendants from the land. There was no evidence that the defendants had in fact been excluded from the land. Moreover, it had been open to them to commence proceedings to enforce the partnership agreement had they so chosen. The defendants never availed themselves of this opportunity.

The reason may have been as stated by the first defendant that he was aware that they had to pay the mortgage and maintain the farm²⁶. Accordingly it is my view that the defendants have failed to substantiate their argument that the claimants derived a benefit which was disproportionate with their legal interest in the subject lands.

²⁴ *Jacobs v Seward* (1871-72) LR 5 HL 464

²⁵ *Ibid* at 474

²⁶ See the affidavit of Ramsawak D.P. filed on 22nd May, 2012.

6. I turn now to consider the defendant's allegation of destructive waste by excavation. I have found earlier in this decision that on a balance of probabilities excavation had been carried out on the subject lands by and on behalf of the first claimant.
7. The user of land by a co-owner is not classified as destructive waste, if it constituted a lawful use of the land. Thus, in both cases cited on behalf of the first defendant, there was a finding that there was no waste because the user by the co-owner was a lawful use of the land. An action in trover was not maintainable. See *Jacobs v Seward*²⁷ and *Job v Potton*²⁸.
8. By contrast, the user in the proceedings before me was completely incompatible with the original user, which was for the establishment and maintenance of a poultry farm. Moreover, it was admitted by the claimant under cross-examination that the excavation created a sheer cliff between the excavated area and the highest point on the remaining land. This in my view resulted in alterations which diminished rather than enhanced the value of the land.
9. The Court was mindful that the claimants contended that the changes effected by the excavation enhanced the value of the land. In the absence of expert evidence to support of the claimant's contention, it is my view that the contention is dissonant with common experience. The difference in heights will render the land useless as a poultry farm. Additionally, the excavation, which left in its wake drastic differences in land levels, will undoubtedly create a real risk of flooding. In my view therefore it is artificial to suggest that the excavation was anything but destructive.

²⁷ *Jacobs v Seward* (1871-72) LR 5 HL 464

²⁸ *Job v Potton* (1875) L.R. 20 Eq. 84

10. The claimant contends further that the proper remedy open to the defendants was an action in tort. This argument was undoubtedly based on two of the authorities cited and relied upon by the first defendant.²⁹ The defendants however, seek not a remedy in tort but a direction from the Court for an equitable account to be taken.
11. The first defendant has provided authority in the decision of in *Re Pavlou*³⁰ in support of the proposition that the court is entitled to direct that there be equitable accounting together with an order for partition. In my view this is an equitable remedy and the Court will be mindful of equitable maxims in granting this remedy.

Orders

12. I will therefore direct that an account be taken of the devaluation which was caused to the subject premises by reason of the unlawful excavation by the claimant.
The claimants are ordered upon such enquiry to pay to the defendants the amount in question.
Upon completion of payment pursuant to the enquiry, the court directs and orders that the subject lands be partitioned according to portions held by each party.³¹

Dated this 31st day of May, 2012.

M. Dean-Armorer
Judge³²

²⁹ Jacobs v Seward (1871-72) LR 5 HL 464/ Job v Potton (1875) L.R. 20 Eq. 84 supra at 27 and 28

³⁰ Re Pavlou [1993] 1 W.L.R 1046

³¹ Portions not in dispute. See Paragraph 4 page 5 of 25

³² JRA- Kendy Jean
Judicial Secretary- Irma Rampersad