IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF THE CO-OPERATIVE REPUBLIC OF GUYANA

CCJ Appeal No CV 12 of 2007
GY Civil Appeal No 35 of 2002

Lots 37, 38, 39 and plot 'a' being portion of lot 40 section 'A' Plantation Caravan of lot no. 68, situate on the left bank of the Corentyne River, in the County of Berbice and Republic of Guyana, the said lots being laid down on a plan by Arthur Sookram, Sworn Land Surveyor dated the 18th June, 1998 and deposited in the Department of Lands and Surveys on the 22nd October, 1998 and recorded as Plan No. 28329

AND

In the matter of Title to Land (Prescription and Limitation) Act Chapter 60:02 of the Laws of Guyana

AND

In the matter of the Petition by **LACKRAM BISNAUTH**, deceased by his duly substituted Executor **EDWARD JONATHAN** by Order of Court dated the 21st day of July, 2000 **APPELLANT**

AND

RAMANAND SHEWPRASHAD and **RAJWATTIE BISNAUTH** appearing by their duly constituted Attorney **SOHAN** by Power of Attorney No. 624 of 1999 (Berbice) of 21st May, 1999. **RESPONDENTS**

Before The Honourables **Mr Justice Nelson**
Mr Justice Pollard
Mme Justice Bernard
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Roopnarine Satram and Mr Chandraprakesh Satram for the Appellant

Mr Khemraj Ramjattan and Mr Neil Persram for the Respondents

JUDGMENT
of Justices Nelson, Pollard, Bernard and Hayton
delivered jointly by
The Honourable Mr Justice Duke Pollard and Mme Justice Desiree Bernard
on the 30th day of June 2009
and
JUDGMENT
of The Honourable Mr Justice Jacob Wit

JUDGMENT

[1] The genesis of this appeal can be traced to the occupation of four lots of land situate at Lot 68 Village, Corentyne, Berbice, by Lackram Bisnauth (hereinafter "Lackram"). He sought to obtain ownership of these lots by prescription, and in December 1998 filed a petition for a declaration of title. Sadly, he died in January 2000. The respondents entered an opposition to the petition, and after a contested hearing in the Berbice High Court, on 23rd April, 2002 the Commissioner of Title and Judge of the Land Court dismissed the opposition to the petition and declared that the estate of Lackram had acquired absolute title to the said lots of land, and that Edward Jonathan, the appellant, in his capacity as executor of the estate of the deceased, was entitled to a conveyance thereof.

[2] The respondents filed a notice of appeal against the decision of the Commissioner of Title, and on 13th June, 2007 the Guyana Court of Appeal allowed the appeal. On 10th October, 2007 the Court of Appeal granted leave to appeal to this Court and on 24th October, 2007, a notice of appeal was filed in which the appellant challenged the findings of the Court of Appeal, inter alia, in relation to his possession of the land for the statutory period in the absence of any evidence that he had abandoned possession of the property.

[3] On 3rd April, 2009 this Court dismissed the appeal after hearing submissions from Counsel for the appellant and for the respondent. We undertook to deliver reasons for the decision, and now proceed to do so.

Background

[4] It is common ground that in 1957 Lackram was allowed into possession by his mother, Janki Hanoman, (hereinafter "Janki") the title holder, of part of lot 40 on which he constructed a wooden house. He occupied the house with his wife Arlene Bisnauth and their eight children. In or about 1960 he entered into possession of lots 37, 38 and 39 with his mother's permission. Lackram alleged in his petition that his occupation of the said property was "in open adverse (sic) over the whole of the said property and has exercised and still continues all acts of full ownership over same

since the year 1957 unto the present time, *nec vi, nec clam, nec precario*" and that he "enjoyed and still continues to enjoy the peaceful and quiet possession and occupation of the said property …" Such acts of ownership as particularised in his petition, Lackram claimed to have carried out on the lands during the period 1957 to 1999 "free from any interruption by any person or persons whomsoever."

[5] However, on the basis of the testimony of Arlene Bisnauth, wife of Lackram, found to be credible by the learned judge of the Land Court, it was established that between 1957 and 1981 Lackram paid to Janki yearly an amount of $50 when he occupied part of lot 40 and $100 yearly when he extended his occupation to lots 37, 38 and 39. It is noteworthy that nowhere in the pleadings of either party is there any claim that Lackram paid rent or made any payments for the lands. These lands were transported to the respondents by Janki in 1996 when Lackram allegedly refused to buy them. Lackram paid the above-mentioned amounts to Janki until 1981 when he took his wife and the majority of his children to the United States of America, and on a return visit in 1982 took his mother, Janki, with him. Lackram's three sons remained in the house until 1983 when he returned for them. Thereafter his niece, Venus occupied the house.

[6] On one of the periodic visits which Lackram made to Guyana he met and became friendly with a young lady named Savitri Persaud who testified on behalf of the respondents, but whom the trial judge found to be credible. She claimed that they met in March 1984 and lived together for a few months in his house on lot 40. When he left she continued to reside there until 1994 during which time he returned on several occasions and stayed there with her. In 1996 the house which was constructed by Lackram in 1957 was demolished and replaced by another house which he bought. He and Savitri continued to cohabit in the new house until 1998. In 1999 he became ill and was taken back to the U.S.A. where he died on 15th January, 2000. In 1998 he had instituted proceedings in the Land Court for a declaration of prescriptive title to the lands which had been transported by Janki to the respondents in 1996.

ISSUES

(i) Was there an intention by Janki and Lackram to enter into legal relations between 1957 and 1981?

[7] The learned trial judge of the Land Court found "as a fact from the evidence adduced that Janki Hanoman, the mother of the Petitioner Lackram Bisnauth, had ceased to exercise any or all of her possessory rights to the said land as from the year 1982 when she migrated to the U.S.A. and that any tenancy at will which may have existed prior to that date had come to an end."

[8] The Court of Appeal, in allowing the appeal and overruling the decision of the trial judge, found that Lackram was a tenant from year to year and that the tenancy was determined by implication when Lackram and Janki emigrated to the U.S.A. in 1982 "and possession of the property reverted to the title holder," Janki. The Court of Appeal further held "(t)here appears to be no relationship of landlord and tenant from 1982 between the petitioner and title holder despite the fact the Commissioner found that the respondent was in exclusive possession of the property when the respondent abandoned the tenancy."

[9] In our opinion the courts below fell into error in finding that there was a tenancy between Janki and Lackram during 1957 and 1981. Indeed, on the basis of the facts established by evidence, the ordinary requirements of a tenancy were palpably lacking. The traditional distinction between a tenancy and a licence of land lies in the grant of land for a period at a rent with exclusive possession as opposed to mere permission to be on the land. Admittedly Lackram's petition alleged no tenancy, but nowhere in the said petition is there any claim by him that his occupancy and possession of the property were exclusive. In this connection it is important to bear in mind that a tenancy as defined in Section 3 of the Landlord and Tenant Act Cap. 61:01 stipulates "exclusive possession" as a requirement of such an arrangement. Section 3(2) of this enactment provides:

> "A tenancy from year to year is a holding of land or buildings under a contract, express or implied, for the exclusive possession thereof for a term which may be determined at the

> end of the first year or any subsequent year of the tenancy either by the landlord or the tenant by a regular notice to quit."

Similarly, in sections 3(1), (3) and (4) the requirement of exclusive possession was posited for other types of tenancies.

[10] However, the test of exclusive possession is not determinative of a tenancy even where it is coupled with the payment of rent if there is no clear intention by the parties to create legal relations.[1] In *Romany v Romany*[2] Georges, J.A. in the Court of Appeal of Trinidad and Tobago, had this to say:

> "Recent authority makes it clear that in family situations … where one member helps another in a period of difficulty over accommodation there is usually no intention to create legal relationships, so that there can be no tenancy at will but merely a licence."

Similar sentiments were expressed by Lord Denning in *Isaac v Hotel de Paris Ltd.*,[3] who found that:

> "the circumstances and conduct of the parties show that all that was intended was that the defendant should have a personal privilege of running a night bar on the premises with no interest in the land at all."

[11] By analogous reasoning it does appear that Lackram, the eldest son of Janki, was allowed to construct a house on part of lot 40 for himself and family after he was married as a personal privilege which incurred no transfer of an interest in the land. Indeed, the familial relationship which Lackram never disclosed in his petition raises a presumption of an intention not to create legal relations. The relationship supported inferentially the status of licensor and licensee, and appears to invoke unequivocally dicta of Lord Greene M.R. in *Booker v Palmer* (supra) to the effect that "(t)here is one

[1] Booker v Palmer [1942] 2 All ER 674 ; Errington v Errington & Woods [1952] 1 K.B., 290; Cobb v Lane [1952] 1 All ER 1199; Abbeyfield (Harpenden) Society Ltd v Woods [1968] 1 WLR, 374; Shell Mex & B.P. Ltd v Manchester Garages Ltd [1971] 1 All ER, 841; Edwards v Brathwaite (1978) 32 WIR 85; Street v Mountford (1985) AC 809
[2] (1972) 21 WIR 491 at 494
[3] (1960) 1 WIR 23

golden rule … that the law does not impute an intention to enter into legal relationships where the relevant circumstances and the conduct of the parties negative any such intention."

[12] If Lackram and Janki had considered the arrangement to be a tenancy, it is reasonable to assume that there could have been some evidence of payment of rent. Equally there is no evidence that Lackram paid rates on the land except for one receipt of dubious legitimacy issued by the Neighbourhood Democratic Council in 1994. In any event, the payment of rates is not conclusive evidence of possession or ownership. (See *Bazil and Another v Wharton*[4]).

(ii) Did Lackram continue in possession as licensee with Janki's express or implied consent after 1981; if not, was he in adverse possession to her title between 1982 and 1999?

[13] In order for Lackram to succeed in his petition, he must establish to the satisfaction of this Court that he fulfilled the relevant requirements of Sections 3 and 10(1) of the Title to Land (Prescription and Limitation) Act Chapter 60:02. The provisions of Sections 3 read as follows:

> *"3. Title to land (including State land or Government land) or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for thirty years, if such possession, user or enjoyment is established to the satisfaction of the Court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose:*
>
> *Provided that except in the case of State land or Government land, such title may be acquired by sole and undisturbed possession, user or enjoyment for not less than twelve years, if the Court is satisfied that the right of every other person to recover the land or*

[4] (1992) 47 WIR 238

interest has expired or been barred and the title of every such person thereto has been extinguished.

…

10. (1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession") and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land."

[14] The Court needed to be satisfied that between 1982 and 1999:

(1) Lackram was in sole and undisturbed possession, user or enjoyment of the land for not less than twelve years, his possession being the possession of a person in whose favour time can run, and that the right of every other person to recover the land or interest had expired or been barred and extinguished;

(2) such possession, user or enjoyment was not taken or enjoyed by fraud or by some *consent* or agreement *expressly* made or *given* for the purpose.

[15] Having regard to the relationship existing between the parties which was clearly evidenced in Lackram's action of taking his mother, Janki to the U.S.A. in 1982, it does appear to be the subject of a reasonable inference that the very thought of Lackram excluding Janki from the property would have been anathema. In any event, irrespective of the characterisation accorded to them, those payments by Lackram to Janki in respect of the lots, as mentioned above at [5], if established, conclusively constituted an acknowledgment by Lackram of Janki's title thereby precluding a viable claim for adverse possession, his possession being by virtue of Janki's express consent (see: Section 3 of the Title to Land (Prescription and Limitation) Act, Cap. 60:02, supra).

[16] In relation to the period 1982 to 1999 both courts below still laboured under the misapprehension that a tenancy existed between Janki and Lackram. The trial judge found that Lackram's holding over without payment of rent after 1981 created a tenancy at will by implication. The Court of Appeal held that the yearly tenancy terminated in 1982 resulting in possession of the property reverting to Janki; and there was no evidence that Lackram was in possession of lots 37, 38 and 39 between 1982 and 1999 despite a claim in paragraph 4 of the petition to the contrary.

[17] In the view of this Court there was nothing to displace Lackram continuing as licensee with Janki's consent after 1981. He resided for most of the time in the U.S.A., and returned to reside permanently in Guyana only in 1996. It follows therefore that his possession as such was not the possession of a person in whose favour the period of limitation could run.

[18] The determinative provisions of section 3 of the Guyana Title to Land (Prescription and Limitation) Act, Cap. 60:02, and the earlier Ordinance of 1916 eschew employment of the terminology "adverse possession" and speak of "sole and undisturbed possession, user or enjoyment for not less than twelve years, if the Court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has been extinguished."

[19] In an attempt to elucidate the applicable law in Guyana, this Court in *Toolsie Persaud v Andrew Investments Ltd and Others*[5] in addressing the issue of adverse possession maintained:

> "the position is that a claimant to land by adverse possession needs to show that for the requisite period (he and any necessary predecessor had:
>
> (i) a sufficient degree of physical custody and control of the claimed land in the light of the land's circumstances ("factual possession");

[5] (2008) 72 WIR 292, CCJ Appeal No. CV 1 of 2007

(ii) an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land ("intention to possess")".

[20] This Court was also careful to point out that in effecting entry to the land it was not important whether the intended possessor was aware of his wrongful act or entered the land under the mistaken belief that he had a legitimate right to enter, provided that such entry was not referable to an agreement or permission of the true owner. Over thirty years earlier Crane, J.A. in *Gobind v Cameron*[6] emphatically stated that "the modern notion of adverse possession is to be found in s. 10 (1) of Cap. 184(G) where it can be seen that the concept is now merely a useful expression to describe the possession of those against whom the true owner has a right of action by accrual of time"; and the effect of the Limitation Act is to "substitute for a period of adverse possession in the old sense a simple period of time calculated from the accrual of the right of action," without qualification. In spite of this the old mantra of "*nec vi, nec clam, nec precario*" continues to be utilised in petitions for declaration of title.

[21] Although Lackram alleged in his petition that he exercised "all acts of full ownership" over the lands, such acts of ownership as described did not extend from 1957 to 1999 in respect of all of the four lots. It is doubtful whether any cultivation of lots 37, 38 and 39 took place until his permanent return to Guyana in 1996 and this is borne out by an examination of the Commissioner of Title's inspection report on 17th December, 2001.

[22] Applying the law to the facts established in evidence, this Court has determined that between 1982 and 1999 Lackram was not in adverse possession for the prescribed period or at all. He never alleged in his petition that he was ever in sole or undisturbed possession of the lands in dispute, and assuming, but not accepting, that he was ever in sole or undisturbed possession of the lands, he was never in a position to establish to the satisfaction of the Court that such possession was uninterrupted for the prescribed period especially between 1982 and 1996 when he was still residing in

[6] (1970) 17 WIR 132

the U.S.A. Further, even assuming, but not conceding, that he was in exclusive, continuous possession of the lands for a period in excess of twelve years, such possession was referable to the implied licence and continued consent of Janki in the absence of evidence to the contrary. This operated to preclude time running against her and in favour of Lackram for any period between 1982 and 1999. In the premises this Court is constrained to conclude that at no time between 1982 and 1999 was Lackram in adverse possession to the title of Janki.

Compliance with Applicable Procedures for Declaration of Prescriptive Title

[23] Both the learned judge of the Land Court and Kissoon, J.A. in the Court of Appeal commented adversely on the failure of both Counsel for the petitioner and opposers to follow the required procedure in such matters. In fact, Kissoon J.A. discussed in rather great detail the need for strict compliance with the Rules of the High Court (Declaration of Title), and quoted extensively from the judgment of Langley, J. in the case of *Incorporated Trustees of the Diocese of Guiana v McLean*[7] who expressed this view in relation to the filing of petitions for prescriptive title:

> "It is clear that the procedure did not contemplate these documents being regarded as preliminary to the appearance of a series of witnesses for either or both parties at the hearing. It was intended that all normal cases should be heard and determined solely on evidence by affidavit. In exceptional cases, additional oral evidence might be adduced, but that event should not be allowed to provide a means of importing new issues which either party may not be prepared to meet."

[24] The learned judge in that case with considerable hesitation allowed the additional oral evidence to be led, but stressed that he decided to do so solely because the petition and supporting affidavit were so deficient in supplying material evidence that he would have had no option but to dismiss the petition without hearing the opposition on the ground of lack of essential evidence.

[7] (1939) LRBG 182

[25] Similar observations could have been made in relation to the petition in this appeal. It lacked specificity on important and material details, such as Lackram's relationship with the true owner or the circumstances of his occupation of the lands. These details may have avoided the irreconcilability of the facts in the petition with Arlene's evidence of Lackram's occupation of the lands with his mother's consent. As it stood and applying the reasoning of Langley, J., the petition ought to have been dismissed either at the court of first instance or by the Court of Appeal.

[26] For all the foregoing reasons, the appeal was dismissed with costs agreed at $300,000.00.

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ

[27] I agree with the judgment delivered by Pollard and Bernard JJ. I think, however, that it would be useful and fitting to make some remarks about the law of acquisitive prescription in Guyana from the perspective of Roman-Dutch law which undoubtedly underlies much of its contents. More particularly, my remarks are prompted by the puzzling fact that despite several fundamental legislative changes in this area, the humming of the old mantra of possession *nec vi, nec clam, nec precario* still reverberates, almost incessantly, from the temples of Guyanese Justice as if time has stood still.

[28] The concept of possession *nec vi, nec clam, nec precario*, usually translated as possession of a thing not by force, nor by stealth nor by consent (or, also, more positively, as of right) goes back to the Roman Republic from before the Common Era. It was the kind of possession of things, movable or immovable, which in the eyes of the Roman jurists deserved to be protected against attacks and which, subject to certain conditions, could properly be transformed into *dominium* or (full) ownership of the thing. The concept is, *inter alia*, mentioned by Cicero in several of his writings (*Pro M. Tullius Oratio*, 19-44, 45, en *Pro A. Caecina Oratio*,92). It can also be found in the Institutes of Gaius, and, in "codified" form, in the *Corpus Iuris Civilis* of Justinian (*inter alia* in the Institutes, Book IV, tit. 15, 4a, and, with respect to servitudes, in Digest 39.3.1.23).

[29] It is from these sources that it entered Roman-Dutch law which basically governed Guyana until 1917 and, so far as incorporeal rights as easements are concerned, through Bracton, Littleton and Coke, also English law where it still survives in a quiet corner of the land law.

[30] Roman law knew several forms of acquisitive prescription the oldest of which was called *usucapio*. Thereafter the *praescriptio longi temporis* and, under Theodosius II, the *praescriptio longissimi temporis* (with a prescription period of thirty years) were developed. The latter was actually a combination of both acquisitive and extinctive prescription and is very similar to the later Roman-Dutch institution of "lange verjaring" which required a prescription period of one third of a century. Interestingly, both in South Africa (where Roman-Dutch law is still the common law) and in Guyana, a period of one third of a century was required in the case of immovables (the thirty year period was in South Africa originally reserved for movables until 1865 when it was adopted for both movables and immovables).[8]

[31] It is important to realise that in order to acquire *dominium* through prescription, Roman-Dutch law neither required a legal title (*justus titulus* or *causa iusta*) nor *bona fides* at the time possession of the land was taken. [9] What was required, however, was a particular category of possession (*possessio civilis*) in a certain form (*nec vi, nec clam, nec precari*o) during the prescription period. I will discuss these concepts later on but first I will have a look at the way the legislature in Guyana has dealt with the subject of acquisitive prescription. In that context it is also useful to observe how other legislatures from mixed jurisdictions with a Roman-Dutch background, notably those from South Africa and Sri Lanka, have dealt with it.

[32] Section 4(1) of the Civil Law of British Guiana Ordinance, 1916 provided that "(t)itle to immovable property … or to any easement, profit *a prendre*, servitude or other right connected therewith may be acquired by sole and undisturbed possession for

[8] C.G van der Merwe, M.J. de Waal and D.L. Carey Miller, *International Encyclopedia of Laws, Property and Trust Law, Supplement 2 South Africa, Prescription*, Nos.330, 331, LL.C. Dalton, *The Civil Law of British Guiana*, p. 30, see also Fenton H.W. Ramsahoye, *The Development of Land Law in British Guiana*, pp. 249-252, although incorrectly as to the original prescription period in Guyana which he states was "a quarter of a century."

[9] Van der Merwe, *op.cit.* , No. 334, Silberberg and Schoeman, *The Law of Property*, Fifth edn, LexisNexis Butterworths, pp. 160, 161.

thirty years." Although this provision did not mention the *nec vi, nec clam, nec precario* requirement, Guyanese jurists and courts kept reading these words into the text.[10]

[33] This continued until 1952 when the Title to Land (Prescription and Limitation) Ordinance, an amalgam of Roman-Dutch law and English law, entered into force. Section 3 of this Ordinance (now an Act) provides that title to land (other than State land or Government land for which the prescription period is thirty years) or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for twelve years, if (1) such possession, user or enjoyment (a) is established to the satisfaction of the Court, (b) was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose, and (2) the Court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has expired (which would not be the case if the person to whom such right accrued was a minor or of unsound mind in which case the prescription period will be extended up to a maximum period of thirty years).

[34] Initially, the Guyanese courts seemed to have acknowledged that this change in the legislation meant the end of the *nec vi, nec clam, nec precario* requirement and consequently of the need to plead it.[11] At some point in time, however, the mantra appears to have emerged again in judicial decisions. And the practice of pleading it in petitions for a declaration of title to land seems never to have ceased. These Latin words can still regularly be found in the affidavits of simple petitioners who want to prescribe the land they are living on. This practice, whether based on the law or not, does not therefore contribute to a truthful and relevant account of the facts which are necessary to establish whether or not the petitioner has properly acquired the ownership of the land he has in possession.

[35] In South Africa the Roman-Dutch prescription received its first statutory underpinning in section 2(1) of the 1943 Prescription Act which defined acquisitive

[10] See Dalton, op.cit., p . 31
[11] See eg Hughes and Stoby JJ in *Inderjeet Tackorie v Port Mourant Ltd* (1954), L.R.B.G. 111 and Luckhoo C (Ag) in *Li v Walker* (1968) 12 WIR p 126

prescription as "acquisition of ownership by the possession of another's movable or immovable property … continuously for thirty years *nec vi, nec clam, nec precario*." This Act which actually contained the sacred words themselves was superseded by the 1969 Prescription Act which did not reproduce them. Section 1 of that Act provides that "(a) person shall by prescription become the owner of a thing which he has possessed *openly* and *as if he were the owner thereof* for an *uninterrupted period of thirty years*..". [12]

[36] In Sri Lanka (Ceylon as it was then called) prescription got a statutory form as far back as 1822. Section 3 of the Prescription Ordinance (No. 22 of 1871), now an Act, requires for positive prescription "undisturbed and uninterrupted possession … by a title adverse to or independent of the claimant or plaintiff (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgement of a right existing in another person would fairly and naturally be held)." [13]

[37] It is clear, therefore, that in none of the Roman-Dutch based mixed legal systems the *nec vi, nec clam, nec precario* mantra has eventually survived in a legislative form. This gives rise to the question whether, perhaps, it may have survived in another way and if so, to what extent?

Nec vi:

[38] In Roman law stolen property (*res furtivae*) or property obtained by force (*res vi possessae*) could never be acquired by prescription, at least not by the thief or robber himself. This seems to have been the position also in early Roman-Dutch law, although as early as the 17th century there have been jurists who were of the view that prescription could also run in favour of a thief or a robber (Mattheaus, *De Auctionibus* 2 7 84 84*; Paroemia* 9 2 3). Later the original position was completely abandoned. It has long since generally been accepted by the Roman-Dutch writers that stolen property or property obtained by force or violence can be acquired by the thief or

[12] Van der Merwe, op.cit., Nos. 332,333, Silberberg and Schoeman, op.cit., p 161
[13] David L. Carey Miller, *Three of a kind? Positive Prescription in Sri Lanka, South Africa and Scotland*, in *Electronic Journal of Comparative Law*, vol.12.1 (May 2008), pp. 1-21

robber provided that he subsequently **possesses** it without force and openly for an uninterrupted period of thirty years or a third of a century, as the case may be.[14] This was the position of the Roman-Dutch law when the Civil Law Ordinance, 1916, came into being. Therefore, at that point in time the question whether possession of the land was **acquired** by force or violence had long since become irrelevant (as was recently affirmed for Guyanese law by this Court in the case of *Toolsie Persaud v Andrew Investments Ltd and Others*)[15]. The question was simply whether the possession of the land itself was "without force." And in South Africa, after 1969, even that requirement was abolished.

[39] As stated above, the Guyanese legislation requires the possession to be "undisturbed." At first sight, this would suggest that in Guyana the *nec vi* requirement might have survived in that particular form. Undisturbed possession is however not synonymous with *nec vi* or peaceful possession. It may be recalled that in Sri Lanka "undisturbed and uninterrupted possession" is required for acquisitive prescription. It appears that the former expression is more or less subsumed in the latter one: "Neither the statute nor the Sri Lanka courts have adverted to the need to prove possession *nec vi* in order to acquire a prescriptive title. It appears, therefore, that the use of force in the possession of property will not jeopardize a prescriber's claim to title."[16] In *Shaw v. Garbutt*, an Australian case, Young J. after an extensive review of authorities from India, Canada and the USA concluded that "peaceable possession" was synonymous with "uninterrupted possession."[17] It is particularly in this sense that the possession must be "continuous."

[40] It would seem that such is also the position in Guyanese law. As follows from section 11 of the Title to Land (Prescription and Limitation) Act, an interruption can either be in the form of an entry or actual dispossession (other than a formal entry) or abandonment, or in the form of an action to recover the land (to be distinguished from a mere claim on the land). In Roman-Dutch law (and in civil law in general) these forms of interrupting the prescription are called natural interruption on the one hand

[14] Van der Merwe, op.cit., No. 336, Silberberg and Schoeman, op.cit., pp. 164, 165
[15] (2008) 72 WIR 292, CCJ Appeal No. CV 1 of 2007
[16] Shirani Ponnambalam, "'Adverse Possession' – A Basis for the Acquisition of Title to Immoveable Property" (1979) 5 *Colombo Law Review* 57, 67 as quoted by Carey Miller, op.cit., p 12
[17] [1996] NSWSC 400 (3 September 1996)

and civil or judicial interruption on the other hand. It is trite law that the latter can only materialise if the action is successful and if it is acted upon. It is equally trite law that the action can only be successful if it is brought against the person who is actually prescribing through possession.[18]

Nec clam:

[41] The Guyanese legislation does not mention as a requirement for prescription that the possession has to be "open" or "notorious", even though it does say that possession of the land should not have been "taken or enjoyed by fraud" which indicates that the possession should not be "concealed." Apart from these express words, it would seem that the legislation clearly implies that the possession of the land must have been open and for everyone to see. This flows from the definition of possession both in the common law sense of adverse possession as in the civil law sense of *possessio civilis*. Both concepts have a factual component and a mental component: (1) actual, effective and therefore **visible** control over a thing and (2) a certain intention or *animus* which will have to be **manifested** by conduct and utterances which are usually the same acts that constitute the required level of control.[19] It also flows from the fact that the kind of possession capable of being upgraded to "ownership" will, at least as a rule, commence at the same moment that time starts to run for the "true owner" to file an action against the prescriber. It is obvious that this would imply that the "true landowner" should at the very least be able to know that the clock is ticking for him so that he "can know that he must take action to recover his land"[20]. This would not be possible if the required "adverse" possession is not visible.

[42] More generally, the main rationale for prescription is that ownership (the legal situation) and possession that manifests itself as ownership (the factual situation) should not be separated for too long as this creates legal uncertainty and subsequently litigation. *Ergo*, if the possession could be enjoyed secretly, acquiring ownership by

[18] See also this Court's decision in the *Toolsie Persaud* case at [43] and [44]; for the position in civil law, see eg the French Code Civil, section 2244: "Une citation en justice, même en référé, un commandement ou une saisie, signifiés **a celui qu'on veut empêcher de prescrire**, interrompent la prescription ainsi que les délais pour agir."
[19] For the Roman-Dutch position see Van der Merwe, op.cit., No. 335, and Silberberg and Schoeman, op.cit., pp. 161, 162; for the English position see S. Jourdan, *Adverse Possession*, Tottel Publishing Ltd 2007, reprinted 2008, pp. 111, 112
[20] *Toolsie Persaud v Andrew Investments Ltd and Others*, at [30]

prescription would have no justification. The *nec clam* or open possession is therefore by definition required.

Nec precario:

[43] In Roman law this requirement had a rather strict and narrow meaning. The original *precarium* was "a prayer on the part of the suppliant to use the owner's property until the permission, if given was revoked."[21] Such a precarious consent or revocable permission would in English law be called a licence. In Roman-Dutch law as it originally developed in South Africa, a broader concept of *nec precario* was used: the right must have been exercised adversely and as of right, without permission or without consent in the wider sense.[22] Clearly, this insertion of "adverse user" was influenced by English law, which also, albeit somewhat differently, left its marks on the Roman-Dutch law of Guyana. Both before and (many years) after 1917 the Guyanese courts 'gave to the term "adverse possession" the same meaning that the English courts had given to those words, prior to …1833.'[23]

[44] As we have seen, the *nec precario* element has been eliminated in South Africa in 1969 but according to authoritative South African jurists this did not really change anything.[24] Even under the 1943 Act the *nec precario* provision was held to be unnecessary because the possession required for prescription was the *possessio civilis* which is defined by the South African courts as consisting of (1) actual, effective and physical control of the thing accompanied with (2) the intention to hold the thing as his own (*animus domini*) or, at its lowest, as the intention of keeping the thing for oneself (*animus rem sibi habendi*).[25] Both forms of intention are clearly inconsistent with the intention of a precarious possessor. In the words of Watermeyer CJ in *Malan v Nabygelegen Estates* [1946]: "In order to create a prescriptive title, such occupation [*nec vi nec clam nec precario*] must be a user adverse to the true owner and not

[21] Van der Merwe, op.cit., No. 338, Silberberg and Schoeman, op.cit., p 166, see also Lord Rodger of Earlsferry in *R (Beresford) v Sunderland City Council*, [2004] 1 All ER 160 at [57]
[22] This was apparently also the position in Guyanese law, see *Inderjeet Tackorie v Port Mourant Ltd*, (1954) L.R.B.G. 111
[23] *Cadogan v Cadogan* (1955), L.R.B.G. 7
[24] Van der Merwe, op.cit., No. 340, Silberberg and Schoeman, op.cit., p. 166
[25] Siberberg and Schoeman, op.cit., pp. 279, 280

occupation "by virtue of some contract or long relationship such as lease or usufruct *which* ***recognises*** *the ownership of another*."[26]

[45] The relevant Sri Lanka legislation[27] uses the term "title *adverse* to or *independent* of" the owner of the land, further explained as "a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, *from which an* ***acknowledgement*** *of a right existing in another person would fairly and naturally be inferred*." Lord Wilberforce in *Nonis v Peththa* called this "in effect a definition of what is commonly, for convenience, referred to as adverse possession."[28]

[46] Most South African and Sri Lankan jurists seem to agree that there is no real distinction between adverse possession and *possessio civilis*.[29] There is, however, some difference of opinion with regard to the mental element of the required form of possession. In English law, where it is also held that the possession required for "acquisition through prescription" has both a factual and a mental element, the latter is described as the *animus possidendi* or the intention to possess. Interestingly, it appears that this requirement of animus was never part of English land law and has only at a fairly late stage (1899) been introduced in English law under the influence of the civil law and more particularly of the German jurists Von Savigny and Jhering.[30] Curiously, the term *animus possidendi* is also used in Guyanese land law. But this does not seem to be correct as this concept is clearly linked to the English common law system of relativity of title, with an, at least originally, weak system of deeds registration and, therefore, a central role of what the Roman-Dutch writers would call the *possessio naturalis* or actual possession. Guyanese law, however, has expressly maintained a system of allodial (full and absolute) ownership together with a relatively simple and in principle fairly certain, although admittedly far from perfect,

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[26] 1946 AD at 574. For a discussion of this judgment, see Van der Merwe, op.cit., No. 338 and Silberberg and Schoeman, op.cit., pp. 166, 167
[27] See [10] of this judgment
[28] (1969) 73 NLR 1,3
[29] Van der Merwe, op.cit., No. 340, Silberberg and Schoeman, op.cit., p. 167, Carey Miller, op.cit., p. 15
[30] Lord Lindley seems to have been the first English Judge to have used this term in a judgment : *Littledale v Liverpool College* [1900] 1 Ch 19 at 23; see about the "German roots" of this "legal transplant": Oliver Radley-Gardner, *Civilized Squatting*, in *Oxford Journal of Legal Studies*, Vol. 25, No. 4, pp. 727-747

system of registration of titles to land (as evidenced by the Deeds Registry Act[31]). In such a system the requirement of an *animus domini* or *animus rem sibi habendi* would be more appropriate.

[47] In the *Toolsie Persaud* case this Court cautiously steered away from the *animus possidendi* concept as it has sometimes been misinterpreted, a misinterpretation which led the Chief Justice in that case in a wrong direction. In this context it should be remarked that in Roman-Dutch law the *animus domini* or the intention to hold as an owner is clearly distinguished from what is called the *opinio domini* or the belief that one is in fact the owner[32]. It is trite law that one can have the required *animus* with or without having the *opinio*. This follows logically from the fact that *bona fides* is not a requirement for acquisitive prescription. Both English law and Roman-Dutch law agree on this point.[33]

[48] It is telling that this Court in the *Toolsie Persaud* case when referring to the English leading case of *JA Pye (Oxford) Ltd v Graham* specifically endorsed only a limited part of Lord Browne-Wilkinson's leading speech in which he *inter alia* described the intention to possess as "an intention to exercise such custody and control *on his own behalf and for his own benefit, independently of anyone else* except someone engaged with him in a joint enterprise on the land." This description was without any doubt adequate to deal with the case then at hand. But in a more general sense, the position which, in my view, is to be preferred in Guyana, can be found in the speech in *Pye* given by Lord Hope of Craighead who – it is to be noted – also hails from a mixed jurisdiction (Scotland). Lord Hope said:

"(…) it is reasonably clear that the animus which is required is the intent to exercise exclusive control over the thing for oneself… The only intention which has to be demonstrated is an intention to occupy and use the land as one's own. This is a concept which Rankine *The Law of Land-Ownership in Scotland* (4th edn, 1909) p 4, captured in his use of the latin phrase 'cum animo rem sibi habendi' (see his reference in footnote 1 to Savigny *Das Recht des Bezitses*)… It is similar to that which was introduced into the law of Scotland by the Prescription Act 1617, Ch 12 relating to the

[31] Registration of land under the Land Registry Act, Cap. 5:2, is clearly more secure; acquisitive prescription of such land is, however, also much more difficult, see sections 106 – 110 of that Act
[32] Silberberg and Schoeman, op.cit., pp. 162, 281
[33] For the English position, see Jourdan, op.cit., pp. 166-168

acquisition of an interest in land by positive prescription… So I would hold that, if the evidence shows that the person was using his land in the way one would expect him to use it if he were the true owner, that is enough."[34]

[49] Both the speech of Lord Browne-Wilkinson (as far as we endorsed it in *Toolsie Persaud*) and, particularly, Lord Hope's speech come very close to the Roman-Dutch position in the mixed jurisdictions of South Africa ("*as if he were an owner*") and Sri Lanka ("*independent of*") with its focus not so much on intention as such but on intention as it is manifested by conduct. It is therefore undoubtedly the appropriate position in the mixed land law of Guyana. I would add that when giving a definition of the required intention it should always be remembered that the contents of such a definition depend on the context in which it is to be used. In cases like these, it is only for the purpose of prescription that the intention of the possessor has to be defined. Clearly, when one must define possession and its mental element, for example, for the purpose of defending the possessor against trespass, another approach might be called for.[35]

[50] The Title to Land (Prescription and Limitation) Act is to a certain extent a not altogether successful attempt to mix Roman-Dutch prescription oil with English limitation water. Interestingly, before 1833 English case law required "adverse possession" in the old sense which meant something in the nature of an ouster, acts clearly against the will of the "true owner".[36] Persons who were in exclusive possession of land with the consent of the owner were held to be *tenants* at will and therefore not in *adverse* possession. Equally a person whose possession of the land was at first lawful (eg based on a lease) did not become an unlawful possessor after the period when he was in possession by right. Although wrongful, the possession was described as one under a *tenancy* by sufferance.[37] The label "tenancy" in these cases was used only to create a situation which in Roman-Dutch terms would be a possession "*vel precario*." As long as this situation continued, the owner did not have to fear that he would lose his property rights. The time for him to take action would

[34] At [71]
[35] Silberberg and Schoeman, op.cit., pp. 279-284; in English law this would be one of the many "heresies" mentioned by Lord Browne-Wilkinson in his speech in *Pye*
[36] Jourdan, op.cit., p. 23
[37] Jourdan, op.cit., p. 24

only start to run when he formally ended his express or implied consent (in the latter case: acquiescence), thereby turning the "tenant's" possession into one of "*nec precario*." It appears that given the rather weak system of registering deeds that at that time existed in England, it was sometimes difficult, certainly when many years had gone by, to decide if and when the owner's consent had ceased. It is probably for that reason that the English Real Property Limitation Act 1833 (in section 7), one might say rather arbitrarily, introduced the fiction that in the case of a tenant at will, the owner's consent was deemed to have ceased one year after the tenant had taken possession.[38] This provision was reproduced in the Real Property Limitation Act 1874 and the Limitation Act 1939 (s. 9(1)) which latter Act provided most of the provisions of the Guyanese Act[39] including section 9 (1) which deals with a tenancy at will.

[51] In the course of time, notably as from the 1950s, this provision became more and more problematic in England. It can be assumed that this was prompted by the fact that the line between a licence and a tenancy at will had become rather thin as it was gradually accepted that licensees could be given exclusive possession of land and that regular payments by the licensee to the licensor would as such not always be at odds with characterizing the relationship as a licence. This being the case, it is clear that the provision under discussion, which created a favourable position only for the tenant at will and not for the licensee (in the sense that it made it rather easy for the tenant at will to become the owner of the land in the event that the true owner was not vigilant enough), led to a substantial difference in treatment of persons holding land with permission or consent of the owner which would eventually be seen as thoroughly unjust.[40] More generally, it can be assumed that under the growing influence of human rights law, *inter alia*, promoting the protection of persons against arbitrary deprivation of property and the corresponding balancing of interests, gradually more weight was given to the interests of the owners of land.[41]

[52] As a result of these developments the provision as to tenancies at will was abolished by section 3(1) of the English Limitation Amendment Act 1980 so that tenants at will

[38] See Sampson Owusu, *Commonwealth Caribbean Land Law*, Routledge-Cavendish, 2007, p. 270
[39] Ramsahoye, op.cit., p. 251
[40] Jourdan, op.cit., pp. 583-597; Owusu, op.cit., pp. 542-569
[41] As became very clear when the *Pye* case reached the European Court of Human Rights, see *JA Pye (Oxford) Ltd v United Kingdom*, (2006) 43 EHRR 3 and (2008) 46 EHRR 45 (Grand Chamber); for its impact on English land law, see *Beaulaire Properties Ltd v Palmer* (2005) 4 All ER 462

are now in the same position as the licensees were before that Act came into being. In Guyana, however, the provision, which was alien to the existing system of land law from the very start, is still part of the law. Seen against the light of the developments in the land law, especially with regard to the fading borders between licences and tenancies at will, there is at least a presumption that, in case of doubt, the relationship between the land owner and the person occupying the land with his permission should, as a rule, be categorized as a licence. This is the more so where the parties are closely related and the relationship appears to be a family arrangement as in the case before us.

[53] Such an approach will both be in line with the Roman-Dutch roots of Guyanese land law and, I may add, the Guyanese Constitution. Section 142(1) of the Constitution clearly considers the protection from arbitrary deprivation of property as a fundamental right worthy of the highest form of judicial relief. It is equally clear that this right is not without exceptions. Properties can be taken "under the authority of a written law" and nothing done under the authority of "any law with respect to the limitation of actions "shall be held inconsistent with" that fundamental right (section 142 (2)(a)(vi) of the Constitution) . But because of the very fact that it constitutes an exception to such a fundamental right, the Title to Land (Prescription and Limitation) Act and its provisions have to be interpreted in a way that will be in keeping with its character as an exception. The interpretation has to be such that the property rights of owners will be preserved as much as reasonable. True, exceptions to fundamental rights are generally possible and even necessary but the written law which embodies them will have to contain what I have called elsewhere[42] "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power." If such safeguards are palpably lacking, such a law, or parts of it, might, although complying with the formal requirement of being a "written law", still be unconstitutional (which might be arguable if, for example, the legislator would decide to limit the prescription period to one year or if he would expressly allow prescription by concealed possession of land). Be that as it may, at the very least, the interpretation of those provisions should be such as to limit arbitrary deprivation of property as far as possible.

[42] *Attorney-General v Joseph and Boyce*, (2006) 69 WIR at p. 226