[2008] CCJ 5 (AJ)

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 1 of 2007
GY Civil Appeal No. 72 of 2004

BETWEEN

TOOLSIE PERSAUD LIMITED **APPELLANT**

AND

1. ANDREW JAMES INVESTMENTS LIMITED
2. SHIVLOCHNIE SINGH (BY ORDER OF COURT)
3. THE ATTORNEY GENERAL OF GUYANA **RESPONDENTS**

Before	**The Right Honourable**	**Mr Justice de la Bastide, President**
and	**The Honourable**	**Mr Justice Nelson**
	The Honourable	**Mr Justice Pollard**
	The Honourable	**Mr Justice Wit**
	The Honourable	**Mr Justice Hayton**

Appearances

Sir Fenton Ramsahoye SC, Mr Anand Ramlogan and Mr Chandraprakesh Vikash Satram for the Appellant

Mr Ashton Chase SC and Mr Sase Narain SC for the First Respondent

Mr Rex H. Mc Kay SC, Mr Neil Aubrey Boston and Mr Hukumchand Parag for the Second Respondent

Mr Doodnauth Singh SC, Mr Vashist Maharaj and Ms Martina Bacchus for the Third Respondent

JOINT JUDGMENT
of
The Court delivered by
The President, the Right Honourable Mr Justice Michael de la Bastide
and The Honourable Mr Justice David Hayton

on the 15th day of July, 2008

The background

[1] Toolsie Persaud Limited ("the Appellant"), by its petition of 21 January 1993 ("the Petition") seeks a declaration that under the Title to Land (Prescription and Limitation) Act, Chapter 60:02 of the Laws of Guyana, (the "Limitation Act") it has acquired title to 83.642 acres of land comprising areas 'C', 'F', 'G', 'H', 'K', 'N'. 'J',and 'O', being part of Plantation Turkeyen on the east coast of Demerara, Georgetown. It seeks to claim prescriptive title by undisturbed adverse possession of this tract of land for over twelve years, adding its own adverse possession of the land to the earlier adverse possession of the Republic of Guyana ("the State").

[2] The Petition has been opposed as to areas 'F', 'G' and 'H' by the First Respondent, Andrew James Investments Ltd, as to area 'C' by the Second Respondent, Shivlochnie Singh, and as to areas 'K', 'N'. 'J', and 'O' by the Attorney General on behalf of the State. The Petition went first to the Land Court. On appeal a trial *de novo* was ordered. The trial took place before Singh CJ who dismissed the Petition. On appeal, the order of Singh CJ was upheld but on different grounds. From the dismissal of its appeal the Appellant now appeals to the CCJ.

[3] By virtue of the Acquisition of Land for Public Purposes (Diplomatic Complex) Order 1977, No 22 of 1977, ("CAO No 22") of 28 March 1977, followed by the Acquisition of Land for Public Purposes (Diplomatic Complex) (No 2) Order 1977, No 43 of 1977, ("CAO No 43") of 8 June 1977, the said areas of land allegedly became vested in the State on 8 July 1977 pursuant to s. 7 of the Acquisition of Land for Public Purposes Act, Chapter 62:05 ("the Acquisition Act"). On 9 August 1977 the Registrar of Deeds annotated the property register so as to make the State appear the owner of those areas (as made clear by Kennard JA on page 3 of his judgment in Civil Appeal No 53 of 1990 referred to at [8] below).

[4] By an October 1987 Agreement of Sale, the State agreed to transfer to the Appellant the said areas of land covered by CAO No 22 and CAO No 43. The purchase price was $2,217,100, with one third, $739,033, payable upon signing the Agreement, and the balance to be paid on the passing of the transport. Possession was to be

given on signing the Agreement. Although the Appellant paid the one third in October 1987, it was agreed that it would take possession later after some seasonal harvesting of the land by the National Dairy Development Programme under the auspices of the Ministry of Agriculture. It took possession when this harvesting finished in April 1988 and commenced preparatory steps for a significant housing project.

Areas 'F', 'G' and 'H'

[5] On 20 March 1989 the First Respondent brought legal proceedings by way of constitutional motion against the Attorney General in which it challenged the validity of CAO No 22 and CAO No 43. It claimed that its fundamental and constitutional rights had been infringed, and a declaration that "the aforesaid property reverted and still does properly belong to the applicants and that their transports, therefore, are valid and effective". It sought "such further and other order and declaration as to the court seems just, including the setting aside of the acquisition of the land."

[6] On 14th May 1990 Kissoon J upheld the challenge after examining s 7(1) of the Acquisition Act, which is as follows.

> "At the expiration of one month from the date of the order mentioned in the last preceding section or of any longer period fixed in the order, the land specified therein shall vest in the State, subject to the payment of the purchase money or of any compensation as hereinafter provided:
>
> Provided that no land shall so vest unless and until the National Assembly has voted or agreed to vote the sum estimated to be necessary for the public work for which the land is required."

[7] Kissoon J held that title should not have vested in the State under s 7(1) of the Acquisition Act because this could not have happened until the National Assembly had (as required by the proviso to s 7(1)) voted or agreed to vote the necessary funds for the proposed public works, and it had not. Thus he "ordered and declared that the acquisition by the State of the Applicant's land at areas F G and H …. be set aside as being contrary to the provisions of the Acquisition… Act." He also held that both CAOs were "ultra vires and bad" because CAO No 22 stated "The land described in the Schedule, upon which it is proposed to site a Diplomatic Complex

for Foreign Missions in Guyana is hereby declared to be a public work", and this mistake of treating "bare land", instead of the Diplomatic Complex project, to be a public work was repeated in CAO No 43.

[8] On 21 June 1990 the State filed an appeal. In May 1991 the Appellant sought to be added as a party to the appeal, but in May 1994 in Civil Appeal No 53 of 1990 the Court of Appeal by a majority rejected this. It appears from page 7 of the judgment of Churaman JA that "as a consequence of the aforesaid order [of Kissoon J], the Registrar of Deeds, quite properly I think in the absence of any stay, duly reconveyed title in respect of the three areas of land to" the First Respondent.

[9] On 3 March 1995 the Court of Appeal dismissed the appeal from Kissoon J. There is only the following order of the Court. "It is ordered that this appeal be dismissed and that the judgment of [Kissoon J] be affirmed in so far as the learned judge ordered that the purported acquisition by the State of the Respondent's property (described in the Schedule hereunder) be set aside on the ground that the said purported acquisition was made contrary to the requirements of the Acquisition… Act and this Court doth declare that the aforesaid purported acquisition was and is unconstitutional and contrary to law".

Area 'C'

[10] Meanwhile, so far as concerns area 'C' and the Second Respondent, two constitutional motions were filed on the 27 and 29 April 1977. They challenged the validity of the CAOs and the acquisition of area 'C' by the State, and claimed they were unlawful, ultra vires and void, so that the Second Respondent was entitled to the land or, alternatively, to compensation. In August 1982 the State agreed to pay $70,000 compensation in settlement of all claims concerning area 'C' upon the basis of both actions being withdrawn and discontinued. The compensation was paid and notices of discontinuance were filed on the footing that the State had acquired title to area 'C' in 1977 and the Second Respondent did not have an effective right to recover the land, only a right to compensation for its compulsory acquisition.

[11] There can be no question of the April 1977 actions amounting to actions to recover the land that would prevent time from running in favour of the State. The issue of legal proceedings that are not pursued, but are dismissed for want of prosecution or are discontinued, is no more relevant than a mere demand for possession which is not pursued. As Simon Brown LJ stated in *Markfield Investments Ltd v Evans*[1],

> "In *Mount Carmel Investments Ltd v Peter Thurlow Ltd*[2] such a demand was held not to stop time running afresh; no more would the service (still less the mere issue) of some earlier writ. Were it otherwise, as the defendant points out, all the true owner would have to do to avoid adverse possession claims is issue (and perhaps serve) a writ every twelve years."

He went on to hold that earlier proceedings to recover land that were struck out for want of prosecution did not prevent time from running against the landowner.

[12] Surprisingly, on 14 November 1989 the Second Respondent and her now-deceased husband filed a fresh constitutional motion against the Attorney General in which they once again challenged the validity of the CAOs and the resultant acquisition of their lands. They claimed "a declaration that the purported acquisition of the said lands is ultra vires, illegal, null and void … and that the applicants are entitled to have the said lands returned to them upon payment by the applicants of the sum of $70,000 which said sum was received for the said purported acquisition." They also requested the Court to "make such orders … and give such directions as it may consider appropriate."

[13] On 4 July 1995 Trotman J, by consent of the applicants and the Attorney-General, made various orders. He declared that "the acquisition by the State of [area 'C'] be set aside as being contrary to the provisions of the Acquisition … Act" and declared the acquisition to be "null and void and of no legal effect". He then declared that the CAOs "are ultra vires and bad … and null and void and of no legal effect." He "further declared that the Applicants are entitled to have Title to the property restored and registered in their names by the Registrar of Deeds", and that the applicants give an undertaking to repay the State the $70,000 compensation it had

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[1] [2001] 1 WLR 1321 at [20]
[2] [1988] 1 WLR 1078

paid to them for the property. The money was repaid. A true extract from Transport No 24 of 1976 vesting title in the Second Respondent shows that the Registrar of Deeds annotated the Transport: "Order No 43 of 1977 mentioned below DECLARED ULTRA VIRES and had an acquisition set aside pursuant to Order of Court dated 4 July 1995 in Application No 4208 of 1987 (Demerara). And Title is restored and registered in the names of Shivlochnie Singh and Jai Narine Singh."

[14] It is important to note that the Appellant was not a party to these proceedings resulting in the 1995 consent order. However, well before the 14 November 1989 constitutional motion leading to that order, in October 1987 the Appellant had entered into a contract to acquire from the State the whole tract of land vested in it by the CAOs in 1977 and, in April 1988, had taken possession of that land. Moreover, after problems arose over the contract, the Appellant on January 21 1993 had issued its Petition, claiming it had acquired prescriptive title by the undisturbed adverse possession of itself and the State. The Second Respondent and the State were well aware of this adverse claim to area "C' when agreeing the 1995 consent order apparently prejudicing the Appellant's position.

Areas 'K', 'J', 'N' and 'O'

[15] So far as concerns areas 'K', 'J'. 'N', and 'O', it is noticeable that their owners in 1977 have not since then thought to bring any legal proceedings in respect of the State's compulsory acquisition of their land pursuant to the 1977 CAOs, so that the State has remained the owner on the property register. Intriguingly, when the Attorney General appeared before us he revealed that, in 1976 under the Vesting of Property (Acquisition of the Interests in Guyana of Booker McConnall Limited) Order No 38 of 1976, made pursuant to The Vesting of Property (Acquisition by Purchase) Act 1975, the State had already acquired all the assets and liabilities of East Coast Estates Ltd, the owner of areas 'J' and 'O', while the owner of area 'N' was the Guyana Housing Corporation a statutory corporation acting as the executive arm of the Ministry of Housing (as apparent from the evidence of John Farley at page 283 of the Record, which also indicates that the Corporation was dissolved in 1978, when, presumably, its land would have vested

in the State or a body operating under the aegis of the State). Area 'K', however, was in 1977 owned by a private individual, Mr Albert Chung-Wee.

The High Court judgment

[16] The Chief Justice found as a fact that the State was in possession of areas 'F', 'G' and 'H' under an implied licence from the First Respondent until the making of CAO No 43. Once the State was in possession of these areas pursuant to that CAO, mistakenly believing itself to be the lawful owner, and "used the lands the way an owner would", it did not have the "*animus possidendi*" necessary to establish a claim to acquire land by adverse possession. He stated "the *animus possidendi* is not met by establishing an intention to own but rather an intention to possess". Later he stated "the absence of an intention to possess the lands leads one to conclude that the government was never in adverse possession of areas 'F', 'G' and 'H'."

[17] Similarly, from the time it believed itself to be in possession as the lawful owner by virtue of CAO No 43, the State had lacked the necessary *animus possidendi* in relation to area 'C' and to areas 'K', 'J', 'N' and 'O', even though it was in continuous occupation thereof from 1976 to 1987.Thus the Appellant's Petition had to be dismissed because there was no transmissible adverse possession by the State which the Appellant could add to its own to make up the requisite twelve year period of limitation.

The Court of Appeal judgment

First point

[18] Chang JA, giving the reserved judgment of the Court, summarily rejected the Chief Justice's view that the State had not had the "*animus possidendi*" in relation to the areas covered by the CAOs. Such ownership-conferring Orders "clearly evinced an intention on the part of the State to possess the said tract of land at least from the time of their making."

Second point

[19] However, after examination of Articles 142(1) (see below at [33]) and 153 (providing remedies for breach of Articles138-151) of the Constitution and the provisions of the Limitation Act, Chang JA stated,

> "This Court therefore holds that in Guyana the State cannot be in possession of land which can be considered adverse for the purpose of the [Limitation] Act"

[20] Thus the State cannot acquire other persons' land except under a valid CAO or some other special legislation authorising compulsory acquisition by the State in return for proper compensation. It followed that the Appellant's Petition, being based largely upon the State's alleged adverse possession, had to be dismissed.

Third point

[21] In case it was "in error", the Court did go on to consider the circumstances before it, where it so happened that possession had been taken pursuant to CAOs that were not valid, though this was not declared to be the case by the Court until 14 May 1990 in respect of areas 'F', 'G' and 'H' and 4 July 1995 in respect of area 'C'.

[22] The Court held

> "that possession acquired or continued under the force and authority of public law legislation can never be adverse since judicial invalidation of such legislation in public law is a necessary precondition to the accrual of a right of action for recovery of possession in private law."

[23] Thus the First Respondent's right of action only accrued on 14 May 1990 and the Second Respondent's right of action only accrued on 4 July 1995. Moreover, since no–one had challenged the CAOs in respect of areas 'K', 'J, 'N' and 'O', so that the CAOs remained valid in respect thereof, no right of action had yet accrued in respect of those areas. Therefore the State had no transmissible possessory rights obtained by adverse possession in respect of those areas that the Appellant could tack on to its own adverse possession. The Appellant's Petition against all the Respondents had to be dismissed as "misconceived".

Review of those courts' legal reasoning

First point: what is the requisite intent to possess?

[24] The Court of Appeal was clearly correct in holding that the requisite intention to possess is present when the claimant in factual possession of the land is intending to make full use of it in the way an owner would. Indeed, it was once thought that *animus possidendi* necessarily involved an intention to own or to acquire ownership of land or to exercise acts of ownership over it.[3] Slade LJ, however, in *Buckingham CC v Moran*[4] made it clear that although "there are some *dicta* in the authorities which might be read as suggesting that an intention to own the land is required … I agree with the judge that 'what is required for this purpose is not an intention to own or even an intention to acquire ownership, but an intention to possess' - that is to say an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title."

[25] This last clause has raised problems in some minds where the factual possessor has mistakenly believed himself to be the owner with the paper title, because he cannot have the intention to exclude himself. However, the cited passage is not part of an Act of Parliament. The intention to exclude the world at large (including the true owner if other than the factual possessor) is what is required. An intention to have exclusive control of the land, mistakenly believing oneself to be the true owner, suffices.

[26] As Saville LJ (later Lord Saville of Newdigate) stated in *Hughes v Cork*[5],

> "The learned Judge appears to have held that it is impossible for someone who believes himself to be the true owner to acquire title by adverse possession since such a person cannot, ex hypothesi, have an intention to exclude or oust the true owner. If this were the law then only those who knew they were trespassing, that is to say, doing something illegal, could acquire such a title, while those who did not realize that they were doing anything wrong would acquire no rights at

[3] See *Littledale v Liverpool College* [1900] 1 Ch 19 at 23, *George Wimpey Ltd v Sohn* [1967] Ch 487 at 511 and *Powell v McFarlane* (1979) 38 P & CR 452 at 478

[4] [1990] Ch 623 at 643

[5] [1994] EGCS 25, quoted by S Jourdan, *Adverse Possession,* Tottel Publishing Ltd 2007, reprinted 2008 para 9-16, and endorsed in *Roberts v The Crown Estate Commissioners* [2008] EWCA Civ 98 and [2008] 2 WLR at [87]

> all. I can see no reason why, as a matter of justice or common sense, the former but not the latter should be able to acquire title in this way. What the law requires is factual possession i.e. an exclusive dealing with the land as an occupying owner might be expected to deal with it, together with a manifested intention to treat the land as belonging to the possessor to the exclusion of everyone else."

Why indeed, should a mala fide user of land to the exclusion of everyone else be better off than a bona fide user in the same circumstances? What is crucial is that it is obvious enough to the paper owner that if he does not take steps to stop this exclusionary user then he will lose his ownership after twelve years have expired (or thirty years if the owner is the State or the Government). The possession of a mala fide user of the land is clearly "adverse" possession, but where there is want of actual possession by the true owner, ordinary possession by another to the exclusion of the true owner fits the modern notion of adverse possession, as made clear by Wooding CJ in *Richardson v Lawrence*[6] and Crane JA in *Gobind v Cameron*[7].

[27] We endorse the following remarks of Lord Browne-Wilkinson in the leading case, *JA Pye (Oxford) Ltd v Graham*[8].

> "Much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Act[9]. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner……..Except in the case of joint possessors, possession is single and exclusive. Therefore if the squatter is in possession the paper owner cannot be…
>
> ..there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."

[28] Thus, 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

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[6] (1966) 10 WIR 234 at 237-238
[7] (1970) 17 WIR 132 at 154
[8] [2003] 1 AC 419 at [36], [38] and [40]
[9] The English Limitation Act 1980 ss 15(1) and 17 and Sched 1 Part 1 paras 1 and 8 deal with extinguishment of title by adverse possession in the same terms as the Guyanese Limitation Act ss 5,13, 6(1)and 10 respectively

(i) a sufficient degree of physical custody and control of the claimed land in the light of the land's circumstances ("factual possession"), and

(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").

[29] This latter requirement serves to make it clear that the factual possessor is not merely the landowner's licensee or tenant or trustee or co-owner but is independently in possession, so that it is obvious to any dispossessed true owner (or any true owner who has discontinued possession of his land) that he needs to assert his ownership rights in good time if he is not to lose them. Intention to possess thus extends to a person intending to make full use of the land in the way in which an owner would, whether he knows he is not the owner or mistakenly believes himself to be the owner eg due to a misleading plan or a forged document or a compulsory acquisition order subsequently held to be ineffective to vest the land in the State. Indeed, in *Blanchfield v Att-Gen of Trinidad & Tobago and Chaguaramas Development Authority*[10], Lord Millett, giving the judgment of the Privy Council, stated that if the State had not been able to rely upon certain Land Acquisition Ordinances for its ownership and possession, "it would have had to prove that it had been in adverse possession of the land for the statutory period before the proceedings were commenced."

[30] Although the Court of Appeal in these proceedings stated, "It is also clear law that possession for the purpose of the acquisition of prescriptive title must be possession *nec vi, nec clam, nec precario*" (not by physical violence, nor by stealth, nor by permission), in our exposition of the law we have deliberately eschewed this Latin phrase. The reason is that s 3 of the Limitation Act focuses upon "sole and undisturbed possession" that was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose." While it remains true that prescriptive possession must be openly enjoyed so that the true

[10] [2002] UKPC 1 and (2002) 61 WIR 443 at [22].The Real Property Limitation Act chapter 56:03, like the Guyanese Limitation Act, in general terms bars the landowner from recovering his land after expiry of the limitation period

landowner can know that he must take action to recover his land, and must not be pursuant to the landowner's permission, it can be based upon a forcible taking and retention of the land, so that the "*nec vi*" portion of the phrase has become an anachronism .

Second point: adverse possession of the State

[31] The State's public functions distinguish it from ordinary citizens, so that, unlike them, it has, under the Acquisition Act, the special power compulsorily to acquire land for public purposes in the teeth of the strongest opposition of the relevant landowner. It also has power under the Acquisition of Lands (Not Beneficially Occupied) Act, Chapter 62:09 to acquire land compulsorily not for public purposes but for a beneficial use of the land if the land is not beneficially occupied by its owner. Thus the State can positively acquire land in the public interest. However, where the owner of land allows his land to be possessed to his exclusion by another and for twelve years or more fails to take action to recover the land, there is no basis for discriminating between the State as possessor or the ordinary person as possessor, as accepted in *Blanchfield* in [29] above[11].

[32] As made clear by the Privy Council in *Jaundoo v Att-Gen of Guyana*[12], a landowner has the constitutional right under Articles 142(1) and 153 not to have the State take his land against his will unless it complies with the Acquisition Act or other special legislation, but this is completely consistent with the landowner losing his right under the Limitation Act if he fails for twelve years to assert his title. A landowner allowing the State to acquire his land because he does not bother to assert his title is very different from the State compulsorily taking his land against his will. This is recognised by the saving provision in Article 142 (2)(a)(vi), as we shall see in the next paragraph. Moreover, it must be appreciated that the major role of adverse possession is to remove uncertainties by making legality coincide with actuality: titles are put in order by confirming the entitlement of someone in lengthy

[11] Also in *Sze To Chun Keung v Kung Kwo Kai David* [1997] 1 WLR 1232 at 1235 the Privy Council held that the Crown in Hong Kong , like an ordinary citizen, could acquire title by adverse possession where the Limitation Ordinance was drafted in the same fashion as the Guyanese Limitation Act (though requiring 20 years adverse possession)

[12] [1971] AC 972, (1971) 16 WIR 141

undisturbed enjoyment of land who happens, for various commonly recurring reasons, to have no paper title. Why should the State be denied the benefit of this longstop in the conveyancing system, which is so crucial for regularising the titles of its own citizens and making their land more cheaply and expeditiously marketable?

[33] Is there anything in Articles 142 of the Constitution or in the Limitation Act to put the State at such a disadvantage as compared with its ordinary citizens? Article 142 states

> "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except by or under the authority of any written law and where provision applying to that taking of possession or acquisition is made by a written law requiring the prompt payment of adequate compensation.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the preceding paragraph-
>
> (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property –
>
> …….
>
> (vi) in consequence of any law with respect to the limitation of actions."

[34] Such a law is the Title to Land (Prescription and Limitation) Act Chap 60:02. Sections 3 and 4 state

> "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 30 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 interest has expired or been barred and the title of every such person thereto has been extinguished.

4. (1) The Court may make a declaration of title in regard to the land or interest in

(a) any action brought by or against the owner thereof or any person claiming through him or in which all the parties interested therein are before the Court; or

(b), (c) (d),

and may order that the land or interest be passed to and registered in the name of the person who has acquired such land or interest."

[35] Sections 5, 10(1) and13 provide

"5. No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

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 (hereinafter 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.

13. At the expiration of the period prescribed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."

[36] It is noteworthy that Guyanese land law is a mixture of Roman-Dutch law and English law. Thus sections 3 and 4 were added to the other sections of the Limitation Act which are based on the English Limitation Act 1939. The latter Act had only an extinctive negative effect, whilst sections 3 and 4 positively confer title where the requisite twelve or thirty years of undisturbed possession are established. Counsel and Guyanese case-law have assumed that sections 3 and 4 combine with the later sections of the Limitation Act to provide an integrated approach to the acquisition of title through twelve or thirty years undisturbed adverse possession of land by one or more successive possessors. We find this to be correct for the circumstances of this case, though difficult problems might, perhaps, arise if one adverse possessor dispossesses another.

[37] Section 3 of the Limitation Act shows that title to land (other than State or Government land) may positively be acquired by exclusive undisturbed possession for not less than twelve years, if established to the satisfaction of the Court and not taken or enjoyed by fraud or the landowner's permission. Sections 5 to 13 show that once a person has failed for twelve years to exercise his right to recover his land from any adverse possessor his title is extinguished. Under section 4, the possessor entitled under section 3 or sections 5 to 13 may positively obtain a declaration of title in his favour and an order that the land be registered in his name, so long as all the parties interested therein are before the Court: the third "or" in section 4(1)(a) must be construed as a conjunction, so that a person interested in the land cannot lose his interest without a fair hearing. There is nothing in the Act to indicate that the benefit of these sections is not available to the State if it is the undisturbed or adverse possessor.

Third Point: accrual of the true owner's right of action and the legal claim needed to stop time running

[38] The Court of Appeal took an artificially strict approach to the concept of "adverse possession". It held that possession by the State under invalid acquisition orders can never be adverse until the court, in public law proceedings, declares the orders invalid in relation to the specific land in question. Until that time the land is not "in the possession of some person in whose favour the period of limitation can run", as required by section 10 of the Limitation Act, so that until then the landowner has no right of action in private law to recover his land. Therefore, there had not been the requisite twelve years adverse possession.

[39] The strict approach has the practical disadvantage that it can leave titles in an unsatisfactory and uncertain state for very lengthy periods of time. It may take many years before the public law proceedings are finally determined by the court. There will then be a further twelve year limitation period before the private law action to recover land becomes barred. Meanwhile, there will be economic stagnation of the land or persons taking a chance that matters will not have to be unravelled or, at least, not until they have passed the problem on to someone else.

Furthermore, why does a landowner deserve to be given such a protracted period within which to take the means which are immediately available to him to assert his title and recover his land, when the State has purported to acquire his land and exclude him from it pursuant to statutory procedures which he claims to be seriously flawed?

[40] Indeed, as apparent from the judgment of Kissoon J at [7] above and reflected in the consent order of Trotman J in [13] above, by the 8 July 1977 at the latest, the First and Second Respondents had the right to file a constitutional motion to establish that title to their lands had not vested in the State pursuant to CAO No 43 of 8 June 1977, and that, accordingly, the Registrar of Deeds should not record the State as owner in the property register.

[41] There is no reason why the Respondents in such a constitutional motion could not raise all their issues with the State and so claim not just declarations that the CAOs and acquisitions thereunder were invalid but also possession as well as title to the relevant lands. However, by the time the First Respondent and the Second Respondent actually brought their proceedings against the State on 20 March 1989 and 14 November 1989, respectively, the State was no longer in possession of their lands, the Appellant having taken possession in April 1988. Thus it is understandable that the Respondents did not seek possession against the State, but they could have joined the Appellant and sought to recover possession from it.

[42] It is noteworthy that in *Blanchfield v Att-Gen of Trinidad & Tobago and Chaguaramas Development Authority*[13] the ousted landowners brought a constitutional motion against the Government but joined the Authority which was in possession of the lands that had been transferred to it by the Government. The former landowners alleged that the lands which had been compulsorily acquired for the purpose of being leased to the US Government as a naval base had reverted to them once the lease in question was surrendered. Just as the Privy Council in *Jaundoo v Att-Gen of Guyana*[14] was unable to find anything in the Rules of the

[13] [2002] UKPC 1, (2002) 61 WIR 443
[14] [1971] AC 972

Guyanese High Court to prevent the plaintiff bringing her action in the form in which she did, so we can find nothing in those Rules that would have prevented the Respondents from bringing one action against both the Appellant and the State so as to recover possession of their lands from the Appellant in the same proceedings in which they demonstrated the absence of any proprietary rights of the State in those lands. Indeed, section 4(1)(a) of the Limitation Act (at [34] above) provides for the Court to make a declaration of title in *any* case brought by or against the owner, provided that all parties interested in the land are before the Court. There was therefore nothing to prevent the First and Second Respondents from claiming declarations as to title (with concomitant possessory rights) as part of the relief obtainable in the constitutional motions they brought against the State, the registered owner, if only they had joined the Appellant as a party.

[43] In our view, if a dispossessed landowner is to stop time running in favour of the person in undisturbed possession of the land he must bring proceedings against that person. Alternatively, of course, the landowner could physically enter the land and take possession thereof, but the danger of breaches of the peace and resultant criminal proceedings are better avoided, especially if the person in possession is likely to resist the landowner.

[44] It follows that the proceedings brought by the First Respondent against the State in March 1989 and by the Second Respondent against the State in November 1989, not being actions against the Appellant for the recovery of possession from it, did not stop the twelve year limitation period running against those Respondents. That period began to run from the time the State's possession of the land was based on the ownership thought to have been conferred by CAO No. 43 of 8 June 1977. Indeed, no action to recover possession from the Appellant was ever initiated by those Respondents before the Appellant's Petition of January 1993. Moreover, even if the Second Respondent's November 1989 action had sufficed to stop the limitation clock, the twelve year period would already have expired by then.

The extinguishment of First Respondent's title to areas 'F', 'G' and 'H' and Second Respondent's title to area 'C'

[45] In October 1987 the State entered into a written agreement to sell to the Appellant all the areas comprised in the CAOs, possession to be taken by the Appellant on the signing of the agreement when one-third of the purchase price was to be paid. Although this was paid in October 1987, it appears that the State and the Appellant agreed that the Appellant would defer taking possession in order to allow the State's licensees to harvest the special grass they had planted. The Appellant took possession in April 1988 and, up to the issuing of its Petition in 1993, did preparatory work for developing the site as a housing estate. It claims to add its adverse possession as seamlessly continuing upon the State's adverse possession (by itself and its licensees). There would then be over twelve years of undisturbed adverse possession to support its claim to be positively declared to have title to areas 'F', 'G', 'H' and 'C'. There is no evidence of any interruption of the possession that passed from the State to the Appellant.

[46] The Appellant's Petition cannot succeed if for the period April 1988 onwards it was in possession as the State's licensee, because that period would enure for the benefit of the State as licensor in adverse possession through its licensee: *Sze To Chun Keung v Kung Kwo Kwai David*[15]. If the Appellant were authorised by the State to be in possession as a tenant at will its position would be similar: *Smirk v Lyndale Developments Ltd*[16]. It is to be noted that section 9(1) of the Limitation Act, which deems the landlord of a tenancy at will to have a right of action against the tenant accruing one year from the commencement of the tenancy at will, does not apply to the State: section 9(4).

[47] However, when the Appellant took possession in April 1988 it took possession as of right in pursuance of its October 1987 contract with the State, having delayed enforcing its express right under clause 4 to take possession upon the signing of the contract and payment of one-third of the purchase price. Possession taken in these

[15] [1997] 1 WLR 1232 at 1235 per Lord Hoffmann
[16][1975] Ch 317

circumstances counts as possession of the Appellant and is adverse to the First and Second Respondents' rights. Although the contract contemplated title passing by transport, the position can be equated to that in *Ramlakhan v Farouk*[17] where the purchaser had taken possession of the vendors' land as of right, having paid them the full purchase price for their possessory rights. In that case the Court of Appeal accepted in obiter dicta[18] that a vendor's possessory rights (even if for less than the statutory period) could be transmitted to benefit a purchaser, although on the facts of that case, the purchaser was able to rely upon over twelve years undisturbed adverse possession in her own right.

[48] It follows that the Appellant can rely upon having established in July 1989 the twelve years of seamless undisturbed adverse possession of the State and itself needed to extinguish the First and the Second Respondent's paper titles under s 13 of the Limitation Act. However, is it the Appellant or the State that should be entitled to obtain a positive declaration of title to areas 'F','G', 'H' and 'C', taking account of sections 3 and 4 of the Limitation Act (at [35] above)?

Positive prescription by Appellant of title to areas 'F', 'G', 'H' and 'C'

[49] Here it is necessary to note that by section 3(b) of the Civil Law of Guyana Act Chapter 6:01 "the common law of Guyana shall be the common law of England as at the date aforesaid [1 January 1917] including therewith the doctrines of equity as then administered or at any time hereafter administered by the courts of justice in England." However, by section 3(c) "the English common law of real property shall not apply to immovable property in Guyana." Instead, by section 3(d) "all questions relating to immovable property in Guyana …shall be adjudged, determined, construed and enforced, as far as possible, according to the principles of the common law of England applicable to personal property" (subject, of course, to Guyanese statutes like the Deeds Registry Act Chapter 5:01 and the Limitation Act)

[17] (1974) 21 WIR 224, Guyanese Court of Appeal
[18] Ibid at 339-340 and 344

[50] As recognised by Crane JA in *Ramlakhan v Farouk*[19], in dealing with successive adverse possessors of land, possessory rights in personal property are transmissible just as possessory rights in immovables are transmissible. Indeed, rights to personal property and to real property are relative. The current possessor's possession evidences his title which is valid and effective except as against someone with a better earlier right to possession: for real property see *Asher v Whitlock*[20] and *Mount Carmel Investments Ltd v Peter Thurlow Ltd*[21], and for personal property see *Armory v Delamirie*[22] and *Parker v British Airways Board*[23]. At first sight, it may appear that the State has a prior right to possession of the land.

[51] However, in July 1989, just fourteen months after the Appellant, as of right, had taken possession of areas 'F','G','H' and 'C' (and 'K', 'J', 'N' and 'O') there was no evidence that the October 1987 contract with the State was not a valid subsisting contract. Indeed, proceedings against the State to invalidate the CAOs had only been brought in March 1989 by the First Respondent, and the Second Respondent had discontinued its earlier proceedings, having been paid compensation by the State on the basis the CAOs were valid (while as explained at [15] there should have been no worries at all over areas 'J', 'N' and 'O', and all appeared quiet in respect of area 'K'). In July 1989 the State was surely barred by its contract from claiming possession of the lands from the Appellant. Thus the Appellant could claim in July 1989 that it had satisfied section 3 of the Limitation Act and positively acquired a prescriptive title based on the sole and undisturbed possession of the State followed by the sole and undisturbed possession of itself through the instrumentality of the contract with the State. To protect itself against this, the State, could, like the vendor in *Hyde v Pearce*[24], have inserted a term in the contract that the Appellant was to be the State's licensee until payment of the full purchase price, but it had not done so.

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[19] Ibid at 344
[20] (1865) LR 1 QB 1
[21] [1988] 1 WLR 1078
[22] (1722) 1 Strange 505, 93 ER 664
[23] [1982] QB 1004
[24] [1982] 1 WLR 560

[52] Once the true owner's title has been extinguished and the undisturbed adverse possessor has positively acquired title under section 3 of the Limitation Act, the latter can apply to the Court under section 4 for a declaration confirming his acquisition of title, and for an order that the Registrar do register the title in his name. At that stage, the possessor has what Bollers CJ termed in *Ramlakhan v Farouk*[25] "crystallized possessory title". This is a vested proprietary interest that has replaced the extinguished interest. Such extinguished interest cannot be revived by any subsequent acknowledgment, as Bollers CJ and Crane JA pointed out in the above case[26] and as held by the English Court of Appeal in *Sanders v Sanders*[27].

[53] Thus in July 1989 the First and Second Respondents' titles to their respective areas of land were extinguished and incapable of revival, and the Appellant had acquired a crystallized possessory title to those areas. Subsequently, the Respondents' actions to assert their titles to those areas against the State led to the order of Kissoon J in May 1990 and the consent order of Trotman J in July 1995, but such orders concerned with the Respondents' extinguished titles and exclusively directed against the State cannot affect the Appellant's earlier crystallized possessory title to the Respondents' areas of land.

[54] It follows that the Appellant has the right as against the First and Second Respondents and the State to be declared under section 4 to have title to areas 'F', 'G', 'H' and 'C'. However, a complication has arisen in respect of area 'C'.

Area 'C' complications

[55] On Thursday April 17 2008 the CCJ Registry received a faxed letter from Mr Rex McKay SC with the simple request that a certified copy of Transport no 24 of 1976 in respect of area 'C' updated to 23-9-2004 should be included in the existing Supplemental bundle. From the faxed certified copy it surprisingly appeared that the Second Respondent had formally transported area 'C' to a Mr Raymond Austin ("Mr Austin") on 23 September 2004 (two days after Singh CJ had delivered his reserved judgment). Thus the Second Respondent no longer owned the disputed

[25] (1974) 21 WIR 224 at 338-339
[26] Ibid at 341 and 347 respectively
[27] (1881) 19 Ch D 373

land. The Court of Appeal appears to have given judgment on 20 December 2006 without having been aware of this. At the hearing before us on Monday 28 April 2008, when Mr McKay was asked by the court to explain this crucial development, he claimed that he had no further information. At the end of the hearing the court afforded counsel the opportunity within a fortnight to send written submissions to assist the court as to who should be declared to have title if it was held that the title of the First and Second Respondents to areas 'F', 'G' and 'H' and/or 'C', respectively, had been extinguished.

[56] On 14 May Mr McKay sent a faxed letter to the CCJ Registry. It appears from that letter, and supporting documents faxed with it, that on 15 August 2003 the Appellant's then counsel, Mr Clarence Hughes SC, in response to an advertisement published in the Official Gazette of 2 August 2003, filed an opposition to prevent the Second Respondent passing transport of area 'C' to Mr Austin. The ground of opposition was that the Second Respondent's title had been extinguished and the Appellant was the true owner of area 'C', as claimed in its Petition of January 1993. At the time of these developments i.e. in August 2003, the Chief Justice had completed the hearing of the Appellant's Petition but had not yet delivered his reserved judgment. The Appellant had duly followed up its notice of opposition with Writ of Summons No 479 of 2003 and on 13 October 2003 Mr McKay, as attorney-at-law for the Second Respondent, had entered an appearance. No further documents were filed by either side, so the Second Respondent sought and obtained from the Deputy Registrar on 14 September 2004 a certificate under Order 32 rule 9 of the Rules of the High Court that the action No 479 of 2003 was "altogether abandoned and incapable of being revived." In reliance upon this, the Second Respondent on 23 September 2004 transported title to area 'C' to Mr Austin. Mr McKay now submits in his faxed letter that, on the authority of *Gondchi v Hurrill*[28], even if the Appellant had acquired a prescriptive title by adverse possession, it cannot now assert any rights against Mr Austin, the current owner of the paper title.

[28] (1931-1937) LRBG 509 at 511

[57] Since Mr McKay was the Second Respondent's attorney while the above steps were taken and since the Appellant was aware of the attempt by Mr Austin to obtain transport and, presumably, of its outcome, it is surprising and unfortunate, to say the least, that these matters were apparently not disclosed to the Court of Appeal and were only brought to the attention of this Court at the times and in the manner described above.

[58] We have held that the Appellant had acquired a good prescriptive title to area 'C', and that the Second Respondent's paper title to area 'C' had been extinguished, as a result of area 'C' having been in the adverse possession firstly of the State and subsequently of the Appellant for more than twelve years. This resolves the issue which was raised in relation to area 'C' by the Appellant's Petition. A different issue is now raised as a result of Mr Austin having secured the passing of transport to himself in September, 2004, and his registration as the owner of area 'C'. Apart from anything else, Mr Austin is not a party to these proceedings and it would be quite improper for us to make any order which affected him without giving him an opportunity to be heard. But even if Mr Austin were joined as a party at this very late stage, this would not justify our enlarging the scope of this case in order to determine whether there was any ground on which the Appellant could claim to have the Register rectified so as to substitute himself for Mr Austin as the owner of the paper title to area 'C'. This claim was not raised or litigated either in the High Court or in the Court of Appeal, and if the Appellant wishes to pursue it, it must do so in fresh proceedings.

[59] This new issue which is between the Appellant and Mr Austin is something *'dehors'* the Petition, has nothing to do with prescription and, accordingly, cannot be decided by us in these proceedings. It is unfortunate that, given the inordinate length of time that these proceedings have been in progress, that is, some fifteen years, the final disposition of this case will still leave the Appellant with another hurdle to cross if it is to succeed in securing title to area 'C', but this is a consequence of events over which we had no control. We wish, of course, to make it clear that nothing in this judgment should be construed as an encouragement to the Appellant to compete with Mr Austin for the legal title to area 'C' or as any

indication that if the Appellant chooses to do so, it is likely to succeed or, conversely, to fail.

Areas 'K','J','N' and 'O'

[60] No one has ever challenged the validity of the 1977 CAOs in respect of areas 'K', 'J', 'N' and 'O', so that the State currently appears on the record of title as the lawful owner thereof. Moreover, the Court of Appeal's order obtained by the First Respondent that invalidated the CAOs was very specific to the First Respondent's areas 'F', 'G' and 'H', while the consent order obtained by the Second Respondent with the State's consent was very specific to the Second Respondent's area 'C'. It does not appear that anyone will ever seek to challenge the CAOs in respect of areas 'J', 'N' and 'O', while it is extremely unlikely that any claim will be made in respect of area 'K' or, if made, would succeed thirty-one years after the CAOs were made. As noted at [16] above, there is the special feature that before the 1977 CAOs the State had already acquired ownership of areas 'J' and 'O', while area 'N' was owned by the Guyanese Housing Corporation which operated as the executive arm of the Ministry of Housing and was dissolved in 1978 (its property presumably passing to the State or a body operating under the aegis of the State).Thus the validity or invalidity of the CAOs is irrelevant for areas 'J', 'N' and 'O'.

[61] As made clear by Evershed MR in *Moses v Lovegrove*[29], there is a fundamental rule that "Possession is never adverse if it can be referred to a lawful title." The lawful title-holder in possession can have no right of action to recover possession from himself so as to start the running of any limitation period, and, indeed, already having title, has no need to be able to obtain it by adverse possession. Due to the legal history of areas 'J', 'N' and 'O', whether or not the CAOs were declared to be of no effect in relation to those areas, the State could not be in adverse possession against itself or a body operating under its aegis. Accordingly, the Appellant's Petition for prescriptive title to areas 'J', 'N' and 'O' must be dismissed as misconceived.

[29] [1952] 2 QB 533 at 540, stemming from Page-Wood V-C in *Thomas v Thomas* (1855) 2 K & J 79 at 83 approved by Lord MacNaghten in *Corea v Appuhamy* [1912] AC 230 at 236

[62] The Petition must also be dismissed in respect of area 'K' which, as noted at [15] above, was owned by a Mr Albert Chung-Wee when the CAOs were made in 1977. Since then, for whatever good or bad reason, no challenge has been made to these CAOs by him or his successors in title, so that the State currently appears as the lawful title-holder of area 'K' and we have to proceed according to the state of the register. As noted above, "possession is never adverse if it can be referred to a lawful title", so that there has been no period of adverse possession by the State to which the Appellant can tack on its own possession.

[63] In any case, we could not make any declaration of title as to area 'K' because Mr Chung-Wee (or his successor in title) is not before us. However, after 31 years it is unlikely that Mr Chung-Wee (or his successor in title) will seek to impugn the compulsory acquisition of area 'K' and, even if he did so, he might well be defeated by a plea of waiver or acquiescence or laches.

Lack of significance of the failure to serve the Petition timeously on First & Second Respondents

[64] Before concluding with a summary of the position as to ownership of areas 'F','G','H','C', 'K', 'J','N' and 'O', something needs to be said about the Chief Justice's view that "a failure to serve a Petition in breach of rule 5(1) [of the Rules of the High Court (Declaration of Title)] would be fatal to the Petitioner's chance of success."

[65] The Appellants had failed to serve the Petition on the First and Second Respondents within seven days of the first publication of the requisite notice in the Gazette and a daily newspaper circulating in the county where the relevant land was located. The purpose of this requirement is to ensure that affected landowners are made aware of the threat to their titles and are given the opportunity to oppose the Petition, by filing a notice of opposition, and thus initiate the process of a full hearing on the merits. This did happen in this case. The First Respondent entered notice of opposition on 1 March 1993, while the Second Respondent entered notice of opposition on 9 February 1994. The Chief Justice commenced to hear the Petition on 28 November 2002 by which time all parties were well-prepared to deal with all

the issues on the merits – and the Chief Justice did, despite his comment, deal with the petition on the merits, as subsequently did the Court of Appeal.

[66] It is, of course, important to keep to the Rules of Court as much as possible for such Rules are deliberately designed to ensure that the courts deal with cases fairly and expeditiously so as to achieve a just result which is the "overriding objective" expressly recognized by Rule 1.3 of the CCJ (Appellate Jurisdiction) Rules. To this end, the Rules may provide express dispensing powers for particular circumstances (eg Rule 5(2) of the Rules of the High Court (Declaration of Title) which empowers a court to dispense with service satisfying Rule 5(1)) or, as in the case of Rule 54 of the Rules of the High Court, provide a general discretionary power to deal with non-compliance with the Rules in such manner and upon such terms as the Court shall think fit eg by ordering payment of costs by a party in breach. In deciding whether a breach is egregious enough to warrant striking out a party's case or sufficiently remediable for matters to be allowed to proceed, it is vital for a court to focus upon the purpose of the broken Rule and to consider whether, despite the breach, that purpose has been or can be achieved so that the matter can still be fairly and expeditiously determined on the merits.

Disposition of the appeal

[67] The Appellant's Petition for prescriptive title to the First Respondent's areas 'F'. 'G' and 'H' succeeds. It is declared to have acquired title to those areas which shall be passed to and registered in the name of the Appellant by the Registrar of Deeds.

[68] In these proceedings the Appellant's Petition against the Second Respondent in respect of area 'C' has succeeded since we uphold the Appellant's claim to have supplanted the Second Respondent in respect of this area by virtue of its acquisition of a prescriptive title under the provisions of the Limitation Act. Any declaration to this effect, however, would have to be subject to the current state of the Register of Deeds in which Mr Austin is inscribed as the legal owner of area 'C' as a result of the chain of events described above. If the Appellant wishes to challenge the right of Mr Austin to retain his registration as legal owner of the land, it must do so in new proceedings launched for that purpose. That is not a matter which is within our

purview in dealing with this appeal. We would point out that we have not had the benefit of any argument from the Appellant's counsel as to whether, and if so why, we should ignore the passing of transport of area 'C' to Mr Austin and Mr Austin's consequential registration as legal owner of that parcel, in determining what declaration or order (if any) we should make in respect of that parcel.

[69] The Appellant's Petition against the Third Respondents in respect of areas 'K', 'J','N' and 'O' is dismissed.

[70] We note that the legal disputes relating to the breakdown of the October 1987 contract between the State and the Appellant remain to be resolved as they, too, were not within the ambit of this appeal. It would be an extremely unfortunate waste of resources if these prime lands for development stagnated for decades yet to come due to protracted litigation over that contract. It is to be hoped, therefore, that the disputes arising from the contract can be speedily settled by the parties with the aid of their legal advisers. Hopefully, such a settlement will not be delayed by a protracted dispute between the Appellant and Mr Austin over area 'C'. It is important not to lose sight of a person's fundamental right to have his case "given a fair hearing within a reasonable time" under Article 144(8) of the Constitution.

[71] As to the costs here and below, the First and Second Respondents are to pay two thirds of the costs incurred by the Appellant in this Petition, and the Appellant is to pay one third of the Attorney General's costs.

/s/ M.A. de la Bastide

Mr. Justice Michael A. de la Bastide (President)

/s/ R. Nelson

Mr. Justice Rolston Nelson

/s/ D. Pollard

Mr. Justice Duke Pollard

/s/ J. Wit

Mr. Justice Jacob Wit

/s/ D. Hayton

Mr. Justice David Hayton