[2011] CCJ 12 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ APPEAL No CV 1 of 2011
GY Civil Appeal No 61 of 2006

BETWEEN

ELROY GARRAWAY — APPELLANT

AND

RONALD WILLIAMS individually and in his capacity as duly constituted attorney for NESHA WILLIAMS — FIRST RESPONDENT
ALVIN RAMBARRAN — SECOND RESPONDENT

Before The Honourables: Mr Justice Rolston Nelson
Mr Justice D. Hayton
Mr Justice W. Anderson

Appearances

Mr Roysdale Forde and Mr Sean A. M Lewis for the Appellant

Mr R. N Poonai and Mr R Satram for the Second Respondent

JUDGMENT
of Justices Nelson, Hayton and Anderson
Delivered by
The Honourable Mr Justice Anderson
on the 4th day of August 2011

[1] Mr. Elroy Garraway (hereafter the "Appellant") has been nothing if not persistent. He has over a period of some fifteen years, taken no less than six separate judicial proceedings to secure by means of various legal submissions the ownership of lands situated at the West Half of North Half of Lot 4 James Street, Albouystown, Georgetown, (hereafter "the Disputed Property"). Regrettably for him, he again fails before us but an advantage of his persistence is that this Court has thereby been given an opportunity to pronounce upon an important question of legal principle relating to the finality of judicial decisions.

[2] In this judgment we are concerned with the Appellant's appeal from a decision of the Court of Appeal of Guyana delivered on 8th June, 2010, in which that Court upheld the decision of the Learned Land Court Judge and Commissioner of Title to refuse the Appellant's claim for the grant of prescriptive title in respect of the Disputed Property. On 29th June, 2011, we dismissed his appeal after hearing submissions from his Counsel, Mr. Forde, and Counsel for the respondents, Mr. Poonai. We undertook then to deliver in due course reasons for our decision. We do so now.

Background

[3] The genesis of this appeal may be traced to the first proceeding taken by the Appellant in respect of the Disputed Property. By way of Writ of Summons instituted in the High Court on 14th June, 1996, the Appellant claimed specific performance of an agreement for sale of the Disputed Property to him. He had entered into this agreement in 1973 with Nesha Williams (hereafter the "First Respondent") and her mother and co-owner in equal undivided shares of the Disputed Property, Betty Shirah, also known as Betty Kalloo, now deceased. The Appellant commenced occupation of the Disputed Property in 1976 as a tenant and the co-owners obtained judgment for rent against him. On 31st January, 1986 the property was destroyed by fire and thereafter the Appellant paid no rent to anyone. On 2nd December, 1994, the First Respondent entered into an Agreement of Sale of the Disputed Property to Alvin Rambarran (hereafter the "Second Respondent") under which she undertook to grant him vacant possession. Notice of this sale was advertised in

the Official Gazette on 25th May, 1996 and was undoubtedly the stimulus for the initiation of proceedings by the Appellant less than three weeks later which have culminated in this appeal.

[4] In addition to specific performance of the 1973 Agreement the Appellant also claimed a declaration that he was the owner of the Disputed Property "subject to the payment of the balance of the purchase price", and damages for breach of contract. The Second Respondent counterclaimed for damages and pecuniary compensation from the Appellant and an order that the Appellant give up possession of the Disputed Property. It appears, however, that the Second Respondent did not receive transport to the Disputed Property until 8th December 2005.

[5] The specific performance claim was heard by Justice Biscessar who, on the 29th December, 2000, dismissed the Appellant's action on the ground that the purported agreement of sale provided for the parties to enter into a formal agreement and did not itself constitute a contract. The learned Judge ordered the Appellant to give up possession of the Disputed Property within three months. The counterclaim for damages and pecuniary compensation by the Second Respondent was dismissed because no evidence of loss had been adduced.

[6] On 26th January, 2001, the Appellant appealed against the decision of the trial judge to the Court of Appeal, then the final appellate court of Guyana. The appeal was heard by Bernard C, and Kissoon and Chang, JJA. On 28th January 2002, these judges unanimously rejected the submission that the agreement of 1973 constituted a binding agreement of the sale and purchase of the Disputed Property. Thus, they upheld the decision of Justice Biscessar. The Appellant was ordered to give up possession within two months.

[7] During this hearing before the Court of Appeal, Counsel for the Appellant raised the possibility that the Appellant could have been entitled to the Disputed Property on the basis of a prescriptive title. Counsel contended further that the learned trial judge ought to

have exercised his discretion to amend the pleadings of his own motion in order to permit the Appellant to establish a claim based on adverse possession. Chang JA felt that there was no basis on which the trial judge could have entertained a claim to prescriptive right since this was never expressly pleaded in the Statement of Claim but Chancellor Bernard, with whom Kissoon JA concurred, approached the matter in broader terms.

[8] The Chancellor held that a claim for prescriptive title "could not have been made alternatively as the Appellant sought to rely solely on the purported agreement for sale thereby recognizing the Respondents' lawful title to the land". In other words, had the Appellant already acquired prescriptive title to the land it would be nonsensical and legally incomprehensible for him to claim that on paying the purchase price to the landowner she had to transfer *her title* to him pursuant to the agreement for sale with him. The Appellant had elected between these mutually exclusive claims by pursuing his claim for specific performance. The Chancellor went further to find that "[t]he totality of the Appellant's evidence does not establish in the slightest degree any claim for prescriptive title". There was therefore no reason why the judge should or could have permitted any amendment of the pleadings to permit a claim of prescriptive title and no reason why the Court of Appeal should entertain such a claim. These crucial findings of law and fact have great relevance to the disposal of the present appeal and we must therefore return to them in due course.

[9] Being dissatisfied with these decisions against him the Appellant began a new round of proceedings. On 25th March, 2002, he filed a petition in the Land Court for a declaration of prescriptive title to the Disputed Property under the provisions of the Title to Land (Prescription and Limitation Act)[1] on the basis that he had obtained prescriptive title by having been in adverse possession of the land since 1973. It will be noted that in this action he dropped entirely the claim to the land on the basis of the agreement of 1973 and instead relied solely on the alleged fact that he had been in possession openly and freely *nec clam, nec vi, nec precario* adverse to the true owner thereof. However, as pointed out below by Roy JA and Persaud J (as an Additional Judge of the Court of Appeal), there

[1] Cap 60:02.

was a clear violation of the mandatory requirement embodied in Rule 3 (2) of the Rules of the High Court (Declaration of Title)[2] for full disclosure of all material facts in the petition. There was no disclosure, for example, of the previous court proceedings or of the fact that the petitioner spent some time as a tenant on the land also occupied by the then transported owner, i.e., the First Respondent. Thus, the learned Commissioner of Title would have been justified in dismissing the petition on the ground of non-disclosure alone. We rest our judgment, however, on a more fundamental issue.

[10] The petition for prescriptive title, which was opposed by the First and Second Respondents, was based upon essentially the same evidence that had been led in the proceedings before Biscessar J. and reviewed by the Court of Appeal. The Learned Commissioner of Title dismissed the petition and ordered the Appellant to pay costs of the Respondents. The Appellant appealed to the Court of Appeal mainly on the basis that the Learned Commissioner had misconceived the effect of the order for possession in the prior proceedings in that as the orders were not made in favour of anyone, Biscessar J merely ordering the Appellant to give up possession of the property within three months and Chancellor Bernard (with whom Kissoon JA agreed) affirming the judge's order but reducing the period to two months, those orders had no legal effect in the prescriptive title proceedings.

[11] The Court of Appeal dismissed the appeal basically on three grounds: (1) the Appellant had not established that he had been in adverse possession of the disputed property for the prescribed period of twelve years required by section 3 of the Title to Land (Prescription and Limitation Act)[3]; (2) any adverse possession by the Appellant had been interrupted by the order for possession granted in 2000 by Justice Biscessar and confirmed by the Court of Appeal in 2002 prior to satisfaction of the twelve year requirement; and (3) the Appellant was, under the terms of the 2002 decision, barred by the doctrine of *res judicata* and his petition was an abuse of process. It is from this decision that the Appellant appeals to this Court.

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[2]Cap. 3:02.
[3] Cap. 60:02 (supra).

[12] It should be said that the *res judicata* point, once decided against the Appellant was clearly decisive and fatal to any further consideration of his case. It is understandable that the Court of Appeal of Guyana felt obliged, in the event that it had erred in coming to its decision on the *res judicata* point, to consider the other issues raised by the Appellant in these proceeding. Indeed this approach is appropriate and commendable. Logically, however, the *res judicata* point ought to have been considered first, and the other grounds considered as alternative bases for disposing of the appeal. At any rate, the Caribbean Court of Justice ("the Court") as the final court of the appeal for Guyana must necessarily treat with the matter differently. A finding that the 2002 decision of the Court of Appeal raised the bar of *res judicata* necessarily disposes of the dispute once and for all without need or opportunity to consider other issues raised by Counsel.

Res Judicata

[13] The question that arises for consideration is whether the January 2002 decision of the Court of Appeal was binding upon the parties to this action and therefore barred the claim begun in March 2002 by the Appellant for his having acquired prescriptive title of the Disputed Property. The court below in three separate and reasoned judgments found that the 2002 decision had this effect. For the reasons which follow, we agree with this finding.

[14] As is well known, the principle of *res judicata* is intended to give finality to judicial decisions. Literally, the term means that a matter has already been finally settled by judicial decision and is not subject to further appeal. In order for the doctrine to be applicable three essential conditions must be satisfied: there must be an earlier decision covering the issue; there must be a final decision on the merits of that issue; and the earlier suit must involve the same parties or parties in privity with the original parties. Once satisfied the principle bars the same parties from litigating on the same claim or any other claim arising from the same transaction or subject-matter that was or could have been raised in the first suit. Thus is precluded continued litigation between the same

parties in respect of essentially the same cause of action. The concomitant waste of judicial resources is avoided.

[15] The eminently reasonable and indeed indispensable proposition of law embodied in the doctrine of *res judicata* has been examined in numerous cases including *Henderson v Henderson*[4]; *Hoystead v Commissioner of Taxation*[5]; *Greenhalgh v Mallard*[6]; *Morley v R. J. Shannon & Co. (Trinidad) Ltd.*[7]; *Swift v McEnearney and Co. Ltd.*[8]; *Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd*[9]; *Thomas v. Attorney-General (No. 2)*[10]; *Talbot v. Berkshire CC*[11]; and *Barber v Staffordshire CC*[12]; *Johnson v Gore Wood & Co*[13]; and *Gairy v Attorney General*[14]. The authorities make abundantly clear that *res judicata* covers two quite different effects of final judgments. In the first place it forecloses the relitigation of matters that have once been litigated and decided. In the academic literature the bar to which this gives rise is sometimes referred to as 'collateral estoppel' or 'issue preclusion'. Secondly, the doctrine also forecloses any litigation of matters that have never been litigated but which could and should have been advanced in an earlier suit. This foreclosure is sometimes referred to as 'true *res judicata*' or 'claim preclusion'.[15]

[16] A classical exposition of the governing principles was enunciated by Wigram VC in *Henderson v Henderson* (supra) where he stated:

> "I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter

[4] [1843-60] All ER 378.
[5] [1926] AC 155.
[6] [1947] 2 All ER 255.
[7] (1970) 17 WIR 29.
[8] (1971) 16 WIR 391.
[9] [1975] AC 581.
[10] [1991] LRC 1001.
[11] [1993] 4 All ER 9.
[12] [1996] 2 All ER 748.
[13] [2002] AC 1, [2001] 2 WLR 72.
[14] [2001] UKPC 30.
[15] See: Professor Allan Vestal, "Rationale of Preclusion", 9 St. Louis U.L.J. 29 (1964).

> which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".[16]

[17] The fundamental rule in *Henderson v Henderson* (supra) has stood the test of time, albeit it has been restated in more flexible terms in more recent times. There remains a basic obligation on a litigant to present the entirety of his case all at once rather than in a piecemeal fashion. Failure by one party to present the whole case at once is detrimental to the interests of the other parties and the efficiency of the judicial system. In assessing whether a defence of *res judicata* will succeed in barring new proceedings, the courts adopt a broad merits-based approach which takes into account all the relevant facts in order to decide whether in all the circumstances of the case a party is misusing or abusing the processes of the court by bringing proceedings in respect of issues that should reasonably have been brought in earlier proceedings (see Lord Bingham of Cornhill in *Johnson v Gore Wood & Co*[17]).

[18] The question therefore arises as to whether the Appellant had an opportunity to recover in the action he initiated in 1996 that which he now seeks to recover in the action under appeal. It seems to be abundantly clear that he had that opportunity. The earlier claim was for specific performance of a 1973 agreement to purchase the Disputed Property. However, during the hearing before the Court of Appeal the Appellant sought to amend the pleadings in order to include a claim for adverse possession of the same property, and after making its decision on the claim for specific performance the Court of Appeal quite clearly considered the question of prescriptive title.

[19] It is at this point that we must return to the judgment of Chancellor Bernard. The Chancellor, with whom Kissoon JA concurred, alluded to the contention of Counsel for

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[16] [1843-60] All ER 378 at 381-382.
[17] [2002] AC 1 at p. 24.

the Appellant that the learned trial judge ought to have exercised his discretion to amend the pleadings of his own motion to permit the Appellant to establish a claim for prescriptive title to the land in question, and then continued:

> "With due respect to Counsel this submission is rather far-fetched and unrealistic having regard to the state of the pleadings and the Appellant's viva voce evidence. A claim for prescriptive title was never made in the Statement of Claim either substantively or alternatively; in fact it could not have been made alternatively as the Appellant sought to rely solely on the purported agreement of sale thereby recognizing the Respondents' lawful title to the land. He also maintained this stand in his evidence when he said categorically that he was seeking damages for fraud and deceit and specific performance of the agreement. The whole trial of the action was centered on the agreement and only by a side wind at the end of his address to the Court did the Appellant's Counsel make mention of the Respondents' rights being extinguished and to case of the *Cadogan v Cadogan* [1954] LRBG.
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> With regard to Counsel's contention raised before us for the first time that the learned trial judge ought to have granted the amendment suo motu I find the reasoning of Lord Watson in *Connecticut Fire Insurance Co. v Kavanagh*[18], very instructive.
> ...
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> The evidence upon which the Appellant relies to establish a claim for prescriptive right is his occupation of the land in question from 1973. However, from his own evidence he was put into possession by the first-named Respondent and Betty Kalloo in 1973; therefore his possession was not adverse. He also admitted that the first-named Respondent had permitted him to build a shed on the land, and again this is inconsistent with adverse possession. Further, he admitted that he was aware that the Respondents had obtained judgment for rent against him, and coupled with his evidence (though later denied) that he at first was a tenant, I fail to understand his claim for prescriptive title to the land.
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> The totality of the Appellant's evidence does not establish in the slightest degree any claim for prescriptive title, and I can see no reason why the learned trial judge should have permitted any amendment of the pleadings to claim prescriptive title and no reason why this Court should entertain any such claim. Accordingly this ground of appeal fails".

[20] It seems pellucidly clear that the Court of Appeal rejected the request to amend the pleadings not merely on the technical point advanced by Chang JA that adverse possession was never expressly pleaded in the Statement of Claim but on more

[18] [1892] AC 473 at p. 480.

substantive grounds. It was totally inconsistent with the Plaintiff's claim to have the Defendant transfer her title to him on receipt of the balance of the purchase price, which clearly acknowledged her title, for the Plaintiff to claim that he had already acquired title on prescriptive principles. Having elected to pursue specific performance of the agreement for sale to him he was thereby acknowledging the Defendant's title. This necessarily meant that the Plaintiff could not begin to pursue a prescriptive claim until twelve years had elapsed from the resolution of his claim acknowledging the Defendant's title in the judgment of the Court of Appeal in 2002. Moreover, there was no evidence to support any amendment to claim prescriptive possession before 2002. Lord Watson in *Connecticut Fire Insurance Co v Kavanagh* (supra) laid down the test to be followed when a question of law regarding amendment of a plea is raised for the first time in a court of last resort and that question of law cannot be disposed of, as it can here, without deciding nice questions of fact. In order to permit the change to the pleadings the court must be satisfied that the evidence upon which it is being asked to act, "establishes beyond doubt that the facts, if fully investigated, would have supported the new plea".

[21] The Court of Appeal clearly accepted this test and examined evidence in order to satisfy itself as to whether to allow the amendment. Far from establishing grounds upon which the amendment could properly be allowed the very opposite was established. The Appellant was claiming specific performance of an agreement under which he would take title to the Disputed Property from the true owner. The Court of Appeal found that the Appellant was thereby implicitly acknowledging that he was not the true owner. There was also evidence that he was a tenant and that activities carried out by him on the property, including the building of a shed, had been done with the permission and consent of the true owner. It was these facts which led the court to decide that there was no evidence to establish in the slightest degree the claim for prescriptive title.

[22] The critical point is that the Court clearly made a finding of law against the claim for prescriptive title by the Appellant once he had elected to acknowledge the First Respondent's title to the land by suing her to transfer *her* title to him and this was further confirmed by the absence of any evidence adequate to establish any prescriptive title.

Hence the order that he give up possession of the property. The Court of Appeal's 2002 decision clearly precluded subsequent proceedings by the Appellant to establish that he had title by adverse possession in the period up to 2002, at least in respect of the same parties. In short, we agree with the court below that the second round of proceedings was barred as the matter was *res judicata*.

[23] Admittedly, Wigram VC in *Henderson v Henderson* (supra) alluded to the possibility of "special circumstances" which could displace the defence of *res judicata*. But typically these special circumstances concern a situation where there was a lack of due process or the court which gave the earlier judgment lacked jurisdiction. The latter normally applies in the context of a federal and state system of courts. In *Johnson v Gore Wood & Co* (supra) the conduct of the parties before, during and after the settlement agreement created a special circumstance that negated the estoppel of the Plaintiff. In *Gairy v Attorney General* (supra) the circumstances had so changed particularly as regards the availability of mandatory orders against ministers of Crown and the failure to pay compensation seven years after the order, as to make it both reasonable and just for the Plaintiff to raise the issue and pursue the claim in question in later proceedings. By contrast, in the present case, there are no special circumstances that would displace the bar of *res judicata*.

2002 decision of the previous final Court of Appeal

[24] Counsel for the Appellant invited this Court to seize the opportunity to make new law in this case regarding the nature of the intention required for the acquisition of prescriptive title. Essentially, Counsel argued that it was possible for the Appellant to have been simultaneously the repository of an intention to acquire the Disputed Property by specific performance of an agreement for sale, and by adverse possession. We decline the invitation.

[25] No question arises of creating law different from the Court of Appeal's decision of 2002 on prescriptive title. We fully agree with the Court of Appeal's reasoning as set out in

[19] above. The decision of a previous final court is binding on the parties and their privies in all later legal proceedings between them whatever the court.

[26] As regards the Court's ability to overrule decisions of previous final courts of appeal, this Court has held in *Attorney General v. Joseph & Boyce*[19] that it has that power. Further, there can be no appeal from a decision of a final court of appeal to this Court: see section 4 (3) of the Caribbean Court of Justice Act 2004 (No. 16). However, in this case no issue of overruling the Court of Appeal's 2002 decision arises either by way of a later case in which *res judicata* does not apply, or by way of appeal from its decision of 2002.

Abuse of Process

[27] Finally, we are of the view that the re-litigation by the Appellant of this matter following the 2002 Court of Appeal decision amounted to an abuse of process. This necessarily follows from the finding that the proceedings were barred by the principle of *res judicata*. Indeed, even if that decision had not dealt at all with title by prescription but had hinged entirely on rejecting the 1973 Agreement as a proper contract of sale, the Appellant would still not have been entitled to bring his 2002 petition for prescriptive acquisition of title. The fact of the matter is that the issues, the subject-matter and the parties were the same. He could have based his claim in the first proceedings on prescriptive title. He could have sought to assert prescriptive title if his possession of the property after the 2002 decision satisfied the requirements for adverse possession (which it clearly did not). What he could not do was to elect to claim specific performance of a contract of the sale of the Disputed Property thereby acknowledging the First Respondent as the true owner and when that claim failed to then start proceedings for the property on the basis of adverse possession relating to the period of time during which he was claiming specific performance. By attempting to do so the Appellant was mounting an indirect challenge to the ruling of the Court of Appeal. This was clearly an abuse of process. As much is evident in a related ruling by Carl Singh CJ who on 13 November 2005 struck out yet

[19] (2006) 69 WIR 104 at [18]

another proceeding by the Appellant, namely, his Notice of Opposition to the transfer of title to the Second Respondent. The learned Chief Justice held, rightly in our view, that the Notice was an abuse of process in the light of the outcome of the Appellant's claim for specific performance of the 1973 Agreement.

Conclusion

[28] We dismiss this appeal and affirm the decision of the Court of Appeal on the basis that the petition begun in the Land Court on 25th March, 2002, was barred by the doctrine of *res judicata*. We are also of the respectful opinion that the 2002 judgment of the Court of Appeal was entirely correct on the nature of the intention required to acquire title by prescription. The Appellant must give up possession of the disputed property to the Second Respondent as transported owner within two months of the date of this judgment and must pay the costs of the Respondents in this appeal to be taxed if not agreed.

/s/ R. F. Nelson

The Hon. Mr. Justice Rolston Nelson

/s/ D. Hayton

The Hon. Mr. Justice D. Hayton

/s/ Winston Anderson

The Hon. Mr. Justice W. Anderson