[2008] CCJ 12 (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 8 of 2007
GY Civil Appeal No. 83 of 2003

BETWEEN

DAVID LACHANA A/C LACHANA **SADONEL DEVI LACHANA**	**APPELLANTS**

AND

COOBLAL ARJUNE **TARA AJUNE**	**RESPONDENTS**

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

Appearances

Mr Roopnarine Satram, Mr Chandraprakesh Satram and Mr Mahendra Satram for the Appellants

Mr Rajendra Poonai and Mr Sohan Poonai for the Respondents

JUDGMENT
of
Justices Nelson, Pollard, Bernard, Wit and Hayton
delivered by
The Honourable Mr. Justice Jacob Wit
on the 17th day of December, 2008

Introduction

[1] This matter concerns the ownership of a parcel of land on the East Coast of Demerara in the Republic of Guyana, known as "Lot 'A', being a portion of block 2 of the West Half of the East Half of the Plantation Quaker's Hall." Although it is only a small piece of land (around 480 sq. m), it is extremely important to David Lachana and his wife Sadoney, the appellants in this case. David's parents had lived on this land since 1945 when he was born there. He grew up on the land and has lived there all his life. In 1965, after they were married, Sadoney joined him and she also has "lived there ever since." Their five children were born and raised on the land. And so, in a way, it is the centre of their world.

[2] When Sadoney joined David in 1965, he, his father Albert and several of his brothers and sisters were living in an old house on the property. That house was broken down in 1969 and in that same year David and Sadoney built a new one. They still live there, up to this very day.

[3] Although one can understand why David and Sadoney have come to consider this parcel of land their own, they have never held title to the land. They never had a transport of it. The "paper" or "true" owners of the land are Tara Arjune, in her capacity of administratrix of the estate of her deceased husband Khemraj Arjune, and Cooblall Arjune. They are the respondents in this case. Cooblall and Tara received the transport of a parcel of land, of which lot 'A' is just a part, in 1982 from the former "paper owner" of the land, a certain Ramsaroop, through his representative E.S. Doobay. The transport was passed nine years after Cooblall and Khemraj had bought the land from him.

[4] In 1999, David and Sadoney Lachana petitioned for a declaration of title to their little plot of land. This petition was based on the Title to Land (Prescription and Limitation) Act, Cap. 60:02 of the Laws of Guyana. Accordingly, they were required to satisfy the Court, that a) for a period of twelve years or more they had had sole, exclusive and undisturbed possession of their piece of land, b) their possession was

open and adverse to the "paper owners" and c) their possession was not obtained by fraud or by some consent or agreement expressly made or given for that purpose.

[5] As was to be expected, Cooblall and Tara Arjune opposed the petition and on 27 November 2003 the Commissioner of Title and Judge of the Land Court dismissed the petition. The Lachanas appealed the decision but on 13 April 2007 the appeal was dismissed by the Court of Appeal. They subsequently appealed the judgment of the Court of Appeal. This Court heard the appeal on 3 November 2008 and dismissed it with costs, stating its intention to deliver its reasons later. We now give our reasons.

The issues

[6] Although the case was about much more, it ultimately boiled down to two issues of fact:

(a) At what point in time did the adverse possession, if there ever was one, begin: in 1969, as the Lachanas initially deposed, or in 1979, as they later deposed (but thereafter sought to qualify)?
(b) From 1982 to 1997 were the Lachanas rent-paying tenants of Cooblall and Tara Arjune, the holders of the "paper title", or were they in adverse possession?

[7] Clearly, if it could be established that the Lachanas had been paying rent for their lot in the period 1982 to 1997 it could not be said that their possession was adverse to the Arjunes during that time. But even then, if they could prove that from 1969 to 1982 their possession of lot 'A' was adverse to the then "paper owner" they would have satisfied the requirement of adverse possession of at least twelve years. In that case the title of Ramsaroop would have been extinguished even before he transferred or purported to transfer the land to the Arjunes. If, however, the adverse possession began in 1979, the Lachanas would not have had a sufficient number of years of adverse possession to defeat Ramsaroop's title in which case their petition would have to fail.

[8] In a well-reasoned judgment the Commissioner of Title found that the adverse possession began in 1979 and that it was more probable than not that the Lachanas had been rent-paying tenants in the period 1982 to 1997. These findings were fatal to the petition which therefore had to be dismissed.

[9] In an equally well-reasoned judgment the Court of Appeal concurred in the findings of the first instance judge although it rephrased, correctly we think, the second issue. The Court of Appeal put the question thus: whether the Lachanas had sufficiently disproved the contention that they had been rent-paying tenants of the Arjunes. The Court of Appeal found they had not.

[10] The decisions of the lower courts are ultimately based on these two concurrent findings of facts, the very same findings we are now asked to review. The question has been raised whether we should do so.

The practice of the Court

[11] Counsel for the Arjunes referred us to the well known case of *Devi v Roy*[1] where the Privy Council "codified" their (utter) reluctance to review the evidence for the third time where there are concurrent findings of two courts on a pure question of fact. This decision was the culmination of a long line of cases in which the Privy Council developed a rather rigid practice of non-intervention with the facts of the case including those facts that were mere inferences from the primary facts. Even when there was a dissentient in the appellate court or where different reasons were given by the judges in arriving at the same findings of fact, the Privy Council was loath to interfere. It would do so in case of "some miscarriage of justice or violation of some principle of law or procedure." Although the Privy Council stated in *Devi v Roy*, and has repeatedly said so in later cases, that this practice is not a "cast-iron one", it would seem that its approach has been more rigid than the practice of other final courts in the Commonwealth. We would in this context expressly refer to recent statements in the High Court of Australia[2] which clearly show a tendency toward more flexibility.

[1] [1946] AC 508 at pp 521 to 522
[2] See *Roads and Traffic Authority of NSW v Dederer* [2007] HCA 42, in particular the judgment of Heydon J at [284] to [294]

[12] We do not think that it is proper for us to adopt wholesale the practice followed by the Privy Council if only because the position of our Court is quite different from that of the Privy Council. When their Lordships decided *Devi v Roy* they were at the judicial apex of an empire that spanned all five Continents. In a way they still are, although the empire has dwindled substantially. The point is that their Lordships are both geographically and culturally far removed from the countries that still retain the Privy Council as their final appellate court. They are, quite understandably, unfamiliar with local situations and customs, and therefore have to tread very carefully and cautiously with the facts as they emerge from the findings of the local courts. The disadvantages of that situation have become clear with some regularity. To take a recent example, in *Panday v Gordon*[3] their Lordships expressly opted to defer to the findings of the lower courts even though it meant depriving the appellant of a fresh look at the factual substratum of the case. The difference with our Court is obvious. We are a regional Court and thus much closer to home as it were. Our closeness to the region and our greater familiarity with its social and cultural dimensions make it easier for us to descend into the facts of the case, especially where the facts do not turn on the credibility of the witnesses or where they are the result of inferences from primary facts.

[13] Furthermore, it would seem to us that a policy of rigid judicial restraint with regard to concurrent findings of fact might be much more appropriate in appeals with special leave where a final court has a broad discretion whether to hear a case or not than in appeals as of right. We note, however, that the Privy Council has maintained its practice even in those appeals (see *Benoit Leriche v Leon Cherry*[4]).

[14] It is against this background that we intend to develop our own practice, for the time being on a case by case basis. As this is an appeal as of right and only deals with factual findings we will, for now, deal with the issues before us as fully as necessary.

[3] [2005] UKPC 36
[4] [2008] UKPC 35

Dealing with the issues

[15] We will start with the first issue: when did the adverse possession of the Lachanas, if any, begin? As it became clear at the oral hearing, this was the main issue which counsel placed before us.

Issue (a): was 1969 or 1979 the relevant year for the start of any adverse possession?

[16] At first, both David and Sadoney Lachana stated and deposed that they had been jointly in sole and exclusive possession of lot 'A' *nec vi, nec clam, nec precario* **since 1969**. Later, in a further affidavit they deposed that David's father Albert Lachana had lived continuously on the parcel of land in question until his death on 21 July 1979. They further deposed they had lived on the said land continuously *nec vi, nec clam, nec precario* **since the death of Albert**. Confronted with the apparent contradictions in these depositions, David testified under cross-examination that his father left the land in 1969 to live with 'another woman' and then came back after two years. He also claimed not to know the meaning of 'continuously'. Sadoney is recorded as having testified under cross-examination that her father-in-law lived with them up to 1979 in the sense that he lived with them for a period of time, coming and going, but that he did not die there. The picture that emerges from these evidential snippets does not look altogether unfamiliar to the Caribbean eye. That the "old" man would leave his home every now and then, to live with another woman or otherwise, and that he would come and go, as Sadoney testified, does not at all mean that he, the *pater familias*, had "abandoned" his land. More information would be needed to reach that conclusion and, unfortunately for the Lachanas, the evidence, skimpy and sketchy as it is, does not reveal much more. The fact that Albert supposedly left the land to live with 'another woman' in the same year that his old house was broken down and a new one was built does not substantially change the picture.

[17] In a final and almost desperate attempt, counsel for the Lachanas sought to put the facts in a new context so as to make the point that if it is that David and Sadoney

Lachana were in sole and exclusive possession of the parcel of land only from 1979 when Albert Lachana died, it must follow that they simply stepped into Albert's shoes as "successors in title" and became entitled through the deceased to the prescriptive rights accumulated by Albert Lachana as a longtime adverse possessor of the land. Although the Lachanas never pleaded at the trial that they were tacking on their possessory rights to Albert's, that was not necessary according to counsel as it would follow from section 2 (4) of the Title to Land (Prescription and Limitation) Act that they "shall be deemed to claim through" their predecessor Albert Lachana.

[18] The problem with this submission is that nowhere does the evidence show or even suggest that Albert, although he had been occupying the land for many years, had ever been in adverse possession of it. On the contrary, the tiny bits of evidence that can be found in the record rather seem to indicate the opposite. And so, there was really nothing to which David and Sadoney could tack on any possible adverse possession of their own.

Issue (b): from 1982 to 1997 were the Lachanas rent-paying tenants or were they in adverse possession?

[19] We can be very short about this issue. Counsel for the Lachanas did not spend much time and energy on this point. We think he was right not to do so. Much of what the Commissioner of Title found in this respect was based on his assessment of the credibility (or lack thereof) of especially David Lachana. As we have said, his judgment was well-reasoned and so was the judgment of the Court of Appeal. We did not find anything in that reasoning with which to disagree.

Conclusion

[20] For these reasons, the appeal is dismissed with costs.

_____/s/ R F Nelson_____
The Hon. Mr Justice R. Nelson

_____/s/ Duke Pollard_____
The Hon. Mr Justice D. Pollard

_____/s/ D P Bernard_____
The Hon. Mme Justice D. Bernard

_____/s/ J Wit_____
The Hon. Mr Justice J. Wit

_____ /s/ D Hayton_____
The Hon. Mr Justice D. Hayton