

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:

1. JAIRAM BOB
DHORAY
2. MARY CECELIA
3. NATASHA ANGELA
PERSAUD nee
DHORAY
4. HARVEY ANGELO
DHORAY

Plaintiffs

-and-

1. MOHAMED BAKSH
2. SHERRY BAKSH

DEFENDANTS
Jointly &
Severally

Mr. A. Nandlall for the Plaintiff

Mr. G. Hanoman for the Defendants

DECISION

The plaintiffs are the owners of lot 133 Bourda, Georgetown, with the building and erections thereon by Transport No. 1690 of 1997. In Transport No. 1690 of 1997 the property is described as west half of lot numbered 133, Bourda, Georgetown, and is annotated to show that the said property is subject to a 999 year lease in favour of one Jerry Ishmael. The West half of lot 133 was previously divided into sublots A and B. The transport relates to subplot A and the lease comprises subplot B which is held by a 999 year lease in favour of Jerry Ishmael.

The defendants claim that they have been in occupation of subplot B, that is, the leasehold with the permission of Mohamed Rajah Ishmael who died in November 1997. The defendants claim that the leaseholder Jerry Ishmael had assigned the lease to Mohamed Rajah Ishmael, but have not produced any document or other writing evidencing the assignment. The defendants also claim that Mohamed Rajah Ishmael died in November 1997 before the lease

could have been assigned / transferred but there are no documents to this effect. In any event an intention to assign cannot amount to an assignment in law and the defendants have referred only to an intention unsupported by any documentary evidence.

The defendants also claim that the premises were held by Jerry Ishmael in trust for Mohamed Ishmael but the defendants have not shown that such a trust exists. It is trite law and a long known legal principle that a trust cannot arise by a mere intention to assign. In fact the defendants have not even shown this court that such an intention existed. This principle is supported by Chancellor George in **Fazal -v- Annamanathadoo** (1991) 48 WIR 150 at page 158 who stated the law as being that only express trusts exist in Guyana. His honour stated:-

“ the overwhelming body of judicial opinion is of the view that, express trusts apart, equitable estates or interests are precluded by the above provisions” (referring to s.3 of Civil Law of Guyana Act, which expressly excluded the English common law of real property from land law in Guyana).

The defendants also claim that Mohamed Ishmael and the defendants had and continue to have sole, continuous and undisturbed possession of the premises. One has to ask the question “adverse to whose ownership or possession did the defendants have sole continuous and undisturbed possession of the premises”?

It is obvious from the chronology of events ascertained from the affidavits and documents attached to the affidavits that Jerry Ishmael acquired the lease in December 1997 and sometime thereafter left Guyana leaving Mohamed Ishmael and the 2nd named defendant to live in the property. The defendants have not shown that Jerry Ishmael had abandoned his rights and on the facts before the court there is no evidence that Jerry Ishmael abandoned his rights to the property. In fact, it is quite clear from the defendants’ affidavit that they were in possession with his permission.

Jerry Ishmael subsequently, in furtherance of his ownership, which he never relinquished, then sold the lease rights to the plaintiffs, and effected a transfer of the lease to the plaintiffs.

The defendants' contention that the agreement of sale was fraudulent is fanciful and ludicrous to say the least. Jerry Ishmael himself entered into the agreement of sale for the sale of the lease rights owned by him. Where is the fraud? The defendants have not shown any particulars of fraud that the court can rely on.

The defendants also claim that the plaintiff purported to surrender the lease to himself by virtue of a Power Of Attorney which did not empower him so to do. I do believe that counsel for the defendants misunderstood the powers granted under the Power Of Attorney and also is not cognizant of the laws of conveyancing.

A perusal of the said Power Of Attorney reveals that the power was given to the Plaintiff Bob Dhoray by Jerry Ishmael to appear on behalf of Jerry Ishmael as vendor and to act on the vendor's behalf to complete the transfer to the purchasers. The Power Of Attorney is in my opinion valid and legal for the purposes for which it was intended and was lawfully and properly executed by the donor and donee.

The allegation that the plaintiff sought to surrender the lease to himself has no merit and has no foundation in law. A perusal of the Transfer shows that the plaintiff requested that the lease be surrendered so that the land held by the lease will become one whole area under the transport and he would not therefore have two documents of title, that is, one for a lease and one for the transport. By acquiring the lease the plaintiffs have now become the owners of the whole of the property known as lot 133 with two subdivisions of sublots A and B.

In conveyancing practice a lease is surrendered when on the transfer documents the purchaser states that the lease is being surrendered so that the two sublots A and B now become one whole property, that is, the west half of lot 133, Bourda, Georgetown, without the subdivisions of sublots A and B, and the purchaser will then be issued one transport for the whole property by the Deeds Registry. This is normal conveyancing procedure accepted by way of practice in the courts of Guyana.

The defendants have therefore shown no particulars of fraud committed by the plaintiffs as alleged that would enable this court to say that the defendants have a claim which ought to be defended.

Furthermore the defendants are required under s.23 of the Deeds Registry Act, Chapter 5:01 to file an action on the grounds of fraud within 12 months after the discovery of the fraud. The defendants have not done so.

The defendants' claim that they are in undisturbed occupation for upwards of 12 years is not a claim maintainable against the plaintiffs. The defendants have not shown that they have any interest adverse to the plaintiffs. The defendants are occupiers of a leasehold held by Jerry Ishmael by a lease deed, who sold his rights to the lease to the plaintiffs. The defendants have no claim against the plaintiffs since they cannot show that they have acquired a statutory claim, registered encumbrance, registered interest or even a registered lease, against the property acquired by the plaintiffs, nor even against the leasehold held by Jerry Ishmael.

Alternatively, the defendants are also claiming that they have spent considerable sums of money to enhance the property for which they intend to make a claim for compensation.

Any claim the defendants purport to have for moneys spent should have been made in opposition proceedings filed to oppose the sale by Jerry Ishmael to the plaintiffs and such claim would have been against Jerry Ishmael. Any claim the defendants may have for money spent cannot succeed against the

plaintiffs who were bona fide purchasers for value who are only required to take cognizance and be bound by registered interests by virtue of s. 23 (1) of the Deeds Registry Act, Chapter 5:01.

The defendants were clearly the gratuitous licencees of the plaintiffs' predecessor in title and this was clearly acknowledged by the defendants in their Affidavit of Defence. In **Ramdass v Jairam** (2008) 72 WIR 270 the CCJ stated –

“equitable interests in immovable property were not recognized and could not be acquired in Guyana.”

The defendants' intention to counterclaim for the money spent on renovating the building cannot succeed against the plaintiffs who are mere purchasers of the property from the owner. The defendants' counter claim must be made against Jerry Ishmael, who sold the building along with the land to the plaintiffs. The plaintiffs were never the owners of the property and had no authority over the property so as to make them responsible for any repairs, renovations, made by the defendants to the building.

In **Dhanpaul v Dem Bauxite Co Ltd** (1959) 1 WIR 257, Luckhoo, J held that where the court was called upon to determine whether an oral agreement of tenancy for land which was never registered under the Deeds Registry Ordinance was binding on purchasers to whom transport of the property had been passed -

“the purchases took free of the tenancy on the ground that unless reserved by the conveyance itself, interests in immovable property which are required to be registered , if not registered are void against a purchaser even if he has actual notice of those interests”.

The case of **Brandis v Craig** submitted by counsel for the defendants is in my opinion supportive of the plaintiffs position in the instant case before us.

The respondent in **Brandis v Craig** was the purchaser of land that the appellant was claiming and the court held that the respondent was the ultimate purchaser of the land in question, and that after the appellant went into occupation of her brother's share in the estate of their deceased father, seven years after that the brother acquired transport and notwithstanding that he did not enter into occupation the fact that he accepted transport 7 years later he thereby asserted his rights and removed the possession of the appellant. The brother thereafter sold his share several times until the respondent became the last owner against whom the appellant claimed adverse possession for over 22 years. Crane C said at page 140-

“ it seems to me that when title passed to Arnold Brandis in 1964 he must be considered in law to have made, by obtaining transport, an effective entry on his inheritance by staking a lawful claim to the title to it.....so indeed if he failed to enter possession of the eastern half of lot 210 after the coming into operation of his father's will in 1956, he would by virtue of having transport passed to him, have exercised a substantial act of ownership by becoming a transported owner, and so effectively entered possession of his inheritance. TIME WOULD THEN HAVE CEASED TO RUN AGAINST HIM.”

And Crane C further went on to say that an effective entry into the eastern half of lot 210 was made when each successive owner took transport of that property, and prevented the twelve year period of the statute from running..

In the present case Jerry Ishmael was the owner of the lease and he left the 2nd defendant in occupation of the property with his permission. This is evident from the defendant's affidavit. The 2nd defendant did not move into occupation and assume possession without the knowledge of the true owner, and therefore her possession and that of the 1st deft cannot be adverse to the true owner.

In **Brandis** the court further went onto say that if, however, instead of after 7 years, transport had been passed to the appellant's brother more than 12 years

after the appellant had entered into possession, then the ownership by transport would not have conferred on him a right to sue in trespass, because the title would have been entirely extinguished.

This clearly states that the title can be extinguished as against the true owner, and anyone purchasing after twelve years of the true owners title, providing he can show that the true owner has abandoned his title, may be subject to a claim for adverse possession by someone already in possession for the prescribed 12 years.

If we apply the law as stated in Brandis above the facts are that Jerry Ishmael acquired the 999 year lease in December 1997 and time would run from that date. 12 years adverse possession would not accrue until December 2009. Any previous claim as to possession by the defendants would have been extinguished when Jerry Ishmael acquired the lease in December 1997 since he would at that time have asserted his ownership to the property. Since twelve years have not yet expired from December 1997 the defendants cannot now claim a right to adverse possession and since Jerry Ishmael has sold the leasehold before the expiration of the 12 years the defendants claim became interrupted since an effective entry would have been made by the plaintiffs (as was the case of the respondent in **Brandis v Craig** who acquired transport 7 years after the appellant's brother sold the transported property to him). The leaseholder's rights were never extinguished since time begins to run from December 1997 and does not run against the owner until after the expiration of twelve years and that would be after December 2009.

The Title to Land (prescription and Limitation) Cap. 60:02 – Section 5 states:

“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

And in Section 10 it is stated: “no right of action to recover land shall be deemed to accrue unless the land is in possession of some person in whose favour the period of limitation can run

In the circumstances the defendants have failed to show that they have any defence or any triable issue upon which they ought to be given leave to defend.

In **Commercial Litigation: pre-emptive remedies**, 3rd ed. 1997, it is stated that the test is that cited in **Banque de Paris-**

“ the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence”.

The defendants must show that they have a clear defence, or a serious issue of fact to be tried or that there is an arguable point of law.

I am not satisfied that the defendants have shown this court that there is a fair or reasonable probability of having a real or bona fide defence, or a serious issue to be tried. In fact the defendants have not counterclaimed for any declaration as to their claim of possession but only indicated an intention to counterclaim for the cost spent in building the house and as indicated earlier this claim is not maintainable against the plaintiffs.

In **Commercial Litigation** (supra) page 361 reference was made to **Lady Anne Tennant v. Assoc Newspapers Group Ltd** (1979) FSR 298 where Sir Robert Megarry V.C. said of the defendants’ attempts to persuade him that there was a triable issue –

“ Now under Order 14 Rule 3 (1) I must refuse to enter judgement for the plaintiff if the defendants satisfy me that there is “some issue or question in dispute which ought to be tried or that there ought for some reason to be a trial

of the action. Counsel for the deft addressed me at some length, but from the first to the last he failed to make it clear to me what issue or question there was in dispute that ought to be tried”.

In this case I am also of the view that counsel for the defendants has failed to make it clear what issue or question there is in dispute that ought to be tried. The defendants’ claim is based on unsupported allegations against the plaintiffs but which seem to suggest that the owner Jerry Ishmael abandoned the property and his rights thereto when he left Guyana, and the defendants further claim that they continued in occupation of the premises until now adverse to Jerry Ishmael. As stated supra this claim is untenable for the reasons given heretobefore.

I can find no justification on the facts for the defendants’ claim to possession, nor have they shown that they have a defence to the plaintiff’s title, which was lawfully obtained by virtue of a lawful sale and purchase from Jerry Ishmael, the owner of the property.

Sir Megarry further said in the case cited above, at page 303 –

“the desire to investigate alleged obscurities and the hope that something will turn up on the investigation cannot, separately or together, amount to sufficient reason for refusing to enter judgement for the plaintiff.”

I find that on the facts the defendants claim is bound to fail as against the plaintiffs herein.

Also with reference to **Commercial Litigation** (supra) it is sated at p. 363 –

“if the legal point on behalf of the defendant is quite clearly unarguable, the court has precisely the same duty under O. 14 as it has in any other case: reference to **Carol v Casey** (1949) 1 KB 474 Lord Greene MR said “ when

the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule”.

I find that the points of law raised by the defendants are clearly unarguable and would not differ if the matter were to be tried. I am of the view that exactly the same points would be raised in litigation were the defendants given leave to defend and the matter goes to trial. In this case the plaintiffs’ liability to the defendants is not dependant upon the view of the facts taken by the judge after he has heard all the evidence, nor is it dependant on observing the demeanour of witnesses. It is clearly evident from the affidavit evidence and the exhibits that the defendants do not have an arguable case.

Again referring to **Commercial Litigation** page 363 where the issue was whether “ argument on law – Forum? In **Verall v Great Yarmouth Borough Council** (1981) QB 202 Roskill L.J. stated –

“We have often said in this court that where there is a clear issue raised in Order 14 proceedings, there is no reason why the judge in chambers – or, for that matter, this court – should not deal with the whole matter at once. Merely to order a trial so that the matters can be re-argued in open court is to encourage the law’s delays which in this court we are always trying to prevent”.

In **Coastal (Bermuda) Ltd v Esso Petroleum Ltd** (1984) 1 Lloyd’s Rep. 11 the court held –

“ the result is that if the defendant raises a point of law which the court feels able to consider without reference to contested facts simply on the submissions of the parties, it is now settled that in applications for summary judgement under Order 14 the court will do so in order to see whether there is any substance in the proposed defence. **If it concludes that the point, though arguable, is bad, it will give judgement for the plaintiff there and then.**

In my view the defendants have failed to show that they have an arguable case, and have sought to set up points of law which have no real substance to them.

Megarry J said in **Lady Anne Tennant** (supra) at p. 303 –

“ you do not get leave to defend by putting forward a case that is all surmise.....”.

In the local case of **Jeffrey Thomas and Pamela Thomas v Citizens Bank Guyana Ltd.**, Civil Appeal No. 51 of 2003, our Court of Appeal referred to the Trinidad case of **Trinidad Home Developers Ltd v IMH Investments Ltd.**, (1990) 39 WIR 355 where Sharma JA said –

“ I would accordingly rule that when a matter of pure law is raised by a defendant in Order 14 proceedings in our jurisdiction no matter how complex the law or extended the argument, even if it includes the citation of many authorities, the master or judge should go on to deal with the matter finally and definitively”

and approved of this dicta and Mr Ian Chang Justice of Appeal delivered the unanimous judgement of the Court and said at pages 9-11 –

“Without doubt, the observations made by Sharma JA are as pertinent to the administration in Guyana as in T & T and the procedural approach of definitively and finally dealing with issues of law which arise in summary judgement proceedings can have only a salutary effect on the administration of civil justice here. This court endorses those observations and commends the approach advocated by him where questions of pure law arise in affidavits of defence in summary judgement proceedings.....this court does not disagree with but rather endorses the approach adopted by the bail court judge in proceedings to determine the issues of law which arose on the affidavit of defencethere is nothing to prevent the bail court judge from making an informed and mature determination of any legal issue and no prejudice can

enure to the detriment of a defendant by an early but mature determination of legal issues”.

Accordingly, for the reasons stated above, I rule that the affidavit of defence of the defendants discloses no triable issues and the affidavit of defence is hereby struck out and judgement entered for the plaintiffs.

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Diana F. Insanally

Puisne Judge

Dated this 18th day of October 2009.