[2014] UKPC 16

Privy Council Appeal No 0105 of 2013

JUDGMENT

Gayadeen and another (Appellants) v The Attorney General of Trinidad and Tobago (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Neuberger

Lord Mance

Lord Clarke

Lord Sumption

Lord Hodge

JUDGMENT DELIVERED BY

Lord Hodge

ON

22 May 2014

Heard on 26 February 2014

Appellants	Respondent
Peter Knox QC	Timothy Straker QC
Ramesh Maharaj SC	Tom Poole
Robert Strang	
(Instructed by Davenport Lyons)	(Instructed by Charles Russell LLP)

LORD HODGE:

1.
This appeal raises the question whether land, which the Government acquired in 1945 for the purpose of the Churchill-Roosevelt Highway but which has not been developed as a road since then, was dedicated as a public highway in either 1945 or 1950. The appellants are occupiers of premises within the bounds of the acquired land. They claim to have acquired title to those premises by adverse possession against the State since 1953. The State claims that all the land acquired in 1945 was

dedicated as a public highway and that the appellants have not acquired possessory rights which can override the rights of highway.

Factual background

2.
In September 1940, in the darkest days of World War II, the Marquess of Lothian, the Ambassador of the United Kingdom Government, and Mr Cordell Hull, Secretary of State of the United States of America, exchanged notes by which the UK Government agreed to lease land for naval and air bases to the US government which in return transferred 50 retired destroyers. In a treaty dated 27 March 1941, the two governments agreed the terms of the leases of the bases. One of those bases was an army air force base at Fort Read in Trinidad, located at Cumuto, about 15 miles to the east of Port of Spain. The US forces constructed the road, which was called the Churchill-Roosevelt Highway after the mid-Atlantic meeting of the two leaders, between December 1941 and March 1942. The road, which was reserved exclusively for US forces, allowed military vehicles to travel between the base and the dockside at Port of Spain, avoiding heavy traffic on the Eastern Main Road. When the war ended, the US forces had little need for the base or the road. On 24 October 1949 the United States authorities handed over the highway to the Government of Trinidad and Tobago.

3.
The road was developed before the formalities of land acquisition had been completed. Section 4 of the Land Acquisition Ordinance 1941 empowered the Governor to authorise the carrying out of works before formal vesting. Publication of a notice in the Royal Gazette under section 5 of that Ordinance vested land absolutely in the Crown. One such “Gazette notice” (No 1711) was published on 6 December 1945, declaring that lands had been acquired for the public purpose of “The Churchill-Roosevelt Highway Section A”. Similar notices were published in the Gazette for other sections of the road on different dates in 1944 and 1945. The land acquired for the road was generally a 200 feet wide strip of land, which was considerably wider than the land on which the US forces had built the road. More land was acquired at junctions, including the junction with Tumpuna Road on which the appellants’ premises are situated, where the strip of land is about 400 feet wide.

4.
On 10 January 1950 the Acting Governor of Trinidad and Tobago issued a proclamation dedicating the Churchill-Roosevelt Highway to the public use for wheeled, bridle and foot traffic. The terms of the proclamation are important to the rights of the parties in this appeal. The Board therefore sets them out so far as relevant.

“Whereas by section 2 of the Roads Ordinance, Ch 16 No 1, ‘public road’ includes inter alia any highway by land dedicated by proclamation of the Governor to public use:

And whereas it is desirable that the highways described hereunder should be public roads:

Now, therefore, I, Patrick Muir Renison, Acting Governor as aforesaid, in exercise of the powers vested in the Governor by the aforesaid Ordinance and of all other powers thereunto enabling me do declare and proclaim that the highways described hereunder be and they are hereby dedicated to the public use for wheeled, bridle and foot traffic:-

The Road known as the Churchill-Roosevelt Highway in the Wards of St Ann’s, Tacarigua and Arima, County of St George, commencing at the 2 ¾ mile mark of the Eastern Main Road and running in a more or less southerly direction for a distance of approximately 3,000 feet and thence in a more or

less easterly direction for approximately 87,816 feet, making a total of 90,816 feet or 17.20 miles, and joining the Demerara Road at the 0.00 mile mark. …" (The Board's underlining)

5.
The State argues that the "Gazette notice" No 1711 of 6 December 1945 or, if not, the Proclamation of 10 January 1950 created a public right of way over the whole of the land acquired for the road, including the reserved land which has yet to be developed.

The Appellants' premises

6.
In about 1953 Gunness and Kawla Rambaran, the parents of the first appellant, first occupied the disputed land which is situated on the western side of Tumpuna Road. The northern boundary of the disputed land was about 80 feet south of the road which the US forces had built. The appellants' case is that in 1955 the Rambarans built a concrete house on the disputed land and began operating a parlour and grocery business. They assert that in about 1959 the Rambarans opened a bar on the disputed land and that their family has operated the bar business ever since. The business and the family's interest in the disputed land were transferred to the first appellant in 2001.

7.
The disputed land comprises three parts. The first is the building, which comprises the residential accommodation, the bar, "Rambarran's Bar", facing onto Tumpuna Road and a garage, and the fenced garden ground to the rear. The second is a car park opening onto Tumpuna Road which the appellants' family concreted and maintained for patrons of the bar to park their cars. The third is a triangular area of ground on the north and north east of the disputed land.

8.
On 21 May 2010 the Ministry of Works and Transport served a notice on the appellants under section 52(1) of the Highways Act 1970, as amended, requiring them to demolish their property because it was built on "the Churchill Roosevelt highway road reserve". In about October 2010 the State took possession of the triangular area of ground and laid tarmacadam on it to create a filter lane from the northbound lane of Tumpuna Road onto the westbound carriageway of the expanded Churchill-Roosevelt Highway. The Ministry has also widened Tumpuna Road and proposes to construct a pavement which the appellants say will encroach on their car park.

The legal proceedings

9.
In March 2011 the appellants commenced these proceedings in the High Court of Justice. They claimed title to the disputed land by adverse possession. Section 2 of the State Suits Limitation Ordinance (as amended) requires adverse possession for 30 years. The State counter-claimed for immediate possession of the disputed land, asserting that the "Gazette notice" No 1711 of 6 December 1945 created an indefeasible public right of way over all of the acquired land, including the disputed land. After trial, Madam Justice Rajnauth-Lee dismissed the appellants' claim and gave judgment for the State on its counterclaim on 17 April 2012. She held that the disputed land was a public highway by reason of the "Gazette notice" and ordered the appellants to give up possession of the property. She also held that the appellants had failed to prove on a balance of probabilities that they had been in possession of the third part of the disputed land, namely the triangular piece of ground.

10.
The appellants appealed to the Court of Appeal. The State in its written submissions relied not only on the 1945 “Gazette notice” but also on the Proclamation of 10 January 1950 to support its case that the disputed land was a public highway. On 29 July 2013 the Court of Appeal (Archie CJ, Yorke-Soo Hon and Narine JJA) dismissed the appeal. They determined that a public highway was created at common law over the lands acquired in 1945 through

i)
the vehicle of the Land Acquisition Ordinance and the “Gazette notice” No 1711 which dedicated the lands to the public purpose of the creation of the Churchill-Roosevelt Highway and

ii)
the acceptance of the dedication by the public through user, confirmed by the Proclamation of 10 January 1950 which dedicated the pre-existing highway as a public road.

In any event, the Court held that the 1950 Proclamation operated as a dedication of the land as a public highway. Accordingly, the appellants could not have acquired a possessory title to the disputed land. On 11 November 2013 the Court of Appeal granted leave to appeal to this Board.

Discussion

11.
This appeal raises two issues. The first is whether the disputed land is part of a public highway by reason of the “Gazette notice” No 1711 of 6 December 1945 or the Proclamation of 10 January 1950. The second, which arises if the disputed land is not part of a public highway, is whether the appellants’ occupation of the car park was sufficient to establish title over it by adverse possession. The appellants do not challenge the finding of the judge at first instance that they did not possess the triangular piece of ground that is the third part of the disputed land (para 7 above). The Government accepts that the appellants and their predecessors had adequate possession of the building and fenced garden on the disputed land to constitute adverse possession if that land was not a highway.

The extent of the public highway

12.
The State conceded that the judge at first instance should not have excluded the documentary evidence of the history of the construction of the Churchill-Roosevelt Highway which informs the summary in para 2 above. That historical record is no longer in dispute.

13.
A highway is a public right of way over a defined route. It is a permanent right of passage for the public at large. In both 1945 and 1950 Trinidad and Tobago had no statutory mechanism for creating a public right of way. A right of highway could therefore arise only under the common law, which requires (a) a dedication by the landowner of a public right of way across his land and (b) acceptance by the public of that right of way. The intention to dedicate may be express, for example by an oral or written declaration, or it may be inferred, for example from evidence that the public used the land and that the landowner acquiesced in that user: Director of Public Prosecutions v Jones [1999] 2 AC 240, 256F-G per Lord Irvine of Lairg LC; Man O’ War Station Ltd v Auckland City Council [2002] UKPC 32, Lord Scott at paras 31 and 36; Halsbury’s Laws of England vol. 55, paras 111-113; Sauvain, Highway Law (5th ed), para 2.25. A right of highway does not divest the owner of the land but he retains his title subject to that public right. In this case the State relies on what it submits is an express

dedication in the “Gazette notice” and in the 1950 Proclamation. Acceptance by the public may be demonstrated by public use of the land as a way or acceptance of the way by highway authorities on behalf of the public, if they have a statutory power to do so: Secretary of State for the Environment, Transport and the Regions v Baylis (Gloucester) Ltd (2000) 80 P & C R 324.

14.
In the Board’s view there are two related problems with the State’s reliance on the 1945 “Gazette notice”.

15.
First, the notice was made under section 5 of the Land Acquisition Ordinance 1941 and declared that the public purpose for which the land was acquired was “[t]he Churchill-Roosevelt Highway Section A”. The State interprets that as a dedication of a public right of way over the acquired land. The use of the word “highway” in the name of the road might at first blush support the State’s case. But the name of the physical entity is not decisive. As Mr Knox pointed out, the Governor and Legislative Council amended the Land Acquisition Ordinance 1898 in January 1941 to extend “public purposes” to include the purpose of fulfilling treaty obligations of the Government or of the UK Government and, when the legislation was consolidated in September 1941 in the Land Acquisition Ordinance 1941, this extended definition was preserved in section 2(4). One must therefore construe the public purpose stated in the “Gazette notice” with this extension in mind and ask what was meant by “the Churchill-Roosevelt Highway” when the land was acquired. The answer to that question is in the facts which are stated in para 2 above: a road reserved exclusively for US forces. There was no dedication of a public right of way.

16.
The second problem arises from the same facts: there was no acceptance by the public through user. The purpose of building the Churchill-Roosevelt Highway in time of war was to create a road which would not be used by the public. That exclusion appears to have continued until the US forces handed back Fort Read and the “highway” in late 1949.

17.
The Proclamation of January 1950, which followed the handover of the road, also does not support the State’s case. While it was a dedication of a public right of way, what was so dedicated was the road which the US forces had built and not the entire strip of ground that had been acquired by various “Gazette notice”s in 1944 and 1945. This is clear from the underlined words in para 4 above. The proclamation speaks of a road running from A to B and joining another road. In the Board’s view that language is inconsistent with an intention to dedicate the entire acquired strip of land to a public right of way. Even if, as the State argues, the Proclamation recognised a pre-existing highway, that highway was for the same reasons the built road. Further, there was no evidence to suggest that in 1950 the Government envisaged any significant expansion of the public highway or otherwise had any interest in restricting its right to use for other purposes or dispose of the unused reserved land.

18.
Mr Straker referred to Turner v Ringwood Highway Board (1870) LR 9 Eq 418 in support of the proposition that there was no requirement in law that all the land over which the public enjoy a right of way must be cleared, graded or metalled or must be used by the public for passage. That is so. But Turner was a case in which the road had been marked out by Inclosure Commissioners, acting under the General Inclosure Act 1801 (41 Geo 3, c 109). Under that statute the commissioners had to mark out and show on a map, which was subjected to public consultation and possible amendment, the land

allotted to a highway (s 8) and fence off the land allotted to the carriage road on both sides (s 9). In Turner the area of land which the commissioners marked out and dedicated as a highway was a wider strip of land than the land which the public subsequently used as the road. As a result, over many years vegetation encroached upon and reduced the width of the highway that was passable. But the whole width of the land which had been dedicated by the Inclosure Commissioners remained the highway - “once a highway always a highway”: Dawes v Hawkins (1860) 8 CB (NS) 848, at 858 (141 E R 1399). See also Cubitt v Maxse (1873) LR 8 CP 704, Brett J at 716. The whole of the ground which inclosure commissioners fenced off as a public road is a public highway and cannot be enclosed: R v Wright (1832) 3 B & Ad 681 (110 E R 248). But more generally, at common law the fences placed on either side of a highway are only prima facie evidence of the extent of a public right of way where there is reason to suppose that the fences were placed to separate the highway from land over which there is no public right of way: Hale v Norfolk County Council [2001] Ch 717, 729-730 per Chadwick LJ, 732 per Hale LJ.

19.
These authorities show that (i) the procedures under the General Inclosure Act, including the marking out and fencing of the land, constituted the dedication of that land and (ii) it is not necessary for the public to use all of the land dedicated to a public right of way for a highway to exist over the entire strip of land so dedicated. See also Tottenham Urban District Council v Rowley [1912] 2 Ch 633, 643 per Cozens-Hardy MR, 646 per Farwell LJ. But the second point does not assist the State’s case because it does not address the prior questions in this appeal: whether there was a dedication of any land as a public right of way, and if so what was the extent of the land so dedicated. It is only if the entire land which was compulsorily acquired in 1945 had been dedicated to a public right of way that the second point would have assisted the State. In the Board’s view there was no such dedication.

20.
The Board concludes therefore that there is no public right of way over the disputed land. It does not need to address the question whether the “Gazette notice” could have constituted a proclamation within s 2 of the Roads Ordinance 1918. It turns to the second issue: whether the appellants’ occupation of the car park was sufficient to establish title by adverse possession.

Adverse possession of the car park

21.
The judge at first instance heard evidence but made no express finding about the quality of the appellants’ possession of the car park. The question for the Board is whether to remit the issue for determination by the local courts or decide the point on the information which is before it.

22.
The appellants gave evidence of the use of the car park at the trial as did three independent witnesses. They were cross-examined on behalf of the Government. The evidence, which was principally that of the appellants, was that (i) Mr and Mrs Rambaran had created the car park by laying down compacted gravel in about 1953, (ii) they had concreted it in the late 1960s, (iii) they had built a slip drain in the 1960s to remove water from the concreted car park, (iv) they and the appellants had regularly cleaned and maintained it, and (v) they and the appellants had sought to restrict parking in the car park to customers of their business, although sometimes others used the space to park their vehicles. The first appellant gave evidence that her parents, she and her husband had asked non-customers who parked there to move their vehicles and that they did not allow vendors to park and sell their wares. She stated that people complied with their requests. She and her

husband also gave evidence that they had put up a sign on the doors of their garage that parking was for customers only. Counsel for the Government cross-examined on the degree of control of the car park and on whether the appellants had displayed a sign that sought to limit parking in the car park to patrons of their business. Counsel also obtained the first appellant's concession that she could not speak of the control over the car park when she was at school, when she and her husband lived in Canada between 1987 and 1992 and at other times when she was not present. But there was evidence of a course of conduct by Mr and Mrs Rambaran and the appellants and there was no contradictory evidence.

23.
The judge at first instance identified two issues for determination namely (i) whether the land had been dedicated to be a highway, thus excluding the acquisition of a possessory title by adverse possession and (ii) whether the third part of the disputed land formed part of the lands "in the purported possession of the claimants". She recorded in her judgment (para 49) that in his closing submission counsel for the Government challenged the appellants' possession and control of the triangular area of ground which is the third part of the disputed land but she did not record any challenge in that submission to their possession and control of the car park. Counsel for the Government founded on the evidence of two of the independent witnesses that a derelict wall separated the triangular part of the disputed land from the car park and that that part had not been concreted, unlike the car park. It is clear that counsel for the Government and the judge made a clear distinction between the triangular third part and the rest of the disputed land. The trial judge did not accept that the appellants had proved that they possessed the triangular part. The Board infers from her judgment that, by the end of the trial, she was satisfied that the appellants had proved sufficient custody and control of the car park.

24.
In any event, the Board considers that on the evidence led before the judge at first instance the only reasonable conclusion was that the appellants had established on a balance of probabilities that they and Mr and Mrs Rambaran before them had possessed not only the building and fenced land behind it but also the car park. The appellants and Mr and Mrs Rambaran had the necessary intention, the animus possidendi. Their construction, maintenance and cleaning of the car park and the steps they took to exclude persons other than their customers from parking there vouch such an intention. The other requirement is factual possession which connotes a sufficient degree of physical control: J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419, 435-436 per Lord Browne-Wilkinson. What constitutes an appropriate degree of physical control must depend on the circumstances. In this case the Rambarans and the appellants would have wished members of the public to have access to their car park from Tumpuna Road in order to provide custom to their business. There could have been no question of fencing off the car park if they were to attract such custom. They dealt with the car park as an occupying owner might have been expected to deal with it. No one who parked there temporarily without their consent dealt with the car park in that way. Such ephemeral use of part of the car park by a driver of a vehicle did not amount to factual possession and did not manifest any intention to possess.

Conclusion

25.
The Board orders that the appeal should be allowed, that the orders of the High Court and the Court of Appeal be set aside, and that it be declared that the appellants have title to (i) the building and the land on which the building stands, and the land behind it enclosed by a fence and (ii) the car park land

shown as “paved area concrete”, both on the plan dated May 2011 by the surveyor, Nasser Abdul (appendix 1 of the Statement of Facts and Issues).