Trinity Term

[2015] UKPC 26

Privy Council Appeal No 0087 of 2014

JUDGMENT

Republic Bank Limited (Appellant) vLochan and another (Respondents) (Trinidad and Tobago)

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

before

Lord Neuberger

Lord Mance

Lord Kerr

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

8 June 2015

Heard on 29 April 2015

Appellant	Respondents
Jonathan Crystal	Anand Beharrylal
Ian L Benjamin	Justin McClintock
(Instructed by Norton Rose Fulbright LLP)	(Instructed by Alvin Shiva Pariagsingh)

LORD NEUBERGER:

1.
This appeal arises out of a dispute about the ownership of a parcel of land of about 1 acre (or 0.4 hectares) at Gasparillo in Trinidad and Tobago ("the Premises"). The proceedings have taken a rather complex course, but the ultimate resolution of the dispute turns on a relatively short point.

2.
The Premises were conveyed by a duly registered Deed dated 20 May 2005 to Ashkaran Jagpersad. He then constructed a building on the Premises. Thereafter, in April 2006, the respondents, Lutchman and Taradath Lochan, wrote to Mr Jagpersad, contending that they were the duly registered owners of the Premises and that Mr Jagpersad was a trespasser, and asking him to vacate. Mr Jagpersad did not

reply for some three years. A brief attempt at negotiations proved fruitless, and the respondents began proceedings for possession and damages in June 2009. In their statement of case (which was amended in September 2009), the respondents contended that they were the duly registered owners of the Premises. In his Defence, served in July 2009 (and amended in October 2009), Mr Jagpersad contended that he was the duly registered owner of the Premises. In their re-amended Reply, the respondents first raised the contention that, if, contrary to their primary contention, Mr Jagpersad had good paper title to the Premises, they had acquired title by adverse possession.

3.
Meanwhile, without mentioning the existence of these proceedings, Mr Jagpersad charged the Premises to the appellant, Republic Bank Ltd ("the Bank"), on 4 September 2009. The proceedings thereafter continued without the Bank being aware of them, and, indeed, without being aware that Mr Jagpersad's title to the Premises was being challenged.

4.
The proceedings came before Jones J in April 2010. Although the respondents had raised in their re-amended Reply an alternative claim to title to the Premises based on adverse possession, the only issue which was argued and decided by the Judge was whether the respondents or Mr Jagpersad had the better paper title.

5.
In that connection, as already mentioned, Mr Jagpersad claimed to be the owner of the Premises in the light of a Deed dated 20 May 2005 ("the 2005 Deed"). Without going into the details of the intermediate Deeds, the root of title invoked by Mr Jagpersad ultimately went back to a duly registered "Note of Deed" dated 4 February 1910 ("the 1910 Deed"). The 1910 Deed was an informal document, under which Josephine Williams conveyed to Bissessar land described as "compris[ing] 1 acre and bounded" on the north side "By the lands of Nohar", on the south side "By the lands of Sookar", on the east side "By the Public Road", and on the west side "By the lands of Mahabir Maharaj".

6.
By contrast, the respondents contended that they had acquired title to the Premises as a result of a Deed dated 24 January 1975 ("the 1975 Deed"), by which land to the north of the Premises, together with (at least as the respondents contended) the Premises, was conveyed to the respondents. Again without going into the details of intermediate deeds, the respondents' case was that this property had originally been conveyed away by a duly registered Deed of 22 October 1909 ("the 1909 Deed"), between the aforesaid Mrs Williams and Nohar. The property conveyed by the 1909 Deed was described therein as "comprising six acres", and as "bounded on the north by land of the purchaser (Nohar), on the south by land of Sookar, on the east by the Public Road and on the west by land of Mahabir Maharaj".

7.
The dispute before the Judge was whether the Premises had been included in the property conveyed by the 1909 Deed. If they had been, then the Premises had been conveyed away in 1909 to Nohar, and the effect of the 1910 Deed and subsequent Deeds which purported to convey away the property conveyed by the 1909 Deed, culminating in the 1975 Deed, would have been to vest paper title in the Premises in the respondents. In those circumstances, as the 1910 Deed had been executed after the 1909 Deed, it would have been ineffective to convey the Premises to Bissessar: nemo dat quod non habet. And in terms of the statutory registration system, as the 1909 Deed was executed and

registered before the 1910 Deed, the title of Nohar under the 1909 Deed would have been accorded priority over that of Bissessar. Accordingly, on that basis, the subsequent Deeds conveying away the Premises as conveyed by the 1910 Deed, including the 2005 Deed, would not have enabled Mr Jagpersad to assert a paper title as against the respondents. On the other hand, if the 1909 Deed did not include the Premises, there was no reason why the 1910 Deed should have been ineffective to transfer good title to the Premises to Bissessar, with the result that Mr Jagpersad could assert good paper title as against the respondents.

8.
After a three-day trial, on 15 July 2010, the Judge gave her decision, which was in favour of the respondents. She explained that the ultimate issue was whether the Premises were included in the 1909 Deed: if they had been, then, as a result of a number of intermediate deeds, good title in the Premises had become vested in the respondents. If they had not been, then the Premises had been transferred under the 1910 Deed, and, as a result of a number of intermediate deeds, good title was now vested in Mr Jagpersad.

9.
The Judge decided that the telling point was that the property conveyed by the 1909 Deed was described as being bounded on the south by the lands of Sookar, as that description of the southern boundary was entirely consistent with that property including the Premises, and irreconcilable with the Premises having been excluded from that property. The Judge accepted that, if the Premises had been included in the property conveyed by the 1909 Deed, then they would have exceeded six acres in area, whereas, if one excluded the Premises, that property was almost exactly six acres in area. However, she did not consider that this vitiated the respondents' case.

10.
The Judge accordingly found for the respondents. However, because they had received an unencumbered benefit, in the form of the building constructed by Mr Jagpersad (and apparently also because she was not impressed with the respondents' expert witnesses, and their conduct of the proceedings), the Judge refused to award the respondents much in the way of compensation, damages or costs, and she permitted Mr Jagpersad to enter onto the Premises for the purpose of removing the building or any fixtures thereon.

11.
Mr Jagpersad appealed to the Court of Appeal, and, on discovering the existence of these proceedings and the decision of Jones J, the Bank applied for, and was granted, permission to intervene in the appeal. The appeal came on before Archie CJ and Kangaloo and Soo-Hon JJA on 16 May 2011. They decided to remit to the Judge the single issue which had been before her, namely "whether the one-acre parcel of land mortgaged to the [Bank] forms any part of the six-acre parcel owned by the [respondents]". There was a subsequent agreement between the parties that the oral evidence at the remitted hearing would be limited to that of surveyors.

12.
The remitted hearing before Jones J took place over two days in November 2011, during which she received argument on behalf of the respondents and the Bank, documentary evidence in the form of the Deeds which were before her at the earlier hearing, evidence from three surveyors, and six plans, prepared in 1971, 1980, 1994, 1997, 2009 and 2010, the last two plans having been prepared for the purpose of the proceedings (for the respondents and the Bank respectively). In her second judgment, given on 23 January 2012, Jones J decided the remitted question in favour of the respondents – ie she

adhered to her first decision that the property conveyed by the 1909 Deed included the Premises. In her second judgment, it is plain that the Judge did not derive assistance from the plans or from the evidence of the surveyors, and that she found for the respondents essentially for the same reasons as she gave in her first judgment.

13.
In other words, the Judge decided in her second judgment that, in the light of the description therein of the southern boundary of the property thereby conveyed, the 1909 Deed included the Premises. She also considered that this view was supported by the fact that (with a small exception) the boundaries of the property conveyed by the 1910 Deed were identical to those of the land conveyed by the 1909 Deed. She therefore concluded that "at the time of the 1910 [Deed] the vendor did not own the [Premises] to the south of [the] parcel [which it is common ground was conveyed by the 1909 Deed]. She could not in those circumstances have divested the [Premises] to the south of [that] parcel by the 1910 Deed".

14.
The Bank and Mr Jagpersad appealed against that decision to the Court of Appeal, and the appeal was heard on 21 June 2013 and 17 January 2014 by Jamadar, Smith and Rajnauth-Lee JJA, who proceeded on the basis that they were also hearing Mr Jagpersad's appeal against the first judgment of Jones J. The Court of Appeal dismissed the appeals of Mr Jagapersad and of the Bank for reasons given by Smith JA. In his judgment, Smith JA explained that, even if the 1909 Deed had not conveyed away the Premises, so that Mr Jagpersad had good paper title as against the respondents, the evidence established that the respondents had acquired title to the Premises by adverse possession.

15.
The Bank now appeals to the Judicial Committee against the dismissal of its appeal.

16.
Their Lordships consider that, while the decision of the Court of Appeal to dismiss the Bank's appeal from the decision of Jones J must be upheld, the reasons given by Smith JA cannot be supported. It was not open to the Court of Appeal to find for the respondents on the ground that they had obtained title to the Premises by adverse possession. However, the first instance judgments of Jones J in favour of the respondents based on the finding that they had title to the Premises through the 1909 Deed was correct, and they should be affirmed.

17.
Turning first to the reasoning of Smith JA, it was inappropriate for the Court of Appeal to rely on the respondents' alternative case based on adverse possession for two reasons. First, it was not a ground which had been run by the respondents before Jones J on either occasion on which the proceedings were before her. It is true that adverse possession was raised by the respondents in their re-amended Reply as an answer to Mr Jagpersad's Defence (ie if he proved that he had good paper title to the Premises). However, no evidence was called on that issue, no submissions were advanced to the Judge on that issue, and no finding was made by the Judge on that issue. In those circumstances, it was not open to the Court of Appeal to dismiss the appeal on that ground. (It is only fair to the Court of Appeal to add that they made it clear in argument that they were impressed with the adverse possession argument, and it was not put to them in terms that they could not decide the appeal on that ground.) Secondly, and in any event, it was fundamentally unfair on the Bank for the Court of Appeal to dismiss its appeal on one ground, adverse possession, when, by its earlier decision, the Court of Appeal had limited the Bank to arguing another ground, paper title.

18.
To that extent, this appeal is justified. However, unfortunately for the Bank, it is impossible to fault the reasoning and conclusion of Jones J in her second judgment (or indeed her first judgment), namely that the Premises were included in the property conveyed by the 1909 Deed and that therefore the respondents had established paper title to the Premises as against Mr Jagpersad, and therefore as against the Bank.

19.
The boundaries of the property conveyed by the 1909 Deed appear clear, and, unless the southern boundary is misdescribed, they lead inexorably to the conclusion that that land included the Premises. It was argued that the boundaries as described were suspect because the western boundary was wrongly described as being bound “By the lands of Mahabir Maharaj”, whereas it was in fact a small river. However, ownership of property adjoining a river involves, at least prima facie, ownership of the river bed ad medium filum – see eg Micklethwait v Newlay Bridge Co (1886) 33 Ch D 133, 145, 152, and 155, and Pryor v Petre[1894] 2 Ch 11. Accordingly, there does not seem to be anything in that point. In any event, it is to be noted that the same description is given of the western boundary of the land conveyed by the 1910 Deed.

20.
The Bank also relies on the fact that the property conveyed by the 1909 Deed is identified as amounting to six acres. It is true that, if the Premises were part of the property conveyed by the 1909 Deed, that property would have amounted to seven acres. However, given that a choice has to be made between (i) departing from the description of the southern boundary in the 1909 Deed, and (ii) treating the description of six acres as being an underestimate by some 15%, it appears to be clear that, at least in the absence of other relevant facts, option (ii) is to be preferred. The boundaries identify the property conveyed with a genuine precision, whereas it is impossible to accept that the six acre description was intended to be precise. Further, the other three boundaries are correct, which would tend to suggest that the fourth is too.

21.
It is relatively common for the land conveyed by a deed to be misdescribed in some way, and in particular for the area to be misstated – see eg in Morrell v Fisher(1849) Exch 591, per Alderson B at 604. In Cowen v Truefitt Ltd [1898] 2 Ch 551, 554, Romer J said that “if there be a description of the property sufficient to render certain what is intended” in a conveyance, “the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect”, a view cited with approval by Lord Sumner in Eastwood v Ashton [1915] AC 900, 914. In such cases, the maxim falsa demonstratio non nocet is often invoked, but, as Lord Parker of Waddington said in Eastwood at p 912, “this maxim is useless unless and until the Court has made up its mind as to which of two or more conflicting descriptions ought under the circumstances to be considered the true description”, and as he added “[w]hen this is done the false description may, of course, be disregarded, and the maxim merely calls attention to this obvious result”.

22.
The Bank argued that the Judge erred in her decision at the second hearing, because she wrongly rejected factual evidence, expert evidence, and a point based on the plans, all of which showed that the Premises were separated from the land to the north of the Premises (ie from the land which it is common ground was the subject to the 1909 Deed). I am by no means convinced that, even if the

Judge had not rejected that evidence, she would or should have reached a different conclusion. However, that is not a point that need be pursued as there is nothing in the argument.

23.
The factual evidence, in the form of oral testimony, was said to show that the Premises had been fenced off from the land to the north, but, on analysis of the transcript of the hearing before the Judge, the evidence only established that the Premises were fenced off on the eastern, western, and southern boundaries, and not on the northern boundary – which, if anything, actually tends to provide a little support for the respondents' case. As to the expert evidence, it was of no value on the issue which had to be decided by the Judge, as she rightly concluded. So far as the plans were concerned it is true that at least some of them showed three iron markers around (i) the north-eastern corner, (ii) the north-western corner, and (iii) the middle, of the northern boundary of the Premises. However, closer analysis of the plans showed that markers (i) and (ii) were simply two of many markers which were placed on the ground when the boundary of the land changed direction, and that marker (iii), and possibly marker (ii) had been placed in the 1990s (as they were not shown in the earlier plans). The Judge was therefore, to put it at its lowest, fully entitled to reject them as being of any assistance.

24.
It can fairly be said to be surprising, at least on the face of it, if Mrs Williams conveyed away the Premises to two different people in successive years, and if, for many decades after 1910, the Premises had been conveyed away by a parallel series of deeds. However, these points do not justify overruling the Judge's conclusion, as the Bank fairly accepted. Conveyancing errors are by no means unusual, and the 1910 Deed is a peculiar document which is either some sort of later abstract or an informal conveyance apparently prepared by a lay person, unlike the 1909 Deed, which clearly appears to have been prepared by an experienced conveyancer. And the history of the use and occupation of the property, including the Premises, was not much gone into before the Judge. It appears, at least mostly, to have been agricultural land held under both series of conveyances for much of the time between 1910 and 2005 in the same family, so that precise boundaries may not have mattered much on the ground in practice. It is also very difficult as a matter of law to justify construing the 1909 Deed either by reference to the 1910 Deed, which was a later document of which the purchaser under the 1909 Deed was presumably unaware, or by reference to the uses, or the subsequent dispositions which were made of the land in question.

25.
Finally, it is right to refer briefly to the issue of proprietary estoppel. Building on another's land in the belief that it is one's land is a classic basis for a proprietary estoppel claim, but such a claim cannot be mounted unless the owner of the land in question was, or ought to have been, aware of the relevant facts. In this case, the respondents do not seem to have been aware of the initial stages of Mr Jagpersad's building work, and, when they discovered that it was going on, they wrote objecting reasonably promptly, and he then failed to reply for nearly three years. It is hard in these circumstances to think that Mr Jagpersad had a promising estoppel claim, although he may feel an understandable sense of grievance at the outcome of this case. However, he may derive some consolation from the small amount of damages and costs he has had to pay.

26.
In these circumstances, the Judge was right to conclude that Mr Jagpersad had no defence to the respondents' claim for possession of the Premises. Because the Bank is Mr Jagpersad's mortgagee, its rights in respect of the Premises are dependent on the rights of Mr Jagpersad, with the result that its appeal must be dismissed.

27.

Unless the Board receives written submissions to the contrary (with a copy to the respondents) within 28 days, the Bank must pay the respondents’ costs of and incidental to the appeal.