Trinity Term

[2020] UKPC 19

Privy Council Appeal No 0048 of 2019

JUDGMENT

Lares (Appellant) v Lares and others (Respondents) (Trinidad and Tobago)

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

before

Lord Hodge

Lord Kerr

Lady Arden

Lord Kitchin

Lord Leggatt

JUDGMENT GIVEN ON

13 July 2020

Heard on 8 June 2020

Appellant	Respondents
Lester Chariah	Anand Beharrylal QC
Kingsley Walesby	Zeik Ashraph
	Abdel Ashraph
(Instructed by Sheridans)	(Instructed by Alvin Pariagsingh)

LORD LEGGATT:

1.
The appellant is one of nine siblings who are the registered freehold owners of property situated at 21-23 Padmore Street, San Fernando, Trinidad. They inherited the property from their mother who died intestate in 1978. The respondents are six of the appellant's siblings who on 13 May 2014 began legal proceedings in the High Court of Trinidad and Tobago seeking partition and sale of the property, with the proceeds of sale to be divided equally between the nine siblings. The appellant opposed the claim and counterclaimed for declarations that she had been in adverse possession of the property or, alternatively, of the upstairs of the building on the property for more than 16 years before the proceedings were begun, with the result that the claim was barred by sections 3 and 22 of the Real Property Limitation Act and she was entitled to exclusive possession of the property or, alternatively,

the upstairs premises. The two other siblings were joined as defendants but have taken no part in the proceedings.

2.
The action was tried before Boodoosingh J who found in favour of the claimants for reasons given in a written judgment dated 19 July 2016. The appellant appealed but did not in the Court of Appeal maintain her claim to have become solely entitled to possession of the entire property. She nevertheless argued that the judge was wrong to reject her alternative claim to the upstairs part of the house. The appeal was heard on 11 June 2018 by Yorke Soo-Hon, Bereaux and Moosai JJA, who affirmed the findings and conclusion of the trial judge. From that decision the appellant has brought this further appeal as of right to the Judicial Committee.

The law

3.
It is common ground that the concept of adverse possession is the same in Trinidad and Tobago as in England and Wales, and that the law has been authoritatively stated by the House of Lords in JA Pye (Oxford) Ltd v Graham [2003] 1 AC 419. In particular, as there explained by Lord Browne-Wilkinson at para 40, there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). Possession is not "adverse" so as to be capable of barring a right to recover land if it is enjoyed as a lawful owner or with the consent of the owner(s): see paras 35-37; and Buckinghamshire County Council v Moran [1990] Ch 623, 636.

4.
At common law it was not possible for one co-owner of land to be in adverse possession against the other owners, and this is again now the position in England and Wales under the Limitation Act 1980. However, in Trinidad and Tobago section 14 of the Real Property Limitation Act has the same effect as the Real Property Limitation Acts 1833 and 1874 did in England and Wales, displacing the common law rule that the possession of one co-owner was deemed to be the possession of the others. Under the law of Trinidad and Tobago it is therefore possible for a co-owner of land, such as the appellant in this case, to acquire title by adverse possession against the other co-owners by exercising exclusive control over the land for the statutory period without their consent and with the intention to do so for her own sole benefit: see Goberdhan-Watts v Boodoo, Civ App No P014 of 2016, paras 37-38.

The appellant's case

5.
The house on the property which is the subject of this claim was completed in 1974 and is a substantial two-storey concrete building with a garage to the side and an upstairs porch, front yard, back yard and yards on both sides of the house. The upstairs portion of the house, to which the appellant claims to have acquired sole title by adverse possession, is described in her defence and counterclaim as consisting of "a living room, kitchen, front gallery, back gallery, two toilets, five bedrooms, a verandah, an internal staircase and two sets of stairs located to the side of the house".

6.
The starting point for the appellant's case, as now maintained, is the view expressed by Lord Walker giving the judgment of the Board in Ramroop v Ishmael and Heerasingh [2010] UKPC 14, paras 22-25, that it is possible to establish title by adverse possession to part only of a building. The respondents dispute this. The Board does not find it necessary on this appeal, however, to address this issue and

will assume, without deciding, that acquiring possessory title to part only of a building is in principle possible under the law of Trinidad and Tobago. The Board will also assume in the appellant's favour that the definition in her defence and counterclaim, quoted above, of the part of the building to which she claims to have established possessory title is sufficiently precise for this purpose.

7.
It was not in dispute at the trial that the appellant had lived on the upstairs floor of the house since it was built and that for more than 16 years before the action was brought no one other than the appellant and her children had been living in that part of the house. The issue was whether without the consent of her siblings she had exercised, and intended to exercise, exclusive control of the upstairs as a distinct part of the property for the necessary length of time. This was a question of fact which required the judge to evaluate oral and documentary evidence and to draw inferences from the primary facts.

8.
On the evidence the judge found that there was no such exclusive control, or intention to exercise exclusive control, of the upstairs premises by the appellant until after her brother James died in 2004. This was too short a time to establish any right by adverse possession. The matters on which the judge based this conclusion included: findings that other members of the family had at relevant times paid water bills and rates for the entire property; the appellant's failure to produce any documents to show that she paid any bills at all for the property before 2007; the fact that the appellant made no attempt to close off the upstairs of the building, which was accessible from the ground floor by an internal as well as external staircases; a finding that the other siblings could and did have access to the upstairs, in particular if they wanted to use the tea sets, glasses and wares of their mother, which were considered common property; and admissions made the appellant when cross-examined that she had lived in the house on the understanding that, like any of her siblings, she was entitled to do so as a part owner and that she did not start to act as if she owned the property exclusively until after her brother James died.

Concurrent findings

9.
As mentioned, the Court of Appeal affirmed the judge's factual findings. Accordingly the first, and fundamental, obstacle which the appellant faces on this second appeal is the settled practice of the Board not to interfere with concurrent findings of fact made by two courts below, save in special circumstances. That practice, and the limited circumstances in which the Board will depart from it, have been clearly established since the Board's decision in Devi v Roy [1946] AC 508 and reiterated many times since, including in two decisions cited in the respondents' written case: Central Bank of Ecuador v Conticorp SA [2015] UKPC 11, para 4; and Al Sadik v Investcorp Bank BSC [2018] UKPC 15, para 44.

10.
Although leading counsel for the appellant confirmed that he is aware of this settled practice, no attempt was made in the appellant's written case nor in oral submissions to argue that there are any special circumstances in the present case which could justify departure from it. That, of itself, is fatal to this appeal.

The appellant's arguments

11.

The principal argument made for the appellant was that there had been a violation of the rules of procedure in treating factual possession as an issue at the trial, as the claimants had not disputed the appellant's pleaded averment that she had been in continuous, exclusive occupation of the upstairs part of the building since 1990. The suggestion that the claimants had not denied this allegation, however, is untenable, as the claimants in their defence to counterclaim had expressly denied all the appellant's pleaded allegations that she had been in continuous, exclusive possession of the property for more than 16 years. That denial clearly encompassed her claims to have been in factual possession of each of the upstairs and downstairs parts of the premises for the required length of time.

12.
It was then said that the claimants did not plead their reasons for denying the averment, as required by rule 10.5(4) of the Civil Proceedings Rules 1998. In this regard Mr Chariah relied on a decision of the Court of Appeal in MI5 Investigations Ltd v Centurion Protective Agency Ltd, Civ App No 244 of 2008, holding that a judge had been right to strike out a defence which consisted of nothing more than a bare denial of a claim. However, the claimants' defence to counterclaim went well beyond a bare denial. It set out particulars of which members of the family had allegedly occupied which parts of the premises at which relevant times and of bills which the claimants had paid in respect of the property (copies of which were annexed). It also pleaded a positive case that, after the death of their parents, "the parties continued to live on the property without the expressed permission of each other or anyone but under an understanding that the property belonged to everyone, so that each party residing at the property did so pursuant to this understanding which gave rise to the tacit permission of each other".

13.
No complaint was made either before or at the trial that the defence to counterclaim was lacking in adequate particularity. Nor was it suggested on the appellant's behalf that the claimants were or should on the basis of the pleadings be prevented from disputing that she had been in exclusive factual possession of the upstairs of the property for more than 16 years. Rather, this was treated as an issue in dispute which counsel for the appellant submitted in written closing submissions should be decided in her favour. In the Court of Appeal the appellant sought, unsuccessfully, to challenge the judge's contrary finding of fact that she did not exclusively occupy the upstairs portion of the premises. No argument was made that the judge had been wrong to treat her exclusive factual possession as properly in issue. Had such a ground of appeal been advanced, it would undoubtedly have received short shrift in circumstances where the issue had been contested on its merits without objection at the trial. It is even more unjustifiable for the appellant to seek to introduce such a complaint for the first time before the Board.

14.
The complaint about the claimants' pleading did not in any event extend to the issue of intention to possess, on which Mr Chariah acknowledged that he faced "something of a challenge" in seeking to displace the judge's factual finding. The Board considers this to be an understatement given not only the Court of Appeal's endorsement of that finding but the admissions made by the appellant under cross-examination, referred to above, to the effect that she did not assert any exclusive control over any part of the property until after her brother James died. In the light of the appellant's own evidence it is difficult to see how the judge could have decided the case in her favour.

15.
The other arguments advanced on the appellant's behalf consisted of invitations to the Board to draw different inferences from various pieces of evidence, including pieces of oral evidence, from those

drawn by the trial judge. Even if there had appeared to be any substance in any of the points made, this is not an exercise on which it would be right for the Board to embark.

Conclusion

16.
For these reasons, the Board did not find it necessary to call on counsel for the respondents at the hearing to reply to the appellant’s submissions and will dismiss the appeal with costs.