

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

**CCJ Appeal No. GYCV2016/002
GY Civil Appeal No. 60 of 2014**

BETWEEN

BIBI ZARIDA

APPLICANT

AND

OMESHWAR MISIR

RESPONDENT

**Before The Right Honourable:
and the Honourables:**

**Sir Dennis Byron, President
Mr Justice Nelson
Mr Justice Hayton**

Appearances

Mr Roopnarine Satram and Mr Chandrapratesh V Satram for the Applicant

Mr Rajendra N Poonai and Mr Sohan J Poonai for the Respondent

JUDGMENT

of

The President and the Honourable Justices Nelson and Hayton

Delivered by

**The Honourable Mr Justice Hayton
on the 23rd day of August 2016**

Introduction

[1] A most unsatisfactory state of affairs has led to this application for special leave to appeal under s 8 of the Caribbean Court of Justice Act 2004 and for an order that the hearing of this application be treated as the hearing of the appeal. At the end of the hearing the Court made the requested order and set aside interlocutory orders made in respect of other interlocutory orders made in respect of High Court Action No 91/S of 2010 that is still awaiting a hearing. To escape from this legal labyrinth and expedite matters, this Court also made further orders set out at the end hereof, promising to give written reasons later. These are those reasons. Our orders will lead more expeditiously than currently possible to the key determination whether or not Mr Misir's property rights under a 1999 transport are free from, or overridden by, prescriptive rights of Mr Massabally, now vested after his March 2012 death in his administratrix, Ms Zarida.

The 2010 Action and its ramifications

[2] In 2010, over a decade after his 1999 transport, Mr Misir brought an action in the High Court against Mr Massabally alleging him to be in occupation of seven acres of rice land situate at the South Section of Plantation Aurora, Essequibo Coast (the Disputed Land) and alleged to be comprised within his Transport No 305 of 1999, and claiming possession thereof. Damages were sought and an injunction preventing Mr Massabally, his servants or agents from entering, remaining, planting or otherwise occupying the Disputed Land. Mr Massabally, however, claimed to have been in possession of it from 1981 to 1999, so as to have acquired the right to a prescriptive title under the Title to Land (Prescription and Limitation) Act, Chapter 60:02, and thereafter to have continued in possession despite the transport in Mr Misir's favour, if indeed that title included all the Disputed Land, which was contested.

[3] Several applications were made by Mr Misir on a variety of grounds to the Rice Assessment Committee in attempts to acquire possession of the Disputed Land from Mr Massabally e.g. for non-payment of rent, but they all failed, being dismissed or withdrawn. In respect of Mr Misir's last application, the Chairman of

the Committee in written reasons dated April 6 2010 made it clear that his Committee had no jurisdiction to determine whether Mr Massabally or Mr Misir had the better right to possession of the Disputed Land, which was the real issue between them.

[4] Shortly thereafter, on April 27 2010 the High Court Action No 91/S of 2010 was filed by Mr Misir, who on April 30 2010 followed this up with an application for an interim injunction in the terms of the claimed permanent injunction so as to prevent Mr Massabally, his servants and agents from entering, remaining, planting or otherwise occupying the Disputed Land until trial of the Action. On December 30 2010 Mr Massabally filed his Defence and Counterclaim. He went on in 2011 to issue Petition 616-P of 2011 before the specialised Land Court in order to establish his prescriptive title to the Disputed Land, but Mr Misir filed an opposition to it.

[5] After an *inter partes* hearing based upon affidavit evidence, Insanally J on November 15 2011 granted the interim injunction in the terms requested for a permanent injunction, though limited until the hearing and determination of the High Court Action. It is notable, however, that she observed¹, “In any event this action should be stayed until the outcome of the Land Court Application is announced”, but did not implement this observation by ordering a stay of the High court action until further order after the outcome of the Land Court Application. Instead, she concluded, “The transported owner is entitled to retain his legal ownership until the hearing and determination of the action” and, as Roy JA stated² when subsequently considering her judgment, she “was guided by the presumptive possession of the Plaintiff [Mr Misir] based on his Transport in granting the interim relief sought.”

[6] On November 22 2011 Mr Massabally appealed the decision of Insanally J to the Full Court. On July 9 2014 the Full Court (comprising Bovell-Drakes and George JJ) discharged Insanally J’s interlocutory injunction. Mr Misir’s attorney rightly

¹ Record p 27.

² Record p 199.

conceded that Insanally J had not considered the relevant *American Cynamid v Ethicon* principles for the grant of interlocutory injunctions, so that the Full Court could review the whole case and come to its own conclusions.

- [7] The Full Court in a lengthy judgment applied the *American Cynamid* principles and, in assessing the balance of convenience and the balance of justice, reviewed³ the affidavit evidence and exhibits thereto. It found that, at the time of filing of the proceedings, “the status quo appears to be that the appellant was in possession”, and “it does appear that the status quo for a number of years prior to the filing of the action was that the appellant was in possession of the land.” It also found Mr Misir to have been guilty of non-disclosure in only disclosing the last of several failed applications to the Rice Assessment Committee against Mr Massabally for possession of the Disputed Land. In the light of Mr Massabally’s possession as the status quo, the balance of convenience and justice led the Full Court to discharge the interlocutory injunction.
- [8] On July 21 2014 Mr Misir, with the consent of the Full Court, filed an appeal (still pending) from the Full Court’s judgment to the Court of Appeal. Over a year later on July 29 2015 Mr Misir filed an application for a stay of execution of the Full Court’s discharge of Insanally J’s interlocutory injunction. On October 19 2015 Roy JA sitting as a single Court of Appeal judge in chambers granted the stay pending the Court of Appeal hearing of the interlocutory appeal from the Full Court. By Notice of Motion to the Court of Appeal dated December 1 2015, Ms Zarida as Mr Massabally’s administratrix applied for Roy JA’s stay to be discharged. On March 4 2016 the Court of Appeal refused to interfere with that stay.
- [9] Roy JA in a very brief judgment had granted a stay of the Full Court’s order discharging the interim injunction, concluding “that the Applicant [Mr Misir] faces the greater risk of injustice as the title holder if a stay is refused.” Because of the straight conflict between Mr Misir claiming by virtue of his 1999 transport to be entitled to possession and occupation of the Disputed Land and Mr Massabally

³ Record pp.165-167.

claiming to be so entitled by prescription, Roy JA considered⁴ that he had to focus on the “Applicant’s Transport” as “the only evidence of legal title to the subject land” and stated “Unless it is set aside, it gives, as a matter of law, a warranty of title and the title holder is in the meantime, entitled to the enjoyment of that property.... It is also a presumption in law that possession of land must follow title. Until the matter is fully ventilated, the present issue remains one of possession and in my respectful view, in the interim, the Respondent has not displaced that presumption of possession.”

[10] It is to be noted, however, that, as clear from *Ramlagan v Singh*⁵, a title holder is not entitled to the enjoyment of the property if an adverse possessor with prescriptive rights is in possession of the property. Moreover, Roy JA ignored the detailed judgment of the Full Court that analysed opposing affidavits and exhibits thereto and found sufficient uncontroverted evidence to indicate that the status quo on filing the High Court Action had been that the Respondent had been in possession, despite some bare assertions of the Applicant to the contrary.

[11] The Court of Appeal refused⁶ to interfere with the exercise of Roy JA’s discretion “as there is nothing to show the exercise to be arbitrary or unreasonable.”

[12] On an application for a stay of execution pending an appeal the court, of course, should not be trying the appeal but it must take account of the nature of the appeal and make a provisional weighing of the issues. In doing this, especially in a case involving possession of land and prescriptive rights it should not refuse to look into factual matters merely because there are conflicting assertions. It would, indeed, be surprising if there were not conflicting assertions in cases involving the title holder and a person claiming to have been in possession of the relevant land for many years before and after the title holder received transport.

[13] Thus a court is obliged to look into the affidavits and supporting exhibits and, in a case like the present, where the status quo at the time the legal proceedings were

⁴ Para 5 of his judgment, Record p 199.

⁵ [2015] CCJ 7 (AJ) especially at [29].

⁶ Record p32.

initiated is a key consideration, it should endeavour where possible to take a view as to the status quo in considering the balance of convenience and justice where the issues between the parties can only be resolved by a trial. The Full Court had done this, ignoring unsupported assertions that were inconsistent with documentary evidence, while taking account of material non-disclosures and statements that could clearly be seen to be economical with the truth. Roy JA unreasonably ignored the Full Court's analysis, simply relying on a presumption of possession following from legal title without considering the balance of convenience and justice where there were indications that the legal title might well have been subject to prescriptive rights of a person in possession of the land when transported title was passed.

[14] This was particularly unsatisfactory if the effect of Roy JA's order was (as it seems he thought) temporarily to revive Insanally J's interlocutory injunction for a likely significant period, and temporarily to allow the interlocutory appeal from the Full Court to the Court of Appeal. In law, however, the Full Court's order that discharged Insanally J's injunction, so that it ceased to exist, was self-executing and required no further proceeding to enforce or execute it. Since execution had taken place no stay of execution was possible. Thus the Court of Appeal should have discharged Roy JA's stay of the Full Court's order: the interlocutory injunction would only have been revived if the Court of Appeal allowed the appeal from the Full Court.

[15] The Court of Appeal, however, erroneously assumed that Roy JA's stay had been validly granted so that Insanally's injunction was in force once more. Nevertheless, on that assumption it erroneously refused to interfere with the stay. It endorsed Roy JA's approach and his view that the holder of the paper title ought to be given protection unless and until his transport is judicially cancelled, whether by prescription or otherwise. Indeed, when it referred⁷ to "untested evidence as to the Applicant's occupation of the disputed land" it made the comment, "It seemingly escaped the attention of the Applicant that mere occupation without more could not in law crystallize into title under the applicable legislation thus extinguishing the

⁷ Record p 31.

paper title.” That is trite law, but it overlooked the fundamental point made clear in *Ramlagan v Singh* that if the Applicant as claimed had been occupying the Disputed Land from 1981 until 2010 his prescriptive rights were not extinguished by any 1999 transport in the Respondent’s favour but entitled him to remain in occupation until duly crystallizing his title by formal proceedings e.g. before the Land Court.

[16] As the Court of Appeal rightly pointed out, a decision in the pending Land Court case 616-P of 2011 as to whether Mr Massabally had crystallised prescriptive rights entitling him or, rather, his administratrix, Ms Farida, to be title holder of the Disputed Land, would strongly affect the High Court Action No 91-S of 2010. Sadly, this is still awaiting a substantive hearing after interlocutory injunction proceedings in the High Court, appealed to the Full Court and pending before the Court of Appeal, and interlocutory stay applications to Roy JA and the Court of Appeal.

[17] It is a great pity that Insanally J on November 15 2011 had not followed up her view that the better course would be to stay the High Court Action until the Land Court application had been finally determined. Clearly, such a stay is required now as well as further orders, taking account of the powers of the CCJ under s 11(6) of the Caribbean Court of Justice Act 2004, of the Court of Appeal under s 7 of the Court of Appeal Act and the High Court under s 25 of the High Court Act. Indeed, the CCJ has the inherent power (recognised in Rule 1.4(2) of the Appellate Jurisdiction Rules) “to make such orders as may be necessary to meet the ends of justice or to prevent abuse of the process of the Court” in order to achieve its Rule 1(3) overriding objective “to ensure that the Court is accessible, fair and efficient and that unnecessary disputes over procedural matters are discouraged.” It is expected that the Land Court application will be dealt with as expeditiously as possible in view of the time already eaten up by costly interlocutory manoeuvres.

Disposal

[18] It is ordered that:

- (i) the Applicant, Ms Zarida, is granted special leave to appeal and this hearing is treated as the hearing of the appeal;

- (ii) the appeal is allowed;
- (iii) the order of the Court of Appeal made on March 4 2016 and the order of Roy JA made on September 19 2015 granting a stay of execution of the order made in the Full Court by Justices Bovell-Drakes and George on July 9 2014 are hereby set aside;
- (iv) the proceedings in High Court Action No 91/6-10 are stayed until the determination of the Land Court proceedings No 616-P of 2011 on terms that the Respondent, Mr Misir, is permitted to harvest the existing rice crop;
- (v) thereafter, the Applicant, Ms Zarida, is entitled to resume possession of the Disputed Lands until the hearing and determination of the Land Court proceedings;
- (vi) the Applicant's costs of this application are to be paid by the Respondent, to be taxed if not agreed.

/s/ CMD Byron

The Right Hon Sir Dennis Byron

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ D. Hayton

The Hon Mr Justice D Hayton