IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No. GYCV2017/011
Guyana Civil Appeal No. 93 of 2008

BETWEEN

RAJPATTIE THAKUR, in her capacity As Executrix of the Will of Dolarie Thahkur, a.k.a Dolarie Takur	**APPELLANT**

AND

DEODAT ORI	**RESPONDENT**

Before The Honourables **Mr. Justice Jacob Wit**
Mr. Justice David Hayton
Mr. Justice Winston Anderson
Mme. Justice Maureen Rajnauth-Lee
Mr. Justice Denys Barrow

Appearances:

Mr. Chandrapratesh Satram, Mr. Roopnarine Satram, Mr. Bindra Dolsingh and Mr. Visal Satram for the Appellant

Mr. Mohabir Anil Nandlal and Mr. Manoj Narayan for the Respondent

JUDGMENT
of
The Honourable Justices Wit, Hayton, Anderson, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Wit
on the 20th day of June, 2018

Introduction

[1] Tucked away in one of the few deeply entrenched provisions of the Constitution of Guyana, section 18, one can find amid a multitude of legal and technical rules, a little philosophical gem of Lockean stature: "Land is for social use and must go to the tiller." This, according to the Constitution, is one of the principles and bases of the political, economic and social system of Guyana. Although not classified as a fundamental right, the principle, one assumes, could have some bearing[1] on Guyana's land law, especially in matters of acquisitive prescription. This appeal, it would appear, deals with such prescription and a tiller named Bissoon Thakur. Bissoon owned and resided at Lot 8 of Plantation Mon Desir, Canal No. 2, West Bank Demerara with his wife and children. The land with which this appeal is concerned is situated at the adjoining sublots, 7A, 7B, 7C and 7D ('the land') and was occupied and cultivated by Bissoon and his family for over forty years.

[2] The Appellant in this matter is Bissoon's daughter, Rajpattie Thakur. She is seeking a Declaration of Title in her capacity as executrix of the Will of her mother, Dolarie Thakur ('Dolarie') who died in 2003. Bissoon died in 1991 and Dolarie was the sole beneficiary of his estate.

Factual Background

[3] As with all matters concerning adverse possession, the facts are crucial to the courts' determination. This case is no different and in summary, the facts are as follows. Sometime in the 1970s, Bissoon went into occupation of the land with the permission of Prince Maison, the titular owner of the land at that time. Bissoon planted the land with various crops without interruption until 1982 when it was sold at execution sale to Basil Basdeo ('Basdeo') for non-payment of rates and taxes. Following the sale, Basdeo obtained Transport No. 1003 of 1982.

[4] That same year, on realization of the Thakurs' occupation, Basdeo threatened Bissoon with legal action for trespass. Bissoon ignored the threat and remained in occupation but sought assistance from local bodies in an effort to remain on the land. On 12 December 1983, he wrote a letter to the local Authority expressing concerns about the sale, particularly as it

[1] See Section 39(1) of the Constitution

related to his crops which he claimed were valued at $25,000. In the letter, he explained that he obtained permission to work the land from Prince Maison in 1972 and had since obtained further permission to continue to occupy from his wife, Pamela Maison as Prince Maison had left the jurisdiction. He claimed that he had occupied the land on the basis that he would eventually purchase it as promised by Prince Maison. The letter also revealed that, with knowledge of the sale, he sought to pay rates and taxes, though this effort was futile. On 10 April 1984, Bissoon wrote a second letter to the Ombudsman in which he attacked the basis of the sale and alleged corruption. He claimed that Basdeo and Mr. Persaud, the village overseer responsible for selling the land to him, had a personal relationship and that the sale was not valid. He also reiterated that his entry onto the land in 1972 was permissive and that he had crops valued at $25,000 on that land. He also acknowledged that Basdeo served him with a letter threatening legal action for trespass.

[5] Basdeo's threat to sue never materialized and Bissoon remained on the land peaceably until Basdeo sold it to the Respondent, Deodat Ori on 2 April 1997. The Respondent subsequently obtained Transport No. 1620 of 1997. He proceeded on to the land on 15 June 1997, and found Jaipaul, the Appellant's brother, planting agricultural produce. Jaipaul was asked to vacate the land on that day and then again in September 1997. After he refused, a series of actions with respect to the land ensued.

Procedural History

[6] As with the factual background recited above, the procedural background is equally important to the disposition of this matter. No less than four matters were filed in relation to the ownership of the land. The first matter filed was High Court Action No. 5042/1997 ('the First High Court Action') instituted by Basdeo and the Respondent for trespass in 1997. This action was filed solely against Jaipaul. The status of this matter is unclear from the record but in paragraph 12 of the Respondent's Affidavit in Support of Opposition filed in 2003, he deposed that '*at the hearing of the aforesaid Action the Honourable Court might deemed* (sic) *same as being abandoned and incapable of being revived because of some procedural defects in the said Action'*.

[7] Later that year, the Appellant and Jaipaul instituted High Court Action No. 5831/1997 ('the Second High Court Action') where they sought a declaration that they were legally

entitled to farm on the land without let or hindrance from anyone. The Appellant withdrew this claim on 11 June 2007.

[8] In 2000, the Appellant and Jaipaul filed a petition, Petition No.233-P/2000 ('the First Petition'), where they sought a Declaration of Title by prescription in their capacity as Administratrix Ad Litem of their father's estate. However, after the Appellant was cross-examined, she sought and obtained leave to withdraw and discontinue in January 2003.

[9] In the matter to which this appeal relates, Petition No.280-P/2003 ('the Second Petition) the Appellant sought a Declaration of Title personally and in her capacity as executrix of Dolarie's estate.

Commissioner of Title Proceedings

[10] The Second Petition was based on the family's joint occupation and cultivation of the land. The Appellant claimed that her parents commenced occupation *and* possession in 1982 and on her father's death in 1991, her mother continued occupation and ownership. After her death, this was continued by the Appellant and Jaipaul on behalf of their mother's estate. Evidence of possession was presented in the petition and at trial. The Appellant detailed the way in which each plot of land was used and cultivated from the 1970s to 1997 when the land was sold to the Respondent. She gave evidence that her family cleared the land of trees and bushes, dug drains and trenches, made dams and built a large strong bridge from the property to the road. They also cultivated the land with sugar cane, pineapples, coconut trees and a wide assortment of crops and reared cattle and pigs as well.

[11] Her evidence was supported by two witnesses, a neighbour, Ashok Sijore and Pamela Maison. Sijore, who lived on the lot south of the land from 1989, swore an affidavit in which he stated that Bissoon was not active when he moved to his lot but he saw the children and Dolarie working the land. He swore that this continued after Dolarie's death and he never saw anyone but the Thakurs carry out any cultivation or other acts of occupation or ownership on the land. Pamela Maison admitted under cross examination, that although she never witnessed Bissoon planting the land, she saw crops on it and that each time Bissoon visited her home, he would bring produce for her and her husband.

[12] The Respondent's evidence was that after receiving transport, he visited the property with Basdeo and saw there was some cultivation on the land including trees and different greens but no crops. He also described an altercation with the Appellant in which she sought to prevent him from ploughing the land. He suffered a broken finger as a result and filed criminal charges. He also testified that after the altercation, an injunction was served on him to restrain him from ploughing and trespassing on the land. Nazim Hussain, a neighbour who lived 25 metres away, gave evidence on the Respondent's behalf. His evidence was contradictory. He testified that he never observed any cultivation on the land prior to 1997 but stated under cross examination, that he observed cassava there. He attested to seeing the Respondent weed the land and stated that he ploughed the land once but never returned after the altercation with the Appellant who had devised ways to prevent him from going on to the land.

[13] Rooplall J found the Appellant to be an honest person and accepted her testimony as truthful and deemed her a credible witness. In his view, she proved on a balance of probabilities that her father and then her mother were in possession of the land for the statutorily required period with Dolarie continuing possession after her husband's death in 1991 until her own death in 2003. Rooplall J held that Bissoon commenced occupation of the land as a result of the permission or licence of Prince Maison but that permission came to an end when transport was passed to Basdeo in 1982. As a result, from 9 August 1982, Prince Maison had no authority to permit anyone to use the land and Bissoon was in occupation without the permission or licence of anyone. On those facts, Bissoon would have acquired a good possessory title by 10 August 1994 but due to his death in June 1991, he had only acquired nine years. However, as he had accepted the evidence that Dolarie took control of the land following his death, Rooplall J still found that the required twelve-year period was satisfied on 10 August 1994.

Court of Appeal Proceedings

[14] The Respondent appealed the decision of Rooplall J. The Court of Appeal, comprising Justices of Appeal Roy and Cummings-Edwards and Additional Judge Persaud allowed the appeal and set aside the order of the Commissioner of Title on 4 October 2016. The decision of the Court, delivered by Persaud J, considered arguments on non-disclosures and false disclosures, the material aspects of the evidence and non-compliance with the Rules of the High Court (Declaration of Title) Chapter 3:02 ('the Rules').

[15] On appeal, the Respondent identified a number of non-disclosures and false disclosures related to the Second Petition, namely the Appellant's failure to disclose that she and Jaipaul filed the First Petition and the failure to mention her mother's occupation and possession until the Second Petition. The Respondent also accused the Appellant of falsely disclosing that an injunction was obtained to restrain him in the Second High Court Action.

[16] The court found that the false disclosures and non-disclosures of facts material to the petition were grave and ought to have been fatal to the petition as they went to the root of the matter and were material to the relief claimed. The court was prepared to allow the appeal and set aside the declaration on this ground alone but decided to consider the merits for the sake of comprehensiveness and to avoid further litigation.

[17] In the court's view, it was unclear when Bissoon, Dolarie, Rajpattie or Jaipaul would have formed the requisite intention to occupy adversely, if at all. The court held that the Appellant '*could not by any stretch of the imagination fulfil the requirements necessary especially as it relates to the establishment of the animus possidendi'*. In its view, the evidence clearly showed that Bissoon was occupying on the basis of a licence and not in his own right. Bissoon's letter to the Ombudsman in 1984 clearly showed that he was occupying and planting the land with the permission of Prince Maison and he had sought and obtained permission to occupy the land from Pamela Maison even after knowledge of the sale to Basdeo which was evidence of his state of mind. He made no attempt to fence the land or pay any of the required rates and taxes. The court concluded that he was merely seeking to protect his crops and nothing more.

[18] The court also found that the evidence was conflicted as it related to the Appellant's own state of mind and made specific note of the exclusion of Dolarie until the prayer in the Second Petition. Neither the Second High Court Action nor the First Petition stated that Dolarie had occupied or cultivated the land. As to factual possession, the Court held that '*the evidence as it relates to the physical occupation of the property seems to suggest at best a mere continuation of planting by the petitioners commenced by their father…*'.

[19] The court did not agree with the Respondent's argument that there was a failure to comply with the *Rules of the High Court (Declaration of Title) Chapter 3:02*. The Respondent argued that the plan annexed to the petition was done at the request of Jaipaul and Rajpattie Thakur and not at the request of Dolarie Thakur, the subject of the petition. In his view,

this was fatal. The court held that this complaint was of little significance. The purpose of the plan was to demarcate the boundaries of the land claimed in order to satisfy the court that there was no encroachment on adjoining occupiers. The land in this matter was clearly demarcated and was also subject to a pre-existing transport which in itself demarcated the boundaries thereto by a referable plan.

Issues

Should the Court of Appeal have interfered with the finding that the Appellant was a credible witness?

[20] The Appellant urged this court to overturn the Court of Appeal's finding that she was not a credible witness. In her view, that court did not consider the factual circumstances of the land and committed an egregious error of law when it substituted the trial judge's assessment of her credibility with its own view. She added that a determination of credibility is the responsibility of the trial judge and the Court of Appeal misunderstood its role as an appellate tribunal.

[21] In *Ramdehol v Ramdehol*[2] and *Campbell v Narine*[3] this Court endorsed the following passage of Byron CJ's judgment in *Grenada Electricity Services Ltd v Isaac Peters*[4] in which he noted:

> "It is in the finding of specific fact or the perception of facts, that the court is called on to decide on the basis of the credibility of the witnesses. When this is the position, an appellate court must exercise caution and have a rational basis for differing with the trial judge who had the advantage of observing the witnesses in the process of giving testimony. On the other hand, the court may have to consider a situation where what is in dispute is the proper inference to be drawn from facts, or in other words the evaluation of facts. In such cases the appellate court is generally in as good a position to draw inference or to evaluate as the trial judge."

[22] As will be seen below when we discuss the alleged false and non-disclosures, there is a reason why an appellate court must be cautious when exercising its discretion to overturn a finding of credibility. In the instant matter, to attribute the Appellant's behaviour to dishonesty was a hasty assessment that did not involve a careful scrutiny of the facts and the evidence in the case. Had this been undertaken, it would have been clear, as it was to this Court, that the lack of legal knowledge and inadequate legal representation must have played a significant role in the Appellant and her family's actions.

[2] [2017] CCJ 14 (AJ) at [46].
[3] [2016] CCJ 7 (AJ) at [39].
[4] Grenada Civil Appeal No 10 of 2002 at [7].

Were the false and non-disclosures fatal to the Second Petition?

[23] The jurisprudence is clear on the importance of pleading all material facts. There is a legislative requirement to do so and this has been further compounded by the case law.[5] The Court of Appeal found that this matter could have been dismissed on this issue of non-disclosure alone as the false and non-disclosures went to the root of the matter and were material to the relief claimed. Counsel for the Respondent, Mr. Nandlall, agreed and argued that the impact of the non-disclosures cannot be overlooked as material facts were suppressed and the Court was deliberately misled. He argued that the Appellant sought to mislead the court by failing to disclose the First Petition and not including Dolarie in the pleadings until the Second Petition. He also argued that despite the contents of the Second Petition, Rajpattie and Jaipaul never obtained an injunction against the Respondent in the Second High Court Action nor was there an Order in the Second High Court Action on 4 December 2000 which dismissed a summons by the Respondent and Basdeo to have said injunction discharged. He also alleged that there was no appeal, Appeal No. 127 of 2000 to the Full Court, in which Deodat Ori and Basdeo sought to reverse the order of Ramlall J (as referred to at [25] below).

[24] In response to these allegations, the Appellant argued that the Court of Appeal did not truly appreciate the state of the record and that its analysis of the evidence was unbalanced, unfair and led to unreasonable inferences. After careful review of the Record of Appeal in relation to the (i) injunction, (ii) the failure to disclose the First Petition, (iii) the existence of the will and (iv) the failure to include Dolarie's occupation in any of the previous proceedings, we agree with this position.

Injunction

[25] The argument as to whether an injunction was granted to prevent the Respondent from entering the land strikes us as peculiar because at some point before this appeal, both parties attested to its existence. The Respondent expressly referred to it in his Affidavit in Support of Opposition when he acknowledged the dismissal of the Full Court Appeal No. 127 of 2000, another matter which Mr. Nandlall claims never existed. He deposed that '*I have been further advised by my Attorneys-at-Law and verily believe the Appeal No. 127 of 2000 to the Full Court was not dismissed on its merits but rather the Court was of the opinion that an application for an extension ought to have been made to his Honour, Mr.*

[5] Rule 3.2 of the Rules of the High Court (Declaration of Title) Rules 1923 and Bisnauth v Shewprashad [2009] CCJ 8 (AJ) at 25.

William Ramlall, who was the presiding Chamber Judge and who made the Order dismissing the summons (to discharge the injunction) as filed by me'. Clearly, this injunction and the appeal existed in his mind as much as the Appellant's.

[26] At page 130 of the Record, we saw that at the Land Court proceedings, there was an effort to locate the file for the Second High Court Action which was the matter in which the injunction was supposedly granted. However, as the file was missing, counsel for both parties agreed to proceed with the matter. The status of the missing files was addressed again during the course of the trial.[6] An Officer of the Supreme Court Registry, Euland Henry, was even called to give evidence as to the location of the file related to the First High Court action brought by Basdeo and Ori against Jaipaul[7]. This illustrated that there was a continuous commitment to assist the court with the requisite facts.

[27] We did, however, observe the existence of an injunction in the First High Court Action in which the Appellant was added as a Second Defendant. Curiously, the Respondent's then counsel, Mr. Britton advised the trial judge of its existence on page 130 of the Record, a fact that has been ignored until now. Further perusal of the Record reveals that an Order was made by Hanomansingh J on 18 September 1998 following an ex-parte affidavit application filed by the Appellant (the defendant in that matter). That Order stated that an injunction was granted and the Respondent, his servants and agents were restrained from entering into or unto the land or from using any acts of violence, threat or intimidation until after the hearing of the matter.

[28] Thus, as it relates to the existence of the injunction and the appeal which followed, what is on record cannot be ignored. It is unfortunate that both counsel for the Respondent and the Court of Appeal seemed to have failed in fully familiarising themselves with the contents of the record with respect to this argument. Had the record been properly reviewed, this appeal could even possibly have been avoided as these allegations influenced the Court of Appeal's finding that the Appellant was not a credible witness and should not be granted the declaration of title.

First Petition

[29] The Respondent also alleged that the Appellant failed to disclose the First Petition.

[6] Page 133 of the Record of Appeal.
[7] Page 137 of the Record of Appeal.

However, the evidence tells a different tale. At page 81 of the Record, at paragraph 15 of his Affidavit in Opposition, the Respondent deposed: *"That during the subsistence of the said Summons in June 2000, the Petitioners Jaipaul Thakur and Rajpattie Thakur purported to file a petition No. 233-P of 2000 for Declaration of Title with respect to the same pieces or portions of properties in question."* So, the Respondent himself made mention of the First Petition. Then, at page 104 of the Record, at paragraph 4 of the Appellant's Affidavit in Reply, she deposed that: *"I admit that the earlier Petition was withdrawn and consequently dismissed."*

[30] To deem this a non-disclosure would be in stark contrast with the jurisprudence on this point of law. In fact, the case of *Trustees of Diocese of Guiana v McLean*[8] contemplates such a scenario. At page 184, Langley J held that in circumstances where an opposer raises a material issue not raised by the petitioner, the petitioner should at once without leave file an additional affidavit addressing the newly raised issue. Although the Record reveals that the Appellant's admission was far from prompt, an affidavit was filed prior to the hearing[9]. What is important here is that the Land Court was apprised of the material facts prior to the start of the proceedings.

[31] Additionally, the Respondent's allegation that the Appellant lied under cross examination about whether she had filed an earlier petition is another gross exaggeration of the facts. When asked if the present matter was the first petition brought in relation to the land, the Appellant answered in the affirmative. But page 135 of the record reveals that that there was an almost immediate clarification. She admitted that she herself and Jaipaul had filed a petition for a declaration of title and stated that when the question was first posed, she was under the impression that it was in relation to the Second Petition.

The Will

[32] The Respondent also alleged that in the First Petition, the Appellant deposed that her father died intestate but stated in the Second Petition that he died testate. The Appellant offered an explanation at paragraph 7 of her Affidavit in Reply, stating that *"We did not know my father died testate until we discovered the probate of his will and the statements amongst the few papers that were in our parental home."* According to her, that search was

[8] (1939) LRBG 182.
[9] The record reveals that there was an eighteen-month gap. The Respondent's Affidavit in Opposition was filed on October 4th, 2003 and the Appellant's Affidavit in Reply was filed on April 26th, 2005.

undertaken after the withdrawal of the First Petition and on instructions from her attorney at that time to search the property for any documents which might elucidate the historical occupation of the property. We think this is a plausible explanation. In our view, there was no effort to mislead the court.

Failure to mention Dolarie Thakur in Previous Proceedings

[33] Finally, the allegation that the Appellant failed to mention her mother in the previous proceedings is of little significance. The evidence clearly stated that the Thakurs occupied and cultivated the land as a family, with Bissoon as the patriarch and Dolarie, the matriarch. It cannot be overlooked that the Appellant, as a lay person with little legal or even educational background, was not aware of the level of specificity needed in matters of adverse possession. Her sole concern was saving the only means of subsistence known to her and her family. In seeking counsel, she would have expected that the procedural requirements would have been met. However, as we well know, that is not always the case and courts should be slow to penalize litigants on this basis. For this reason and in the circumstances of this case, we do not agree with the submission that the Appellant's initial failure to specifically plead Dolarie's possession should be treated as fatal to the petition.

[34] The alleged non/false disclosures cannot be described as efforts to mislead the court but are the unfortunate result of poor legal advice and a lack of understanding of the law and procedures to be followed to acquire prescriptive title. In our view, it is not enough to prevent the consideration of the merits of this claim, which is whether the Appellant has proven on a balance of probabilities that her mother's estate should be granted a Declaration of Title.

Was prescriptive title established?

[35] It is accepted by both parties that Bissoon entered into occupation sometime in the 1970s with the permission of Prince Maison. Rooplall J rightly found that after the sale to Basdeo in 1982, Prince Maison was no longer in a position to permit Bissoon to occupy the land. As such, this Court has to consider the capacity in which the Thakurs were occupying the land from that point onwards, namely whether this occupation was adverse to Basdeo.

[36] Rooplall J was sufficiently satisfied with the evidence led by the Appellant and found as a fact that Bissoon occupied and possessed the land adversely to Basdeo from 1982 until his

death in 1991, when his widow Dolarie took control and continued occupation with their children. The Court of Appeal disagreed and held that the evidence led in support of the petition did not fulfil the requirements necessary for acquiring prescriptive title. We do not agree with this finding. In our view, there was sufficient evidence to support the grant of a declaration of title to Dolarie's estate.

Factual Possession

[37] What constitutes factual possession involves an objective assessment of the facts and evidence. A court is typically concerned with whether the petitioner for prescription of land, given all the circumstances and in particular the nature of the land and the manner in which such land is commonly used or enjoyed, had a sufficient degree of exclusive physical control of the land. The Thakurs consistently cultivated the land for well over forty years. The extent of this cultivation was detailed by the Appellant at trial. She described the way in which each plot of land was used. This was supported by the evidence of two witnesses who attested to the Thakurs' sole presence on the land. Bissoon's letters are also replete with evidence of sufficient factual possession, particularly that he had crops of a considerable value on the land. Some credence also must be given to the fact that he had $25,000 worth of crops on the land in the 1980s. That is no small sum. The petition further revealed that even after Bissoon's death, the family continued to sell the crops they reaped in Dolarie's name. Then, there is the fact that the Appellant physically defended the land when the Respondent sought entry in 1997. In our view, there is more than enough evidence on record to support factual possession of the land at all material times.

Intention to Possess

[38] In *Toolsie Persaud v James Investments*[10], this Court described the intention to possess as "an intention to exercise such custody and control on his own behalf and for his own benefit, independently of anyone else except someone engaged with him in a joint enterprise on the land".[11] In short, there must be an intention to occupy and use the land as one's own in order to acquire ownership. In *Toolsie,* the Court further stated: "Intention to possess thus extends to a person intending to make full use of the land in the way in which an owner would, whether he knows he is not the owner or mistakenly believes himself to

[10] [2008] CCJ 5 (AJ).
[11] Ibid at [28].

be the owner."[12] On the other hand, a squatter who is of the mistaken belief that he is occupying with the permission of the owner does not have the requisite intention to possess[13].

[39] In the instant matter, Rooplall J held that Bissoon acquired prescriptive title after time started running from August 1982, when presumably the land was sold to Basdeo. In the judge's view, Bissoon's letters to the Local Authority and the Ombudsman, though admissible, were heavily intermixed with hearsay and he placed no weight on them. In his submissions, Mr. Nandlall, however, advanced the argument that in order to prove an intention to possess, there must be clear and affirmative evidence on record that Bissoon made it perfectly clear to the world at large including the paper owner, Basdeo, that he wished to possess the land on his own behalf and for his own benefit. Such a (subjective) intention must actually exist and it must be manifested by unequivocal actions. Counsel argued that the letters were clear evidence to the contrary: given that Bissoon sought permission from Pamela Maison two years after the sale, he obviously had the state of mind of a licensee and in fact acted as such, while there was no clear evidence whether, and when, his state of mind ever changed.

[40] Before discussing this submission, it is important to draw attention to the distinction on the one hand between an intention to possess, the concept of the *animus possidendi*, as it has been developed in the English common law and largely been followed in Guyana, and, on the other hand, the intention to hold a property as his own, the *animus domini*, or, at its lowest, the intention of keeping the property for oneself, the *animus rem sibi habendi*, concepts unique to the Roman Dutch land law system upon which the Guyanese land law is based. In *Bisnauth v Shrewprashad*[14], caution was already expressed against too broad a use of the term *animus possidendi* and it was noted that Roman Dutch law in its purest form requires an *animus domini* for acquisitive prescription:

> "Curiously, the term *animus possidendi* is also used in Guyanese land law. But this does not seem to be correct as this concept is clearly linked to the English common law system of relativity of title, with an, at least originally, weak system of deeds registration and, therefore, a central role of what the Roman-Dutch writers would call the *possessio naturalis* or actual possession. Guyanese law, however, has expressly maintained a system of allodial (full and absolute) ownership together with a relatively simple and in principle fairly certain,

[12] Ibid at [29]; See also: Hughes v Cork [1994] EGCS 24
[13] See: Clowes Developments (UK) Ltd v Walters [2005] EWHC 669.
[14] [2009] CCJ 8 (AJ).

> although admittedly far from perfect, system of registration of titles to land (as evidenced by the Deeds Registry Act). In such a system the requirement of an *animus domini* or *animus rem sibi habendi* would be more appropriate.
>
> In the *Toolsie Persaud* case this Court cautiously steered away from the *animus possidendi* concept as it has sometimes been misinterpreted, a misinterpretation which led the Chief Justice in that case in a wrong direction. In this context it should be remarked that in Roman-Dutch law the *animus domini* or the intention to hold as an owner is clearly distinguished from what is called the *opinio domini* or the belief that one is in fact the owner. It is trite law that one can have the required animus with or without having the *opinio*. This follows logically from the fact that *bona fides* is not a requirement for acquisitive prescription. Both English law and Roman-Dutch law agree on this point."[15]

[41] Determining whether a possessor is holding property *animo domini,* or *animo possidendi,* is largely dependent on surrounding circumstances and evidence. The difference between these two concepts is largely one of degree: those who hold land with an *animus domini* must of necessity have the *animus possidendi* but not every occupier who has the intention to possess the land also has the intention to own it. The *animus possidendi* is the broader concept, while the *animus domini* is the stricter requirement. For example, if a possessor recognizes the rights of the owner, possession will not be or will cease to be *animo domini*.

[42] This maybe so even in circumstances where the prescription period has expired. In *Sapphire Dawn Trading 42 BK v De Klerk and Others*[16], the third respondent claimed to have acquired certain prescriptive rights, but the plaintiff objected by stating that the third respondent had acknowledged the rights of the owner. In response, the third respondent replied that he only recognized the owner's rights after the 30-year period had already expired, since he was unaware of the fact that he already acquired the property through prescription. The Court rejected this argument stating that the acknowledgement illustrated the mental attitude with which he possessed the property up until that time:

> "The problem with this is that the third respondent's actions, after the expiration of the prescription period, undeniably illustrate the mental attitude with which he possessed the property up until that stage. His actions simply boil down to an acknowledgement of the ownership of the deceased [owner] over the property and that alone is fatal for his allegation of acquisitive prescription"[17]

[15] Ibid at [46, 47].
[16] (693/2008) [2009] ZAFSHC 11 (12 February 2009).
[17] Ibid para 9 (translated from Afrikaans into English). Much, however, may depend on the circumstances. See also *Basir v Goolcharan (1961) LRBG*, 528 at pg 534.

[43] It would also appear, and this has some relevance for the case before us, that the *animus domini* requirement is not satisfied if one holds another person's property with the mere intention of *becoming* owner.[18] On the other hand, an exclusive occupier, for example, who knows that he cannot become owner in a formal sense until expiry of the relevant prescription period, can nonetheless acquire ownership by prescription if behaving as currently the owner in resisting attempts of another person to assert ownership.

[44] So what potential effect could this distinction have on the instant matter? If anything, it should caution us not to apply too wide a concept of the *animus possidendi* in Guyanese land law[19]. The most devastating facts for the Appellant's case would seem to be that her father Bissoon (initially) kept acknowledging Prince Maison as the owner of the land, even after being notified that Basdeo had become the new paper owner, that in December 1983 Bissoon still sought (and obtained) permission from Pamela Maison to stay on the land and that, given his statement in the December 1983 letter "*I had known Comrade Maison for a very long time and he promised me on many occasions that the first sale of the property be sold it will be me for first*", he would seem to have indicated that he was in possession of the land with the mere intention of *becoming* its owner. That appears to be fatal certainly to a finding of *animus domini* but even to a finding of *animus possidendi*, and brings at the very least into question the finding of Rooplall J that time started running in Bissoon's favour from 9 August 1982.

[45] However, in our view the argument that the letters are evidence that Bissoon had no intention to own or even to possess the land is in the light of their context a skewed interpretation of the documents. Faced with a threat of legal action, Bissoon sought the advice and assistance of the local authority, the Ombudsman and the Maisons in desperate attempts to continue occupying and working the land which was his means of supporting his family. According to the evidence, it was he who initially cleared the land of trees and bushes, dug drains and trenches, made dams and built a large strong bridge from the property to the road, it was he who cultivated the land, it was he who tilled the soil. It is true that all of this commenced while he was on the land with permission of the then owner. But clearly, Bissoon expected with good reason eventually to become the owner of the

[18] See Ernst Jacobus Marais, *Acquisitive prescription in view of the property clause*, 2011 at pg 44, citing FE Marx *Verkrygende Verjaring in die Suid-Afrikaanse Reg* (1994) 237 and Van der Merwe CG "Original Acquisition of Ownership" in Ziummernamm R & Visser D (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996) at pgs 701-717, 715.

[19] Compare with the position at common law (*animus possidendi*) where a squatter who would have paid rent to remain on the property was still found to have the requisite intention to possess (See: *Boodhai v Rambaran* TT 2009 HC 103*; Ocean Estates v Pinder* [1969] 2 A.C. 19, *Smith v Benjamin* TT 2009 CA 24.)

land that he had cultivated and brought to fruition. When he was unexpectedly confronted with Basdeo alleging to be the new owner of the land and threatening to take his crops, he initially reacted in a defensive manner. He went back to the original owner of the land to seek help, which he received. This was in December 1983 and we agree that at that point in time, Bissoon did not have, and did not act with, the required intention to independently hold and control the land as his own. This changed, however, soon thereafter as becomes clear when reading his letter to the Ombudsman of 10 April 1984. The references to permissive occupation in that letter merely served as the background of his longstanding arrangement with the Maisons and do no longer reflect any dependency of them. If anything, while realizing that the Maisons had lost their property, Bissoon made clear that he did not acknowledge Basdeo as the legitimate owner of the land and that he would stand his ground in face of any opposition. He had now become a defiant occupant, remained with his family on the land and continued crop rotation even after a threat of legal action from Basdeo.

[46] This situation did not change in any way after Bissoon's death. It is true that nothing is known about Dolarie's state of mind with respect to the land but the evidence contains no indication whatsoever, and there is no reason to assume, that she had any intention to surrender the land or pledge proprietary allegiance to others. In those circumstances it can solidly be inferred that she also had the required intention to hold and use the land as her own. Thus, by April 1996 the Thakur family can be deemed to have continued peaceable occupation and possession of the land for more than 12 years without any interference from Basdeo. When the latter sold the land to the Respondent in 1997, he, and consequently the Respondent, was already time barred by statute.

Safeguarding Property Rights in Guyana

[47] Before closing, we wish to address a point made by Mr. Nandlall. In making his submissions before us, Mr. Nandlall raised a passage from the case of *Bisnauth*:

> "Section 142(1) of the Constitution clearly considers the protection from arbitrary deprivation of property as a fundamental right worthy of the highest form of judicial relief. It is equally clear that this right is not without exceptions. Properties can be taken "under the authority of a written law" and nothing done under the authority of "any law with respect to the limitation of actions "shall be held inconsistent with" that fundamental right (section 142 (2)(a)(vi) of the Constitution). But because of the very fact that it constitutes an exception to such a fundamental right, the Title to Land (Prescription and Limitation) Act and its

> provisions have to be interpreted in a way that will be in keeping with its character as an exception. The interpretation has to be such that the property rights of owners will be preserved as much as reasonable…Be that as it may, at the very least, the interpretation of those provisions should be such as to limit arbitrary deprivation of property as far as possible."[20]

[48] Mr. Nandlall argued that 'the law of prescriptive title was being ridden like an unruly horse' and reminded the Court of the importance of the fundamental right to the protection of property. We must be very emphatic in stating that the principles stated in *Bisnauth* remain influential in matters such as these. The protection of property rights has always been of utmost importance and will remain so, but that protection has always been subject to certain exceptions and principles, which Mr. Nandlall rightly conceded. The law of adverse possession is one such exception. It was developed to protect the rights of those who had been in undisturbed possession of land for a certain period of time subject to proof, on a balance of probabilities, of physical occupation and an intention to hold it as their own. The 'true' or 'paper owner' is not automatically excluded as there is the right to bring proceedings and 'reclaim' his property within that said period. What is most important is the that there must be clear and convincing evidence to support any claim for prescriptive title.

[49] Despite Mr. Nandlall's arguments to the contrary, we have found that there is sufficient evidence in this case to support the Thakurs' right to prescriptive title. There was nothing unruly or arbitrary about the way in which they acquired ownership of the land. Their adverse possession of the land was manifest, solid and genuine. From the very start it must have been clear to Basdeo, the new paper owner of the land, that Bissoon Thakur was not voluntarily going to surrender the land that he had prepared, cultivated, worked and made productive and that he felt should be his and his descendants'. Basdeo had twelve years to reclaim the land in court. But, for reasons of his own, he did not use that opportunity. And so, he lost his property and sold the Respondent nothing more than *a fata morgana*, an optical illusion.

Conclusion

[50] This case unfortunately illustrates how lack of proper legal advice affects those who may be in a disadvantageous position in society and 'ignorant' of the law. The alleged false and

[20] Supra n13 at [53].

non-disclosures do not amount to behaviour intended to mislead the court, while the Court of Appeal had a misleading impression of the state of the record.

[51] We see no reason to doubt the trial judge' assessment of the Appellant as a credible and truthful witness and accept her evidence that her family has been in continuous occupation and possession of the land from 1982. For the reasons given above, we find that the evidence supports factual possession and an intention to possess (even in its stricter emanation). The Appellant's father, Bissoon, possessed adversely from 10 April 1984 until his death in 1991, after which her mother, Dolarie, continued possession with the assistance of her children until her death in 2003. No cases were filed against the Thakur's by the paper owner or his successor before 1997. As such, the statutorily prescribed period of twelve years is met. Under these circumstances, the outcome is clear. In the words of section 18 of the Constitution: the land must go to the tiller.

Disposition

[52] The appeal is allowed. The order of the Court of Appeal is set aside and the order of the Commissioner of Title dated 14 July 2008, granting a declaration of title in favour of the Appellant in respect of said land is hereby reinstated.

[53] Basic costs for two attorneys at law are awarded to the Appellant.

/s/ J. Wit

The Hon Mr Justice J. Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D. Barrow

The Hon Mr Justice D Barrow