ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2005/0028

BETWEEN:

FERDINAND CARTY
KIM SAMANTHA JANE CARTY as
Personal Representatives of the Estate of
Cyril Rommick aka Cyril Joseph, deceased

Claimants

And

ROWAN BAILEY

Defendant

Appearances:

Ms E Ann Henry and Ms C. Debra Burnet for the Claimants
Mr Alex Fearon for the Defendant

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2006: May 8th
June 29th
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JUDGMENT

[1] Blenman: J, This is a claim for the possession of land and a counterclaim for an order to be registered as the proprietor of the land.

[2] Mr. Cyril Rommick also known as Cyril Joseph deceased (Mr Rommick) owned land that is recorded and registered as Registration Section: Falmouth & Bethesda Block 34 2482 B Parcel 71 (the property)

[3] Mr Rommick left Antigua and Barbuda several years ago to reside in London. He died in England on 23rd January 2000. Mr. Ferdinand Carty and Ms Samantha Kim Carty (the Cartys) are the Personal Representatives of Mr Rommick's estate. Mr Rowan Bailey (Mr Bailey) is a relative of Mr Rommick.

[4] On behalf of Mr Rommick's estate, the Cartys are seeking to obtain possession of the property from Mr Bailey, the latter who is resisting their attempts to reclaim the property. They have filed a claim seeking possession of the property from Mr Bailey and contend that Mr Rommick had merely granted Mr Bailey permission to occupy a portion of the property for the purpose of placing a freezer which was to have been used to store fish in connection with his (Bailey's) fishing business.

[5] Mr Bailey strenuously resists the Cartys claim. He contends that he is entitled to the property since he has been in its peaceful, exclusive and undisturbed possession since 1979. He alleges that he has acquired ownership of the property and claims an Order from the court to be registered as the proprietor of the property.

[6] The issues that the Court has to resolve are as follows:

(a) Whether the Cartys', as the personal representative of Mr Rommick, are entitled to possession of the property;

(b) Whether Mr Bailey has acquired ownership of the property.

[7] The Cartys adduced evidence on their behalf through Mr Ferdinand Carty (Mr Carty) and their witness Ms Adamae Lewis (Ms Lewis).

[9] Mr Bailey testified in his defence and counterclaim and called as witnesses Ms Violet Harrigan (Ms Harrigan) and Mrs Maude Edwards Bailey (Mrs Bailey).

The Cartys' evidence

[10] Mr Ferdinand Carty (Mr Carty) said that his father is the registered owner of the property. His father left Antigua several years ago to reside in London but regularly visited Antigua on vacation. He said that others of his father's relatives occupy portions of the property claimed by Mr Bailey. He is aware that his father permitted Mr Bailey to utilize the property for the sole purpose of plying his trade as a fisherman/vender. At no time did Mr Rommick permit Mr Bailey to erect a permanent structure on the property.

[11] His father having died on 23rd day of January 2000, he (Mr Carty) was appointed one of the personal representatives of his father's estate. In settling the estate, he knew that he had "to distribute the estate." He was aware that Mr Bailey was in occupation of the land so he thought it prudent to meet with Mr Bailey to discuss the property with a view to ensuring that they would not have had any problems later on.

[12] Sometime in May 2000 he said, that he met with Mr Bailey the latter who agreed to pay a rent of $200.00 per month. With no rents forthcoming he sent Mr Bailey a letter dated 18th October 2000 confirming their arrangement and requesting that Mr Bailey remedied his breaches. This letter was met by silence from Mr Bailey.

[13] Mr Carty said he then requested Ms Adamae Lewis (Ms Lewis) to speak with Mr Bailey about his non-payment of rents which she did. He later visited Antigua sometime after November 2003 and observed that Mr. Bailey had put down a jetty on the property. He became very concerned and instructed his solicitors to write a letter to Mr Bailey which they did by virtue of letter dated 11th October 2004. It was not until 25th October 2004 when Mr Bailey's solicitors replied by way of letter that he (Mr Carty) leant that Mr Bailey was claiming to have been in uninterrupted possession of the property since 1979.

[14] Mr Carty maintained that Mr Bailey had permission from his father (Mr Rommick) to occupy the property. The permission was terminated by way of letter dated 11th October 2004 yet Mr. Bailey has refused to vacate the premises despite several requests.

Cross examination (Mr Carty)

[15] During cross examination by learned counsel Mr Alex Fearon, Mr Carty said that to his knowledge, while his father was alive his father did not do anything such as writing to Mr Bailey to indicate to Mr Bailey that he (Bailey) had a licence. His father returned to Antigua several times during Mr Bailey's occupation of the property. He was unaware as to whether or not his father had even written to Mr Bailey requesting him not to build on the land. He was nevertheless sure that his father had given Mr Bailey permission to utilize property even though he was unsure as to the date Mr. Bailey went into its occupation.

[16] Mr. Carty admitted under further cross-examination that before his father's death he had no difficulty with Mr Bailey's occupation of the property since these are matters that ordinarily would have been dealt with by his father. It was only after his father's death and while he was "settling the estate" that he spoke to Mr Bailey about the property. He said that he is unaware that Mr Bailey has been in occupation over 12 years and refuted the suggestion that he is trying to dispossess Mr Bailey and had in effect concocted the story about Mr Bailey having agreed to pay a monthly rental of $200.

[17] Mr Carty maintained that he envisaged that it was possible after his father's death that Mr Bailey would have wanted to remain on the property. Mr Carty reiterated that Mr. Bailey had agreed after discussion to pay rents for the property. He felt that he was required to ensure that Mr Bailey paid the rent, as the administrator of the property and, in order to prevent future problems. He maintained that himself and Mr Bailey entered into an oral agreement and denied that he manufactured the letter dated 18th October 2000 with a view to asserting on behalf of the estate, its claim to the property.

Ms Adamae Lewis' evidence

[18] Ms Lewis stated that she is the sister of Mr Rommick and she has lived in Antigua all of her life. She knows the property very well. At one time she lived on it together with several relatives and for many years previously. Some of her relatives still occupy portions of the property. She said that she is aware that her deceased brother had given Mr Bailey permission to occupy the property. She was sure that Mr Bailey did not occupy the property until 1989. He started fishing around 1989 and it was when he was fishing that Mr Bailey utilized a building on the property to store his fish in the freezer that was in that building.

[19] She was cross-examined by learned counsel Mr Alex Fearon and conceded that most of the information she had in relation to the circumstances in which Mr Bailey came to be occupying the property she did not know from her own free knowledge. Under further cross examination by Mr Fearon she stated that the information she had about Mr Bailey's occupation was told to her. She visited the area regularly and had no doubt that when Mr

Rommick visited Antigua in 1994 he was seriously ill and left in June 1995. However he never returned to Antigua. Mr. Rommick was in and out of hospital between 1994 and 1995.

[20] Learned counsel Mr Fearon sought to test Ms Lewis' evidence with some further vigorous cross-examination. Ms Lewis however, maintained that she was aware that her brother Mr Rommick had never given Mr Bailey permission to build on the property even though there is no written documentation to this effect. She was not aware that the (two) 2 buildings were on the property before her brother's death. She admitted to having spoken to Mr Bailey on behalf of Mr Carty about (his) Mr Bailey's non payment of rents.

[21] Ms Lewis further maintained that several years ago she lived on the property which Mr Bailey occupied presently with some of her relatives. She was forced to say under cross-examination that while she is aware that Mr Bailey occupies the property she is unsure for what length of period. However, she is sure that he did not occupy the land prior to 1989 of this she was certain about because she is certain that Mr Bailey was the captain on a boat and there was an incident involving the boat in 1989. After the incident, Mr Bailey went to work with uncle at a hotel and subsequently started fishing.

Mr Bailey's evidence

[22] Mr Bailey's evidence was to the effect that Mr Rommick, who was the owner of the property, left Antigua several years ago. Mr. Rommick returned to Antigua on vacation on several occasions. Later he (Mr. Bailey) had built two concrete/wooden buildings on the property.

[23] Mr Bailey said that at no time did Mr Rommick object to his occupation of the property nor did Mr Rommick ever request that Mr Bailey pay him any cash. He occupied the land without Mr Rommick's permission

[24] Initially, Mr. Bailey said that both buildings were constructed after September 1995. While he admitted that in 2000 Mr Carty requested him to pay $200.00 per month rent he denied

ever agreeing to make any payments to Mr. Carty or Ms Lewis. Infact he said that when Mr. Carty approached him and asked him to payment for the property he told Mr Carty "to get his act together."

[25] During cross-examination by learned counsel Ms E Ann Henry he said that for most of the time between 1981-1989, while he worked at the hotel, he was also employed as a fisherman. He had a freezer in the building owned by the Sailing Club that was on the property. He admitted that other relatives occupy other portions of the property.

[26] During very searching cross-examination by Ms Henry, Mr. Bailey stated that one of the buildings on the land in which he initially placed his fishing equipment was owned by Falmouth Sailing Club and was not infact built by him. He then said that he used that building to vend his fish. He resiled from his earlier position and stated that he took over the Sailing Club building. He used the property to sell fish and has his fishing equipment stored in the building situate on the property.

[27] Mr Bailey stated further that when Mr Rommick last visited Antigua in 1994–1995 that Mr. Rommick had never told him anything about his occupation of the property. He said that on one occasion when Mr Rommick visited the property the deceased commended him (Mr Bailey) for the work that he had done on the property and encouraged him to seek to develop the property further. By this time he (Bailey) had already erected the two buildings on the property. Hurricane Luis had destroyed the Sailing Club building causing him to build the two properties.

[28] Mr. Bailey admitted that he is 43 years having been born on 28 September 1963 and would have been 16 years in 1979. He said that whilst he worked elsewhere on a ship he also did fishing.

[29] He agreed that the property in question is approximately 21/2 acres. Under further very skilful cross examination, Mr Bailey admitted that he did not occupy the entire property since 1979 and that presently other of Mr Rommick's relatives occupy portions of the

property. He maintained that he has been in exclusive occupation of the property since 1979 and is therefore entitled to be registered as its proprietor.

Ms Bailey's evidence

[30] Ms Bailey maintained that Mr Bailey went into occupation of the land in 1979. Mr Rommick returned to Antigua and Barbuda Mr Bailey had built the property on the land.

[31] Ms Bailey's evidence was tested by Ms Henry's cross-examination and she said that she was not living in Antigua between 1980 and October 1996. However, she was sure that Mr Rommick had never given Ms Bailey permission to occupy the property; she later admitted that she never had any discussion with Mr Rommick about the land. The conclusions to which she came were arrived at mainly from speaking to Mr. Bailey.

Mrs. Harrigan's evidence

[32] Ms Harrigan said that she is a neighbour and close friend of Mr Bailey. She is aware that Mr Bailey went into occupation of the property in 1979. Mr Rommick who lived abroad visited the property whenever he returned to Antigua and Barbuda. As far as she is aware Mr Rommick never objected to Mr Bailey's occupation of the property.

[33] She was sure that she attended a party on the same property that was "held for Cyril."

[34] When Mr. Rommick returned to Antigua, Mr Rowan Bailey had already built two concrete/wooden buildings. As far as she was aware at no time did Mr Rommick object to Mr Bailey being on the land.

Law

[35] I find it convenient to address the relevant legal provisions at this juncture.

Section 130 of the Registered Land Act Cap 374 (the Registration Act) of the Laws of Antigua and Barbuda stipulates that:

> "The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission any person lawfully entitled to possession for a period of 12 years."

[36] Section 136 of the Registration Act provides as follows:

> "Where it is shown that a person has been in possession of land at a certain date and is still in possession of the land, it shall be presumed that he was from that date been in uninterrupted possession of the land until the contrary be shown."

[37] Section 136 (6) of the Registration Act states that:

> "Possession shall be interrupted
>
> (a) by physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the possessor thereby loses possession; or
>
> (b) By the institution of legal proceedings by the proprietor of the land to assert his right thereto; or
>
> (c) By any acknowledgement made by the person in possession of the land to any person claiming to be the proprietor thereof that such claim is admitted."

[38] Section 17 of the Limitation Act No 8 of 1997 of the Laws of Antigua and Barbuda (the Limitation Act) states that:

> "No action shall be brought by any person to recover any land, after the expiration of twelve years from the date on which the right of action accrue to him or, if it has just accrued to some person through whom he claims, to that person."

Mr Bailey's submissions

[39] Learned counsel Mr Alex Fearon urged the court to accept Mr Bailey's evidence when he testified and stated that he went into possession of the property since 1979 without the permission or consent of anyone. Further, he posited that Mr Bailey has been in peaceful and uninterrupted possession of the property from 1979 until 2000 when Mr Carty sought to change the nature of Mr Bailey's occupation to no avail.

[40] Mr. Fearon argued further that since Mr Bailey has been in continuous peaceful and uninterrupted possession of the property for in excess of 12 years any claim that Mr Rommick and his estate claiming through him would have had been extinguished. He urged the Court to find that Mr Bailey has obtained title to the property by virtue of prescription/adverse possession.

[41] Mr. Fearon further argued that there is no evidence before the court to indicate that Mr Rommick granted a "bare licence" as alleged the Mr Cartys. The evidence before the court clearly established that Mr Bailey asserted rights of ownership over the property since 1979 and that when Mr Bailey took occupation of the property he did so without the permission of anyone. From 1979, Mr Bailey carried on his fishing business on the property. He said that the Court should accept the evidence that Mr Bailey built the two buildings on the property between 1995/1996. From 1995/1996, Mr Bailey's actions in constructing the two buildings on the property were inconsistent with him having a bare licence

[42] Mr. Fearon further stated that the claim before the court suffers from another impediment in so far as it was instituted in excess of 12 years after it accrued. He submitted that the claim is statue barred in so far as Mr Bailey entered into possession of the property in 1979. Therefore the cause of action for possession, if any, would have arisen since 1979. The evidence shows that Mr Rommick did not assert his rights of ownership over the property from 1979 up until his death. Therefore time would have run against "any cause of action Mr Rommick would have had against Mr Bailey." Mr Carty in his capacity as the personal representative of Mr Rommick's estate is in no better position than the deceased in this regard. Counsel relied on section 17 of the Limitation Act in support of his argument.

[43] Mr. Fearon asked the Court to reject the Cartys' contention that Mr Bailey had "a bare licence" to put a freezer on the property. He stated that the evidence led on behalf of Mr Bailey clearly proves that he (Mr. Bailey) has acquired title to the property by virtue of

being in peaceful and undisturbed possession of the property for in excess of 12 years without the permission of anyone.

[44] Mr. Fearon stated further stated that the Cartys have not adduced any evidence to substantiate their contention that Mr Bailey only possess a licence, this undermines the proof of the Cartys' case, counsel posited.

[45] Counsel further argued that Mr Rommick did nothing during his lifetime to suggest that Mr Bailey's occupation was with (his) Mr Rommick permission, this Mr. Fearon submitted is consistent with Mr Bailey's assertion that he obtained possession of the property without the permission anyone. Mr. Fearon said that when Mr Bailey constructed the buildings on the property in 1995/1996 he would have been in occupation for sixteen years. Mr Bailey exercised acts of ownership over the land from the time he went into occupation in 1979.

[46] Mr. Fearon, finally stated, that when the Court reviews all of the evidence the court can only conclude that "the deceased Registered Proprietor" wanted the defendant to have the land, having openly encouraged him to continue to develop.

[47] The Cartys' submission

Learned counsel Ms E Ann Henry submitted that based on the evidence before the Court the Cartys have established that Mr Rommick gave Mr Bailey a licence to occupy the premises. Counsel submitted that there is no dispute that Mr Rommick is the registered owner of the property. The property was occupied by several of Mr Rommick's relatives and portions of it are still in their occupation. This Ms Henry said must have been with the deceased's permission. The evidence adduced shows that Mr Bailey initially did no more than place a freezer in a building that was already on the property to store fish. He never constructed any buildings on the land before 1995.

[48] Ms Henry urged the court to find as fact that the last time Mr. Cyril Rommick came to visit Antigua was in 1994/1995 and he was seriously ill. After he left about June 1995 he never returned.

[49] Counsel indicated that while Mr Bailey claims to be entitled to the entire parcel of land the Court should look at this very carefully particularly in view of the fact that Mr Bailey conceded that other persons/relatives of the deceased are presently occupying portions of the said land.

[50] Ms Henry argued that Mr Bailey's behavior before the last visit of Mr Rommick is entirely consistent with the evidence led on behalf of Mr Carty in so far that Mr Bailey took no steps before 1995 to assert any alleged rights of ownership.

[51] Ms Henry posited that the Court should in making its determination pay regard to the fact in 1979 that is the date on which Mr. Bailey alleges that he first occupied a portion of the property he was merely 16 years old. He therefore at that date (namely 1979) did not have the requisite intention to dispose Mr Rommick.

[52] In support of her contentions, Ms Henry relied on the leading case of Powell v McFarlane (1977) 38 P &CR 452, Justice Slade said "… I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else had done so."

[53] Ms Henry also referred to the case of Lord Advocate v Lord Blantyre (1879) 4 APP. Cas.770, Lord Blackburn said that "the weight of an act as evidence of possession: … depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it."

[54] The above view found favour with the court in case of Prudential Assurance Co Ltd. v Waterloo Real Estate Inc [1999] 2 EGLR 85, in which case Lord Justice Peter Gibson said:

> "It would plainly unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the

> world including the paper owner, if present at the land, for the requisite period that he was intending to possesses the land…"

[55] Mr. Henry argued that a high standard of proof of the existence of the necessary animus possidendi is required. In Powell's case, Justice Slade said that a trespasser whose use of land was equivocal was required to adduce "compelling evidence" of the animus possidendi. He said:

> "An owner … will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation, the courts will, in y judgment, require clear and affirmative evidence that the trespasser, claiming that he had acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly clear to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner."

[56] Powell's case received acclamation and was followed in the House of Lords decision in the case of J.A.Pye (Oxford) Ltd. And anor. v Graham and anor. [2002] UKHL 30, which is reported in [2002]3 ALL ER 865.

[57] Ms Henry relied on Vaughn v Vaughn (1953) 1 ALL ER 209 in support of her assertion that a letter can terminate a bare licence.

Courts analysis/findings

[58] There is no dispute that Mr. Rommick is the registered owner of the property. The burden of proving adverse possession rests on Mr Bailey.

[59] Based on the totality of the evidence, I accept that Mr Bailey went on the property in 1979. Even though I believe that Mr Bailey occupied the property for a longer period that the

Cartys' and their witness assert, that does not resolve the matter. The real issue is whether Mr. Bailey has satisfied the Court on a balance of probabilities that he has been in exclusive occupation of the property adverse to the interest of Mr Rommick and for a period of twelve years. In order to establish the acquisition of title by adverse possession, Mr Bailey must prove that he had exclusive physical control over the property in question and the intention to possess the land exclusively, the animus possidendi.

[60] Halsbury's Laws of England 4th Edition Vol 28 paragraph 997 states as follows:-

> "No right of action to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes adverse possession is a question of fact and degree and depends on all of the circumstances of each case, in particular the nature of the land and the manner in which the land is continually used. The claimant's possession should be sufficiently exclusive and the claimant should have intended to take possession."

[61] In Halsbury's ibid at paragraph 979 under the rubric "Intention to possess" it is stated as follows.

> "For there to be adverse possession the person claiming possession should have the necessary animus possidendi, that is, an intention to possess the land to the exclusion of all other persons including the owner with the paper title so far as is reasonable and so far as the process of law will allow."

[62] From the evidence adduced I find that Mr. Rommick permitted Mr. Bailey to occupy the property for the purpose of storing fish in freezer that was placed in one of the buildings on the property.

[63] I accept that, initially, Mr. Bailey was on the property with the permission or acquiescence of Mr. Rommick. This is to some extent with Mr. Fearon's submission in so far as he argued that Mr. Rommick wanted Mr. Bailey to have the land. I am far from satisfied that when Mr. Bailey occupied the land in 1979 that he had the intention to exclude Mr. Rommick from it.

[64] I have reviewed the evidence very carefully and am of the view that originally Mr. Bailey's behaviour and dealing with the property strongly indicate to me that he was in occupation of the property with Mr Rommick's express permission. I am of the opinion that Mr. Bailey entered into possession of the land initially with the consent of Mr. Rommick. It is not unusual for these family arrangements to be made on the basis of trust and respect without the need to formalize the arrangements in writing. I therefore do not place much emphasis on Mr Bailey's suggestion that the failure of the Cartys to produce any documentary proof of the licence they alleged should work against their claim. In coming to the above conclusion I do not overlook the fact that when Mr. Bailey entered the property he was merely 16 years old.

[65] Applying the principles referred to above together with those relied upon by Ms Henry, I am satisfied from the evidence that Mr. Bailey did not have the requisite possession or the intention to acquire the property in 1979. I accept Ms Henry's submissions in this regard.

[66] I have no doubt that it was not until about 1995/1996 that Mr. Bailey took steps with the view to claiming an interest/ownership of the property, by adverse possession, when he built the two buildings. By the year 1995/1996, the evidence discloses that Mr. Rommick was very ill and was "in and out" of hospital. Mr. Rommick never returned to Antigua on vacation after that time.

[67] To put it clearly, Mr. Bailey has not satisfied me that his occupation of the property since 1979 was adverse to Mr. Rommick's interest. Nor has he satisfied me that he held any intention adverse to the Mr. Rommick's interest until after 1995, which in my opinion is the earliest point at which he appears to have had the necessary animus possidendi. Further Mr. Bailey's possession of the 21/2 acres of land is not exclusive since based on Mr. Bailey's own evidence in cross examination other relatives of the deceased's occupy the property.

[68] I am satisfied that Mr. Bailey was always a mere licensee of the property at least up to 1995.

[69] The Cartys commenced their proceedings on 19th January, 2005, even though I have found that Mr Bailey was in possession of the property since 1995 he would not have completed the requisite period of possession for 12 years as required by the Registration Act. Mr. Bailey is therefore not entitled to an order to be registered as the proprietor of the property.

[70] Time only began to run if at all, against the estate (and ultimately the Cartys') after 1995 when Mr Bailey constructed the two buildings. I have no doubt that in 2000 Mr. Carty discussed the payment of rents with Mr Bailey. This is a clear indication of Mr. Carty on behalf of Mr Rommick's estate indicating to Mr. Bailey that it was asserting its ownership.

[71] I agree with Ms Henry that when the Estate filed this claim on 19th January 2005 against Mr. Bailey it effectively stopped this time running and so prevented Mr Bailey from acquiring rights or interest in the property on the basis of his adverse possession.

Conclusion

[72] In conclusion and for the above reasons, I am satisfied that the Cartys' on a balance of probabilities have established their claim for possession against Mr Bailey. I have no doubt that Mr Bailey has failed to establish his claim for an order of possession against Mr Rommick estate. I give judgment for the Cartys' on their claim against Mr. Bailey and dismiss Mr. Bailey's counterclaim against the Estate of Cyril Rommick represented by the Cartys.

[73] Accordingly, I make the following orders:

(a) That the Cartys are granted possession of the property recorded in the Registration Section: Falmouth and Bethesda Block: 34 2482B Parcel 71.

(b) That Mr. Rowan Bailey delivers vacant position of the property recorded in the Registration Section: Falmouth and Bethesda Block: 34 2482B Parcel 71 to Mr. Ferdinand Carty and Ms Kim Carty (Personal representatives of the estate of Cyril Rommick and Cyril Joseph deceased) on or before 30th January 2007.

(c) Mr. Rowan Bailey is also ordered to pay the Cartys' prescribed costs unless otherwise agreed.

[74] I commend all counsel for their industry

Louise Esther Blenman
Resident High Court Judge