

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2016/0002

BETWEEN:

IN THE MATTER of the Registered Land Act,
Revised Statutes of Anguilla, Chapter R30, section
147

and

IN THE MATTER of an Appeal by Collins Richardson, Carolyn Richardson (Administrator of the Estate of John Samuel Richardson); Boswell Richardson; Calvin Richardson; Leslie Richardson as Administrator of the Estate of Alma Richardson; Margie Hughes as Administrator of the Estate of Evangeline Hughes; Estell Hughes as Administrator of the Estate of Samuel Benjamin Richardson; Calvin Richardson as Administrator of the Estate of Victor Richardson; Robert Austin Richardson as Administrator of the Estate of Eneria Richardson; Royston Richardson as Administrator of the Estate of James Richardson; Oliver MacDonna as Administrator of the Estate of Jane Rebecca Richardson and Sybil Ryhmer as the Administrator of the Estate of Florence Richardson against decisions of the Registrar of Lands dated 28th September 2010 and 7th July 2011.

Appellants/Counter Respondents

and

Benjamin W Richardson (Administrator of the Estate of John Richards Richardson); Global Investment (Anguilla) Ltd.; Robert Considine & Anna Considine; Benjamin Wilson Richardson; Leonard Bennett (Administrator of the Estate of Athelson Richardson) and James Webster and Cleopatra J. Webster

Respondents/Counter Appellants

Temenos Realty LLC

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Clyde Williams with him, Mr. Alex Richardson for the Appellants/ Counter Respondents
Mrs. Tana'ania Small-Davis with her, Ms. Keisha Spence, Mr. Kerith Kentish and Mr. Kyle Kentish for the 1st – 5th Respondents/Counter Appellants
Mr. John Wigley for the 7th Respondent

2019: January 15;
May 24.

Civil appeal — Application to be registered as proprietors by prescription — Section 135 of Registered Land Act — Whether learned judge erred in finding that the appellants/counter respondents had not acquired ownership by prescription — Approach of appellate court to learned judge's findings of fact — Principles governing appellate interference with concurrent findings of fact of two tribunals

The appellants/counter respondents, Collins Richardson's family, are the descendants of the late Abraham and Ann Richardson ("the Richardsons") who resided on the Long Bay Estate many years ago. In September 1890, John Richards Richardson ("John Richards") by deed secretly purchased the Long Bay Estate from David Richardson and Margaret Susan. John Richards allowed his parents, the Richardsons, to occupy the eastern part of the land while he occupied the western part. His siblings and their descendants also occupied part of the eastern portion of the land for years. In 1975, during a cadastral survey, a dispute as to the ownership of the Long Bay Estate arose. The descendants of John Richard's siblings claimed that the land which they occupied and the whole Long Bay Estate belonged to the heirs of Abraham Richardson. A competing claim was filed on behalf of John Richards. In 1977, the adjudication officer found that legal title to the Long Bay Estate was vested in the heirs of Abraham Richardson and he denied the claim of John Richards.

Benjamin Wilson Richardson ("Benjamin Wilson"), the grandson of John Richards as well as the personal representative of his Estate appealed the decision of the adjudication officer to the High Court. The learned Justice Monica Joseph allowed Benjamin Wilson's appeal and ordered by consent that the Registrar of Lands ("the registrar") was to receive applications for ownership of land with absolute title as per the list attached to the plan of the Long Bay Estate. The list attached to the plan named 30 persons, twelve of whom are parties to this consolidated appeal. The judge further ordered that the eastern portion of

the Long Bay Estate, with the exception of the areas subject to the consent order, vest in the personal representative of the Estate of John Richardson. Therefore, Benjamin Wilson had satisfied the learned judge of his grandfather's entitlement to Parcel 1 by virtue of a deed of sale to John Richards.

Twenty-seven years after the consent order, which gave the listed persons an opportunity to make claims to areas of land forming part of Long Bay Estate, the appellants/counter respondents made their applications to the registrar to be registered as proprietors, by prescription, in respect of portions of the said Estate. The registrar dismissed their applications, finding that the appellants/counter respondents had not established ownership of the claimed portions of the Long Bay Estate by prescription under section 135 of the Registered Land Act (the "Act").

Dissatisfied with the registrar's decision, the appellants/counter respondents appealed to the High Court. The learned Acting Justice Combie-Martyr dismissed the appeal and concluded that the appellants/counter respondents had not acquired ownership by prescription of the portions of the Long Bay Estate claimed. She found that the appellants/counter respondents had not established that they personally or in the capacity as heirs, successors or assigns of the listed persons have been in peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of 12 years during the years 1940–2015.

The appellants/counter respondents further appealed to this Court. The 1st–5th respondents/counter appellants, Benjamin Richardson's family, have filed a counter notice of appeal challenging several findings of the learned judge's decision. The issue arising for this Court's determination is whether the learned judge erred in finding that the appellants/counter respondents had not acquired ownership, by prescription under section 135 of the Act, of certain portions of the Long Bay Estate.

Held: dismissing the appeal and the counter appeal; ordering that each of the appellants/counter respondents and the 1st – 5th respondents/counter appellants bear its own costs; and ordering that the 7th respondent shall have prescribed costs in the court below and on this appeal of two thirds of the prescribed costs in the court below, that:

1. Where a trial judge has made findings of fact, an appellate court should not interfere with those findings unless it is satisfied that any advantage enjoyed by the trial judge, having seen and heard the witnesses, could not be sufficient to justify the judge's conclusion. It is no function of the appellate court to go trailing through the evidence to determine whether the findings of fact by the judge were correct. In the present case, there is no discernible error of law in the judge's reasoning or findings. The appellants/counter respondents have failed to identify any errors in the learned judge's reasoning or conclusion, despite several invitations from this Court to specifically point out the alleged errors. Therefore, there is no basis to interfere with the learned judge's findings of fact.

Watt (or Thomas) v Thomas [1947] AC 474 applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Ltd** BVIHCVAP2018/0028 (delivered 20th April 2016, unreported) followed; **Flat Point Development Limited v Mary Dooley** ANUHCVP2015/0029 (delivered 13th March 2019, unreported) followed.

2. Where the Court is being asked to overturn the concurrent findings of fact of two tribunals, each of whom had the benefit of seeing and hearing the witnesses and assessing their demeanour, the burden on the appellant to identify a serious violation of legal principle or procedure is at a higher standard. As a matter of settled practice, an appellate court will decline to interfere with concurrent findings of fact, save in very limited circumstances. The question of the weight of the evidence is not sufficient reason to depart from this established practice to decline to interfere with concurrent findings of fact.

Philomen Dean v Chanka Bhim [2019] UKPC 10 applied; **Desir and Another v Alcide** [2015] UKPC 24 applied.

3. In this case, there is no doubt that the learned Acting Justice Combie-Martyr properly applied the law in relation to acquisition of property by prescription and made findings which were open to her on the evidence. The learned judge thoroughly examined the evidence before her, finding inconsistencies in the period under which certain portions of the Long Bay Estate were under cultivation and the evidence of possession, and arrived at the same conclusion as the registrar. It was open to the learned judge to find on the evidence that the appellants/counter respondents had not acquired ownership by prescription of the portions of the Long Bay Estate claimed. Accordingly, there is no basis to interfere with the concurrent findings of fact of the learned judge and the registrar and the judge's decision cannot be assailed.

JUDGMENT

Introduction

- [1] **BLNMAN JA:** This is an appeal against the decision of the learned Acting Justice Combie-Martyr, made on 21st January 2016, dismissing an appeal by the appellants/counter respondents, Collins Richardson's family, against decisions of the Registrar of Lands (the "registrar") dated 28th September 2010 and 7th July 2011. In those decisions, the registrar dismissed the appellants/counter respondents' applications to be registered as proprietors by prescription, under

section 135 of the **Registered Land Act**¹ (the “Act”), in respect of certain parcels of land situate at Long Bay Estate, Anguilla, formerly registered as Registration Section West End Block 18011 B Parcel 1 (“Long Bay Estate” or “Parcel 1”). There is also a counter appeal brought by Benjamin Richardson’s family, the 1st – 5th respondents/counter appellants (“respondents/counter appellants”) challenging several findings of the learned judge’s decision but nonetheless seeking to have this Court affirm the judge’s decision.

- [2] I will now address the factual background in some detail since it is necessary to provide the requisite context.

Background

- [3] The parties are descendants of the late Abraham and Ann Richardson (“the Richardsons”) who resided on the Long Bay Estate many years ago. In September 1890, John Richards Richardson (“John Richards”) by deed secretly purchased the Long Bay Estate from David Richardson and Margaret Susan. John Richards allowed his parents, the Richardsons, to occupy the eastern part of the land while he occupied the western part. His siblings and their descendants also occupied part of the eastern portion of the land for years. In 1975, during a cadastral survey, a dispute as to the ownership of the Long Bay Estate arose. The descendants of Abraham Richardson claimed that the land which they had occupied and the whole Long Bay Estate belonged to the heirs of Abraham Richardson. A competing claim was filed on behalf of John Richards. In 1977, the adjudication officer ruled in favour of Abraham Richardson’s descendants and denied the claim of John Richards. The adjudication officer found that the deed conveying the Long Bay Estate to John Richards was vague and that there was no evidence to show that legal title to the Estate vested in any person other than the heirs of Abraham Richardson.

¹ Cap. R30, Revised Statutes of Anguilla.

- [4] Benjamin Wilson Richardson (“Benjamin Wilson”), the grandson of John Richards, as well as the personal representative of his Estate, appealed the decision of the adjudication officer to the High Court. In July 1982, the learned Justice Monica Joseph (“Joseph J”) ordered that the registrar draw a detailed map depicting the houses and cultivation on Parcel 1. Subsequently, by consent order dated 25th April 1983, Joseph J ordered that the registrar receive applications for ownership of land with absolute title as per the list attached to the plan of Parcel 1. The list attached to the plan named 30 persons, twelve of whom are parties to this consolidated appeal. Joseph J allowed Benjamin Wilson’s appeal against the adjudication officer’s decision and ordered that the eastern portion of Long Bay Estate, with the exception of the areas subject to the consent order, vest in the personal representative of the Estate of John Richards. It stands to reason that Benjamin Wilson therefore satisfied the learned judge of his grandfather’s entitlement to Parcel 1 by virtue of a deed of sale to John Richards. The decision of Joseph J was subsequently affirmed by the Court of Appeal.
- [5] Twenty-seven years after the 1983 consent order which gave the listed persons an opportunity to make claims to areas of land forming part of Parcel 1, the appellants/counter respondents made their applications to the registrar to be registered as proprietors by prescription in respect of portions of Parcel 1. The registrar dismissed their applications, after what seemed to have been a keenly contested hearing, based on filed statutory declarations which included the basis of the portions of land claimed and oral evidence including cross examination and a visit to the locus in quo. The registrar also received submissions on behalf of the parties by their respective counsel. Critically, the registrar found that the appellants/counter respondents had not established ownership of the claimed portions of Parcel 1 by prescription.

The Proceedings in the High Court

- [6] The appellants/counter respondents, being dissatisfied with the decision of the registrar, appealed to the High Court pursuant to section 147 of the Act and Part

60 of the **Civil Procedure Rules 2000** (“CPR”). It is noteworthy that although the hearing before the High Court was an appeal from the decision of the registrar, CPR 60.8 provides for the hearing of appeals from tribunals such as the registrar to be by way of rehearing. As the hearing before the learned judge was a rehearing of the appellants/counter respondents’ claims, the judge therefore had the benefit of hearing the matter afresh and reading all the material that was before the registrar in coming to her conclusion.

- [7] Before the learned judge, the gravamen of the appellants/counter respondents’ contention was that, at the date of the secret purchase of Parcel 1, the predecessors in title to John Richards had been dispossessed by his parents, siblings and other family of portions of Parcel 1, the portions on which they had built their houses, cultivated, raised animals, among other acts of possession. The appellants/counter respondents further contended that that the predecessors’ title to portions of Parcel 1 had been extinguished by the time of the secret purchase, and as the Richardson family grew, so did the portions of land they possessed, and so too the extent to which the title of the legal owner, John Richards, was being extinguished.

The Judgment Below

- [8] In a very detailed and closely reasoned 67-page judgment, Combie-Martyr J [Ag.] dismissed the appellants/counter respondents’ appeal. At the outset, the learned judge carefully identified the issues for the Court’s determination. At paragraph 45 of the judgment, the learned judge stated the hurdle which the appellants/counter respondents had to overcome in order to establish their claims for ownership by prescription thus:

“...it is this court’s considered opinion that the appellants can be successful on the claims if the appellants can show a continued presence by way of cultivation of the land and other physical acts which would constitute the possession necessary to establish factual possession and the requisite intention to possess the lands being claimed. Alternatively in the absence of actual cultivation, that they can satisfy this court that they maintained effective single and exclusive control and occupation sufficient

to establish the necessary factual possession and requisite intention to possess the lands being claimed.”

- [9] The learned judge outlined the applicable legal principles and was careful to refer to the evidence that was led and to record her perception and assessment of the witnesses and by extension the evidence. She visited the locus in quo in order to appreciate the state of the property as it physically existed as some of the appellants/counter respondents had claimed that acts of possession in terms of cultivation and occupation continued up to the time of hearing before the judge. In arriving at her conclusions, the learned judge thoroughly examined the evidence of several witnesses as well as the transcripts of the 1975 cadastral hearing and the proceedings before the registrar. She individually examined each appellants/counter respondents’ claim and then clearly outlined in the judgment what she found to be weaknesses in their evidence. The learned judge highlighted the various contradictions and inconsistencies in the evidence of cultivation and possession which emerged following cross-examination and explained why she accepted the evidence of the respondents/counter appellants over the evidence of the appellants/counter respondents. Indeed, the judge carefully dealt with the competing interests of the parties in a matter which was very fact-sensitive.
- [10] Based on the evidence, the learned judge concluded that the appellants/counter respondents had not acquired ownership by prescription, under section 135 of the Act, of the portions of Parcel 1 claimed. She found that they had not established that they personally or in the capacity as heirs, successors or assigns of the listed persons have been in peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of 12 years during the years 1940 – 2015.
- [11] Dissatisfied with the learned judge’s decision, the appellants/counter respondents have appealed to this Court. The respondents/counter appellants have also

appealed against the judgment on a number of grounds through which they additionally seek to have this Court uphold the judge's decision.²

The Issue on Appeal

- [12] The issues arising from the grounds outlined in the notice of appeal and counter notice of appeal can helpfully be crystallised into one main issue, namely, whether the learned judge erred in finding that the appellants/counter respondents had not acquired ownership by prescription under section 135 of the Act of certain portions of Parcel 1.
- [13] Against that backdrop, I now turn to examine the parties' submissions on the main issue.

Appellants/Counter Respondents' Submissions

- [14] Learned counsel for the appellants/counter respondents, Mr. Clyde Williams, argues that the learned judge erred in finding that the appellants/counter respondents had not acquired ownership by prescription of certain portions of Parcel 1. Mr. Williams contends that the learned judge erred in law when she limited her examination of the evidence of physical acts of possession from 1940 onwards, thereby disregarding the possession of the appellants/counter respondents' forefathers through whom they derived their possession. Mr. Williams says that the learned judge erred in her application of the principles set out in section 142 of the Act in finding that the appellants/counter respondents had not established possession by themselves personally or in the capacity as heirs, successors or assigns of the 30 persons entitled to claim as per the 1983 consent order.
- [15] In fact, Mr. Williams argues that the appellants/counter respondents are entitled to ownership of portions of Parcel 1 by virtue of their and their forefathers'

² Except for the ground in the counter notice of appeal which addresses abuse of process. Even though the respondents/counter appellants have filed four grounds of appeal, they are in effect the opposite position to those grounds stated in the notice of appeal.

peaceable, open and uninterrupted possession of the land without the permission of any person lawfully entitled to such possession for a period of 12 years. He says that, at the date of the secret purchase of Parcel 1, the predecessors-in-title of John Richards had been dispossessed by his parents, siblings and their families. Mr. Williams says that the appellants/counter respondents ground their possession on the cumulative effect of the possession of their foreparents and their own possession and rely on cultivation, the raising of animals, the building of houses, the living and raising of families on the land for several generations among other acts of factual possession. Mr. Williams says that the law is settled on the question of acquiring title by long possession through the cumulative possession of successive squatters. He argues that on a proper construction of section 142 of the Act, each appellant/counter respondent benefits from the years of possession of their foreparents to which years they add their years of possession. He relies on **Asher v Whitlock**³ and **Perry v Clissold and Others**⁴ in support of his submission.

[16] Mr. Williams maintains that the learned judge erred in her application of the principles of dispossession or discontinuance of possession in a prescriptive claim by not properly considering the significance of the purchase of Parcel 1 by John Richards, on which parcel his parents lived, cultivated and continued to do so after September 1890, and where he and his siblings were raised; which purchase was, on the evidence, unknown to his parents and siblings during their lifetime. He says that the learned judge failed to give any sufficient weight to the uncontested evidence that the parents, siblings and the descendants of John Richard lived, cultivated and treated Parcel 1 as their own after September 1890 without the permission of John Richards or his successor-in-title.

[17] Mr. Williams, referring to the well-known decision of **JA Pye (Oxford) Ltd and another v Graham**,⁵ reminds this Court that the person lawfully entitled to

³ (1865) LR 1 QB 1.

⁴ [1907] AC 73.

⁵ [2002] 3 WLR 221.

possession must be dispossessed or must discontinue possession and it is from the time of the dispossession that the 12 year period starts running. He posits that it is not a matter of counting backwards 12 years from the date of the 1983 consent order to search for acts of possession, but rather the starting point is the period of dispossession. Mr. Williams argues that time began to run against John Richards' predecessors in title from the time the Richardsons settled on the land and started to raise a family and by the time of the secret purchase of the Long Bay Estate in September 1890, the title of John Richards' predecessors to portions of Parcel 1 had been extinguished. Mr. Williams claims that the 1983 consent order "for the registrar to receive applications for ownership of land with absolute title as per the list attached to the plan" is an acknowledgment by the Estate of John Richards that it had been dispossessed of portions of the Long Bay Estate by persons including the parties to this appeal. Additionally, Mr. Williams contends that the learned judge failed to give any sufficient weight to the uncontested evidence that the possession of John Richards' parents, his siblings and their descendants between September 1890 and 1983 was not interrupted by physical entry, the institution of legal proceedings, or by an acknowledgment by the appellants/counter respondents and/or their predecessors as to John Richards' ownership.

[18] Additionally, Mr. Williams contends that the appellants/counter respondents had an intention to possess the land in dispute. He says that this is evidenced by the appellants/counter respondents' long possession of certain portions of Parcel 1 without any discontinuation or interruption in possession. He therefore says that it is open to this Court to find, on the evidence, that several of the appellants/counter respondents jointly possessed certain portions of Parcel 1.

[19] Mr. Williams challenges the learned judge's reliance on exhibit C4 as the detailed map drawn by the registrar in compliance with the July 1982 order of Joseph J. He contends that the learned judge erred in finding that exhibit C4 indicates accurately what existed on Parcel 1 at the time of the making of the 1983 consent

order as it relates to the areas of cultivation by the appellants/counter respondents. His challenge to this finding is put forward even though there was a clear indication that the judge did not utilise exhibit C4 on her own volition, but rather that the parties through their respective counsel had consented to the court's utilisation of exhibit C4.

[20] Mr. Williams contends that the learned judge failed to consider the appellants/counter respondents' application for costs on the application to strike out the appellants/counter respondents' fixed date claim forms, which was granted by the High Court but overturned on appeal. Relying on rule 64.6 of the CPR and **Rochamel Construction Limited v National Insurance Corporation**,⁶ he contends that this Court should award costs in those strike out proceedings to the appellants/counter respondents to be assessed, if not agreed.

[21] On the issue of costs, Mr. Williams submits that the Court should award the appellants/counter respondents costs on the appeal and in the proceedings in the court below to be assessed, if not agreed.

Respondents/ Counter Appellants' Submissions

[22] Buttressing her written submissions during oral arguments learned counsel for the respondents/counter appellants, Mrs. Tana'ania Small-Davis, launched her argument by highlighting that the appellants/counter respondents challenge findings of fact made by the learned judge and the concurrent findings of fact of the judge and the registrar.

[23] In relation to the findings of fact and referring to **Watt (or Thomas) v Thomas**,⁷ **Grenada Electricity Services Ltd v Issac Peters**⁸ and **Harracksingh v Attorney General of Trinidad and Tobago**,⁹ she says that the learned judge's decision ought not be disturbed unless it can be shown that it is affected by

⁶ SLUHCVP2003/0010 (delivered 24th November 2003, unreported).

⁷ [1947] AC 474.

⁸ GDAHCVP2002/0010 (delivered 28th January 2003, unreported).

⁹ [2004] UKPC 3.

material inconsistencies and inaccuracies or unless the judge may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved otherwise to have gone plainly wrong. Mrs. Small-Davis therefore contends that the question to be determined by this Court is whether the learned judge was plainly wrong in making the findings being appealed.

[24] Mrs. Small-Davis reminded this Court that where the Court is being asked to overturn the findings of facts of two tribunals, each of whom had the benefit of seeing and hearing the witnesses and assessing their demeanour and visiting the locus, the burden on the appellants/counter respondents to identify a serious violation of legal principle or procedure is at an even higher standard. Mrs. Small-Davis contends that the appellants/counter respondents have failed to establish any meritorious basis for the Court to deviate from the established principle not to lightly interfere with concurrent findings of fact. She further states that, having regard to the inconsistencies in the evidence given by the appellants/counter respondents' witnesses, it was open to the learned judge to find that the appellants/counter respondents' possession of Parcel 1 was not continuous and did not establish a clear intention to possess exclusively.

[25] It is noteworthy that the respondents/counter appellants' written submissions and Mrs. Small-Davis' oral arguments were confined to answering the grounds of appeal. She highlighted the fact that learned counsel Mr. Williams failed to specifically point out the findings of fact of which he complained were as a result of the judge's error. Mrs. Small-Davis says that the appellants/counter respondents have not provided any basis for the Court to depart from settled principle in relation to concurrent findings of fact. She says that the claims before the registrar and the learned judge were grounded in occupation and possession of land, and both tribunals correctly identified and applied the applicable law. Mrs. Small-Davis argues that the appellants/counter respondents have not provided any example or instance where the registrar or the learned judge departed from any established law or procedure. Mrs. Small-Davis contends that

the appellants/counter respondents' primary compliant concerns the weight which the learned judge attached to the evidence. However, referring to **TLM Company Limited v Bedasie and Another**,¹⁰ she says that the question of the weight of the evidence is not sufficient reason to depart from the established practice to decline to interfere with concurrent findings of fact.

[26] On the contention that the learned judge erred by limiting the timeframe within which the appellants/counter respondents could found claims for possession, Mrs. Small-Davis points out that to the contrary the learned judge in fact expanded the timeframe beyond the appellants/counter respondents' pleaded claims in which they identified 1983 as the relevant date and allowed them a sufficient period for them to show 12 years of peaceful, open and uninterrupted possession.

[27] Regarding the learned judge's findings in relation to the map exhibit C4, Mrs. Small-Davis points out that on numerous occasions before the learned judge the appellants/counter respondents stated that they did not object to the admission of the said exhibit into evidence. She states that exhibit C4 is both admissible and relevant to the matter and the appellants/counter respondents, by not objecting to its admission into evidence in the court below, accepted that position. Mrs. Small-Davis therefore says that the appellants/counter respondents cannot now argue that the learned judge should not have attached weight to exhibit C4. She further states that the parties consented to make applications for ownership based on exhibit C4 and the 1983 consent order is evidence that the parties had accepted the map accurately reflected what existed the ground at the time of the making of the 1983 consent order and the learned judge correctly so found. Turning to the effect of the 1983 consent order, Mrs. Small-Davis says that the areas of cultivation on Long Bay Estate which could be subject to a claim for possession, were delineated on exhibit C4. She says that the appellants/counter respondents are therefore limited to claiming within the delineated areas and

¹⁰ [2014] UKPC 25.

cannot now assert that they cultivated any other areas of Parcel 1. She points out that as their appeal has progressed through the courts, they have sought to expand the areas to which they are entitled.

- [28] Learned counsel, Mr. Kerith Kentish, who also appeared on behalf of the respondents/counter appellants challenges the appellants/counter respondents' contention in relation to the learned judge's finding on the issue of costs of the strike out application. He states that the learned judge could not have considered the application for costs pertaining to an application dealt with by another judge because the Court of Appeal remitted the matter to be determined on the merits of the claims, and not for any determination on the issue of costs.

7th Respondent's Submissions

- [29] Learned counsel for the 7th respondent, Mr. John Wigely, contends that there is no basis to impugn the learned judge's judgment. In fact, he urges this Court to affirm the learned judge's decision in its entirety.
- [30] I turn now to discuss the main issue on appeal.

Discussion

- [31] Stripped of all of its initial appearance of complexity, in my view, this appeal is concerned primarily with challenges to the learned judge's findings of fact and concurrent findings of fact made by the learned judge and the registrar. A useful starting point would therefore be to set out the well-established principles guiding the approach an appellate court should adopt on an appeal from the findings of facts of a trial judge. Suffice it to say that, in examining the judge's findings of fact, the function of an appellate court is not to substitute its own views for those of the court below. The principles were first laid down in **Watt (or Thomas) v Thomas** and have been restated by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**.¹¹ The correct approach to be adopted

¹¹ [2014] UKPC 21.

has been examined extensively in several judgments of this Court and require no detailed recitation. Indeed, in **Yates Associates Construction Company Ltd v Blue Sand Investments Ltd**¹² this Court propounded that:

- “1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge’s decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge’s conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.
2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.”

...

[32] Of similar effect is the observation of the Privy Council in **Sandra Juman v The Attorney General of Trinidad and Tobago and Anor**¹³ where the Board stated:

“14...The limited role of an appellate court when asked to review the factual findings of a lower court has been expounded and emphasised in authorities too many to mention. Their effect was summarised by Lord

¹² BVIHC VAP2012/0028 (delivered 20th April 2016, unreported).

¹³ [2017] UKPC 3.

Reed in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, at paragraph 67, as follows:

“...in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

[33] Recently in **Flat Point Development Limited v Mary Dooley**,¹⁴ this Court emphasized that it is no function of the appellate court to go trailing through the evidence in order to determine whether the findings of fact by the judge were correct. At paragraphs 38-39 of the judgment, the Court stated:

“38....It is not open to this Court to seek to have a re-run of the trial and to determine who is to be believed. The appellate court ought not to second guess the trial judge who has been immersed in the case and has had a unique opportunity of hearing and seeing the witnesses and testing their evidence and gaining a feel of the case, an opportunity which is denied to the appellate court.

39. It is the function of the appellate court to make sure that the judge has correctly directed himself to and applied the relevant law and has properly approached his task in deciding disputed facts and has not erred in principle. After this has been determined, the appellate court has to stand back and determine whether the findings of fact were open to the judge to make. If they were, the appellate court should not interfere.”

[34] The above principles are very applicable to the appeal at bar. I therefore apply them.

[35] In the case at bar, an even higher threshold must be attained by the appellants/counter respondents who seek to have the appellate court interfere

¹⁴ ANUHCVP2015/0029 (delivered 13th March 2019, unreported).

with concurrent findings of fact. In a very recent decision of the Privy Council in **Philomen Dean v Chanka Bhim**,¹⁵ the Board stated at paragraph 6 that:

“It is the settled practice of the Board not to interfere with concurrent findings of primary fact by the courts below. This is the practice regardless whether an appeal lies to the Board as of right, as in this case, or only with leave: see *Juman v Attorney General of Trinidad and Tobago* [2017] UKPC3, per Lord Toulson at paras 14-15, following *Devi v Roy* [1946] AC 508 at 521 and *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 at paras 4-8. In *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15 the advice of the Board included this passage, at para 44:

‘The Board’s settled practice is not just to treat the scales as loaded against an appellant in the circumstances described above, but altogether to decline to interfere with concurrent findings of pure fact. This means, ..., that an appellant seeking to mount such an appeal must first persuade the Board that the case comes within that very limited special category which justifies a departure from that practice.’”

- [36] The principles relating to the issue of concurrent findings of fact were earlier enunciated by the Privy Council in **Desir and another v Alcide**.¹⁶ At paragraph 25, the Board propounded thus:

“...First, the Board will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. The well-established position remains as stated in *Devi v Roy* [1946] AC 508. Second, quite apart from the settled rule relating to concurrent findings, any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge’s findings and position, and in particular the extent to which he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ.”

- [37] The above pronouncements are helpfully adopted and applied to the case at bar. It is therefore incumbent on the appellants/counter respondents to demonstrate that the learned judge’s findings of fact are such that require interference by the

¹⁵ [2019] UKPC 10.

¹⁶ [2015] UKPC 24.

appellate court. Further, as the present appeal also challenges findings of fact made by a judge of the High Court on appeal from a decision of the registrar and similar findings were made by the registrar, the principles relating to appellate interference with concurrent findings of fact are therefore applicable. Accordingly, the appellants/counter respondents must establish that their appeal comes within that very limited special category which justifies departure from the general principles outlined above.

[38] It is noteworthy that even though the appellants/counter respondents were served with the respondents/counter appellants' submissions which addressed the matters of findings of fact and concurrent findings of fact, they did not even attempt to assail those submissions orally or in writing. This, in the absence of exceptional circumstances of which none were provided, is fatal.

[39] I now turn to examine the aspect of the appeal challenging the learned judge's findings of fact, which I will deal with cumulatively.

[40] I have given deliberate and respectful consideration to the submissions that were advanced by learned counsel Mr. Williams and those that were advanced by learned counsel Mrs. Small-Davis. I find the latter submissions to be persuasive and attractive and I accept them.

[41] Mrs. Small-Davis, in her written submissions, helpfully distilled the findings of fact made by the registrar and the learned judge which I accept as follows: (i) that the appellants/counter respondents only established title to the house lots and the areas around them; (ii) that the evidence of factual possession was either uncertain, ambiguous, internally contradicting for example in terms of areas worked, commencement, continuous use, size, boundaries, degree of physical control; (iii) that the evidence of possession was not single and exclusive as, on the evidence, different appellants/counter respondents were claiming title to the same areas of land which they each claimed to have occupied exclusively and

that this was evidence not sufficient to establish an intention to exercise control on their own behalf to the exclusion of all others; and (iv) that the evidence of joint possession is evidence of occupation shared by them and does not amount to single and exclusive possession and effective control in law.

[42] The law on acquisition of ownership through long possession is settled. Section 141 of the Act provides that:

“(1). The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of 12 years, but no person shall so acquire the ownership of Crown land.

(2) Any person who claims to have acquired the ownership of land by virtue of subsection (1) may apply to the Registrar for registration as proprietor thereof.”

...

“(6). 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;
(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 a claim is admitted.”

[43] The well-established requirements of legal possession are stated by Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd and another v Graham and Another** thus:

“...there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control (“factual possession”); (2) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (“intention to possess”). What is crucial is to understand that, without the requisite intention, in law there can be no possession.”

[44] Lord Browne-Wilkinson referring to the judgment of Slade J in **Powell v McFarlane**¹⁷ stated at paragraph 41 that:

“In Powell’s case Slade J said, at pp.470-471:

¹⁷ (1977) 38 P&CR 452.

‘(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...Everything must depend on the particular circumstances, but broadly, 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 has done so.’

I agree with this statement of the law which is all that is necessary in the present case.”

- [45] On the matter of the learned judge’s findings of fact in relation to possession, there is no doubt that the judge properly applied the above principles in relation to acquisition of property through long possession and made findings which were open to her on the evidence. There is no discernable error or identifiable error of law in the judge’s reasoning or findings. As Mrs. Small-Davis has pointed out, this Court is being asked to overturn the findings of facts of two tribunals, each of whom had the benefit of seeing and hearing the witnesses and assessing their demeanour and attending at the locus. The learned judge thoroughly examined the inconsistencies and contradictory statements found in the evidence before her as to factors including the period under which certain portions of Parcel 1 were under cultivation and the evidence of possession. In fact, throughout her judgment, the learned judge pinpointed that the evidence of some of the appellants/counter respondents’ witnesses was either uncertain, imprecise or contradicted the evidence of other appellants/counter respondents and documentary evidence. It is clear that the matter depicts a situation where the exclusive claims of several appellants/counter respondents to portions of Parcel 1 overlap. In that vein, and in view of the totality of the circumstances, there is no doubt that it was also open to the learned judge to find that the appellants/counter

respondents' possession of Parcel 1 was not continuous and did not establish a clear intention to possess exclusively.

[46] This Court invited the appellants/counter respondents several times to point out, during oral arguments, where the judge erred. However, they have not precisely identified how the learned judge erred in coming to the findings of fact which they seek to impugn. Even though there were complaints in the grounds of appeal that the judge misdirected herself on the law, neither in their written nor oral arguments did they point out what the errors were. In fact, the appellants/counter respondents have not provided any example or instance where the registrar or the learned judge departed from any established rule or judicial procedure. The gravamen of the appellants/counter respondents' attack on the learned judge's judgment appears to be against the weight she ascribed to the evidence. However, it is the law that the question of the weight of the evidence is not sufficient reason to depart from the established practice to decline to interfere with concurrent findings of fact. It is noteworthy that even though the registrar and the judge approached matters differently, they arrived at the same conclusion. In the circumstances and as indicated earlier, I am in total agreement with Mrs. Small-Davis that the appellants/counter respondents have failed to establish any proper basis for the Court to deviate from the established principle not to lightly interfere with concurrent findings of fact. In fact, they have simply not addressed the issue and there is nothing before this Court upon which the concurrent findings of fact can be disturbed. Further, they have not shown that the learned judge made any error of law or applied the law incorrectly.

[47] In relation to the learned judge's reliance on exhibit C4 as the detailed map drawn by the registrar in compliance with the July 1982 order of Joseph J, it is not open to the appellants/counter respondents, having agreed or not objected to the admission of the exhibit into evidence in the court below, to seek to impugn the learned judge's reliance on the exhibit. It was open to the judge to rely on the exhibit in light of the parties consent to make applications for ownership based on

exhibit C4 which shows an acceptance that the map accurately reflected what existed at the time of the making of the 1983 consent order. It is therefore part of the evidence that is before this Court and there is no basis to exclude evidence which has been properly admitted. In my view, the learned judge was entitled to consider exhibit C4 and it was open to her to make the findings she did. It is an unfair criticism to say that the learned judge improperly relied on the plan when it was obviously placed in evidence without objection from the appellants/counter respondents and witnesses were cross examined on it. The appellants/counter respondents, having cross-examined on exhibit C4 in the court below cannot now seek to challenge the learned judge's reliance on the evidence on appeal. Further, now that the appellants/counter respondents have lost before the judge it is too late for them to resile from the position they took in allowing the plan to be utilised by the learned judge as part of the evidence in the case. In any event, and in my view, the learned judge's decision cannot be said to be wrong. Therefore, in my opinion, there is no basis to impugn the judge's findings in relation to exhibit C4 and her conclusions in general.

[48] By way of emphasis a complete review of the judgment does not indicate that the judge made any errors of the law. In fact it demonstrates contrary. It was very surprising when even at the repeated invitation of this Court to learned counsel for the appellants/counter respondents to point out in the judgment where any errors were made, the invitation was not accepted. There were many general statements about misdirection on the law made without the appellants/counter respondents getting into the specifics, and I repeat despite several invitations from this Court to specifically point out the alleged errors.

[49] On the matter of costs of the strike out application, in my view, there is no basis to interfere with the learned judge's decision refusing to award costs. The Court of Appeal remitted the matter to be determined solely on its merits before Combie-Martyr J [Ag.] and it is my considered view that the decision on costs in that strike out application was not a matter within the purview of Combie-Martyr J [Ag.]. It is

clear that this Court cannot award costs to the appellants/counter respondents of a strike out application which was dealt with by another judge and also considered by a differently constituted bench of the Court of Appeal, the decision of whom could not be the subject of this appeal. It would have been improper for the judge to award costs on the appeal from the registrar, in the circumstances of a remittance, in the absence of clear directions from the Court of Appeal so permitting. In these circumstances, I agree with learned counsel Mr. Kentish that the decision of the learned judge cannot properly be criticised for not awarding costs. This Court also declines to award costs to the appellants/counter respondents on the strike out application.

- [50] In view of the totality of the circumstances, I am of the view the appeal should be dismissed and the learned judge's judgment is affirmed. This effectively disposes of the appeal. However, insofar as the respondents/counter appellants have filed a counter notice of appeal, I will now address it for the purposes of completeness.

The Counter Appeal

- [51] As indicated earlier, the respondents/counter appellants filed a counter notice of appeal challenging aspects of the learned judge's judgment. Having reviewed the grounds outlined in the counter notice, I am of the respectful view that no useful purpose is served by repeating them, since it is my considered view that the issues raised in the appeal are determinative of the issues raised on the counter appeal. It is striking that the respondents/counter appellants have not filed any written submissions in support of their counter appeal. It is noteworthy that written submissions were filed by the appellants/counter respondents in response to the counter notice of appeal. In my view, it is unnecessary to examine the counter appeal in any detail, save for the purpose of dismissing it based on the fact that the respondents have not indicated that the counter appeal has been withdrawn. Accordingly, the counter appeal is dismissed.

Costs

- [52] Insofar as the counter appeal has been dismissed, the appellants/ counter respondents would be entitled to costs. However, as the appellants/ counter respondents have also failed on their appeal, the appropriate costs order in the circumstances would be that each of the appellants/ counter respondents and the respondents/ counter appellants shall bear its own costs.
- [53] It is of note that in the court below the learned judge had ordered costs to be assessed instead of the correct order for prescribed costs in accordance with CPR 65.5.
- [54] The 7th respondent has prevailed against the appellants/ counter respondents on the appeal and is entitled to its costs on the appeal of two-thirds of the prescribed costs awarded in the court below.

Conclusion

- [55] In view of the above reasons, I would therefore make the following orders:
- (1) The appeal and the counter appeal are dismissed and the judgment of Combie-Martyr J [Ag.] is affirmed.
 - (2) Each of the appellants/counter respondents and the respondents/counter appellants shall bear its own costs.
 - (3) The 7th respondent shall have prescribed costs in the court below and on this appeal two-thirds of the prescribed costs awarded in the court below.

[56] I gratefully acknowledge the assistance of learned counsel.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar