ASHTON CHASE ASSOCIATES

LB #4/2001

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

(CIVIL JURISDICTION)

CIVIL APPEALS NOS. 11 & 12/2000

BETWEEN:

In the matter of an application by **GENEVIEVE CREARY** for a declaration of Title by Prescription to the E ½ of lot E, North of the dam, within the Klien/Pouderoyen District Council, situate on the West Bank of the Demerara River.

- and –

In the matter of North half of the East half of lot E, North of the Central Dam, Pouderoyen, within the Klien/Pouderoyen Local Government District situate on the West Bank of the Demerara River in the Republic of Guyana the said lots being shown on a plan by Henry Rainsford, Sworn Land Surveyor, dated the 27th July, 1852 and deposited in the Deeds Registry at Georgetown containing an area of 0.4436 ac. (nought decimal four four three six) of an acre being shown on a plan by L.W. Cox, Sworn Land Surveyor dated 3rd February, 1997 on record in the Department of Lands and Surveys on Plan No. 26856, together with a right of way 8(eight) feet wide running along and within the Eastern boundary of the said east half of the lot and leading from the North half of the east half of the lot of the dam.

- and –

In the matter of the Title to Land (Prescription and Limitation) Act, Chapter 60:02 of the laws of Guyana.

BEFORE:

The Honourable Mr. Nandram Kissoon - Justice of Appeal
The Honourable Mr. Carl A. Singh - Justice of Appeal
The Honourable Mr. Ian N. Chang - Justice of Appeal

Mr. B. Gibson for the Appellant
Mr. C.M.L. John for the Respondent

2000:
December 4th
2001:
January 22nd, 29th
February 15th

JUDGMENT OF THE COURT DELIVERED BY THE HON. CARL SINGH, JA:

These appeals concern a plot of land which may be described as the East half of Lot E, North of Centre Dam, North part Plantation Klien, Pouderoyen, West Bank Demerara.

referred to earlier, she claimed to own the building. There is a fundamental difference between the ownership of a house and the control of a house. It would be readily appreciated, that one can control a house without being the owner thereof. But from her evidence, it seemed that from the year 1966, Creary has been back and forth, between Guyana and the United States of America and in 1984 she left Guyana to take up permanent residence in that country. Under cross-examination, she admitted that when she lived in Guyana, she was not living on the land. Why then did Creary give her address in her Petition as Lot E, Central Dam, Pouderoyen? The answer to this question will become clear as other issues affecting her petition are discussed.

One cannot help but notice, that all that is contained in Creary's petition is her bald assertion that she has been in sole and undisturbed occupation of the whole of Lot E from the year 1970. Her petition is silent about the house in which Duncan lives, though she disclosed this in her evidence before the Court as well as admitting under cross-examination that she saw "a fence (cross fence) of Duncan's property". The cross fence runs from east to west. Her reference to "Duncan's property" is perhaps a classic manifestation of the statement that the truth sometimes surfaces in the most unguarded moment. Here was a petitioner, laying claim to the whole of Lot E, referring to that part of the said Lot E, on which the house occupied by Duncan stands, as being "Duncan's property". What she did was to let the learned Commissioner into her state of mind, but he failed to grasp this in his evaluation of the evidence. But more unfortunately, there is not one iota of evidence, to support Creary's bald assertion in her petition, that from the year 1970, she had been in sole and undisturbed occupation of the land. Interestingly, she told the learned Commissioner of Title that when she left Guyana in 1984 for the United States of America, there were three houses on the said Lot E. Having admitted that, when she was in Guyana she never lived on the land, what then were the acts which Creary relied on as evidence of her sole and undisturbed occupation. As I indicated before there was no evidence of such acts of occupation. No evidence that she cut the grass, or planted ornamental or fruit trees or that she dug drains and empoldered the land or that she maintains the land and keeps it free from overgrowth. These in my view, are things which ought reasonably to be expected from an occupier of land in these circumstances.

learned Commissioner ought to have drawn the inference that Creary was grounding her claim and substantiating her possession by and through her tenant Bovell.

Mr. Gibson cited in support of this argument, the case of **Williams v. Pott** (1871) 12 Ch.D 149. The principle established by this case is that "possession of an agent is possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent ....."

The learned Commissioner in dealing with this aspect of the case, dealt with the evidence as a matter for belief and said of Creary:

> "....she sought to have control and possession of the land through her alleged rent paying tenant Bovell from 1970. She, in her testimony said Bovell was paying rent. She did not say she was receiving rent from Bovell. Also in her affidavit evidence, she stated and I note (paragraph 3) 'that your petitioner owns the building situated on the land and the said building is occupied by Mr. S. Bovell who pays no rent to your petitioner.' From her demeanour in the witness box, I find that the petitioner was catching at straws in the wind, when she said that Bovell is her tenant. I do not believe her."

On this issue, there was more involved than just the question of belief or disbelief of Creary's testimony. The learned Commissioner quite rightly recognised that there was no evidence that Creary was in receipt of rent from Bovell. Her evidence was that rent was collected from Bovell by a Mr. Reece and upon his death by the late Attorney-at-Law, Mr. Alvin Holder. She did not however, lead any evidence to establish that either of these gentlemen was her agent and that they collected rent from Bovell on her behalf and so, without this evidence, the decision in **Williams v. Pott (supra)** becomes inapplicable to the facts of this case. More importantly however, is the fact that the learned Commissioner while recognising that there was a conflict between the contents of paragraph 3 of Creary's affidavit, to the effect that Bovell paid no rent and her evidence, under oath that he was her tenant paying a rental of two thousand dollars per month, seemingly failed to notice and to comment upon the fact that this was a substantial variation of her case.

As I pointed out earlier, a petitioner before the Land Court is required to set out in his/her petition all the material facts upon which the petition is based. No amendment was sought and none was granted and the petition proceeded on the footing that Bovell paid no rent.

In the text **Pleadings, Principles and Practice** by Jacob and Goldrein, the learned authors at pages 11-12 state:

In her affidavit in support of her petition dated 17th July, 1996 which was executed before a Commissioner of Oaths on the said day Creary having taken oath deposed that the statements made and contained in paragraphs 1-8 of her petition were true and correct. At paragraph 1 of her petition dated 17th July, 1996, she referred to a plan by L.W. Cox dated 3rd February, 1997.

In making this submission about Duncan's failure to annex a plan to her petition, Mr. Gibson seems to have been very unmindful of the Biblical exhortation, "Let he who is without blame cast the first stone." Mr. John drew our attention to Duncan's Notice of Publication which indicated that a plan accompanied the petition. The plan that Duncan was referring to was the plan drawn by L.W. Cox. However, Duncan's description of the property against which she sought to prescribe was the "North half of the East half of Lot E...." But Cox's plan made no reference to the North half of the East half of Lot E .... nor did it show the boundaries of this North half of the East half of Lot E.

The purpose of the plan in cases such as these, is to define, delimit and demarcate the boundaries of the land, the subject of the claim, so that adjoining occupiers or other interested persons may determine whether the petitioner has encroached upon their land or is in anyway making a claim which exceeds his or her entitlement.

The learned Commissioner attempted to resolve this problem by ruling that Duncan was entitled to a mathematical half of lot E and relied as authority for so doing on the case of **Perreira v. Perreira** (1931-37) LRBG 464. However, the decision in that case was premised on the existence of a transport wherein land is described as the "North half lot" or "South half lot" the owner by transport would be entitled to the mathematical half of the whole lot in question. Pereira's case is not applicable in the circumstances of the instant case.

There is much uncertainty which surrounds Duncan's claim, not only is the North half of the East half not clearly demarcated on Cox's plan but the right of way which the learned Commissioner awarded was also not clearly identified on this plan, and Duncan's averment at paragraph 2 of her petition where she makes reference to her occupation and that of her predecessor to "a quarter lot at lot E" did not assist her case. The learned Commissioner's order that a plan was to be drawn in conformity with his award to Duncan