Michaelmas Term
[2022] UKPC 55
Privy Council Appeal No 0045 of 2021

JUDGMENT

Robert Gormandy and others (Appellants) *v* Trinidad and Tobago Housing Development Corporation (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Hodge
Lord Briggs
Lord Burrows
Lord Stephens
Sir Guy Newey

JUDGMENT GIVEN ON
22 December 2022

Heard on 6 July 2022

Appellant
Oliver Radley-Gardner KC
Ramesh Lawrence Maharaj SC
Imogen Dodds
(Instructed by Sheridans (London))

Respondent
Deborah Peake SC
Ravi Heffes-Doon
(Instructed by Signature Litigation LLP (London))

LORD HODGE (with whom Lord Briggs, Lord Burrows, Lord Stephens and Sir Guy Newey agree):

1. This appeal is a challenge to the judgments of the High Court and Court of Appeal which held that Mr Robert Gormandy ("Mr Gormandy") had failed to establish an entitlement to the ownership of land by adverse possession. The land in dispute ("the Property") is a plot of approximately 4.6 acres in Couva, Trinidad. The Respondent, the Trinidad and Tobago Housing Development Corporation ("the Housing Corporation"), is the registered proprietor of the Property, having acquired title to it by a statutory vesting process in 2004. The Housing Corporation challenges the basis of Mr Gormandy's appeal on the ground that it is in essence an appeal against concurrent findings of fact by the courts in Trinidad and Tobago and prays in aid the practice of the Board that, save in very limited circumstances, it will not consider appeals on questions of fact when there are such concurrent findings of fact.

2. The Board has repeatedly held that it is its settled practice not to go behind concurrent findings of fact made by the courts below save in very limited circumstances. Absent a legal error which undermines those findings, it is generally necessary for an appellant to show that there has been some miscarriage of justice or violation of a principle of law or procedure which means that what has occurred is not in a proper sense a judicial procedure. The classic statement of this practice is, as is well known, set out in *Devi v Roy* [1946] AC 508, 521 and the Board has more recently confirmed that position in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, [2016] 1 BCLC 26, para 4; *Alcide v Desir* [2015] UKPC 24, paras 24-26; *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, paras 43-45; *Dass v Marchand (Practice Note)* [2021] UKPC 2, [2021] 1 WLR 1788, paras 15-17; *Pickle Properties Ltd v Plant* [2021] UKPC 6, para 3; *Betaudier v Attorney General of Trinidad and Tobago* [2021] UKPC 7, para 14; and *Glory Trading Holding Ltd v Global Skynet International Ltd* [2022] UKPC 35, para 15.

3. In view of this established practice, the Board has adopted the approach, when faced with an appeal against concurrent findings of fact, of requiring the appellant to set out in a concise manner in the written case, and of inviting the appellant to explain at the outset of the appeal hearing, how he or she can bring the appeal within the limited circumstances which are recognised as exceptions to the Board's practice. In the event that the appellant cannot satisfy the Board that the appeal falls within such circumstances, the Board declines to hear the appeal if it is simply a challenge to concurrent findings of fact and does not call upon the respondent. As the Board sets out below, this is what has occurred in this appeal. Where an appeal is in part a challenge to concurrent findings of fact the Board will decline to hear that part of the appeal which involves such a challenge unless the

appellant has satisfied the Board that the case falls within the limited circumstances in which the Board departs from its settled practice.

4. It is pertinent to this appeal to refer to the relevant statement in *Devi v Roy* at p 521 in which the Board set out propositions to illustrate the scope of the practice and the special circumstances which would justify a departure from its practice of not going behind concurrent findings of fact. The Board, in a judgment delivered by Lord Thankerton, stated:

> "(1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.
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> (2) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice.
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> (3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.
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> (4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.
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> (5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

> (6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.
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> (7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiment peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.
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> (8) That the practice relates to the findings of the courts below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court."

5. Although in proposition 6 above Lord Thankerton was cautious not to be definitive, it is important to emphasise the high hurdle which his words in proposition 4 entail. There must usually have been a miscarriage of justice or violation of principle in the courts below which is so serious "as to make what happened not in a proper sense judicial procedure at all." This hurdle, which applies to appeals to the Board, is in addition to the caution which common law courts of appeal exercise, and which the Court of Appeal exercised in this case, before interfering with a trial judge's findings of primary fact and the inferences which the judge draws from findings of primary fact, having regard to, among other things, the advantages which the trial judge has in seeing the witnesses and in reaching conclusions based on an assessment of the evidence as a whole, not all of which may have been set out in his judgment. See for example, *Biogen Inc v Medeva plc* [1997] RPC 1, *Piglowska v Piglowski* [1999] 1 WLR 1360, *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477, and the judgment of the Board in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418. The Board's settled practice is an additional hurdle over and above such appellate caution: *Dass v Marchand* (above), para 16.

6. There are several reasons for this settled practice. First, the Board is a court of second or further appeal. A party, before appealing to the Board, has already had access to justice, including an appeal. Secondly, the trial judge's findings of fact will usually have already been reviewed with care by an experienced court of appeal.

Where the two courts have agreed on the proper factual finding, it is unlikely that a court of second or further appeal will be in a position to disagree with any confidence unless something has gone seriously wrong in the judicial process. Thirdly, especially where the case involves no point of law of general public importance, the principle of finality in litigation militates against the use of the resources of the parties and public resources in a further review of factual findings. There is no reason to believe that the second appellate court is more likely to be correct about the facts than the two courts which have already addressed them. Fourthly, in cases which involve the customs, culture and practice of a country or locality, the Board is inclined to give weight to the understanding of local courts of such matters within their jurisdiction. The Board also discusses the reasons for and consequences of this settled practice in its judgment in *Sancus Financial Holdings Ltd v Holm (Practice Note)* [2022] UKPC 41; [2022] 1 WLR 5181, paras 1-8.

Factual background

7. Before the Housing Corporation obtained title to the Property in 2004, it had been owned by a company called Caroni Ltd and its successors in title, the most recent of which was Caroni (1975) Ltd. Mr Gormandy claimed to have entered the Property in 1984, to have staked out its boundaries and planted trees on it in 1985, and to have farmed it in a rotational manner thereafter, initially as a hobby but later on a commercial footing. He gave evidence that his practice of rotational farming was to cultivate small plots within the Property at different periods while leaving other parts uncultivated. He claimed that through this possession of the Property he had extinguished the title of Caroni (1975) Ltd in 2000, after the limitation period of 16 years had expired, pursuant to sections 3 and 22 of the Real Property Limitation Act 1940 (Ch 56:03). He argued that, as a result, his title to the land could not be affected by the purported vesting of, among other land, the Property in the Housing Corporation in 2004.

8. By a sale agreement dated 17 March 2017 ("the Sale Agreement") Mr Gormandy purported to sell the bulk of the Property to the second appellant, Mr Shaun Sammy. The third appellant, Junior Sammy Contractors Ltd ("JSCL"), is a company controlled by Mr Sammy. Mr Sammy is also a manager of Julin Ltd, which in September 2010 bought two acres and two roods of land located immediately to the west of the Property which had formerly been owned by Carillion (Caribbean) Ltd.

9. Annexed to the Sale Agreement was a roughly drafted plan drawn by Mr Gormandy which showed two parcels of land. Mr Gormandy agreed to sell the larger parcel of land, which has been referred to as "G1", to Mr Sammy for $500,000, while retaining a smaller parcel of ground which has been referred to as "G2". The Sale

Agreement referred to the Property as a whole as comprising three acres "more or less" and gave a written description of its boundaries, which is not material to this appeal.

10. Mr Sammy entered into possession of the larger parcel of land, G1, and, as the Court of Appeal recorded at para 2, he and JSCL "levelled the land, destroyed any boundary trees alleged to have been planted and removed any sign of [Mr] Gormandy's cultivation." The crops growing within the property were cleared to enable the site to be levelled to accommodate storage for Mr Sammy's business. Walls were erected on the northern boundary and part of the eastern boundary of the Property. These activities caught the attention of the Housing Corporation which wrote on 29 March 2017 to JSCL alleging trespass and demanding that it vacate the site. After proceedings for an injunction, undertakings and correspondence between the parties, Mr Gormandy and Mr Sammy raised legal proceedings on 28 April 2017 in which they sought a declaration that Mr Gormandy was owner of the Property, damages for trespass and an injunction restraining the Housing Corporation from entering the Property.

11. The Housing Corporation filed a defence on 26 May 2017 asserting that Mr Gormandy had not had the requisite possession of the Property since 1984 or any period necessary to enable him to acquire title by adverse possession. They asserted that because Mr Gormandy had no title, he could not sell the land to Mr Sammy and the Sale Agreement was therefore null and void. The Housing Corporation also issued its claim to this effect. The parties agreed that Mr Gormandy's claim and the Housing Corporation's claim be tried together.

12. It was only after JSCL had taken control of the Property, removed any crops and built the walls described above that the appellants commissioned a land surveyor, Ms Marion Mohammed, to conduct a cadastral survey of the Property. Ms Mohammed conducted the survey on 25 April 2017 and produced a survey plan two days later. It was not disputed that, in the absence of any trees or crops or other markers, she had relied exclusively on Mr Gormandy to point out to her the boundaries of the Property of which he claimed he had had possession. Ms Mohammed also produced in her survey 11 scanned aerial photographs dating between 1980 and 2014 which showed cultivation of different parts of the Property. The survey plan measured the property as comprising 1.8662 hectares or approximately 4.6 acres and Ms Mohammed pointed out to the appellants the disparity between this and the three acres which Mr Gormandy claimed to have possessed. Notwithstanding that advice, Mr Gormandy pleaded a case that he had occupied and cultivated land of approximately three acres more or less and that the land had been discovered in a recent survey to comprise 1.8662 hectares.

The judgment at first instance

13. After a trial in the High Court, Rahim J held that Mr Gormandy had occupied part of the Property for the purpose of farming and that he was a bona fide farmer by the time he entered into the Sale Agreement. But he concluded that Mr Gormandy had failed to demonstrate on the evidence that he had continuously used a defined and ascertainable 4.6 acre parcel of land for the requisite period to establish ownership by adverse possession. He concluded that the evidence established only that Mr Gormandy had cultivated part of the Property. In reaching this view the judge had regard to the facts (i) that the only evidence as to the extent of occupation came from Mr Gormandy as the other witnesses whom he called, including Ms Mohammed, had relied on what he had told them, (ii) that Mr Gormandy's case was that he had believed that he had cultivated land amounting to three acres and only learned that the Property amounted to 4.6 acres after the cadastral survey, (iii) that Mr Gormandy admitted on cross-examination that he did not have the entire Property under his control in 1985, (iv) that there had been a clear path or fire break on the western side of the Property adjacent to the land later purchased by Julin Ltd, (v) that land towards the northern boundary of the Property near Kiscadee Avenue had been used for the dumping of refuse, (vi) that a letter from the Ministry of Agriculture dated 2 August 2013 stated that Mr Gormandy was cultivating 2.5 acres of land, (vii) that Ms Mohammed's evidence based on her examination of the aerial photographs was that the entire Property had not been cultivated at the same time but that different parcels of land within the Property had been cultivated at different times, and (viii) that there was no evidence of the precise size of the plots that had been planted on a rotational basis or of the length of occupation of the various plots. It is relevant also to record that counsel for the Housing Corporation made a successful attack on Mr Gormandy's general credibility based on untruths which he had told in a sworn statutory declaration in order to obtain housing from the National Housing Authority.

14. The judge (in para 401 of his judgment) asked himself whether it was reasonable to believe that Mr Gormandy had been in error in believing that he was farming three acres and only found out that he was farming more land after the survey. The judge did not accept Mr Gormandy's evidence that he had been mistaken about the area which he had farmed initially as a hobby and then as a part-time commercial business, stating (para 402) that "It is a matter of public knowledge … that farmers are very good at averaging". The judge observed that Mr Gormandy was now claiming that he had occupied an area that was 12 lots larger than he had thought it was. He held that Mr Gormandy must have had a clear knowledge of the lots within the Property having portioned them out on a rotational basis for cultivation. In substance the judge concluded that Mr Gormandy wanted the court to believe that his occupation was more extensive than it in fact was in order to claim

the whole Property. He did not accept Mr Gormandy's evidence that he had occupied the entire parcel of 4.6 acres (para 403).

15. The judge therefore concluded that the appellants had no right, title or interest in the Property and that the Sale Agreement was of no effect.

The judgment of the Court of Appeal

16. The appellants appealed the judgment of Rahim J. They advanced three arguments. First, they submitted that the judge fell into error in making a finding that was not put to Mr Gormandy on cross-examination and had not been part of the Housing Corporation's pleaded case, namely that he had failed to define the boundaries of the disputed land ("the Pleading Issue"). Secondly, they submitted that the judge had erred in making inappropriate use of the doctrine of judicial notice ("the Judicial Notice Issue"). Thirdly, they argued that the judge had failed to take into account relevant material evidence ("the Material Evidence Issue").

17. The Court of Appeal, in a careful and detailed judgment, correctly stated that an appellate court had to be cautious about disturbing a judge's findings of primary fact and would intervene in a judge's findings of fact only if satisfied that the judge had gone "plainly wrong". The court rejected the challenge on the Pleading Issue, holding that one of the issues raised in the pleadings was the extent of the land that Mr Gormandy had continuously controlled and occupied. The burden of identifying the extent of the land claimed to have been occupied had rested on the appellants when the Housing Corporation had pleaded that the land was overgrown and that Mr Gormandy had not occupied it to the extent and for the duration that would extinguish its title. It had been put to Mr Gormandy on cross-examination that he was never in possession of the entire 4.6 acre parcel. It had therefore not been unfair for the Housing Corporation to submit at the end of the trial that the appellants had failed to prove their case as to the area of land which Mr Gormandy had possessed.

18. The court also rejected the appellants' submissions on the Judicial Notice issue, holding that the judge was not speaking of the doctrine of judicial notice but was adopting a practical approach, applying his common sense when assessing the credibility of Mr Gormandy's claim of the extent of his occupation. The use of the term "judicial notice" in the judgment did not support the contention that there had been an improper assessment of the evidence.

19. On the Material Evidence Issue the court held that it had not been demonstrated that the judge's analysis was plainly wrong as the judge had had a

sound basis to reject the appellants' claim to the 4.6 acre parcel of land. Between paras 117 and 174 of its judgment the Court of Appeal dealt with each of the contentions which the appellants had raised in relation to the evidence in the case.

The appeal to the Board

20. The appellants appeal to the Board with the leave of the Court of Appeal by order dated 3 March 2021.

21. In their written case the appellants assert that the appeal raises three questions of law. The first issue they seek to raise is whether the judge or the Court of Appeal was entitled to take the view that Mr Gormandy should be taken as having occupied only three of the 4.6 acres of land with the consequence that he had not furnished evidence of the location of the three acres which he had occupied. The second issue challenged the legal relevance to Mr Gormandy's claim of the evidence of (i) the maintenance by the owners of the land on the western boundary of the Property of the path or firebreak on the Property and (ii) the dumping of rubbish on the Property near Kiscadee Avenue. The third issue asked the Board to state the correct conclusion in law which should have been reached if the courts below had resolved the first two issues correctly.

22. Counsel for the appellants submit that the judge erred in relying on the doctrine of judicial notice and failing to conduct a fact-finding exercise. The Board is satisfied that there is no substance in this challenge, essentially for the reasons given by the Court of Appeal. The judge assessed the evidence and applied his common sense in reaching the view that Mr Gormandy as an experienced market farmer would have been aware if he were cultivating land that was over 50 per cent greater in area than his repeated estimate of three acres.

23. Counsel for the appellants also submit that there are two reasons why the appeal falls within the exception to the Board's practice set out in proposition 4 in *Devi v Roy*, which the Board has set out in para 4 above. The first is that the failure to put to Mr Gormandy that he was deliberately exaggerating the extent of the land which he had occupied and that he was making a deliberately inflated claim to the court amounted to a fundamental procedural unfairness. Secondly, the judge by resorting to "judicial notice" and the Court of Appeal by asserting "common sense", in order to decide that Mr Gormandy had deliberately exaggerated the extent of the land which he had occupied, had ignored the contemporaneous documentary evidence which the aerial photographs provided showing cultivation throughout the Property. Citing as examples *Reid v Charles* [1987] UKPC 24 and *Attorney General v Samlal* (1987) 36 WIR 382, 387, the appellants submit that a judge is required to

check his or her assessment of a witness's demeanour and oral evidence against among other things contemporary documents. They submit that the courts had failed to do so and accordingly had failed to undertake a proper evaluation of the evidence.

Determination

24. The Board is satisfied that this appeal does not fall within the exceptions to its general practice which the Board set out in *Devi v Roy*.

25. The first ground which the appellants propose as vouching the exception is the failure of the Housing Corporation to put to Mr Gormandy that he was exaggerating the extent of the land which he had occupied. This is in essence the Pleading Issue which the Court of Appeal addressed. In the summary of its judgment (para 10(a)) the Court of Appeal stated:

> "The Pleading Issue: As a matter of law and on the pleadings one of the main issues raised in this case for trial was the extent of land which was under the continuous physical control and occupation by Gormandy. There could be no surprise to the appellants that the question of properly ascertaining the boundaries of actual occupation was to be a matter for which they must adduce credible evidence."

The Board agrees. In its pleaded defence the Housing Corporation had averred (para 10) that Mr Gormandy "did not have any exclusive, continuous, sole or effective possession and control of [the Property] since 1984 or at all". The Housing Corporation referred to in its pleaded defence and led eyewitness evidence in the form of witness statements and oral evidence that part at least of the property had been overgrown with trees and bushes. In para 12(b) of its defence the Housing Corporation averred:

> "If it is found that [Mr Gormandy] planted on the subject lands, carried out any cultivation of crops or cleared any part or portion of the subject lands, the [Housing Corporation] says that [Mr Gormandy's] purported sporadic use of parts or portions of the subject lands did not constitute open, continuous, exclusive, sole, undisturbed or effective possession of the same for the time necessary to

result in the extinguishment of the title of the paper title owner of the subject lands or at all".

Further, as the Court of Appeal recorded in para 93 of its judgment, Mr Gormandy was challenged on cross-examination that he had never been in exclusive possession of the Property or even the three acres of land and that he had not excluded people from going onto the Property. In that cross-examination counsel put to Mr Gormandy that he had been planting parts of the land from time to time. In the Board's view there was no fundamental procedural unfairness in requiring Mr Gormandy to prove the extent of the land of which he had had exclusive possession and, on his failing to do so, in concluding that he had exaggerated the extent of the land which he had cultivated.

26. The second ground for claiming an exception to the Board's general practice was in essence that it was unfair to rely on common sense as to what a farmer would have known about the area he cultivated in order to conclude that Mr Gormandy had exaggerated the extent of his possession of land within the Property and that the courts had ignored the evidence of the aerial photographs which showed over several years the cultivation of large parts of the Property. Rahim J did not ignore the documentary evidence and Ms Mohammed's interpretation of the aerial photographs. As he recorded at para 405 of his judgment her evidence demonstrated that different parcels within the property had been cultivated at different times and that at no time was the entire Property clear. Rahim J concluded (para 406) that Ms Mohammed's evidence established that Mr Gormandy had cultivated the majority of the Property and not the whole. That was consistent with Mr Gormandy's claim to have occupied three acres. The judge also relied on the letter of the Ministry of Agriculture dated 2 August 2013 which stated that 2.5 acres had been planted by mixed vegetables and trees, which he took as contradicting Mr Gormandy's claim to have occupied the whole of the Property. While the judge considered these matters in his judgment after expressing the view that Mr Gormandy had not established that he had occupied the whole of the Property, the Board is satisfied that the judge was correct to conclude that the aerial photographs and the letter of the Ministry of Agriculture supported rather than contradicted the view which he reached on Mr Gormandy's evidence of the extent of the land which he had occupied.

27. In the Board's view both Rahim J and the Court of Appeal have made a proper evaluation of the evidence led in the trial. The Board in summary observes that (i) the general attack on Mr Gormandy's credibility was successful as he admitted the untruthfulness of his statutory declaration which he made when seeking housing, (ii) Mr Gormandy repeatedly claimed to have cultivated three acres in his oral evidence and had referred to the subjects as being three acres in the Sale Agreement and the plan annexed to it, (iii) similar estimates of the extent of Mr Gormandy's cultivation

were made by Mr Sammy and the appellants' witness, Andy Dubay, (iv) Mr Sammy had destroyed all evidence of Mr Gormandy's occupation within the Property before the cadastral survey had been carried out with the result that Mr Gormandy had to tell Ms Mohammed where the boundaries were of the lands of which he claimed possession, (v) the aerial photographs as explained by Ms Mohammed suggested periodic rotational cultivation of parts of the Property, and (vi) the Ministry of Agriculture's letter of 2 August 2013 also supported the view that Mr Gormandy had carried on rotational cultivation of parts of the land within the Property, as Rahim J concluded.

28. This is therefore not a case in which there has been a miscarriage of justice or a violation of a principle of law or of procedure of the nature discussed in *Devi v Roy* which would cause the Board to depart from its established practice of not intervening where there have been concurrent findings of fact.

Conclusion

29. The Board dismisses the appeal.