

Presentation on Adverse Possession

Adverse Possession as explained by Lord Millet in Privy Council Appeal No. 8 of 2000.

In *Ramnarace and Lutchman*, Lord Millet explains that adverse possession is "possession which is inconsistent with, and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by the lawful title or with the consent of the true owner."

HISTORICAL BACKGROUND:

Due to Tobago's peculiar historical, cultural and administrative antecedents, the enjoyment of the subject parcel of land, has unlike the case of adverse possession, been with the permission of the owner and his heirs. I am sure it does not bear repeating that the history behind many Tobago applications is that the applicant was permitted to occupy a portion of land by a proud and supportive grandparent. Others grew up in their parents' homes and were allowed to construct their dwelling houses a short distance away. Still others purchased lands and were allowed into occupation by the owner on the promise to make small payments until the full sum was liquidated. Can all these situations where the original owner and/or his descendants actively supports the application be termed "adverse"?

There are therefore a large number of parcels of land in Tobago which have been lived on, for generations, without the owners/occupiers having proper title thereto.

As history indicates, as recently as the 1940's when lands were purchased, the deed was embossed with the appropriate stamp evidencing the fact that the relevant stamp duty was paid.

The deed was next presented to the then Warden's Office (now the Inland Revenue Office) at Scarborough and the parcel of land was entered on the

Assessment Roll according to the parish and the owner was given an assessment number and his deed was returned to him.

Most people did not travel to Trinidad to register their deeds (at the time Tobago had no land registry) but rather, they kept the copy their deeds with them, those that got that far and thought that that document was the registered title document. Over the passage of time, the fragile paper became unreadable, or disintegrated. Several of those said deeds were lost in Hurricane Flora of 1963 as well.

An attempt thereof re to find a root of title, for the most part is futile as no deed was registered in the majority of cases. Most of the assessment rolls are blank in the comments field and do not mention any deed on record.

Most, of the assessed owners are currently deceased. Many had several children who merely possessed the land, one of them, or sometimes none paid the land and building taxes. There are other cases where only one such heir remained on the land, others having died or migrated to Trinidad or beyond.

BRINGING LANDS UNDER THE RPO AS A SOLUTION

The only solution to persons, who fall within the scenario described above, is to bring their lands under the Real Property Ordinance. Without proper title, the persons are in occupation but can neither sell, mortgage, subdivide nor otherwise deal with the property. As it currently stands, with most of the applications from Tobago not being approved, this has caused severe hardship to the people of Tobago especially when they have gone through the expense or paying Attorneys' fees, paying to have the land surveyed, paying for a valuation and On Site Investigators report etc. The same hardship is suffered by some Trinidadians where they, too have been living on family lands. For the most part, the applications are not being approved because the Judge can find that adverse possession has not been proven.

Problems encountered in Tobago.

1. Requirements of the Judges Guideline.

The purpose behind the Judges Guidelines is unclear to me. No

where does it expressly declare its purpose nor does it state what is the "mischief" that it is intended to address. I can only assume that it is intended to eradicate and/or reduce some problem - or problems - that the Real Property Ordinance Chapter 27 No. 11 does not adequately address. Herein lies my first problem with the Guidelines. In my respectful view, the Guidelines as presently worded, are tantamount to **judicial law making**. As evidence of this I would put forward the following arguments.

The Guidelines:

- i) **create totally new requirements, some of which are directly in conflict with the provisions of the Act.**
- ii) **introduce great confusion and does not appear to be well thought out.**
- iii) **Its requirements are onerous and almost punitive**
- iv) **increase substantially the cost of making an application**
- v) **are discriminatory in their effect and application against applicants who live in Tobago or whose application relates to lands in Tobago.**

As an example of i) and ii) above, I would cite the repeated

references in the Guidelines to the words "adverse possession."

The term is used throughout the document and it leads me to think, quite respectfully, that there is some confusion in the minds of those who formulated the Guidelines as to the basis of an application under the Act. Such an application is not based on adverse possession but on possession *simpliciter*. Adverse possession may be one of the grounds on which an application can be founded, but it is not the only form of possession that entitles an applicant to regularize his title. In fact, in stark contrast to the Judges Guidelines, the Act repeatedly speaks of "possession" not "adverse possession". To require that possession be adverse is to

disqualify a substantial number of Tobago applicants from the pool of eligible applicants.

As further example of the confusion being created by the Guidelines one only has to look at the title of the document. Contrary to what is indicated therein, Section 18 is not the section that authorizes the bringing of lands under the provisions of the Act, but rather Section 8.

The following appear to me to be requirements that are being **created and or expanded upon** by the Guidelines, contrary to the Act:

i) Guideline A 8 — A valuation is only required under Section 29 of the Act "if the Registrar General is not satisfied as to the correctness of the declared value." It appears therefore that with the mandatory requirement for a valuation stipulated by the Guidelines, the Registrar General is, at the outset, abdicating her statutory responsibility to make a judgement as to the correctness of the value. In addition, except I have overlooked something, nowhere in the Form A, is it stipulated that the value must include the improvements made to the land. That reeks of unfairness especially as it is the title to the land that is being regularized not the land itself and when the applicant went into possession, the improvements were not yet made.

ii) Guideline A 8, in my view, simply puts another layer of expense on an already burdened applicant who may have preferred to declare the "correct" value, and thus eliminate the additional cost of a valuator. The Guidelines have removed that option away ' from the applicant. It is compounded by the fact that the required valuation must include the improvements to the land. Yet another case, in my respectful view, of **judicial lawmaking**,

iii) Guideline A 11 — The reference to "person interested" is puzzling. Does that mean the applicant?

iv) Guideline A 12 — Escheat. This requirement convinces me that there is a lack of understanding of the purport and workings of the Real Property Act. There is no escheat to the state because Parliament in its wisdom provided an avenue through the Act, for eligible persons to avoid their lands being escheated. The Act, unlike the Judges Guidelines, is authorized by Parliament.

Guideline D (Witness Declaration)

I am unable to identify anywhere in the Act (including the Schedules) that requires witnesses to make declarations in support of the application. It is however an acceptable practice against which one can have no objection. The matters set out in Guideline ID are in my view quite reasonable, except those at (m) and (n) as well as the increase of the number of witnesses to three. Both of these requirements appear to be out of touch with reality and are again onerous and punitive. It is virtually impossible for an 80+ witness to identify a parcel of land by reference to a sketch" and the other features referred to in (m)).

Similarly, does anyone reasonably expect to get details of tenancies on the subject land from such a witness?

8. Guideline F (Abstract of Title)

This requirement appears to be inconsistent with the Act and it is onerous, expensive, and like the previous references, appears to be punitive in tone. Section 10 of the Act requires the applicant to **deposit** with the Registrar-General all instruments in his possession or under his control ... and furnish, **if required**, an abstract of title". Hence furnishing an abstract of title should be at the discretion of the Registrar-General. However the Registrar-General has converted this requirement to a mandatory, one abandoning the discretion that she has been given by the Act. In

respect of this as well as the Guideline pertaining to valuation, it appears the Registrar-General does not want to carry out some of the responsibilities placed on her by the Act and is anxious to shunt them off on other persons.

One also wonders in light of Section 12 and Guideline 3 (Requirements from Registrar-General), why is there a need for the applicant to incur the expenses of providing an abstract of title when the Registrar General is required by the Act to provide it.

Guideline 4 (Notice)

If it is accepted that some applications are not based on adverse possession then to require the applicant to make judgment as to which persons have a legal and equitable interest seems to perpetuate the misconception about the application. Again this is another area of conflict with the Sections 17 and 18 of the Act.

Guideline 5 (Advertisement)

The requirement for publication of the notice in at least two daily newspapers etc., is another blatant case of judges creating law. It is contrary to Section 14, which states the advertisement shall be done in **one daily newspaper**. In addition, the bold heading of the advertisement is **incorrect** in cases where the applications are not based on "adverse possession."

Guideline 6 (On-site Investigator's Report)

This is a creature that is alien to the Act. It is yet another example of laws being made by the judiciary.

Some four years ago I was invited to be part of a Special committee APPOINTED TO MAKE RECOMMENDATIONS FOR THE AMENDMENT of the REAL PROPERTY ORDINANCE (Chapter 27:11) and or THE JUDGES GUIDELINES.

Most of the problems that I have already elaborated on as it relates to the judges guidelines were heightened in the final document prepared by the committee. However there are a few others that are worthy of mention.

1. Training for persons involved on the process, especially examiners in the Registrar Generals office. A common query by personnel in this department had to do with the area of land as assessed and that found on survey. In 90% of the cases they differed and they could not understand that the area on the assessment is an approximation and can only be certified/corrected by a survey.
2. Having the same judge deal with an application. It was customary that a judge in Chambers remain there for a period of six months. Consequently he or she would not have dealt with the same application from beginning to end. One judge would therefore require A B and C. When those queries were answered and returned another judge may be in Chambers and that judge often times would make other requirements much to the irritation of the lawyer and the applicant.
3. Applications to bring lands with perfect title under the RPO should be subject to different requirements.
4. The Registrar General's department should provide the title search at a cost to the applicant.
5. The word "adverse" should be deleted from the heading of the advertisement as there are various forms of possession.

In closing let me remind us that there is a Land Titles Legislation Package" which is made up of the Land Adjudication Act, of 2000, the Land Tribunal Act No15 of 2000, and the Registration of Titles to Land

Act, No 16 of 2000, which are meant to deal with the problems of adverse possession and defects in title. It is my understanding that the Acts have not as yet been proclaimed by the President since the regulations to operate the Acts have not yet been passed. I am therefore urging the Institute, the Land Survey board, and the Legal fraternity represented here to use all means available to have these Acts put in place so that the problems of which I speak will be a thing of the past.

Thank you.

