

SUPREME COURT OF SEYCHELLES

Reportable
[2020] SCSC 268
CS 131/2018

In the matter between:

CAROLINE CHETTY
(rep. by Tamara Christen)

Plaintiff

and

1. THE ESTATE OF REGIS ALBERT
(rep. by its executor Camille Albert)

2. THE ESTATE OF LORNA ALBERT
(rep. by its executor Camille Albert)

3. CAMILLE ALBERT

4. MICHEL ALBERT

5. LOUISETTE ALBERT

6. DEZILNA ALBERT
(all defendants rep. by Wilby Lucas)

Defendants

Neutral Citation: *Chetty v The Estate of Regis Albert & Ors* [2020] SCSC 268 CS 2/2019

Before: Twomey CJ

Summary: Section 80 of the Code of Civil Procedure - Counter claim - Acquisitive prescription - Articles 2229 - 2235 of the Civil Code – Animus

Heard: 10-11 October 2019, Submissions 13 November 2019

Delivered: 8 May 2020

ORDER

The Defendants' counterclaim of acquisitive prescription of Parcels C5773 and C5769 is dismissed. The Plaintiff's prayers are granted. The Defendants are ordered at their own cost to remove all structures they have erected on the properties and to return them to their natural state within eighteen months of this judgment. The Defendants are further ordered not to trespass on the land after that date and not to erect any further structures.

JUDGMENT

TWOMEY CJ

The Pleadings

- [1] The Plaintiff, by amended Plaintiff dated 3 May 2018, states that she is the registered owner of Parcels C5773 and C5769 (hereinafter the Property) situated at Anse Royale, Mahé and that the Property were subdivisions of Parcel C5767, the latter being a subdivision of Parcel C1546.
- [2] She avers that the First and Second Plaintiffs whilst they were alive and without her permission and consent erected structures, carried out works and planted vegetation on the Property. The Third, Fourth, Fifth and Sixth Defendants still live on the Property.
- [3] She further avers that despite the Defendants filing a claim in a previous action with regard to the ownership of the Property by succession, the same was dismissed and that the Defendants have no legal right to the Property.
- [4] The Defendants, in a joint Statement of Defence filed on 9 May 2019, raise two pleas in *limine litis*, namely:
1. The Plaintiff is prescribed as per Article 2262 of the Civil Code as the Defendants' possession of the Property started over fifty years ago without interruption.
 2. Alternatively, the Plaintiff is prescribed pursuant to Article 2271 of the Civil Code as the Plaintiff's right of action is limited to five years and the occupation of the property started over fifty years ago.
- [5] On the merits, the Defendants aver that they are not aware that the Plaintiff is the owner of the Property and that the houses they occupy were built more than fifty years ago.
- [6] The Third, Fourth, Fifth and Sixth Defendants aver that the First and Second Defendants were their parents with whom they lived since birth on Parcel C1545.

[7] They aver that they are claiming the “right of ownership [of the Property] by virtue of [its] exclusive possession under Article 2262 of the Civil Code for their occupation of more than twenty years.”

The Evidence

The Plaintiff’s oral evidence

[8] The Plaintiff testified that she owns property at les Canelles, Mahé, namely Parcels C5773 and C5769. She visited the Property before she purchased it in 2008 and saw structures thereon but was told by Mr. Radley Sinon representing the seller, Miriam Sinon, that the occupants would be moving out as soon as the Property was sold. Subsequently, the notary who handled the transfer also effected a search at the Land Registry and she was notified that no encumbrances were registered against the Property.

[9] In 2007, unknown to her at the time, the Defendants (then Plaintiffs) filed a case claiming ownership of the Property she had purchased. On learning of the suit, she filed an intervention to their plaint asking the Court to declare her the lawful owner of the Property and to dismiss the Defendants’ case. Ultimately, the Court did not pronounce itself on the ownership of the Property as the case was dismissed for want of prosecution as two of the original Plaintiffs in the suit had passed away and no one was appointed to represent their Estates. In that plaint it is stated that the structures on the Property were built with the permission of one Joseph Cassime.

[10] The witness stated that she wanted the Court to evict the Defendants and to have them remove their structures at their own costs. The structures are mostly on Parcel C5769 with some encroachment on Parcel C5773.

[11] The witness also produced the court proceedings in CS 90/2007 which suit was dismissed by the Court for want of prosecution.

The Defendant’s Oral Evidence

[12] Camille Albert, the Third Defendant and the Executor of the Estates of the First and Second Defendants, gave evidence that he was born on 22 April 1972 and has lived on the property all his life. His parents were the First and Second Defendants, Regis and

Lorna Albert née Cassime and they had received permission from the owner, Noelie Loger, to build on the land. Ms. Loger was his ‘grandparents’ grandmother’ (sic) and his family had always lived on the Property. He now lived on the Property with his partner and children.

[13] There were four structures on the Property and they were all occupied by his siblings and their families. All the structures were built by his father, Regis Albert. He was not willing to vacate the Property.

[14] In cross examination, he stated that his parents received permission to erect the structures from the heirs of the property. It was common to build structures on the Property without its prior subdivision as it was heirs’ land. He admitted that in 2007 in the previous court case filed by his mother, Lorna Albert, the Second Plaintiff in that case, that she had averred that she had built the structure on the Property because she was entitled to the land by succession. He was of the view that he also had a right to the Property as an heir of the original owner Noelie Loger. He also admitted that in the 2007 plaint there is mention of only two structures, a house belonging to his mother and one to Brunette Cassime, his grandmother. He stated that his entitlement to the Property could either be by the fact that he was an heir of Ms. Loger or through long occupation – although he was of the view that the former would be more the case.

[15] Mr. Renald Robert, the Third Defendant’s older brother, testified that he used to live in his parent’s house on the Property. He left when he was nine or ten years old. His parents had obtained the permission of their parents and they of their parents before to build on the Property. The original house had been of corrugated iron and was built by his father Regis Albert in or around 1969. In 1977, the house was converted into a three-bedroom house. He came back to live in the house about five years ago. He was unaware as to the reason why he had not been added as a Defendant to the instant suit as he also lived in the house.

[16] The Property had been sold fraudulently by one Alzette Lozé to Miriam Siméon. He admitted that he had nothing in writing to show that his parents had permission to build on the land.

[17] Michel Albert, the Fourth Defendant adopted his brother's evidence but also added that he had lived on the Property all his life but was never informed about its subdivisions or the sale of the Property.

[18] The other Defendants adopted their siblings' evidence.

Root of title

[19] Witnesses from the Land Registration Division submitted documentary evidence including the deeds of sale and land transfers to the Court from which the Plaintiff's root of title can be established.

[20] On Thursday 8 August 1912, with the attestation of Charles Quatre and Andre Jules, Noelie Loger acquired three acres of land by *notoiréte prescriptive* (prescriptive acquisition) at 'Mont Plaisir', Mahe for having lived thereon for twenty-four years continuously and uninterruptedly, peacefully, publicly, unequivocally and as a person acting in the capacity of an owner (Court Exhibit 1).

[21] This land was surveyed as Parcel C1545 and placed on the New Land Register on 7 February 1986 and notice sent to Ms Loger's (Lozé) heirs, care of Mrs. Marthe Marie at Anse Aux Pins (Court Exhibit 2).

[22] In 2001, Parcel C1545 was subdivided on the request of Bernard Mondon, the Executor of the estate of Ms. Loger's executor, into Parcels C2239 and C2240 (Exhibit Court 3).

[23] Parcel C2239 was transferred to Alzette Stella Lozé (Exhibit Court 4) and Parcel C2240 to Miriam Sinon (Exhibit Court 5).

[24] Miriam Sinon subdivided Parcel C2240 into Parcels C4874 and C4875. She transferred Parcel C4874 to one Julien Dominique de Pinho (Exhibit Court 6).

[25] Parcel C4875 was further subdivided by Miriam Sinon into Parcels C5765, C5766, C5767, C5768, C5769, C5770, C5771, C5772, C 5773 and C5946 in 2003 (Court Exhibit 7 and Exhibits P3 and P4).

- [26] Parcels C5769 and C5773 were transferred to Caroline Chetty by Radley Sinon acting on behalf of Miriam Sinon under a power of attorney on 5 February 2009 for SR175,000 and SR 350,000 respectively (Court Exhibits 9, 10 and Exhibits P6 and P7).
- [27] Several houses are clearly visible on Parcel C5769 on the Geographic Information System aerial photos of January 2020 (Exhibit P8a).

Closing Submissions

- [28] The Defendants have repeated their pleas in *limine litis* and have reiterated that they have occupied the parent parcel of Parcel C1545 for over fifty years while their parents, the First and Second Defendants, were still alive and that they had not been aware that the subdivisions had taken place. They have also made further submissions relating to the behaviour of the executor of the Estate of Noelie Loger amounting to evidence not adduced at the hearing which is therefore neither repeated nor considered by the Court. They have also submitted that they are claiming ownership (prescriptive acquisition) of the Property by virtue of Article 2262 of the Civil Code as prayed for in their prayer in the Statement of Defence.
- [29] Learned Counsel for the Defendants, Mr. Wilby Lucas, also submitted that the Defendants corroborate each other's evidence as to their long occupation of the Property and that they are not bound by previous pleadings relating to their entitlement to ownership of the Property by virtue of having inherited the same and on which the Court made no ruling. He has also relied on the authority of *Equator Hotel v Minister for Employment and Social Affairs* (1996 -1997) SCAR 243 for the principle that the failure or omission of a party to object to issues during proceedings does not have the effect of importing these issues into the pleadings or evidence.
- [30] With regard to the Defendant's acquisitive prescription of the Property, Counsel submitted that when the Plaintiff purchased the Property in 2009 it was already burdened with the structures belonging to the Defendants and which they had occupied for the requisite period of at least twenty years. He also submitted that the Defendants' possession of the Property meets all the conditions of Article 2229 for its acquisition by them.

- [31] Learned Counsel for the Plaintiff, Ms. Tamara Christen, conceded with respect to the plea in *limine litis* relating to acquisitive prescription that the prescriptive period to extinguish a claim in relation to a property (real) right is indeed twenty years. She submitted however that extinctive prescription runs against the rights holder only from the date the person asserting the rights acquired these rights, which in the instant case is the date of the registration of the deed of transfer, that is, 5 February 2009. She relied for this proposition on the Encyclopédie Dalloz (Ed 1985) paragraph 605 - *Prescription Extinctive, computation des délais*. She also submitted on the second plea in relation to the limitation period of five years, that the limitation period of five years for the bringing of an action is excepted by claims relating to property rights.
- [32] Counsel for the Plaintiff further submitted that, as the registered owner of the Property, the Plaintiff is asserting her rights of ownership over the Property and that to displace the Plaintiff's right of accession under Article 552 of the Civil Code, the Defendants must prove that their unregistered rights were obtained by acquisitive prescription which they have failed to do. Accordingly, under Article 555.2 the Plaintiff is entitled to demand the removal of the structures at the Defendant's costs.
- [33] Learned Counsel also submitted that judicial notice must be taken of previous pleadings in CS 90/2007 in which the Defendants asserted their rights to the Property by succession as the heirs of Noëlie Loger and that consideration must be given to the evidence of the Third Defendant in the instant case when he stated that his parents were entitled to build on the Property because they were heirs of the Noëlie Loger.
- [34] With respect to the Defendants' claim of acquisitive prescription, counsel submitted that the conditions for such acquisition under Article 2229 of the Civil Code had not been satisfied. In particular, she submitted that the *animus* of possession is not present in the instant case as the Defendants believed that that they had a right to build and remain on the Property because of their succession rights which would therefore make their possession equivocal.

[35] She also submitted that the Defendants' belief that they had a right to right to remain on the Property ran counter to the provisions of Article 2240 relating to contrary title and would therefore bar their possession or *titre* of the same by acquisitive possession.

[36] Finally, Counsel submitted that the evidence of the Defendants that they had permission to build on the land would also run counter to the provisions of Article 2229.

Procedural difficulties arising from the pleadings

[37] The Court notes that the Defendants have not counterclaimed for acquisitive prescription of the Property although Paragraph 7 of their Statement of Defence states:

"...the Defendants collectively are claiming the right of ownership by virtue of exclusive possession under Article 2262 of the Civil Code for more than 20 years on either C5773 or 5769 of which he same has been extracted from C1545."

[38] They also pray for an order that they have acquired the Property by acquisitive prescription.

[39] With regard to counterclaims, section 80(1) of the Seychelles Code of Civil Procedure provides:

"Subject to subsection (2), where a defendant in any action wishes to make any claim or seek any remedy or relief against a plaintiff in respect of anything arising out of the subject matter of the action, he may, instead of raising a separate action make the claim or seek the remedy or relief by way of a counter claim in the action; and where he does so the counterclaim shall be added to his defence to the action."

[40] The issue that arises is whether paragraph 7 above amounts to a counterclaim. The jurisprudence on this issue is not settled. In the case of *Adonis v Celeste* (Civil Appeal SCA28/2016) [2019] SCCA 32 (23 August 2019), one of the (successful) grounds of appeal was that the trial judge erred by declaring that the respondent had a *droit de superficie* in respect of the Property, despite the fact that he had not brought a counterclaim to this effect. The judgment notes:

“At the hearing of the appeal, Counsel for the respondent acknowledged that the respondent’s defence had no counterclaim, and that it was not specifically pleaded that the respondent had a droit de superficie. However, he contended that the statement of defence had a clear plea at para 3 and a clear invitation at prayer (b) on which the trial court could make a finding that the respondent had a droit de superficie.”

[41] The Court rejected Counsel’s submission finding that:

“it was essential for the respondent to plead a counterclaim in accordance with section 80 of the Seychelles Code of Civil Procedure”.

[42] It concluded that:

“the learned trial Judge erred in law in declaring that the respondent has a droit de superficie in respect of the Property, because he did not bring a counterclaim to that effect.”

[43] The judgment cites the majority judgment in *Grandcourt and others vs Gill* (SCA 7 of 2011) [2012] SCCA 31 (07 December 2012), which considered whether it was regular for the appellants’ amended statement of defence, which had not pleaded a counterclaim, to pray for rescission of contract and damages. Applying section 80 of the Code of Civil Procedure, the majority concluded:

“if he seeks rescission of contract and damages he has run afoul the rules of civil procedure. There is no point praying for remedies in a defence when the basis for the remedy is not set out in pleadings [...]. ” ... "A prayer for a remedy in a defence does not by any stretch of the imagination amount to a counterclaim [...].

[44] The *Adonis* judgment reflects a general emphasis by the Court of Appeal in recent jurisprudence regarding the importance of pleadings. The Court of Appeal decision in *PTD Ltd v Zialor* Civil Appeal SCA 32/2017 [2019] SCCA 47 (17 December 2019) is the latest instalment in this respect – emphasising the need for allegations in every pleading to be, “(i) Material” and “(ii) Certain”. While not apposite on the facts, the judgment cites the case of *Elfrida Vel v Selwyn Knowles* Civil Appeal No 41 and 44 of 1988, which touches on the desire to ‘do justice’:

"It is obvious that the orders made by the trial judge was ultra petita and have to be rejected. It has recently been held in the yet as unreported case of Charlie v Francoise (1995) SCAR that civil justice does not entitle a court to formulate a case for a party after listening to the evidence and to grant a relief not sought in the pleadings. He was of course at pains to find an equitable solution so as to do justice to the Respondent but it was not open to him to adjudicate on the issue in particular re-conveyance which had not been raised in the pleadings".

[45] The issue of a procedural irregularity being a bar to a legal remedy has been considered on many occasions. Courts have recognised that a strict adherence to procedural requirements risks a perverse outcome and that a failure to comply with civil procedure should not be the basis for denying otherwise legally acquired rights. In *Coles and Ravensher* (1907) 1 KB 1 Collins MR aptly stated:

"Although I agree that a court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

[46] In our own jurisdiction in *Ablyazov v Outen & Ors* (SCA 56/2011 & 08/2013) [2015] SCCA 23 (28 August 2015) the Court of Appeal stated:

"We adopt the reasoning that procedure is the hand-maid of justice and should not be made to become the mistress even if many hand-maids would aspire to become mistresses: see Gill v Film Ansalt 2003 SLR 137; Mary Quilindo and Ors v Sandra Moncherry and Anor SCA 29 of 2009; Toomany and Anor v Veerasamy [2012] UKPC 13.

In the Toomany and Anor v Veerasamy [Mauritius], the Law Lords of the Judicial Committee [noted that] such technicalities raised to shut out litigants from the court system constitute a blot on the administration of justice. This has been made part of the law of Seychelles as per the decision of Twomey JA, now Chief Justice."

[47] In *Gill v Film Ansalt* (2013) SLR 137, the Court of Appeal recognised that there ought to be a careful balancing exercise carried out by the Court in such circumstances:

“Procedure is only the handmaid of justice. It should not be made to become the mistress. That is true. But, if the analogy is to be pursued, there is no handmaid if there is no mistress. In a number of cases, the courts will not look at the merits of a case for the purposes of deciding whether a mere procedural lapse should be condoned or not. The idea is not to lock the court door to a litigant but to allow him his chance, at his expense and at his risk and peril.”

[48] The case of *Grandcourt* could have easily been distinguished by the Court in *Adonis* - the former case concerned a contract to sell land and involved a defendant failing to counterclaim rescission of a contract and setting out damages arising therefrom. In two previous statements of defence he had included a counterclaim but had chosen not to do so in the third amended defence. He had clearly indicated by this omission that he did not wish to counterclaim. He also had not set out any claim in his defence but had only included a prayer for damages. The defendant in *Adonis* in contrast, had in the body of the statement of defence set out a claim of a right to remain on the property because of authorisation from the Plaintiff’s predecessor in title to build on the land and had repeated the same in a prayer in his defence.

[49] It must be noted that the filing of a counterclaim, instead of a separate action, is presented as an option in the Code of Civil Procedure – but not a requirement *per se*. The permissive wording “may” in section 80 (*supra*) makes that clear. It is obviously, in the interests of efficiency, preferable that a counterclaim is made in actions such as the present one.

[50] I find that in the instant case a counterclaim is clearly made out in the statement of defence and in the prayer.

Acquisitive prescription

[51] The law relating to acquisitive prescription in Seychelles begins with Article 712 of the Civil Code which provides:

“Ownership may also be acquired by accession or incorporation and by prescription.”

[52] The conditions for such acquisition are contained in the provisions of Articles 2229 - 2235 and 2261 of the Civil Code of Seychelles. Article 2229 provides that:

“In order to acquire by prescription, possession must be continuous and uninterrupted, peaceful, public, unequivocal and by a person acting in the capacity of an owner.”

[53] Article 2232 also provides:

“Purely optional acts or acts which are merely permitted shall not give rise to possession or prescription.”

[54] Further, Article 2261 provides that the rights by prescription shall be acquired when the last day of the period of possession has ended.

[55] Article 2262 also bars real actions in respect of rights of ownership of land after twenty years.

The Pleas in *Limine Litis*

[56] Two pleas in *limine litis* have been entered by the Defendants relating to the prescription of the instant suit - the first plea is to the effect that the Plaint is prescribed as per Article 2262 of the Civil Code as the Defendants’ possession of the Property started over fifty years ago without interruption. The alternative second plea is that the Plaint is prescribed pursuant to Article 2271 of the Civil Code as the Plaintiff’s right of action is limited to five years and the occupation of the property started over fifty years ago.

[57] The first plea could of course not be decided until evidence was adduced to support the averment that possession of the Property by the Defendants began fifty years ago. This is addressed below in relation to whether or not the Court finds that the Defendants have acquired the Property prescriptively pursuant to Article 2262.

[58] The second plea is dismissed as the prescriptive period for an action involving property is at least ten years. In the instant case, the suit relates to acquisitive prescription. The prescriptive period to extinguish such a claim is twenty years and only begins to run from the date the person asserting the rights acquired these rights, which in the instant case is

the date of the registration of the deed of transfer, that is, 5 February 2009. The suit is therefore not prescribed, having been filed on 3 May 2018.

Discussion

[59] Acquisitive prescription (*uscapion*) is the acquisition of a property right through the effects of possession over time as outlined by Article 2229 above. In the present case, there is no issue with continuous and uninterrupted possession; nor with the possession being peaceful and public (see *Anglesy v Mussard and anor* (1938) SLR 31). There is an issue, however, with respect to the last two conditions i.e. unequivocal possession and the possessor acting in the capacity of an owner – i.e. the *animus* requirement. In particular, whether *animus* is present in the instant case given (a) the Defendants’ evidence that their parents were given permission to build on the Property; and (b) that the Defendants believed that that they had a right to build and remain on the Property because of their succession rights.

[60] In so far as those conditions are concerned Gardner Smith CJ in *Anglesy* (*supra*) had the following to say on the subject:

“Equivocal” means ambiguous, that is, not the manifest exercise of a right (Boyer C.C Annoté, art. 2229) and “animo domini” or “à titre de propriétaire” means not à titre précaire”, but exclusive and not promiscuous (Boyer, art., 2229). The two must be taken together.”

[61] In general, a person seeking to prove acquisitive prescription must show *corpus* and *animus*. As explained in relation to French and Quebecois law:

“Acquisitive prescription in French and Quebec civil law is a means of acquiring property that is based on possession, which includes a material aspect and an intentional aspect: the possessor must demonstrate corpus and animus in order to acquire a title by prescription. Corpus refers to “physical control” or “the exercise in fact of a real right”. As for animus, it refers to animus domini, in other words, the intention to become the owner, or more broadly the “desire of the possessor to present himself to others as the holder of a real right.” (Emerich Yaëll. Comparative overview on the transformative effect of acquisitive prescription and adverse possession: morality, legitimacy, justice. In: Revue

internationale de droit comparé. Vol. 67 N°2,2015. La comparaison en droit public. Hommage à Roland Drago. pp. 459-496).

[62] As explained by Cody in relation to the Louisiana law of acquisitive prescription, the absence of *animus* operates as a bar to a finding of acquisitive prescription:

*“The absence of animus or the admittance of proof that possession began on someone else's behalf implicates the concept of precarious possession, which is insufficient for acquisitive prescription. The Civil Code defines precarious possession as “[t]he exercise of possession over a thing with the permission of or on behalf of the owner or possessor.” The precarious possessor in turn suffers from a legal presumption that he or she is presumed “to possess for another although he may intend to possess for himself.” This presumption is an important part of defeating acquisitive prescription and can be fatal to both a supposed possessor and quasi-possessor” (Cody J. Miller, *Boudreaux v. Cummings: Time to Interrupt an Erroneous Approach to Acquisitive Prescription*, 77 La. L. Rev. 1143 (2017).*

[63] In the instant case, the Defendants’ claim for acquisitive prescription is in conflict with the evidence of their permissive occupation of the Property. The first issue relating to *animus* is the purported permission granted to the Defendants’ predecessors in title to build on the Property.

[64] Permissive occupation is not compatible with prescriptive acquisition: if permission was granted to build on the Property, this will operate as a bar to prescriptive acquisition. To find otherwise would discourage people from the positive social act of allowing their neighbours, for instance, to use portions of their land. If the initial occupation was permissive, the claimant must identify and prove when this ended and when acquisitive prescription commenced to support a claim for acquisitive prescription. As noted by the Court of Appeal in *SDC v Morel* Civil Appeal 8/2002 (18 December 2002):

“Once permissive possession was admitted in evidence, the case for the respondent had to fail. It negated the foundation of the claim of the respondent, based as it was on acquisitive prescription.

... On the facts of this case the respondent must establish when his permissive occupation terminated and when his possession as owner commenced. Time begins to run only after he commences to possess the parcel as owner.”

[65] The same approach was adopted in the Supreme Court decision of Egonda-Ntende CJ in *Bertin v Farlour* Civil Side No 228 of 2004. The Petitioner, Fanny Bertin, in her petition asserted that 47 years prior to the presentation of this petition she occupied a piece of land at Mare Anglaise, owned by Milena Tirant, who passed away on 23rd October 1988. The judgment records:

“The petitioner has been clear. She was given permission to stay on this land or at least develop it by the owners according to her own testimony. ... It is therefore clear that she did not occupy this land as owner. She knew the family that owned the land. She sought their permission for the various developments. She occupied the land on behalf of another and not herself. ... She knew the land belonged to some other people. She did not dispute their title. When Mrs Milena Tirant died the petitioner waited for the intervenor, as the only legal heir of her mother, Milena to process the gift of land promised to her by the mother. And that was not to happen as she was told in 2004 to stop touching anything on the property.... It is clear that the attempt to assert ownership occurred only in 2004 after she was told by Marsya Tirant not to touch anything on the property in question. That is when she went to an attorney and this case was filed. She had previously on the strength of her own evidence been waiting for the intervenor to prepare papers to transfer the land in question to her as it had been given to her by the intervenor's mother as a gift.”

[66] Turning to the present case, the evidence of Camille Albert, the Third Defendant, is problematic in the same way for a claim of prescriptive acquisition. In cross examination, he stated that his parents received permission to erect the structures from the heirs of the property and that it was common to build structures on the property without its prior subdivision as it was heirs' land.

[67] Mr. Renald Robert, the older brother of the Third Defendant, also gave evidence to this effect, noting that his parents had obtained the permission of their parents and they of their parents before to build on the Property. The other Defendants adopted their brothers' evidence. Furthermore, in the plaint filed by the defendants in 2007 claiming ownership of the Property, it is stated that the structures on the Property were built with

the permission of one Joseph Cassime. It must be noted that there is no evidence that the permissive occupation by the Defendants' predecessors ended when the Defendants themselves took possession of the Property.

[68] As an aside the Court notes Mr. Lucas's submission that the Defendants were not represented or advised by him when they gave evidence. Suffice it to say that the Defendants' answers were elicited in cross examination and would have been given had he been present or not. Similarly, the Court cannot be prevented from taking judicial knowledge of the averments in proceedings in a former suit admitted in evidence for its consideration.

[69] The instant case could be seen as analogous to the *Bertin* situation – where the petitioner lived on the land for almost fifty years. The petitioner believed that the former 'owner' was going to transfer the land to her as a gift. When this did not happen, she claimed acquisitive prescription. In the present case, it appears that the Defendants believed that they had inherited the land, until it became clear that they had in fact not, at which point they sought prescriptive acquisition.

[70] Another issue regarding *animus* is that the evidence reveals that the Defendants believed that that they had a right to build and remain on the Property because of their succession rights. Camille Albert admitted that in the case filed in 2007 by his mother, Lorna Albert (the Second Plaintiff), she had averred that she had built the structure on the Property because she was entitled to the land by succession. He was also of the view that he had a right to the Property as an heir. He also admitted that in the 2007 plaint there is mention of only two structures, a house belonging to his mother and one to Brunette Cassime (his grandmother). The Court further recalls his evidence that his entitlement to the Property was either by the fact that he was an heir of Ms. Loger or through long occupation – though he was of the view that it was more likely the former.

[71] When interpreting the Civil Code, the wording of the relevant article must be the starting point. Article 2229 refers to the need for the possessor to be 'acting in the capacity of an owner'. The reason for that belief is not necessarily material to the provision. Here, it is clear that the Defendants did believe that they were owners of the land and acted

accordingly. Even if the reason for believing that was unclear (equivocal), their belief of their status as owners was not: their evidence was unequivocal regarding their status as owners. The claim brought in 2007 is consistent with their belief that they owned the Property.

[72] Nevertheless, in the circumstances, the Defendant's defence to the Plaintiff's suit fails.

[73] Having stated the law, however, it must be said that the policy reasons underpinning the doctrine of acquisitive prescription support the Defendants' case. Acquisitive prescription is justified on moral, economic and public interest grounds. In terms of morality, acquisitive prescription sanctions the negligence of the *verus dominus* (true owner), while rewarding those who value the property. Economically, 'acquisitive prescription encourages the effective use of real property, favouring the active possessor over the inactive owner. This forces owners to look after their property, thereby ensuring a more efficient use of scarce resources.'

[74] In terms of public interest Yaëll (*supra*) states:

"As has been recently pointed out, "maintaining social order requires the consolidation of long-time factual situations and that such factual situations not be questioned for all time". Acquisitive prescription and adverse possession help ensure the stability of transactions and some certainty of ownership. Prescription gives some certainty to title, correcting any error or defect that may affect it, and even resulting in acquisition of title in some cases. Acquisitive prescription and adverse possession therefore have a transformative effect: a possessor, who can even be in bad faith, is transformed into an owner once the required period of time has run. Acquisitive prescription confirms or proves title and brings in line the law and a factual situation. In other words, prescription can clarify legal reality by giving recognition to an apparent state.

In both civil law and common law, the essence of possession may be found in communication. Possession seeks to communicate to third parties that one has control over a thing. This concept of communication explains the main effects of possession and, notably, of acquisition through acquisitive prescription. Ultimately, it is because possession is a means of communication that acquisitive prescription creates law, regardless of the bad or good faith of the possessor.

...

Law cannot be blind to social reality. If in fact a person acts as the owner, over a period of many years, it might be legitimate to treat him as such, regardless of whether or not he knows he was not the true owner at the outset of his possession.”

[75] In the instant case, the moral, economic and public interest justifications for acquisitive prescription favour the Defendants, who have lived on the Property their whole lives. They have erected structures, carried out works and planted vegetation on the Property. To recognise their occupation as giving rise to legal rights would be to bring the law in line with the factual reality. The new owner (the Plaintiff) knew that the Defendants were living on the property when she brought it, and therefore was put on notice.

[76] This Court is unable to grant legal rights to the Defendants but acknowledges the hardship their eviction from the Property and the demolition of their structures will cause. In the circumstances, the Defendants are granted eighteen months to leave the Property.

[77] The Court is also concerned with the poor representation and advocacy afforded to the Defendants by Counsel and wishes to add that there are other legal remedies that are available to the Defendants and which they can explore.

Order

[78] The Defendants’ counterclaim of acquisitive prescription of Parcels C5773 and C5769 is dismissed. The Plaintiff’s prayers are granted. The Defendants are ordered at their own cost to remove all structures they have erected on the Property and to return them to their natural state within eighteen months of this judgment. They are further ordered not to trespass on the land after that date and not to erect any further structures.

Signed, dated and delivered at Ile du Port on 8 May 2020

Twomey CJ