*Privy Council Appeal No. 51 of 1983*

**Hajjah Tampoi bte. Haji Matusin a Haji Hussin and others** *Appellants*

*v.*

**Haji Matussin bin Pengarah Rahman** *Respondent*

FROM

# THE COURT OF APPEAL OF BRUNEI

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JULY 1984

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*Present at the Hearing:*

LORD FRASER OF TULLYBELTON
LORD ROSKILL
LORD BRIDGE OF HARWICH
LORD BRIGHTMAN
SIR ROBIN COOKE

*[Delivered by **Sir Robin Cooke**]*

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This appeal in litigation in the State of Brunei concerns the limitation of actions as between co-owners of land and the relationship between statutes of limitation and Torrens titles.

By action commenced in the High Court of Brunei on 19th June 1979 the four plaintiffs, members of the family of a deceased co-owner of a parcel of land, sued the defendant, a son of the other deceased co-owner, claiming an account of rentals, an order for the demolition of buildings, damages and other relief. Initially the plaintiffs obtained judgment by default, but this was set aside on the application of the defendant and the setting aside was upheld by the Court of Appeal of Brunei. The defendant then filed a defence and counterclaim, later amended, and the action was tried by Jones J. sitting as Commissioner. The main issue was whether the action was barred by the Limitation Enactment 1962. In a judgment delivered on 4th August 1982 Jones J. held that it was not barred, his critical finding on that issue being that he was not satisfied that the defendant had been in adverse possession. By reason of delay and the conduct of the plaintiffs in

impliedly allowing the defendant to deal with the land as he thought fit, the judge refused to order an account, demolition or damages; but he did make an order for possession in favour of the plaintiffs - a form of relief which their counsel had asked for in final submissions only.

Both sides appealed to the Court of Appeal, where the case was heard by Sir Geoffrey Briggs P., Leonard and Kempster JJ., sitting as Commissioners. In a judgment delivered on 21st May 1983, in which the other members of the Court concurred, Kempster J. held that adverse possession had been admitted in the pleadings and that there had been no issue arising at the trial on that score. He went on to conclude that the effect of the 1962 Enactment was to extinguish the titles of the plaintiffs. The defendant's appeal was accordingly allowed and relief was granted on the counterclaim by declarations and by orders under section 29 of the Land Code 1909 (1951 Revised Edition of the Laws of Brunei, cap. 40) that the Land Register be rectified by registering the name of the defendant in place of those of the plaintiffs as the owner of undivided shares totalling 50/128ths of the land in the title. From that decision the plaintiffs appeal to Her Majesty in Council.

The land, E.D.R. 218, lot 347, Land District of Brunei, comprises about 9/10ths of an acre. It is in a downtown area and although formerly worth little is now described as prime land, a government valuation officer estimating its value as between $400,000 and $500,000.

The History of the Titles

Title to land in Brunei is governed by the Land Code of 1909, which replaced the original Land Code of 1907. The history of the registered title to the land in question begins with an application made in 1911 and resulting in the grant in 1913 of a title in perpetuity to Mohammed Tahir Bin Damit, subject to a special condition as to sharing coconut crops. On 6th August 1915 two transfers were registered. The first was of the whole land to Pengarah Rahman bin Kahar, the defendant's father; the second was of a half-share from the latter to another person. The half-share was transferred back to the defendant's father by transfer registered in 1921. But in 1924 he again transferred an undivided half-share, on this occasion to Nuralli bin Hassan, and it is from this half-share that the plaintiffs derive their interests.

The defendant's father has remained shown throughout as the registered owner of the other half-share, although the trial judge records that it is

believed that he died over 50 years ago. The persons entitled to his estate are the defendant and the latter's two brothers. According to the defendant's evidence in cross-examination at the trial they have not taken steps to have their names entered on the title as "All three of us always say do it later". The defendant is now some 89 years old and says that he has lived on the land since the age of 12. He would have been about 29 when his father transferred the half-share, but in effect he claimed in evidence that he had no knowledge of the transfer and considered that the whole property belonged to his father.

The share transferred in 1924 by the defendant's father passed by transmission registered in 1929 to another person and later, by transfer registered in 1939, to Haji Hussin bin Abdullah, members of whose family are the plaintiffs in the action. The trial judge found that he died some time between 1939 and 1948. In 1948 his successors (the present plaintiffs or those whom they represent) took action to register their title. But, for reasons unexplained by the Land Office records or otherwise, it was not until 1963 that any transmission of the share was registered. The deceased's widow then became registered as owner of an undivided share being 8/128ths of the whole land, three sons as the owners of 14/128ths each, and two daughters as the owners of 7/128ths each. The widow having died (apparently as long ago as 1949) one of the daughters obtained letters of administration in her estate in 1978, and a transmission of her mother's share to her was registered in 1979 shortly before the action was commenced. She is the first plaintiff, suing as administratrix in respect of 8/128ths and in her own right in respect of 7/128ths.

The second and fourth plaintiffs are two of the sons, suing in respect of their own shares. The other son died in 1963; a transmission of his share to the first plaintiff was registered in 1982, but this share is not a subject of the action. The third plaintiff is a son of Haji Hussin bin Abdullah's other daughter. She had died in 1948; letters of administration were granted to her son in 1978 and transmission to him was registered in 1979, likewise shortly before the action was commenced. He thus sues in respect of 7/128ths.

In summary the plaintiffs are the registered owners of 50/128ths and they sue in reliance on titles registered in their respective names in 1963 (the two sons and the daughter as to her own share) and 1979 (the daughter as administratrix of the widow, and the grandson as administrator of the deceased daughter).

The History of the Legislation

The Brunei Land Code embodies a Torrens title system. The most material provisions of the 1909 Code are the following:

"9. (1) Every title by entry in the Register shall vest in the person named therein a surface right only to the land specified therein and such person shall have a permanent transmissible and transferable estate, interest and occupancy of his land subject to the provisions of this section or such lesser estate as shall be specified in the entry. ....

27. No claim to or interest in any land shall be valid unless it has been registered in the Land Office. ....

28. (1) When any land charge or lease shall have been transferred or transmitted by virtue of any form of succession or under any order of Court or act of law a record thereof shall be made in the Register and on the extract. .... (3) Every entry in the Register shall be taken as conclusive evidence that the person named therein as owner of the land is the absolute and indefeasible owner thereof for the estate specified therein subject to the conditions upon which the original entry was made and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.

29. Any person claiming that he is entitled to be registered in respect of any land may apply to the High Court for an order that any Register, book or journal kept at the Land Office shall be rectified or that any entry may be made or interpolated in any such Register, book or journal or that any entry therein may be cancelled, and the Resident after giving such notices to the persons in occupation of or interested in such land as he may think fit may refuse the application, or if satisfied as to the justice of the case may make such order in reference thereto as he may think just, and the officer in charge of the Land Office shall rectify the Register and the extract of title in accordance with such order."

The Land Code contains no provision dealing with the relationship between registered titles and the general Enactments in Brunei regarding the limitation of actions. The first such legislation was the Limitation of Suits Enactment 1918. By section 3 it provided that the High Court should have a discretion to dismiss suits of different kinds unless instituted within various prescribed periods. Section 3(g) was capable of applying to actions for possession of land, for it extended the discretion to "...any suit

of any other description whatsoever unless instituted within the period of limitation provided therefor under the Limitation Ordinance of the Straits Settlements". The Limitation Ordinance of the Straits Settlements, enacted in 1897, prescribed in its Schedule, articles 110 and 112, 12 years. The 1918 Brunei Enactment was replaced by the Limitation Enactment 1962, which was not brought into operation until 1 September 1967. This was apparently the product of virtually a wholesale copying of the current Limitation Ordinance of what by then had become the State (and is now the Republic) of Singapore, an Ordinance in turn derived largely from the old Straits Settlements Ordinance already mentioned. Hence section 3 of the Brunei Enactment of 1962 provides that, subject to certain qualifications, suits instituted after the limitation period prescribed by the Schedule, if limitation has been set up as a defence, shall be dismissed. Section 26, copied from a section added to the Singapore legislation in 1929, reads:

> "26. At the determination of the period limited by this Enactment to any person for instituting a suit to recover possession of immovable property, the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished."

And the Schedule to the Brunei Enactment includes the following articles, their text similarly copied from the Singapore Schedule:

| "Description of Suit | | Period of Limitation | Time from which period begins to run |
|---|---|---|---|
| 110. | For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession | Twelve years | The date of the dispossession or discontinuance. |
| 112. | For possession of immovable property or any interest therein not hereby otherwise specially provided for. | Twelve years | When the possession of the defendant becomes adverse to the plaintiff." |

Section 13 of the 1962 Limitation Enactment should also be noticed. It reads:

> "13. In computing the period of limitation in respect of any suit, the period commencing on the 22nd day of December, 1941, and ending on the 30th day of December, 1949, shall be excluded."

To adopt words used by Kempster J. in his judgment, that section suggests overwhelmingly that the Enactment had retrospective effect. On this point their Lordships fully agree with Kempster J.

The Issues

In the light of the history already outlined, two main issues emerge in the case, namely:

(i) Whether, apart from any effect of the registration provisions of the Land Code, the action would be barred and the titles of the plaintiffs extinguished by the Limitation Enactment.

(ii) If so, whether the registration provisions nevertheless protect the plaintiffs.

The second issue may be referred to as the Torrens title point, the first as the adverse possession point. Their Lordships confine the first in that way because in the amended defence and counterclaim the defendant pleaded only adverse possession, purporting to "admit" that for upwards of 15 years prior to the issue of the writ he had been in adverse possession of the land. That pleading was manifestly an invocation of article 112 in the Schedule. It cannot be regarded as sufficient to set up a defence under article 110. In his closing speech at the trial, after all the evidence had been heard, counsel for the defendant mentioned for the first time the alternative that article 110 might apply, apparently suggesting that the case might be seen as one in which the plaintiffs (or perhaps only some of them) had once been in, but had discontinued, possession. That suggestion was rejected by the trial judge and the Court of Appeal for reasons which it is unnecessary to discuss. Counsel for the defendant, now the respondent, endeavoured to raise it again on the argument of the present appeal, but it was plainly an afterthought at the trial, raising possibly difficult questions of fact to which the evidence had not been sufficiently directed. In these circumstances their Lordships should not entertain it.

The Adverse Possession Point

It was to this point that the evidence at the trial and the trial judge's examination of the evidence was principally directed. The Court of Appeal disposed of it, however, by holding that it was not or should not have been in issue at the trial. They said that

paragraphs 10 to 14 of the statement of claim had positively alleged adverse possession by the defendant since 1964.

Those paragraphs included allegations certainly consistent with a claim based on adverse possession. For example they alleged that in 1964, without the consent and knowledge of the plaintiffs and without approval from the proper authorities, the defendant erected buildings on the land and rented rooms to tenants; and that the plaintiffs had not been able to make use of the land because of "the unlawful occupations, possession and illegal use of the land by the defendant". But there was no express allegation of adverse possession. Moreover the first remedy sought, an account of rentals, was at least arguably incompatible with a claim based on adverse possession (*Caxton Publishing Co. Limited v. Sutherland Publishing Co.* [1939] A.C. 178, 198.) At all events the statement of defence was irregular in purporting to admit an allegation not in terms made in the statement of claim. The plaintiffs were entitled to plead in their reply, as they did among other allegations, that the defendant's occupation was attributable to his father's registered ownership and could never be adverse to the other registered owners. Accordingly their Lordships are unable to treat the adverse possession point as concluded by the pleadings.

The judgment of Kempster J., while based primarily on the pleadings, also contains some passages to the effect that the only finding open on the evidence was that the defendant had possessed the whole of the land as if it was his own. This view is reflected in the order made by the Court of Appeal that the name of the defendant be entered on the title in respect of 50/128ths in place of the names of the plaintiffs.

It is true that the defendant said in evidence that he considered that the whole property was his father's and also said that he made use of it as his own and paid the annual quit rent to the Government. But in cross-examination he said that his brothers had a share in the land and that he wanted all three on the title. The defendant's own evidence was thus equivocal, for the last-mentioned part of it pointed to his occupying as one of the lawful successors to his father's true interest - namely an undivided half-share. It follows that, even disregarding altogether the evidence for the plaintiffs and the findings of the trial judge, the adverse possession point cannot be seen as admitting of only one answer.

In the history of English law the term "adverse possession" has been used in different senses at different periods: see Preston and Newsom, Limitation of Actions, 3rd edn. (1953) pages 86 - 89; Limitation

Act 1980, Schedule 1, paragraph 8. And the law as to limitation between co-owners has also varied. Thus there was once a rule that one co-owner of land could as such never have possession adverse to another, since each was entitled to occupy the whole. By the Real Property Limitation Acts 1833 and 1874 that rule was excluded, undivided shares in land being treated as enabling separate possessions (*Paradise Beach and Transportation Co. Limited v. Price-Robinson Limited* [1968] A.C.1072). After 1925 the position was again altered by the imposition of statutory trusts for sale (*In re Landi* [1939] Ch.828). For present purposes, however, these formidable technicalities need not be explored. The Brunei Limitation Enactment does not define "adverse possession", nor does it contain any special provision affecting the case of co-owners. The Application of Laws Enactment 1951 brought about the first general application in Brunei of English law, section 2 providing:

> " 2. Subject to the provisions of this Enactment and save in so far as other provision has been or may hereafter be made by any written law in force in the State, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Enactment, shall be in force in the State:
>
> Provided that the said common law, doctrines of equity and statutes of general application shall be in force in the State so far only as the circumstances of the State and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary."

The Land Code and the Limitation Enactment, written laws in force in Brunei, cover the fields of real property and limitation. Their Lordships have no doubt that in those fields the effect of the two Enactments is to exclude the refinements of English law, whether common law or statutory; the Enactments cannot be treated as importing an ambience of English law as at some period to be ascertained. In Brunei what is adverse possession must be a question of fact in every case. There is no ground for holding that one co-owner cannot possess adversely to another by ousting the latter; but the fact that each is necessarily entitled to use the whole land is a factor to be borne in mind, together with all the other circumstances of the case, in deciding whether there has indeed been an ouster.

Among the other circumstances of this case are some of significance appearing from the evidence for the plaintiffs. The evidence of the present senior land officer and of the second plaintiff established that

on 15th February 1967 the then senior land officer wrote to the second plaintiff a letter (a copy of which was produced) reading as follows:

> " With reference to your application for sub-division of land held under EDR 218 lot 234 which has been kept in this office for sometime.
> 1. I am given to understand that one of the co-owners of the land had passed away. In view of that no steps can be taken for the sub-division until the deceased owner's right and interest in the land has been settled by his beneficiaries.
> 2. I have requested the beneficiaries concerned many times to call at my office in order to advise them the position but without success. Under the circumstance the sub-division cannot proceed until the probate matter is finalised.
> 3. I return herewith the land title EDR 218 lot 234. You may ask for the refund of your deposit money. I also leave it to you to take further action to settle this matter according to law."

The reference to a deceased owner was evidently to the defendant's father. While the last paragraph suggested that legal action might be open to the plaintiffs, the second indicated that a sub-division could not proceed until probate in the estate of the defendant's father was finalised. The second plaintiff gave evidence of taking part in some negotiations, apparently after the defendant's brother and children had built houses on the land. He could not remember the date but said that it was after his name was registered in the Land Office; he added that he received the letter already set out. The notes of evidence are exiguous and defective at this point, but there is an indication that in the negotiations there was discussion about the land title. All this supports the inference that the defendant's occupation was as a beneficiary in the estate of the registered co-owner, not as a squatter.

The second plaintiff also testified that at an earlier stage, perhaps during the Japanese occupation, he and his father had built a house on the land, which was occupied by relatives for a time but became vacant and later collapsed. He also said in cross-examination that there were still coconuts and mangoes on the land and that the crops were shared "amongst ourselves" but that he could not remember when that last happened. The defendant on the other hand denied that he had ever shared any "fruits" with the plaintiffs. It is at least clear that he did not share with them the rents collected from his tenants.

As a whole, however, the evidence was far from clear. The issue was essentially one of fact and degree. In his judgment Jones J. summarised it

accurately. He sufficiently stated the tests to be applied by saying that in order to establish adverse possession there must be clear evidence of denial of the plaintiffs' title and some positive action by the defendant to show that he intended to acquire the ownership of the plaintiffs' shares. Jones J. found no evidence of any overt act by the defendant before the writ to support his claim to adverse possession to the exclusion of the plaintiffs. The judge attached importance to the land office letter of 1967 and to delay caused by the defendant's omission to apply for administration. He thought that the plaintiffs had not abandoned their claim to title but had impliedly allowed the defendant to deal with the land as he thought fit.

Their Lordships regard those findings as open on the evidence and realistic. It is to be remembered that occupation by licence of the plaintiff is not adverse possession: see, for example, *Hughes v. Griffin* [1969] 1 All E.R.460. The present is not as clear a case as the one just cited. Rather it is a borderline case of the kind in which disturbance of a trial judge's conclusion is not warranted. It continues a sequence of cases in the same somewhat difficult field in recent times, where findings of trial judges have been restored, or have stood, on appeal to the Privy Council: *West Bank Estates Limited v. Arthur* [1967] 1 A.C. 665; *Ocean Estates Limited v. Pinder* [1969] 2 A.C. 19; *Higgs v. Nassauvian Limited* [1975] A.C. 464.

The Torrens Title Point

Strictly it becomes unnecessary to deal with this point, but their Lordships will add some observations on it because clarifying legislation may well be thought desirable in Brunei.

When the Singapore Limitation Ordinance was largely copied in Brunei, it may have been overlooked that the Land Titles Ordinance 1956, which had made available in Singapore a system of registration of titles, had contained in sections 32 to 35 specific and limited provision as to the application of the Limitation Ordinance to registered land. Broadly the scheme adopted was that title could not be acquired by possession adverse to the title of a registered proprietor except as expressly provided, and the express provisions enabled an adverse possessor to obtain a certificate of title not less than 12 years after the land was brought under the registration system or after the entry in the register of the most recent memorial or notification affecting the land. A registered proprietor fearing that his land was in adverse possession could take steps to have notified on the register a reassertion of ownership, in which event time would run thereafter. This scheme represents a careful compromise between on the one

hand the concept of indefeasibility of title, which is central to the Torrens system (*Frazer v. Walker* [1967] A.C. 569, 580, 585) and on the other the public interest in discouraging sleeping on rights and supporting long established possession, which is reflected in limitation statutes.

The Land Code of Brunei contains nothing expressly addressed to this problem. Notwithstanding its provisions as to "permanent" estates and "conclusive evidence", there is obvious room for the argument that paramountcy must be given to the subsequently enacted provisions in the Limitation Enactment barring suits for recovery of possession and extinguishing title. The Court of Appeal accepted this argument. By analogy it can be further supported by *B ize Estate & Produce Co. Limited v. Quilter* [1897] A.C. 367. It is true that the argument requires a modified reading of section 26 of the Limitation Enactment in order to accommodate the procedure laid down in section 29 of the Land Code. But there is a substantial difficulty in the way of treating title under the Land Code as altogether immune from the Limitation Act, in that section 26 of the latter and articles 110 and 112 might then have no operation whatever. For, at the hearing before the Board, counsel were unable to say that there is any land in Brunei in private ownership but not held under a Land Code title. On the limited information that has been made available to them, their Lordships cannot be unreservedly confident on that matter; this reinforces their view that it would be undesirable to rule on the relationship between the two Enactments in a case where a ruling is not necessary. Early legislative attention is preferable, as the question is basically one of State policy and may be of some general importance in Brunei.

Such an issue of policy is not for the courts to decide, but a few examples of various ways in which legislatures have dealt with the question may be of help.

In England the Limitation Act applies to registered land and interests may be acquired by adverse possession, but until such an interest is entered on the register the registered proprietor's title is not extinguished and he holds in trust. The English registration system has historical origins different from those of Torrens systems. So also has the Scottish feudal system, under which a real right of ownership of land cannot be lost by prescription, and a recorded title is the essential basis for acquiring a title by possession: See the Prescription and Limitation (Scotland) Act 1973.

In the main, countries with Torrens systems have attached particular weight to the registered title. For instance, in *Gatz v. Kiziw* [1958] 16 D.L.R. (2nd) 215 the Supreme Court of Canada, reversing the Court of Appeal of Ontario, interpreted the Ontario legislation as excluding, even between adjoining owners, the subsequent acquisition of a possessory title or interest once the titles had been registered. In the meantime the Ontario legislature had anticipated the decision by an express enactment to the same effect, now section 54(1) of the Land Titles Act, R.S.O. 1980, c.230.

By contrast, in New South Wales, where the early legislative policy as regards Torrens land was uncompromisingly against possessory titles, legislation has been enacted in 1979 enabling an adverse possessor to obtain in due course a registered title, but not if a person has become registered as proprietor without fraud and for valuable consideration and the whole of the limitation period has not run since he became registered: see 54 A.L.J. 79. In New Zealand, Queensland and South Australia the legislatures have been more concerned to protect the registered proprietor's interests. In those jurisdictions statutory amendments have enabled adverse possessors ultimately to become registered, thus meeting the case of the registered owner who has transferred the property informally or who cannot be traced; but they have provided that a possessor's application must be refused if the registered proprietor lodges in time a caveat against it: see Hinde, McMorland and Sim, Land Law in New Zealand (1978) 2.184 to 186; D.J. Whalan, The Torrens System in Australia (1982) 325 to 331.

Those examples, together with the Singapore legislation previously mentioned, are enough to show that the range of options open to a legislature is considerable. Nevertheless one common feature does emerge. Clearly it would be impracticable to provide that a registered legal title should automatically be extinguished on the expiry of a limitation period. The only workable approach is to consider whether, and if so when and with what safeguards, a possessor should be granted a registered title in place of the proprietor currently registered.

Orders

In the result, for the reasons previously given on the adverse possession point, their Lordships will humbly advise Her Majesty that the appeal should be allowed. The declarations and orders made in the Court of Appeal should be vacated and instead it should be declared that the claims of the plaintiffs in the action are not barred by section 3 of the Limitation Enactment and that their titles are not extinguished by section 26. Their Lordships see

insufficient ground for disturbing the decision of the trial judge to refuse orders for damages, account, demolition and costs. His dismissal of the counterclaim was right. In the foregoing respects his judgment should be restored. Counsel for the present appellants rightly conceded that the order for possession, if intended to exclude the present respondent, went too far. It should be further declared that the respondent and the other beneficiaries in his father's estate are entitled, upon making all proper applications for administration and otherwise, to be entered on the register as owning between them an undivided half-share in the land. The appellants should have their costs of the present appeal and half their costs in the Court of Appeal.