IN THE COURT OF APPEAL OF BELIZE AD 2014
CIVIL APPEAL NO 20 OF 2012

DARIUS DANIELS
CINDY CHAN

Appellants

v

JAMES SABAL

Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Douglas Mendes	Justice of Appeal
The Hon Mme Justice Minnet Hafiz-Bertram	Justice of Appeal

Mr P Zuniga SC for the appellants.
Mr H E Elrington SC for the respondent.

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18 October 2013, 14 March 2014.

SOSA P

[1] I concur in the reasons for judgment given, and the orders proposed, in the judgment of Mendes JA, which I have read in draft.

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SOSA P

MENDES JA

[2] This appeal involves what has turned out to be a contest between the first appellant and the respondent concerning the rightful ownership of property situate at Lot 126 Commerce Street, Dangriga Town, Stann Creek District ("the property"). It is a stark illustration of the enormous difficulties which are created when a case is not properly pleaded. It is best to begin with what appear to be the undisputed facts.

The Facts

[3] By a Governor's Fiat Grant No. 56 of 1898, dated 2 July 1898, Christopher Ogaldez was vested with the freehold title to the property.

[4] Mr. Ogaldez had three daughters, Henrietta, Cyrilla and Petrona. Henrietta married a Castillo. She had three children, one girl and two boys. Her eldest son was named Martin Castillo. Cyrilla married a Sabal and had six children, three boys and three girls. The respondent is Cyrilla's son.

[5] Mr Ogaldez died intestate on 12 March 1960. It is clear that Henrietta and Cyrilla survived him. Petrona was said by the respondent to have died a long time ago, and it was not established with any certainty whether she also survived her father. Accordingly, either the three daughters became entitled on intestacy to the property, or only Henrietta and Cyrilla. But nothing was done for the next half century to administer Mr Ogaldez's estate.

[6] Henrietta lived with her family at the property until her death on 10 May 1978. Cyrilla lived at the property as well until she got married, whereupon she went to live with her husband at his property situate at 207 Yampa Street, Dangriga. Cyrilla died on 12 September 1976.

[7] After Henrietta's death, her daughter, Regina, continued living at the property. Her eldest son Martin had long since emigrated to the United States, either from 1959,

according to the respondent, or 1963, according to the first appellant. Regina occupied the property until her death in 1982.

[8] The respondent testified that upon Regina's death he began maintaining the property, cutting the grass and performing general maintenance work. At this point in time, there would have been quite a number of persons interested in the property as beneficiaries in the intestacy of their parents or grandparent. Henrietta left three children surviving her, and Cyrilla six. They or their estates would have been entitled to a share in the property once Mr Ogaldez's estate and that of his daughters, Henrietta and Cyrilla, had been administrated. But it appears that only the respondent and Martin Castillo, who at the time was living abroad, were showing any active interest in the property.

[9] The respondent said under cross-examination that in 1987 Martin Castillo visited him in Belize and stayed with him at his parent's property at Yampa Street. He said that he and Martin made an oral agreement that he (the respondent) would look after the property for Martin and pay the taxes on Martin's behalf because he (Martin) did not intend to come back to Belize to live. This suggested, at the very least, a recognition on the respondent's part of Martin's interest in the property, and indeed some sort of controlling interest, and is consistent with the description of his and Martin's agreement which his lawyer gave years later, a matter to which I will return shortly.

[10] Under re-examination the respondent's story began to undergo a transformation. In answer to Mr. Elrington's first question as to what he understood Martin to have meant when he said that he should look after the property because he (Martin) was not coming back, the respondent replied: "I understood him to mean by that, I must take the property." Then when asked whether he acted on that understanding, he said that he began to research the property and found out that his grandfather was still recorded as the owner and "I went to look after the taxes." Upon further questioning, he said that he had in fact began looking after the property since Martin's sister Regina had died,

getting men to cut the grass and clean the place, and he dumped sand from time to time because “it was under water.”

[11] On 14 December 1995, the respondent obtained letters of administration of Mr. Ogaldez’s estate. But the estate has remained un-administered to date, and the respondent did not take any steps to transfer the property to the estate of Mr. Ogaldez’s daughters, Henrietta, Cyrilla or Petrona. It was eventually common ground on the appeal that the legal title to the property remains vested in the respondent as administrator of his grandfather’s estate.

[12] What the respondent did do next was, on 18 December 1995, to apply for letters of administration of his mother’s estate. In that application, he stated, falsely, that his mother was survived by two sons, himself and Robert Sabal, when in fact she was survived by her six children, his father having died by then, it appears. It is also of significance that in the inventory of his mother’s estate accompanying the application, he quite correctly did not include the property, since, as administrator of his grandfather's estate he had not by then vested any share of the property in his mother’s estate.

[13] Yet still, pursuant to letters of administration granted to him on 7 February 1996 in respect of his mother's estate, the respondent purported by an Assent dated 12 February 1996, to vest the property in himself as his mother’s sole beneficiary.

[14] Mr. Zuniga has drawn attention to the fact that in the Assent, the respondent falsely represented that at the time of her death, his mother was seized of the property, had left no other issue and that he was his mother’s surviving son. He has maintained throughout that the Assent should be set aside because it was fraudulent. But there is no need to pursue this ground of challenge at this stage because it was common ground that the Assent was ineffective to vest the property in the respondent, since, as a matter of fact, the respondent’s mother did not die seized of the property and accordingly, he, as administrator of his mother’s estate, could not lawfully vest the property in anyone.

[15] It is not clear exactly what happened after this point in time except that the respondent continued to take care of the property and to pay the taxes. There was a suggestion that the respondent informed Martin Castillo that he had vested the property in himself, but it is best at this point that I simply record the exchange between him and Mr. Zuniga:

> Q. One last question. That vested deed that you spoke about, the one ... in your mother's estate. You didn't tell Martin anything about that?
>
> A. Estate of what?
>
> Q. Cyrilla Sabal, you did a vesting assent to yourself.
>
> A. I wrote Martin and I sent him a copy of the gazette what he had already told me when he came in 1957 (he probably meant 1987). When he stayed here with me, because there was no other place for him to stay.
>
> Q. A copy of the gazette of your mother's estate.
>
> A. Yes, a sent him a letter and inform him of what I was going to do and he did agree.
>
> Q. He did agree with what?
>
> A. He agreed to what I was doing, because he told me to look after the property and that he was not coming back here again.
>
> Q. But you did say you were doing it for him?
>
> A. What you mean?
>
> Q. What you said earlier Sir.
>
> A. He told me before he went to the States back to the States that I must look after the property, because he was not coming back to Dangriga. But there was no written agreement, because of my close relationship with him ... We're like brothers.

There then immediately following the question from Mr. Elrington in re-examination which produced the answer that he understood Martin to be saying that he (the respondent) must take the property.

[16] What Martin's side of the story is we will not ever hear from him first hand, because he died on 6 December 2005. However, prior to his death, he did not behave as someone who had relinquished his interest in the property.

[17] The first appellant was Martin Castillo's third cousin. Henrietta and his mother were second cousins. He and Martin were good friends. He referred to Martin's mother as 'Aunty Henny'. By a Power of Attorney dated 30 September 2003, Martin appointed the first appellant as his lawful attorney for the purpose of obtaining letters of administration of Henrietta's estate for his use and benefit, until he (Martin) applied for and obtained letters of administration himself.

[18] Acting on Martin's instructions, the first appellant caused Mr. Zuniga to pen a letter dated 28 January 2004 to the respondent. Mr. Zuniga said he was acting on Martin Castillo's behalf. He recorded his instructions as being that Martin was Henrietta's sole surviving heir, that she died seized of the property, and that as a result Martin was entitled to it. He drew the respondent's attention to the Assent made on 12 February 1996 in which he vested title to the property in himself. Mr. Zuniga's instructions were that the respondent was trying to sell the property. He contended that the Assent was defective since the property was not part of Cyrilla's estate. He advised the respondent that if he were to sell the property he would expose himself to a suit for fraud and to a criminal trial for obtaining a pecuniary advantage by deception, since he was not capable of passing good title. He therefore called upon the respondent to desist from selling the property.

[19] There appears to have been a reply to this letter in early 2004. It is referred to in a letter dated 2 January 2006 from the respondent's then lawyer, Ms. Antoinette Moore, to which reference will be made momentarily. But the reply was not produced in evidence. Whatever Ms. Moore told Mr. Zuniga at that time, it is clear that the respondent did not take any further steps to sell the property.

[20] In the meantime, Martin had agreed to sell the property to the first appellant for $50,000.00. The agreement is confirmed by and evidenced in a written memorandum

dated 21 May 2005 and signed by Martin in which he acknowledged receipt of $35,000.00 over the period 10 May 1998 to 20 October 1995(?) “in the form of part-payments, land transactions and legal fees.”

[21] Then, on 6 October 2005, administration of Henrietta’s estate was granted to the first appellant as Martin’s lawfully attorney and for his use and benefit.

[22] Martin died on 6 December 2005. There then followed the letter dated 3 January 2006 from Ms. Moore to Mr. Zuniga previously referred to. It appears that this letter was prompted by a “creditor’s notice dated 8 December 2005”, but there was no evidence tendered in relation to this notice. Ms. Moore referred to the letter she had written in early 2004 and proceeded to ‘refresh’ Mr. Zuniga’s ‘recollection’ that the respondent was Henrietta’s nephew and Martin’s cousin and had paid taxes on the property and cleaned and maintained it as well. She noted that now that Martin had died, the respondent and his siblings were the surviving next of kin of Henrietta and that the respondent was the only one currently residing in Belize. Ms. Moore closed with the statement that the respondent “wishes to advise the intended administrator of his aunt’s estate of his existence as well as of his brothers and sister.”

[23] It is a pity that Ms. Moore’s letter sent in early 2004 was not put before the court for its consideration. But what is significant about her 3 January 2006 letter is the absence of any claim on the respondent’s part to be entitled to an interest in the property, either in his personal capacity or as an heir to his mother’s estate. He asserted an interest only as Henrietta’s next of kin, the assumption being that Henrietta alone had an interest in the property.

[24] Mr. Zuniga’s reply, if any, to Ms. Moore's 4 January 2006 letter was not adduced in evidence. There is reference in Ms Moore's later letter of 7 June 2006 to a letter Mr. Zuniga wrote on 30 May 2006 dealing with the caption of Ms. Moore's letter, namely, “Re: Estate of Martin Castillo, deceased, Lot #126, Commerce Street, Dangriga”, but Mr. Zuniga's 30 May 2006 letter was not put in evidence either. Significantly, however,

in her letter dated 7 June 2006, Ms. Moore stated that the respondent's "objective is to recover the monies he has spent from 1987 through the present for the maintenance costs and property taxes paid by him for the property." She referred to the fact that in 1997 the respondent was sued by the Dangriga Town Council for $2,300.00 in overdue property taxes and the respondent paid the sum "on behalf of the late Mr. Castillo." She continued that it was only fair that the respondent be compensated since Mr. Castillo was perfectly aware that he was paying the taxes and upkeeping the property. She advised that the respondent "has instructed me that this is all he is seeking."

[25] On the very next day, 8 June 2006, the first appellant, acting as administrator of Henrietta's estate, purported to convey the property to himself. Mr. Zuniga ultimately conceded before us that this conveyance was ineffective since the property had not by then been conveyed to Henrietta or to her estate, and accordingly the administrator of Henrietta's estate was incompetent to convey it to anyone. The property was still vested in the respondent as administrator of Mr Ogaldez's estate.

[26] The first appellant claimed that since he conveyed the property to himself he had been paying all taxes due on the property.

[27] This then was the backdrop to the pleadings filed in this case.

The Pleadings

[28] By his Claim Form and Statement of Case filed in the Supreme Court 22 February 2008, the respondent claimed to be in lawful possession of the property for a period of twenty years. He claimed further that since 7 January 2008 the appellants had on numerous occasions entered upon the property, threatened violence, used force, tore down the fence that surrounds what he referred to as his property, tore down his no trespassing sign and, despite his requests that they desist, parked their vehicles on the property and refused to remove them when asked to do so. Though the respondent referred to the property as his own, and although, as the evidence showed, the ownership of the property was disputed, the respondent did not seek any relief declaring

that he had title to the property. The only relief which the respondent did seek, was an injunction restraining the appellants from entering the property, from placing or leaving any of their goods or vehicles on the property or from in any way interfering with the respondent's possession of the property. He also claimed damages from trespass.

[29] In his defence, the first appellant claimed to be the fee simple owner of the property, having acquired title by the conveyance dated 8 June 2006. The second appellant, he pleaded, was his licensee who had his permission to park her car on the property. He claimed that the respondent's possession of the property was only in his capacity as agent of Martin Castillo and that that agency terminated by operation of law on Martin's death. The first appellant counter-claimed for a declaration that he was entitled to possession of the property, for possession of the property, damages and mesne profits.

[30] The respondent did not reply to the first appellant's defence nor did he file a defence to the counterclaim. Although the respondent claimed to be in lawful possession of the property for 20 years and that the property was his, he did not condescend to particulars as to how he came to own the property or how he came to be in lawful possession.

[31] It was only in his witness statement that he claimed that after Regina's death, when the property became unoccupied, he decided to 'step in' because the property was abandoned and no one was willing to pay the taxes. He said that he "began to take care of the property and pay the taxes, intending to acquire squatters' rights." He said further that he took a Grant of Administration of his grandfather's estate, which enabled him to vest the property in his name as beneficial owner and that none of his siblings ever challenged his vesting of the property in his name. He claimed that Martin "had actual or constructive notice of my application for letters of Administration and of the Vesting Deed by which I vested the property in my name" and that between 1982 and 2000, Martin did not bring any proceedings to challenge the Grant of Administration or his vesting of the property in himself. He said further that since 1987 he had been

publicly and openly asserting that he was the sole owner of the property and no one had instituted proceedings to say otherwise "in the next twenty years that ensued." He said finally that Martin Castillo's claim was made long after the statutory period of limitation for asserting such claims had passed.

[32] Here then was the first clear indication of the basis of the respondent's claim for title to the property. It was either that he had acquired it as beneficiary to his grandfather's estate, or by adverse possession. But neither source of title had been pleaded.

[33] But to complicate matters further, at the opening of the trial Mr. Elrington declared that he was prepared to concede at the onset that the property did not belong to the respondent. He pointed out that the respondent had been granted letters of administration of the estate of Christopher Ogaldez, who, before his death, was the owner of the property, and that accordingly the respondent held the property in trust for the estate of Mr. Ogaldez's children. As a result, Mr. Elrington applied to amend his pleading to change the capacity in which the respondent was suing, such that he would no longer be pursuing the relief he did claim in his personal capacity, but as administrator of the estate of Mr. Ogaldez. Any such amendment would have meant the abandonment of the respondent's claim to be interested in the property in his personal capacity, either as the beneficiary of the Assent he made to himself or on the basis of adverse possession. But his application to amend was met with opposition from Mr. Zuniga, who complained of the lateness of the application, and in the end, Mr. Elrington withdrew the application, and the trial proceeded.

The trial judge's decision

[34] Although there was no claim to this effect by either party, the trial judge found first of all that Henrietta acquired the freehold title of the property by adverse possession. It followed, he said, that by the time the respondent obtained letters of administration of his grandfather's estate on 14 December 1995, the property was no longer part of that estate. For the same reason, when the respondent obtained letters of administration for

his mother's estate on 7 February 1996, her estate could have no beneficial interest in the property either. It is for these reasons that the trial judge found that assent dated 12 February 2996 did not vest title to the property in the respondent. There is no appeal or cross-appeal against these findings.

[35] Despite the absence of specific pleading, the trial judge treated the respondent claim as being one for title by adverse possession. He found that the respondent first took possession of the property when Regina died in 1982 and the property was unoccupied. At that point, the respondent began to maintain the property and delivered landfill. The trial judge found that the respondent began paying taxes from 1982, refurbished the structure and built a fence. But there is no evidence of any of this. While the respondent did at one point say that he had refurbished the property, what he said he meant was that he was having it cleaned and maintained. In the end, however, these findings were neither here nor there, since the trial judge found that in 1987 the respondent and Martin Castillo agreed that the respondent would take care of the property for Martin, which constituted an acknowledgement of Martin's interest in the property and as a result any claim to adverse possession from 1982 had been destroyed. However, the trial judge found that the respondent's claim to adverse possession was resumed in December 1995 when he obtained letters of administration of his grandfather's estate without obtaining Martin's permission or agreement. The second manifestation of adverse possession was in September 1995 when the application for letters of administration for his grandfather's estate was published in the Gazette. Martin Castillo and all other beneficiaries, he said, would have had notice of it. The respondent was accordingly in adverse possession for more than 12 years before the first appellant launched his counterclaim claiming title to the property and possession. By this time, the respondent had acquired freehold title by adverse possession in 2007, 12 years after he took possession of the property in 1995. The trial judge found further, that ever since 1987 when Martin Castillo left Belize, not intending to return, the respondent had taken possession of the property with the intention of making it his own. But this appeared to contradict his previous finding that the

respondent had agreed to take care of the property and pay the taxes on Martin's behalf.

[36] In the result, the trial judge ordered that:

i) The respondent held freehold title to the property by virtue of adverse possession from 1987 or 1995;

ii) The appellants pay the respondent nominal damages in the sum of $100 for trespass;

iii) A permanent injunction be granted restraining the appellants from entering the property;

iv) The first appellant's conveyance dated 8 June 2006 be cancelled by the Registrar of Lands;

v) The counterclaim be dismissed; and

vi) The appellants pay costs of the proceedings to the respondent.

The Faulty Pleadings

[37] The only claim to title which can be teased out of the respondent's statement of case is his plea that he was in lawful possession of the property for 20 years. The only legal rule to which we were referred by which a person may acquire title to the fee simple of any property or to any right or privilege over property by possession thereof, is section 42(1) of the Law of Property Act, but possession must be continuous and undisturbed for a period of thirty years. It is clear therefore that the mere pleading of possession for 20 years was insufficient in the circumstances of this case.

[38] A claim to the title to property must not be confused with a plea that the right of action to recover land from someone who claims to be in adverse possession is barred by the passage of time. The successful invocation of a limitation period against a person who may have the legal or equitable right to land, extinguishes that person's title, but does not vest title in the person in adverse possession. Section 12(2) of the Limitation Act merely provides that

> "No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person..."

And section 22 provides that:

> "Subject to the provisions of section 15 and of any law relating to the registration of land titles, at the expiration of the period prescribed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished."

[39] The upshot of this is that even if the trial judge was right to hold that section 12 of the Limitation Act applied to bar the first appellant's right of action to recover possession, he was wrong to declare, as he did, that the respondent held the freehold title to the property.

[40] The upshot as well is that, like all pleas that a right of action is barred by the passage of time, it must be specifically pleaded or otherwise it may be deemed to have been waived. In ***Ketterman v Hansel Properties Limited*** [1987] AC *189* Lord Griffiths said (at p. 219):

> "A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties."

[41] The need to plead reliance on section 12 is even more pressing given that the effect of a successful adverse possession plea for the requisite period of 12 years is that the paper title to the property is extinguished. Common fairness therefore requires that

a plea of adverse possession be specifically raised. I made this point recently in ***David Limited v Plaza Blanca Dive and Beach Club Limited*** (CA 44 of 2011, 1 November 2013) in a passage which is worth repeating (para 27):

> "I mean no disrespect to Mr. Young by not making reference to any of the plethora of cases to which he has referred in support of the proposition that parties to civil proceedings are bound by their pleadings and are not to be allowed to conduct their cases outside of the issues raised therein. Pleadings serve the important function of informing the parties of the case they have to meet, permitting them to decide what evidence they need to gather and legal arguments they need to deploy to answer the legal and factual contentions relied on by the other side. Pleadings are accordingly the vehicle through which the right to a fair hearing in civil proceedings is guaranteed. Under the regime which the CPR has replaced, amendments to pleadings were only permitted outside of the time frame set by the rules where injustice would not be caused to the opposing party. The circumstances under which a party might be permitted to run a new case under the new rules is now much more restricted and it must be a rare occasion when an amendment to a pleading would be permitted at trial."

[42] In this case, the first appellant sought to answer the respondent's claim for an injunction and damages for trespass by asserting his right to the legal title to the property. He either acquired title as he said, or he did not. It was perfectly in order for the respondent to decide that his claim should be decided on the merits, as it were. Or he could have, in reply, invoked section 12 to defeat any right to the property the first appellant might have had. He did not do so. I do not think it is right in the circumstances that the parties' rights ought to have been determined on an issue such as this which was not specifically pleaded. And to make matters worse, at the start of the trial, Mr. Elrington disavowed any interest in the property on the part of the respondent in his personal capacity, applying instead to amend to plead that the respondent was in possession in his capacity as administrator of his grandfather's estate, an application which he later withdrew.

[43] For similar reasons, I think it was wrong for the trial judge to consider and rule upon what title Henrietta may have acquired in the property as a result of her occupation of it after her father's death. This was not pleaded and the first appellant did not

contend for it in his written submissions to the court below. Although the respondent did not cross-appeal on this point, Mr. Elrington did challenge the judge's findings in his submissions without objection from Mr. Zuniga, and it would accordingly be wrong to decide this appeal on the basis of that finding.

[44] The other complication which has arisen as a result of the failure to answer the first appellant's defence and to defend the counterclaim, is that it allowed the first appellant to rely upon CPR 18.12(1)&(2)(a) which provide that:

> "(1) This Rule applies if the party against whom an ancillary claim is made fails to file a defence in respect of the ancillary claim within the permitted time.
>
> (2) The party against whom the ancillary claim is made -
>
> (a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings in so far as it is relevant to any matter arising in the ancillary claim..."

[45] Mr. Zuniga submitted to the trial judge that, as a consequence, the respondent was deemed to have admitted the first appellant's plea that he was the title holder of the property in fee simple and therefore should grant the declaration claimed in the counter-claim that the first appellant was entitled to possession of the property. The trial judge did not rule on this point and accordingly Mr. Zuniga repeated the submission before us.

[46] It is immediately apparent that acceding to Mr. Zuniga's submission that we should declare that, based upon the conveyance dated 8 June 2006, his client was entitled to possession of the property, would be incompatible with his concession before us that the first appellant was incompetent to convey the property as administrator of Henrietta's estate.

[47] The way these proceedings have unfolded no doubt justifies the time worn practice of courts declining to make declarations of rights based solely on admissions

made, or deemed to have been made on pleadings. Buckley LJ made the point in ***Wallerstein v Moir*** *[1974] 1 WLR 991, 1029*

> "It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] W.N. 141, where Kekewich J., whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a fortiori they should not be made in default of defence, and a fortissimo, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admission or by agreement or in default of pleading, and it is necessary to make clear upon what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be upon such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation."

And as Scarman LJ emphasised (at p. 1030):

> "When a defendant fails to plead, it is ordinarily in the interests of justice that the plaintiff should be able without more ado to obtain judgment for the money or property for which he is suing; the defendant is not without remedy after judgment in default, for, if he can show a bona fide defence, he can get it set aside before it is enforced. But, when what is sought is a declaration, there is the risk of irremediable injustice: the court has spoken and words cannot be recalled, even though later they be negatived: "nescit vox missa reverti," Horace, *Ars Poetica,* line 390. The power of the court to give declaratory relief upon a default of pleading, of course, exists, but, for the reason crystallised by Horace in those four words of his, should be exercised only in cases in which to deny it would be to impose injustice upon the claimant."

[48] Given the concession ultimately made by Mr. Zuniga, it is clear that not to grant the declaration which the first appellant seeks, on the basis of what the respondent is deemed to have admitted, would not impose injustice on his client.

[49] In the result, but not for the reasons given by the trial judge, the first appellant's counter-claim for a declaration of his right to possession of the property was rightly dismissed.

Merits of the Adverse Possession claim

[50] Although, strictly speaking, I have said enough to dispose of this appeal, except for a consideration of the respondent's case on the basis of his bare possession of the property (about which more below), it is appropriate that I should express my views on the merits of the respondent's claim that the first appellant's claim was barred by adverse possession. In doing so, I should make clear that the first appellant did not counterclaim against the respondent in his capacity as trustee of his grandfather's estate. Nor did he counterclaim as a beneficiary under that estate to recover trust property for the benefit of the estate on the ground that, by conveying the property to himself, the respondent acted in breach of trust. In such a case, it might have been argued that no limitation period applied at all in accordance with section 25 of the Limitation Act which provides that:

> 25.-(1) No period of limitation or prescription applies to an action brought against a trustee-
> (a) in respect of any fraud to which the trustee was a party or was privy; or
> (b) to recover from the trustee trust property or the proceeds thereof-
> (i) held by or vested in him or otherwise in his possession or under his control; or
> (ii) previously received by him and converted to his use.

[51] The first appellant counterclaimed against the respondent in his personal capacity and indeed resisted Mr. Elrington's attempt to change the capacity in which the respondent was joined as a party to the proceedings. He was not seeking to recover trust property for the Ogaldez estate but to establish that he was the outright owner of the property. It is therefore clear that section 25 was not applicable.

[52] Whether the first appellant could maintain an action to recover possession of the property in his own right therefore dependent upon whether the respondent could establish adverse possession for a period of 12 years. In this regard, it is important to bear in mind section 18 of the Act. It provides:

> 18.-(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as "adverse possession") and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.
> (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession.

[53] Even if it is assumed that the right of action to recover the property accrued when the respondent took possession of the property in 1982 when Regina died by maintaining the property, the trial judge was right to find that in 1987 the respondent ceased to be in adverse possession of the property when he agreed to pay taxes and maintain the property on Martin's behalf. In ***JA Pye (Oxford) Ltd. V Graham*** [2003] 1 AC 419, 435, a case cited by the trial judge, the House of Lords held that in order to be in adverse possession there must be a sufficient degree of physical custody and control, or factual possession, of the property, and "an intention to exercise such custody and control on one's own behalf and for one's own benefit." As Lord Browne-Wilkinson pointed out (p. 436), if a squatter intends to stay in a house for as long as he can for his own benefit, his intention is an intention to possess. But if his intention is only to trespass for a night or he has "expressly agreed to look after the house for his friend he does not have possession." The respondent's agreement to take care of the property and pay taxes on Martin's behalf accordingly constitutes an abandonment of any adverse possession which he might have previously established. To the extent that the

trial judge operated on the assumption that the respondent was in adverse possession since 1987, therefore, he fell into error.

[54] To Mr. Elrington's credit, he conceded that the respondent could not have been in adverse possession since 1987, given his agreement with Martin. He also did not rely on the steps taken by the respondent to obtain letters of administration of his grandfather's estate. Upon the grant of letters of administration, the respondent became bound in law to administer his grandfather's estate, which included the property, on behalf of the beneficiaries of the estate, which included his siblings and Martin Castillo. Any actual custody or control he had on the property as a consequence was accordingly not for his own benefit, but for the beneficiaries of the estate. This could not constitute adverse possession for the purposes of section 12, and the trial judge was wrong so to find.

[55] On the other hand, Mr. Elrington does rely on the respondent's conveyance of the property to himself on 12 February 1996 as re-establishing adverse possession and causing time to run once again against any right of action to recover the property from the respondent in his personal capacity. In this, Mr. Elrington is on more solid ground. This assertion of outright ownership on the respondent's part, even if ineffective in law to transfer legal title to himself, coupled with his factual possession of the property, was sufficient in my view to re-establish adverse possession.

[56] But circumstances changed dramatically once again eight years later when Mr. Zuniga wrote his letter dated 28 January 2004, claiming, wrongly as it turned out, that Henreitta died seized of the property and that Martin was the sole beneficiary to its title, but asserting, correctly nevertheless, that the property was not part of Cyrilla's estate and that the Assent vesting title in the respondent was accordingly defective. As noted, we have not had the benefit of seeing and assessing the effect of Ms. Moore's reply in early 2004, but the net effect of the two letters written by Ms. Moore in 2006 is that the respondent accepted that he was one of Henrietta's surviving next of kin and that the property was part of Henrietta's estate. More importantly, he asserted through Ms.

Moore that his objective was to recover the monies he spent on the property since 1987 and that that was all he was seeking. By 2006, for the latest therefore, the respondent had signalled that his possession of the property was no longer for his benefit, to the extent that it was so previously, and that his only interest was in recovering the monies he had spent maintaining the property and paying land taxes. Adverse possession accordingly once again terminated.

[57] For all these reasons, therefore, the trial judge was wrong to find that section 12 of the Limitation Act barred a right of action to recover the property and even moreso to declare that the respondent held the freehold title to the property.

Trespass

[58] That leaves for consideration the respondent's claim that the appellant had trespassed on the property.

[59] Despite his pleading of threats of violence, use of force, destruction of a fence and no-trespassing signs, the respondent did not adduce any evidence of such activities on the appellants' part. But the appellants did admit in their joint defence that, with the first appellant's permission, the second appellant parked her vehicle on the property.

[60] It is clear that neither appellant had any title to the property or otherwise acquired any right to be there. The sole basis upon which the first appellant claimed an entitlement to permit the second appellant to enter the property and park her vehicle there, was his conveyance of the property as the administrator of Henrietta's estate to himself, which I have already held was ineffective.

[61] The appellants claim that neither did the respondent have any lawful possession of the property to found a claim in trespass since, although the respondent was previously in possession of the property, this was only as Martin's agent, and that agency terminated by operation of law upon Martin's death. While that may be so, and while Martin's death would have changed the capacity in which the respondent was

possessing the property, it did not change the fact of his possession and his ability, based on that possession, to maintain an action in trespass against anyone not capable of demonstrating superior title.

[62] I would therefore uphold the trial judge's finding that the appellants trespassed on the property and his award of $100.00 as damages for trespass. But I would discharge the permanent injunction restraining the appellants from entering the property. The first appellant has demonstrated that through his agreement to purchase Martin's interest in the property, he might have an interest as a beneficiary in the administration of the Ogaldez estate. It would accordingly be inappropriate to permanently restrain him from entering the property. On the other hand, one would expect that the parties would engage with each other with respect and restraint in order to ensure the orderly disposal of the property for the benefit of all those who might be interested.

Disposal and Costs

[63] In the result, the appeal is allowed to the extent that the trial judge's orders declaring that the respondent holds the freehold title to the property and that a permanent injunction be issued are set aside. However, the judge's orders that the appellants pay damages of $100.00 for trespass, and that the conveyance dated 8 June 2006 be cancelled are upheld and confirmed. The trial judge's order that the counterclaim stands dismissed is also confirmed, except that it is ordered that the Assent made by the respondent dated 12 February 1996 be cancelled.

[64] As the trial judge pointed out, the major area of contest in these proceedings concerned the parties' respective claims to title to the property. They both failed. The property stands vested in the respondent as administrator of the estate of Christopher Ogaldez and must be administered according to law. Although the respondent in the end succeeded on his claim for trespass, this, as it turned out, was only a minor issue in the proceedings. I would accordingly order provisionally that the parties bear their own costs here and in the court below. This order as to costs shall stand unless application

be made for a contrary order within 7 days of the date of delivery of this judgment, in which event the matter shall be decided by the Court on written submissions to be filed within 15 days from the said date.

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MENDES JA

HAFIZ-BERTRAM JA

[65] I agree with the judgment of Mendes JA, which I have read in draft, and have nothing to add.

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HAFIZ-BERTRAM JA