[2014] JMCA Civ 25

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 95/2011

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**ZEPHANIAH BLAKE**	**1ST APPELLANT**
A N D	**INEZ BLAKE**	**2ND APPELLANT**
A N D	**ALMANDO HUNT**	**1ST RESPONDENT**
A N D	**HAZEL CLAIR HUNT**	**2ND RESPONDENT**
A N D	**THORNIA ELEANOR HUNT**	**3RD RESPONDENT**
A N D	**CASHEL ROSELYN HUNT**	**4TH RESPONDENT**

Alexander Williams instructed by Usim, Williams and Co for the appellants

Miss Althea McBean instructed by Mrs Donna K.P. McIntosh-Brice for the respondents

8, 9 July 2013 and 20 June 2014

HARRIS JA

[1] This appeal emanates from a dispute between the appellants and the respondents in respect of an encroachment by the respondents on the appellants' land.

The appellants now challenge the following decision of Brooks J (as he then was) made in favour of the respondents:

> "It is therefore declared that:
>
> 1. The Defendants are the beneficial owners of all that parcel of land, hereinafter called 'the property', comprising 123.312 square metres being the parcel of land identified as section 10A on the survey plan prepared by Llewelyn Allen and Associates, commissioned land surveyors from a survey conducted on 27 March 2010 and being a part of the land comprised in Certificate of Title registered at Volume 1015 Folio 678 of the Register Book of Titles;
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> 2. The Claimants hold their interest in the property on trust for the Defendants.
>
> It is also ordered that:
>
> 1. judgment for the Defendants on the claim and the counter-claim;
>
> 2. the Claimants are hereby restrained, by themselves or by their servants and/or agents or in any manner howsoever, from removing, relocating, destroying or interfering in any manner with the boundary fence located between lots 10 and 11 Clanhope Drive, [sic] Golden Spring, in the parish of Saint Andrew;
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> 3. The Registrar of Titles shall rectify the Certificates of Title registered at Volume 1015 Folio 678 and Volume 1020 Folio 166 in accordance with the declarations herein contained;
>
> 4. Liberty to apply;
>
> 5. Costs to the Defendants to be taxed if not agreed."

On 9 July 2013, we dismissed the appeal and awarded costs to the respondents to be agreed or taxed.

[2] The appellants are the registered proprietors of lot 10 Canthope Drive, Golden Spring, in the parish of Saint Andrew, registered at Volume 1015 Folio 678. The respondents are the owners of adjoining property, 11 Canthope Drive, registered at Volume 1020 Folio 166. A surveyor's report dated 10 December 2007, which was exhibited in evidence, shows an encroachment of lot 11 on lot 10.

[3] On 8 April 2008, the appellants instituted proceedings against the respondents claiming an injunction and damages for trespass. The following was averred in paragraphs 4 to 6 of their particulars of claim:

> "4. In or about 1989, the 1st Claimant on behalf both of [sic] Claimants requested that 1st Defendant remove a metal fence which had then encroached on the Claimants [sic] said land at its eastern boundary which the 1st Defendant consent to do.
>
> 5. In or about 2003, the 1st Claimant discovered that the 1st Defendant had removed the said metal fence to abate the trespass, but the 1st Defendant, on behalf of himself, and the other Defendants, and either by themselves or through their servants and/or agents, wrongfully erected a new concrete fence upon the Claimants property without the consent of any of the Claimants. The said concrete fence encroaches upon the Claimants [sic] said land at its eastern boundary.
>
> 6. The Defendants threaten and intend unless restrained by the Honourable Court to continue to maintain the said concrete fence upon the Claimants [sic] said land."

[4] On 1 December 2009, the respondents filed a defence and ancillary claim paragraphs 4 to 8 of which read:

> "4. The Defendants join issue with the Claimants [sic] claim in paragraph 4 of the Particulars of Claim and avers [sic] that they

never met the Claimants until the Claimants started to build in 1999 and at no time requested the 1st Defendant to remove a metal fence.

5. The Defendants denies [sic] the Claimants [sic] allegations in paragraph 5 of the Claim and avers that in 1967 the 1st defendant purchased the parcel of land referred to in paragraph 2 hereof with the metal fence already installed and in July 2002 he invited the 2nd Claimant to contribute to the re placement of the said metal fence with a concrete base and chain link on top which the 2nd Claimant agreed to pay but not immediately. The fence was completed in October, 2002.

6. The Defendants denies [sic] paragraph 6 of the Claimants [sic] claim and avers that the said concrete fence is upon the Defendants [sic] land and not the Claimants [sic] land as the Defendants have a proprietary interest in the said land and the Claimants hold part of the land registered in paragraph 1 hereof on trust for the Defendants.

7. In December, 2007 [sic] Surveyors [sic] notice was served on the 1st Defendant, copy attached and marked "H".

8 On 13th December, 2007 Defendants responded by serve [sic] on the Claimants of a letter with surveyors sketch plan dated December, 2007 copy attached and marked 'H2'."

[5] In their reply to the defence and ancilliary claim, the appellants averred as follows:

"1. In response to paragraph 4, the Claimant's [sic] contend that they repeatedly instructed the 1st Defendant to remove the fence, and to have it replaced by the proper boundary.

2. In response to paragraph 5, the Claimants contend that they agreed to contribution [sic] 50% of the price of removing and re-erecting the fence, on the sole condition that the fence was placed on the correct boundary as reflected by the registered title to the lots of the Claimants and the Defendants.

3. Further the Claimants deny that the metal fence was erected in 1967, and will contend that insufficient time had run against the

Claimant [sic] for title to have been obtained by adverse possession and will contend that they never acquiesced in the Defendants obtaining the lands caught by the offending fence.

4. The Claimants therefore deny that the Defendants are entitled to any of the reliefs claimed by way of counterclaim."

Appellants' evidence

[6] The 1st appellant's evidence is that the purchase of his property commenced in 1989, at which time, his wife, the 2nd appellant, and himself, were resident in London and were on a visit to Jamaica. At that time, he met the 1st respondent and identified himself as the owner of lot 10 Canthope Drive. Subsequent to the payment of the deposit on the purchase price, he said that he was permitted by the vendor to enter into possession of the property. The fence separating the two properties then "consisted of wooden pegs with three barbed wires running across the pegs".

[7] He said that during the process of his acquisition of the property, it was his intention to secure a mortgage but this did not materialize as a survey of the land had been carried out which revealed the encroachment by a fence on his land. However, in cross-examination he stated that he did not obtain a survey when seeking to purchase the property. In 1990, on a visit to Jamaica, he inquired of the 1st respondent his reason for preventing a surveyor from carrying out a survey. The 1st respondent, he said, responded by saying that he had recently erected the fence and did not have sufficient funds to remove it.

[8] While on a further visit to Jamaica in 1991, prior to the completion of the sale of his property to him, he said he observed that the barbed wire fence was replaced by a mesh wire fence which appeared to have moved 10 feet into the land which he was purchasing and that some of the existing pegs had been removed. Being infuriated by this act of the respondents, he went to the 1st respondent and demanded that he remove the fence but he refused to do so. He also said that on several other occasions he requested that the fence be removed, but to no avail.

[9] He went on to state, that in 2003, he endeavoured to secure a surveyor's report but the 1st respondent refused the surveyor entry on his land, and in 2004 he observed that the 1st respondent had constructed a concrete fence on his, the 1st appellant's land six inch from the chain link fence. In 2007, after a survey had been done, a survey plan, which revealed the encroachment, was obtained by him (the 1st appellant).

[10] He further stated that the 1st respondent spoke to him about selling him a piece of his (the appellant's) land to build a road. He also asserted that the 1st respondent offered to purchase the land where the fence was located, however, despite negotiations in this regard, the 1st respondent reneged and subsequently informed him that his, (the 1st appellant's) cost towards constructing a wall was $150,000.00.

[11] The 2nd appellant testified that the property was purchased in 1999 but when pressed, in cross-examination, stated that she was not quite sure of the date. When she

first saw the fence, she declared, it was constructed from barbed wire supported by wooden posts. She was unsure of the time of her first encounter with the respondents, but said at that time they exchanged pleasantries. However, she had no further conversation with them until 2004 when the 1st respondent informed her of his proposal to build a concrete fence, which he would place in the right boundary and would be requiring a contribution from her, but a price was not discussed.

[12] Thereafter, her husband and herself left for England but returned a month later at which time she observed that a new concrete fence had been constructed "a little over in her land".

[13] Mr Clinton Hanna (who testified that he was also known as Steve) stated that on or about 1994, he erected a concrete fence for the 1st respondent which replaced an existing chain link fence. He related that Mr Hunt instructed him to affix the chain link fence on top of the concrete fence and to place the new fence 6 inches away from the chain link fence and from a water meter at the front of the respondents' property. About two and half years before the trial of the action the appellants requested him to demolish the wall. (The trial was held on 5 July 2011.)

Respondents' evidence

[14] The 1st respondent stated that his property was bought in 1967 and the fence between lots 10 and 11 had remained in the same position since the purchase of the property. The current wall, he said, is within the correct boundary and the original

fence was erected by the previous owners of their property and themselves. He went on to state that if the fence were to be re-positioned, a water meter on his side of his property would have had to be relocated.

[15] He further related that he did not meet the appellants until several years after the purchase of their (the appellants) property and that he had no conversation with them in 1989 about the removal of the fence. In 2003, he said, his wife and himself made a decision to construct a concrete fence and after informing the 2nd appellant of his intention to do so, sought a contribution from her towards the construction. She, having consented to the proposal, informed him that upon completion of the fence she should be so advised and she would then make a contribution, on completion of the fence wall. She failed to fulfill the promise.

[16] He went on to state that he only became aware of the encroachment in 2010, when he was so informed, after the survey of the property was done.

[17] The 2nd respondent testified that their property was bought in 1967 and when they moved to that property, due to certain security concerns, they agreed with the Browns, the previous owners of lot 10, to build a new fence replacing an existing old wire fence. That old fence was replaced, by a chain link fence, by them (the respondents) sometime during the 1970s. She said that Mr Brown, the previous owner of lot 10, acknowledged that a problem existed in respect of the fence adjoining the two properties. Mr Brown, she asserted, made the decision to allow the new fence to

remain in the same position in which the old fence was erected for the reason that the correction of the boundary would have created a difficulty, in that, it would have required the removal of a water meter on their (the respondents) property.

[18] The property remained mostly unattended for several years. At some later date, the 2nd appellant introduced herself as the owner of lot 10.

[19] Sometime in 2003, an agreement was brokered between the 1st respondent and the 2nd appellant about the replacement of the chain link fence and although the 2nd appellant expressed a willingness to contribute to the replacement, she said she was unable to meet their part of the expenses at that time but would do so at a later date.

[20] It was further stated by her that her husband and herself went to reside in the United States of America in 2003 and returned to Jamaica in 2007, at which time she reminded the 2nd appellant of her commitment to meet a part of the costs of constructing the wall but the 2nd appellant refused to assist with the costs, asserting that they had taken away her land. She went on to state that it was at that time, that she learnt of the encroachment. She further asserted that the replacement wall was constructed by Mr Steve Hanna in the existing boundary.

[21] Evidence was given by Mr Luscaine Hibbert who stated that he was a frequent visitor to 11 Canthope Drive and that initially, a chain link fence was placed from the

rear to the left side of the property but this was replaced by the concrete wall with the chain link fence on top.

[22] Thornia Hunt, daughter of the Hunts, also testified that the physical boundary between the two properties had remained intact. The only change, she stated, is in relation to the type of fence which had been erected.

[23] Seven grounds of appeal were filed, the last of which was abandoned. The remaining grounds read:

> "(a) The learned trial judge failed to have any or any due regard to the inconsistencies and discrepancies on the respondent's case, concerning their knowledge of the encroachment on the Appellants' land.
>
> (b) The learned trial Judge failed to appreciate that the Respondents failed [sic] discharge their evidentiary and legal burden of proving their intent to dispossess, given the inconsistencies and discrepancies in their case.
>
> (c) The learned trial Judge attached too much weight to the fact of fencing, given the circumstances of this particular use.
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> (d) The learned trial Judge erred in concluding that the construction of a new boundary wall in 2004 in a different position than the previous existing fence did not negate the reputed boundary and failed to appreciate that the location of the new wall constructed in 2004 was, on the Respondents' case, the reputed boundary.
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> (e) The learned trial Judge, having found as a fact that the wall constructed in 2004 was placed in a different location than the previous fence, failed to appreciate that this was evidence showing lack of acquiescence in the Appellant and Respondent to the 'reputed' boundary represented by the previous existing fence.

(f) The learned trial Judge failed to have sufficient or any regard for the evidence given by the Appellant [sic] of their objections and the dispute between the parties between 1991 and 2004."

Submissions

[24] It was Mr Williams' submission that it is common ground that a concrete fence was constructed on the appellants' property and they were entitled to judgment unless the respondents could prove that they were entitled to possession. There was, he argued, evidential material before the court showing that the concrete fence had been placed in a different position from any of the fences which had previously existed.

[25] The learned judge, in assessing the evidence of the respondent placed reliance on some and not all of the witnesses and although relying heavily on the 2nd respondent's evidence, the learned judge omitted to have taken into consideration the discrepancies and inconsistencies in her evidence, he argued. In her evidence in chief, the 2nd respondent stated that she first became aware of the encroachment in 2007, however, in cross examination she stated otherwise; this, the learned judge failed to have taken into account, counsel submitted. Further, he contended, the learned judge, in accepting her as a credible witness, failed to have considered her evidence in chief in which she stated that the fence had never been removed, but Mr Hanna, who was also accepted as a credible witness, said the 1st respondent asked him to place the fence 6 inches into the appellants' land.

[26] The 2nd respondent having stated that prior to 2007, she was unaware of the fence being in a different boundary, there could have been no intent by the respondents to dispossess the appellants nor could there be acquiescence on the part of the appellants, counsel argued. Significantly, the certificate of title does not disclose anyone by the name of Brown as a previous owner of lot 10. Therefore the respondents must show that the persons who claim to be the registered proprietors acquiesced on the boundary and therefore, they ought to have placed before the court any other document in their possession relating to the boundary, he contended. The physical act of possession does not permit a party to obtain title and if the respondents believed that the fence was continuously in the same position and they never regarded themselves as trespassers, they could not have acquired title by reason of possession, he argued.

[27] The 2nd respondent stated that the object of the fencing was for security purposes, which is insufficient to demonstrate an intention to possess, counsel submitted, citing ***Tracey Enterprises MacAdam Limited v Drury*** [2006] IEHC 387 to support this submission.

[28] Counsel further cited the cases of ***Keelgrove Properties Ltd v Shelbourne Development Limited*** [2005] 1ECH 238, and ***Kelleher v Botany Weaving Mills Limited*** [2008] 1ECH 417 to show that where a person acts in the mistaken belief of ownership, this is not enough to prove an intention to possess.

[29] It was also counsel's contention that the intention to dispossess requires a certain standard of proof and this, the respondents had not met and therefore ought not to have succeeded in their defence. The case of ***J A Pye (Oxford) Ltd and Another v Graham and Another*** [2003] 1 AC 419 was cited to bolster this submission. The critical issue, counsel argued, was the intent to dispossess and the respondents had continuously removed the boundaries and therefore cannot be regarded as falling within section 45 of the Limitation of Actions Act ("the Act") as a previous proprietor or a person claiming to be the owner.

[30] Miss McBean, in response, argued that the learned judge directed his attention to the discrepancies between the 1st and 2nd respondents' evidence and had a preference for that of the 2nd respondent, who gave cogent evidence which is capable of belief. Her evidence in cross-examination, counsel contended, is not inconsistent with that which she gave in examination in chief. The evidence in chief was that upon her return from the United States in 2007, she learnt for the first time of the encroachment when the 2nd appellant told her that she and the 1st respondent had taken her land, but in cross-examination she indicated that she was aware of a difficulty with the fence, she argued. The evidence shows that they had discussions with the Browns, the persons whom her husband and her believed to have been the previous owners and although discovering that a problem existed, they agreed that the fence should remain, due to the presence of the water meter, she submitted.

[31] Dispossession requires evidence to show an intention to take the land, she argued, that is, knowledge that a person is owner, and the party who seeks to acquire possession makes a decision to take the land. The 1st appellant said he had discussions with the 1st respondent in 1990. Despite this, he did nothing to assert the appellants' right to the land which goes to show acquiescence and therefore, the learned judge rightly found encroachment by the respondent as of 1991 which continued until 2004, effectively ousting any right which the appellants would have had to that part of the land which had become the settled boundary, she submitted. On the evidence, there was intent to take possession of the land by the respondents and the learned judge, she argued, in stating that this case meets the criteria laid down in ***Pye***, properly applied the Limitation of Actions Act and rightly found that the 14 years in which the respondents were in occupation, exceeded the period required by the Act.

[32] The fence needed to go back 6 inches into the appellants' property and would have been erected by the respondents as the reputed boundary and this would be in keeping with the relevant provision of the Act, counsel submitted. Section 3 of the Act applies, the chain link fence had been there for 12 years, which ousts the entitlement of the appellants to possession, she argued. Further, she contended, the chain link fence had been in the respondents' possession for 14 years, they had the intention to possess it and with the acquiescence of the appellants for 17 years, the right of the appellants had been extinguished.

[33] In response to ***Kelleher v Botany Weaving Mills***, counsel stated that that case requires the defendant to prove intention to dispossess under the Irish Limitation of Actions Act which specifically refers to adverse possession, which is not a requirement under our Act.

Analysis

[34] Consideration will first be given to the appellants' complaint of the learned judge's acceptance of the 2nd respondent's evidence despite the variance between that of the 1st respondent and hers and her evidence and Mr Hanna's.

[35] The matter of the acceptance of a witness' testimony in preference to that of another is clearly within the province of a trial judge. He is the arbiter of the facts and, in assessing the evidence is entitled to decide on whose evidence he can place reliance. In making a determination, in keeping with the discretionary powers which reside in him, it is for him to consider what evidence he will accept. He may believe all of a witness' testimony or reject all, or may accept a part and reject a part. It is incumbent on him to assess the credit-worthiness of a witness and he may regard the testimony of one witness as being preferable over that of another.

[36] The real question is whether on the evidence before the learned judge, there was sufficient evidence from the 2nd respondent which was of probative value and from which he could have reasonably drawn the conclusion that she was a credible witness.

In assessing the evidence of the 1st and 2nd respondents, the learned judge had this to say at pages 4 and 5 of his judgment:

> "Mr and Mrs Hunt gave different accounts on a very significant aspect of the case. Whereas Mr Hunt, in my view, untruthfully stated that he was not aware of any difficulty with the fence until 2010, Mrs Hunt said she was aware, from as far back as 1967, that the fence had been incorrectly placed. Mrs Hunt was the more credible of the two.
>
> On her account, they purchased lot 11 in 1967 but that after they had moved to live there, they had security problems. She says that, in addressing those security problems, they replaced an old wire boundary fence, which was between lots 10 and 11, with a new chain-link fence. At the time of the replacement, she says, it was agreed with the then owner of lot 10, Mr Brown that although the chain-link fence was in the wrong location it should remain where it was. The rationale at the time was that placing it in the correct location would have required removing the water meter to lot 11, from its then location and such a removal would have been difficult.
>
> Mrs Hunt says that when the Blakes took possession of lot 10, no permission was sought from them for the fence to remain where it was. She insisted that the chain-link fence was replaced in 2004 pursuant to a discussion between Mrs Blake and Mr Hunt. According to Mrs Hunt, Mrs Blake had agreed to pay a half of the cost of replacing the chain-link fence but said that she did not then have the money to finance her half of the cost but would pay it later. They agreed, according to Mrs Hunt, to replace the chain-link fence with a concrete block wall. Mrs. Hunt says that in 2007, Mr Hunt asked Mrs. Blake for her contribution to the cost and Mrs. Blake refused to pay; saying that the wall had taken in some of her (Mrs. Blake's) land. Thereafter, Mr Blake, it is said, threatened to knock down the wall."

[37] The 1st respondent stated that the fence was always in the same location from the time of the purchase of the property, which was untrue. He stated that he became aware of the encroachment in 2010, which was also untrue. The 2nd respondent's

evidence shows otherwise. She recounted that she became aware that there was a problem with the fence and the barbed wire fence was replaced with the chain link fence in the 1970s with the knowledge and consent of the previous owners of lot 10. Therefore, it is reasonable to infer that the 1st respondent would have also known of the difficulty in respect of the boundary from then. Clearly, although the 2nd respondent stated that in 2007, she first knew of the encroachments when she spoke to the 2nd appellant about her promise to contribute to the fence and the 2nd appellant mentioned that she would not make any payment as they had taken her land could not be accepted as correct.

[38] So far as the complaint as to the evidence of the 2nd respondent that the fence had not been removed from its original position in contrast with Mr Hanna saying that the 1st respondent had requested that the fence be moved 6 inches into the appellants' property, that in itself, would not in any way, preclude the learned judge from accepting such of the 2nd respondent's evidence as he found credible. The evidence of the 2nd respondent was capable of belief on the significant issues as stated by the learned judge.

[39] The learned judge had a complete grasp of the evidence and correctly assessed the strengths or the weaknesses of each of the witnesses and in particular, adequately dealt with the 2nd respondent's evidence and did not arrive at a conclusion as to the evidence of the 2nd respondent and Mr Hanna, or that of any of the witnesses, contrary to the facts before him or based on any misunderstanding of those facts.

[40] We now turn to the following issues:

(1) Whether in light of the discrepancies the respondents failed to discharge their burden of proving an intent to dispossess;

(2) Whether the fence erected in 2004 negated the reputed boundary;

(3) Whether there was acquiescence on the part of the appellants.

[41] It will be appropriate to make reference to the relevant law governing actions for recovery of property. The law concerning the bar to the recovery of possession of land is encapsulated in the Limitation of Actions Act. Two essential elements are contemplated by the statute namely:

(a) dispossession

(b) discontinuance of possession

[42] Under section 3 of the Act, the right of an owner of land to recover possession from a person who is in physical possession of it, ceases after the expiration of 12 years. The section reads:

> "3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."

[43] Section 30 speaks to the extinguishment of the right to bring an action for the recovery of possession of property on the determination of the period limited under the Act. It provides:

> "30. At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

[44] Section 45 relates to the acquiescence to a reputed boundary. It states:

> "45. In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such lands, or the persons under whom such proprietors claim, for the space of seven years together, such reputed boundary shall for ever be deemed and adjudged to be the true boundary between such proprietors; and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding."

[45] For years, the authorities show that the application of the law has been ensnared by some amount of complexity. This is due to the mistaken concept that in order for a squatter to obtain title by the effluxion of time, he had to act adversely to the owner of the paper title. In ***Pye*** Lord Browne-Wilkinson expressed the view that any discomfiture or complication occasioned in applying the law can be eluded by the avoidance of reference to the words "adverse possession". At page 434, he said:

> "In my judgment much confusion and complication would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into possession of the land for the requisite period without the consent of the owner."

[46] The operation of the law requires the co-existence of two components: firstly, a physical possession by the person who seeks to displace the true owner; and secondly, the presence of a mental ingredient showing an intention to possess. There must be explicit and definitive evidence of acts of possession and it must be established that these acts are unequivocally in harmony with an intention to exclude the true owner's possession of the land. In order to be effective in displacing the true owner, possession must be without the consent of the true owner and devoid of violence or secrecy.

[47] The case of ***Pye*** on which the learned judge relied, was one in which Pye had entered into a written grazing agreement with the Grahams on their land in 1983. The agreement ended in 1993 and the Grahams were requested to vacate the land. Pye failed to adhere to the Grahams requests for renewal of the agreement, but the Grahams remained on the land for 12 years without making any payments to Pye and subsequently obtained title to the land. In 1999 Pye brought proceedings against the Grahams for recovery of possession. The judge found that the Grahams had enjoyed factual possession of the land from January 1984 and Pye's title was extinguished as the Grahams had the intention to possess the land. This judgment was reversed by the

Court of Appeal. On the Grahams' appeal to the House of Lords, the judgment of the court of first instance was restored.

[48] In his judgment, Lord Browne-Wilkinson expressed the view that two elements are required to establish legal possession namely: factual possession and intent to possess. In dealing with the first of these two components, his Lordship, at page 436, cited, with approval the following extract from a judgment by Slade J, in ***Powell's*** case 38 P and CR 452, at pages 470 and 471, as the correct statement of the law:

> "(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

Speaking to the question of an intention to possess, Lord Browne-Wilkinson went on to say at pages 436 and 437:

> "There are cases in which judges have apparently treated it as being necessary that the squatter should have an intention to own the land in order to be in possession. In ***Littledale v Liverpool College*** [1900] 1 Ch 19, 24 Sir Nathaniel Lindley MR referred to the plaintiff relying on 'acts of ownership': see also ***George Wimpey & Co Ltd v Sohn*** [1967] Ch 487, 510. Even Slade J in ***Powell***, at pp 476 and 478, referred to the necessary intention as being an "intention to own". In the ***Moran*** case [1988] 86 LGR 472, 479 the trial judge (Hoffmann J) had pointed out that what is

> required is "not an intention to own or even an intention to acquire ownership but an intention to possess. The Court of Appeal in that case [1990] Ch 623,643 adopted this proposition which in my judgment is manifestly correct. Once it is accepted that in the Limitation Acts the word 'possession has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that at any given moment the only relevant question is whether the person in factual possession also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title."

[49] Lord Hope of Craighead at pages 445 and 446 expressed the components in the following terms:

> "70 The general rule, which English law has derived from the Roman law, is that only one person can be in possession at any one time. Exclusivity is of the essence of possession. The same rule applies in cases where two or more persons are entitled to the enjoyment of property simultaneously. As between themselves they have separate rights, but as against everyone else they are in the position of a single owner. Once possession has begun, as in the case of the owner of land with a paper title who has entered into occupation of it, his possession is presumed to continue. But it can be transferred from one person to another, and it can also be lost when it is given up or discontinued. When that happens, possession can be acquired by someone else. The acquisition of possession requires both an intention to take or occupy the land ("animus") and some act of the body ("corpus") which gives effect to that intention. Occupation of the land alone is not enough, nor is an intention to occupy which is not put into effect by action. Both aspects must be examined, and each is bound up with the other. But acts of the mind can be, and sometimes can only be, demonstrated by acts of the body. In practice, the best evidence of intention is frequently found in the acts which have taken place."

[50] The requisite intent must be one of exclusivity that is, the intent to exercise physical control over the disputed land.

[51] It is only necessary to show that the possessor had an intention to occupy and utilize the land as owner. That is, an intention to acquire a title in his own name and "to exclude the world at large including the owner with the paper title if he is not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow" - see ***Pye***.

[52] In ***Chisholm v Hall*** (1956-1970) 7 JLR; (1959) 1WIR 41, a case on which the learned judge also relied, a dispute between the parties related to the correct boundary between two contiguous parcels of land. The respondent brought an action for the recovery of possession of a tract of land which encroached seven feet on his land. At the time of the commencement of the action, a physical boundary between the lots was in existence which the appellant contended was the true boundary. The respondent sought a declaration that the encroachment was on his title and he was entitled to possession and mesne profits. In a counterclaim, the appellant sought a declaration that the existing boundaries were the correct boundaries. It was held that the respondents' title was "ousted" in favour of the appellant.

[53] In ***Pye***, Lord Browne-Wilkinson expressed disfavour with certain authorities embracing ouster from possession as a relevant constituent of dispossession. At pages 434 and 435 he had this to say:

> "It is sometime said that ouster by the squatter is necessary to continue dispossession: see for example ***Raines v Buxton*** [1880] 14 Ch D 537; 539 per Fry. The word "ouster" is derived from the

> old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a (dispossession) of the paper owner in any case where (there being no discontinuance of possession of the paper owner) a squatter assumes possession in the ordinary sense of the word."

[54] The issue as to the insufficiency of evidence to support a finding of an intent by the respondents to dispossess the appellants will now be addressed. At pages 13 and 14 of his judgment, the learned judge, after looking at the relevant law and several authorities said:

> "In my view, few things, if any, more emphatically demonstrate an intention to possess land and dispossess others of that land, than the erection of a fence around that land. Their Lordships in Wills however, made it clear that fencing, "although significant, is not invariably either necessary or sufficient as evidence of possession." The intention associated with the act of fencing must be considered.
>
> I find that when Mr Hunt erected the fence between his lot and lot 10, he intended to possess the lot (he was then the sole registered proprietor) for his own benefit and to exclude the world at large. His refusal, when requested by Mr Blake to remove the encroaching fence, showed his intention to also deprive the Blakes of the land enclosed by the fence.
>
> The Hunts were therefore in physical possession of the subject land and possessed the requisite intention to possess it. Because that possession lasted for a period in excess of twelve years, the Blakes have been deprived of the beneficial interest in that land by the combined operation of sections 3 and 30 of the Act. The Blakes' claim must therefore fail."

[55] It cannot be denied that there were discrepancies and inconsistencies in the evidence of the respondents. Despite the discrepancies and inconsistencies, sufficient evidence was adduced by the 2nd respondent to show that the respondents were on the

disputed strip of land without the appellants' permission. From as far back from 1967, when the respondents acquired ownership of their land, they were aware that the boundary fence had been incorrectly positioned. The persons who they presumed to have been the previous owners of the appellants' property and themselves agreed that the chain link fence which replaced the barbed wire fence was in the incorrect position. The respondents' remained in occupation of the land on which they had encroached up until the appellants brought the recovery of possession proceedings. However, the mere occupation of the land is not enough to establish dispossession. There must be credible evidence evincing an intention by the respondents to exclude the appellants as owners and there is such evidence.

[56] The respondents were fully aware that a problem as to the location of the fence existed. This problem of the encroachment had come to the 1st appellant's knowledge in 1991 as on his own admission, he discovered that the chain link fence was in the incorrect position. Sometime in 1991, the 1st respondent expressed his disinclination to remove the fence when asked by the 1st appellant to do so. The 1st appellant said that the 1st respondent offered to purchase the encroached area but withdrew the offer. This shows an intention of the respondent to possess the land. The appellants remained silent as to the respondents' occupation of the land until 2004 at which time they registered objection to the construction of the wall. This would have been too late for them not to have been expelled from the encroached area of the land as the 12 years prescribed by section 3 of the Act would have expired.

[57] The acts of the respondents are capable of showing that they had dispossessed the appellants. What was done was sufficient to demonstrate that the respondents had taken physical possession of that part of the property of the appellants on which they encroached from 1991 and time would have begun to run then and would have continued to run contrary to the appellants' enjoyment of their land. It was clearly the respondents' intention to use the land as their own. Mr Williams' submission that there could not have been any intention to dispossess as the 2nd respondent stated that the construction of the fence was for security purposes is misplaced. Even if the chain link fence was erected for security reasons, the fact is that it remained, in the incorrect position, in the respondents' possession for more than 12 years, which shows their intent to dispossess the appellants.

[58] The learned judge was fully cognizant of the discrepancies arising on the respondents' case and properly directed himself as to how they should be determined. He was correct in finding that when the 1st respondent erected the fence it was his intention to do so for his exclusive benefit and that his refusal to remove it demonstrated his intention to deprive the appellants of the strip of land. Accordingly, the appellants' right to bring an action for recovery of possession would have been extinguished under section 30 of the Act, the 12 year limitation period having expired.

[59] Consideration will now be given to the complaint that the concrete wall had been constructed on a different boundary from that which ought to have been the reputed boundary and there could not have been an intent to dispossess the appellants. The learned judge, in dealing with the question of the boundary, said at page 12:

> "In so far as the physical boundary fence is concerned, I find that the Blakes acquiesced in the chain link fence being located on their property. The chain link fence being there in excess of seven years meant that it became the boundary for the purposes of section 45 of the Act. It became the reputed boundary.

Then, at page 13, he said:

> "In my view, the construction of the wall in a different location did not negate the location of the reputed boundary, in other words it did not result in the registered boundary becoming, once again, the boundary for the purposes of the Act. It did, however, restart the clock, in terms of the wall becoming the reputed boundary, for the purpose of section 45 of the Act."

It is clear that the learned judge, in dealing with the reputed boundary, correctly placed the physical location of the boundary at the site at which the chain link fence had been erected. In light of his findings, it could not be said, that it would have been improper for him to have concluded that the concrete fence which was constructed in 1994 would not have altered the fact that the location of the concrete fence was the reputed boundary. Although the concrete structure was erected in 1994, it was not until about two and a half years before the trial of the action in July 2011 that the appellants took an objection to the erection of the wall by seeking to demolish it. By then, more than seven years would have expired and the appellants' legal and equitable right to the land would have been extinguished by virtue of section 45 of the Act. It cannot be said that the judge erred in his findings and conclusion.

[60] The issue relating to acquiescence will now be considered. The learned judge gave consideration to the meaning of "acquiescence" within the context of the Act, by making reference to the meaning of that word as defined in the 2nd Edition Jowetts

Dictionary of English Law and also by alluding to dicta from several cases including: ***In Duke of Leeds v Earl of Amherst*** (1846) 2 Ph 117 and ***Bell v Alfred Franks and Bartlett and Co*** (1980) 1 All ER 356. In ***Duke of Leeds v Earl of Amherst*** Lord Cottenham said at page 124:

> "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress, he cannot afterwards complain this is the proper sense of the word 'acquiescence'."

[61] In ***Bell v Alfred Franks and Bartlett*** at page 360 Shar LJ said:

> "What is meant by acquiescence? It may involve more than a merely passive attitude, doing nothing at all. It requires an essential factor that there was knowledge of what was acquiesced in."

Referring to ***Weldon v Dicks*** (1878) 10 Ch D 247 in which Malins V-C said at page 262 that "this court never binds parties by acquiescence where there is no knowledge", the learned judge stated that it appears that knowledge is an essential criterion of acquiescence. At page 11 of his judgment, after reviewing the meaning and the various dicta in respect of the term acquiescence, he said:

> "It would seem that a mere initial objection to a breach may be deemed supplanted by acquiescence. If there is no effort to seek redress against the violation of one's right within the period of limitation."

Then at page 14 he said:

> The Blakes, by their inactivity for a period of over twelve years, despite being of the view that the Hunts had wrongly enclosed their property by placing a boundary fence in an incorrect position, failed to take any step to correct the situation. Their initial objection, upon discovering the encroachment in 1991 became by

2004, acquiescence to the location of the boundary fence as the boundary."

[62] The learned judge's conclusion that the appellants acquiesced in the chain link fence being placed on their property and that the construction of the wall in a different location was inconsequential in that it did not affect the registered boundary becoming the new reputed boundary cannot be faulted.

[63] In his review of the law and the evidence, the learned judge properly and adequately dealt with the issue of the respondents' factual possession of the land and their intention to dispossess the appellants of it. We cannot say he was wrong in arriving at his conclusion.

[64] The cases of ***Trace Enterprises Macadam United v Drug***, ***Keelgrove Properties Ltd v Botany Weaving Mills Limited*** and ***Kellcher*** cited by Mr Williams do not assist the appellants. The cases are of Irish origin and the matters were grounded in the Irish Limitation of Actions Act which expressly speaks to adverse possession. Our Limitation of Actions Act does not. Remarkably, in ***Pye*** Lord Browne - Wilkinson stated that after 1833, the concept of adverse possession ought not to have found a place in judicial decisions and that although the term re-appeared in the English Limitation of Action Act of 1939 and in the schedule of the Limitation of Actions Act of 1980, it does not assist in proving whether a squatter is in possession of disputed land - see page 434.

[65] In fact, Lord Hope of Craighead specifically pointed out that the term, adverse possession is employed for convenience. At page 445, he said:

> "It is used as a convenient label, only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner, or in the case of registered land, of the registered proprietor".

He then went on to say:

> "A right of action is treated as is regarded as accruing as soon as the land is possessed of a person in whose favour the limitation period is capable of running. In that sense and for that purpose the other person's possession is adverse to his. But the question whether that other person is in fact in possession of the land is a separate question on which the word 'adverse' casts no light."

[66] The foregoing are our reasons for dismissing the appeal.