Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 74/87

COR: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN	GEORGE JOHNSON	PLAINTIFF/APPELLANT
A N D	EDRIS MYERS	DEFENDANT/RESPONDENT

D.M. Muirhead, Q.C., & John Vassell for Appellant

R.N.A. Henriques, Q.C., & Allan Wood for Respondent

January 25, 26 & February 18, 1988

CAREY, J.A.:

This is an interlocutory appeal from an order of Panton, J., dated 25th September, 1987 refusing the plaintiff's application for an interlocutory injunction. The plaintiff with leave of the judge appeals from that judgment to this Court.

In his statement of claim dated 27th July, 1987, the plaintiff claimed against the defendant:

> "(i) A declaration that as against the Defendant, he is entitled to possession of premises known as lot 2, 39 Gloucester Avenue, Montego Bay in the parish of Saint James.
>
> (ii) An injunction to restrain the Defendant by herself, her servants or agents from interfering with the Plaintiff's possession, use or enjoyment of the said premises."

At the hearing of the application for interlocutory injunction, the learned judge had before him the plaintiff's statement of claim and affidavits from the parties. It may be said at once that the affidavit in support of the plaintiff's application was remarkable for the omission of relevant facts which were eventually brought to the Court's attention in the defendant's affidavit in reply. As to these facts which were admitted by the plaintiff he deposed to his belief that they were legally irrelevant to his claim against the defendant.

As to the statement of claim, the plaintiff averred that he has been in continuous, open and undisturbed possession of premises known as lot 2, 39 Gloucester Avenue, Montego Bay in the parish of St. James since 1970. By his affidavit he deposed, however, that he operated a car rental business, United Car Rentals Limited, on premises adjacent to lot 2 on which he parked his company's vehicles and had done so since 1970.

It transpired, however, that the plaintiff had been a tenant of Charles and Michael Marzouca who also had operated a car rental business and used lot 2 for the purpose of parking vehicles. In 1970 the plaintiff had rented a room in the offices of the Marzoucas and was given permission to park cars in the same parking lot. The plaintiff acknowledges this to be true and explained that he continued to pay rent to the Trustee in Bankruptcy after the bankruptcy of Charles Marzouca.

There were other facts which were disclosed in the the affidavits which, although strictly speaking, irrelevant to a consideration of the question which fell to be determined in this appeal, are useful as providing the setting for the dispute between the parties. The disputed plot forms part of 3/4 acre of land owned by the Commissioner of Lands and leased by him to the defendant in 1959. That lease was registered under the Registration of Titles Act. It

was a building lease and obliged the defendant within 2½ years to construct a hotel. She did not. The Commissioner did not take steps to forfeit the lease, as plainly, he was at liberty to do. Be that as it may, on 17th July, 1971 the same parties executed another building lease for a period of 41½ years, the defendant covenanting (inter alia) to erect and construct a hotel within 4 years. Again no construction took place. In 1984 the Ministry of Agriculture issued instructions to the Commissioner of Lands for the sub-division of certain lands including lot 2, owned by the Commissioner and it was directed that lot 2 should be allotted to the plaintiff. However, those instructions were never carried into effect. In April 1985 the defendant submitted plans for building approval which finally was obtained in October 1986.

In my opinion, the sole question for the determination of the learned judge as it is, for this Court, is whether there is any serious question to be tried. In the state of this material which I have summarized, I am of the view that the issue is whether there was any evidence of adverse possession on the part of the plaintiff as against the lessor of the land.

The answer which must be in the negative is plain beyond words, and for a number of reasons. If anything, the affidavit of the plaintiff showed that the occupation of lot 2 since 1970 was by this company United Car Rentals Limited, of which the plaintiff was the Managing Director, and not in right of himself, in his personal capacity. That would be enough to dispose of the matter completely. But I would rather base my conclusion on grounds other than that, seeing that there exist other matters of more substance which were canvassed before us.

First, I would refer to Treloar v. Nute [1977] 1 All E.R. 230, a case similarly concerned with the question of adverse possession and upon which Mr. Muirhead placed great reliance. In that case

Sir John Pennycuick who gave the judgment of the Court cited sections 4(3), 5(1) and 10(1) of the Limitation Act 1939 (U.K.) which are, in import, similar to our sections 3, 4 and 30 of the Limitation of Actions Act, and then stated as follows:

> "The law as we understand it, always apart from that special type of case, is that if a squatter takes possession of land belonging to another and remains in possession for 12 years to the exclusion of the owner, that represents adverse possession and accordingly at the end of the 12 years the title of the owner is extinguished.
>
> That is the plain meaning of the statutory provisions which I have quoted and no authority to the contrary has been cited to us. The simple question is: did the squatter acquire and remain in exclusive possession?
>
> The literal application of the statutory provisions has been adapted by this court to meet one special type of case. It sometimes happens that the owner of a piece of land retains it with a view to its utilisation for some specific purpose in the future and that meanwhile some other person has physical possession of it. When that state of affairs exists, the owner is not treated as dispossessed. See Leigh v. Jack (1879) 5 Ex. D. 264 where factory materials were placed on a strip of land intended by the owner to be dedicated as a road: in particular per Cockburn C.J. 5 Ex. D. 264 at 271 and per Bramwell L.J. 5 Ex. D. 264 at 273 where the latter said:
>
> '.... in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes'."

Mr. Muirhead argued that the appellant in the instant case was in the position of a "squatter". It requires no mean feat of mental prestidigitation to put forward such a view. The plaintiff in this case, as the evidence shows and as he himself confessed, took possession of the land in question as a tenant or licensee of the

Marzoucas. This was possession by permission: it would not be "nec precario". Indeed he has received notice to quit which expires 30th June, 1988 from his landlords, the Marzoucas. They used the land as a parking facility with the tacit approval of the 'paper owner' viz., the lessee, the defendant who in his affidavit, deposed at paragraph 7 (at page 21):

> "This use of the lands as a parking facility constituted no inconvenience as the Defendant was not then ready to build upon the said lands as was provided for by her Lease."

Mr. Muirhead maintained that it was not open to this Court to hold that the use of the land was sanctioned by a tacit approval. I am not altogether clear why he held that view. He said that it was a matter of fact for the trial court, but he never argued that the act of parking vehicles by the landlord constituted an ouster of the rightful owner. Indeed, even if it constituted an ouster, the benefit would accrue to the landlords who had given the tenant, i.e., the plaintiff a licence or a tenancy, to enable use of the lot for parking vehicles. It was incumbent on the plaintiff to show that his possession was adverse.

Thus there was an onus on him to show that there was, on the basis of the material submitted, an arguable case as to ouster or dispossession. Lord Denning M.R. in Wallis's Ltd. v. Shell-Mex and BP (1974) 3 All E.R. 575 at page 580 had this to say on the subject:

> "Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor. That is shown by a series of cases in this court which, on their very facts, show this proposition to be true.
>
> When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it

> "unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more: see Leigh v. Jack (1879) 5 Ex. D. 264: Williams Brothers Direct Supply Stores Ltd v. Raftery (1957) 3 All E.R. 593, (1958) 1 Q.B. 159, Tecbild Ltd v. Chamberlain (1969) 20 P & CR 633."

There really was no arguable situation as to whether the plaintiff was a squatter. The true position was that the plaintiff was a tenant or a licensee using the lot as a parking facility jointly with his landlord, who was allowed to do so because the defendant was not ready to build. The inference is then inescapable that there was tacit permission to occupy. I am reinforced in this view of the facts by the following observation of Lord Denning in Wallis's Ltd v. Shell-Mex and BP (supra) at page 580 as to implied permission:

> "By using the land, knowing that it does not belong to him, he impliedly assumes t that the owner will permit it; and the owner by not turning him off, impliedly gives permission."

The following words in the same passage should be emphasized:

> "And it has been held many times in this Court that acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939."

It is scarcely necessary to add that the law is no different in this country. Such facts, as I suggested were proferred to the learned judge below, would scarcely prove dispossession. I have already indicated that even if the facts were capable of proving dispossession, the only person who could take adversely would be the landlord Marzouca, not the plaintiff.

Lord Denning also makes it clear in the extract I have quoted from the same case, that dispossession does not occur where an

owner who has some future plan for the land leaves it idle and some other party enters and uses it for some temporary purpose. This situation is that characterized as a "special type of case" by Sir John Pennycuick in Treloar v. Nute (supra) at page 237. Now the evidence before the learned judge was that the lot was intended for building; the defendant had entered into a building lease in respect of it. Plainly, therefore, the 'paper owner', the defendant, "retained it with a view to its utilization for some specific purpose in the future."

There was some argument by Mr. Muirhead that in the present case the purpose was not realisable because the defendant was in breach of his covenant; he had not constructed the hotel in pursuance of his lease agreement. But, in my judgment, the real question is not whether the planned use was realisable but whether the true owner, at the time the person claiming adverse possession entered into possession, had in mind a future use therefor. The distinction is thus between land left derelict for which there is no use and that for which the true owner has a use in mind.

In this state of affairs, some other person who uses the land will not acquire title to it, unless his use is inconsistent with the owner's enjoyment thereof. In this regard, the nature of the property and the nature of the acts are important. This is exemplified in a number of cases to which reference was made by Lord Denning in Wallis's Ltd v. Shell-Mex and BP (supra). It is enough to say that using the land to park vehicles was in no way inconsistent with the 'paper owner's' enjoyment of the soil for the purposes for which he intended to use it. See Leigh v. Jack (1879) 5 Ex. D. 264 at page 8. Apart from parking vehicles on the said land, the plaintiff did no other acts. This act does not, in my view, amount to an act ousting or dispossessing the 'paper owner'. As it was held in Tecbild Ltd vs. Chamberlain (1969) 20 P & CR 633, an owner of land does not necessarily

discontinue possession of it, i.e., abandon it, merely by not using it; "unless there is at least some affirmative evidence of adverse possession consistent with an attempt to exclude the true owner's possession, the defendant cannot pray in aid evidence of discontinuance in order to obtain a finding of adverse possession" (per Sachs L.J. said at 641).

In the result, the conclusion is inevitable that there was no serious question to be tried and the learned judge's order should not be disturbed. It was for those reasons that I agreed that the appeal should be dismissed.

WHITE, J.A.:

I have had the opportunity of reading the draft of the judgment by Carey, J.A. I agree with his reasoning and the conclusion that the appeal be dismissed.

CAMPBELL, J.A.:

I too agreed that the appeal should be dismissed, based on the reasoning and conclusion of Carey, J.A., whose draft judgment I have had the opportunity of reading.