NILS

[2011] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 80/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	MARLENE STREET- FORREST	1st APPELLANT
AND	KEENA STREET	2nd APPELLANT
AND	FRANCINE PHILLIPPS	RESPONDENT

Gavin Goffe instructed by Myers Fletcher and Gordon for the appellants

Miss Carol Davis for the respondent

16, 17, 18 February and 30 June 2011

MORRISON JA

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion. There is nothing further I wish to add.

DUKHARAN JA

[2] I too agree with the reasoning and conclusion of Phillips JA and have nothing to add.

PHILLIPS JA

[3] This is an appeal from the decision of Brown J (Ag) made on 3 June 2010, wherein he discharged an interim injunction granted without notice, on 20 April 2010, by Thompson-James J for a period of 28 days, or until further order of the court. The application for an interlocutory injunction was set for further consideration, inter partes, on 18 May 2010, was heard, and, as indicated, the injunction was discharged by Brown J (Ag). In discharging the injunction the learned judge gave an oral judgment in these terms:

> "The claim for an interim injunction has not been made out. The 2nd Defendant has an apparent entitlement to herself bringing an action to get the Claimants out of the portion of the premises she formerly occupied based on the continued maintenance of security apparatus to show she maintained occupation of the place. It would not be promoting justice to exclude the 2nd Defendant."

[4] On 14 June 2010 the appellants appealed the decision on the grounds that:

> "(1) The learned judge erred when he sought to determine questions of fact at the interlocutory injunction hearing instead of identifying whether there was a serious issue to be tried.
>
> (2) The Claimants showed that there is a serious issue to be tried as to whether the 2nd Defendant has lost the right to re-enter the premises and satisfied the other tests for the grant of an injunction and the learned Judge ought to have exercised his discretion in favour of granting the injunction to preserve the status quo."

The appellants therefore sought, on appeal, an order setting aside the order refusing the injunction and an order restraining the respondent from entering the said property until the trial of the claim or until further order of the court.

[5] The appellants had commenced their claim by fixed date claim form on 20 April 2010, against the Registrar of Titles (1st defendant) and the respondent (2nd defendant) seeking declarations that the respondent had no right to re-enter the property at 12a Tucker Avenue, registered at Volume 1088 Folio 372 of the Register Book of Titles, (the said property), and that the appellants were entitled to make an application under section 85 of the Registration of Titles Act for title acquired by possession in respect of the said property.

[6] In the particulars of claim the appellants stated that they both resided at the said property, the 2nd appellant, the daughter of the 1st appellant having done so from birth. The said property is situated at the corner of Tucker Avenue and Robertson Avenue, is comprised of 7,250 square feet, and a duplex dwelling home is constructed thereon. Of importance is the fact that each side of the duplex is independent of the other, separated by a concrete wall, with access to the said property through one gate that opens out onto Tucker Avenue. The 1st appellant has been residing on the said property since 1978. At that time, she had been a tenant of the estate of Rupert Williams, deceased and had paid rent to his executor Mr Kavanaugh. Mr Williams was the registered proprietor of the said property. When Mr Kavanaugh died sometime in 1990, the 1st appellant stopped paying rent as no one came forward to collect the same either on behalf of his estate or that of Mr Williams. Thus, since 1990 the appellants aver that they have remained in open and exclusive possession of one-half of the duplex on the said property.

[7] The appellants also stated that since 1978, the other half of the duplex had been occupied by one Winnifred Hugo and subsequently by her daughter, the respondent, when Mrs Hugo went to reside overseas. However, in 2005 the respondent served them with a notice to vacate the said property on the basis that Mrs Hugo without their knowledge had obtained a certificate of title for the said property by adverse possession. Needless to say, action was filed by the appellants and this certificate of title was later cancelled pursuant to an order of Beckford J and the previous title was reinstated. The learned judge also ordered that the notice given by Mrs Hugo to the appellants to vacate the said property, was null and void. Between 2005 and 2009 the appellants and the respondent continued in occupation of the said property.

[8] It is the appellants' contention that in August 2009, the respondent packed all her belongings and vacated the said property without advising them of her intention to do so, or of any forwarding address, and has not returned to reside there since then. The appellants stated that in September 2009 they took steps to secure the said property and placed a chain and padlock on the only gate to the property, and in November 2009 they entered the other side of the duplex, changed the locks on the doors, and commenced using the area for storage of their belongings. They maintained that they were the only persons residing on the property who have done so "openly and continuously for in excess of 12 years and are therefore the only persons entitled to make a claim for possessory title under the Registration of Titles Act". They claimed

that they had expended sums to maintain the said property, including repairs to the sewerage pit, the exterior of the property and paying property taxes.

[9] In the particulars of claim the appellants pleaded further that on 15 April 2010, the respondent forcibly entered the property and removed the locks placed there by them. The police were summoned and they endeavored to assist the respondent to remove her belongings, but it is the appellants' contention that since none were there, she was unable to identify any. The appellants thereafter changed the locks installed by the respondent, replaced the chain on the gate, and contemporaneously with the filing of the documents initiating the suit, filed the application for interim injunction and obtained the same, ex parte, as indicated previously. The grounds for the application for the injunction in the main, were that the respondent had abandoned the premises and had gone to reside elsewhere, and as she was not an owner, tenant or occupier, she had no right to enter the said property. The appellants could however apply for a possessory title in respect of the whole premises, and any re-entry by the respondent could prejudice the appellants' rights, which were yet to be determined by the courts. There were therefore serious issues to be tried and damages would not be an adequate remedy. The 1st appellant swore to an affidavit attesting to the facts set out in the particulars of claim.

[10] An acknowledgement of service was filed by the respondent on 13 May 2010 indicating that she had received the claim form and the particulars of claim, that she intended to defend the claim and gave her address as 12a Tucker Avenue, Kingston 6.

Her affidavit in response was filed simultaneously, in which she averred that her side of the duplex was larger than that which was occupied by the appellants, and that she had been in continuous occupation of her portion of the duplex since 1974, and had paid no rent since 1988, as she deponed that that was when Mr Kavanaugh had died. She stated that her mother had lived there also for many years, and still returned to Jamaica regularly, and maintained a presence in a room on her side of the duplex with her belongings. She stated that the said property belonged to the Crown and that they were all squatters with no rights whatsoever over the said property. She stated also that she had left the premises temporarily as she was experiencing harassment from the appellants and so she went to house sit for a friend, who was away, but who planned to return. She claimed that she remained in control and possession of "my property at 12a Tucker Avenue" and that she had left some of her belongings there. She attached light bills relating to her side of the property and statements from her gardener and someone who had come to install curtain rods, to lend weight to the allegations of harassment by the appellants, and her continued presence on the property.

[11] The respondent swore that an alarm system had been installed by Stealth Electronic Controls in 1998, which was located on her side of the property which was later taken over by Hawkeye Electronic Security Limited (Hawkeye) in 2003, and she had maintained the system from then to date. She indicated that she was appalled at the conduct of the appellants when they stated that, they had endeavoured to lock the gate when she temporarily left the premises, in an effort to keep her out, as she said

they had no legal rights to the property as squatters, and was even more alarmed with regard to their entry of her side of the house, as she stated they had no claim whatsoever to the same. In any event, she maintained that their claim that she had been precluded from gaining access to the property was untrue, as she had been able to do so, notwithstanding their alleged actions. She deposed that she had paid taxes for the period from 1988 to 2009, whereas the appellants had not paid any water bills for over five years although three adults resided in their portion of the duplex. She denied that the appellants were the only persons in open continuous occupation of the said property and therefore the only persons entitled to claim ownership by possession. She indicated that in her view, the property vested in the Crown.

[12] The respondent's position with regard to 15 April 2010 was that she went to the said property at the request of Hawkeye as the security system, which was still connected, had been sending low battery signals. She had to access her section of the duplex with the assistance of a locksmith as the locks on her doors had been changed. She was advised that no signal was being received from the system as it had been tampered with. Work was effected to the system but later that evening at approximately 8:30 pm an alarm went off and the Hawkeye response team could not gain entry to the said property. She advised them to summon the police, which they did. On this occasion, she had to climb over the gate to gain entry and, with the assistance of the police, the appellants permitted her access to her portion of the duplex. She said that although that same evening, the appellants were claiming, through their attorneys, that she was a squatter who had lived at the premises but who

no longer resided there, and therefore had no right to be there, she maintained that she had not abandoned her home. Her fixtures, she said, were still in the bathroom, her curtains were hanging at the front bedroom door, and the security system was still at the location. She pointed out that although the appellants claimed to have taken control of her portion of the duplex, she only saw a small bookshelf with books, a broken umbrella, a child's triangular blackboard, a child's motor bike and a fan, in a small corner of the living room. She said that the Hawkeye personnel advised her to report what had occurred at the duplex to the Stadium police, but as she arrived at the station she received a further call from Hawkeye indicating that yet another alarm had been triggered at the house. This seemed to indicate to her that the system may have been further tampered with. She said that she was not able to address the situation and since then had been restrained by the court from entering the said property. She attached to her affidavit: invoices from the Jamaica Public Service Company covering the period 1 March - 30 April 2010; invoices from the National Water Commission covering the months of April, May and June 2009; property tax receipts in respect of 1993, 1994, 1996, 2000, 2003, 2008, 2009, 2010; and the Hawkeye contract of 2003 with invoices relating to the month of January 2009 and the events of April 2010.

The appeal

The application to adduce fresh evidence

[13] The appellants filed an application for leave to adduce fresh evidence in the appeal, namely (1) the acknowledgment of service of claim and (2) the application to

pay by installments, both filed by the respondent in Supreme Court Claim No. CD00036 of 2010 on 5 July 2010, ***First Global Bank Limited v Francine Phillips*** (the First Global suit). The grounds of the application were that the information was not available at the hearing, it had been produced as soon as practicable, the evidence had been filed in the Supreme Court and the respondent had deposed to it being true and/or credible, but it contradicted evidence given in the injunction hearing which could have affected the decision of the court in respect of an important finding, that is, whether the respondent had abandoned the said property subject of the appeal. The 1st appellant swore to an affidavit in support of the application to which she attached the abovementioned documents, and pointed out that in the acknowledgment of service form, although signed by the respondent's attorney (who was the same attorney representing the respondent in the claim, the subject of this appeal), the respondent's address was given as 7 Toucan Way, Kingston 8. In the application to pay by installments, the respondent had indicated that she lived in rented property, one of her regular monthly expenses was the payment of rent in the sum of US$1,000.00=J$90,000.00, and she was in arrears in the amount of US$3,000.00. The 1st appellant commented that the respondent would therefore have had to have been in those rented premises from at least April 2010, yet she had deposed in the interlocutory application, that in May 2010, she was residing at the said property, and had only been house-sitting for a friend at the material time. Additionally, there was no mention of any monthly expense and/or obligation in respect of the Hawkeye

monitoring fee mentioned in her affidavit filed in opposition to the application for the interlocutory injunction.

[14] The respondent filed an affidavit in response in which she claimed that her permanent address was 12a Tucker Avenue, and that her temporary address was 7 Toucan Way. She said that she was at the latter address house-sitting for her friend, as her son had suggested that she move away from the said property for a while, due to the harassment by the appellants and in concern for her safety. He was paying the rental of the same. She maintained that she had paid the Hawkeye monitoring fees or Hawkeye would not have responded to the alarms in April 2010, but she had forgotten to include the same in her affidavit in the First Global suit. She indicated, however, that as her son was no longer able to pay the rental in respect of 7 Toucan Way, she had tried to resume occupation of her portion of the said property in December 2009, but found that access to her portion of the duplex could only be achieved through the front door of the appellants' section, then through the interconnecting door between the sections. She said that she discovered that areas of her section of the duplex had been damaged, in that the entire bathroom had been removed including the bath tub, basin and toilet. The door and grill that separated the sections of the house had been removed, and another door had been placed there in their stead. She found that her section of the duplex was uninhabitable, which was a further indication of the appellants' attempting to remove her from the dwelling to further their claim to adverse possession of the said property.

[15] The court took the view that the application for fresh evidence and the appeal itself should be argued together and counsel proceeded accordingly. However, I will indicate my ruling on the application at the outset.

[16] Counsel for the appellant submitted that the criteria for the introduction of fresh evidence had been satisfied, and relied on the well known and oft cited cases in respect of this area of the law, namely ***Ladd v Marshall*** [1954] 3 All ER 745 and ***George Beckford v Gloria Cumper*** (1987) 24 JLR 470. Counsel specifically referred to the distinction between house sitting and rental accommodation, and indicated that it was a material inconsistency. He further submitted that on the basis of the new evidence provided to the court, at the time the application for injunction was before the court, the respondent was not residing at the said property. The issue in relation to Hawkeye, he argued, was fundamental to the case as the maintenance of the system appeared to be the basis of an important finding of the judge below, and this new information could, therefore, clearly have influenced his decision.

[17] The submissions by counsel for the respondent in reply were quite brief and to the point. She also referred to the three criteria to be established for the admission of fresh evidence on appeal as laid down in ***Ladd v Marshall*** and submitted that the appellants had failed to satisfy the second criterion, viz, that the evidence sought to be adduced was likely to have influenced the result. She argued that the respondent giving her address on the acknowledgment of service form as 7 Toucan Way, and failing to mention that she was paying rent in her affidavit in support of the application to pay in

installments in the First Global suit, was not inconsistent with the position taken by the respondent in the court below. There was no legal position which precluded one from averring that one was house-sitting and yet paying rent. The respondent had been at Toucan Way since August 2009, and in May 2010 she was asked to pay rent. She was at that location taking care of the house, whether or not she paid rent, and even if she had rights as a tenant, once the owner returned she would have to leave, as those were the arrangements.

[18] Counsel submitted that the learned trial judge had found that the maintenance of the Hawkeye security system was sufficient to show continued possession of the duplex by the respondent. Counsel submitted further, in her written submissions that "there was evidence before the court of invoices paid to Hawkeye, and there was no dispute as to the presence of the equipment on site". In her oral submissions she argued that even if the respondent had not been paying for the service, she had an obligation to pay: there was evidence of a contract with Hawkeye to maintain the system, the invoices had been submitted, and the Hawkeye personnel had attended on the property. The evidence therefore sought to be adduced, counsel concluded, would have had no influence on the outcome of the case.

[19] Both counsel have referred to three conditions which must be fulfilled for the court to allow fresh evidence to be adduced on appeal. Lord Denning set them out thus in ***Ladd v Marshall***:

> "First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

On the facts of this case, I would refuse the application primarily on the basis as contended for by Miss Davis, which is that the evidence sought to be adduced does not meet the second criterion enunciated by Lord Denning in ***Ladd v Marshall.*** I will return to this in greater detail at the end of the judgment.

Ground of Appeal 1 - The learned judge erred in seeking to determine the facts instead of identifying the serious issues to be tried.

[20] Counsel for the appellant relied on the seminal speech of Lord Diplock in ***American Cyanamid v Ethicon*** [1975] 1 All ER 504, with particular reference to the evidence not being complete at the interlocutory stage but that no injunction should be granted unless triable issues are disclosed. Counsel identified three serious issues to be tried in his written submissions, but clarified and refined them in his oral submissions on appeal to read thus:-

> *1. Whether Phillipps has been in possession of one-half of the duplex for a period of 12 continuous years in her own behalf, having regard to (a) the application for title in the name of Mrs Hugo only in 2005 (b) the evidence of Phillipps that Mrs Hugo returns to Jamaica regularly and maintains a room at the premises.*

Counsel argued that the respondent could not prove the 12 years continuous possession on her own, and could not rely on the possession of her mother, as her

mother had not given any evidence of continued possession, and her claim to, and title to the said property had been disallowed and cancelled in any event, on the basis of fraud:

> *2. If Phillipps had been in possession of one-half of the duplex for a period of 12 continuous years up to August 2009, whether her ceasing to personally occupy the premises to date affects her right to re-enter the premises or to make a claim for adverse possession.*

It was the contention of the appellant that the Limitation of Actions Act does not confer any title on an adverse possessor, that depends on continuous possession up until the application for possessory title is made, so once the respondent had not maintained possession up until then, she would have lost any right she may have had to exclude the appellants whose possession of the duplex was joint with her and her mother:

> *3. Whether Phillipps ceasing to personally occupy the premises, coupled with her denial of her having any right to the property is sufficient to establish that she abandoned the property in August 2009.*

Counsel submitted that the respondent is presumed in law to have abandoned the said property and the allegations of maintaining the Hawkeye security system were insufficient to rebut that presumption.

[21] Counsel relied on the judgment of Slade J in ***Powell v McFarlane*** (1977) 38 P & CR 452 for the definition of possession, which definition and judgment have been accepted and endorsed by the House of Lords in ***Pye (Oxford) Ltd and Others v Graham and Another*** [2002] 3 All ER 865. Counsel stated, quite correctly in my view, that in the latter case the House of Lords confirmed that there are two elements

necessary for legal possession: (1) a sufficient degree of physical custody and control (factual possession); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). With regard to factual possession, counsel also relied on a passage in the judgment of Slade J with regard to what acts constitute a sufficient degree of exclusive physical control, and the fact that it must depend on the circumstances of each case, namely how the land is commonly used, and whether the alleged possessor has been using the land in a manner in which an occupier might have been expected to have done, and that no-one else had done so. He referred to the English Court of Appeal case of ***Brown v Brash and Ambrose*** [1948] 2 K.B. 247, which dealt with the issue of the cesser of possession or occupation. Counsel referred to the judgment of Asquith LJ in which he stated that to rebut the presumption that possession had ceased, one must show signs such as the installation of a caretaker or representative, or leaving furniture, which could be considered symbols of continued occupation. However, if the caretaker leaves or the furniture is removed, and not temporarily, their "protection artificially prolonged by their presence ceases" whether intended by the occupier or not.

[22] Counsel also argued that the exclusive control in relation to possession can be joint, and particularly so in relation to the circumstances of this case, in respect of the duplex, which if taken with its common areas surrounding it, could be treated as "unum quid". He submitted that in the instant case, the possession of the said property could have been considered joint between the appellants and the respondent up to September 2009, as neither excluded the other from any of the common areas, but

subsequent thereto, he argued, the appellants exercised exclusive possession over the entire property. Other than as described, it was submitted, that two persons could not exercise exclusive control over a particular property, so the court would have to decide who had the greater control.

[23] Counsel submitted that pursuant to section 3 of the Limitations of Actions Act, the title of the paper owner is extinguished once 12 years continuous occupation excluding the paper owner can be shown, but seemed to suggest that this continuous occupation must be immediately prior to the commencement of litigation. Counsel also argued that time runs against the paper owner but not against the adverse possessor. If anyone can prove a better title, the Act does not operate to bar that person, it is the better claim that will obtain the title.

[24] Counsel put the appellants' case in this way: he said that they had taken control of the property to the exclusion of all others when they put a lock and chain on the gate in September 2009 and then took exclusive control of the entire property when they entered the respondent's side of the duplex in November 2009 and put their belongings there. On the other hand, the respondent no longer resided there. She had no removable belongings in her section of the duplex, only some curtains as, it was argued, she could not claim ownership of the security system. Her claim was to maintenance of the system, and even in that regard she had not produced any receipts showing payment of the Hawkeye invoices. This aspect of the case should therefore not have been the subject of any finding by the learned judge at the interlocutory stage of

the proceedings. With regard to the intention to possess the respondent's claim to be house-sitting for eight months and continuing indefinitely, was simply not credible. Additionally, she herself, in light of her affidavit evidence, and statement in the First Global suit, seemed to be of the view that as a squatter she had no rights in respect of a claim for the property which was therefore **"bona vacantia"**, and so gave an alternative location as her address. In any event the question would arise how could these matters be resolved on untested affidavit evidence?

Ground of appeal 2 – Once there are serious issues to be tried re re-entry to the premises, are damages an adequate remedy? Does the balance of convenience favour the status quo?

[25] Counsel submitted that it was clear that the relationship between the parties had been an acrimonious one since the respondent's mother had tried to obtain ownership of the said property through fraud. It was noteworthy, he argued, that the respondent had never denied facilitating the registration of the said property in her mother's name. Both parties were afraid that the other might commit harm, and in that situation damages would not be an adequate remedy. It was the appellants' contention that the respondent had no need to come to the said property as she was admittedly residing elsewhere, and felt the ownership of the property resided in the Crown. Her only interest in re-entering the property therefore, was to frustrate the appellants' claim for ownership of the said property by adverse possession, and by permitting that re-entry, the court would prejudice their claim. In those circumstances, in the interests of justice, the balance of convenience must lie with the status quo which would permit

the appellants to have quiet and undisturbed exclusive occupation of the said property until trial. Counsel submitted that the appeal should be allowed with costs.

Ground of Appeal 1

[26] Counsel put the respondent's case in this way: the respondent had been living on the said property since 1974, in her side of the duplex which, she said, and as was pleaded by the appellants, an entirely independent section from that of the appellants, separated by a concrete wall. In 2009 she had moved out of the property, with most of her belongings as she was being harassed by the appellants, but left on her section of the said property the most important item, the Hawkeye security system. The claim by the appellants had been commenced by a fixed date claim form which suggested that there should be few contested facts. It was not in issue that the Hawkeye equipment was on the site, that there was attendance from their employees and that the first visit indicated some tampering with the equipment which triggered the second visit. There was evidence that the respondent had attended the property and had not seen evidence of the appellant's belongings there. There was a challenge as to the admissibility of the statement of the gardener, but counsel said that in interlocutory proceedings the statement ought not to be considered hearsay when its provenance was known. That statement indicated that the respondent had been to the property several times since August 2009, as much as every other Thursday, to tend to the grounds and landscaping. It was not the respondent's position that she was residing at

the said property; it was her position that she had maintained her presence there, in that she had paid bills (light and water) and kept some of her belongings there.

[27] Counsel submitted that the appellants had varied their position from that taken below. Their position previously had been that: (1) the appellants and the respondent had owned the property jointly but since the respondent had left the property, only the appellants occupied the whole property and had rights in relation thereto. In the Court of Appeal, the appellants position was now: (1) The order of Beckford J in 2005 cancelling the title defeated the claim of the respondent; and (2) the respondent having abandoned her section, the only person with the rights to the section was the paper owner, but as the paper owner's rights had been extinguished, who then was in actual possession? Counsel submitted that on a perusal of the fixed date claim form, there was no claim for possession of the property from the respondent or that the respondent had been interfering with the appellants' possession of the said property. In those circumstances, counsel submitted, it would have been difficult for their claim for an injunction to succeed, in order for their claim to proceed. Counsel argued that the learned trial judge did not make any determination on a contested question of fact, but gave in his own view, the legal consequences of the respondent maintaining the Hawkeye security apparatus.

[28] In summary, counsel submitted the respondent had:

1. lived at the premises since 1974;
2. paid rent and lived in her section in exclusive possession;
3. moved out of her section with some of her things in August 2009;

4. returned various times to the premises with the gardener to landscape the property;
5. maintained electricity and water on her section of the property; and
6. maintained Hawkeye security system on the property.

In those circumstances, it would not be unreasonable for the learned trial judge not to be inclined to grant an injunction which would have the effect of precluding her from entering the premises. It would not, counsel argued, be an improper exercise of his discretion, and the judge in refusing the injunction said that it would not be "promoting justice" to exclude the respondent from the premises.

Ground of Appeal 2

[29] Counsel indicated that her submissions in respect of this ground of appeal would be similar to those made in respect of ground one, as there was no basis on which one could claim that the learned trial judge had exercised his discretion improperly, and she relied on the case of ***Hadmoor Productions Ltd et al v Hamilton*** [1982] 1 All ER 1042.

Counsel submitted that the appeal should be dismissed with costs.

Analysis

[30] The role of the court at this stage of the litigation is to review the exercise of the discretion of the judge in the court below who in this case refused the grant of an interlocutory injunction, which injunction would have had the effect of restraining the respondent from entering the said property until trial or further order of the court. As

Lord Diplock said in ***American Cyanamid v Ethicon*** when delivering the judgment of the court:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial..."

The court however must be satisfied that "the claim is not frivolous or vexatious; in other words that there is a serious question to be tried". Once that hurdle has been crossed, then one must go on to decide if damages are an adequate remedy, and in whose favour the balance of convenience lies. Lord Hofmann in ***National Commercial Bank Jamaica Limited v Olint Corp. Limited*** Privy Council Appeal No. 61 of 2008, in delivering the opinion of the Board stated that the purpose of the injunction (whether ordering a defendant to do something or not to do something else) "is to improve the chances of the court being able to do justice after a determination of the merits at trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result". He also went on to say that "... the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other...".

[31] On appeal, the court must also be guided by the principles laid down in ***Hadmoor Productions v Hamilton*** where Lord Diplock made it clear that it is not the function of the appellate court on an appeal from a judge's grant or refusal of an interlocutory injunction, to exercise its own independent decision, but it should defer to

the judge's exercise of his discretion, as the role of the appellate court is one of review only. The court should only interfere if the judge's exercise of his discretion is based on a misunderstanding of the law or the evidence before him or an inference is made on the facts which can clearly be shown to be wrong. In this case before us, we have not had the benefit of any reasons from the learned trial judge, which is unfortunate, and it makes the review process that much more difficult, as one is forced on the basis of one short statement made on the delivery of his decision to refuse the injunction, to surmise the thinking of the judge which informed that decision. Be that as it may, we must therefore look at the information before the judge to ascertain whether any triable issues were disclosed, whether refusing the injunction, in the words of Lord Hofmann, produced a just result, and whether the course adopted by the learned judge produced the least irremediable prejudice in the circumstances of this case.

[32] The appellants, as indicated filed two grounds of appeal, which will be examined within the context of the above review, and filed an application to adduce fresh evidence which I will address in the course of my deliberations.

Ground of appeal 1

[33] The issues before this court are:

(1) Were there triable issues before the learned trial judge?

(2) Did he, to the detriment of the appellants, attempt to resolve questions of fact at the interlocutory stage?

(3) Additionally, can it be shown that he was wrong in assessing the balance of convenience, in the interests of justice, in refusing the grant of the injunction?

[34] There are many principles which can be distilled from the leading cases on this area of the law, viz, ***Pye (Oxford) Ltd and Others v Graham and Another,*** from which one gleans the following: there can be joint exclusive possessors of land who through that possession can dispossess the paper owner. To establish legal possession there must be factual possession (including an appropriate degree of physical control) and the intention to possess. In law it is an intention to possess and not to own, and an intention to exclude the world at large, including the paper owner. One can be in possession and yet be willing to pay the paper owner, if asked. Thus, an admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime. The twelve years possession must have elapsed prior to the commencement of proceedings claiming title. However, the right of action to recover the land by the paper owner is barred whenever the 12 years have elapsed from the time when any right of action may have accrued, and does not have to be a period immediately before action is brought. The right of action accrues as soon as the land is in the possession of some other person, for exclusivity is the essence of possession. Only one person can be in possession of the land at any one time, as even if possession is exercised by several persons jointly, they are considered a single owner as against the rest of the world. Additionally, there is no necessity for ouster of the paper owner, which suggests a confrontational knowing removal of the paper owner, but possession in the ordinary

sense of the word is sufficient and once the squatter is in exclusive possession the paper owner cannot be in possession. What is also clear is that without the requisite intention in law there can be no possession.

[35] The acts which constitute a sufficient degree of exclusive physical control would depend on the circumstances of each case, which would include the nature of the land and how it has been used and enjoyed. The intention to possess (animus possidendi) must be shown to be in one's own name and on one's own behalf, and with clear affirmative evidence, that intention to possess to the exclusion of the world must be made known to the world (***Powell v McFarlane***).

[36] With regard to the cesser of occupation, it has been accepted for over one-half of a century, that "absence may be sufficiently prolonged or un-intermittent to compel the inference prima facie of a cesser of occupation" . The issue however is one of fact and of degree. And if the absence is long enough to give rise to that assumption, then the onus is on the person who had ceased to occupy the premises to rebut the presumption that possession has ceased by showing by way of credible evidence that he had a de facto intention to return after his absence (animus revertendi), and even that (the inward intention to return) may not be sufficient unless clothed with formal outward and visible signs. So possession in fact, as opposed to possession in law, concerns two ingredients: (1) "an animus possidendi" and (ii) a "corpus possessionis" namely "some visible state of affairs in which the animus possidendi finds expression" (***Brown v Brash and Ambrose***).

[37] It may not be as clear, but there are authorities to the effect that once the area is defined and not disputed, then acts of possession done in respect of part of the land can be considered to be acts referable to the whole. However, as would be expected, no set of acts can be conclusive evidence and the weight to be given to each act as evidence of possession of the part, so as to be accepted as possession of the whole, depends on the circumstances of each case (***Lord Advocate v Lord Lovat*** (1880) 5 App Cas 273, and ***Higgs v Nassauvian Ltd*** [1975] AC 464.) The question is, as usual, one of fact and degree, and one cannot generalize with any precision as to what acts will or will not suffice to evidence factual possession in such circumstances (***Powell v McFarlane***). "Acts on one part of an area may be treated as constituting possession of the whole area provided that there is "such a common character of locality as to raise a reasonable inference "that if a person were possessed of one part of it as owner then he would so possess the whole of it" (***Mark Andrew Roberts & Another v Swangrove Estates Limited & Another*** [2007] EWHC 513 (Ch)).

[38] In the light of the above statements of the law and on review of the questions posed by the appellants' counsel, it does seem to be arguable that the respondent may be able to show continuous possession of one-half of the duplex for 12 years. She has been in occupation of the same since earliest 1974 and latest 1978 (according to the appellants) with her mother, so the possession could be considered joint throughout that period, and when the personal representative of the owner died in 1988 or in 1990, the respondent and her mother could, even if continuing to acknowledge title or

being willing to pay rent, if asked, would still have been in continuous possession until 2000 or 2002. That being the case, it is certainly arguable that the title of the paper owner could have been extinguished from that time in favour of the respondent in possession, in respect of one-half of the duplex at the said property. The failed claim by her mother, it is arguable, may not interfere with that claim for possessory title at all. The respondent's claim could survive and proceed without any evidence from her mother, which has been impugned in any event. However, up until 2000 or 2002, it does not seem to me that the claim of the appellants in respect of that part of the duplex, could have been a better title as against the paper owner.

[39] The interpretation of sections 3, 4a and 30 of the Limitations of Actions Act precludes the paper owner from making an entry, or from bringing an action for recovery of the said property, after 12 years of continuous exclusive occupation of the squatter, or from the date the paper owner's right to possession shall have accrued, and does not require continuous occupation immediately prior to the commencement of litigation (as ***Broadie & Broadie v Allen*** RMCA No. 10/2008 delivered 3 April 2009) therefore the cesser of occupation by the respondent of one-half of the duplex between August 2009 and May 2010 would not appear to be relevant or important for the disposal of this matter.

[40] In any event, the question of whether the respondent ceased to occupy her portion of the duplex is certainly a matter of fact for the trial court. It is also a matter of degree. It is a question of whether she left symbols of her occupation in her side of the

duplex, and whether she had an intention to return which was formal, external and visible to the rest of the world. The fact that she may have thought that neither of the parties had any rights in respect of the property as squatters, and that the property was **bona vacantia**, may influence any finding of the court with regard to the genuineness of the intention either to return, and or to possession of her part of the duplex.

[41] In conclusion on this ground therefore, I find that there may be triable issues but they are not compelling, and the learned judge, although he did not give any reasons for his decision, did state, which on the evidence before him I must agree with Miss Davis was not an unreasonable comment, that the security system had been maintained by the respondent on her side of the duplex. There was a contract between the respondent and Hawkeye: the document had been disclosed, the Hawkeye personnel had attended the said property on more than one occasion on the same day, whether on the basis of low signals being emitted from the equipment on site, or because the equipment had been tampered with, but apparently messages were being fed back to their head monitoring system. Invoices had been submitted later in relation thereto. The learned judge concluded that the evidence had "shown she maintained occupation of the place". I agree that it is a matter for the trial judge whether maintenance of the equipment was a significant symbol of de facto possession, particularly, bearing in mind that there was no evidence that the Hawkeye invoices had been paid by the respondent. There is also the question as to whether there was sufficient evidence of the intention to return to the premises, in light of the

respondent's stated view that the parties were squatters with no rights, and since she claimed that she was being harassed by the appellants. However, the learned judge was entitled to conclude that there was prima facie evidence from which he could make that preliminary finding, and in respect of which a court could ultimately arrive at a similar conclusion. This ground of appeal would therefore fail.

Ground of appeal 2

[42] In my view, even if there are serious questions to be tried, based on the evidence in this case, where the respondent has been in exclusive possession of her portion of the duplex from at least since 1988 for a period of 12 years, it would not seem unreasonable for the learned trial judge to have stated that "it would not be promoting justice to exclude her from the premises". On the appellants' case, and based on the submissions of counsel, the steps taken to exclude the respondent from the premises commenced between 2009 and 2010. At that time, if the paper owner's rights to recover possession had been extinguished, then the respondent's rights to possession would have crystallized. The appellants' case of possessory title of the whole property, having shown and enjoyed continuous possession of their one-half of the duplex for the requisite period of 12 years, and on their evidence, having taken possession of the whole for approximately two to three years, seems fraught with substantial evidentiary and legal hurdles. But this, as all the authorities make plain, is a matter of fact and of degree for the consideration and determination of the trial judge. In all the circumstances, it would not seem fair to exclude the respondent from her one-half of the duplex until trial.

[43] I am fortified in this view, as, at this time, there is an order in place made by D.O. McIntosh J in Chambers at the case management conference, on 29 November 2010, in the action below, when both parties were represented. It reads:

> "10. The claimants are not to interfere in any way by themselves, or their agents or by their dogs, with the entry or exit of the 2nd defendant [respondent] to premises which she occupies at 12A Tucker Avenue."

This particular order was not appealed.

[44] On the basis of the principles enunciated in ***Hadmoor Productions v Hamilton***, I would not interfere with the judge's exercise of his discretion. The interests of justice demand that the status quo remain the same, which would permit the respondent unrestrained entry to and exit from her portion of the duplex, until trial. If at the trial the appellants can show that there was de facto cesser of occupation in August 2009, without the necessary intention to return, then the presumption would not have been rebutted, and the appellants could endeavour to continue their exclusive possession not only of their side of the duplex, but of the whole premises as a single unit, against the rest of the world including the respondent, as trespasser, and the paper owner. However, on the other hand, the respondent may prove that she has acquired a possessory title against the paper owner, and the appellants and the respondent may have to consider their joint claim to possession of a single "unum quid" against the registered paper owner. In my view therefore, this approach to the status quo would result in the least irremediable harm to the parties until all the issues can be determined.

[45] As indicated from all the issues canvassed above, with regard to whether the fresh evidence would have influenced the result, in my view, even if the learned trial judge accepted that the address of 7 Toucan Way had been given in the acknowledgment of service in the First Global suit in respect of the respondent, the evidence before him was that she was house sitting for a friend, and this was not necessarily inconsistent evidence; she could also have been paying rent for a period while she was allegedly taking a respite from the harassment from the appellants at the said property. She could also have forgotten to mention the fact that she was paying rent in her affidavit. But the real question was the maintenance of the security system at the said property which the learned judge viewed as important in the circumstances of this case. I am not satisfied that this new evidence would have had any appreciable influence on the result of the exercise of his discretion to refuse the grant of the injunction, which is why I would have refused the application.

Conclusion

[46] I would refuse the application to adduce fresh evidence and dismiss the appeal with costs to the respondent to be agreed or taxed.

MORRISON JA

ORDER

Application to adduce fresh evidence refused.

Appeal dismissed with costs to the respondent to be taxed if not agreed.