BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 16 of 2009

BETWEEN:

CLYDE BROWNE **Appellant**

AND

MICHELLE MOORE-GRIFFITH **Respondents**

ROBIN REGINALD MOORE

BASIL ROY MOORE

Before: The Honourable Sherman R. Moore, CHB, The Honourable Sandra P. Mason, The Honourable Andrew D. Burgess, Justices of Appeal

Date: 2012: February 23

2012: July 2

Mr. Lalu Hanuman in association with Mr. Satcha Kissoon Attorneys-at-law for the Appellant

Mr. Clement Lashley, Q.C. in association with Ms. Honor Chase Attorneys-at-law for the Respondents

JUDGMENT

MASON JA

Introduction

[1] This appeal is from the judgment of ***Kentish J*** delivered on 25 September 2009 in favour of the respondents as a result of an action brought by them against the appellant claiming among other things, possession of a parcel of land (the disputed land) situate at Pasture Land, Haggatt Hall, St. Michael.

[2] The appellant claimed a right to possession of and title to the disputed land by virtue of adverse possession. The judge rejected that claim.

Background

[3] The essential facts out of which this appeal arises are as follows:

(a) By Conveyance dated 3 January 1948, the disputed land was conveyed by Israel Vivian Gilkes, Acting Clerk of the Assistant Court of Appeal to Reginald Archibald DaCosta Moore, the father of the respondents. That land measures 4.185.85 square metres, a metric conversion from one acre, five and a half perches.

(b) On the death of their father in 1985, the respondents applied for and were granted Letters of Administration to his estate. By virtue of a Vesting Assent dated 15 November 1988, the disputed land was conveyed to the respondents who all reside in the USA. Parts of the disputed land were tenanted at the time.

(c) Over the years, the first respondent, who in all matters related to the disputed land acted on behalf of the second and third respondents, paid many visits to the Island and would visit the disputed land on each visit. It was on one of these visits in 1996 that the first respondent discovered that her aunt had attempted to obtain, through foreclosure proceedings, ownership of the disputed land. The respondents promptly brought an action against their aunt and were able by 2003 to recover possession. Over time, the respondents terminated all but one of the existing tenancies.

(d) In June 2007 while again on a visit to the Island, the first respondent observed what she described as a crudely and hastily constructed shed placed on the disputed land. She spoke with the appellant and requested its removal. When it appeared to her that her requests were being ignored, the first respondent, on behalf of and with the consent of the other respondents, filed an action on 24 July 2007 claiming among other things:

(i) possession of the disputed land;

(ii) an injunction to restrain the appellant from entering the land;

(iii) an order for the appellant to pull down and remove the structure from the land;

(iv) damages; and

(v) costs.

(e) The appellant came from St. Lucia to Barbados in 1960. In the 1980's he purchased from one Owen Allder a house at the said Pasture Land, on the western side of the disputed land and took up residence there. At the time, most of the land in the area was uncultivated and overgrown. The appellant began the process of debushing and cultivating lands in the area. Over the years, he openly and without anyone's consent, eventually entered into possession of approximately nine acres of land in the surrounding areas. He remained in undisturbed and peaceful possession from that period in the 1980's, cultivating the land and carrying on other activities such as erecting other houses, setting up a lumber yard and operating a cane crushing mill.

(f) It is the appellant's contention that he has an entitlement to and a right to possession of the disputed land through adverse possession; that the respondents' claim was barred by ***section 25*** of the ***Limitation of Actions Act, Cap 231*** (the ***Act***) and that the rights and title of the respondents had been extinguished by virtue of ***section 37*** of the ***Act.***

Pleadings

[4] The action was commenced by a Writ of Summons and Statement of Claim. In addition to claiming title through succession to the disputed land, the respondents relied on an order of the Court made on 17 December 2003 declaring them entitled to possession of the property based upon the cancellation by the Court of a Registrar's conveyance to their aunt.

[5] In their claim, the respondents alleged trespass by the appellant through the erection of a wooden house and galvanized paling, the removal of which was requested by the first respondent. The respondents also alleged entry on their land and use of a bobcat to clear and heap up mould around the house. They further alleged that they had been deprived of use and enjoyment of their land and had thereby suffered damage.

[6] On 25 July 2007, the respondents filed a Summons for an interlocutory injunction accompanied with a Certificate of Urgency. They requested, among other things, that the appellant be restrained from entering the disputed land, that he pull down and remove the wooden house and other structures and material he had placed on the land. The summons was heard on 31 July 2007, and an order made by **Kentish J** for the cessation of all activities by the appellant with respect to the land until adjudication of the matter. Certain directions were given to effect a speedy trial of the action.

[7] On 30 July 2007, the appellant filed his defence and counterclaim. He denied the respondents' claim and allegations. He alleged that he had been in occupation of the land for over twenty years and was therefore entitled to a possessory title through adverse possession as a result of being in undisturbed possession of the land since on or around the year 1985. In his counterclaim, he claimed, among other things, the following:

1. A declaration that he is entitled to possession of the land.

2. A permanent injunction to restrain the plaintiffs whether by themselves, their servants and/or agents or otherwise however from entering the land occupied by the defendant.

3. Damages.

4. Interest thereon pursuant to Section 35 of the Supreme Court of Judicature Act, Chapter 117 of the Laws of Barbados.

5. An order directing the Registrar of the Supreme Court to amend the Conveyance annexed and transfer the title of the land to the defendant.

6. Further and/or alternatively, leave to institute a foreclosure suit to have title of the land registered in his name.

[8] The respondents filed a reply and defence to the counterclaim on 14 August 2007. The matter came on for trial on 21 April 2008 and was heard over an extended period ending on 10 October 2008. The decision was delivered on 25 September 2009.

Judge's Findings

[9] The judge examined the evidence in detail and with the consent of the parties paid a visit to the disputed land, but was not satisfied that the appellant had established a case of adverse possession of the said land.

[10] The facts which the judge regarded as indicia for her conclusion are summarised as follows:

(i) The judge had no reservation in finding that the plaintiffs had a good title to the land. Admitted into evidence by consent were the abovementioned Conveyance and Assent. The judge felt satisfied on the basis of those exhibits that at the date of his death the respondents' father was the legal owner of the disputed land and that the plaintiffs as his children were his successors in title by virtue of the Assent.

(ii) The judge found that the plaintiffs satisfied the test of "factual possession" with regard to the land. She identified the two most relevant

elements of the test: (1) the suitable and natural mode of using the land, and (2) the conduct which the plaintiffs as owners might reasonably have been expected to follow with due regard to their own interests. She pointed out that the testimony of the first respondent had not been challenged. She was further satisfied that the land was suitable for growing crops and its natural uses were agricultural and the renting of house lots for residential purposes. She also accepted the evidence of Eileen Brathwaite and Gwendolyn St. Hill who were also on the land.

(iii) The judge then dealt with the second element of the test. She said at paragraph [25]:

> "… I am satisfied that the Plaintiffs have consistently exercised the kind of vigilance to protect their interests vis-à-vis the land that could be reasonably expected of them, from 1975, starting with the visits of Moore-Griffith to Barbados and to the land, continuing up to 2003 culminating in the order setting aside and cancelling the conveyance of land to their aunt, Enid Downes."

The judge in her decision, at paragraph [24] provided a detailed chronology of various events which demonstrated the type of vigilance that the plaintiffs exercised to protect their interests.

(iv) The judge rejected the evidence of Browne that he carried out a number of activities on the disputed land at Pasture Road after he took up residence there in the 1980's. These activities were identified at paragraph [32] of the judgment as:

(i) The planting of coconut trees;

(ii) Cultivating of some nine acres or more of land;

(iii) Erection of houses and placing of cars thereon;

(iv) Erection of the offending house and structures;

(v) Carrying on a lumber yard; and

(vi) Laying of irrigation pipes.

(v) The judge determined that the sole question was whether these activities took place, on the disputed land. With regard to the planting of the coconut trees the judge did not accept the evidence of Browne that he planted coconut trees all around the land from Cutting Road to Mapp Hill. The judge based her conclusion on the fact that defence counsel, Mr. Kissoon, in response to a query by the Court, conceded that no plan was put in evidence to establish exactly where the coconut trees were planted.

(vi) The judge next turned to the cultivation of the nine acres or more of land. She accepted the evidence of the plaintiffs and found that the disputed land is not part of the nine acres or more of the land at Pasture Road cultivated by Browne. The judge at paragraph [42] of her judgment found from the evidence of Moore-Griffith, Eugene Carrington, Marcus Brathwaite and from the admission of Browne himself, that when he took up residence in Pasture Road the disputed land was not vacant or unoccupied land.

(vii) The judge then found on a careful analysis of the evidence as to the erection of the alleged five, six or seven houses, though erected by Browne on land at Pasture Road, that the houses are not on the disputed land. She also found that the abandoned car on the disputed land and its presence were not in itself sufficient to establish factual possession by Browne. The judge accepted that the car had been parked there for over ten years but held that that fact did not assist Browne since only the acts of the squatter and his intention are material to a claim of adverse possession. It was Browne's evidence that the abandoned car which had been on blocks for about twelve years belonged to his daughter.

(vii) As regards the offending house and structures the judge found that these were erected on the disputed land by Browne and that the sole issue was the date when they were erected. The judge also made it clear that the houses and the land on which they were erected were to be distinguished from the offending house and structures. The judge rejected the evidence of Browne and his witnesses and found that the offending house was erected on the disputed land in 2007 as contended by the plaintiffs. With regard to the galvanised structure, the judge found that it was erected in 2006. In reaching that conclusion the judge rejected the evidence of Browne and his witnesses that he was operating a lumber yard on the land for a period of ten years or more as alleged.

(ix) The judge concluded her findings by dealing with the laying of the irrigation pipes. She rejected the evidence of Anthony Alleyne, a water marshal of the BADMC, called as a witness for Browne. The judge at paragraph [67] said:

> "Given his testimony that the pipes were run on the same land on which Browne lives and in light of the earlier finding that Browne does not live on the disputed land, I therefore do not accept that any irrigation pipes laid by the BADMC at the request of Browne were laid on the disputed land."

Issue of Fresh Evidence

[11] At the hearing of the appeal, the appellant sought to have heard an application by way of motion under ***Part 62.23*** of the ***Supreme Court (Civil Procedure) Rules, 2008 (CPR)*** to allow for the receiving of fresh evidence.

[12] By affidavit in accordance with ***Part 62.23 (5)*** of the ***CPR,*** the appellant deposed, inter alia, that the disputed land was irrigated by pipes installed by the Barbados Agricultural Development and Marketing Corporation (BADMC) according to a site plan which the judge refused to admit into evidence despite an attempt by his attorney-at-law at the trial. The appellant also stated that during the judge's site visit, she overlooked the BADMC's drips,

stop cock and meter which were clearly visible above ground on the disputed land. He stated that he caused photographs to be taken of the drips, stop cock and meter and was now seeking to have these photographs as well as the site plan admitted into evidence in furtherance of the overriding objective of the ***CPR's*** requirements regarding fresh evidence.

[13] Counsel for the appellant noted that while the application was for the admission of fresh evidence, it in fact related to the inclusion of evidence which had been excluded by the judge at trial after an objection by Counsel for the respondents on the ground that there had been no prior notification of it having been led in evidence. Counsel for the appellant further requested that the Court allow the officer of the BADMC who had presented the site plan to the High Court to be heard in order to show where the pipes had been placed on the disputed land. Counsel submitted that the judge erred in refusing to admit the site plan.

[14] Counsel for the respondents objected to this application on the grounds that there were no special circumstances disclosed by the affidavit to compel the Court to revisit that area of evidence and that the evidence related to matters which occurred after the date of the trial.

[15] It is not uncommon for fresh evidence to come to light after a judgment has been perfected. In those circumstances the unsuccessful litigant may be able to invoke the evidence in order to challenge the judgment on appeal. It is, however, understood that such circumstances must be of exceptional character, for the rule of practice in relation to fresh evidence is that the outcome of litigation should be final and the Court of Appeal will not allow fresh evidence to be adduced in support of an appeal if that evidence was reasonably accessible at the time of the original hearing: ***Ladd v. Marshall [1954] 1 WLR 1489.*** Thus when a litigant has obtained a judgment, he is by law entitled not to be deprived of that judgment without very solid grounds being advanced but when the ground is the alleged discovery of new evidence it must at least be such as is presumably to be believed and if believed would be conclusive: per ***Lord Loreburn*** in ***Brown v. Dean [1910] AC 375 H.L.***

[16] ***Lord Wilberforce*** in ***The Ampthill Peerage*** case ***[1977] AC 547*** at ***569*** stated:

> "This principle of finality of determination (……) is, of course, but one strand in a more general fabric. English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes. Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

[17] In denying this application by the appellant, we were mindful of these legal principles as well as the fact that the Appellate Court has a discretion to reopen the case on a claim of fresh evidence "if the particular exigencies of justice clearly outweigh the general undesirability of doing so". We also took note of the remarks by ***Lord Wilberforce*** in ***Mulholland v. Mitchell [1971] AC 666*** at ***679*** that fresh evidence ought not to be admitted "when it bears upon matters falling within the field or area of uncertainty".

[18] In this context we were cognisant that the BADMC officer who the appellant was seeking to have recalled was not the photographer who had taken the photographs to be admitted; that the said photographs had only recently been taken (two months prior to this hearing and four years subsequent to the High Court trial); that the photographs did not nor could not identify the location of the land of which they had been taken; that in other words the geographical integrity of the photographs was suspect. With respect to the site plan, its particular relationship to the disputed land could not be established and so there had not been revealed any satisfactory grounds for displacing the decision of the judge regarding its admission. In addition, during the judge's visit to the disputed land, her attention had not been drawn to the presence of any drips, the stop cock or meter despite the suggestion by counsel that they were all clearly visible above ground. At paragraphs [67] and [68] of her judgment, she stated the following in relation to the pipes with no mention of the stop cock or the meter:

> "[67] I reject the testimony of Anthony Alleyne that the pipes and the shop are on the land in dispute. Given his testimony that the pipes were run on the same land on which Browne lives and in light of the earlier finding that Browne does not live on the land in dispute I therefore do not accept that any irrigation pipes laid by the BADMC at the request of Browne were laid on the land in dispute.
>
> [68] In the event that I am wrong in this regard I find that if the pipes were indeed laid on the land in dispute in the manner indicated by Anthony Alleyne, they were not sufficiently visible and open to the gaze of the Plaintiffs or the public to constitute adverse possession in this case".

[19] The Court was of the opinion that this alleged fresh evidence, which on the admission of the applicant was not in fact fresh evidence but evidence which in the judge's estimate could not be admitted, bore no apparent relevance to the matter since it essentially "fell within the field or area of uncertainty" and could not be believed. It therefore did not operate to advance the case.

Grounds of Appeal

[20] The appellant listed the following as the grounds of his appeal:

a. That the Learned Trial Judge erred in law in holding that the plaintiff/respondents are entitled to title and possession of that certain land in dispute, namely that land containing by estimation 4,185.83 square metres situate at Pasture Road, Haggatt Hall in the parish of Saint Michael, abutting and abounding on lands now or late of J.T. Cutting, on lands now or late of M.E. Weekes, and on the public road, or however else the same may abut and abound presently occupied by the

defendant/appellant.

b. That the learned trial judge erred in law in refusing to admit into evidence the site plan prepared by the Barbados Agricultural Development & Marketing Corporation which showed the irrigation pipes placed by them on the land in dispute in the 1980's, on behalf of the defendant/applicant.

c. That the said decision was against the weight of evidence.

d. That the learned trial judge misdirected herself as to the law and the facts.

e. That the learned trial judge failed to pay due regard to the Barbados Agricultural Development & Marketing Corporation irrigation pipes and drips on the land in dispute, when she visited the locus in quo which were clearly visible to the naked eye.

Counsel's Submissions

[21] The main thrust of the argument developed by Counsel for the appellant was that the facts did not support the judge's conclusion. He argued, for example, that the witness for the BADMC was the only genuine and independent witness, all of the other witnesses being either friends, relatives or employees of the parties, and therefore his evidence should be accorded maximum weight.

[22] According to that witness, the pipes had been placed on the disputed land since the early 1990's; he had been associated with the land in the 1980's and what had now "evolved" into a house was at first a shed in which the appellant used to store his manure. Counsel contended that the judge by her description of the house, had mistakenly focused on the age of the house rather than on the occupation of the house spot.

[23] In developing his argument in relation to the appellant's occupation of the land, Counsel submitted that the judge failed to take into consideration the provisions of ***section 31(4)*** of the ***Act***, namely, the possibility of dual possession of the land. He asserted that merely because the occupation of the land was not inconsistent with the present or future enjoyment of the land by the person entitled to the land did not mean that there could not be adverse possession. He then suggested that there could be what he termed "an equitable way forward" by the partitioning of the land between the parties given the fact that the parties both had interest in different parts of the same land: the respondents by tenanting of the land and the appellant by his agricultural use of it, by his use as a house spot and as a park for his vehicle.

[24] Counsel noted that unlike the English legislation, ***section 31(4)*** of the ***Act*** does not speak of exclusive possession. He contended that on the facts of this case since both parties are interested in the same piece of land, there would be no need for exclusive possession. According to Counsel, on a literal interpretation of the ***section***, there is contemplated the possibility of dual possession.

[25] With respect to the parking of the vehicle, Counsel submitted that the appellant having parked his car on the disputed land for a period in excess of 10 years was further proof of his intention to treat the land as his own, thus evidence of factual possession. He cited the case of ***Burns v. Anthony [1997] 74 P. & C.R. D41*** in support of his submission and referred specifically to the statement of ***Simon Brown LJ*** at ***D43*** that:

> "… actions speak louder than words, and one could scarcely look to find a more assertive expression of exclusive possession than by regularly, and apparently as of right, parking cars close to someone else's conservatory."

[26] Counsel next queried the certainty of the respondents' legitimate title to the disputed land. He submitted that the Order of 17 December 2003 on which the respondents based their claims to the disputed land was manifestly challengeable. It was his opinion that since the defendant to that action, the respondents' aunt, was deceased when the Order was granted and so could not enter an appearance, the respondents did not have a *de jure* title to the disputed land. He argued that in the circumstances, that title was voidable.

[27] The next ground of appeal challenged the judge's finding that the appellant's daughter had not been honest when she testified that she used to "live in" the house on the disputed land. He referred to a "decided case", without identifying it, in which it was held that to stay in a house for one day a year amounted to "living in" that house.

[28] Counsel also argued that the trial judge erred in admitting into evidence a letter from Counsel for the appellant to the respondents in which he offered on behalf of the appellant to purchase the land from the respondents. He contended that an intention to possess is not in anyway negatived by an offer to purchase from the paper owner. He referred to the case of ***Rush & Tompkins Ltd. v. Greater London Council and Another [1989] 1 AC 1280 H.L.*** for the general principle that a "without prejudice" letter between attorneys-at-law cannot be used to establish admission or partial admission and that "the rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or written, from being given in evidence". Counsel admitted that this case did not specifically touch and concern the question of adverse possession but contended that it was useful in illustrating the underlying purpose of the rule which is to protect the litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement.

[29] To generally shore up his submissions, Counsel referred the Court to the case of ***JA Pye (Oxford) Ltd. v. Graham [2003] 1 A C 419*** where he noted that the House of Lords stated that once it is accepted that a necessary intention is to possess and not to own and to exclude the paper owner only so far

as is reasonably possible, there is no inconsistency between a squatter being willing to pay the paper owner and in the meantime being in adverse possession. In addition, Counsel cited the cases of ***London Borough of Lambeth v. Blackburn [2001] 82 P. & C.R. 494*** and ***Dennis Li v. Walker (1968) 12 W.I.R. 195.***

[30] Counsel based his final submissions on the ground that at the very least and in the alternative, the appellant had acquired an easement over the disputed land by the running of the irrigation pipes and the parking of the car.

[31] Counsel for the respondents was very succinct in his reply noting that the judge had properly dealt with the relevant issues in regard to adverse possession and the applicability of the relevant principles set out in the ***Act.***

He referred the Court to his skeleton arguments in which he emphasised that the findings of the judge could not be faulted especially with respect to:

(a) her rejection of the evidence of the BADMC employee;

(b) her finding that the appellant's daughter was an untruthful witness;

(c) her observations during her site visit about the house on the disputed land; and,

(d) her handling of the issue of the abandoned car on the disputed land.

[32] Counsel next referred to the appellant's submission on the question of the voidabilty/invalidity of the order restoring the disputed land to the respondents subsequent to the action against their aunt. He argued that while the aunt had retained counsel in the matter, the action had never been defended, and since the appellant had not raised the issue at trial, the Court could not now be asked to determine the matter. In support of this contention, Counsel referred the Court to Order 59/10/10 of the UK Supreme Court Practice 1999 in which it is noted that a point not taken at the trial, but presented for the first time in the Court of Appeal ought to be most "jealously scrutinised".

Statutory Provisions and General Principles

[33] A simple definition of adverse possession is possession in opposition to the true owner and is an ouster of the true owner. ***The Limitation of Actions Act, Cap. 231*** (the ***Act***) provides the legal basis on which a claim by the true owner is made whenever the circumstances surrounding the possession of the stranger for 10 years are found to be sufficient to manifest incompatibility with the title of the true owner. In relation to the limitation of actions to recover land, ***section 25(1)*** of the ***Act*** which prescribes the period as 10 years, states:

> "25(1) Subject to ***subsection (2)*** no action shall be brought by any person to recover land after the expiration of 10 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

In relation to an action to claim by adverse possession, ***section 31(1)*** provides:

> "No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run, that is to say, the land is in "adverse possession", and when under this ***Act*** any right of action to recover land is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing until adverse possession is taken of the land".

and further by ***subsection (4):***

> "In determining whether a person occupying any land is in adverse possession of the land, it may not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely because the occupation of the land is not inconsistent with the present or future enjoyment of the land by the person entitled to the land".

[34] Sampson Owusu in ***Commonwealth Caribbean Land Law*** at ***p. 267*** articulated the doctrine relating to adverse possession in the following terms:

> "Title to land can be acquired by appropriating a piece of land of another person and remaining in undisturbed possession of it for a period prescribed by statute without acknowledging the title of the true owner. If the true owner fails within the prescribed time to assert his title to his land which is wrongfully possessed by the stranger, his title to the land will be extinguished by operation of the statute. The stranger's possession ripens into a valid title to the land if his possession is adverse to the rights of the true owner."

[35] A summary of what constitutes adverse possession is to be found in ***Halsbury's Law of England, Fifth Edition (2008), Volume 68*** at ***paragraph 1078*** as follows:

> "What constitutes adverse possession is a question of fact and degree and depends on all the circumstances of each case, in particular the nature of the land and the manner in which land of that nature is continually used; there is no general principle that, to establish possession of an area of land, the claimant must show that he made physical use of the whole of it. However, for the claimant's possession of the land to be adverse, so as to start time running against the owner, the factual possession should be sufficiently exclusive and the claimant should have intended to take possession on his own behalf and for his own benefit. Where the occupier's possession of the land is by permission of the owner, that possession cannot be adverse and possession is never adverse if it is enjoyed under a lawful title".

[36] The principles evolved by the common law governing the establishment of sufficient adverse possession are well known and were eloquently summarised by ***Slade J*** in ***Powell v. McFarlane [1979] 38 P. & C.R. 452*** at ***470 – 472*** and have been subsequently confirmed in numerous cases, notably ***Buckinghamshire County Council v. Moran [1990] Ch 623; London Borough of Lambeth v. Blackburn (supra)*** and ***Pye v. Graham (supra).***

[37] We find it necessary to quote at length the relevant principles as adumbrated by ***Slade J*** in ***Powell v. McFarlane (supra):***

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('*animus possidendi*').
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive 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.
>
> …
>
> Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession.
>
> …
>
> 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.
>
> (4) The *animus possidendi,* which is also necessary to constitute possession, was defined by ***Lindley MR*** in ***Littledale v. Liverpool College [1990] 1 Ch. 19, 23 CA*** (a case involving an alleged adverse possession) as 'the intention of excluding the owner as well as other people.' This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

Although it was not specifically stated, it is evident that it was with these principles in mind that the judge came to her decision.

Discussion

[38] The principal issue for this Court is whether the judge was correct in her finding that the disputed land did not form part of the land to which the appellant could legally lay claim through adverse possession. This being so, then the other issues namely, whether the appellant had the factual possession of and intention to possess the disputed land sufficient to satisfy his claim of adverse possession, though considered by this Court, will be

of peripheral and academic importance.

[39] While it is accepted that by ***section 61(1) (e)*** of the ***Supreme Court of Judicature Act, Cap. 117A,*** the Court of Appeal has the authority to make its own decision on issues of fact, it is also accepted that the Court of Appeal will not interfere with conclusions of primary fact which have been reached by a trial judge unless it can be shown that the judge has "palpably misused" her advantage. In other words, the Court of Appeal is ever mindful of the advantage enjoyed by the trial judge who would have seen and heard the witnesses.

[40] In addition to the testimony of the first respondent which she found to be unassailable, the judge considered the evidence of a number of witnesses including, Eugene Carrington, who at the time of his testimony was 82 years old, had lived in the vicinity of the disputed land since 1964 and was therefore very familiar with the area and knew very well the history of its occupation. Carrington particularly identified the disputed land and in unchallenged evidence, spoke of the respondents' three tenanted houses which were on the disputed land at the time when the appellant took up residence in the neighbourhood.

[41] While "allowing for any ill will" between Carrington and the appellant and so "approaching his evidence with caution", the judge found favour with Carrington's evidence and accepted his uncontroverted testimony that when the appellant came to the area, he bought the house in which he is presently living from one Owen Allder and that this house was situated on land belonging to one Cutting who was residing in America and not on the disputed land which belonged to the respondents' father. Carrington maintained that it was until then (the time of the hearing) that the appellant remained on the same land belonging to Cutting and he had never known of any activities which the appellant had carried out on the disputed land except for the building of the house and "galvanize structure". According to him, the appellant had never lived on the disputed land.

[42] This evidence corresponded to that given by another elderly witness, James Stewart, age 90 at the time of the hearing, who had been living in the area from 1947.

[43] Both witnesses were firmly of the view that since the appellant's house in which he is living has remained in the same place from the time he had purchased it, it could not be said to be on the disputed land. This view was accepted by the judge.

[44] What further informed the judge's decision was that while the appellant testified that he lived on the disputed land and that he had six houses on the same land, this conflicted with evidence procured through the production of a sketch plan of the disputed land. This sketch plan (Ex MG 15) which was admitted into evidence without objection has unfortunately not been produced to this Court. The plan was prepared in 2008 for the respondents and shows the presence of only two houses on the disputed land – one occupied by the respondents' tenant and the other which was described by the first respondent as crudely and hastily constructed (a fact borne out by the judge as a result of her site visit and described in her judgment (paragraph 55) as "an incomplete partially and crudely painted structure". The state of the structure easily dispelled the notion that this was a house "under repair". It is to be noted that both witnesses Carrington and Stewart gave evidence that this house was built in March 2007. The land surveyor who visited the disputed land in 2007 and prepared the sketch plan identified it as a house "under construction". By the appellant's own admission, when shown the plan, the house in which he lives is not on the plan although he had said in evidence-in-chief:

> "I live on the same land where **the house** is. I have my lumber yard there. I got a mill. I does make cane juice and I got five houses on that same land that I am living on. I now say that I have six houses on the land. Last house I built was nine years ago. All six houses are still on the same land". (Emphasis supplied)

[45] The judge found that these houses, though erected by the appellant are not on the disputed land - a logical conclusion with which this Court must agree.

[46] "The house" about which the appellant was speaking in the excerpt at paragraph [44] is the house which the first respondent described as crudely and hastily constructed and the house which witnesses Carrington and Stewart testified was constructed in 2007 but which the appellant maintained he had put on the disputed land some 15 years previously.

[47] Consequently, in the judge's view, and a view we also hold, since the exhibited sketch plan is of the disputed land and the appellant's residence is not on the plan, then it stands to reason that the appellant cannot **in these circumstances** lay claim to the disputed land.

[48] But the question remains, can the appellant otherwise show that he was in possession of it? Taking into account the principle that some form of exclusive factual possession coupled with a sufficient intention to possess is the basic requirement and having regard to the test set out by ***Slade J*** in ***Powell (supra)*** that everything must depend on the particular circumstances, especially the nature of the land and the manner in which land of that nature is commonly used or enjoyed, can the purported actions and activities of the appellant on the disputed land satisfy his claim of adverse possession?

[49] Our consideration of the judgment has satisfied us that the judge in coming to her decision applied her mind correctly to the following issues:-

(a) whether the respondents had abandoned possession of the disputed land;

(b) whether the appellant had proved entry into possession of the land;

(c) if such entry had occurred, whether his acts demonstrated an exclusive possession inconsistent with the respondents' possession and title, in other words, did the appellant dispossess the respondents by openly using the land as his own?

[50] In the Jamaican Privy Council case of ***Wills v. Wills (2003) 64 WIR 176,*** the facts of which are not particularly relevant to the present case, ***Lord Walker of Gestingthorpe*** after considering a number of decided cases remarked at paragraphs [19] and [20]:

> "[19] All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the court carefully considering the extent and character of the land in question, the use to which it has been put, and other uses to which it might be put. They also rightly stated that the court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably either necessary or sufficient as evidence of possession. Nevertheless, the decisions must now be read in the light of the important decision of the Court of Appeal in *Buckinghamshire County Council v. Moran [1990] Ch 623* and the even more important decision of the House of Lords in *Pye*.

> [20] In *Moran* each member of the court approved the following passage from the dissenting judgment of ***Stamp LJ*** in ***Wallis's case [1975] QB 94*** at 109 and 110. 'Reading the judgments in ***Leigh v. Jack 5 Ex D 264*** and ***Williams Bros Direct Supply Ltd v. Raftery [1958] 1 QB 159,*** I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done upon it and the intention of the squatter fall to be considered. Where the land is wasteland and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one may more readily conclude that the acts done on the wasteland do not amount to dispossession of the owner. But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it, the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession".

[51] As to the respondents' claim of ownership and possession, after having previously accepted that they had established legal title, the judge at paragraphs [21] to [24] of her judgment listed the actions taken by the respondents which in her opinion attested to their "vigilance" in protecting their interests vis-à-vis the disputed land: the first respondent's frequent visits to the land beginning from 1975; her prompt initiation in 1996 of the action against her aunt to recover possession and her immediate instructions in 2007 to her attorney-at-law to institute proceedings against the appellant when she was of the opinion that he was encroaching on the land. These actions exhibited an intention to preserve rather than abandon possession of the disputed land. The words of ***Slade J*** in ***Powell (supra)*** support this finding:

> "… the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession".

In the result, it is our view that there is no direct evidence of intention on the part of the respondents to abandon the disputed land and nothing from which such intention could be inferred.

[52] The appellant's claim centred around his taking up residence in the area in the 1980's and carrying on a number of activities, some of them allegedly on the disputed land: the planting of coconut trees; cultivation of agricultural produce; erection of houses; parking of cars and laying of irrigation pipes. We will consider these activities to determine whether they satisfy the requirements of a claim for adverse possession.

[53] As to the planting of the coconut trees, the judge determined that although produced in evidence was a series of photographs, one of which (Ex MG 12) showed a number of trees, including coconut trees which the appellant alleged he had planted, no plan of the area had been produced to positively establish the location of the coconut trees.

[54] Since the location of the trees could not be determined from the photographs, there could be no finding either that the particular trees had been planted by the appellant or even that the trees were on the disputed land. The first respondent had stated in her evidence that in fact the coconut trees shown in the distance in that photograph were not on the respondents' property. Both witnesses Carrington and Stewart spoke of there being one coconut tree on the disputed land. The appellant's witness Anthony Alleyne of BADMC when shown the said photograph described the coconut trees as being "back of the defendant". We accept the judge's finding.

[55] As to cultivation of the disputed land, the judge referred to the unchallenged testimony of the first respondent to the effect that her father had "worked" the land himself during the years she lived in Barbados and had grown sugar cane and rotation crops. During her visits to Barbados subsequent to her father's death, there were no crops being grown on the land. Those visits, it is to be recalled from the first respondent's uncontroverted testimony, numbered 16 – sometimes twice a year – from 1995 to 2003. It is evident then that had the land been under cultivation, the first respondent would have been aware of it. Thus the judge while accepting that the disputed land was suitable for agricultural use, was not of the view that the disputed land had been cultivated by the appellant despite his assertion that he had been "working the land" and therefore user of this kind necessary to prove ouster had not been proved.

[56] As to the erection of the house on the disputed land which is the principal constituent of the appellant's claim, the judge was satisfied that the construction of the "offending house and structures" was of recent vintage. The appellant testified:

> "I did have a small house up there where I put down my tools and my spray and the house get old and I repaired it. After I repaired it, I clean it and stock up my things in there. The house was there since 15 years ago. After I done repair this house, I only put my things there. I never do anything with it. My daughter Carolyn Edwards used to live in this house."

Under cross-examination he stated:

> "House in this Exhibit put on land fifteen years ago. No one was living in the house in the last fifteen years. I did not paint the house in last six months. House was painted year before last in 2006."

[57] Contrasted with the appellant's evidence-in-chief about the use and occupation of the house is that of his daughter:

> "This house is my house. Before the way it looks now it was an old run-down house. My sister used to live in this house before it was in the present state, that sister lives in St. George for about ten years now ….. When she got married she moved out… After she moved out my father did more repairs. Then I used to go in the house and do my homework after school. Since it was in present state my father decided that he would give it to me in 2006".

[58] Coupled with her own observations regarding the state of the house and taking into account the contradictions of the appellant and his witnesses with respect to the use and occupation of the house, the judge found that the appellant had not made good his case with respect to the erection of the house

on the disputed land.

[59] As to the parking of the car on the disputed land, the judge was totally dismissive of this as being insufficient to establish a claim by the appellant since in her words "only the acts of the squatter and his intention are material to a claim for adverse possession".

[60] All of the legal authorities indicate that a trespasser seeking to dispossess the legal owner has to adduce compelling evidence that he had the requisite *animus possendi*. In addition his claim will fail in instances where his use of the land was equivocal in the sense that it did not necessarily by itself establish an intention on his part to claim the land as his own and so exclude the true owner.

[61] It was the evidence of the appellant and his witnesses that the car which was sitting devoid of wheels and on concrete blocks on the disputed land belonged to the appellant's daughter and had been placed there by the daughter for some time – for periods varying from 12 to 13 to 14 years depending on the witness.

[62] Counsel for the appellant challenged the "incorrect finding" by the judge that the car had been on the land only since 1999 when in fact according to Counsel, the first respondent had herself stated that she had seen that car on blocks on the disputed land since she had first visited the land in 1975.

[63] Under cross-examination the first respondent stated:

> "In this photo I see a motor car. When I made the first visit the motor car was there. It is not my motor car. The motor car is on blocks. It is on my land. That car has been there for a while. I have seen it there in about 1999 and for over 8 years. I did not place it there."

In her evidence in chief, she had referred to "an abandoned motor car" on her property.

[64] As far back as the case of ***Leigh v. Jack (1879)5 Ex D. 264*** in which a stranger claimed adverse possession by his having deposited heavy factory material on the owner's land, it had been determined that the mere fact that the true owner does not make use of his land does not necessarily mean that he had discontinued possession of it and the mere fact that a stranger has interfered in some way with the land of the true owner is not sufficient to show dispossession. In the case of ***Archer v. Georgiana Holdings Ltd. (1974) 21 WIR 431,*** the Court of Appeal of Jamaica cited with approval the case of ***Philpot v. Bath (1905) 21 T.L.R. 634*** which involved the placing of huge stones and boulders on land and a claim that this action ousted the true owner. In affirming the decision of ***Warrington J*** when he rejected this claim, the English Court of Appeal stated:

> "At the moment of the act being done it would have been the duty of the court in considering such a question, to say, how has the particular article come into the place in which it is found, and what was the object of that article being placed there? It was not sufficient for the present defendant to say that the article had been placed there a long time. It was necessary to show whether the article was placed there in order to assert a title of ownership to the soil, or whether it was intended to be merely ancillary to the use by the defendant of his property. In a case of this kind it was always open to inquiry how the article came to be in the place in which it was found, and what the parties intended as to its use; and their respective rights must be subject to explanation by evidence: ***Lancaster v. Eve (1859) 5 C.B. (N.S.) 715, Wood v. Hewitt (1846) 8 Q.B. 913.*** Here there was nothing binding one to hold that the acts of the defendant or his predecessors in title had indicated any intention to exclude the plaintiff's rights."

[65] It is our judgment that Counsel's challenge to the judge's finding with respect to the time of the placing of the car is of no import since even if, as had been determined, that the car had indeed been on the disputed land since 1975, the appellant by his own admission, did not **himself** place it there and so cannot take advantage of someone else's action or intention to support a claim for adverse possession. Therefore in concurrence with the judge's decision, we are of the view there was neither the factual possession of the land nor the intention to dispossess the respondents. In any event the placing of the car can be described as only an equivocal act since it was done for the purpose of protecting a perceived right - parking until it could be repaired – which was not inconsistent with ownership of the disputed land. As stated by ***Hutton LJ*** in ***Pye v Graham (supra):***

> "It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess".

[66] Counsel's analogy of the circumstances of this case to what ***Simon Brown LJ*** in ***Burns v. Anthony (supra)*** referred to as the "assertive expression of exclusive possession … by regularly and apparently as of right parking cars close to someone else's" property is totally misplaced. Parking a car "regularly" connotes constant use and movement of the car, whereas in this case, the car had been immobilised for in excess of 10 years and therefore effectively abandoned. The respondents' ownership of the land could therefore not be said to have been prejudiced or altered by the trivial act of parking an abandoned car on the land.

[67] As to the laying of irrigation pipes on the disputed land, the judge rejected the testimony of Anthony Alleyne of BADMC who was responsible for the laying of the pipes for the appellant. That witness sought, in the face of the sketch plan of the disputed land, (a) to establish that he had laid pipes on that land as far back as 1984 on the instructions of the appellant and (b) to locate the appellant's house on the land.

[68] Counsel for the appellant was critical of the judge for neglecting to mention in her judgment that the BADMC witness had testified that he had seen the shed where the appellant stored his tools "evolve" into a house over a period of years.

[69] It is our view that the judge was correct in her analysis of the evidence determining that it could not be accepted that the pipes which had been laid by the witness had been laid on the disputed land. She noted that the witness under cross-examination stated that the appellant had a shop on the land with the pipes and this was where the appellant lived, but in fact the sketch plan did not show any shop or that this was where the appellant lived. The appellant's daughter later contradicted Alleyne's evidence regarding the house with the shop. Under cross-examination, she stated:

> "My father has a house with a shop which is attached to the house. My father does not live in the house attached to the shop".

[70] The judge further concluded that in any event, even if the pipes were indeed on the disputed land, they were not sufficiently visible and open to the gaze of the respondents and the public to constitute adverse possession. This conclusion was reinforced because of her personal observations at the site visit which were subsequently agreed by Counsel for both sides as being accurate.

[71] We reject Counsel for the appellant's submission with respect to the concept of dual possession in accordance with the provisions of ***section 31(4)*** of the ***Act*** as well as his suggestion of a partition of the disputed land as an "equitable way forward".

[72] Based on the judge's findings which we have already indicated to be justified, the testimony of the appellant and his witnesses fall far short of the evidence of factual possession which is required to establish a claim for adverse possession. Secondly, reminiscent of the principle set out by ***Slade J*** in ***Powell (supra),*** the judge found that the respondents as owners of the disputed land and the appellant as a person supposedly intruding on that land without the respondents' consent were not both in possession of the land at the same time.

[73] Counsel in our opinion while citing the case of ***Dennis Li v. Lucy Walker (supra)*** correctly refrained from suggesting the degree to which the partition should go. Apart from the agreement that the remedy of partition could properly be employed if the circumstances permitted, we do not think that the case of ***Dennis Li*** can be of any help to the appellant. In that case the parties each owned an undivided half part or share in a lot of land but when a survey was carried out, it was discovered that the fence, at one end had deviated. The appellant demanded his mathematical half, a move resisted by the respondent. In granting the division, the Court of Appeal of Guyana also held that no question of ouster arose as it was not competent for the respondent in the circumstances to prescribe against the appellant, they having agreed not to recognize any occupation which did not provide for an equal apportionment of land in place of their equal undivided interests.

[74] It is clear from the facts in ***Dennis Li v. Lucy Walker (supra)*** that the circumstances in the present case could not give rise to a partition of the disputed land as is suggested.

[75] Even if geographical proximity to the disputed land could be said to be in the appellant's favour, he having already acquired the adjacent and surrounding lands, it makes for an illogical premise, given the evidence, to conclude that he had automatically gained a right to the disputed land as well.

[76] He would have had to show that the respondents had discontinued possession or that they had been dispossessed for the requisite period of 10 years. Mere non user by the true owner does not amount to discontinuance of possession in the same way as are equivocal acts insufficient to constitute factual possession. In other words, where the true owner of land does not immediately use his land 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 parking an abandoned car or stacking materials or for some other temporary purpose like growing vegetables: per ***Denning MR*** in ***Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd [1974] 3 All ER 575 CA*** at ***580.***

[77] Although a sketch plan was produced to the court and the first respondent gave in evidence that she had had the land surveyed there is no evidence that any of these lands were either fenced or enclosed or demarcated on the ground. There was some evidence from the appellant that he had planted some coconut and fruit trees. However, the exact boundaries of these trees were not clear. The judge at paragraph [39] of her judgment, called attention to the absence of explicit boundary lines:

> "[39] It is regrettable that no evidence has been adduced of the boundaries of this 9 acres of land or any plan thereof put into evidence to assist the Court. The absence of such evidence serves only to blur the critical issue as to whether this cultivation was on the land in dispute or **put another way was the land in dispute part of the 9 acres under cultivation by Browne"**. (Emphasis supplied)

[78] Thus we are in agreement with the judge that while the appellant may have acquired prescriptive title to the surrounding acreage, he had not acquired such title to the one acre owned by the respondents: see also the statement of ***Slade J*** in ***Powell (supra)*** at paragraph [37] above.

[79] In the Privy Council case from Guyana, ***West Bank Estates Ltd v. Arthur and Others [1967] AC 665, Lord Wilberforce*** delivering the judgment of the board, cited with approval the case of ***Glyn v. Howell [1909] 1 Ch 666*** in which it was decided that where title is founded on adverse possession, the title will be limited to that area of which actual possession has been enjoyed and that, as a general rule, constructive possession of a wider area will only be inferred from the actual possession of the limited area if the inference is necessary to give effect to contractual obligations or to preserve the good faith and honesty of a bargain. Such is not relevant in our case.

[80] Counsel for the appellant made much of the judge's exclusion of any reference in her judgment to the case of ***Rush & Tompkins v. Greater London Council (supra)*** which he says had been cited at the trial. He contended that her admission into evidence of the "without prejudice" letter from the appellant's attorney-at-law in which the appellant had offered to purchase the disputed land from the respondents conflicted with the principle set out in ***Rush &Tompkins.***

[81] It is our view however, that based on the evidence led at trial, it is understandable why the judge did not consider it necessary to reflect upon ***Rush & Tompkins.*** The appellant's letter was in fact not a "without prejudice" letter as determined by the judge. It therefore proved damaging to the appellant's claim since what was clearly in contemplation was a purchase of the lands owned by the respondents.

[82] In our judgment, the general principle with respect to the admission of "without prejudice" communications notwithstanding, once an acknowledgment has been reduced to writing, there is certainty about the words used and the court need only decide whether the words which have been written amount to an acknowledgment because the written word speaks for itself: per ***Lord Templeman*** in the Privy Council case from Antigua and Barbuda: ***Browne v. Perry [1991] 1 WLR 1297*** at ***1300***. See further ***Basildon v. Charge [1996] C.L.Y. 4929*** where it was made clear that an act on the part of the squatter which recognises the superior title of the paper owner, such as making enquiry of the paper owner with a view to purchasing the land, can negative an intention to possess or an intention to possess adversely.

[83] In the Court of Appeal decision from St. Vincent and the Grenadines, ***Pollard v. Dick (1977) 2 OECSLR 239, Davis CJ*** held that the adverse claimant had failed to show the necessary *animus possendi*, as he had entered the land, not with an intent to dispossess the owner, but in the expectation of purchasing it from someone who purported to be the true owner. Such evidence was fatal to the claim based on adverse possession.

[84] All of these authorities while supportive of the judge's decision, are nevertheless irrelevant to the determination of the present case in which there is no evidence of possession and certainly not for the requisite 10 year period.

[85] Counsel also suggested that in light of the decisions in ***London Borough of Lambeth v. Blackburn (supra)*** and ***Pye v. Graham (supra),*** the judge had

misconstrued the meaning of "intention to possess".

[86] The cases of ***London Borough of Lambeth v. Blackburn*** and ***Pye v. Graham (supra)*** admittedly give very valuable guidance on the question of what constitutes intention to possess and what amounts to deprivation of possession. They are however distinguishable from the instant case where possession of the disputed land was found not to be evident and hence there could not be an intention to possess nor dispossession.

[87] In ***Blackburn,*** the appellant squatter had been in possession of the flat belonging to the respondent Council for in excess of 12 years having broken the padlock off the front door to gain entry and installed his own yale lock. He then proceeded to live in the flat as if it were his own home. This effectively evinced an intention to dispossess the Council albeit he had stated that he expected that one day he would be asked to move out. He however expressed the resolve that he had no intention of moving out until he got evicted. The Court of Appeal held that this intention to dispossess the owner and to remain in possession for the time being until evicted did not alter throughout the 12 years or more that he had remained in factual possession, thereby establishing adverse possession. His possession was deemed adverse because it was made manifestly apparent to the Council that the appellant intended to maintain possession against them as owners as well as against "the whole world". The fact that if the Council had come along, the appellant would have negotiated with them, and if he had been allowed to stay if he paid rent, he would have leapt at the chance, did not negative the requisite intention to possess because an intention to own the property is not required. The squatter must merely intend to exclude the owner so far as reasonably practicable and so far as the processes of the law allow.

[88] Similarly in ***Pye (supra)*** where there was again evidence of use and occupation of certain grazing lands for over 12 years before the action was brought, the House of Lords held that the requisite intention was not to own or acquire ownership, but to possess land on one's own behalf in one's own name to exclude the world at large, including the paper title owner, so far as reasonably possible and that it was not therefore inconsistent for a squatter to be willing, if asked, to pay the paper title owner while being in possession meantime.

[89] Intention to possess must of necessity include some element of possession and that possession must be for the full period of 10 years. The judge in the instant case decided that any contention on the part of the appellant that he had that intention could not be substantiated because except for his act of trespass in constructing the house in 2007, she had already determined that the appellant did not at any time enter into possession of the disputed land. It was with this diagnosis that she sought to emphasise that lack of intention to possess was further evidenced by the contents of the appellant's letter of offer to the respondents. Thus the proposition advanced to the Court that a request to purchase made by a squatter to the documentary title holder does not eclipse the squatter's right to adverse possession is not substantiated by the facts of the present case. We can find no fault with the judge's determination of this proposition for while the foregoing rubrics of law are undeniable, each case has to be determined on its particular facts and circumstances.

[90] It is evident that in light of her demeanour and the answers she gave with respect to the ownership and occupation of the house on the disputed land, that the judge determined that the appellant's daughter was not a witness upon whose evidence she could safely rely.

[91] Counsel for the appellant was concerned by the judge's challenge to the appellant daughter's connotation of the term "living in". The daughter testified that the house had been on the disputed land for a number of years and it had been given to her by her father (see paragraph [52]). It is her responses under cross-examination which obviously led the judge to conclude that she was neither candid nor honest and that her evidence had been "crafted to support her father's defence and counterclaim":

> "I live in same house in which my father resides. I do not sleep in that house (house on disputed land) … I do not have clothing in that house. The house does not have water … neither my father nor I live in the house …"

[92] In accepting the judge's determination and despite the protestations of Counsel for the appellant, we do not consider that a judicial interpretation of "living in" is necessary in this context.

[93] Counsel's charge that the judge mistakenly focused on the age of the house rather than on the occupation of the land cannot be sustained. Before noting her observations about the house during her site visit, the judge had stated:

> "[53] If it were accepted that Brown put the offending house on the land "fifteen years ago" as he testified, then it would have been erected in or about 1993 counting back from the year 2008 in which he was giving his evidence. It would also mean that the house was erected in a period during which the Plaintiffs, as I have found at para [25] were consistently exercising the kind of vigilance to be reasonably expected of them to protect their interests in the land.
>
> [54] It seems incongruous that the Plaintiffs had begun the legal proceedings against their aunt Enid Downes in Suit No. 1663 of 1996 to set aside the conveyance (see Exhibit "M.G.3") obtained by her, but would not have taken any action to have the offending house removed if indeed it had been erected there as Brown contends in 1993."

[94] In addition to these paragraphs the judge had dedicated paragraphs [46] to [52] to respond to her own question of when were the offending house and structures erected by the appellant on the disputed land.

[95] It is our judgment that there is no reason for this Court to consider the appellant's contention regarding the illegality of the respondents' title to the land. We are in agreement with Counsel for the respondents that this point having not been taken before the judge at trial, it would not be just to allow the appellant to advance the point at this stage. It is our view that taking into account the facts as found by the judge, it would most likely not have been an important influence on the result. More importantly, however, it is to be noted that there was neither an appeal from, nor any claim made by anyone on the order of ***Payne J*** of 17 December 2003 in favour of the respondents. It follows then that from the grant of the order by ***Payne J,*** that for the purposes of any subsequent possessory title claim, the claim by the appellant would have to fail.

[96] We are also of the opinion that there is no evidence to substantiate a claim by the appellant for an easement over the disputed land. As determined by the judge there was an absence of activity by the appellant with respect to the land: no irrigation pipes placed on the land as alleged nor any parking of a car there.

[97] In sum, the judge decided that the body of evidence presented by the appellant, as contrasted by that of the respondent, was not completely consistent within itself and was in material respects contradicted by other evidence. She determined that she was therefore not bound to accept it and she could take the view that the evidence was unreliable and insufficient to discharge the burden of proof resting on the appellant.

[98] As a result of the foregoing and taking into account that this case was one of appraisal of the evidence and of decision on issues of fact, we have found no reason to derive a different conclusion from that of the judge. We are satisfied that the judge's finding was justified by the evidence, not vitiated by any error of law and therefore ought not to be disturbed.

[99] For the above reasons we dismiss the appeal and affirm the judge's decision. Costs are awarded under the ***Rules of the Supreme Court, 1982*** to the respondents against the appellant in this Court to be agreed or taxed and certified fit for two attorneys-at-law.

Justice of Appeal

Justice of Appeal

Justice of Appeal