[2019] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2010

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**SANDRA BAILEY**	**1ST APPELLANT**
AND	**BASIL BAILEY**	**2ND APPELLANT**
AND	**DONOVAN LEWIS**	**RESPONDENT**

Gordon Robinson instructed by Winsome Marsh for the appellants

Miss Michelle Smith instructed by Lewis, Smith, Williams & Company for the respondent

8 November 2017 and 10 May 2019

PHILLIPS JA

[1] This appeal concerns the right to possession of a gazebo and other associated facilities existing adjacent to a unit in a residential scheme. Mrs Sandra Bailey and Mr Basil Bailey (the appellants), sought to challenge the decision of Sinclair-Haynes J (as she then was), delivered on 17 December 2009. In that decision, the learned judge refused to grant a declaration sought by the appellants that they were entitled to the said gazebo and other alleged facilities by way of adverse possession, and granted possession of the disputed area to Mr Donovan Lewis (the respondent). This challenge

was brought on grounds that the learned judge erred when she struck out the entire claim based on a preliminary issue, and erred in her rejection of the appellants' claim for possessory title.

Background

[2] The appellants entered into an agreement for sale to purchase Lot 14, Kingswood, Stony Hill in the parish of Saint Andrew, comprised in the certificate of title registered at Volume 1187 Folio 78 of the Register Book of Titles (Lot 14), from Monarch Investments Company Limited (Monarch) on 20 July 2005. They were duly registered on the said certificate of title for the property on 27 April 2006.

[3] The 1st appellant (Mrs Sandra Bailey), in an affidavit filed 15 July 2008, deponed that when considering the purchase of Lot 14, a gazebo was attached to the building. She therefore considered the gazebo to be a part of Lot 14, and bought Lot 14 with that belief. The appellants, she deponed, were placed in possession of Lot 14 on 1 September 2005, and since then, have remained in continuous and open possession of the said property.

[4] In June 2008, the appellants commenced construction to extend and reinforce the gazebo. The respondent, a developer of the said property, raised an objection indicating that the gazebo was on an area of land forming part of the common area of the scheme, and not on the appellants' property. Mrs Bailey deponed that that was the first time a claim was being made to the land on which the gazebo had been built. The respondent also sent certain items of correspondence to the appellants, objecting to

any extension of construction on the gazebo, ending in a letter dated 9 July 2008, from his attorneys-at-law to that of the appellants, indicating that if the gazebo, "the offending structure", was not removed within seven days, the respondent would have it forcibly removed.

[5] On 15 July 2008, the appellants filed a claim form against the respondent and Mr Lloyd Wilson (another developer of the said property). They sought a declaration that they were entitled by way of adverse possession to ownership in fee simple of the area of 35.080 square meters of land described as Lot B, being part of the certificate of title held jointly by the respondent and Mr Wilson, registered at Volume 1187 Folio 830 (the property). This area of land is specifically shown on survey diagram bearing survey department examination number 319247, dated 27 June 2005, prepared by Horace A Manderson, Commissioned Land Surveyor. They also sought, by way of consequential relief, an order that the Registrar of Titles be directed to rectify the certificates of title registered at Volume 1187 Folio 830 and Volume 1187 Folio 78 of the Register Book of Titles to reflect the said ownership.

[6] On 15 July 2008, the appellants also filed an application for an interim injunction restraining the respondent and Mr Wilson from entering or interfering, in any way, with their enjoyment of the said area of 35.080 square metres adjacent to their land, which was on the respondent's land. The grounds of the application were that the appellants were in possession of the land, and had filed a claim for a declaration that they were the owners of the same by way of adverse possession; that they had good prospects of succeeding on the claim; and that the respondent had threatened to take immediate

steps to interfere with the appellants' possession of the property. The application was supported by the affidavits of Mrs Sandra Bailey and Mr James Smith, managing director of Monarch, sworn to on 15 July 2008, and that of Mr Rudolph Smellie, attorney-at-law for the appellants, who attached the Certificate of Title for the said property.

[7] Mr James Smith stated in his affidavit that as at 25 October 1993, the said property, bearing civic address 5 Ordon Close, Kingswood, Stony Hill in the parish of Saint Andrew, was registered in Monarch's name. The property had been purchased from Mr Loy Anthony D'Oyen. He stated that at the time of the purchase, the property consisted of a "single floor town house and an extension to the back thereof in the form of a gazebo or porch". He said that at least from October 1993, Monarch occupied the property inclusive of the gazebo and the land, and had remained in continuous, open, quiet, and undisturbed possession of the same until 31 August 2005. Mr Smith stated that Monarch entered into an agreement for sale with the appellants dated 25 June 2005, and pursuant to that agreement, the company gave up possession of the property to the appellants as at that date, viz, 31 August 2005.

[8] On 15 July 2008, Brooks J (as he then was) restrained the respondent and Mr Wilson from interfering in any way with the property until 29 July 2008, when the application was fixed to be considered.

[9] The respondent, in an affidavit filed 25 July 2008, deponed, that at all material times, he was the owner and developer of a subdivision at Ordon Close, Kingswood,

Stony Hill in the parish of Saint Andrew, which was completed about 20 years ago. He stated that Lot 14 on the subdivision was 5 Ordon Close which he had designed and constructed. He stated that the boundaries of each unit were "clearly defined and delineated and the areas common to all unit owners [were] properly earmarked".

[10] He indicated that a previous owner of Lot 14 had utilised the services of famed interior decorator, Mrs Joyce Buchanan, who in the process of remodelling the unit, added a wooden porch above the steps at the rear of the building. That addition encroached on his property which was earmarked for the common area, and did not form a part of the certificate of title for Lot 14, but was on property in his name. He informed the owner of this, and requested the removal of the wooden porch. He stated that the owner and Mrs Buchanan met with him and requested his permission for the wooden porch to remain as it was not a permanent structure, and that it would be removed at any time at his demand. He stated that he therefore allowed the wooden porch "to remain at [his] licence". He maintained that all subsequent owners were informed that the wooden porch did not form a part of the property and that it was only allowed to remain if it would be removed at his (the respondent's) request.

[11] The respondent stated further that at the time Monarch was purchasing Lot 14, Mr Smith had made a request to him to transfer the area occupied by the porch. He declined this request and indicated to Mr Smith that the porch could only remain as long as Mr Smith understood that it was not a part of the property. Mr Smith, the respondent deponed, accepted that, and also requested that the porch not be removed.

[12] The respondent stated that, subsequently, when Mr Smith had entered into negotiations for the sale of the property, he (Mr Smith) told the respondent that the prospective purchasers were interested in acquiring the area occupied by the porch. Mr Smith again requested whether he, the respondent, was interested in transferring that part of the land on which the gazebo was situate. The respondent said that he was not interested in doing so.

[13] Subsequent to that request, the respondent stated that he had received a request from Mr Mark Golding, Monarch's attorney-at-law of the firm of Messrs Hart Muirhead Fatta, requesting that he transfer the said area to the purchasers of the property. He indicated that he declined yet again, and informed Mr Golding that the piece of land formed a part of the common area, and the gazebo had only been allowed to remain on the lot, on the understanding that the structure was not permanent, and that the owners were aware that the use of the porch was "only based on [his] expressed permission". He said that Mr Golding expressly stated that he accepted that the land occupied by the porch was not being transferred to the purchasers, which he subsequently confirmed in writing to the respondent's attorneys.

[14] The respondent stated further that on or about 16 June 2008, he noticed that the occupants of the property had deposited building materials nearby, and so he inquired about the purpose of the building materials and was informed that the material was for building a structure to include the area of the porch. He said that he had informed the appellants that they could not do so as the land did not belong to them. He stated further that they had acknowledged that, but claimed that Mr Ronald

Thwaites, their attorney-at-law, had indicated that he, the respondent had agreed to transfer to them the area on which the gazebo was situate. The respondent said that he informed them that that information was incorrect, as he had no intention of transferring that area to them, and that they should desist from any construction on it and, in fact, they should remove the wooden porch.

[15] The respondent stated that Mr Thwaites had written to him suggesting that he had commissioned a survey which indicated the area that he had agreed to transfer. He indicated that the survey suggested that he had been served a notice in relation to it, but that had never been done, and he had no knowledge of the same. His attorneys, he said, had written several letters to Mr Thwaites correcting the information stated in his correspondence, and requesting that the encroachment be corrected. He said that there was no response to his attorneys' letters. He maintained that the appellants were fully aware that they were not purchasing the encroached area of land. He insisted that no owner of the property had had continuous, open, quiet, and undisturbed possession of the encroached area where the wooden porch was situate, and the appellants were certainly not entitled to the property by way of adverse possession or otherwise. He contended that despite warnings prior to the commencement of the current construction, the appellants continued to build on the said area of land.

[16] On 29 July 2008, Mrs Bailey filed an affidavit in response. She deposed that the structure which she subsequently discovered was encroaching on the adjoining land was "only partly wooden", as it had a concrete section which was "six feet wide by nine feet long and eight inches high, which functioned as an outdoor bathroom". The

wooden section was built completely on a concrete foundation. It was her contention that the addition could not be enjoyed by the owners (the respondent and Mr Wilson) as a part of the common area.

[17] She insisted that before June 2008, she had never been informed by the respondent, his servants or agents that the said structure was not a part of the property that she had acquired. She was also not informed that the structure was only being allowed to remain on the basis that once the respondent requested it, it should be removed.

[18] She indicated that Mr Smith had informed her that when he sold Lot 14 to the appellants in 2005, the property existed in the same form and extent as when he had purchased it in 1993. Mr Smith had also informed her, she stated, that the respondent had never indicated to him that the structure did not from a part of the property, and that it could only remain as long as that was understood.

[19] She insisted that she could not understand how the structure could not be a part of the property, as it consisted of a concrete foundation and should not therefore be subject to removal. Additionally, she said, that the wooden extension had at all times "constituted one of the main attractions of the premises, and, housing, as it does our laundry room, and serving, as it does, as a dining, relaxation and storage area for the family, in keeping with the usage that we found in 2005". She deponed that the property was "vital to the comfort and enjoyment of the dwelling house". She said, as a

consequence, had she known that it was not a part of the property, she probably would not have purchased the same.

[20] On 29 July 2008, on the hearing of the application for interlocutory injunction, R Anderson J, having read the affidavits of the parties and heard the submissions of counsel representing both sides, ordered that:

> "1. The interim injunction be discharged.
>
> 2. The issue of whether either the present or previous owners had been notified by the [respondent and Mr Wilson] as to the status of the encroached on land and whether there was a licence in place, is to be tried as a preliminary issue as a matter of urgency on a date to be fixed by the Registrar for no later than the Summer of 2009.
>
> 3. No further work is to be done by the [appellants], and nothing is to be done by the [respondent and Mr Wilson] to demolish the construction on the encroached area presently part of the common area owned in part by the [respondent and Mr Wilson] and the other lot owners.
>
> 4. In relation to the trial of the preliminary issue referred to above, each party is to file Witness Statements, Skeleton Submissions and copies of Authorities at least 21 days prior to the hearing of the preliminary issue.
>
> 5. Costs to be costs in the claim.
>
> 6. The [appellants'] Attorneys-at-Law to prepare, file and serve this Formal Order.
>
> 7. Liberty to apply."

The hearing on the preliminary issue

[21] Witness statements were duly filed for the hearing of the preliminary issue as directed by R Anderson J, and the witnesses were cross-examined when the preliminary question came up for hearing before Sinclair-Haynes J (as she then was).

Evidence of Mrs Bailey

[22] Mrs Bailey's witness statement, in the main, contained similar information set out in the affidavits in support of the application for interlocutory injunction. She stated that although she knew that Mr Smith was Monarch's managing director, she categorically denied that she had ever negotiated with him when purchasing the property. In fact, she said, that she had become aware that Lot 14 was available for purchase through real estate agents, McEachron and Clarke Real Estate, who had negotiated the sale on the appellants' behalf.

[23] She said also that from the outset she was aware that the property was a part of a development scheme, comprising several individual owner lots and common areas jointly owned by the owners of the said lots, but she denied knowing about the encroached land until August 2005. That information, she said, was first discovered through receipt of the surveyor's report, sent to the appellants on 18 August 2005, which was obtained for the purpose of completing mortgage arrangements. She said that it was the mortgagee who had requested that the problem of the encroachment be solved. But Mrs Bailey maintained that the problem was not discussed with the respondent, whom she never met until June 2008 when she sought to modify the gazebo further. She averred that until then, the respondent had never said that the

gazebo encroached on his property, and that it was allowed to remain there with his permission.

[24] Under cross-examination, she said that before being put in possession on 1 September 2005, she had refurbished the gazebo by enclosing the basement of the gazebo with plywood; removing the old steps and building new ones and adding rails; installing a door to the washroom area; placing awnings around the gazebo; and painting the gazebo. She said that there had not been any communication with her throughout that period. She recognised that Mr Mark Golding was the attorney representing Monarch in the sale of the property, and "was aware before completion of the sale that the gazebo did not constitute part of the land that [she] was buying". She said she could have rescinded the sale but chose to continue with the sale knowing that the gazebo was not part of the property. She confirmed that the respondent's attorney never spoke to her. She acknowledged that she knew that the gazebo was a part of the common area which was for "the purpose of persons who are part of the scheme and for the enjoyment of all of the unit owners including [herself]". She agreed that "one person [cannot] have exclusive possession of the common area".

[25] With regard to the modification of the house and gazebo, she said that she had made modifications to both, before she took possession of the house. In fact, she stated, that she started modification in mid June 2005. She said she had been given permission to do the repairs before September 2005. She stated further that she had been put into possession of the property in September 2005 before the mortgage had been approved. The respondent, she stated, never objected to the refurbishing of the

gazebo. As already indicated, she set out the work that she had done. She referred to the fact that when she purchased the property, there was a washroom on the gazebo. She said that she had also done other refurbishment to the house on the property from June 2005. It was not until 2008 that the respondent first objected. In spite of the respondent's objection, she continued building on the property even though she knew that the part of the land on which the building sat was not hers. She was asked an important question and gave an interesting answer as follows:

> "Ques. Were you capturing the land?
>
> Ans. If that is how it is defined in law, I don't know."

[26] She made it clear that she had not spoken to Monarch or anyone on their behalf to acquire the particular piece of land. She was not aware if Monarch had had that discussion with the respondent. She said that as the land was not hers, if the respondent wished to sell it to her she would buy it, but she would also "take it for free if he wants to give me for free".

Evidence of James Smith

[27] Mr Smith indicated that although he had resided elsewhere, he assumed that the gazebo and the extension to the rear of the premises formed a part of the property Monarch had bought, and he had never been told otherwise by Mr D'Oyen (the previous owner) or anyone else. In fact, he had not been told that the gazebo was on common area, and so subject to removal at the respondent's request, and further did not know that it remained there "merely by [the respondent's] licence and permission". He was

aware though that the property "formed part of a developing scheme comprising individually owned lots and common areas jointly owned by the owners of the individual lots".

[28] He said that he had never had any interaction with the respondent, although he knew who he was. He confirmed that although owning the property since 1993, it was not until the sale to the appellants was being contemplated in June 2005 and a survey was done, that he became aware of the encroachment. The attorneys representing the parties, he said, tried to arrive at a resolution. But it was certainly not the case, he stated, that he had asked the respondent to transfer to Monarch the piece of property which contained the gazebo. He stated that the respondent had not indicated that the porch could only remain as long as it was accepted and understood that the piece of land on which the gazebo was situate did not constitute a part of the property.

[29] During cross-examination, he acknowledged that the agreement for sale of the property to the appellants was made in 2005 and completed in August 2006. However, he rejected the suggestion that the appellants had been put into possession before they had signed the agreement as he had not known them before, and so, had that been the case, they would have had to pay rent, and he did not recall that having occurred. The deposit, he said, had been paid on the date of the agreement, and he did not recall any survey of the property having been done. It was his position that he had not commissioned one. He averred that the gazebo was made of wood with a concrete base, and then made the following statements of note:

1. As far as he was concerned he thought that the gazebo was a part of the property.
2. He did not want to capture anyone's land.
3. He did not know that the piece of land housing the gazebo was on the respondent's land.
4. If he had known that the gazebo was on the respondent's land, he would not have tried to take it way, and stated specifically: "I had no intention to take way the area where the gazebo sits from [the respondent]. I had no intention to do that. I frowned on squatting".
5. When he entered into the agreement with the appellants, Monarch had already been in possession of the property for a period of 12 years.
6. He insisted that the respondent had never told him that the gazebo was on his (the respondent's) land.
7. He said that the attorneys for the parties tried to resolve the situation. He gave his attorneys permission to do so. He did so, he said, as once he realised that the area did not belong to Monarch, he said specifically: "I was not claiming that land by

capture. It wasn't my intention to capture anybody's land".

8. He said that had he known when he had entered into the agreement with the appellants that the gazebo was not on the property he would have told them, as he said specifically: "It would be below me to capture anybody's land".

Evidence of the respondent

[30] The respondent's witness statement was adduced into evidence. It mirrored, essentially, the information deposed in the affidavit sworn to by him, and filed in opposition to the application for the interlocutory injunction, referred to previously.

[31] In cross-examination, he maintained that the extension to the appellants' home had always only consisted of a wooden structure on a wooden base. It was a shed with four wooden posts from ceiling to ground, with a wooden platform and wooden steps projecting therefrom. At the time that he gave evidence, he said it was then made up of concrete and wood, which, he said, he had only become aware of when the materials had been brought to the appellants' home in 2008. He said that originally, there had been no bathroom in the extension as one could not permit a bathroom construction on the common area as one would have to dig into the area to lay pipes. There was a bathroom, however, constructed near to the exit of the townhouse. He asserted that there was no concrete structure relative to the gazebo on the property when Monarch bought the property. It was the appellants, he stated, who in 2008, removed the entire

wooden structure, constructed a concrete base with an extended structure with a roof, and a wall with a door, all of which had been made wholly of concrete. There, however, was still a wooden shed there.

[32] He reiterated that he had met Mr Smith on several occasions and spoken to him about the breach relating to the encroached area, and Mr Smith asked him if he would transfer the area to Monarch. These conversations he said took place between 1993-2005. He was unable to recall the exact date of the conversations and who had initiated them. However, he stated, that he had also had conversations with Mr Smith's attorney Mr Mark Golding, who on one occasion had actually come to his house with a friend of Mr Smith's concerning the transfer of the said piece of land to the rear of the property. He maintained that he had told Mr Smith, repeatedly, when Mr Smith was negotiating the purchase of the property, that he would not transfer the area as it was common area.

[33] While giving his testimony, he was shown a diagram of the encroachment on the common area, and he still insisted that the encroachment did not include an outside bathroom. It was his position that the wooden structure and refurbishing done by Mrs Buchanan on behalf of predecessors of the property, was wooden and had no concrete section. He said that had the structure been concrete from the very beginning, he would have requested that it be removed. He insisted that the concrete section was placed there by the appellants in 2008.

The decision of Sinclair-Haynes J

[34] Having heard the evidence adduced before her and the submissions made, the learned judge ordered as follows:

> "1. Judgment for the [respondent] - Declarations sought by the [appellants] refused. Order for possession of the disputed area to the [respondent].
>
> 2. Execution of said judgment to be stayed for 8 weeks from the date hereof.
>
> 3. Costs to the [respondent] to be agreed or taxed.
>
> 4. Counsel's Certificate granted."

[35] In her reasons for judgment, the learned trial judge set out the evidence adduced on behalf of both the appellants and the respondent which has already been set out herein. She stated that the accounts given by both sides were wholly different and that "credibility [was] a serious issue". She noted that counsel for the respondent submitted that the evidence of Mr Smith that he had no desire to dispossess the respondent, made any need to assess the credibility of the parties otiose and unnecessary. In fact, she concluded that the real issue in the case before her was whether the admitted absence of intention on his part to dispossess the respondent, would affect the appellants' claim for possession.

[36] The learned judge demonstrated that her role at that stage of the proceedings was to address the preliminary issue, viz, whether the present or previous owners were notified by the respondent as to the status of the land encroached on and whether a licence was in place. In an effort to arrive at a conclusion on the issues raised in the

preliminary hearing, the learned judge addressed the contrary versions of the parties by querying the following:

1. Were the appellants allowed to renovate before they were put into possession?
2. Did Mr Smith attempt to purchase the property?
3. Were the owners notified by the respondent that the gazebo could remain at his licence?
4. Were the appellants entitled to possessory title?

[37] On the issue of whether the appellants were given permission to renovate, Sinclair-Haynes J canvassed the evidence adduced by Mrs Bailey and Mr Smith on the one hand, as against that of the respondent on the other hand. She referred *inter alia* to the following:

1. the agreement for sale, between Monarch and the appellants, when it was signed, and when it was completed;
2. the fact that Mrs Bailey said that she had not interacted with Mr Smith during the negotiations as she dealt with a real estate agent; and
3. the fact that Mr Smith said that he had not known the appellants before the transaction, and so, if they had gone into possession before they had signed the agreement, they would have had to pay rent, which

> he did not recall. However, Mrs Bailey said she paid rent after September 2005 when she went into possession, while allegedly waiting on her mortgage from Life of Jamaica to be processed, which mortgage was a condition of the completion of the sale.

The learned judge found that these all meant that the parties were really in a strict business relationship. She therefore concluded, on a balance of probabilities, that she did not believe that the appellants had been permitted to renovate the premises in June 2005, before the agreement had been signed and before they had obtained a mortgage, they being total strangers to Mr Smith. She found that that testimony was "simply designed to bolster the [appellant's] case".

[38] The learned judge also said that she did not believe that a bathroom, concrete or otherwise had been constructed in the area of the gazebo in 2005. These items were added in 2008. She rejected the evidence of both Mr Smith and Mrs Bailey that a washroom was in the gazebo. She accepted that in 2005 the gazebo was entirely wood. The learned judge also referred to Mrs Bailey's evidence that she thought that the gazebo was part of the premises when she bought it, and that she may not have bought it if she had known otherwise. However, she said, that having found out about the encroachment, she nonetheless proceeded with the purchase. The learned judge did not accept this evidence as credible. She found that this evidence was only tendered to support the position that the gazebo was partly concrete in 2005. This evidence was of significance to the judge as she stated that at this time, Mr Smith could

not claim a possessory tile as he had not occupied the property for the required time of 12 years.

[39] With regard to the second issue, the learned trial judge combed through the evidence concerning Mr Smith's recall that the respondent had never told him about the gazebo encroaching on the property, and that that was only discovered after a survey had been done. She indicated that he also only admitted, when pressed, that he gave instructions to his attorneys to enter into discussions to resolve the issue. He also, she noted, eventually admitted that he permitted those discussions because he became aware that the area did not belong to his company.

[40] The respondent on the other hand, she stated, in his evidence said that he had informed Mr Smith about the encroachment in the negotiations with Monarch to purchase the property. Mr Smith had tried to convince him to transfer the said area to Monarch in 1993, and then again in 2005 when he was selling the property to the appellants. The respondent, she noted, had said that he was not minded to do so, and told Mr Smith that. The learned judge accepted, on a balance of probabilities, the respondent's evidence that in 1993 when Monarch acquired the property, Mr Smith informed him that it was a cash sale, and therefore, the absence of a surveyor's report would not interfere with the sale. She also accepted the respondent's evidence that Mr Smith repeatedly asked him to transfer the property to facilitate the sale to the appellants who required a mortgage, and in respect of which, a survey report was necessary.

[41] She therefore concluded that Mr Smith asked the respondent to transfer the area that encroached to the appellants. The learned judge made the statement that having had the opportunity to hear and observe the demeanour of the respondent, she found him a truthful witness, whereas Mr Smith did not impress her as a reliable witness. She found that he lacked candour.

[42] In respect of her third query, the learned judge made a specific finding that the respondent had the conversations that he had testified to with Mr Smith, his attorney, and the appellants' attorney. So, she concluded that the respondent had informed Mr Smith that the gazebo could remain with his permission. She also found that Mr Smith agreed with that arrangement.

[43] The learned judge then addressed the consequential substantive issue in the preliminary question posed, that is, whether the appellants were entitled to a possessory title. She indicated at the outset that, in spite, of her ruling on the existence of a licence she would consider the evidence of Mr Smith, specifically, his desire not to deprive the respondent of the specific area, and its impact on the appellants' claim to an entitlement of a possessory title. This, she said, was important, particularly, in the light of submissions from counsel for the respondent that Mr Smith's lack of intention to dispossess the respondent defeated the appellants' claim.

[44] The learned judge examined the leading authorities on the subject, namely **J A Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30; **Myra Wills v Elma Roselina Wills** [2003] UKPC 84; **Kenneth McKinney Higgs, Senior v**

Leshel Maryas Investment Company Limited and Another [2009] UKPC Case Ref 47; and **Toolsie Persaud Limited v Andrew James Investments Limited and others** [2008] CCJ 5 (AJ), and dealt with the law relating to possession and possessory titles. She stated that:

> "[u]ndoubtedly, [the appellants] have demonstrated the requisite *animus possedendi* in relation to the area on which the gazebo stands. They have renovated the area by transforming it into a concrete structure. They have also constructed a bathroom and are using the area in a manner which excludes the world at large. They, however, have only been in possession since September 2005. To acquire a good possessory title pursuant to Section 3 of the Limitation [of Actions] Act, the [appellants] must establish that they and/or their predecessors in title have been in uninterrupted adverse possession for a period of at least twelve years."

[45] The learned judge noted that Mr Smith had discovered the encroachment before the expiration of 12 years' ownership of the property and had expressed his desire not to deprive the respondent of the property. She asked the question whether those facts coupled with his efforts to purchase the area of land, stopped time running against the respondent. The learned judge pointed out that it was the state of mind of the person seeking to establish possessory title that was important and not that of the title holder. She found that there was no credible evidence adduced subsequent to the discovery of the encroachment on the piece of land of any act of exclusive possession of the area by Mr Smith which could indicate an intention to possess the land. Indeed, the evidence was to the contrary, in that, he had stated that he had no intention to dispossess the respondent. The learned judge said the position may have been different had Mr Smith

only tried to convince the respondent to transfer the area to him without expressly stating his lack of intention to dispossess him.

[46] She also stated that had the knowledge of the encroachment come to Mr Smith's attention after the 12 years had expired, even if he was of the erroneous view that he owned the area, he would have gained possessory ownership by exclusive possession thereof. Ultimately, the learned judge held that in the circumstances, time had stopped running against the respondent. She stated that Mr Smith's actions had wiped out the years that could have run against the ownership of the respondent. She concluded that the appellants could not benefit from an occupation which did not dispossess the respondent. She therefore refused the declaration as prayed and ordered possession of the disputed area to the respondent with costs.

The appeal

[47] The appellants appealed, relying on 10 grounds set out below:

> "(a) The Learned Judge erred in dismissing the [appellants'] entire claim when the Court was only empowered to decide on a specifically worded preliminary issue.
>
> (b) In absence of any Defence or Counterclaim filed by the [respondent] or any of them, the Learned Judge erred in dismissing the [appellants'] claim when the [appellants] were entitled to Judgment in default of Defence.
>
> (c) In absence of any Defence or Counterclaim filed by the [respondent] of either of them, the Learned Judge erred in trying any preliminary issue as a matter of law as there can be no issue that has not been raised in a pleading filed by or on behalf of the

[respondent] and, if necessary, the prior order of the Honourable Anderson J ought to have been set aside.

(d) The learned Trial Judge erred in admitting any evidence from or on behalf of the [respondent] and then making her decision based on evidence from the [respondent] in circumstances where there was no Defence or any other pleading filed by the [respondent] or any of them.

(e) That the Learned Trial Judge erred in holding that Monarch investment Company Limited did not possess the disputed land for as long as twelve years in that its possession thereof did not commence in June/July 1993 but rather commenced no earlier than October 1993 when the transfer of Lot 14 5 Ordon Close was registered in said company's name.

(f) That the Learned Trial Judge's finding that between June/July 2005 and October 2005, Monarch Investment Company Limited had entered into negotiations to buy the disputed area or to have it transferred to it was erroneous/unreasonable, having regard to the admissible evidence.

(g) That the Learned Trial Judge's finding that between June/July 2005 and October 2005 Monarch Investment Company Limited relinquished its intention to possess the disputed land was erroneous and unreasonable, having regard to the evidence.

(h) That the Learned Trial Judge erred in law in holding that Mr. James Smith's admission in the witness box that he never intended to take away the disputed land and that on finding out that the disputed land was not part of lot 15 his lawyer took steps to resolve the problem, signified his intention at the time not to possess same and to relinquish possession thereof, thereby breaking the chain of 12 years adverse possession.

(i) That the Learned Trial Judge erred in holding that, to the extent that Monarch Investment Company Limited entered into negotiations to have the disputed land transferred to it or otherwise sought to buy the

disputed land between June/July 2005 and October 2005 after it found out that said land was not part of the land it was selling, this evidenced an intention at said time not to possess, or to relinquish possession of, said disputed land and broke the chain of 12 years adverse possession.

(j) That the Learned Trial Judge erred in refusing an application by Counsel for the [appellants] for the court to visit the locus in quo when a substantial part of the dispute was the type of construction originally added to the [appellants'] home and what, if any, improvements had been made by the [appellants]." (Underlined as in original)

[48] The appellants sought the following orders:

"(a) The judgment of the Learned Trial Judge in favour of the [respondent] be set aside and that the judgment be granted in favour of the [appellants] on the preliminary issue.

(b) Alternatively, the Learned Judge's dismissal of the [appellants'] claim be set aside and the matter remitted to the Supreme Court for a full trial of all the issues, if any, to be raised when a Defence is filed and in the meantime, the [appellants] be granted leave to amend the claim to include alternative claims for breach of trust, breach of the original conditions of the sub-division approval, and for orders restraining the [respondent] from interfering with the [appellants'] use of the disputed property either pursuant to their rights as Lot Owners in a Sub-Division subject to specific conditions of approval which ought to have been endorsed as restrictive covenants on the title of the said disputed property or pursuant to the licence coupled with an interest in the property which arises a fortiori from the evidence given by the [respondent] in the Court below.

(c) All that part of the land measuring [35.080] square metres, being part of all that parcel of land, part of

stony Hill, called Kingswood and registered at Volume 1187 Folio 830 of the Register Book of Titles in the names of [the respondent] and Lloyd Wilson and described as Lot B in the said Certificate of Title and being all that portion of land more specifically shown on the Survey Diagram prepared by Horace A. Manderson, Commissioned Land Surveyor, bearing the date June 27, 2005 and Survey Department Examination number 319247, be preserved in its current state, form and condition pending the outcome of the Trial.

(d) All that part of the land measuring [35.080] square metres, being part of all that parcel of land, part of Stony Hill, called Kingswood and registered at Volume 1187 Folio 830 of the Register Book of Titles in the names of [the respondent] and Lloyd Wilson and described as Lot B in the said Certificate of Title and being all that portion of land more specifically shown on the Survey Diagram prepared by Horace A, Manderson, Commissioned Land Surveyor, bearing the date June 27, 2005 and Survey Department Examination number 319247, be preserved in its current state, form and condition pending the outcome of the trial.

(e) The Costs of this Appeal and in the Court below be to the [appellants].” (Underlined as in original)

Submissions

Ground of appeal (a)

[49] It was the appellants’ contention that although the learned judge correctly indicated that she was dealing with the trial of specific preliminary issues, she nonetheless "embarked on a full trial and ended up [dismissing] the [appellants'] entire claim". Counsel for the appellant, Mr Gordon Robinson, submitted that this was improper as the learned trial judge was asked to decide a preliminary issue and not to

make an order striking out the claim for lack of a reasonable ground on behalf of the appellants for suing pursuant to rule 26.3 of the Civil Procedure Rules 2002 (CPR).

[50] Counsel for the appellants submitted further that the learned judge was not permitted to decide issues of fact on evidence in the absence of pleadings. The judge in the instant case was only empowered to consider the evidence on affidavit and by way of cross-examination on the specific issues ordered to be tried. Counsel referred to rule 26.1(2) of the CPR to support a submission that, in any event, subsequent to the determination of the preliminary issue, further consideration of its effect ought to be made at a case management conference. Counsel therefore argued that even if the issue had been decided against the appellants, the issue of adverse possession remained an important question to be tried, and could not be resolved totally by way of the decision on the preliminary issue.

[51] Counsel for the respondent, Miss Michelle Smith, submitted that the learned judge was empowered to give judgment on the claim after a determination on the preliminary point. The rules envisage that and encourage that approach in keeping with the overriding objective, thereby saving expense, time and resources (see rules 26.1(2)(j), rules 1.1(2)(b) and (e), and rule 1.2 of the CPR). The court does not have to give judgment on the claim at a case management conference or a pre trial review. In any event, the evidence given by Mr Smith was admissible and sufficient to support the judge's decision. The learned judge found that the previous owner, Monarch, had been notified as to the encroachment on the land, and had a licence from the respondent for the gazebo to remain there, and that was enough to dispose of the claim in respect of

adverse possession. Counsel submitted that the respondent was the registered owner of the property and could grant permission/licence. There was no challenge in the court below, or in the notice and grounds of appeal, of the respondent's ownership of the common area. There was no doubt that the respondent held the common area in trust for all the owners in the scheme.

Grounds (b) to (d)

[52] Counsel for the appellants argued under these grounds that as the respondent had not filed a defence and was in breach of the rules, he was not in a position to obtain judgment or to defend the case. Counsel relied on rule 10.2(1) of the CPR. Additionally, counsel submitted, that a defendant who failed to file a defence could not rely on any allegation or factual argument which ought to have been in a defence unless the court grants permission (see rule 10.7). In this matter no application was made and no permission had been granted. Indeed, counsel submitted, the trial of the preliminary issue ought not to have proceeded in the absence of the defence. Without pleadings, he argued, no "issue can properly arise".

[53] Counsel for the respondent submitted that there was no reason why the learned judge could not proceed to hear the evidence and order judgment in the absence of a defence, especially when the evidence had been tested on cross examination. In fact, it was the evidence of the appellants' own witness that had defeated the appellants' claim for adverse possession. The appellants were not entitled to judgment in default. The relief they sought was non-monetary, and would have to be applied for and proved. It was unlikely that they would have succeeded, but even if they had been able to do so,

it could have been set aside on an application under rule 13.3 of the CPR based on the facts of this case. In any event, as no application for judgment in default of defence had been applied for or granted, the learned judge was not restricted in her approach to the determination for the preliminary issue before her (see rules 10.2(5), 12.5, 12.10(4) and (5), 13.3 and 13.4 of the CPR)

[54] Miss Smith also argued that the appellants' statement of case was before R Anderson J, as well as the affidavits of both sides, and it was clear what the parties were saying with regard to the issue of adverse possession. It was therefore well within R Anderson J's remit to make the orders that he had made and there had been no appeal there from. As a consequence, it was quite proper for the learned judge to proceed to hear the preliminary point ordered by a judge of coordinate jurisdiction. Additionally, the appellants fully participated in the hearing of the preliminary issue including the filing of witness statements. They therefore waived any objection to having the preliminary issue heard without a defence having been filed, and ought not to be permitted to raise that point at this late stage.

[55] The respondent’s counsel asserted that the absence of a defence did not prevent the respondent giving evidence. Also there was no judgment in default of defence that could have had that effect either. The court was correct to admit and accept the evidence of the respondent. It was a matter of credibility between Mr Smith and the respondent and the judge preferred the respondent's evidence which she was entitled to do. She found the respondent to be a truthful witness, and that Mr Smith was unreliable and lacked candour.

[56] Miss Smith submitted that it was of significance that the learned judge's decision to dismiss the claim was based on the appellants' own witness, Mr Smith, the representative of their predecessor in title. The appellants' would have had to rely on Mr Smith's years of possession in order to claim possessory title, the appellants only having possession of the property since 2005, and which was interrupted by the respondent in 2008. The possession of Monarch would therefore be important to prove 12 years of exclusive possession which the Statute of Limitation requires. It was the evidence of Mr Smith which defeated the appellants claim. Counsel submitted that it was well within the power of the learned judge, in those circumstances, to dismiss the claim in its entirety.

Grounds (e) to (i)

[57] Mr Robinson submitted that the learned judge was not empowered by the order of R Anderson J to embark on an examination of whether or not there was, in effect, a possessory title. Her deliberations should have stopped at the issue of whether a licence had been given. Instead, the learned judge, he submitted, had failed to make any finding in that regard. It was implied by the rules and by the judge's order that a defence was to have been filed. Additionally, in the absence of the defence and with only limited admissible evidence, it was impossible for such a complex issue to have been considered fully at the preliminary stage.

[58] The appellants contended that if permitted to go to trial the evidence as to possessory title would be completely in their favour, as they are entitled to get the benefit of the years of adverse possession accumulated by the previous owner, and

their acts showing an intention to possess would be decisive. Negotiations by that previous owner would not destroy the chain of possession. Additionally, counsel posited, the respondent in this case had admitted that the gazebo was in the common area. As a consequence, counsel argued, he was not lawfully in a position to issue any licence. That would have to be issued by the owners of the scheme, or at least by a majority of them. And in any event, permission/licence by the respondent could not interfere with the appellants' adverse possession of the property and the disputed land. He referred to the authorities relied on by the learned judge in order to distinguish the facts in those cases with the facts of the instant case.

[59] Counsel for the respondent argued that the evidence was initially that Monarch entered in to the agreement for purchase of the property in June/July 1993, but also, that the property was purchased in October 1993, which may be when possession commenced, as the learned judge found. The agreement for sale with the appellants was on 20 July 2005, and possession on the evidence took place on 1 September 2005. It was therefore not unreasonable, on a balance of probabilities, that Monarch was, contrary to what Mr Smith had said initially, not in possession of the property for 12 years before he knew about the encroachment, which was at the time of the sale to the appellants.

[60] Counsel maintained that the evidence was that Mr Smith discovered that the gazebo had encroached on the disputed area of land in August 2005. He then, he said, gave his attorneys permission to resolve the situation. The respondent said that Mr Golding contacted him about transferring the land in 2005. There was therefore

sufficient evidence to conclude that Monarch had entered into discussion to buy the disputed land between June/July and August 2005. It was not unreasonable, counsel submitted, for the judge to find that negotiations took place about the purchase and transfer of the dispute area of land.

[61] Counsel also submitted that there was ample evidence from Mr Smith that once he became aware that the disputed area of land did not belong to Monarch, he tried firstly to buy the area of land, and then indicated that he had no intention to capture the land. There certainly was sufficient evidence to support the judge's finding that Monarch had relinquished any intention to possess the disputed land.

[62] Miss Smith argued that the law of adverse possession required one to establish both physical possession and an intention to possess the land. Without the requisite intention there could be no adverse possession. Counsel argued that Mr Smith's testimony that he was not seeking to capture anyone's land and endeavouring to work to a resolution of the problem demonstrated his intention to no longer "squat" on the disputed land, thereby breaking the chain of 12 years adverse possession.

Ground of appeal (j)

[63] Counsel for the appellants submitted that an inspection of the site would have readily demonstrated what type of construction existed, in respect of the gazebo, and its facilities, and whether it was recent or long past.

[64] Counsel for the respondent submitted that the notes of evidence and the reasons from the trial judge do not indicate that any application had been made to visit the

locus in quo. However, if there was an oral application, and it had been refused by the judge, that was entirely within her discretion. Additionally, whether the construction was old or new, of concrete and/or of wood, was not determinative of the matters raised on the preliminary question. Those related to whether the previous owners had been notified of the encroachment, and had been given a licence by the respondent for the gazebo to be there.

Issues on appeal

[65] In my view, on an examination of the claim, the evidence tendered herein and the grounds of appeal, there are essentially three main issues arising on this appeal, namely:

1. Did the learned judge err in proceeding to hear the preliminary issue and giving judgment thereafter, bearing in mind:
   (i) the order of R Anderson J made on 29 July 2008;
   (ii) the relevant rules of the CPR;
   (iii) the fact that no defence had been filed by the respondent; and
   (iv) the admission and reliance on evidence by the respondent? (grounds (a), (b), (c) and (d))

2. Did the learned judge err in her findings in relation to her rejection of the appellant's claim for a possessory title, bearing in mind:

   (i) the issues posed in R Anderson J's order;

   (ii) the evidence of Mr Smith and the respondent on the question of possession of the property and the disputed land? (grounds (e), (f), (g), (h) and (i))

3. Was there a question raised with regard to a visit to the locus in quo? And, if so, what was the effect of this on the preliminary issue before the court? (ground j)

Analysis and discussion

Issue 1: Giving judgment on a preliminary issue (grounds (a), (b), (c) and (d)

[66] This appeal is all about a preliminary issue hearing. Was the judge correct? Could she have done what she did, in that, was she so empowered? Did she go about it the right way? Did she overstep her remit? Has she decided the issues on inadmissible evidence? Has she decided the whole case, and not the specific matters ordered to be heard and determined on a preliminary hearing by R Anderson J? In any event, has she applied the correct principles of law to the facts as found?

[67] There are several rules of the CPR which are relevant to certain aspects of this appeal. Firstly, counsel for the appellants referred to and relied on rules 26.1(2)(j) and

26.3 of the CPR. Under the court's general powers of management, and in addition to any powers given to the court by any other rule or practice direction, or by any enactment, or where the rules provide otherwise, the court may dismiss or give judgment on a claim after a decision on a preliminary issue (see rule 26.1(2)(j) of the CPR). Although this rule is contained in Part 26 of the CPR, which deals generally with case management and the court's powers, there is no indication in Part 26 and the rules set out thereunder, that the courts' powers of management can only be utilised at the case management conference. Nor is there any indication that after a decision is made on a preliminary issue, the effect of it ought to be further considered at a case management conference, thereby precluding the immediate entry of judgment on the claim. Indeed, in Part 39 dealing with trials, rule 39.9 of the CPR states:

> "Where the court considers that a decision made on an issue substantially disposes of the claim or makes a trial unnecessary, it may dismiss the claim or give such other judgment or make such other order as may be just."

[68] On an examination of these rules, it seems to me, that it is not therefore improper to dispose of the claim after the decision on a preliminary issue, if the trial has become unnecessary, and it can be done without it only being on the basis that the claimant had no reasonable ground for bringing the claim.

[69] In the instant case, the learned judge was obviously empowered by the rules and the order made by R Anderson J to decide the issues outlined in the order. The order made by R Anderson J has not been appealed. The question, therefore, is

whether the learned judge's determination of the issues was properly done, and whether the decision determined the claim?

[70] It is not in dispute that no defence had been filed by the respondent. But R Anderson J ordered that witness statements should be filed. That was done. The parties attended before Sinclair-Haynes J with their witnesses and were cross-examined on their witness statements. There was no objection to that process. The parties knew that the cross-examination was to elicit information concerning whether the previous or current owners had been notified about the encroachment, and whether the respondent had given any of them a licence with regard to the encroachment. On any examination of the notes of evidence, that was the thrust of the cross-examination.

[71] Much time was spent on the type of structure which had been erected on the disputed land, but, in my view, that point did not seem to have much relevance to the real issues before the court for determination. However, presumably the question that was posed by the learned judge and addressed in her reasoning, related to whether the structure was of wood and easily removable, or was one that was more permanent. That information appeared to aid the learned judge in her deliberations as to whether the structure that existed on the property when Monarch purchased the same, was the same structure which was installed in 2008 when the matter went before the court. The learned judge believed the respondent when he said that it was a wooden structure up until 2008, and that he would only have allowed the structure to remain on the disputed land if it was. This was consistent with the respondent's objection to the

appellants attempt to build on the gazebo and extend the construction. He then revoked his earlier permission/licence for the gazebo to remain.

[72] The appellants relied on rule 10.2(1) of the CPR which states that "a defendant who wishes to defend all or part of a claim must file a defence". They also relied on rule 10.7 which states that "[t]he defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission". This was done to support their argument that since no defence had been filed in this matter, and no application had been made to proceed without one, there was no "issue" before the court, and the respondent could not defend the preliminary issue hearing, and concomitantly could not rely on any allegation as he had not set out the same in a defence.

[73] I do not think that there is any merit in these arguments. I agree with submissions of counsel for the respondent that the fact that no defence had been filed did not mean that the preliminary issue could not be dealt with. It also did not mean that there were no issues between the parties. The issues were clearly delineated in the witness statements. No judgment in default had been entered and so the parties could set out their respective cases in their witness statements, and that was clearly what R Anderson J envisaged, and neither judge seemed to think that they were hampered by the lack of a defence.

[74] Additionally, in the circumstances of this case, the witness statement of the respondent was very clear. He was the developer of the residential scheme at

Kingswood, Saint Andrew. He said that he knew from the outset that the gazebo was on the common area reserved for use of all owners of the scheme. He knew that he ought not to permit one owner to have exclusive use of any part of the common area. So he says he maintained that position from Monarch purchased the property in 1993 to 2005 when the appellants did so, and beyond. He was not willing to nor did he transfer the disputed property.

[75] He gave, as he put it, licence/permission for the gazebo to remain on the property only if it could be removed at his direction at any time. He told the appellants that they could not use building materials they had deposited on the property to build on the gazebo as the property was not theirs. However, he stated, the appellants indicated, through their attorney, that they were of the view that he had agreed to transfer the area to them which position he said was not correct. He was adamantine that there was no situation of open undisturbed exclusive possession of the disputed area. He had always indicated that the gazebo was on his land, reserved for the common area of the housing scheme, which is why the gazebo existed at his licence. A filed defence would not have made that position any more pellucid. That was his case simple and clear. It was also ultimately what the court accepted.

[76] The learned judge did not believe the evidence of Mr Smith. She accepted the evidence of the respondent that he had had several conversations with Mr Smith, between 1993 and 2005, when Monarch had purchased the property from him up until the appellants bought the property from Monarch, and when Mr Smith continued to try to purchase the disputed land from the respondent. It does seem more credible that

the respondent would have known that the gazebo was on common area land, and would have recognised that it ought not to be there for the use of only one owner, and so should be able to be removed at his direction, and not permanently modified thereby making its removal difficult. As against Mr Smith's position, that he never knew that the gazebo was not a part of the property until 2005 when it was being sold to the appellants and a survey had to be done. But in any event, that was what the learned judge accepted. She preferred the evidence of the respondent. She found that Mr Smith lacked candour. That proved a difficulty for the appellants in the preliminary hearing and it would be no different, in my view, if the same facts were for determination whether at this stage or at a trial.

[77] It is also accepted that once a question of fact has been tried by a single judge of the court below and he has not misdirected himself in law, the appellate court in reviewing the record of the evidence should attach great weight to his opinion as he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court could of course reverse the findings of the single judge in the court below, if he had not taken advantage of seeing and hearing the witnesses, or if the grounds given by the judge are unsatisfactory by reason of material inconsistencies or inaccuracies, or the judge has failed to appreciate the weight and bearing of the circumstances admitted or proved (see **Watt (or Thomas) v Thomas** [1947] AC 484). In this case, the learned trial judge appears to have given due consideration to all the evidence adduced before her, and on the facts that she has

found one could not say that her judgment was plainly unsound. That would therefore dispose of issue 1.

Issue 2: The claim for possessory title (grounds (e), (f), (g), (h) and (i)

[78] The first issue raised in Anderson J's order is "had the respondent communicated to the owners that the porch encroached on the common area?" As indicated in my discussion in respect of the matters referred to in issue 1, Sinclair-Haynes J accepted that several conversations/discussions had taken place between the respondent and Mr Smith relating to the gazebo as an encroachment being on land not owned by Monarch from as far back as 1993. Indeed, the learned trial judge found that Mr Smith instructed his attorneys to engage in discussions to transfer the disputed land, as he was aware that it did not belong to the company. She also found, as a fact, that on a balance of probabilities, Mr Smith had asked the respondent to transfer the disputed land to the appellants. She found that before the purchase of the property in 2005, Mrs Bailey knew that the gazebo was not a part of the land that she was buying. This information was the subject of discussions between her attorneys, and the attorneys for Mr Smith. Mr Smith also had discussions on this subject with the respondent.

[79] In her reasons for judgment, the learned judge stated that Mrs Bailey said that at no point had she discussed the encroachment with the respondent, and they had never been notified that the gazebo was allowed to remain with his permission. Her note of the respondent's evidence was that from the creation of the gazebo, he had informed all subsequent owners that the wooden porch did not constitute a part of the

premises that they occupied, and that it was allowed to remain on the understanding that it would be removed whenever he demanded.

[80] She made no specific finding that the respondent told the appellants about the encroachment. However, she did find that Mrs Bailey knew about the encroachment in 2005 on the purchase of the property. She also found that the appellants did not renovate the gazebo in 2005 before they took possession in September 2005, but endeavoured to do so in 2008. It seems pellucid, therefore, that notification certainly did take place between the appellants and the respondent as when they endeavoured to extend the gazebo, the claim was filed by the appellants in 2008.

[81] The learned judge did make a specific finding that the respondent had told Mr Smith on behalf of Monarch, on several occasions over several years that the porch was on the common area.

[82] The next question posed by Anderson J was "did the porch remain at the licence of the respondent?" On the basis of all the evidence adduced before Sinclair-Haynes J, which I have summarised previously, and based on the findings of the learned trial judge, it is clear that the gazebo remained on the disputed area at his licence or permission. And that would be so from before 1993 until 2008. That would therefore dispose of the preliminary issues raised by Anderson J.

[83] The learned judge found, as a fact, that the gazebo remained on the disputed area from before 1993 until 2005 when the appellants purchased the property. Subsequently, because of the plans by the appellants to construct further on the area in

spite of the respondent's objection, the licence was revoked and the respondent asked that the gazebo be removed. The question which must therefore be considered is whether the appellants' claim, in those circumstances, against that backdrop, and the decided facts, could be maintained.

[84] The rules permit the learned judge to give judgment on the claim, as indicated, on the determination of the preliminary issues. The law of possession, although it may appear on the face of it to be complex, has been clarified in a few major cases over the years. I wish to refer to a few extracts from judgments in these authorities to distil the applicable principles which will demonstrate why, in the circumstances of this case, the appellants can go no further with their claim for adverse possession.

[85] In **Pye**, Lord Browne-Wilkinson cited with approval the dictum of Slade J in **Powell v McFarlane and Another** 38 P & CR 452 where at pages 470-472 he said:

> "(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...
>
> (4) ... 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.
>
> ... An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative the discontinuance of possession."

[86] In **Toolsie**, the Caribbean Court of Justice defined the "requisite intent to possess" as:

> "[t]he intention to exclude the world at large (including the true owner if other than the factual possessor) is what is required. An intention to have exclusive control of the land, mistakenly believing oneself to be true owner, suffices..."

[87] At the end of the day, when the appellants went into possession in September 2005, Mr Smith did not have 12 years' possession of the property or the disputed area. The learned judge found that Monarch's possession commenced in October 1993. The learned judge found that there were no acts, subsequent to his alleged discovery of the encroachment, that indicated an exclusive possession of the area with the necessary intention to possess. In fact, what was disclosed was to the contrary as he expressed his intent not to dispossess the respondent. The appellants would therefore have a

further hurdle as they must rely on the possession of their predecessor in title mainly Monarch to claim possession of 12 years as required by the Limitations of Actions Act. They cannot claim possessory title on their own as they have only been in possession of the property and the disputed area for a period of three years. So, if the entity through whom they claim did not have actual possession for a period of 12 years and the necessary intention to possess the disputed land, then their claim for adverse possession seemed doomed from the outset.

[88] In those circumstances, the decision of the learned trial judge cannot be faulted. There seemed no basis to pursue a trial. The substratum of the claim for a possessory title did not exist. In any event, as the learned judge found that Monarch was in possession pursuant to a licence, that would also have defeated the claim for a possessory title. Indeed, in **Ramnarace v Lutchman** [2001] UKPC 25, Lord Millet on behalf of the Board said at paragraph [10]:

> "Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner."

Counsel for the appellant submitted that the respondent could not grant a licence or permission as the gazebo was on the common area. However, I must say, I agree with counsel for the respondent that as the registered proprietor he could do so on behalf of the owners of the common area on whose behalf he would have held title and have acted. There was no information to the contrary and the survey showed that the gazebo was encroaching on land registered in the respondent's name.

[89] The evidence showed that Monarch, having received permission to maintain the gazebo on the disputed land, was not acting with an intent to possess the disputed land in one's own name, and on one's own behalf to the exclusion of the world at large, including the respondent. It is also well accepted and acknowledged that a possessory title cannot be maintained if one's possession of the subject premises is with the consent of the owner, that is, through his permission/licence. It was not an occupation which was exclusive to the possession of the owner. Further, the evidence was that on countless occasions, Mr Smith acknowledged title of the area to be that of the respondent, and although not in writing, and not in keeping with section 16 of the Limitation of Actions Act, those acts requesting the purchase of the land were not consistent with an intention to dispossess the respondent. That would dispose of issue 2.

Issue 3: Visit to the locus in quo (ground j)

[90] There was no note in the transcript of evidence that any application was made to visit the locus in quo. There was also no indication by the learned judge in her reasons that any such application had been made to her. I agree with counsel for the respondent that, in any event, if she had refused such an application it was entirely within her discretion to do so, and particularly, in the circumstances of this case and the matters in issue between the parties, I cannot say that she was palpably wrong. That would dispense with issue 3.

Alternative relief sought

[91] In spite of the conclusions that I have made, I nonetheless would wish to refer to one of the reliefs claimed by the appellants. In the amended notice of appeal the appellants sought an order that the judgment be set aside and that judgment on the preliminary issue be granted to them. However, they sought, alternatively, as an amended order (b), that the dismissal of the appellants' claim be set aside and that the matter be remitted to the Supreme Court for full trial of all issues, if any, to be raised in the filing of a defence. They were also asking in the meantime as relief on the notice of appeal, for leave to amend the claim to include: (i) alternative claims for breach of trust; (ii) breach of conditions of the original subdivision approval; and (iii) for orders restraining the respondent from interfering with the appellants' use of the disputed property. These orders were being sought as the appellant claimed that subdivision approval ought to have been endorsed with certain conditions of approval as restrictive covenants on the title of the said disputed property, or as a licence coupled with an interest in the property. This was stated to have arisen from the evidence given by the respondent in the court below.

[92] In my opinion, these are entirely new claims. They were clearly not a part of the appellants’ claim in the court below and would therefore not have been the subject of the preliminary issues ordered by R Anderson J, and subsequently for determination by Sinclair-Haynes J and the later review of this court. These are matters which the appellants may have concerns about arising out of the creation of the residential

scheme and the rights and obligations of the owners inter se, and with the developer cumulatively. Those issues, however, would have to be fully articulated and developed.

[93] On an examination of the claim form filed by the appellants herein, they only sought a declaration that they were entitled to the disputed area of 35.080 square meters in Kingswood, by way of adverse possession. There was no indication of any facts relevant to a claim for breach of trust, or breach of the conditions of the subdivision approval or otherwise. The judgment having been given on the claim as it existed, this application would be ineffectual. In any event, I would not have been minded without fuller information and documentation to have granted any amendment to the claim by way of relief on the notice of appeal at this time in the appeal.

[94] In the light of all of the above, in my view the appeal must be refused with costs to the respondent to be taxed if not agreed.

P WILLIAMS JA

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

STRAW JA (AG)

[96] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

ORDER

1. The appeal is dismissed.

2. Costs to the respondent to be taxed if not agreed.