[2017] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 105/2016

APPLICATION NO 31/2017

BETWEEN	**KENNETH BOSWELL**	**APPLICANT**
AND	**SELNOR DEVELOPMENTS LIMITED**	**RESPONDENT**

Miss Karen O Russell for the applicant

Seyon T Hanson instructed by Seyon T Hanson & Co for the respondent

3 and 19 October 2017

IN CHAMBERS

PHILLIPS JA

[1] In an amended application for stay of execution of the judgment of K Anderson J delivered on 18 January 2017, pending appeal, the applicant (Mr Kenneth Boswell) sought the following orders:

> "i. That the Order made by The Honourable Mr. Justice K. Anderson on the 18th day of January 2017 dismissing [Mr Boswell's] application for a stay of execution pending appeal be discharged or set aside.
>
> ii. That there be a stay of execution pending appeal of the judgment of The Honourable Mr. Justice K Anderson made on the 6th day of November 2016 and specifically those sought by [Selnor Developments] and granted as contained in Orders (iii), (xi), (xii) and

(xiii) of [Selnor Developments'] Fixed Date Claim Form dated the 8th day of May 2015.

iii. That [Selnor Developments] be restrained whether by itself, its servants and/or agents or otherwise from taking any steps or any further steps to transfer an interest in Lots 150A and 151A registered at Volume 972 Folio 488.

iv. Such further and other order as this Honourable Court deems to be just and fit."

[2] The grounds on which Mr Boswell sought the above orders are set out below:

"i. Pursuant to Rule 2.15(a) and 2.15(b)(a) of the Court of Appeal Rules 2002 in that the Court may affirm, set aside or vary any judgment made or given by the court below.

ii. Pursuant to Rule 2.11(1)(b) of the Court of Appeal Rules 2002 in that a single Judge may make orders for the stay of execution on any judgment or order against which an appeal has been made pending the determination of the Appeal.

iii. There is an appeal pending in this Honourable Court from the Judgment of [K] Anderson [J], the Notice of Appeal having been filed on November 17, 2016.

iv. [Mr Boswell] has a real prospect of success on appeal based on the grounds filed in his Notice of Appeal.

v. There is a greater risk of injustice being done to [Mr Boswell] than [Selnor Developments] if the stay of execution is not granted and the said [Mr Boswell] is successful in his appeal. [Mr Boswell] expended sums to purchase the lands in question and is the sole registered proprietor of same.

vi. There is minimal risk of injustice being done to [Selnor Developments] if the stay of execution is granted and [Mr Boswell] is unsuccessful in his appeal."

[3] Mr Boswell filed two affidavits in support of the application for stay of execution pending appeal, one he swore to on 16 February 2017, containing 12 exhibits and also one by Karen Russell, his attorney-at-law who had represented him throughout the proceedings, sworn on the same date. The respondent (Selnor Developments) filed one affidavit in opposition to the application, sworn on 30 August 2017. I will deal with the contents of the affidavits later on this judgment, in the context of the decision I have to make, but I am of the view that it may be prudent to summarize the claim in the court below, state the orders made by Anderson J on 3 November 2016, and the reasons therefor later delivered on 18 January 2017.

The claim

[4] The fixed date claim form was filed on 8 May 2015, and sought two declarations, namely: (i) that the claimant/respondent Selnor Developments had acquired title by adverse possession in respect of Lot 150A and Lot 151A as shown on the subdivision of Spring Valley in the parish of Saint Mary being part of the lands registered at Volume 972 Folio 488 of the Register Book of Titles; and (ii) a further declaration that as the defendant/applicant Mr Boswell is the registered proprietor of all that land registered at Volume 972 Folio 488, he holds the part of the land, namely Lot 150A and Lot 151A on trust for Selnor Developments, pursuant to section 85 of the Registration of Titles Act (ROTA).

[5] Certain consequential orders were therefore sought, namely that Mr Boswell would be restrained either by himself and or his servants and or agents, from:

(i) entering the said lots and exercising any control over them;

(ii) committing any acts of waste, cutting down trees, or damaging any part of the said lots;

(iii) interfering with, removing, altering or destroying any fence or gate on the said lots;

(iv) interfering with any right of way on the said lots;

(v) interfering with any of the said occupants of the said lots, and breaching their quiet enjoyment of the same; and

(vi) interfering with the ingress or egress of Selnor Developments and its tenants and or licensees, and other authorized users of the said lots.

[6] Additionally, Selnor Developments sought other consequential orders, namely:

(i) That the Registrar of Titles rectify the land register and transfer the said lots from the certificate of title registered at Volume 972 Folio 488, and that a new certificate of tile be issued in respect of the said lots in the name of Selnor Developments;

(ii) That Selnor Developments remain in possession of the said lots pending the completion of the transfer of the said lots from Mr Boswell to Selnor Developments;

(iii) That the Registrar of the Supreme Court be empowered to take all necessary enquiries and accounts with regard to the transfer of the said lots;

(iv) That the Registrar of the Supreme Court be empowered to execute any documents to effect registration of the said lots, in the event that either party refuses to sign the same, either party being deemed to have refused to sign if they refused or neglected to sign within 14 days of having been requested to do so;

(v) That the Registrar of Titles be empowered to dispense with the production of the duplicate certificate of title registered at Volume 972 Folio 488 of the Register Book of Titles in relation to the rectification of the said duplicate certificate of title for the purpose of transferring the said lots out of that certificate of title in order to issue a new certificate of title in respect of the said lots in the name of Selnor Developments.

[7] On 14 March 2016, Straw J (as she then was) had made certain orders at the case management conference in relation to the claim. At that hearing, Mr Hanson and Mr Jason Smith, the representative of Selnor Developments, were present however Mr

Boswell and Miss Russell were not. The learned judge made orders *inter alia* for the filing of any further affidavits and skeleton submissions, set the hearing of the claim for 3 November 2016 and ordered that all affiants were to be present for cross-examination. The formal order relative to the conference was to be prepared by the attorney for Selnor Developments and the date of the adjourned hearing was to be served on Miss Russell.

[8] At the hearing of the fixed date claim form, on 3 November 2016, Mr Boswell and Miss Russell were absent, and Mr Gilroy English, attorney-at-law, attended holding on their behalf having been instructed by Miss Russell to do so, and also having been instructed to apply for an adjournment of the hearing fixed for that day. The learned judge however refused that application and ordered that the trial of the claim proceed. Mr Hanson complied with all the orders made at the case management conference, and on 3 November 2016 (the date for the hearing of the claim), he, together with Mr Smith and Mr Dunstan Simmonds, the witnesses for Selnor Developments, were present. On 3 November 2016 Anderson J, having refused the request for an adjournment, proceeded summarily to make all the orders prayed for in the fixed date claim form with costs to Selnor Developments to be taxed if not agreed. An earlier order made by Brown J on 15 May 2015, with regard to an injunction granted to Selnor Developments and Mr Boswell was discharged.

The appeal

[9] On 17 November 2016, Mr Boswell filed a notice of appeal challenging the orders made by Anderson J allegedly on the basis of no defence having been filed. It was his

contention that the refusal to grant an adjournment was unreasonable, unfair, and an unjust exercise of the learned judge's discretion, and appeared to be penal in nature rather than in furtherance of the overriding objective of the Civil Procedure Rules 2002, (CPR).

[10] The grounds of appeal stated, *inter alia* that at arriving at his decision the learned judge had not taken into consideration all the relevant facts and evidence from the pleading and material placed before him; he had failed to give Mr Boswell a "right of audience" as his defence had not been filed; he had acted in breach of rule 12.2(a) of the CPR; he had been unfair and unreasonable in dealing with Mr Boswell's case and had acted in a draconian and drastic manner which was prejudicial to Mr Boswell; he had not considered even cursorily the merit of Mr Boswell's case; he had failed to consider the damage likely to be caused to Mr Boswell, the registered proprietor of the subject lands; he had failed to consider that Mr Boswell should not have to suffer irreparable damage caused by the mistake, inadvertence or failings of his counsel; he had failed to consider that there were alternate ways of disposing of the matter other than the sanction he had deployed; and finally he had acted in a manner which was unfair, unjust and without any indication that he had shown balance with regard to the competing interests in the case. Mr Boswell requested that the judgment of Anderson J be set aside, that he be allowed to file a defence; and that the matter be set for case management for trial dates to be fixed.

The application for stay

[11] On 25 November 2016, Mr Boswell filed an application for stay of the execution of the judgment of Anderson J pending appeal. On 18 January 2017, the learned judge gave his decision on that application and his written reasons therefor. In essence he indicated that the claim had been undefended and so the evidence led on Selnor Development's behalf was "entirely uncontested". He indicated that the fact that the said lots were comprised in the certificate of title in the name of Mr Boswell was not a relevant fact to be considered and the parties in his view were on the same footing before the court, based on the adverse possessory claim of the said lots on the part of Selnor Developments.

[12] The learned judge stated that his determination of the application was based on the affidavits before him, namely that of Jason Smith filed 4 January 2017, that of Karen Russell filed on 17 November 2016 and that of Mr Gilroy English filed on 5 January 2017. The judge addressed which of the orders made by him could properly be made the subject of the grant of a stay. He referred to the fact that he had made certain declaratory orders which were not amenable to an order for a stay. (see **Harold Miller and Ocean Breeze Hotel Limited v Carlene Miller** [2016] JMCA App 1). He referred to other orders as being merely permissive empowering the holder of the particular office to take certain actions but not requiring the taking of those actions, and so concluded that the orders were not amenable to the grant of a stay of execution either. With regard to the order which required the Registrar of Titles to rectify the certificate of title registered in the name of Mr Boswell, he concluded that there was no

specific time stated in the order by which the rectification of the order should be done, that the order may yet be unenforceable. While the learned judge considered that most of the orders granted were not subject to an order for a stay, he nevertheless accepted that there were some orders, which related to the restraint of certain actions of Mr Boswell, which he stated were subject to the principles for the grant of a stay, namely whether the applicant had some prospect of success and whether the case was a fit one for the grant of a stay.

[13] The learned judge thereafter reviewed the matter before him and decided that on the unchallenged evidence before him, Selnor Developments had entered into possession of the subject lots, fenced the same, had had exclusive control of the same in excess of 12 years before Mr Boswell purchased the property included in the certificate of title registered at Volume 972 Folio 488, and therefore the title to Lots 150A and 151A had been extinguished by that time. He recounted what had occurred on the day of trial and stated at paragraph [43] that:

> "If it is counsel's fault that results in litigants' failures to comply with rules and timelines, it will generally be open to those litigants to pursue appropriate reliefs in the appropriate fora, as against those attorneys. Such fault or failures on the part of counsel, cannot, other than in the rarest of circumstances, properly be utilised as a good excuse for the failure to comply with requisite court timelines and schedules. If it were otherwise, one could simply avoid complying with the applicable timelines and schedules, by blaming one's neglect to do so, on one's attorney(s)-at-law."

[14] He spoke further about the finite resources of the court and the time which should properly be allotted to each matter in the court. He referred to the affidavits

filed and the grounds set out in the notice of appeal, stated that the Court of Appeal will only interfere with the exercise of the learned judge's discretion if such exercise was plainly wrong, and concluded that, "[Mr Boswell] has wholly failed to satisfy this court, for present purposes that there even exists the remotest prospect that the Court of Appeal may very well, so conclude". He found that [Mr Boswell's] appeal appeared to him to "have absolutely no prospect of success". He indicated that the affidavit filed by Mr Boswell allegedly in support of an application for injunction could not be utilized at the hearing before him as there was no application for injunctive relief and the court could not, acting on its own accord, treat the same as constituting Mr Boswell's defence, and there had been no evidence "as would even remotely serve to inferentially suggest" that Mr English had asked for that affidavit to be treated in that way.

[15] The learned judge set out and accepted all the "unchallenged evidence" as he described it which had been placed before him by Mr Smith and Mr Dunstan Simmonds. He therefore refused the application for the stay, and it seemed to me that his reasons for the order made summarily on the fixed date claim form, were included in those reasons provided for the refusal of the application for stay of execution of the judgment.

[16] In the affidavit in support of the application for the stay of execution of the judgment of Anderson J, before me, Mr Boswell testified that he had completed the purchase and transfer of approximately 683 acres, part of Spring Valley Estate in the parish of Saint Mary, that is the lands stated in the schedule to the agreement, comprised in the certificate of title registered at Volume 972 Folio 488 of the Register

Book of Titles (the said lands), from Sandra Rose for the amount of US$175,000.00 inclusive of the said lots on 9 May 2006. He stated that both parties had been represented by separate attorneys, and it was agreed in the agreement for sale made on 8 February 2006 and signed by the parties, that he would have been given possession on execution of the agreement prior to its completion, which had occurred. He stated that it was the intention of the parties that he would be given vacant possession, not subject to any tenancy, licence, or occupation of anyone, and there was no such condition stated in the agreement for sale. Pursuant to advice received he had engaged the services of a qualified land surveyor, Mr Keith Gentles, with whom he had walked the lands to the extent that it was possible, as he said, the said lots appeared to be a woodland, particularly Lot 150A but both were overgrown by trees and shrubbery.

[17] Mr Boswell testified further that unfortunately the report of Mr Gentles had been misplaced and only an excerpt of the same could be located which was attached to his affidavit. He stated however that on his visit to the lots, he observed a derelict building on Lot 151A which could easily be removed. It was unoccupied, abandoned, unfenced and was partially built on an old condemned parochial road, and was visible from the main road leading from Stewart Town to Boscobel. Mr Boswell indicated that there was no visible basis to believe that the lands were occupied and so he completed the purchase of the said lands inclusive of the said lots. He deponed that the report from Mr Gentles supported his recollection of discussions held with Mr Gentles in respect of the said lots. He also indicated that after consultation with his attorney, he was not

concerned about the encroachment of the building as most of it was on the parochial road and in any event the building had appeared abandoned.

[18] Mr Boswell deponed that since the purchase of the said lands, travelling along the Stewart Town Main Road, whether by day or night, he had observed that there was no sign of activity on the said lots, and the derelict building remained in the same condition. However, on one of his usual drives along that main road, he noticed construction in progress on the said building and that a fence was being erected. He made enquiries which led him to Mrs Cynthia Smith, the widow of Mr Selbourne Smith, but he had not obtained any useful information from that source. He obtained the service of another land surveyor Mr Ivor Stewart, due to his concern in settling the boundaries, and putting up a perimeter fence.

[19] The report of Mr Stewart took some time to be submitted and it was then that he discerned that the encroachment of the old abandoned derelict building had expanded, and that a perimeter fence had been erected which encroached on Lot 151A, although the building was still mainly on the parochial road, which he thought was owned by the Commissioner of Lands. He said that he had instructed his attorney-at-law to write to Mrs Smith and he assumed that that had been done. Nonetheless, he later received through his then attorneys-at-law, a letter from Selnor Developments' attorneys indicating that the company had been in possession of that lot for several years. A meeting was requested by their attorneys but that did not occur. Instead, the litigation commenced. He stated that he had complied with the injunction granted in the court and had endeavored to obtain all the documentation necessary to put his case properly

before the court, but the vendor was abroad and so he had experienced some difficulties.

[20] Additionally, he averred on the day that the matter was before the court, in November 2016, Miss Russell was involved in a murder trial which was nearly at the end, and the court would not release her to attend the fixed date hearing before Anderson J. Mr Boswell indicated that as he had been informed that she was intending to obtain counsel to represent her at the hearing, then there would not have been any need for him to attend court, and he had not done so. He maintained however that he was interested in defending his case, and in having the same resolved in a transparent and impartial manner. He claimed that he had filed an affidavit in the court which his attorney had informed him had been responded to by Mr Smith, but the court had accepted Mr Smith's affidavit, it being a part of the court bundle, but had not accepted his affidavit as being part of his defence. He said that the claim by Selnor Developments was unfounded. Indeed, he said that he had enjoyed undisturbed and exclusive possession of the said lots since the acquisition of the same, and had plans to develop the said lots for his children and himself. He stated that he had been entered on the tax roll and had been trying to honour his obligations in that regard.

[21] He testified that to his knowledge, Mr Smith was approximately 20-25 years his junior (that is in his late forties); resided overseas; had limited dealings with the said lots before the death of his father; and had never been visible or in possession or control of the said lots either on his own behalf or as a company official.

[22] Mr Boswell rejected the assertion of Selnor Developments that they had had extended occupation of the said lots, and in fact claimed that Mr Smith and Selnor Developments had been in unauthorized occupation of a portion of a small piece of Lot 151A, since only around 2012 by virtue of the encroachment of the said derelict building which was mainly on the parochial road. He averred that there was no injustice to Selnor Developments, if the stay was granted, as they remain in occupation, and to the extent that the lots have been used as income earners they would not have been deprived, hindered or impeded in any way. He stated that he would experience grave injustice if he were not given an opportunity to mount his defence and to challenge the evidence being put forward by Selnor Developments, given that he was the registered proprietor of the said lots. He stated that the only claim that Selnor Developments could have, would be to the encroachment of the building, but not to any other part of lot 151A and not in any way whatsoever to Lot 150A. He claimed that his losses would be enormous as the value of the said lots were approximately $25,000,000.00. He testified that since the commencement of the claim, Selnor Developments had expressed an interest in purchasing the said lots from him.

[23] He therefore asked that the court grant the stay of execution of the judgment as it would be manifestly unjust for him to be dispossessed of the said lots on the basis of a claim not supported by either facts or truth. The claim, he stated, needed to be ventilated properly to prevent the unjust enrichment of Selnor Developments.

[24] Miss Russell filed an affidavit in support of the application for stay of execution of the judgment pending appeal. She attached the fixed date claim form which had been

filed on 8 May 2015 and indicated that Selnor Developments had filed an application for injunction restraining Mr Boswell from interfering with the said lots and she had made a similar application to restrain Selnor Developments from taking any steps to register any interest that was being claimed by them in respect of the said lots, which injunctions she said, were granted upon the consent of the parties. She confirmed that when the fixed date claim form came up for hearing, she was before V Harris J in the Saint Ann Circuit Court conducting a murder trial, which she said was the cause of her absence from the hearing before Anderson J, and why she had asked Mr Gilroy English to attend in her absence. She further confirmed that she had been informed by Mr English that the learned trial judge would not accept the reason for her absence, and had proceeded to summarily dispose of the matter, in spite of Mr English's entreaties to permit time to be given to regularize the administrative difficulties existing in Mr Boswell's case.

[25] Miss Russell testified that she had filed the notice and grounds of appeal, as Mr Boswell had a good chance of succeeding on appeal as the learned judge had exercised his discretion wrongfully in his refusal to grant the adjournment on the application of counsel for Mr Boswell. This was so particularly since the learned judge appeared not to consider the nature of the claim, and the balance between dispossessing the registered proprietor, as against the administrative errors which had occurred, and that he could have exercised his powers and utilized the affidavit filed by Mr Boswell in support of the application for injunction to stand as Mr Boswell's defence, given that she had filed an acknowledgement of service indicating that Mr Boswell intended to defend the matter.

That affidavit, she said, was before the court in the bundle submitted by counsel for Selnor Developments and yet, she deponed, in spite of all that, the learned judge had not considered all the material that was before him. Mr Boswell is the registered proprietor of the said lots, she stated, and she referred to the fact that he had claimed to be in exclusive possession of the said lots save for the slight encroachment by Selnor Developments on a small portion of one lot since 2012.

[26] Miss Russell further deponed that the balance of justice lay with Mr Boswell, as while the appeal is pending, the said lots were transferred to Selnor Developments and subsequent to that other third party interests became involved, the challenge from Mr Boswell would be made more difficult, whereas on the other hand, if the stay were granted, Selnor Developments would suffer no prejudice, as to her knowledge they were not being hindered in their use of the said lots.

[27] Mr Smith filed an affidavit in response to both affidavits mentioned above in opposition to the application for the grant of a stay pending appeal. He stated that he was a director of Selnor Developments and duly authorised to do so. With regard to Miss Russell's affidavit, it was his position that Mr Boswell had only filed an affidavit in the proceedings, no application for an injunction had been filed, but a consent order had been made by Glen Brown J extending an order that had been made earlier in Selnor Developments' favour and restraining them from taking steps to register any legal interest or proprietorship in their name in the said lots. Mr Smith agreed with Mr Boswell's and Miss Russell's description of the manner in which the matter had unfolded before the courts, namely before Straw J with the orders being made at case

management directing the parties to be present for cross examination on the affidavits filed. However, he said that since at the hearing before Anderson J, the acknowledgement of service had been filed late, that no defence had been filed, nor had any application for extension of time to file the defence been filed, the learned judge, he submitted, was correct to have refused the adjournment. He stated, that Mr Boswell had no right of audience not having filed a defence, and so the matter proceeded on the basis of submissions of counsel and the affidavits filed on behalf of Selnor Development.

[28] Mr Smith averred that the learned judge had put his reasons in writing and had indicated that Mr Boswell had no realistic chance of success on appeal. Mr Smith stated that the deficiencies in Mr Boswell's case were not merely administrative, but that he had failed to comply with the orders of the court. He referred to the history of Mr Boswell's participation throughout the matter. He stated further that Selnor Developments had acquired its interest in the said lots by adverse possession, and there was no impediment to their interest being registered. The company would be prejudiced if the stay were granted as it would be prevented from regularizing its ownership of the said lots which it had occupied in excess of 20 years.

[29] With regard to Mr Boswell's affidavit, Mr Smith denied that the building could be described as derelict, at any time, and stated that it had always been fenced, although it had been unoccupied for a short period of time after his father's death. Selnor Developments, he said, had always been in possession and control of the said lots as part of a large subdivision. This, he said, had taken place in open occupation and not in

any clandestine manner. Mr Smith claimed that at the time that Mr Gentles' report had been prepared, the interest in the lots of Mr Boswell's predecessor had long been extinguished. Any vacant possession to which he, Mr Boswell, would have been entitled would have been in respect of the remaining part of the lands comprised in the certificate of title registered at Volume 972 Folio 488, but not in relation to the said lots.

[30] Mr Smith averred that the fence had always been there around the building which had been constructed in 1986, and the only work effected to the building since then was certain renovation works effected in 2010. He stated further that the parochial road was no longer visible as it had once existed, as the land had been significantly altered over the years prior to the construction of the building, as part of the lands were levelled, and other parts had been dumped up in the process.

[31] Mr Smith pointed out that the only affidavit filed by Mr Boswell in the matter was that in relation to the application for an injunction, which had not been filed in direct response to his affidavit filed in support of the fixed date claim form, and was not a defence to the claim. Mr Boswell, he said, had purchased the property in 2006, when the title to the said lots had been extinguished, and so he denied that Mr Boswell had ever had any exclusive and undisturbed possession to the said lots as claimed by him. He stated that Mr Boswell had been placed on the tax roll by virtue of his registered ownership of the said lands, but that could not defeat Selnor Developments' ownership of the said lots by adverse possession. He said that he had personal knowledge of the matter as he had worked with Smith's Trucking Company Limited for the period 1987 to 2005, which had also used the building, part of which had been constructed on Lot

151A. He had also been the site manager of Selnor Developments for several years during the 1990's when the roads in the subdivision were being built, and so he had had extensive dealings with the said lots. He could therefore, he said, attest to the fact that Selnor Developments had had exclusive and undisturbed possession of the said lots.

[32] Mr Smith emphasized that Selnor Developments' occupation of the land could be traced back to the 1980's, no legal action for recovery of possession had ever been taken out against them, and as a consequence, it would be an injustice for any stay of execution to be granted to put them to additional expenses to continue to pursue the matter, in the light of the fact that they had a judgment and were only interested in having the certificates of title formally issued in their name in respect of the said lots. He stated that Mr Boswell had had ample time to file his defence but he had not done so. Mr Boswell, he said, had never attended court, and on multiple occasions his attorney had also failed to do so. Additionally, he maintained that the appeal had no prospect of success and the court ought not to grant the stay in those circumstances, as the only injustice in ordering the stay of execution of the judgment would be against the interest of Selnor Developments.

[33] At the end of the hearing before me, both counsel requested that in my consideration of the application I should have sight of the affidavit of Jason Smith in support of the fixed date claim form, and in support of the application for an injunction, the skeleton submissions filed by counsel for Selnor Developments for use at the hearing before Anderson J and the affidavit of Mr English filed in support of the

application for stay of the execution of the judgment on behalf of Mr Boswell, in the court below. I did so, and will attempt to summarize the same for completeness, but as I am not hearing the appeal, I do not intend to capture every aspect of the same in fulsome detail.

[34] What I gleaned from the affidavit in support of the fixed date claim form of Mr Smith, was that whereas Mr Boswell became the registered proprietor of the said lands comprised in certificate of title registered at Volume 972 Folio 488 in May 2006, Selnor Developments became the registered proprietor of lands made up of 190 acres comprised in Volume 1154 Folio 846, in 1981, which lands had been carved out of the certificate of tile registered at Volume 972 Folio 488. The said lands although originally purchased for farming and the rearing of livestock, a decision had been made to move the offices of Selnor Developments and Smith's Trucking Services Limited to Spring Valley. This decision was based on the plan to subdivide the lands at Spring Valley and have them sold as residential lots. The subdivision approval was supposed to include the said lots, the numbers of the lot allegedly being assigned pursuant to the subdivision plan. Selnor Developments stated that it constructed a building of concrete and steel with concrete foundation, and a part of the building was on the said lots. The building was completed in 1986 and occupied by Selnor Developments, and Smith's Trucking Services Limited and other related businesses. When the building was constructed, a concrete wall was built around it and a gate was constructed which operated as the entrance to Lot 151A. Selnor Developments limited claims that the road and entrance constructed at some time in 1983, has been used as an access road to

the Spring Valley development from then, without any incident or claim either from Mr Boswell or his predecessors in title.

[35] It was their contention also, that prior to the construction of the building, a shed had been constructed on the said lots to store cement, pipes and other materials. The lots had also been used for the parking of heavy duty equipment, at which time, a part of the lots had been fenced. Lot 151A had been used as an office until 2010 when the former managing director died, when it had been closed briefly. Up until then, there had been undisturbed exclusive use of the said lots. After 2010, the office building had been leased to a day care known as 'Faithbuilder's Early Childhood Centre' which catered to children between the years of two to six years old.

[36] It appears that it was subsequently discovered that the office building had been constructed on property that consisted of four lots, two registered and two unregistered (the survey report and pre-checked plan although said to be annexed to the affidavit were not annexed). Thereafter, Selnor Developments endeavoured, it said, to have the lots registered in its name as they were allegedly part of the subdivision plan. But on 13 March 2015, Miss Russell wrote to 'The Spring Valley Basic School' care of Mrs Cynthia Smith, indicating that Mr Boswell would not "stop at anything" to exercise his rightful claim to ownership of the said lots. She invited discussions on the subject. She enclosed survey diagrams in her letter, but Selnor Developments claimed that the diagrams confirmed their occupation of the said lots. Thereafter, Mr Boswell proceeded to attempt to enforce his rights by placing a padlock on the gate of the said lot, and though it was said to have been removed on the advice of the police by Mrs Smith, Mr

Boswell continued to place security personnel on the premises, who advised persons that he had been instructed by Mr Boswell to protect the property and to prevent anyone from entering the same. Police reports had to be prepared and the police were called to attend on Lot 151A, and the operation of the school resumed. However, Mr Boswell later attended on the school and attempted to place signs on the lot stating 'Private Property Trespassers will be Prosecuted', and he proceeded also to attempt to drop large stones and other rubble at the entrance of the school. Mr Boswell also, it was said, commenced cutting various trees on the property which resulted in significant amounts of dust and discomfort in the process to the members of staff and children.

[37] Selnor Developments stated that they owned various unsold lots in the Spring Valley Development, had various accounts at various financial institutions, owned heavy duty equipment and therefore would be able to give an undertaking as to damages, if any award were to be made against it. They urgently required assistance from the court and claimed that they had acquired adverse title of the said lots, having been in occupation in relation thereto in excess of 25 years, more than twice the period required to make the possessory title claim. They also claimed that when Mr Boswell purchased the said lands inclusive of the said lots, he would have had constructive notice that the lots were occupied, as both lots are adjacent to the main road, and the activities being conducted by Selnor Developments had been long standing, and had not been carried out clandestinely.

[38] The skeleton submissions of counsel for Selnor Developments set out the history of the matter which has already been detailed herein. Of assistance was the fact that

counsel informed that the first order made in the matter by Pusey J restrained Mr Boswell from interfering with the occupants, tenants, and or licensees; from committing waste; exercising control; and from removing fences, gates *inter alia*, from the said lots, until the *inter partes* hearing date, which was set. Lindo J later extended the injunction as the hearing date was adjourned and reset. On 26 June 2015, Glen Brown J extended the injunction until the determination of the matter or until further order of the court, but also restrained Selnor Developments from taking steps to register any legal interest in the said lots. Counsel referred to the affidavits before the court and did refer to the "defendant's evidence in response to the application" being contained in the Mr Boswell affidavit which was filed in support of the application for interim injunction.

[39] Counsel canvassed all the evidence in the affidavits, highlighting those matters that were deserving of specific mention. He identified what he said were the three issues in the case below, namely:

> "• Whether the [Selnor Developments] has acquired title for Lots 150A and 151A by way of adverse possession;
>
> • Whether the [Mr Boswell's] title to the land contained in Lots 150A and 151A has been extinguished by the Limitation of Actions Act
>
> • Whether the [Mr Boswell's] purchase of the property affects the right of [Selnor Developments] to claim title by way of adverse possession in circumstances where [Mr Boswell] only became the registered proprietor in 2006, by which time [Selnor Developments] had been in possession well in excess of 12 years."

[40] He relied on several authorities, namely: **Recreational Holdings 1 (Jamaica) Ltd v Lazarus (Jamaica)** [2016] UKPC 22; **James Clinton Chisholm v Hall** [1959] AC 719; **Broadie (Thomas) and Another v Derrick Allen** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Civil Appeal No 10/2008, judgment delivered 3 April 2009; and **Freckleton (Valerie Patricia) v Winston Earle Freckleton** (unreported), Supreme Court Jamaica, Claim No. 2005HCV01694, judgment delivered 25 July 2006, to support Selnor Developments' position that there was clear authority that rights could be acquired by limitation in respect of registered land; that a purchaser of registered land takes a transfer subject to those rights; and further, that the court would have had no difficulty accepting that Selnor Developments had been in possession for the required period of time. As a consequence, the title in respect of the said lots had been extinguished.

[41] In the affidavit of Mr Gilroy English, he had set out what had transpired as he recalled it before Anderson J in his role as holding brief for Miss Russell. The learned judge had not taken issue with the contents of that affidavit in his reasons for judgment, but what I find was of some significance was that Mr English stated that none of the affiants for Selnor Developments gave evidence from the "witness box", and no questions were asked of them by the learned judge. He confirmed that the affidavit of Mr Boswell in support of the application for injunction was before the court, but he was not allowed to participate in the proceedings and certainly not to cross-examine the affiants on their affidavits, as there was no defence on behalf of Mr

Boswell before the court. The learned judge, he observed seemed to have been focused on the fact that:

1. the acknowledgment of service had been filed late;
2. the defence had not been filed at all; and
3. the explanation for the absence of Miss Russell was not an acceptable one.

The learned judge, he said, had therefore refused to adjourn the hearing, and proceeded summarily as indicated previously, accepting the evidence before him, and making the orders as prayed.

Submissions

[42] Miss Russell accepted that there was no authority for me to grant a stay of execution in respect of any of the declaratory orders made. As a consequence she identified those orders that required some action to be taken, and requested a stay of the execution of those orders. She submitted that there was a real prospect of success on appeal and that Mr Boswell was likely to suffer much more harm if the stay was not granted. She stated that the matter related to land which had unique relevance in some cases, was of intrinsic value in certain cases and of sentimental value in others. In the instant case, she said there was no evidence that Lot 150A was involved at all, and there was only a portion of Lot 151A on which the offending building encroached. There was an issue whether there was occupation for the length of time claimed, and whether it existed at the time that Mr Boswell purchased the said lots. She submitted that it was a matter of credibility between Mr Boswell and Mr Smith. There were serious issues to

be tried, and the matter should have been adjourned so that it could have been properly ventilated before the court.

[43] While Miss Russell recognised that the Court of Appeal hesitates to disturb the exercise of the discretion of a trial judge unless he was palpably wrong, this was such a case she submitted. Her contention was that the learned judge had information before him that would have indicated what Mr Boswell's defence was. The word "defence" was not on the document, but his defence, which was before the court, could be gleaned from his affidavit related to the injunction. The court should have addressed the substance of the case, and not just the form. The learned judge had not found that there was no merit in Mr Boswell's case, he had simply not decided the case on the merits at all. She submitted that the fact that Mr Boswell was absent from the hearing did not equate with him having no interest in his case. Finally, she submitted, that Selnor Developments would suffer no prejudice if the stay was granted as they were enjoying the fruits of the judgment, whereas losing the said lots would be harmful to Bowell as retransferring the same would be difficult, if he was successful on appeal, and particularly so if other parties had acquired an interest in the meantime. Justice demanded, she submitted, that the status quo remain until the appeal had been determined.

[44] Mr Hanson referred to the case management orders made by Straw J and pointed out that Mr Boswell had not complied with any of them; no affidavit had been filed and he had not attended and made himself available for cross-examination. So, even if he had attended the hearing of the fixed date claim form, he would still have

been in breach of the orders of the court. He stated that Miss Russell was aware of the hearing date, but had been absent therefrom, and had been absent from other dates, such as the case management conference. Mr Boswell, he stated, had not been at any of hearing dates in the matter. Counsel, he submitted could not agree adjournments between them, it was a matter for the discretion of the learned trial judge. The learned judge, he contended, had properly exercised his discretion pursuant to the CPR, in particular with regard to rules 39.5 and 39.7 of the CPR, which permit him, once he was satisfied that the party had been duly served, to strike out the claim or to proceed in the absence of a party who had not appeared. He may, he submitted, also adjourn the matter if he thought it fit to do so.

[45] Mr Hanson submitted that there was no real prospect of success on appeal. On the substantive claim, the learned judge had perused the affidavits before him and had concluded that Selnor Developments had occupied the said lots over the period required by the Limitation of Actions Act long before Mr Boswell had purchased the said lots, and had therefore acquired ownership of the said lots through adverse possession. There was also other supporting documentary evidence before the court of invoices showing the purchase of material from Mr Boswell for the construction of the building before the said purchase by him of the said lots, thereby indicating that he was aware of the building existing on the said lot. With regard to the hearing date, the explanation of the absence of Miss Russell was not acceptable to the learned judge as she had been absent before, and Mr Boswell had never attended at all. Additionally, Anderson J had found, he stated, that none of the orders that he had made were amenable to a stay,

as some were declaratory and the others were permissive. That was the basis, he said, why the learned judge had refused the application for stay when it had come before him.

[46] Counsel submitted that there was no real risk of injustice to Mr Boswell as there was no prospect of success on appeal. Selnor Developments had been in occupation of the said lots in excess of 20 years, and all they were interested in was regularizing the registered ownership of the said lots. There could, in the circumstances, be no financial hardship suffered by Mr Boswell. As a consequence, the application ought to be refused.

[47] In response, by the leave of the court, Miss Russell submitted that there is a real issue as to whether the wall and fence were built in 2010, or even more recently, but certainly after 2006 which was of significance in this case with regard to the claim for adverse possession. The evidence in relation to the invoices, she contended, was equivocal, as the invoices did not state that the materials purchased were in respect of the said lots, and Selnor Developments owned several other lots in the subdivision. It was counsel's position that a site visit from the court would be recommended in this case. The matter remained one of credibility between the *dramatis personae*, she submitted, and ought to have been tried. That alone, she maintained, rendered the appeal one with a real prospect of success.

Discussion and analysis

[48] A single judge of appeal has the power to make an order for the stay of execution of any judgment or order against which an appeal has been made pending the determination of the appeal (rule 2.11(1)(b) of the Court of Appeal Rules (CAR)). An appeal however does not operate as a stay of execution of the decision in the court below, unless so ordered by the court below, or this court or a single judge of this court (rule 2.14(a) of CAR). The traditional approach to the grant of a stay of execution was established in **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887, which was a two-fold test which required the applicant to demonstrate that: (i) he had some prospect of succeeding in his appeal; and (ii) without the stay he would be financially ruined. However in recent times, a more liberal approach has been adopted: see **Watersports Enterprises Ltd v Jamaica Grande Limited and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, Application No 159/2008, judgment delivered 4 February 2009; **Reliant Enterprise Communications Limited and Another v Infochannel Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 99/2009, Application Nos 144/ 2009 and 181/2009, judgment delivered 2 December 2009; and **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1. In **Paymaster V GKRS**, Harris JA observed that the court's approach now is to "seek to impose the interests of justice as an essential factor in ordering or refusing a stay". Phillips LJ in **Combi (Singapore) Pte Limited v**

Ramnath Sriram and Another [1997] EWCA 2164 stated the following as the proper approach:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

It is necessary therefore in deciding whether to grant or refuse a stay that I must consider whether there is some merit in the applicant's appeal and whether the granting of a stay is the order that is likely to produce less injustice between the parties.

[49] In the instant case, counsel representing Mr Boswell at the hearing of the fixed date claim form made an application for an adjournment which was refused. This order was made by way of the exercise of the discretion of the learned trial judge. In making a determination as to whether to interfere with a learned judge's exercise of discretion, regard must be had to the principles stated by Lord Diplock in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, which have been endorsed in and applied by this court in numerous cases such as **The Attorney General v John Mackay** [2012] JMCA App 1. It is clear that in applying the principles

gleaned from these cases, this court can only interfere with the learned judge's exercise of his discretion if it can be shown that he misconceived the facts; misapplied the law or there was a change in the circumstances of the case sufficient to show that his exercise of discretion was plainly wrong.

[50] There are several authorities dealing with the review on appeal of the learned judge's exercise of his discretion to grant or refuse an adjournment at the trial. I will have to examine the same against the background facts of this case. In **Maxwell v Keun and Others** [1928] 1 KB 645, a case of some antiquity, decided long before the advent of the Civil Procedure Rules, the question arose as to whether two actions for libel ought to have been adjourned and taken out of the trial list until a date could be fixed in the future, to facilitate the plaintiff being able to obtain leave from the army to return from overseas to England for the hearing. The learned Chief Justice had refused both applications. It is interesting to examine the approach taken by the court so many years ago, as though the rules have introduced the overriding objective and the focus of dealing with cases justly, the Court of Appeal in **Maxwell v Keun** appeared to lay that foundation, taking the justice of the case into consideration from then, although now many other different factors fall for deliberation.

[51] On appeal in **Maxwell v Keun**, the Master of the Roll, Lord Hanworth, set out the applicable principles with clarity. At page 649, he agreed with the arguments submitted to the court as follows:

> "It is obvious - indeed, it is almost an essential of our system and practice - that the discretion of a judge should be not only respected but upheld; and in Order XXXVI, r 34 - if,

> indeed, a rule were necessary - it is plainly said that 'the judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place, and upon such terms, if any, as he shall think fit.' It is said, and said cogently, that, inasmuch as the Lord Chief Justice is armed with that discretion, the Court of Appeal ought not to interfere with the discretion exercised judicially; that this discretion was exercised judicially; that in a matter of what cases should be in the list to be tried by him it must surely be a matter for the judgment of the Lord Chief Justice; and that, even if there be an appeal, this Court ought to have respect for the discretion appropriately exercised."

[52] However, the learned Master of the Rolls accepted the circumscription of the court in **Sackville West v Attorney-General** (1910) 128 LT Journ 265, where the judges stated that it could not be said that under no circumstances could the Court of Appeal interfere, but that "it would only be in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of the business in his own Court could succeed". It was also acknowledged that interference of the appellate court would only be accepted if justice did not result, and the judge had failed to see that that would be the effect of his decision.

[53] In **Maxwell v Keun**, the learned Master of the Rolls concluded that in the absence of the plaintiff, the result would be judgment for the defendants, and so the question would have been, had justice been done between the parties? Lord Hanworth queried further, that whoever was right or wrong in the case, would the partial hearing offered by the attendance of the defendants and the non attendance of the plaintiff result in an injustice?

[54] For his part, Lord Atkin made the following powerful comment in his speech which has been oft cited over the years as the appropriate approach of the appellate court on the question of review of the judge's exercise of the grant of an adjournment in the court below. He put it succinctly in this way at page 653:

> "I quite agree that the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has the power to review such an order, and it is, to my mind, its duty to do so."

Because, as Lord Atkin stated, "the whole duty of this Court, and of every Court, should be to do justice between the parties without being prevented by technical objections". it was also his view, that had the case been heard in the week it was scheduled to have been heard, judgment would have been given to the defendants, and the plaintiff would have been deprived of his right. He went on further to state that although there had been delay in the plaintiff's advisers giving notice of their situation, he was of the view that the plaintiff ought not to be punished by losing his rights altogether because of the delay of his attorneys of five or six weeks in making the application. A decision to do that should only be made in circumstances wherein the court is satisfied that the conduct has been such that justice could only be done to the other party by coming to that decision.

[55] Lawrence LJ made his contribution in **Maxwell v Keun** by adding that if it was plain that if the plaintiff not being present at the trial his case was likely to fail, then he

would not have had an opportunity of having his case properly tried and thus of obtaining justice. In his Lordship's opinion, the error of judgment by the late application by the plaintiff's advisers ought not to result in the penalty to the plaintiff that his case should not be properly tried, particularly if there was no evidence of prejudice to be caused by such a postponement.

[56] It is important however to review the impact, if any, of the advent of the Civil Procedure Rules on this aspect of litigation. In Stuart Sime's text, 'A Practical Approach to Civil Procedure' 15th edition at page 452, paragraph 38.09, the learned author referred to the fact that there was a general power to adjourn hearings. Rule 39.7 of the Jamaican CPR states that a judge may adjourn a trial on such terms as the judge thinks fit, and may do so to a date and time fixed by the registry. The learned author stated that adjournments are usually granted where the need to adjourn arises through events outside the control of the parties such as witnesses being unavailable or other practical impossibilities in meeting the trial date. He referred to **Croydon London Borough Council v Bates** [2001] EWCA Civ 134, where an adjournment was given as the appellant was awaiting a determination of an application for legal aid and she had been served with the respondents' witness statements and other documents shortly before the hearing. Indeed Lord Mance stated at paragraph [17] that:

> "Standing back and looking at the position overall, I would fully accept the general desirability in conducting litigation as briskly as possible in the interests of justice. I would also be reluctant to reach any conclusion which would suggest that decisions on adjournment by district judges were readily susceptible of review. However it does seem to me that, on the facts of this particular case, the decisions reached on

> adjournment were wrong and that there should have been an adjournment to enable Mrs Bates' legal aid certificate to be finalised and to enable her to be represented. This was a case of considerable difficulty and delicacy for her where an advocate would undoubtedly have been of value. She was on very short notice required to respond in writing to lengthy detailed material, and then on almost equally short notice required to conduct a case in person in relation to the same subject matter. The background is one which had extended over some two years. In one sense the speed with which proceedings were pursued was a virtue but, taken in combination with the fact that her legal aid application had not been finalised and that the proceedings sought immediate and unconditional possession of her home, it seems to me that it involved a substantial injustice."

[57] However, the learned authors also noted that the court will refuse to adjourn the case when the need to adjourn is caused by the failure to prepare for the trial, and the also, the court would require exceptional circumstances before it would vacate a trial date on account of a failure to comply with directions, or when the application is made late in the day.

[58] In **Nigel John Holmes v SGB Services PLC** [2001] EWCA Civ 354, a case in which the court below vacated the trial date; gave several directions with regard to the amendment of pleadings; and addressed the production and use of certain expert evidence, Lady Justice Arden, stated that in doing so, the learned judge was exercising a discretion and making a case management decision. It was therefore incumbent on the defendants to show that the judge had erred in principle, and not merely that he could have reached some other decision. She found that the learned judge correctly applied the overriding objective, as he was bound to do, and he had concluded that it was fair if the claimant had the opportunity to instruct the expert on further matters as

set out in the order for directions. The learned judge had carried out a balancing exercise and so the decision was not one in respect of which the appellate court would interfere. The judge, she said, in making his decision was bound to consider dealing with the case justly. The applicants had not succeeded in showing that he had committed an error in principle, and so the Court of Appeal could not say that the judge was wrong.

[59] In **J R Edwards v The Secretary of State for Trade and Industry and Another** [2002] UKEAT 1117 01 2511, the application was for an adjournment to await the determination of a case which had been referred to the European Court of Justice. The Tribunal was therefore requested to await the decision. The Tribunal refused on the basis that the case was unreported, they had no knowledge of the facts of the case or when the decision was expected. The decision was upheld on appeal as the matter had been dealt with within the discretion of the Tribunal. Also, in the circumstances the Tribunal had reviewed the right matters in not permitting the adjournment bearing in mind the situation of great uncertainty.

[60] In **Yunez Teinaz v London Borough of Wandsworth** [2002] EWCA Civ 1040, the issue was whether an adjournment ought to have been granted by the Employment Tribunal on the basis of the ill health of Mr Teinaz. The adjournment was refused but an appeal to the Employment Appeal Tribunal was allowed, and that decision was upheld in the civil division of the English Court of Appeal. The Employment Tribunal had expressed the view that the medical ground for the postponement had not been made out, and the burden to do so was on the applicant to demonstrate, on adequate

evidence, that there was good ground for postponing the hearing. The Employment Appeal Tribunal was concerned with that finding of the Employment Tribunal as Mr Teinez had not chosen not to attend, but had been advised by his doctors not to do so. There had not been any indication that the advice had not been genuine. On appeal, the court yet again restated the role of the appellate body in reviewing the decision of the inferior tribunal, namely that the decision to grant the adjournment was an exercise of discretion given in the management of the case, in respect of which the appeal body ought not to interfere, and could only do so on limited grounds. The court stated that the one recognised ground in respect of which the court could interfere, was where the tribunal or court in exercising its discretion had taken into account certain matter which it ought not to have taken into account. That interference would not be usurping the role of the lower tribunal or court. That was a necessary part of the function of the reviewing body. The court said that "[w]ere it otherwise, no appellate body could find that a discretion was wrongly exercised". The court noted, endorsing Lord Atkin's speech in **Maxwell v Keun**, that allowing an adjournment was a discretionary matter, and some adjournments must be granted if not to do so amounted to a denial of justice, for example, when the consequence of a refusal of the adjournment was so severe, so much so, that it may lead to the dismissal of the proceedings.

[61] I find for completeness I must mention two other cases from the Queen's Bench Division and the English Court of Appeal respectively, they are **National Westminster Bank plc v Aaronson and Another** [2004] All ER (D) 178 (Mar), and **Gilbart v Graham (A Firm**) [2008] EWCA Civ 897. In the former, a trial date had been fixed at a

time that was not convenient to the defendant, in error. However the claimant corresponded with the defendant acting as though the date for hearing of the trial would proceed. When the defendant instructed counsel to attend the trial to seek an adjournment, the application was refused as the court found that even if the defendant had not received the letter from the court fixing the date, the correspondence from the claimant should have put him on notice of the date for trial. In refusing the adjournment, the court found that the defendant should have attended the trial and had no good reason for having not done so, although having only been made aware of the date very late, but that he could have obtained an adjournment in advance of the trial date, as a matter of urgency. In the alternative, the defendant should, the court found, have prepared for the trial in the short space of time given. The judge also dismissed the application by the defendant to set aside the judgment given in his absence. The appeal was dismissed on the ground that the judge had not erred in the exercise of his discretion.

[62] In **Gilbart v Graham**, the court refused to vacate the trial date and instead set out detailed specific case management orders for certain matters to be effected. However, it was not possible for those orders to be complied with. Discovery could not take place in the specified time, responses to the documents exchanged and objections could not occur either. The Court of Appeal found that the order made by the court was unreasonable. It was not feasible to get the documentation completed by the date fixed for trial. As a consequence, it was not possible to obtain a fair trial.

[63] On examination of the authorities set out herein, against the background of some of the undisputed facts of the instant case, it would appear to me to be clearly arguable whether in the circumstances of the instant case, an adjournment ought to have been granted. Many questions must arise on the facts as they unfolded, for instance: Was it likely that in Mr Boswell's absence the result was no doubt judgment in favour of Selnor Developments? And would that not effectively completely defeat Mr Boswell's rights, namely his legal interest in registered land, namely the said lots? Would that result be an injustice to him? Was it therefore prudent and crucial not to exclude him from participation in the trial? Was the basis for the adjournment reasonable in the circumstances? Or on the other hand had Mr Boswell's attorneys been given sufficient notice of the trial, and ought they to have treated with the trial date differently and applied for the adjournment timeously, and not on the date of the first hearing of the fixed date claim form? Was that a reasonable use of the court's time? Did the judge in the circumstances of this case exercise his discretion appropriately, reasonably and judicially? If yes, ought the Court of Appeal in those circumstances to interfere in that exercise of his discretion? However, one must not lose sight of the caution expressed by Lord Denning in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865, at page 866 where he stated that:

> "So [the applicant] is out of time. His counsel admitted that it was his, counsel's, mistake, and asked us to extend the time. The difference between two weeks and four weeks is not much. If [the applicant] had any merits which were worthy of consideration, we could certainly extend the time. We never like a litigant to suffer by the mistake of his lawyers. I can see no merits in [the applicant's] case. If we extended his time it would only mean that he would be

> throwing good money after bad. I would therefore refuse to extend the time. I would dismiss the application."

[64] It is therefore important to address the issue as to whether the court ought not to have taken the time to consider whether there was merit in Mr Boswell's case. It was not in dispute that Mr Boswell was the registered owner of the said lots. There have been several cases from the Judicial Committee of the Privy Council, the House of Lords and the Court of Appeal of England which have stated authoritatively the applicable law with the regard to the extinction of the registered title, and the claim by a party of possessory title having dispossessed the registered owner of land, namely: **Paradise Beach Transportation Co Ltd and Others v Cyril Price-Robinson and Others** [1968] AC 1072; **Wills v Wills** (2003) 64 WIR 176; **J A Pye (Oxford) Ltd v Graham** [2003] 1 AC 419; **Buckinghamshire County Council v Moran** [1990] Ch 623; **Powell v McFarlane** (1977) 38 P & CR 452; and **Recreational Holdings 1 Ltd v Lazarus**.

[65] In **Powell v McFarlane**, Slade J stated with great clarity and precision, the intention that must exist in the party who is claiming to have dispossessed the registered owner. Indeed, at pages 470-472, he set out the basic principles of possession in this way:

> "It will be convenient to begin by restating a few basic principles relating to the concept of possession under English Law:
>
> (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. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. 'What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants': *West Bank Estates Ltd. V. Arthur*, *per* Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. 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. On the particular facts of *Cadija Umma v. S. Don Manis Appu* the taking of a hay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the *Red House Farms* case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting: *per* Cairns, Orr and Waller L.JJ. 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 M.R., in *Littledale v. Liverpool College* (a case involving 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.

The question of *animus possidendi* is, in my judgment, one of crucial importance in the present case. 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 judgement, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner.

> A number of cases illustrate the principle just stated and show how heavy an onus of proof falls on the person whose alleged possession originated in a trespass."

[66] What is clear is that a person claiming that the title of the paper owner has been extinguished has to establish that there was: (a) occupation or physical control of the land; and (b) an intention to possess. That intention must mean that the dispossessor has it in mind to possess the land in question in his own name on his own behalf, and to exclude the world at large including the paper owner so far as possible. The burden is on the claimant to prove the above, and as indicated, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession being the person with the prima facie right to possession, and the law will ascribe possession "without reluctance" to the paper owner or those claiming under him.

[67] There is no question also with regard to the interpretation to be given to the indefeasibility of title as proscribed by virtue of sections 168 and 170 of ROTA. However, the Act recognises the protection of possessory titles and the applicability of the Limitations of Actions Act resulting from those principles. As a consequence, other questions arise, in this case for instance: Did Selnor Developments enter into possession of Lot 151A in 1986? Did Selnor Developments enter into possession at any time of Lot 150A? If the answer is yes, what was the extent of the possession and for what period did it occur? Was the possession uninterrupted, and exclusive to everyone including Mr Boswell and was it on its own behalf? When was the building constructed was it fenced? When was it fenced? Was it built on the parochial road? Was it merely an unoccupied derelict building in 2006? What is the effect of the survey reports? The

invoices? Had Selnor Developments sufficiently satisfied the evidential and legal burden placed on it to demonstrate that Mr Boswell's paper title had been extinguished? Had the learned judge failed to take into consideration Bowell's defence before him? Did he err in focusing on the late filing of the acknowledgement of service which had been filed before entry of the judgment and which had indicated that Mr Boswell intended to defend the action? Did he consider whether in all the circumstances of the case an UNLESS order could have been made, as proceeding summarily to judgment could be described as drastic or draconian? Or was proceeding as he did entirely within his discretion by virtue of rule 39.5 of the CPR, which permits the learned judge to strike out the claim if no party appears, or to proceed in the absence of a party who did not appear? Of importance, and of great significance is the question, was this all a matter of credibility between Mr Smith and Mr Boswell? Was Mr Smith able to speak to matters which allegedly occurred more than two decades ago? Was any prejudice claimed or suffered or likely to be suffered if the matter had been postponed and the trial of the competing interests heard? Was there prejudice to Selnor Developments due to the recalcitrance of Mr Boswell's attorneys with regard to compliance with the order made at case management.

[68] On the basis of the principles expressed in **Combi (Singapore)**, it is prudent to examine where the irremediable harm would lie if a stay was not granted. Based on all of the above, it would appear that there is some likelihood of success on appeal on the issue of the failure to adjourn the matter, which action could have said to have had the results of defeating Mr Boswell of rights to his legal interests in the said lots. The claim

by Selnor Developments that the registered title to the said lots had been extinguished was not challenged before Anderson J. Indeed, no viva voce evidence was taken at all due to the absence of Mr Boswell and his attorney, (notwithstanding their representative,) and on the basis of no defence having been filed. The issue of whether Selnor Developments can prove 12 years of exclusive possession with the intention to possess, has not been subjected to the rigours of cross-examination in litigation.

Conclusion

[69] In my view, therefore, on the basis of all that I have said, if any of the specific questions posed or several of them could be answered in Mr Boswell's favour, in keeping with the evidence deposed by him in his affidavit, then there would seem to be an arguable case on the merits with real prospects of success on appeal. In all the circumstances also Mr Boswell does seem to be the party likely to suffer the most irremediable harm if the stay of execution is not granted, and I therefore do so pending the determination of the appeal. The orders I make are as follows:

1. There shall be a stay of execution pending the determination of appeal no. 105/2016 of order nos 4, 12, 13, 14 and 15 of the judgment of K Anderson J made on 3 November 2016, namely

    '4) An order for the Registrar of Titles to rectify the land register and the Duplicate Certificate of Title to transfer the said Lot 150A and 151A from the Duplicate Certificate of Title Registered at Volume 972 Folio 488 of the Register Book of Titles, and for a new

Certificate of Title to be issued in respect of the said Lot 150A and Lot 151A in the name of Selnor Developments Limited.

12) That the Registrar of the Supreme Court be empowered to take all necessary enquiries and account with regard to the transfer of the said Property being Lot 150A and Lot 151A being part of the land registered at Volume 972 Folio 488 of the Register Book of Titles.

13) That the Registrar of the Supreme Court be empowered to execute any document or documents to effect the registration of the said Property being Lot 150A and Lot 151A being part of the lands contained in the Duplicate Certificate of Title registered at Volume 972 Folio 488 of the Register Book of Titles and that in the event that either party refuses to sign same (a party being deemed to refuse to sign if they refuse and/or neglect to sign a document within 14 days of being requested so to do).

14) That the Registrar of Titles is hereby empowered to and shall do the following:

    a. Dispense with the production of Duplicate Certificate of Title registered at Volume 972 Folio 488 of the Register Book of Titles in relation to the Rectification of the said duplicate certificate of Title for the purpose of transferring the said Lot 150A and Lot 151A and creating a new duplicate certificate of title for Lot 150A and Lot 151A in the name of [Selnor Developments];

    b. Issue a new Certificate of Title for the parcel of land known as Lot 150A and Lot 151A being part of the land registered at Volume 972 Folio 488 of the Register Book of Titles.

15) The Costs of this Claim are awarded to [Selnor Developments] as against [Mr Boswell], and such costs shall be taxed if not agreed.'

2. There shall be no costs on this application.

3. An early date should be fixed for the hearing of this appeal, and in pursuance of that, a case management conference is scheduled for hearing on 31 October 2017 at 10:00 am so that the court can effectively manage the process of the appeal.