[2012] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 25/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT**
AND	**ROSE MARIE SAMUELS**	**RESPONDENT**

Patrick Foster and Miss Tavia Dunn instructed by Nunes Scholefield DeLeon & Co for the appellant

Sean Kinghorn and Dale Staple instructed by Kinghorn & Kinghorn for the respondent

23, 24 April and 28 September 2012

HARRIS JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and with his conclusion and have nothing further to add.

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and his conclusion that this appeal be dismissed.

BROOKS JA

[3] In or about 2003, Ms Rose Marie Samuels entered into an agreement to purchase land at Rhymesbury in the parish of Clarendon. During the course of the transaction, she became aware that there were wires and towers traversing a portion of the land. These were for the transmission of electricity and are owned by the Jamaica Public Service Company Limited (JPS), the holder of a licence to supply electricity to the public.

[4] JPS asserted that its equipment was on the land by virtue of an agreement that it had had with Mr Hubert Melville, a previous owner of the land. It was with Mr Melville's widow Hermine, who was also his successor in title, that Ms Samuels had contracted to purchase the land.

[5] Having been made aware of the presence of the equipment, Ms Samuels ascertained that there was nothing registered on the title for the land, which addressed that presence. She completed the purchase and, on 3 April 2008, filed a claim against JPS for damages for trespass and for the removal of its equipment from the land. JPS filed a defence denying the trespass, relying on the agreement with Mr Melville and asserting that Ms Samuels, having purchased with knowledge of its presence on the land, was estopped from denying its right to remain.

[6] On 19 January 2010, F. Williams J (Ag), as he then was, granted Ms Samuels summary judgment, declared JPS' presence as constituting a trespass on the land and

gave Ms Samuels permission to assess damages arising from the trespass. JPS has appealed against that judgment.

[7] The question raised by this appeal is whether Williams J properly rejected JPS' defence and granted summary judgment for Ms Samuels. The law on the point has evolved over the years and a review of that evolution would assist the analysis. It may be helpful, before embarking on the analysis, to set out, for context, the grounds of appeal.

The grounds of appeal

[8] Nine grounds of appeal were filed. They are:

> " (i) The Learned Judge erred, in law, in that he failed to consider that the Claimant, at the time of purchase, was aware of the fact that the Appellant/Defendant had its equipment on a portion of the property and was in occupation thereof.
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> (ii) The learned judge erred as a matter of law and/or fact in that he failed to consider [sic] the occupation of the property by the Appellant/Defendant was constructive notice to the Respondent/Claimant.
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> (iii) The learned judge erred as a matter of law and/or fact in that he failed to consider that the Appellant/Defendant was in occupation of the lands pursuant to an agreement with the previous owner, Mr. Melville.
>
> (iv) The learned judge erred as a matter of law in failing to consider that legal and/or equitable rights would have accrued to the Appellant/Defendant by virtue of its occupation of the property with the agreement of the previous owner.
>
> (v) The learned judge erred as a matter of law in that he failed to consider that an easement existed in favour

of the Appellant/Respondent [sic] by virtue of the common intention of the Appellant/Respondent [sic] and Mr. Melville, the previous owner.

(vi) The learned judge erred as a matter of law and/or fact in finding that the Appellant/Defendant is a trespasser.

(vii) The learned judge erred as a matter of law and/or fact in finding that the Appellant/Defendant has no real prospect of successfully defending the claim.

(viii) The learned judge erred as a matter of law and/or fact in finding that the Respondent/Claimant had a real prospect of succeeding on the claim.

(ix) The learned judge erred as a matter of law and/or fact in finding that the Respondent/Claimant's statement of case disclosed reasonable grounds for bringing the claim."

The grounds of appeal will not be considered separately as they fall within the context of the issues that will be identified after an outline of some other pertinent facts.

Additional background

[9] There is little dispute as to fact in this matter. There is, however, some additional information, by way of background, which is relevant to the discussion.

[10] One important factor, by way of information, concerns the document on which JPS bases its entitlement to resist Ms Samuels' claim. The document is entitled "Grant of Easement" and is said to have been made on 4 October 1996. The document asserts that, Mr Melville, in consideration of the payment by JPS to him, of the sum of $20,000.00, granted to JPS the right to construct, maintain, repair, inspect, remove, replace and operate its towers and lines across his land. Other rights, complementary

to those, were also granted to JPS. Mr Melville also agreed to refrain from using his land in a manner which would derogate from the entitlements afforded to JPS. The critical clauses in the document, for these purposes, read as follows:

> "...the Grantor [Mr Melville] as beneficial owner HEREBY GRANTS to the Company [JPS] the easement liberties and rights [summarised above] in through and over the said land TO HOLD the same UNTO and TO THE USE of the Company its successors and assigns to the intent that the grant hereby made **shall run with the said land and be binding on the owner or owners for the time being of the said land or any part thereof**.
>
> 1. For the consideration aforesaid the Grantor hereby covenants with the Company (**to the intent that the said covenants shall run with the said land**) as follows:-
> ...
>
> 4. If and so far as these presents may at any time for any reason fail to be effective as a grant of easement the same **shall be construed as granting to the Company a licence comprising such of the rights and liberties herein mentioned as may fail to be effective as easements**." (Emphasis supplied)

[11] Another important factor to be considered is that, although JPS was entitled, by virtue of section 41 of the Electric Lighting Act, to have the document registered on Mr Melville's title for the land, it did not do so. Once the title had been transferred to his widow, JPS was precluded, thereafter, from registering that document and it made no further agreement with Mrs Melville, concerning its use of the land.

[12] There are also some defects in the document, which was the subject of much comment by the learned judge as well as, during this appeal, by Mr Kinghorn, on behalf of Ms Samuels. These defects as well as the issues concerning easements, licences,

constructive trusts, the Registration of Titles Act and the Electric Lighting Act will be considered in turn, in the course of this judgment. I shall first turn to the effect of the document.

Whether the document constituted a binding agreement with Mr Melville

[13] There is no dispute that the document contained gaps and omissions. Firstly, the land was described in only the most general terms and the places reserved, on the document, for the insertion of the volume and folio numbers for the title, were left blank. Secondly, there was a reference to a plan, which should have been attached to the document, and there was no such plan attached. Thirdly, there was a marginal note in handwriting which stated "easement signed subject to signing of drawing". There was no drawing attached. Nor was there any evidence that such a drawing either existed or had been signed.

[14] Mr Kinghorn, both in his written submissions and orally, argued that the document was too uncertain to create a binding contract between Mr Melville and JPS. He addressed matters such as the certainty of parties, certainty of subject matter and the certainty of the terms of the agreement. Learned counsel cited authorities dealing with these issues and concluded that the document failed as a valid and legally binding document. Williams J arrived at a similar position. He found, at paragraph 15 of his judgment, that "the subject matter of the document cannot clearly and definitively be identified". Based on that finding, he adopted the stance that "there is no contract enforceable in law".

[15] With the greatest of respect to the learned judge and to Mr Kinghorn, those views are not sustainable. The law relied on by the learned judge and Mr Kinghorn, addresses the matter of executory contracts. That is not the situation that exists in the instant case. Not only was the consideration paid to allow the construction to take place, but the construction did take place and was in existence for years, for all to see.

[16] This was an executed contract. All that was left undone in respect of it were the continuing obligations requiring Mr Melville to allow JPS access to the land and restricting him from constructing certain structures close to JPS' equipment. It is inconceivable, had a dispute arisen with JPS during his lifetime, about those continuing obligations on either side, that Mr Melville would have succeeded in raising issues of uncertainty of the location of the land, positioning of towers and the like.

[17] Mr Kinghorn referred us to the learning in Halsbury's Laws of England (4th ed Reissue) Volume 9(1)) dealing with the requirement of certainty. Williams J referred to paragraph 672 of that work which addressed the point. It is important to note that the paragraphs cited by Williams J and Mr Kinghorn fall under the larger heading of "Incomplete Agreements". The aspect of the case of **Boggess and Another v Badder Hassan** (1991) 46 WIR 72, cited by Williams J, which dealt with the terms of a contract, may be distinguished for the reason that the contract in issue, in that case, had not been executed.

[18] Where the contract has been acted upon by the parties, the court is prepared to find that any term, which may have been too uncertain to constitute a binding contract,

has been clarified or made specific by the actions of the parties. This was the effect of the decision in the cases of **Hillas and Co Ltd v Arcos Ltd** [1932] All ER Rep 494 and **Foley v Classique Coaches Ltd** [1934] 2 KB 1. In the former case, the House of Lords found that uncertainty in a written agreement, as to the quality of goods to be traded, had been clarified by the transactions that the parties had performed pursuant to that agreement. Similarly, in **Foley v Classique Coaches**, the English Court of Appeal held that the uncertainty in the written agreement, about the price of petrol to be sold thereunder, had been clarified by the subsequent dealing of the parties, pursuant to the agreement, over a period of three years.

[19] If the abovestated principle is applied to the instant case, it may properly be held that, depending on the evidence about the actions of the parties, any uncertainty as to the location of the land or the location of the route for the lines had been resolved. In that regard, the omissions contained in the document were not grounds upon which the defence, filed by JPS, may have been struck out. There is evidence, contained in the affidavit of Miss Katherine Francis, on behalf of JPS, that pursuant to the agreement, JPS placed the towers and lines on the land. If there were any dispute in that regard, it would have been a matter for trial. The nature of the rights conferred by the document will now be considered.

The nature of the rights conferred by the document

(a) <u>Is the document an easement?</u>

[20] Although the document was entitled "Grant of Easement", it is beyond dispute that it does not constitute an easement. Reference to first principles, in the law

concerning easements, makes it clear that one of the four essential characteristics of an easement is that there must be a dominant tenement as well as a servient tenement (see **In re Ellenborough Park** [1956] Ch 131 at page 163). The dominant tenement may be defined as the land, in respect of which, the right claimed over the servient tenement, must be connected. There is no doubt that this element is absent from the agreement in the instant case. JPS had no connection to any land, which may be considered a dominant tenement, for the purposes of its agreement with Mr Melville.

(b) Does the document create an interest in land?

[21] By reference to similarly basic principles, the document does not create an interest in land. Exclusive possession, for a term, at a rent, are said to be the three hallmarks that distinguish a tenancy from a licence (see **Street v Mountford** [1985] AC 809. In **Street v Mountford**, Lord Templeman at page 827 expressly approved the following quotation from the judgement in **Radaich v Smith** (1959) 101 CLR 209 at page 222:

> "What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? **By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant**." (Emphasis supplied)

There is nothing in the document which suggests that JPS had exclusive possession of any part of the subject land. For that reason, and based on the abovestated law, it had no interest in the land; it was granted a licence by Mr Melville.

(c) Is the document more than a contractual licence?

[22] Mr Foster QC, appearing for JPS, readily accepted the absence of the essential element of a dominant tenancy. He, however, sought to construe the agreement between Mr Melville and JPS, which, he submitted, "was more than a mere contractual licence". Learned Queen's Counsel argued that the nature of the equipment, placed on the land, made it clear that the agreement was intended to transcend "the uncertainties of the death of an owner or the uncertainties of a sale or the views of a successor owner". JPS, he submitted, could not be expected to have to "pull up stumps" each time there was a new owner.

[23] There is statutory support for Mr Foster's view. Section 41 of the Electric Lighting Act allows for an undertaker, as defined in the statute, in this case, JPS, to enter into an agreement with a landowner to allow the undertaker to enter on land and to place, thereon, lines, posts and such other apparatus needed for carrying out the undertaking. Importantly, however, the section allows the agreement to bind the landowner's successors in title.

[24] It is important to note, however, that the Electric Lighting Act does not characterise the agreement, so reached, as an easement. Section 41 refers to such an agreement as a "wayleave agreement". It is also important to note that section 41(2)

allows the undertaker to have the wayleave agreement registered on the title for the land. The subsection also stipulates that the wayleave agreement, once registered, would represent "an encumbrance affecting the registered title of the land, and the provisions of the [Registration of Titles Act] shall have effect accordingly". The difference between Mr Foster's stance and that of the Electric Lighting Act is that the Act requires the document to have been registered before it would have the effect that Mr Foster contends that the instant agreement possesses.

[25] In the absence of registration, the tenets of the system of registration of land, pursuant to the Torrens system, upon which the Registration of Titles Act is based, must apply. The essential principle that is relevant for these purposes, is that a person dealing with the registered proprietor is, normally, only bound by that which appears on the face of the registered title. That principle can be extracted from the decision of their Lordships in the Privy Council in **Gardener and Another v Lewis** (1998) 53 WIR 236 at page 239 c – f. A number of sections of the Registration of Titles Act exemplify the position. The first is section 63 which prevents any instrument, until registered, from passing any estate in registered land:

> "63. When land has been brought under the operation of this Act, **no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land**, or to render such land liable to any mortgage or charge; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the

same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title." (Emphasis supplied)

The second is section 68, which alludes to the indefeasibility of a registered title:

> "68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, **be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power**." (Emphasis supplied)

The third is section 70, which speaks to the title, mirroring the interests in the land:

> "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, **the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever,** except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:..." (Emphasis supplied)

The fourth section is section 71 which addresses the protection of persons dealing with the registered proprietor:

> "71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, **or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding**; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." (Emphasis supplied)

[26] These sections of the Registration of Titles Act demonstrate firstly, that JPS, by virtue of failing to register the document on the certificate of title to Mr Melville's land, failed to secure any interest or right in respect of that land, which, by itself, could bind any person other than Mr Melville. The second significant element contained, especially in section 68, is Ms Samuels' status as registered proprietor. The agreement with Mr Melville remained a personal contract and did not, by itself, bind any person succeeding Mr Melville. Authority for this finding may be found in **Barclays Bank v Administrator General for Jamaica and Another** (1973) 12 JLR 1223.

[27] The issue of notice is the next relevant matter to be considered.

The effect of notice

[28] In the context of notice, but by way of passing reference only, it is noted that Mrs Hermine Melville was apparently the witness to Mr Melville's signature on the document. Whether or not the document fixed Mrs Melville with notice of JPS' rights on the property was not argued before us. The matter of notice to Ms Samuels is more relevant to the issues to be resolved in the instant case. As was mentioned in the introduction to this judgment, Ms Samuels had notice, before she concluded the purchase, that JPS had its equipment on the land that she had agreed to buy. Whereas the document containing the terms of the agreement between Mr Melville and JPS was not, by itself, binding on her, the fact that she had notice of the presence of JPS' equipment may be of significance in determining the issues joined between the parties.

[29] Since the document was not binding on her and section 71 of the Registration of Titles Act, cited above, makes it clear that notice of an unregistered interest, by itself, will not affect the interest of any person taking a transfer from a registered proprietor, what then could bind a transferee such as Ms Samuels?

[30] The law relevant to the answer to that question has not been without uncertainty and may still be in a state of evolution. It commenced with the strict orthodox position that a bare contractual licence could not be binding upon the licensor's successors in title, even if the successor had notice of the licence (see **King v David Allen & Sons, Billposting Ltd** [1916] 2 AC 54). The law then moved, under the guidance of Lord Denning MR, to the position where a contractual licence was held to have created an equitable interest in the subject land, which interest would bind all persons succeeding

the licensor, except a *bona fide* purchaser for value without notice (see **Errington v Errington and Woods** [1952] 1 KB 290 and **Inwards v Baker** [1965] 1 All ER 446). The equitable interest stance, although dogged by controversy, was applied in this jurisdiction in **Bourke v Roberts** (1980) 17 JLR 6 and in **Trenchfield v Leslie** (1994) 31 JLR 497. Neither of these local cases involved registered land.

[31] The evolution of the law continued with the attachment of the concept of a constructive trust to the contractual licence. This concept is exemplified in **Binions v Evans** [1972] Ch 359. In that case the purchaser from the licensor agreed in writing to take the property subject to the contractual licence and paid a reduced price on that account. The court held that the purchaser was a constructive trustee for the licensee.

[32] In recent years there has been a shift back to the strict orthodox position but with the caveat that the person taking title may be bound by a contractual licence if his conscience is bound. The English Court of Appeal, in **Ashburn Anstalt v Arnold and Another** [1989] Ch 1, after a comprehensive review of the relevant authorities, ruled that certain principles enunciated in **Errington v Errington** were made without reference to relevant authorities. Although **Ashburn Anstalt** was, itself, found to have been wrongly decided on the separate question of whether a tenancy had been created in the circumstances of that case (see **Prudential Assurance Co Ltd v London Residuary Body and Others** [1992] 3 All ER 504), the alternative analysis by the court, dealing with contractual licences, has survived. During the latter analysis, Fox LJ expressed himself thus:

> "The far-reaching statement of principle in **Errington** was not supported by authority, not necessary for the decision of the case and *per incuriam* in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different ratio. Of course, the law must be free to develop. But as a response to problems which had arisen, the **Errington** rule (without more) was neither practically necessary nor theoretically convincing. By contrast, the finding on appropriate facts of a constructive trust may well be regarded as a beneficial adaptation of old rules to new situations." (page 22C – D)

[33] The court held that a mere contractual licence to occupy land was not binding on a purchaser even though the purchaser had notice of the licence. It went on to state, however, that appropriate facts might give rise to a constructive trust. A constructive trust would only be imposed if the court were satisfied that the conscience of the new owner had been affected so that it would be inequitable to allow him to deny the licensee an interest. Fox LJ said at page 25H – 26B:

> "The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected. The mere fact that that land is expressed to be conveyed "subject to" a contract does not necessarily imply that the grantee is to be under an obligation, not otherwise existing, to give effect to the provisions of the contract. The fact that the conveyance is expressed to be subject to the contract may often, for the reasons indicated by Dillon J. [in **Lyus v Prowsa Developments Ltd** [1982] 1 WLR 1044], be at least as consistent with an intention merely to protect the grantor against claims by the grantee as an intention to impose an obligation on the grantee. The words "subject to" will, of course, impose notice. **But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter.** Thus, mere notice of a restrictive covenant is not enough to impose upon the estate owner an obligation or equity to give effect

to it: **London County Council v. Allen** [1914] 3 K.B. 642."
(Emphasis supplied)

[34] A line of cases, decided after **Ashburn Anstalt**, was assessed by the English Court of Appeal in **Chaudhary v Yavuz** [2012] 2 All ER 418. In **Chaudhary v Yavuz**, Mr Chaudhary and his neighbour, called "Mr Vijay", owners of two adjoining parcels of land, agreed that Mr Chaudhary would construct a staircase on a portion of Mr Vijay's registered land. The portion of land was a small alley and it lay between and butted upon, the buildings on each property.

[35] The staircase as agreed upon, designed and built, led to the upper floors of both properties and was used by the occupants of those floors. There was no other means by which those floors could be accessed. Mr Chaudhary did not seek to register any interest against Mr Vijay's registered title and although Mr Chaudhary, belatedly, sought to reduce the terms of the agreement into writing, Mr Vijay did not sign the document. Mr Vijay, thereafter, sold his property. Although the staircase was discoverable on an inspection of the property, the new owner, Mr Yavuz, some time after purchasing the property, cut off the portion of the staircase that led to Mr Chaudhary's building. Mr Chaudhary brought proceedings for a declaration, damages and an injunction.

[36] It was held that Mr Yavuz was not bound by the terms of the agreement between Mr Chaudhary and Mr Vijay. Firstly, the court held, there was no specific reference to the agreement in the contract between Mr Vijay and Mr Yavuz that could bind Mr Yavuz. Secondly, it held that there was no actual occupation of the staircase which could qualify as an overriding interest incorporated in the contract. Thirdly, it

could not be said, the court held, that Mr Yavuz's conscience could be bound by the terms of the agreement between Mr Chaudhary and Mr Yavuz.

[37] In deciding whether a purchaser's conscience would be affected, the Court of Appeal stated that the crucial question was whether the purchaser had undertaken a new obligation, to give effect to the prior interest. The court, at pages 434–435, approved the following as the relevant legal principles:

> "(1) Even in a case where, on a sale of land, the vendor has stipulated that the sale shall be subject to stated possible incumbrances or prior interests, there is no general rule that the court will impose a constructive trust on the purchaser to give effect to them.
>
> (2) The court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property …
>
> (3) **In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed** …
>
> [(4) Notwithstanding some previous authority suggesting the contrary, a contractual licence is not to be treated as creating a proprietary interest in land so as to bind third parties who acquire the land with notice of it, on this account alone: see **Ashburn Anstalt v Arnold** (supra) at pp 15H and 24D.]
>
> (5) Proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the relevant incumbrance or prior interest may provide some indication that the transferee has undertaken a new obligation to give effect to it: see **Ashburn Anstalt v. Arnold**…However, since in matters relating to the title to

> land certainty is of prime importance, it is not desirable that constructive trusts of land should be imposed in reliance on inferences from 'slender materials'…" (Emphasis supplied)

[38] On the general principle concerning notice in the context of registered land, their Lordships, at paragraph 66, quoted with approval from paragraph 8.2.24 of Gray and Gray, Elements of Land Law (5th edn, 2009), as follows:

> "**It is a standard feature of land registration the world over that a disponee's mere knowledge of a protectable, but unprotected, interest does not normally affect the title derived from registration**. This reluctance to allow the traditional doctrine of notice to intrude upon registers of title lies deeply embedded in the origins of the Land Register and has persisted to the present day. As Cross J observed in [**Strand Securities Ltd v Caswell** [1964] 2 All ER 956 at 965, [1965] Ch 373 at 390], it is 'vital to the working of the land registration system that notice of something which is not on the register should not affect a transferee unless it is an overriding interest'. **Title registration is intended to mark a 'complete break' from the equitable rules which formerly governed land law priorities.** In consequence there has been a general rejection, no less so in England than elsewhere, of any temptation to qualify the system of title registration by the importation of an equitable doctrine alien to its central purpose." (Emphasis supplied)

[39] Based on the above, a contractual licence does not bind a successor in title under English law, even if that party has previous notice of the interest, unless that party has undertaken some new obligation to give effect to the licence. There seems to be no difference in the current position, in the context of land under the Torrens system of registration, such as exists in Jamaica. This is exemplified by the case of **Hampson v Hampson** [2010] NSWCA 359, a decision of the New South Wales Court of Appeal.

[40] In **Hampson**, Glen Hampson brought proceedings against the executor of his late mother's estate, claiming, among other things, that he was entitled to a parcel of registered land forming part of the estate, by virtue of a proprietary estoppel. His pleadings revealed that he was relying on promises made to him by his late father, who was the mother's predecessor in title to the land. The promise, Glen stated, was that if he lived on the land and improved a cottage thereon, the land would have been transferred to him. He alleged that he relied on this promise and acted to his detriment in so doing. The father, however, willed the land to the mother but affirmed to Glen that the land would be transferred to him after the mother's death.

[41] After his father's death, Glen continued to occupy the property with the approval and acquiescence of his mother. He did not assert, however, that the mother ever made any promise or assurance to him that he would become the owner of the property.

[42] The New South Wales Court of Appeal, in rejecting Glen's claim ruled that "it was only by establishing that the [mother] was subject to a personal equity that the proprietary estoppel claim could succeed". It accepted the following as a correct statement of the law in the circumstances:

> "It is not enough that a party claiming, as Glen does, an equitable interest or an equity in [the land] should establish some entitlement against [the father] and his estate; it is necessary to establish a personal equity enforceable in her lifetime against [the mother] as registered proprietor."

There was nothing that could have bound the mother, either to the father's promise or by way of any fresh promise, made in her own right.

[43] Is the situation any different with registered land in Jamaica? I have found no case which establishes any difference in this jurisdiction in respect of the law pertaining to licences and equitable estoppel. Mr Foster sought, however, to establish a distinction. He prayed in aid of his submissions, the case of **Life of Jamaica Ltd v Broadway Import and Export Ltd and Another** (1997) 34 JLR 526. In that case, a company, which had entered into a contract to purchase land that was in open occupation by a tenant, had the contract relegated behind an option to purchase, which the tenant had in respect of the property. This court held that the tenant's occupation was constructive notice to the purchaser of the tenant's interest in the land.

[44] The **Life of Jamaica** case may be distinguished from the principle concerning contractual licences on the basis that, in **Life of Jamaica**, the tenant had an interest in the land, in the form of a lease.

The analysis

[45] The court may grant summary judgment to a claimant if it considers that "the defendant has no real prospect of successfully defending the claim or the issue (see rule 15.2 of the Civil Procedure Rules 2002 (the CPR)).

[46] The analysis of the instant case must be made in the context of the established principle that summary judgment, although a discretionary power, should only be granted "where there is no valid defence to the claim" or, put another way, where the defence has "no real prospect of success" (see page 6 of **Stewart and Others v Samuels** SCCA No 02/2005 (delivered 18 November 2005)).

[47] From an appellate point of view, it should be borne in mind that this court will not lightly interfere with the exercise of the discretion given to the judge at first instance. In **Jamaica Citizens Bank Ltd v Yap** (1994) 31 JLR 42, at page 51C, Rattray P highlighted the portion of Lord Diplock's speech in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 at page 1046b, which identified the limited circumstances in which an appellate court would exercise an independent discretion. These include "the ground that [the exercise of the discretion of the judge at first instance] was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist…" (page 1046c).

[48] This principle was reiterated in the context of the CPR. In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 2, Morrison JA, with whom the rest of the court agreed, reiterated the principle that an appellate court may exercise an independent discretion in limited circumstances only. He also quoted from Lord Diplock's judgment in **Hadmor Productions**.

[49] The foregoing outline of the law in relation to licences, and the manner by which a licensor's successor in title will be bound, demonstrates that Ms Samuels will not be bound by the agreement between Mr Melville and JPS, on the mere basis of JPS' presence on the land when she purchased it. JPS has not pleaded any factor that would indicate that Ms Samuels accepted any new obligation whereby her conscience would be so bound as to prevent her from exercising her rights of ownership against

JPS. It is important to note that she did not purchase from Mr Melville but from Mr Melville's successor in title. Based on these factors, I agree with the finding of Williams J that Ms Samuels is not bound by the contractual licence or any equitable estoppel.

[50] It is important for the purposes of this aspect of the analysis to note that the transfer to Ms Samuels had been effected, unlike the situation in **Life of Jamaica**, where the registration of the transfer had been prevented by the grant of an injunction. In the instant case, Ms Samuels is the registered proprietor and there is no encumbrance registered against her title. There is, however, another aspect to JPS' presence on the land.

Is JPS a trespasser?

[51] Although Ms Samuels is not bound by Mr Melville's agreement with JPS, there remains the question of whether JPS is a trespasser on the land. Williams J, as a result of his finding that she was not so bound, declared that JPS' "actions in erecting and maintaining [its equipment on the land] constitute a trespass to the claimant's said land and such trespass is not justified by law". He thereafter granted Ms Samuels permission to proceed to assessment of damages for the trespass.

[52] It may, at first blush, seem surprising to say that JPS was a trespasser. This is especially so since JPS already had its equipment on the land when Ms Samuels purchased the land and could not have properly been considered a trespasser before Ms Samuels became the registered proprietor. It was not a trespasser when Mr Melville

was the owner of the land. Neither has it been shown that Mrs Melville objected to the presence of its equipment on the land.

[53] Despite the impression that the factual position may indicate, the authorities do not support JPS on the issue of whether it is a trespasser.

[54] Trespass to land has been defined as "any unjustifiable intrusion by one person upon land in the possession of another" (see Clerk and Lindsell on Torts 19th ed paragraph 19.01). Trespass may, however, as the cases which will be discussed below establish, also result from a continued presence on land without authority.

[55] In **Wallis v Harrison** (1838) 4 M. & W. 538; 150 ER 1543; [1835 – 1842] All ER Rep 284, the court held that the conveyance of a parcel of land terminated a licence granted in respect of that land. Parke B stated at page 544 of the firstmentioned report:

> "…if the owner of land grants to another a licence to go over or do any act upon his close, and then conveys away that close, there is an end to the licence; for it is an authority only with respect to the soil of the grantor, and if the close ceases to be his soil, the authority is instantly gone."

[56] The case is authority for the principle that notice to the licencee of the end of his licence is not required. The headnote of that case accurately encapsulates the judgments of their Lordships. It states:

> "A parol license from A. to B. to enjoy an easement over A.'s land, is countermandable at any time whilst it remains executory; and **if A. conveys the land to another, the license is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he**

> **afterwards enters upon the land**. When the profert of a deed is requisite, it is not sufficient to allege as an excuse, 'that the deed was delivered to the opposite party'." (Emphasis supplied)

[57] Similar reasoning was applied in **Thompson v Earthy** [1951] 2 All ER 235. In that case, a husband who was the freehold owner of premises, agreed to let his estranged wife and children live at the premises rent-free. He later conveyed the premises to the plaintiff who thereupon sought possession of it from the wife. The court held that the wife "had no legal or equitable interest in the premises which ran with the premises and were [sic] capable of binding them in the hands of a purchaser, and, therefore [the wife] was a trespasser" (see headnote). Roxburgh J, after analysing the status of the wife, found that her status, as wife, had no relevance to the case. This was because the plaintiff was not the husband but a purchaser from the husband. He concluded at page 237 D:

> "The plaintiff has proved her title to the land. The [wife] has proved no estate or interest, legal or equitable, in the land, and, accordingly, she is a trespasser, and I must order her to deliver up possession to the plaintiff."

The decision was approved by the House of Lords in **National Provincial Bank, Ltd v Ainsworth** [1965] 2 All ER 472.

[58] Based on these authorities, it seems that despite its presence on the land prior to the transfer to Ms Samuels, JPS' licence was terminated immediately upon that transfer to her. It thereupon became a trespasser and Ms Samuels became entitled to possession. The time at which JPS became a trespasser is relevant to the issue of the damages to be awarded. This issue will be discussed next.

The assessment of damages

[59] There is need to comment on Ms Samuels' case, as pleaded, in the context of the assessment of damages.

[60] In giving permission for damages to be assessed, Williams J did not specify a period for which damages would be recoverable. His speaking to the "actions in erecting and maintaining" the equipment, could, however, give the impression that damages could be recovered from the time of erection. This is so despite the fact that Ms Samuels only became the owner some time afterward. Ms Samuels, in fact, had stated at paragraph 4 of her particulars of claim that JPS had "[i]n or about the year 1996…trespassed upon [her] property", although she had earlier averred that she purchased the property in the year 2006.

[61] As mentioned above, however, since JPS already had its equipment on the land when Ms Samuels purchased the land, JPS could not have properly been considered a trespasser before she became the registered proprietor. It was not a trespasser when Mr Melville was the owner of the land. Neither has it been shown that Mrs Melville objected to the presence of its equipment on the land.

[62] The assessment of damages must, therefore, consider the date at which JPS became a trespasser.

[63] Subject to the consideration of the date on which the trespass commenced, I find that the decision of Williams J is correct and should not be disturbed.

The effect of the Electric Lighting Act

[64] I confess, however, that the decision rests uneasily with me. I am convinced that Mr Foster is correct when he submitted that public utilities should have an entitlement that transcends the uncertainties and transience associated with ownership of interests in land. I am therefore concerned that the decision below ignored sections 2 and 36 through 42 of the Electric Lighting Act. To be fair to the learned judge, however, it does not appear that the impact of these provisions was argued before him. They certainly were not pleaded and it is possible that they may not have been able to alter the decision to which the court could properly come. These provisions show, however, the intention of the legislature that there should be some permanence to structures by which public utilities provide their services.

[65] Section 2 of the Act incorporates all the provisions of the Lands Clauses Act. That Act authorises the purchase or taking of lands for use in authorised undertakings. In summary, sections 36 through 42 of the Electric Lighting Act allow an undertaker to place equipment on land, in accordance with its licence. The undertaker is, however, required to compensate the landowner for the imposition. There is provision also that the landowner may request the removal or relocation of the equipment.

[66] It is critical to note that if the landowner and the undertaker fail to arrive at an agreement, concerning either compensation or presence, the Act provides a remedy. If there is a dispute as to the amount of compensation, the dispute "shall be referred to arbitration and the provisions of the Arbitration Act shall accordingly apply" (section

42). (An example of a dispute concerning compensation in respect of the acquisition of lands for an electricity undertaking is **West Midlands Joint Electricity Authority v Pitt and Others** [1932] 2 KB 1.)

[67] If an undertaker fails to remove equipment when required, the landowner "may refer the matter to the [relevant minister of government] and the provisions of section 44 shall accordingly apply" (section 40(2)). Section 44 of the Act speaks to the Minister establishing a commission to inquire into the matter.

[68] Section 40(2) could possibly (I put it no higher), therefore, be used to assert that the continued presence by JPS could only be considered a trespass if Ms Samuels had demanded the removal of the equipment and JPS had failed or refused to accede to the demand. Nowhere in her particulars of claim or in her affidavit in support of the application for summary judgment, has Ms Samuels stated that she demanded the removal of the equipment. An example of the result of an authority refusing to remove equipment when requested by the landowner is **Welford and Others v EDF Energy Networks (LPN) plc** [2006] 3 EGLR 165. In that case, the introductory paragraph describes a fact situation which is similar to the instant case. It states:

> "The reference in this case concerns a number of underground electricity cables vested in EDF Energy Networks (LPN) plc (EDF) as licensed distributor of electricity under the Electricity Act 1989...They have existed for many years, and cross a site (site A)…that the first and second claimants bought at auction in 1994…When [the claimants] bought the land, they were unaware of the presence of the cables. They were notified of the presence of the cables in July 1995 and, on 12 September 1995, they gave notice to EDF's predecessor, London Electricity plc, to remove them. London Electricity applied for statutory wayleaves for the

> retention of the cables and, following a hearing in November 1997, these were granted on 17 August 1998."

Unlike JPS, the public utility in that case, after being requested to remove its equipment, applied for a wayleave.

[69] These provisions are important to the stability of a public utility. They should be considered in determining whether equipment, necessary for the supply of the commodity to the public, should be removed. Despite the existence of these provisions, which could have addressed JPS' status on the land, JPS did not pray any of them in aid when it set out its defence. It is not within the remit of this court to disturb the decision of Williams J based on matters that were not before him.

Conclusion

[70] The document by which JPS entered the land at Rhymesbury, was a contractual licence which, neither at common law nor in equity, bound the licensor's successors in title. JPS did not register the document on the registered title as it was entitled to do during the licensor's lifetime and therefore failed to secure the benefit of the provisions of section 41 of the Electric Lighting Act, which allowed its licence to be so registered.

[71] JPS' contractual licence ceased immediately upon the land having been transferred to Ms Samuels and it became a trespasser upon that event occurring. Ms Samuels is entitled to possession in the absence of JPS relying on any of the provisions of the Electric Lighting Act.

[72] In the circumstances the defence, as pleaded, had no chance of success, the summary judgment must be upheld and the matter proceed to assessment of damages, taking into account the date on which Ms Samuels became entitled to possession. I would therefore dismiss the appeal and award costs, to be taxed if not agreed, to Ms Samuels.

HARRIS JA

ORDER

1) The appeal is dismissed.

2) The judgment of Williams J (Ag) is affirmed.

3) Costs to the respondent to be taxed if not agreed.