[2012] JMSC Civ. 118

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012 HCV 03053

IN THE MATTER OF ALL THAT parcel of land part of Hugh Wilson's Patent in the Parish of Westmoreland comprised in Certificate of Title registered at Volume 947 Folio 55 of the Register Book of Titles.

AND

IN THE MATTER of the **LIMITATION OF ACTIONS ACT**

BETWEEN	**RALPH WILLIAMS**	**1ST CLAIMANT**
AND	**MARC WILLIAMS**	**2ND CLAIMANT**
AND	**KUYABA NEGRIL LIMITED**	**3RD CLAIMANT**
AND	**THE COMMISSIONER OF LANDS**	**1ST DEFENDANT**
AND	**TIMES SQUARE WEST HOLDINGS LIMITED**	**2ND DEFENDANT**

Mr. Conrad George and Ms. Kimone Tennant instructed by Hart Muirhead Fatta, Attorneys-at-Law for the Claimants.

Ms. Althea Jarrett instructed by the Director of State Proceedings, Attorney-at-Law for the 1st Defendant.

Mr. Walter Scott Q.C. and Ms. Anna Gracie instructed by Rattray Patterson Rattray, Attorneys-at-Law for the 2nd Defendant.

Heard: 12 July, 23 August 2012

INTERLOCUTORY INJUNCTION – ADVERSE POSSESSION CLAIM – REGISTERED LAND – SECTIONS 3, 4(a), 30 AND 38 OF THE LIMITATION OF ACTIONS ACT SECTIONS 68, 69, 70, 71, 85 - 87, AND

161 OF THE REGISTRATION OF TITLES ACT – REMEDIES – INTERIM DECLARATION AGAINST THE CROWN – SECTION 16 OF THE CROWN PROCEEDINGS ACT

IN CHAMBERS

MANGATAL J

[1] The 1st and 2nd Claimants, Ralph and Marc Williams, are the sole shareholders and are directors of the 3rd Claimant Kuyaba Negril Limited.

[2] Kuyaba Negril Limited is a limited liability company with registered offices at Norman Manley Boulevard, Negril, in the Parish of Westmoreland. Kuyaba Negril Limited owns and operates the Kuyaba Hotel.

[3] The Claimants claim that they occupy land more particularly described by way of a plan annexed to the Particulars of Claim as Annexure 1 “the Land”.

[4] The 1st Defendant is a corporation sole established by virtue of section 3 of the Crown Property (Vesting) Act. By virtue of section 4 of that Act, all lands for the use of the Government of Jamaica other than lands acquired by the Minister of Housing are vested in the Commissioner of Lands and held by her and her Successors in trust for the Crown. The 1st Defendant is the registered owner of land registered at Volume 947 Folio 55 of the Register Book of Titles “the registered land”, this land having been transferred to her in 1983 from Trade Wind Properties Limited, (erroneously referred to in the Particulars of Claim as Trade Wind Resorts Limited, a former mortgagee), for a consideration stated on the Certificate of Title as being five hundred and forty eight thousand two hundred and four dollars, “for this and two others”.

[5] The Land occupied by the Claimants is part of the registered land.

[6] The 2nd Defendant Times Square West Holdings Limited was granted a lease of a portion of the registered land by a written lease agreement commencing on the 1st of February 2012. The leased land includes a portion of the Land.

[7] On the 4th April 2012, the 1st Defendant served a Notice on the Claimants headed “Notice to Quit Illegally Occupied Government Lands”, requiring the Claimants to cease occupation, vacate and deliver up possession of, and remove any fencing and/ or temporary structures erected on, “land part of Negril in the Parish of Westmoreland” on or before the 2nd of June 2012.

THE APPLICATION

[8] Although the Notice of Application for Court Orders filed June 1 2012, does not expressly say that the relief sought is until trial, this was clearly the basis upon which the application was argued and contested. The application seeks the following until trial:

1. an injunction restraining the 1st Defendant from enforcing the terms of Notice to Quit Illegally Occupied Government Lands dated April 4, 2012 (“the Notice”),...
2. an injunction restraining the Defendants and/or agents of each or either of them from coming onto or otherwise trespassing upon or taking any steps whatsoever to remove the Claimants and/or any of them from the land occupied by the Claimants as depicted in the Plan at Annexure 2 (“the Land”).

[9] On the 1st of June 2012 the application came before me ex parte, at which time I granted the application as sought until the 12th of June 2012, the date fixed for further consideration inter partes. On the 12th of June, the Defendants were not yet in a position to proceed. I ordered the Fixed Date Claim Form by which the claim was initially commenced to continue as if begun by Claim Form since I was of the view that given the nature of the claim, and the fact that there may be significant disputes as to fact, a Claim Form was the more appropriate procedure. I also ordered the filing of

Statements of Case by all of the parties. The injunction first granted on the 1st of June was extended until the 12th of July, 2012, the new date fixed for hearing.

[10] On the 12th of June, Counsel who appeared for the 1st Defendant Ms. Jarrett, had not opposed the extension of the injunction. However, by the 12th of July, having completed her research and taken full instructions, Counsel indicated that she was in fact opposing the injunction. One of the bases for that opposition was that it was submitted that if the relief sought against the 1st Defendant was ordered, it would amount to an injunction against the Crown and that the Court is prohibited by section 16(2) of the Crown Proceedings Act from granting an injunction against the Crown. It was submitted that the 1st Defendant, the Commissioner of Lands, holds the registered land not in her personal capacity, but rather as servant or agent of the Crown, and reliance was placed upon the Court of Appeal's decision in **Brady & Chen Ltd. v. Devon House Development Ltd.**, [2010] JMCA Civ 33, S.C.C.A. No. 62/2009, delivered 30 July 2010.

[11] In response, prior to the commencement of the hearing in July, Mr. George stated that he would not be taking issue with Ms. Jarrett on that aspect of her submissions, but would instead be seeking to have the Court make an interim declaration pursuant to Rule 17.1(1)(b) of the Civil Procedure Rules 2002 "the CPR".

[12] On the 12th of July the application for the interim injunction was heard by me, at which time I reserved my decision until the 23rd of August 2012. I extended the injunction granted against the 2nd Defendant until the 23rd of August and the 1st Defendant gave an undertaking until the same date, in terms similar to the interim injunction order granted previously.

THE CLAIMANT'S CASE

[13] It is the Claimants' case that the 1st and 2nd Claimants, Ralph and Marc Williams' father, Israel Williams, first began occupying the Land in 1967-see Particulars of Claim. (Mr. Ralph Williams' Affidavit filed June 1 2012, says 1965, and not 1967).

The senior Mr. Williams built ecosystems and a wild life sanctuary, and conducted extensive landscaping which led to many mature trees growing and being to this date located on the Land. The Claimants state that since 1967(1965) they have been enjoying the occupied land as a recreational park and garden.

[14] In 1970, the 1st and 2nd Claimants began operating a small boutique hotel called “Sea Gem” which was subsequently renamed “Kuyaba Hotel” (“the Hotel”). The Land, it is alleged, has since 1970 been used as a part of the amenities of Sea Gem, and subsequently, the Hotel.

[15] The Claimants aver that they have continuously improved on the landscape of the property, fenced the section they occupied and built permanent structures, including concrete platforms, a barbeque area with a gazebo, a laundry building and a storage unit. Photographs showing the landscape and these structures were exhibited.

[16] It is the Claimants’ case that they have enjoyed uninterrupted use of the Land since 1967(1965). Accordingly, that since 1979 (1977) (12 years after first entering into possession), the Claimants have been in adverse possession thereof, extinguishing the title of the then owners Trade Wind Properties Limited, a private company, insofar as such title related to the Land.

[17] The Claimants allege, that pursuant to sections 3, 4(a) and 30 of the Limitation of Actions Act, the Defendants are restrained from making entry onto the Land, or bringing any action or suit for its recovery, the right and title of the 1st Defendant to it having been extinguished.

[18] The Claimants consequently claim that they are entitled to be registered as proprietors of the Land.

[19] In the Particulars of Claim, the Claimants claim as follows:

1. A declaration that the Claimants have an absolute possessory title over the Land occupied by them as depicted in the plan attached at Annexure 1 ("the Land").
2. A declaration that the lease purportedly granted by the 1st Defendant to the 2nd Defendant is invalid and of no effect.
3. A declaration that neither of the Defendants has any rights over the Land whatsoever.
4. A permanent injunction restraining the Defendants and/or the agents of each or either of them from coming onto or otherwise trespassing upon or taking any steps whatsoever to remove the Claimants and/or any of them from the Land.

THE 1ST DEFENDANT'S CASE

[20] The 1st Defendant states that as registered proprietor of the registered land since 1983, she was entitled to and did grant a valid lease of 2,023.479 square metres of the registered land to the 2nd Defendant for a term of 10 years, commencing on February 1, 2012, at a rent of $250,000.00 per annum. The land was slated for use as a car park. The Leased Land is part of the Great Morass and the lease is subject to 11 conditions mandated by the Natural Resources Conservation Authority and which were incorporated as special conditions in the lease. The 1st Defendant admits that the Leased land includes a portion of the Land occupied by the Claimants.

[21] The 1st Defendant denies that the Claimants have any valid claim based upon a possessory title or adverse possession. She claims that as registered proprietor of the registered land she has an indefeasible title to the Land by virtue of sections 68, 70, 71 and 161 of the Registration of Titles Act. The 1st Defendant further says that in 1983, she was a purchaser for value of the registered land without notice of any entitlement by the Claimants to an estate therein and that even if she had notice of any unregistered interest that the Claimants may have had in the registered land, she would not be affected by such notice by virtue of the clear provisions of section 71 of the Registration of Titles Act.

[22] The 1st Defendant also relies upon section 38 of the Limitation Act and avers that time has not run against her as Commissioner of Lands in favour of the Claimants. By virtue of section 38, the 1st Defendant submits that the Claimants would have had to be in possession as against the 1st Defendant for a period of 60 years to succeed. The 1st Defendant further states that as the registered proprietor of the registered land, time in favour of the Claimants can only run against her and no one else.

THE SECOND DEFENDANT'S CASE

[23] The 2nd Defendant does not admit that the Claimants or any of them occupy the entire area demarcated in red on the Plan, the Land, and puts the Claimants to strict proof of that assertion.

[24] The 2nd Defendant is the registered owner and occupier of the lands comprised in Certificate of Title registered at Volume 1256 Folio 55 of the Register Book of Titles. By an Agreement for Sale dated October 2009, the 1st Defendant agreed to sell and the 2nd Defendant agreed to purchase 1,707.070 square metres of land adjacent to the lands owned by the 2nd Defendant. This parcel of land was valued at $2,000,000.00 and as at November 2009, the 2nd Defendant having paid the deposit and further payment, was placed in possession and occupation of the said 1,707.070 square metres.

[25] The 2nd Defendant avers that, as depicted in the sketch plan prepared by Ivor Stewart & Associates, part of the 2nd Defendant's building is constructed on the said 1,707.070 square metres, being the purchased land, and the area immediately behind the building was at all times used as the original parking lot.

[26] Subsequent to the acquisition of the purchased land, the 1st Defendant and the 2nd Defendant entered into a lease agreement to commence on the 1st February 2012 for a period of ten years in respect of 2,023.479 square metres of land adjacent to the purchased land. The lease provided that the Leased Land was to be marked out and used exclusively as a car park.

[27] The 2nd Defendant admits that the Leased Land includes a portion of the allegedly occupied Land.

[28] In its Defence, the 2nd Defendant avers that it and its servants and/or agents have from time to time entered upon the Leased Land. At no time during these visits did the Claimants attempt to prevent this entry except in April 2012.

[29] Further, the 2nd Defendant alleges that at no time were the 1st Defendant and/or their successors dispossessed of the 2,023.479 square metres of the land registered at Volume 947 Folio 55. The Claimants, the 2nd Defendant asserts, were at all times aware that they had not dispossessed the 1st Defendant and as a result sought the assistance of the Jamaica Environment Trust.

[30] By letter dated 20th April 2012, Messrs. Livingston Alexander & Levy wrote to the 2nd Defendant advising that that firm acted for the Claimants and further stated that "We understand that the land in question is owned by the Commissioner of Lands".

[31] The 2nd Defendant avers that by virtue of the Claimants' said letter, the Claimants were acknowledging that Mr. Israel Williams nurtured the property for everyone to enjoy, and not for the purpose of exercising possessory title and to dispossess the registered owner.

[32] The 2nd Defendant further avers that by Circular dated the 26th April 2012, the Claimants sent around a circular to all concerned regarding the precedent being set for the lease of the protected lands.

[33] The 2nd Defendant denies that the Claimants have acquired title by possession or that the 1st Defendant's right and title to the Land have been extinguished.

GUIDELINES FOR THE GRANT OF AN INTERIM INJUNCTION

[34] The guidelines for the grant of an interim injunction until trial (or interlocutory injunction), are set out in the oft-cited case of **American Cynamid Co. v. Ethicon Ltd.** [1975] 1 All E.R. 504, and more recently in the decision of the Judicial Committee of the Privy Council in **NCB v. Olint** [2009] J.C.P.C. 16. Basically, the following considerations arise:

(a) Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court should then go on to consider the balance of convenience generally.

(b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.

(c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.

(d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.

(e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.

(f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.

(g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if

all the court can form is a provisional view-see **NCB v. Olint**, and the well-known case of **Fellowes v. Fisher** [1975] 2 All E.R. 829. This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of **American Cynamid**, "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult points of law which call for detailed argument and mature considerations".

(h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.

[35] At the end of the day, in principle, what the court must try to do at this interlocutory stage is to adopt the course which seems likely to cause the least irremediable harm or prejudice, this exercise of necessity having to take place at a time when the court cannot be certain as to the final outcome of the matter.

IS THERE A SERIOUS ISSUE TO BE TRIED?

[36] In my judgment, there clearly are serious issues to be tried. Although the 2nd Defendant in its submissions correctly points out that there is a discrepancy as to the date when the possession by the Claimants through the father Israel Williams commenced, i.e. whether 1967 or 1965, the dates put forward are not so far apart as to cause me to find the evidence dubious. I am prepared to accept, for the purposes of deciding whether there are issues to be tried, that the Claimants are saying that they entered into possession somewhere in the period 1965-1967, and that at its latest, the 1967 date would mean that they had been in possession, on their case, continuously, for a period in excess of 12 years before the 1st Defendant became the registered owner of the Land in 1983. There may also be factual disputes between the parties as to whether the Claimants had the necessary intention to possess. In addition, in the 2nd Affidavit of Indrukumar Dadlani, one of the Directors of the 2nd Defendant, filed July 6 2012, the 2nd Defendant asserts that the Claimants have failed to tell the court

which of the many amenities and structures which they have described, and indeed provided photographs of, are located on the 2023 square metres of the Leased Land leased by the 2nd Defendant from the 1st Defendant for use as a parking lot. The 2nd Defendant alleges that the lands which the Claimants occupy, (having referred to the Affidavits of Ralph Williams, and the Affidavit of Grantley Kindness, commissioned land surveyor, filed on June 20 2012, exhibiting a surveyor's report of land registered at Volume 947 Folio 55), encompass approximately 3973 square metres, and this includes the lands leased to the 2nd Defendant. The 2nd Defendant avers that the following structures are not located upon the Leased Lands: (a) The gateway/gazebo access; (b) barbeque gazebo; (c) laundry building; (d) loading ramp; (e) cut stone fountain; (f) circular concrete platform; and (g) landscape garden. This has not been disputed by the Claimants. However, I do not attach too much importance to that allegation by the 2nd Defendant at this stage since the existence and vehicle of those structures is not the only basis upon which the Claimants assert their claim of possession and occupation. Indeed, the 1st Defendant admits in its Defence that the Claimants occupy the Land depicted in Annexure 1 to the Particulars of Claim, and further admits that the Leased Land includes a portion of the Occupied Land.

[37] In my judgment, therefore, there are serious issues to be tried, and the question of whether the Claimants can satisfy the criteria of a claim for adverse possession or title by possession is not frivolous or vexatious. In light of the authorities, it cannot be said at this stage that the material available to the court fails to disclose that the Claimants have any real prospect of succeeding in their claim for a permanent injunction at the trial, as against the 2nd Defendant.

[38] Though the main aspects of the question about adverse possession in this case essentially involve points of law, they are not capable of easy resolution. It appears to me that some of the issues involved in this case still need to be settled by a court at the highest level. These include the issue of whether (a) a registered title is extinguished on the expiry of the relevant limitation period; (b) whether a person who claims to have acquired title by possession during the time when another person was

the registered owner can now maintain that claim against a new registered owner to whom the registered land has been transferred and in respect of whose own period of being registered as owner the limitation period has not run anew (c) Can a claim to adverse possession/title by possession in those circumstances be maintained where the claimant has not applied to become the registered proprietor pursuant to section 85 of the Registration of Titles Act, or has not sought and obtained from the court a declaration of entitlement prior to the successor of the person “dispossessed” becoming registered as owner, or has not lodged a caveat in protection of his interest? In my judgment, these are legal matters requiring detailed argument and calling for mature consideration.

ADEQUACY OF DAMAGES AS A REMEDY FOR THE CLAIMANT

[39] The Claimants claim is that they have an absolute possessory title to the Land. They claim to have been in possession and enjoying this land and amenities added by them, for at least 45 years (since 1967). If the injunction is refused and the Defendants are not enjoined from commencing the building of the proposed parking lot, then the ecosystems, pond and mature trees and plants would be destroyed. The Claimants say that the Land is also a garden and is one of the major amenities offered by the Kuyaba Hotel. In those circumstances, it would seem plain that damages would not be an adequate remedy. I will therefore go on to consider the adequacy of damages for the Defendants.

ADEQUACY OF DAMAGES FOR THE DEFENDANTS

[40] Given that the 1st Defendant has granted a 10 year lease to the 2nd Defendant, at a rent of $250,000.00 per annum and subject to three yearly reviews, it seems plain that damages would provide an adequate remedy for the 1st Defendant and that those damages would not be terribly hard to quantify.

[41] As regards the 2nd Defendant, though it has averred that the parking that it presently has available for the Times Square Shopping Mall, without the Leased Land, is insufficient, it has not in its 2 Affidavits, said exactly how or what the nature of the

loss it might suffer would be if it is not entitled to exercise the terms of the lease pending trial. In any event, in my view damages would be an adequate remedy for the 2nd Defendant. The use of the lease and its implementation form part of its business and is therefore part of its income machinery. There is no evidence that not being able to implement the lease would affect the company the 2nd Defendant's overall ability to earn its livelihood or its viability adversely, or that its business will be ruined. It therefore boils down to a matter of monetary loss and as such, damages should not be found wanting as a remedy.

[42] Counsel for the Claimants cited the case of **Hubbard v. Pitt** [1976] Q.B.142, where the English Court of Appeal dismissed an appeal against the grant at first instance of an interlocutory injunction to the Claimants, estate agents, restraining the Defendants from picketing their offices. One of the points discussed was that the Claimants were likely to suffer irreparable damage, whereas the Defendants could picket elsewhere. In the instant case, it is also true that the Claimants' potential damage may be more irreparable based upon the nature of their claim of a proprietary interest based upon possession and present enjoyment and use of the specific piece of land, as opposed to the 2nd Defendant's intended use of the Leased Land as a Parking Lot to facilitate parking for its Shopping Mall, which Mall is located on a different piece of land owned by the 2nd Defendant.

[43] In my view, particularly having regard to the 2nd Affidavit of Ralph Williams, filed June 5 2012, the Claimants would be in a financial position to pay any damages found due to the 2nd Defendant. The Claimants appear quite able to fulfill their cross-undertaking in damages in the event that the 2nd Defendant were to succeed at trial in establishing its rights to do that which it is now sought to prevent it from doing.

THE BALANCE OF CONVENIENCE GENERALLY – THE STATUS QUO

[44] In **American Cynamid**, Lord Diplock at page 408 stated that where other factors appear to be evenly poised, it is a counsel of prudence to take measures calculated to maintain the status quo. The reason why it is a counsel of prudence is

because preservation of the status quo will normally, (but not always), cause less disruption, and all else being equal, less injustice. Said Lord Diplock of the rationale, "If the Defendant is enjoined from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial."

[45] The status quo has been described as generally being the state of affairs existing during the period immediately preceding the issue of the claim seeking a permanent injunction - **Garden Cottage Foods Limited v. Milk Marketing Board** [1984] 1 A.C. 130.

[46] In this case, immediately before the issue of the claim form, the Claimants were occupying and allegedly enjoying and using the Land in respect of which the injunction is sought. Although the 2nd Defendant has already paid the first year's rent in advance, it has not yet commenced using the Land as a parking Lot or as a turn bay for larger vehicles. Nor has it yet started the fencing off of the Leased Land for which it has obtained an estimate. Maintenance of the status quo in my judgment accordingly points quite heavily in the direction of granting the interim injunction.

OTHER ASPECTS OF THE BALANCE OF CONVENIENCE AND RELATIVE STRENGTH

[47] Initially, when I had perused this application, I had thought that given the points of law involved, I should proffer a provisional view of the legal position. This is particularly so since I have indeed, in my unreported decision in **Violet McFarlane & Others v. John and Kathleen Eugster** Consolidated Claims including Claim No. HCV 0144/2003, delivered 28th January 2011, and which has been referred to by Counsel for both Defendants, expressed views as to a number of the issues in this case. My views and decision in that case are supportive of the position taken by the Defendants rather than that of the Claimants. That decision was not appealed and thus none of our

higher courts have had an opportunity to examine the issues raised therein. However, in light of the fact that in the instant case I have formed the view that the extent of the uncompensatable disadvantages does differ quite substantially, and I find that in all of the circumstances to be weighed, the Claimants stand to suffer the more irremediable harm, I will refrain from analyzing and using the relative strength of the parties' cases as a factor tipping the scales in the balance of convenience. I have also taken into account what I perceive as a need for our higher courts to examine these very important issues in respect of this area of the law which can fairly be said to be difficult and problematic. There is a need for definitive pronouncements from our highest courts on this issue of title by possession which is becoming more and more topical and controversial. Indeed, in our Court of Appeal's decision in R.M.C.A. No. 10/2008, **Broadie and Broadie v. Allen**, delivered 3rd April 2009, cited by Mr. George, Harris J.A. at paragraph 19, referred to the leading House of Lords decision in **JA Pye (Oxford) Ltd. v. Graham** [2003] 1 A.C.419, by stating: "Lord Browne-Wilkinson in the case of (J.A. Pye)... acknowledged that the use of the term 'adverse possession' within the context of the Act has caused much perplexity over the years. It was his view that as far as practicable, the use of the term should be avoided, as the critical question is whether a defendant squatter, without the consent of the true owner, had dispossessed the owner by entering into ordinary possession of the land for the period prescribed by the Act."

[48] Suffice it to say that the following matters, amongst others, will be important in order to fully elucidate this matter at trial:

(a) Sections 3, 4 (a), 30 and 38 of the Limitation of Actions Act.

(b) Sections 68, 70, 71, 85, 87 and 161 of the Registration of Titles Act .

(c) The Privy Council's decision in **Chisholm v. Hall** [1959] A.C.719 which appears to support the Claimants' case more than that of the Defendants. However, it will have to be borne in mind that the factual scenario actually before the court in **Chisholm** is quite different from the facts considered by me in **McFarlane** or from those extant in the instant case. The Privy Council overruled the Jamaican Court of Appeal's

decision in **Goodison v. Williams** (1931) Clark's Rep. 349. However, the Privy Council in arriving at their ultimate decision, made no reference to what is now section 71 of the Registration of Titles Act which is relevant to the instant issues, and which appears to have been in existence, (or at any rate its equivalent was), at the time of the decision. Further, since **Chisholm**, the Registration of Titles Act has been amended, by the addition of sections 85, 86 and 87 dealing with "Title Acquired by Possession of Registered Land", providing for cancellation of an existing title, registration of title acquired by possession, and the procedure for effecting same. Such provisions may well arguably suggest, that no matter what may have been the law at the time when **Chisholm** was decided, it is now clear that in relation to a registered title, the limitation period does not result in extinguishment of the registered owner's title.

(d) The Court of Appeal's decision in R.M.C.A. No. 10/2008, **Broadie and Broadie v. Allen**, delivered 3rd April 2009 as well as a decision from Alberta, Canada, **Harris v. Keith** 1911 CarswellAlta 1, 3 Alta. L.R.222, 16 W.L.R. 433, cited by the Claimants.

(e) The unreported decision of Anderson J. in Suit No. C.L.2002 W 070, **Doig-Warner v. Lewis and Lewis**, decided April 7 2005, particularly as it relates to the issue of whether there is need to lodge a caveat pursuant to section 139 of the Registration of Titles Act in order to secure the protection available under section 140. Anderson J. referred to an article Caveatable Interests-The Common Lore Distinguished, in Murdoch University Law Journal 1993, Volume 1 No: 1, by Sandra Boyle, speaking about the Torrens System of land registration in Western Australia where the learned author wrote that ".....under a Torrens system a person who seeks to preserve an unregistered interest against a subsequent inconsistent dealing must at the very least, lodge a caveat to preserve and maintain it, or that interest will be extinguished...."

(f) The **McFarlane** case and the authorities and principles therein discussed.

[49] In the event that I am wrong in not taking the relative strength of the parties' cases into account on these points of law, I should state that my provisional view would be that the Defendants' case is more likely to succeed than that of the Claimants. If such a factor should be taken into account, (which as I have said, I think it should not), it would be a consideration pointing in the direction of the Defendants' posture and favouring the refusal of the injunction. However, I am only marginally of that provisional view. Since I cannot (because of the matters I have previously outlined as to the state of the law), state that I am highly persuaded to that view, I think that the other factors pointing towards granting the injunction in favour of the Claimants, particularly the adequacy of damages as a remedy for the Defendants, and the wisdom of preserving the status quo, would, when combined, in any event outweigh this factor of the relative strength of the cases.

[50] Queen's Counsel Mr. Scott raised what I consider to be capable of counting as an interesting special factor in this case. He argued that since an injunction cannot be ordered against the Crown and the 1st Defendant pursuant to section 16(2) of the Crown Proceedings Act, then an injunction ought not to be granted against the 2nd Defendant. This is because, Mr. Scott submitted, whilst in theory an injunction could be ordered against the 2nd Defendant, as the 2nd Defendant really takes its rights and powers in relation to the lease and the Land from the 1st Defendant, the injunction should not be ordered since in effect this would amount to an injunction restraining the 1st Defendant. I think that there is some merit in Mr. Scott's submission in that the question of whether to grant the injunctive relief against the 2nd Defendant involves, on the other side of the same coin, the issue of whether to grant an interim declaration against the 1st Defendant.

[51] Accordingly, I will now therefore turn to examine the issue of whether an interim declaration ought to be granted against the 1st Defendant.

INTERIM DECLARATION – WHETHER SHOULD BE GRANTED AGAINST THE 1ST DEFENDANT

[52] In relation to this issue, it should be noted that although the Claimants had filed written submissions, none of those arguments addressed this issue. Mr. George made this argument orally at the hearing and no authorities were cited on this aspect of the matter save for section 16(1)(a) of the Crown Proceedings Act. In that regard Mr. George submitted, that by virtue of that sub-section, the court is expressly given the power to make all such orders as it has power to make in relation to proceedings between subjects. Provided that where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court may in lieu make an order declaratory of the rights of the parties. (Mr. George's emphasis) Ms. Jarrett for her part, submitted that whilst the court has the power to make interim declarations against the Crown, and against the 1st Defendant, in this particular case, the interim declaration would amount to an injunction, and would be inappropriate since here it would be an interim declaration as to the rights of the parties, which are yet to be determined. (Ms. Jarrett's emphasis)

[53] Rule 17.1(1) (b) of the CPR provides that the Court may grant interim remedies, including an interim declaration. By virtue of an amendment to the Crown Proceedings Act in 2002, the CPR are incorporated into the Crown Proceedings Act. The CPR being incorporated into this Act constitute statutory authority empowering the court to grant interim declarations against the Crown-see the unreported decision of Marsh J. in Claim No. 2008 HCV 05710, **Caribbean Cement Co. Ltd. v. The AG et al**, delivered 16th July 2010.

[54] Interim declarations still fall into largely unexplored territory in this jurisdiction. Indeed, in the English jurisdiction, Lord Diplock in **International General Electric Company of New York v. Customs and Excise Commissioners** [1962] Ch. 784 at page 790 expressed the view that by its nature an interim declaration is really a contradiction in terms. See also Hale J. in **Re S (Hospital Patients) Courts Jurisdiction** [1995] Fam 26, where she stated that "it was axiomatic that there was no

such thing as an interim declaration." These statements appear to have been made at a time when there was not yet express statutory authority for making interim declarations. However, they nevertheless express some conceptual discomfort with the creature of an interim declaration which in my view to some extent still lingers. Interim declarations have not yet proven popular either with our courts or with Counsel in Jamaica.

[55] In the English decision of **R v. Ministry of Agriculture, Fisheries and Food** [2001] 1 C.M.L.R. 826, it appears to have been suggested that the courts will apply principles similar to those applicable to interim injunctions. At paragraph 49, it was stated that an interim declaration as to the legal position would have the same practical effect as an interim injunction, since the relevant Ministry could be expected to observe its terms. The court was reluctant to grant an interim declaration in that case because it would not maintain the status quo and might have led to confusion in relation to related final rights that were still pending and awaiting decision.

[56] In the **Caribbean Cement** case, Marsh J., in determining that there was no justification for setting aside an interim declaration which Morrison J. had made ex parte, rejected the argument of the respondents that the interim declarations amounted to final orders having the effect of determining the issues between the parties being sought in the substantive application. My learned brother Marsh J. at page 20 pointed out that the declarations being sought in the substantive hearing were different from the interim declarations granted to the applicant. At pages 19-20 Marsh J. quoted with approval from 'English Civil Procedure' page 1035 (per Neil Andrews), where it was stated:

> *"Interim declarations should be granted only where the claimant has a prima facie case ....when considering the balance of convenience test; relevant factors and the strength of the claimant's case and the respective detriment to the parties should the interim declaration be granted or denied."*

[57] I agree with Mr. George that the purpose of the Crown Proceedings Act and the provisions relevant to this issue is not to prevent remedies being had against the

Crown, but rather to ensure that the Crown and its servants or agents were not made subject to coercive orders or sanctions being imposed by the courts, the courts being themselves, Her Majesty's Courts, and where Her Majesty would therefore be herself the principal imposing these sanctions against the Crown. In my view therefore, when the Crown Proceedings Act was amended and incorporated the CPR, and hence Rule 17.1(1)(b), which empowers the court to grant an interim declaration, the principles upon which an interim declaration can be granted has a special meaning in relation to the Crown. It simply means that the court can grant an interim declaration against the Crown in circumstances in which it could have granted an interim injunction against a subject in proceedings between subjects. It does not mean that the court is concerned only or indeed at all, with declarations of final rights. It simply means that the court can make a declaration of the rights of the parties governing the interim situation and circumstances before trial. I see no difficulty in having declarations as to interim rights, as opposed to final or substantive rights. Rights can also be relative to each other. Granting such an interim declaration does not in my judgment in any way interfere with the court's duty and power of deciding on the final rights at the substantive hearing or trial. The matter may well have much to do with how carefully the terms of the interim declaration are fashioned. The terms must make it clear that what is being declared relates only to the rights of the parties in the interim before trial and prior to final disposition of the matter and the issues relevant at that final stage.

[58] In my view therefore I am entitled to examine the issue of whether an interim declaration should be granted against the 1st Defendant in the same way as I would have examined the question of whether an interim injunction should in the same circumstances be granted in proceedings had they been between Her Majesty's subjects. In my judgment, the same sort of issues as arise in considering the Claimants' application for an interim injunction against the 2nd Defendant, a subject, arise in considering the Claimants' application for an interim declaration against the 1st Defendant, the servant or agent of the Crown. In particular, in this case an interim declaration along the lines sought by the Claimants would assist in preserving the

status quo, which is one of the more common uses to which an interim declaration may be justly put.

[59] In all of the circumstances, it is appropriate to exercise my discretion in favour of the Claimants to grant an interim injunction against the 2nd Defendant and an interim declaration against the 1st Defendant. This is the course which in my judgment is likely to lead to the least irremediable harm or prejudice pending the final determination of the matter.

[60] I therefore grant the following orders upon the Claimants' undertaking to abide by any order that the court may make as to damages should the Defendants suffer any by reason of this interim order, which in the opinion of the Court, the Claimants ought to pay:

(1) A Declaration that the 1st Defendant, the Commissioner of Lands is not entitled to enforce the terms of the Notice to Quit Illegally Occupied Government Lands dated April 4, 2012, until the trial of this matter;

(2) A Declaration that the 1st Defendant, the Commissioner of Lands, her servants, and/or agents, are not entitled to come onto, enter upon, remain upon, or take any steps whatsoever to remove the Claimants and/or any of them from, the land occupied by them, as depicted in the plan attached at Annexure 2 to the Notice of Application for Court Orders filed June 1, 2012, or in any way whatsoever interfering with or preventing the Claimants' use and enjoyment of the Land, until the trial of this matter;

(3) An injunction restraining the 2nd Defendant Times Square West Holdings Limited, its servants and/or agents, from coming onto, entering upon, remaining upon, or taking any steps whatsoever to remove the Claimants and/or any of them from, the land occupied by them, as depicted in the Plan attached at Annexure 2 to the Notice of Application for Court Orders filed June 1, 2012, or in any way whatsoever interfering with or

preventing the Claimants' use and enjoyment of the Land, until the trial of this matter;

(4) Costs to be costs in the Claim;

(5) The Claimants' Attorneys-at-Law are to prepare, file and serve the formal order.