

Judgment Book

SUPREME COURT JUDICATURE OF
JAMAICA
KINGSTON
JAMAICA

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.D. 059 OF 1992

BETWEEN	MABEL DEMERCADO	FIRST PLAINTIFF
	GEORGE DEMERCADO	SECOND PLAINTIFF
AND	TREVOR MCKENZIE	FIRST DEFENDANT
	MAVIS ESME KING	SECOND DEFENDANT

Burchell Brown for Plaintiffs
Hugh Small Q.C. and Earl DeLisser for the Defendants

Heard on the 20th, 21st and 24th days of February, 27th March, 18th and 21st September, 12th October 1995 and 27th and 28th May 1996 and 18th September 1997.

JUDGMENT

COURTENAY ORR J

This matter has had a chequered history. In March 1995, it had to be adjourned because the Court became gravely ill. When I had recovered sufficiently to resume duties on a limited basis, the original Defendant, Leonard McKenzie, also became seriously ill before his evidence was concluded. Unfortunately he succumbed to his illness.

By an Order dated 13th May 1996 it was ordered that this suit which had begun with Leonard McKenzie as sole defendant, should be continued against the abovenamed first and second Defendants, the executors of the estate of Leonard McKenzie, deceased.

I regret that judgment is being delivered at this late date; but this is due to the fact that although I resumed duties my recovery has been slow and I have not been able to produce as much as I could do normally.

In their amended statement of claim the Plaintiffs claim the following relief:

- "(a) An injunction restraining the Defendant by himself servant or agent or otherwise from having any further dealings with the land in question, Lot 8A and 10A part of 16 Sandy Park Lane in the parish of Saint Andrew registered at Volume 963 Folio 245 and Volume 664 Folio 51 respectively.
- (b) That the Defendant cease to further demolish the building on Lot 8A and Lot 10A part of 16 Sandy Park Lane.

- (c) That the Defendant pay adequate compensation for the destruction of buildings, walls and fences on the said premises.

AND THE PLAINTIFF CLAIMS DAMAGES."

THE BACKGROUND TO THE CLAIM

Lillian Beatrice Demercado died testate on the 11th day of March 1955. She had four children Mary Thomas, Ernest Demercado, Martha Demercado and Edna McDonald. Ernest Demercado, deceased, was the father of the second Plaintiff George Demercado. Mabel Demercado is the widow of Ernest Demercado.

In her will Lillian Beatrice Demercado named Andrew H.B. Aguilar and Robert Cecil Marley as her Executors and Trustees. Probate was granted on 8th December 1959.

She was the proprietor in fee simple of 16 Sandy Park Lane, Saint Andrew, registered at Volume 664 Folio 51. This land was bequeathed to the four children mentioned above, in four lots as follows: Lot A to Mary Thomas, Lot B to Ernest Demercado, Lot C to Martha Demercado and Lot D to Edna McDonald.

The dispute in this case has its genesis in the action of the late Defendant Leonard Cecil McKenzie in bulldozing land part of the estate of Lillian Demercado, which is now known as Lot 10A. That land is still registered in the names of the executors of Lillian Demercado's will, Andrew H.B. Aguilar and Robert Cecil Marley, at Volume 664 Folio 51 of the Register Book of Titles.

The basis for the prayer for injunctions and compensation is set out in paragraphs 9 to 14 inclusive.

In paragraphs 9, 10 and 11, although not expressly stated the action is founded in trespass and the threat of trespass. They read as follows:

- "9. That on or about the 13th March 1990, the Defendant and his servant and/or agent bulldozed and demolished a 3 bedroom house erected by the first Plaintiff and her husband as the family home in 1961 and this was situated on a lot 10A and the said Defendant and his servant and/or agent forcibly evicted the tenant, Ivy Nicholson, who has been a tenant for several years.
10. That on or about the 11th day of April 1992, the Defendant and his servant and/or agent demolished the fence and wall placed by the first Plaintiff on Lot 10A and the said Defendant abused the first Plaintiff when she spoke to him about his illegal action.

11. That the defendant has threatened the Plaintiffs to bulldoze the house that they now occupy on Lot 8A and had told the Plaintiffs that he might get these lands since the Plaintiffs do not have any money to fight him."

Paragraph 14 repeats the allegation of a threatened use of force, and is couched in these words:

- "14. The Defendant had threatened to continue to use force and intend (sic) to unless restrained by an injunction from doing so."

Paragraph 12 contains another basis - allegations of fraud and breach of trust. These are stated as follows:

- "12. That the Defendant and the executors acted fraudulently and in breach of trust."

PARTICULARS OF FRAUD AND/OR BREACH OF TRUST

- (a) The Defendant and Executors acted fraudulently and in Breach of Trust when Defendant bought and the Executors sold Trust property at an undervaluation and, both Defendant and Executors knew or ought to have known of this undervaluation.
- (b) Both Defendant and Executors acted fraudulently and in Breach of Trust in dealing in Trust property, the subject of this suit, with total disregard for the beneficiaries and with the intention of depriving the beneficiaries of their legacy.
- (c) Both Defendant and Executors have acted fraudulently when on being registered on Transmission the Executors attempted to sell the Defendant the said lands instead of executing Assent of Devise to the relevant beneficiaries.
- (d) The Defendant also acted fraudulently and in Breach of Trust when he disturbed the Plaintiffs on the said land on the 13th of March 1990, he fully well knew and ought to have known that the Plaintiffs have been in undisturbed occupation from the death of the Testator on the 11th day of March 1955.
- (e) The Defendant and Executors have acted fraudulently in presenting a Sale Agreement that was executed in 1993 stating that it was executed in 1970."

Paragraph 13 simply states:

"The first and second Defendants say that the will of the late Lillian Beatrice Demercado is clear and the law of Devolution is clear and at no time did the Defendant become the owner of Lot 8A or Lot 10A and the Plaintiffs have suffered Financial loss because of the Defendants' action."

The defence asserts that by an Agreement for Sale dated the 10th day of December 1970, the said executors (the registered proprietors of the land) agreed to sell the land in question to Leonard Cecil McKenzie at a price of \$31,000 or £15,000, that he paid the deposit that same day and was let into possession; that having paid the balance of the purchase price he was the beneficial owner of the fee simple and held a registerable transfer to himself.

It was also stated that Leonard McKenzie had been continuously in possession of the land since 1st December 1970, without anyone making a claim thereto, and that he had been paying the property taxes thereon.

As regards the allegations of trespass and abuse, these were denied and it was stated that Leonard McKenzie merely demolished a derelict structure on the land in March 1990, and removed a fence encroaching on the land in April 1990.

The defence also asserted that if Ernest Demercado is deceased, the Plaintiffs are not the personal representatives of the deceased and have no legal right to the estate of Ernest Demercado, and no Locus standi in relation to this action.

The allegations of fraud were denied.

THE CASE FOR THE PLAINTIFFS

The first Plaintiff is the widow of the late Ernest Demercado and the second Plaintiff is his son. Ernest Demercado was a son of the late Lillian Beatrice Demercado, who up to the time of her death owned 16 Sandy Park Lane which was registered at Volume 664 Folio 51 of the Register Book of Titles.

Lillian Beatrice Demercado died on the 11th day of March 1955, testate, naming Andrew H.B. Aguilar and Robert Cecil Marley as her executors and trustees. She bequeathed all her holdings in 16 Sandy Park Lane to her four children having divided the land into four lots A, B, C, D, respectively. She gave Lot A to Mary Thomas, Lot B to Ernest Demercado, Lot C to Martha Demercado and Lot D to Edna McDonald.

All of the four children of Lillian Beatrice Demercado, died intestate. Only Ernest left children. He was survived by seven children.

16 Sandy Park Lane was divided into ten lots; of which Lot 10(a) is part of the lands registered at Volume 664 Folio 51, in the names of the executors of the estate of Lillian Beatrice Demercado. Her will was probated on 8th December 1959.

Lot 10A is the land which Leonard McKenzie bulldozed. Ernest Demercado built a house on that land in 1961. It was a wooden house, with a wooden floor.

There was an outside bathroom of board and zinc. There were three bedrooms, one measured 6 feet by 8 feet, and two 6 feet by 6 feet. The dining/living room measured 14 feet by 12 feet.

The land was cultivated by Ernest Demercado, with congo peas, black-eye peas, corn, tomatoes, yam and sweet potatoes. No one ever disturbed him in his planting. He also raised fowls there. There were bearing mango, soursop, ackee and plum trees on the land. These were freely reaped.

The Sandy Gully ran through the area. At first there were three branches of the gully which met on 16 Sandy Park Lane, but the government implemented a scheme in which the gully was rearranged and paved, and thereafter there was only one channel in which the water could flow.

Both executors were neighbours owning lands which adjoined the Demercado lands, and both were trusted friends of the family.

Ernest Demercado died on 3rd November 1980, in the very house which Leonard McKenzie bulldozed. After the death of Ernest Demercado, a room was let to Ivy Nicholson. The family of Ernest Demercado has occupied the land undisturbed since 1961. After a while the family left and Ivy Nicholson continued to live on the land as a tenant. No one had seen Leonard McKenzie on the land until February 1990 when he came there and informed Ivy Nicholson, "I am now the owner of this place and will be coming shortly to build on it."

He returned in March of that year, and a bulldozer was used to knock down two outside bathrooms and two toilets. An attempt was made to knock down the house, but this was proving difficult. Then a woman pleaded that a lady was inside the house and the workmen desisted. In April 1992, men returned with bulldozers and this time a fence and wall which the builder was about to complete were demolished.

There is a conflict of evidence as to whether Ivy Nicholson kept a church on the premises. She denied this, but said she did keep, "a little praying, a little service together; just a little sort of get together thing, discussing Bible stories etc.... Prayer three times per day.... I would come out and give three strokes (on a drum) just saying the time."

Mabel Demercado agreed that Nicholson kept a church there. George Demercado denied a church was kept there.

He described the activities in this way:

"I hear her give the drum about three lick. But not music wise. Sometimes three times for the day.... Don't hear her sing or shout, or preach from her yard. She did have a flag pole there....

No worshipping took place there. Just a little prayer by herself... Not a lot of people coming and going."

I accept the evidence of Mabel Demercado that a church was kept on the land.

THE CASE FOR THE DEFENCE

Leonard McKenzie gave evidence on 20th February 1995, and was partly cross-examined. The matter was adjourned to the following day when counsel for the Plaintiffs was ill. He had not recovered on the 24th February 1995 and the matter was adjourned to 27th March 1995. By then the court was seriously ill. When the court resumed on 18th September 1995, Leonard McKenzie was ill in Florida, and he later died without completing his evidence.

I accept as a correct statement of the law paragraph 33 - 67 of the Thirteenth Edition of Phipson on Evidence. It says:

"When the witness dies or falls ill before cross-examination, his evidence in chief is admissible though its weight may be slight. (emphasis mine)

In the instant case Leonard McKenzie, deceased was partly cross-examined and certain written exhibits tendered.

He said that in 1969 he was engaged in developing flood control in the Sandy Gully Flood Control Scheme for which the Public Works Department and the Department of Housing had responsibility. It was administered by the Ministry of Housing. He purchased the lands in dispute. He signed the agreement for the sale (Exhibit 5) regarding the disputed lands as purchaser. At that time Ernest Demercado was living in a wooden house on the land. Special conditions 2, 3, 4 and 5 of the agreement provided as follows:

- "2 Mr E. A. Demercado to be entitled to remain in possession of the part of lands presently occupied by him free of rent until 21st February 1971 as a tenant at will."
- "3 The purchaser will pay to the Ministry of Utilities and Housing the sum of \$5,000.00 representing the contribution payable by the Vendors in respect of the Bridge erected across the paved gully course on lands of the Hamiltons."

- "4 The purchaser will pay to the Hamiltons the sum of \$1,600.00 being the amount which the vendors agree to contribute towards the cost of the Roadway from Sandy Park Road to the northern side of the said Bridge."
- "5 The purchaser will construct the roadway from the northern side of the said Bridge along the northern boundary of the said paved gully course at least to a point directly opposite the western boundary of the lands comprised in Certificate of Title at Volume 963 Folio 245 registered in the name of the said E.A. Demercado."

He said he paid the money to the Ministry of Utilities and Housing in Accordance with Special Condition 3, and tendered a receipt - Exhibit 5. He constructed the roadway indicated in Special Condition 4. Transfer 786943 dated 15th April 1993 with a survey plan dated 1st May 1991 was attached. It was signed by Robert Cecil Marley, surviving executor of the estate of Lillian Demercado, and it related to the lands in dispute.

He said he paid for the land. He maintained that he took possession of it and showed possession by clearing the land of bush and rubbish from time to time. He put in a culvert too. Ernest Demercado later left the land and he (Leonard McKenzie) did nothing for a while until he received complaints about activities on the land.

Phillip Hamilton gave evidence in support of the defence. His evidence was to the following effect:

Ernest Demercado was his cousin and Lillian Demercado was his aunt. He knows the disputed lands, and lives in the vicinity of the Sandy Gully Drainage Scheme. Hamilton Terrace where he lives was part of 14 Sandy Park Road. No. 14 Sandy Park Road was sub-divided and became 12½ Sandy Park Road.

When the gully was being paved by Leonard McKenzie, an arrangement was made between Leonard McKenzie, Ernest and Mary Demercado (children of Lillian Demercado) and himself. This was for the construction of a roadway and a bridge from 12½ Sandy Park Road across the gully to the back of the land. The Government would pay half the cost of the bridge and he and the Demercados the other half.

Later Mary and Ernest Demercado told him that Mr Marley, the executor of Lillian Demercado's estate, had said the estate could not afford to sub-divide

the land. Mary then asked him to ask Leonard McKenzie if he would buy a piece of the land. He spoke to Mr McKenzie, and he saw him speaking to Ernest and Mary Demercado. They told him that Leonard McKenzie would go to see Mr Marley. The bridge and the roadway were later built.

Before the bridge was built there was no access for the Demercados to that portion of their land.

THE COURT'S ASSESSMENT OF THE EVIDENCE

In answer to Mr Small's submission that the Plaintiffs had no locus standi to bring this action Mr Brown submitted in these terms:

"They are suing in their own right because they occupied the land:- Occupied as owners. They went there not as inheriting anything; but they saw the place and occupied it. Mabel gave evidence that she is the administratrix of her late husband Ernest Demercado."

On their own case the Plaintiffs did not have possession to maintain an action for trespass.

I agree with Mr Small that since the land belongs to the estate of Lillian Demercado it should have been brought in the name of the estate, either on behalf of the estate or with the consent of the executors. Therefore the Plaintiffs have no locus standi.

Secondly the evidence has failed to substantiate the allegations of fraud made in the statement of claim. I adopt the meaning of fraud accepted by Rowe JA, in Boothe v Clarke 19JLR 278 at 288, where he quoted from the judgment of Lord Lindley in Assets Co. Ltd. v Mere Roihi [1905] AC 17.

"[B]y fraud in these Acts is meant Actual fraud i.e. dishonesty of some sort, not what is called constructive or equitable fraud...."

The Plaintiffs' position is that the following facts pointed to fraud. The Sale Agreement was not stamped until 1993, though allegedly made in 1970; the signatures of the executors were not witnessed on the Sale Agreement; Leonard McKenzie did not tender any written proof of money paid; the time of completion was 31st January 1971.

The transfer diagram and the Sale Agreement showed a difference in acreage. So too the tax receipt showed a different square footage from that

of the transfer and the Sale Agreement.

I do not regard these factors either separately or cumulatively as amounting to fraud, or even a breach of trust.

Section 71 of the Registration of Titles Act, shows that unless there was fraud on his part, Leonard McKenzie would be protected when dealing with the executors of the estate of Lillian Demercado.

Section 71 provides:

"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."

THE ISSUE OF ADVERSE POSSESSION

Mr Brown in his closing address submitted that the Plaintiffs had established adverse possession of the land. That submission fails for three reasons: Such a claim was never pleaded; secondly, the evidence tendered in support of this issue is not sufficient to found such a claim, and thirdly, the executors should have been parties to the suit.

It is trite law that in actions in the Supreme Court pleadings are of paramount importance, and that save where a preliminary objection is taken if a party wishes to obtain judgment on a certain issue it must be pleaded. This is both logical and reasonable. Jacob and Goldrein in their book, Pleadings; Principles and Practice describe the functions of pleadings in this way at page 2:

"Properly drafted, the pleadings should disclose clearly and precisely the real issues which are in dispute between parties, as opposed to a recitation of evidence which each party intended to adduce at the trial. They are not mere narratives or provisional documents. The parties are bound by what they say in their pleadings which have the potential of forming part of the record, and moreover the court itself is bound by what the parties

have stated in their pleadings as the facts relied on by them." (emphasis mine)

The learned authors then go on to state the objects of pleadings in the following words:

"First. To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court....

Thirdly. To inform the court what are the precise matters in issue between the parties which alone the court may determine...." (emphasis supplied)

The case SCCA 67/91 Jamaica Telephone Co. Ltd. vs. Rattray (unreported), delivered February 23, 1993 illustrates the above principles well. In that case Rowe P. giving the judgment of the Court of Appeal said at page 8:

"The final point in the case is whether the respondent could recover damages for the disconnection which took place January 23, 1986. There was no claim for such damages in the writ filed on December 2, 1985.

Paragraph 14 of the statement of claim pleaded:

'On or about the 26th day of September 1985, in breach of its contract, the Defendant arbitrarily and without just cause, disconnected the Plaintiff's telephone number 92-51174 and has refused and neglected to restore the said service on demand.'

"This pleading remained unamended at the end of the case. In my view it was impermissible for Clarke J. in that state of the pleadings to award damages for a period of approximately five years of disconnection.... I would therefore allow the appeal as to damages and substitute Five Thousand Dollars for the award in the court below."

What is amazing is that although Mr Small took the point, no attempt was made to apply for an amendment. In this connection Section 270, of the Civil Procedure code states:

"The Court or Judge may at any time and on such terms as to costs or otherwise as the court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings." (emphasis mine)

It is not always appreciated that adverse possession is a complex issue. It does not mean that once someone occupies the land of another for the requisite period that the title of the owner is extinguished.

The evidence tendered by the Plaintiffs in this regard consisted of five activities - cultivation, fencing, buliding, paying taxes and letting

a house on the land.

CULTIVATION

The Plaintiffs' witnesses including both Plaintiffs spoke of the land being cultivated by Ernest Demercado and others. Mabel Demercado said that Ernest Demercado always cultivated the land, and that he planted mango trees - black mango, number eleven, and kidney mango, as well as coolie plums and red plums. In addition he planted other trees which were not fruit trees. She also stated that he cultivated congo peas, black eye peas, corn, tomatoes, yams and sweet potatoes. He also raised fowls and there was an ackee tree on the land. No one, said she, disturbed him when he planted these crops.

The second Plaintiff supported the evidence of the presence of mango trees and ackee trees and added that there was a sour sop tree on the land.

Ivy Nicholson, who said she rented a house on the land also spoke of plum trees and mango trees and added that she planted six palm trees, flowers, about four squares of bananas, and yams and pumpkins. Although the existence of banana trees would hardly affect my decision, I must point out that I do not accept that statement of the witness as I find it extremely odd that no other witness mentioned such a banana cultivation which should have been obvious.

FENCING

As regards fencing, I attach no weight to the evidence on this matter. Albert Baker, carpenter and mason who gave evidence for the plaintiffs has this to say:

"I ran a wire fence and block fence for her (Mabel Demercado). Did both in 1992.... Length of fence was 80 feet.... Same day I about to finish fence Defendant came there with tractor...."

This clearly shows that the Defendant took action promptly before the Plaintiffs were able to enclose the land; indeed it is this activity by the Defendant which led to the bringing of this suit.

TAXES

Mabel Demercado, the first Plaintiff said:

"I have paid taxes on the land since I got letters of administration."

The grant of letters of Administration was made on 9th July 1992, after the bringing of the suit and therefore the bulldozing of the land by Leonard McKenzie. I regard this evidence as contributing not one iota to the claim.

RENTING THE LAND TO A TENANT

A number of witnesses speak to Ivy Nicholson renting a wooden house on the land. This evidence is equivocal on the issue of adverse possession. It points no more in the direction of seeking to exclude the true owner than endeavouring to derive some enjoyment from the land.

BUILDING

Mabel Demercado said that her late husband Ernest Demercado built a house on the land in 1961. It is the same house bulldozed by the late Leonard McKenzie, and she, her husband and children occupied it. Her husband died in it in November 1980. Ivy Nicholson went to live there when her husband died, and she stayed there till it was bulldozed. It was a wooden 4 bedroom house with a concrete verandah.

She denied that it was a derelict house, but said:

"House was not in a first class condition,
but it could be lived in. It was not new."

Again I regard this aspect of the Plaintiff's case as equivocal.

LIVING ON THE LAND

This evidence too is equivocal.

Sections 2, 4(a) and 30 of the Limitation of Actions Act provides that time does not begin to run against the owner of land so as to extinguish his right thereto unless it has been established that:

- (i) He has been dispossessed of the land,
- (ii) he has discontinued his possession of the land;
and that in either event,
- (iii) Some other person in whose favour the period of limitation (twelve years) can run is in adverse possession of the land. Time then runs against the true owner at the time adverse possession is taken of land.

The Law on this issue is admirably summarised in Archer vs. Georgiana Holdings Ltd. 12 JLR 1421 at 1426 F-I

"The onus of proving that the true owner has been effectively dispossessed is on the party who alleges it. The question whether this onus had been discharged does not always admit of a ready answer. At the outset it is necessary to appreciate the difference between "dispossession" and "discontinuance" of possession.

'The difference', said Fry, J., in Rains vs Buxton (1), 'Between 'dispossession' and the 'discontinuance' of possession might be expressed in this way: the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed in by others.'

The mere fact that the true owner does not make use of his land does not necessarily mean that he had discontinued possession of it: Leigh vs. Jack. Non-user is equivocal. To establish discontinuance it must be shown positively that the true owner has gone out of possession of the land, that he has left it vacant with the intention of abandoning it. Evidence of lack of user which is consistent with the nature of the land in issue and the circumstances under which it is held is not sufficient to justify a finding of an intention to abandon and thus discontinuance: Tecbild Ltd. vs. Chamberlain.

Again, the mere fact that a stranger had interfered in some way with the land of the true owner is not enough to show dispossession. The stranger must go further. He must prove occupation and use of the land of a kind altogether inconsistent with the form of enjoyment which is available to or intended by the true owner."

It must be understood that if an owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title: thus cultivating land and later using it for training greyhounds in a fenced area may fail to amount to adverse possession. (see Williams Brothers Direct Supply Ltd. vs. Raftery [1958] 1 QB 159.)

Finally on this issue, where a legal title in land is involved the persons in whom the legal right resides must be parties to the action. Beneficiaries who wish to protect their rights should first request the trustees to sue, and upon refusal may sue, but the trustee must be added as defendants where legal title is involved - Franklyn vs. Franklyn [1915] W.N. 342.

THE EFFECT OF THE EVIDENCE PROFFERED BY THE DEFENCE

Although it is not necessary to do so, I shall assess the strength of the case for the defence. In view of the fact that cross-examination of Leonard McKenzie was incomplete, I regard it as my duty to look for evidence other than that coming from his lips, such as would tend to confirm his testimony in a material particular.

One such item of testimony is the evidence of Mr Hamilton that there was need for a bridge in order for the Demercados to have access to a portion of their land and that his land needed a roadway in addition to the bridge, and that the Demercados contributed to the bridge only.

Secondly, as regards the receipt from the Ministry of Public Utilities and Housing, I accept it as genuine and thus it clearly supports Mr McKenzie's testimony.

Thirdly, there is a statement made by Albert Baker a witness for the Plaintiff. He said he erected a fence and a wall for the Plaintiffs. Interestingly he said, "Same day I about to finish the fence the defendant (Leonard McKenzie) come there with a tractor." To my mind Mr McKenzie acted as soon as the Plaintiffs were engaged in the sort of activity which could be interpreted as excluding him from the land.

In short therefore, I accept the testimony of the defence and would be willing to give judgment for the defendants on that basis, if it were necessary. I agree with Mr Small that the evidence which I accept indicates that Mr McKenzie had a right to possession sufficient to entitle him in law to evict Miss Nicholson who was not a tenant.

In fine the decision is: judgment for the defendants with costs to be taxed if not agreed.