Hamson v. Jones

[1988] O.J. No. 1306,
65 O.R. (2d) 304, 52 D.L.R. (4th) 143
50 R.P.R. 197, 11 A.C.W.S. (3d) 236
Ontario High Court of Justice
Parker C.J.H.C.
August 17, 1988

[1] PARKER C.J.H.C.:— This is an action for a declaration that the plaintiffs, Edwin Hamson and Dorothy Hamson, are the owners of cottage property in Muskoka. The Hamsons also claim damages for fraud in the amount of $100,000 and punitive damages in the amount of $50,000. Paper title to the property was held by the defendant Terry Jones and his wife until 1985, when they conveyed the property to the defendants Sidney and Nancy Dickinson. The defendants have counterclaimed against the Hamsons, and cross-claimed against each other.

Facts

[2] On January 19, 1967, the defendants, Terry Jones and Donna Jones, purchased Lots 40, 41 and 42 of Block A, Concession XIII, in the Township of Muskoka. The purchase price of $5,340 was financed in part by a mortgage given back to the previous owner, in the amount of $4,340.

[3] Terry and Donna Jones were at that time husband and wife. The plaintiffs Edwin and Dorothy Hamson are the aunt and uncle of Mrs. Jones. During the summer of 1967, with the permission of Mr. and Mrs. Jones, the Hamson family camped on part of Lot 40 and erected a tent floor on the land. No rent was paid for the use of the land.

[4] In 1968, the Hamsons executed an offer to purchase Lot 40. The evidence is not entirely clear as to precisely when the offer to purchase was signed. Mrs. Hamson recalled it being in January of 1968, while the agreement itself is dated May of 1968. In any event, the agreement was executed by the Hamsons and the Joneses. The purchase price was to be $2,500 and the sale was to be completed on or before June 25, 1969. Consideration payable upon the signing of the offer was $1. There was some dispute at trial as to whether this dollar was ever paid. Mr. Hamson testified that it was, and Mr. Jones testified that he had no recollection. I find that the dollar was paid.

[5] There was similarly some dispute as to whether the purchase price was tendered. The plaintiffs testified that the funds were withdrawn from their credit union in May, 1969, and deposited in their bank. A cheque was then written on the bank account. Bank records for 1968

are apparently not available to corroborate this, but the records submitted from the Toronto Electrical Utilities Credit Union indicate that $2,500 was withdrawn by Mr. Hamson on May 30, 1968. This tends to corroborate the Hamsons' recollections, and I find that the cheque was in fact tendered. The Hamsons further testified that the cheque was never cashed. This is not surprising since Mr. Jones was unable to give a deed at that time. Counsel for Mr. Jones asks that the court find that the purchase money was returned to the Hamsons by the Joneses. There is no evidence to support such a contention, and I decline to make such a finding.

[6] The Hamsons did not obtain the assistance of a lawyer with this transaction nor did they receive a deed to the land. They testified that Mr. Jones explained to them that for tax reasons, it would be better for him to keep the property in his name, although Mr. Jones testified that he had no recollection of telling this to the Hamsons. They testified that they always believed a deed could be obtained from Mr. Jones should one be required. Mr. Hamson testified that initially he was not aware of the mortgage placed on the land by Mr. Jones, to raise the purchase money for the property.

[7] The land was not severed from the other two lots owned by Mr. Jones, and no attempt was made to sever it until the mid- 1970's. Mrs. Hamson testified that Mr. Jones told her in 1969 that before a deed could be delivered, a severance would be required and that he would look after it. The Hamsons testified that they believed that such a severance would not be a major problem, and that they trusted Mr. Jones to look after it. Mr. Jones did in fact make an application to sever the property in 1974, which application was turned down by the municipality. He made a second application in 1984. This was terminated by the sale of the property to the Dickinsons in 1985.

[8] During the summer of 1969, the Hamsons commenced to build their cottage. It was built over a period of years. In 1970, electricity was brought into the cottage. Mr. Hamson applied for this service, although there is conflicting evidence as to how the installation costs were paid, as between the Hamsons and the Joneses. The Hamsons paid the monthly bills. Taxes on the property were paid by Mr. Jones. Mr. Hamson testified that it was understood that when the deed was delivered, Mr. Jones would be reimbursed for taxes paid on the Hamson property.

[9] Commencing in 1971, the cottage was habitable and became the focus of the Hamsons' vacationing. They spent week-ends and three weeks of holidays at the site every year. It was also used during some winter week-ends, although not frequently as the cottage was difficult to reach at that time of year. The building was described as a "sleeping cabin" in various documents submitted to the municipality. In fact, it had a self-contained cooking area, its own septic system, and was insulated.

[10] In correspondence to the solicitors acting for him on the 1974 severance application, Mr. Jones stated his intention to transfer Lot 40 to the Hamsons. Mr. Jones intended to build a cottage for himself on Lot 41 at this time. The severance was not granted, but Mr. Jones built a cottage in any event. To obtain a building permit, the cottage of the Hamsons was described as a sleeping cabin. The municipality later took the position that the information used to obtain the building permit was incorrect. The concern of the municipality centred around the fact that there were apparently two dwellings on property where only one would be permitted by the zoning. Mr. and Mrs. Jones were charged with infringing the building by-law in 1977, but the case was dismissed apparently because of delay in bringing the charges.

[11] The cost of building the Jones' cottage was financed by a mortgage on Lots 40 and 41, in the amount of $41,600. Mr. Hamson testified that he was not aware until July of 1985 that this mortgage covered both Lots 40 and 41. The Hamsons testified that prior to that time, they had been aware of the mortgage, but understood that it affected only Lot 41.

[12] When the septic system was installed for the Jones' cottage in 1977, a similar system was also installed for the Hamson cottage. Mr. Hamson testified that Mr. Jones had suggested that one tank would be sufficient, but Mr. Hamson insisted on two.

[13] In the following few years, there was a significant amount of correspondence between the municipality and Mr. Jones concerning the property. It was discovered that both cottages encroached on an old road allowance. Eventually this matter was cleared up by the closure of the road allowance, and the transfer of the land under the road allowance to Mr. Jones. This transfer was pursuant to a deed dated December 3, 1982.

[14] In addition, the municipality continued to complain about the existence of two cottages on the property. In June of 1982, Mr. Jones went so far as to tell the municipality in writing that the cooking facilities had been removed from the Hamson cottage. This was in fact false. At one point, Mr. Jones offered the Hamsons a deal to solve the severance problem: the Hamsons would receive a life tenancy in the cottage and the option to use Mr. Jones' Florida condominium in the winter, in return for Mr. Jones receiving the remainder interest in Lot 40. The Hamsons refused this offer.

[15] By the end of 1982, Mr. Jones was beginning to have problems with his business affairs, and in September of 1982, he listed his cottage for sale. The listing agreement makes reference to only one building, and it is clear from the description in the agreement that this is the Jones' cottage. The cottage was not sold at this time.

[16] In September, 1983, a second agreement of purchase and sale was executed between the Joneses and the Hamsons. The evidence concerning this agreement was contradictory: Mrs. Hamson testified that she had understood that the agreement would cover only the property

on which the Jones' cottage was located, i.e., Lot 41; Mr. Jones testified that the agreement was to cover the entire Lots 40 and 41. Both testified that this contract was never intended to be completed. Mr. Jones had told Mr. and Mrs. Hamson that he was in financial trouble, and that the bank was "hounding him for payment". Mr. Hamson testified that the agreement was signed in order to have something to show the bank, to buy Mr. Jones more time to get his financial house in order. Under the circumstances, I give no weight to this document and specifically find that it is not an acknowledgment of title of Mr. Jones to Lot 40, within the meaning of s. 13 of the Limitations Act, R.S.O. 1980, c. 240.

[17] In 1984, severance application was made to the municipality. It did not come to a hearing that year, but remained pending throughout the purchase and sale which followed the next year. When the committee of adjustment heard of the sale of the property to Mr. Dickinson, they deemed the application to be abandoned.

[18] The mortgage placed by Mr. Jones on Lots 40 and 41 went into arrears, and a sale or foreclosure of the property appeared imminent.

[19] Mr. Jones' business affairs went from bad to worse. It would appear that the Hamsons were not entirely aware of this deterioration. Mr. Hamson testified that there was some discussion of the problems in mid-July, 1985, but that Mr. Hamson was assured by Mr. Jones that a "white knight was in the wings", and the problems would disappear. Mr. Hamson raised the issue of the severance at that time, and Mr. Jones assured him that the application would be heard and the lot would be transferred to the Hamsons before the sale.

[20] At this time, Mr. Jones was in negotiations with Mr. Sidney Dickinson concerning the sale of Mr. Jones' insurance company. Mr. Dickinson discussed the purchase of the cottage property with Mr. Jones and went to view the property.

[21] An agreement of purchase and sale between the Joneses and Sidney Dickinson was concluded on June 20, 1985. An attempt was made by Mr. Jones to append a right of first refusal on the repurchase of Lot 40, but that was not executed by Mr. Dickinson. As part of the deal between the Joneses and the Dickinsons, the Joneses executed a declaration that they were the absolute owners of the lands. Taxes were approximately $6,700 in arrears at that time.

[22] On or about July 28, 1985, Mr. Dickinson visited the Hamson cottage with Mr. Eland, a real estate agent. It is unclear whether he told the Hamsons at this time that he had bought the property. The Hamsons testified that they told Mr. Dickinson that they owned the property. Mr. Dickinson testified that the language used was more vague, that the Hamsons had an interest in the property. Either way, it appears to be common ground that Mr. Dickinson was given actual notice at that time of the Hamsons claim to the property. I find that they were told that Mr.

Dickinson had actually bought the property, as Mr. Hamson testified that they were given seven days to vacate the premises.

[23] As a result of this conversation, both the Hamsons and Mr. Dickinson contacted Mr. Jones. Mr. Dickinson was informed by Mr. Jones that the Hamson interest was a family matter, and that no further attention to it was warranted.

[24] The Hamsons discussed the matter with Mr. Jones at his office on July 29, 1985. It was at this time that the Hamsons began to get a clearer picture of the financial trouble facing Mr. Jones. They were accompanied by their daughter, Marcia, at this meeting. At one point, as the financial picture was unfolding, Marcia indicated that it looked as if the Hamsons would lose their cottage. The Hamsons were assured by Mr. Jones that such was not the case. The Hamsons were told that some arrangement would be worked out with Mr. Dickinson once the severance was completed.

[25] Mr. Jones contacted the Hamsons on or about August 28, 1985. At that time he indicated that the deal with the Dickinsons had closed. Mr. Hamson telephoned Mr. Dickinson and was told to vacate within two weeks.

[26] Mr. and Mrs. Jones separated in December, 1985, and have lived separate and apart since that time. Mrs. Jones is not a defendant to these proceedings. She, too, experienced financial difficulties and, on the advice of counsel, made a personal assignment in bankruptcy in August of 1986. Thereafter, the claim against her was abandoned, and she was not represented in these proceedings. Although she was not formally removed as a defendant to the Dickinson cross-claim, counsel did not press the cross-claim except as against Mr. Jones.

The effect of the 1968 agreement

[27] The agreement signed by the Hamsons and Joneses in 1968 was subject to the terms of the *Planning Act*, R.S.O. 1960, c. 296, s. 26, as re-enacted by the *Planning Amendment Act*, 1960-61, S.O. 1960-61, c. 76, s. 1, as amended. That section gave the municipality the power to designate areas within the municipality as areas of subdivision control. After this had occurred, subdivision of land was permitted only in defined situations. Pursuant to s. 26(4), any document made in contravention of the section did not create or convey any interest in land.

[28] While there was no direct evidence on the point, it does not appear to be disputed that the property owned by the Joneses was in an area of subdivision control. As the Joneses retained the fee in the land abutting Lot 40, and as the exception provisions do not apply in this case, the land could only be sold to the Hamsons with the consent of the municipality. Such consent was never obtained and, as a result, the 1968 agreement of itself did not create an interest in the land.

Adverse possession arguments

[29] The central issue argued in this case is whether the Hamsons extinguished the title of the Joneses by adverse possession, prior to the sale of the property to the Dickinsons in 1985.

[30] The starting point in assessing these arguments is consideration of the relationship between the Joneses and the Hamsons *vis-a-vis* Lot 40: were the Hamsons licensees, tenants, or trespassers, or did they enter the premises under colour of title?

[31] It is the position of the defendants that the Hamsons were licensees. That would be the case if their occupation on the land was pursuant to the express or implied consent of the Joneses. I find that such is not the case.

[32] The Hamsons and the Joneses executed an agreement of purchase and sale for Lot 40 in 1968. The required deposit was made, and the purchase price was set and tendered. It was the Hamsons' understanding that a deed would be delivered after some formalities had been complied with. Consistent with the relationship between the parties to the agreement, the Hamsons relied on Mr. Jones to handle these formalities. They believed they had acquired the right to possess the land. Their behaviour throughout the period is consistent with this. There is no indication that they asked Mr. Jones' permission to build the cottage, as one would expect a licensee would. Indeed, it is not even clear that Mr. Jones was told that they were building a cottage, and there was never any suggestion that he objected to the erection of such a structure.

[33] There is evidence that the Joneses viewed the matter in a similar light. First, there is the testimony of Donna Jones that the cottage on Lot 40 was always viewed as the Hamsons' property. The tenor of her evidence was that when she was in the Hamson cottage, she was there as a guest of the Hamsons. She was not there as an owner of the property.

[34] Second is the fact that Mr. Jones attempted, both in 1974 and in 1984, to sever the lots. This is consistent with an attempt to complete the formalities of the 1968 agreement. Consistent with that interpretation are Mr. Jones' comments in letters to the lawyers handling the severances. Concerning the 1974 severance, Mr. Jones made the following comment in a list of the properties and owners to be affected by the proposed severance:

> Lot #40 — is the one in my name which I want to get a severance for, to transfer to Mr. and Mrs. Edward [sic] Hamson, 63 Kenilworth Avenue, Toronto.

Concerning the second severance, Mr. Jones wrote:

> The other matter that is of great importance to me is that due to family matters I must make a supreme effort to effect a formal severance of the property that contains the

> two buildings on it. As you know, my wife's father-in-law [sic] built the building known as the "A" frame on the North/West of the property, and my cottage was built on the South/East. ... As you know there has been a long history on this matter. I know I have tried your patience on this whole problem, but, sincerely hope that you will undertake to represent me in a proposal for early severance. If you would I will be forever grateful. This is probably the most important matter before me at present needing a solution.

[35] Finally, Mr. Jones in fact made an offer to the Hamsons to terminate the difficulties regarding title. The fact that such an offer was made by Mr. Jones is evidence that he considered the agreement of purchase and sale of 1968 to have given the Hamsons rights in Lot 40. He would not have made such an offer to a mere licensee.

[36] The Hamsons took possession of Lot 40 pursuant to the agreement of purchase and sale of 1968, and not pursuant to any express or implied licence from the Joneses. That agreement, as discussed above, was not of itself capable of creating an interest in the land, as it was in contravention of the Planning Act. Notwithstanding that they believed they owned the property, the Hamsons were legally trespassers on Lot 40.

[37] The law distinguishes between trespassers who are essentially squatters and those who enter on colour of title. Colour of title refers to persons who believe in good faith that they have title to the land, but do not have such title. A clear example is a purchaser who receives a deed from a person who could not make good title. The nineteenth century case-law was clear that an individual who entered land in good faith under an agreement of purchase and sale had colour of title: see *Mulholland v. Conklin* (1872), 22 U.C.C.P. 372. That case-law has not been overruled, and while there may be few situations now when it applies, it is still good law in Ontario. I find that the Hamsons entered Lot 40 under colour of title.

[38] The first practical effect of this finding is that the Hamsons obtained constructive possession of the whole of the property described in the offer, when they were in possession of any part thereof. The Court of Appeal in *Harris v. Mudie* (1882), 7 O.A.R. 414 at pp. 427-8, makes the point this way:

> But it has no doubt been treated as settled by a long current of authorities as the general rule, that when a party having colour of title enters in good faith upon the land professed to be conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his deed, and the possession so taken may ripen into a title so as to bar the entry of the owner to the whole after the period fixed by the statute. In such a case one of two innocent persons has to suffer, and the entry and possession of a part with acts of ownership of a character to indicate that the claim extended or might extend to the limits of the deed,

might well in such a case be regarded as notice to the true owner, and the deed be admitted in evidence to define the precise limits of the claim and possession.

On this basis, the Hamsons' occupation is to be understood as extending to all of Lot 40. It is therefore necessary here, as it was, for example, in *Walker v. Russell*, [1966] 1 O.R. 197, 53 D.L.R. (2d) 509 (H.C.J.), to decide what parts of the property were occupied by the claimants of adverse possession. The Hamsons had constructive occupation of the entire lot.

[39] The old road allowance is to be understood as included in this scope. Neither the Joneses nor the Hamsons were concerned with its existence at the time of the purchase. It would appear that the Hamsons believed they were buying right down to the water, and this apparently corresponds with what the Joneses believed they were selling.

[40] The next issue is what law is to be applied in these circumstances. The position of the defendants is that the applicable law is to be found in various recent judgments of the Court of Appeal: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182; *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722, 128 D.L.R. (3d) 59, 22 R.P.R. 75; and *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563, 31 R.P.R. 200. These cases hold that the successful claimant of possessory title must have:

(a) had actual possession;

(b) had the intention of excluding the true owner from possession, and

(c) effectively excluded the true owner from possession for the 10-year period described in s. 4 of the *Limitations Act*. The possession must be open, notorious, constant, continuous, peaceful, and exclusive of the right of the true owner. It must be more than equivocal, occasional, or for a special or temporary purpose.

[41] The recent Court of Appeal decisions have placed a high standard on the *animus possidendi* of the claimant of possessory title, and specifically on the degree of adversity which was required to be shown. The mere fact that the defendants occupied the land at issue is not sufficient in these cases; the occupation must be inconsistent with the form of use and enjoyment the titled owner intended to make of the land. Thus in *Masidon*, for example, the fact that an airstrip had been operated on the subject lands for more than 10 years did not displace the right of the paper titleholder. The paper titleholder had bought the land as a speculation, and the airstrip did not preclude the use of the land for this purpose.

[42] Other decisions have not set so high a standard. In *Smaglinski v. Daly*, [1971] 3 O.R. 238 at p. 239, 20 D.L.R. (3d) 65 at p. 66, the Court of Appeal upheld a claim for adverse possession on the basis that:

> [The claimant], though uncertain of and quite probably unconcerned about the precise legal nature of this occupancy, did act in a manner entirely consistent with ownership in clearing and sowing the land and there is no evidence whatever that his right to do so was questioned at any time by Philip Norlock, owner of the paper title.

[43] In *Beaudoin v. Aubin* (1981), 33 O.R. (2d) 604 at p. 617, 125 D.L.R. (3d) 277 at p. 289, 21 R.P.R. 78 (H.C.J.), Mr. Justice Anderson held that "where there is possession with the intention of holding for one's benefit, excluding all others, the possession is sufficient and the *animus* is presumed". At issue is what standard to apply on the facts of the case before the court.

[44] Mr. Justice Anderson, in the *Beaudoin* case, at p. 619 O.R., p. 292 D.L.R., warns that: "The application of judicial statements, without due regard for the facts of the case in which the statement was made, is a pregnant and perennial source of error." An examination of the facts in the various cases cited to the court is instructive in this regard.

[45] All three of the recent Court of Appeal decisions are cases which might fairly be said to concern squatters' rights. The claimants of the possessory title were aware throughout the running of the statute that they had no legal right to the land, or, in the case of *Arillotta*, that they were exceeding the rights conveyed in their right of way. In *Masidon*, at p. 566 O.R., p. 205 R.P.R., the claimant went so far as to admit that he had "fashioned a design to acquire possessory title to the land in dispute". The courts are understandably reluctant to extend rights in these situations. This point is made in the *Masidon* case, in response to the submission of counsel for the claimant that possessory title would be virtually unobtainable as against land held for speculation. Mr. Justice Blair, for a unanimous court, says at p. 574 O.R., pp. 214-5 R.P.R.:

> This result, however, is not surprising because there is no policy reason for concern about the rights of the appellant in this case or, indeed, any trespasser seeking to acquire possessory title to land held for development. The appellant deliberately embarked on a course of conduct which ultimately led to an intention to dispossess the respondents of their property. In my opinion, Justice Carruthers was correct in concluding that the purpose of the *Limitations Act* was not "to promote the obtaining of possessory title" by a person in the position of the appellant. The policy underlying the *Limitations Act* was stated by Burton J.A. in *Harris v. Mudie* (1882), 7 O.A.R. 414, as follows at p. 421:
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> > The rule, as I understand it, has always been to construe the Statutes of Limitations in the very strictest manner where it is shewn that the person invoking their aid is a mere trespasser ... and such a construction commends itself to one's sense of right. They were never in fact intended as a means of

> acquiring title, or as an encouragment to dishonest people to enter on the land of others with a view to deprive them of it.
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> Robins J.A. speaking for this Court in [*Giouroukos v. Cadillac Fairview Corp.* (1983), 44 O.R. (2d) 166] reiterated this policy when he said at pp. 187-8:
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> > When all is said and done, this is a case of a businessman seeking to expand significantly the size of his commercial land holdings by grabbing a valuable piece of his neighbour's vacant property. The words of Mr. Justice Middleton used in denying the claim of an adverse possessor to enclosed land in *Campeau v. May* (1911), 19 O.W.R. 751 at p. 752, are apposite:
> >
> > > It may be said that this makes it very hard to acquire a possessory title. I think the rule would be quite different if the statute was being invoked in aid of a defective title, but I can see nothing in the policy of the law, which demands that it should be made easy to steal land or any hardship which requires an exception to the general rule that the way of the transgressor is hard.

[46] The important point to be made here is that the Hamsons are not in this category. They believed they had bought the property. They entered under colour of title. They are not squatters. Mr. Justice Blair continues to distinguish *Masidon* on its facts from a situation where persons enter under colour of title, at p. 575 O.R., p. 215 R.P.R.:

> The appellant's occupancy of the land was not justified by any suggestion of colour of right or mistake as to title or boundaries. Occupation under colour of right or mistake might justify an inference that the trespasser occupied the lands with the intention of excluding all others which would, of course, include the true owners.

[47] The distinction drawn by Mr. Justice Blair is not novel or revolutionary. It is explicit in the Mudie case, cited by His Lordship. It is also contained in the case of *Ezbeidy v. Phalen* (1957), 11 D.L.R. (2d) 660 (N.S.S.C.), and a host of cases from the maritime provinces which follow that decision.

[48] In the result, what law is to be applied in the case before the court? The required degree of possession involves a finding of fact, depending on all the particular circumstances of the case: *Re St. Clair Beach Estates Ltd. v. MacDonald* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650 (Div. Ct.). The facts here are that the Hamsons believed they had acquired rights in the property. Mr. Hamson estimated that $70,000 was spent in improving the land and constructing a cottage. While I have reservations about that figure, it is clear that a major investment in the property was made by the Hamsons. In so far as actual knowledge of the

Joneses is required, and I specifically do not think that it is, the evidence is clear that they were aware of the Hamsons' activities on the property by the early 1970s at the latest. The evidence is that the Joneses similarly considered that the Hamsons had a proprietary interest in Lot 40. The cottage was the focus of the Hamsons' vacationing from 1968 to the time of trial. They were there most week-ends between May and October, and for longer periods when Mr. Hamson was on holidays from work.

[49] The fact that the cottage was not inhabited in the winter months is not a bar to recovery. While the cottage was insulated, the testimony is that it was difficult to get to in the winter months. In *Walker v. Russell, supra*, Chief Justice Gale, at p. 210 O.R., p. 522 D.L.R., found that adverse possession could be obtained over a cottage which was uninhabited during the winter months. In that case, there was concrete evidence that similar properties in the vicinity of the subject cottage were not used in the winter. In the case at bar, the evidence that the cottage was difficult to reach in the winter is sufficient to hold that there was not intermittent occupation such as would make a break in the adverse possession. Mr. Justice Middleton faced a similar issue in *Nattress v. Goodchild* (1914), 6 O.W.N. 156. That case concerned the possession of a cabin on an island. At pp. 157-8, he held:

> The possession, during the winter, of the island was precisely the possession that there would have been by the actual owner. Such personal belongings as it was not desired to remove were left upon the island. The house was closed, and left ready for occupation in the following spring.

That appears to be precisely the situation of the Hamsons. I find that the period from 1968 to the commencement of the action constituted a period of continuous possession by the Hamsons.

[50] The test requires that possession be open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner. The occupation by the Hamsons meets these criteria. They had actual possession from 1968 to 1985. As having colour of title, they had the required intent to exclude the Joneses from possession, and they effectively did exclude the Joneses from possession. I believe they have met the required test.

[51] My analysis above rests on the fact that the Hamsons had colour of title, and that this, combined with the actual knowledge of the Joneses and the open and notorious possession of the lot, provided sufficient *animus possidendi* to ground the claim for adverse possession. In the event that I am wrong, and the tests of inconsistent user enunciated by the Court of Appeal are held to apply in this case, I would indicate that I believe they would have met this test as well.

[52] By 1974 Mr. Jones had formed the intention of building a cottage on Lot 41. Because the lot was not severed from Lot 40 at that time, and because the Hamsons had constructed a

cottage on Lot 40, Mr. Jones could not legally build a cottage on Lot 41. At this time at the latest, the existence of the Hamson cottage was precluding Mr. Jones from making the use of the property that he wanted to make of it: see *Arillotta*, supra, at p. 691 O.R., p. 193 D.L.R. In fact, Mr. Jones avoided the problem by making a false representation to the municipality. He said at one point that the cooking facilities had been removed from the Hamson cottage, when in fact they had not been. He was eventually charged by the municipality for violating the building by-law. While the charges were dismissed for delay, it is none the less clear that the occupation of the Hamsons was inconsistent with the use Mr. Jones wished to make of the property. The limitation period thus begins to run when Mr. Jones formed the intention of building his cottage. This can be no later than the fall of 1974 when Mr. Jones applied for the first severance. This is more than the required 10 years before the sale to Mr. Dickinson and the attempt to remove the Hamsons from the property.

[53] In the result, either way, the Hamsons have a valid claim for possession of Lot 40.

Priority between the Hamsons and the Dickinsons

[54] The court was encouraged to find that Mr. Dickinson had no way of knowing of the claim of the Hamsons. It was specifically urged that the court find that the Hamsons acquiesced to the purchase of the property by Mr. Dickinson. I reject that contention. I have found that Mr. Dickinson was told by the Hamsons on July 28th, prior to closing, of the Hamsons' interest in the land. The Hamsons did allow Mr. Dickinson to inspect the cottage, but the evidence from Mr. Eland, the real estate agent who accompanied Mr. Dickinson on the July 28th visit to the cottage, was that the Hamsons were very upset during this visit. Under the circumstances, this can hardly be taken as acquiescence.

[55] Mr. Dickinson's concern was great enough that he asked Mr. Jones about the merits of the claim. He apparently did not notify his solicitor of the possible adverse claim. As a reasonably prudent businessperson, Mr. Dickinson ought to have done so. He had notice of the Hamson claim but elected to continue with the deal in any event. I find that the claim of the Dickinsons to Lot 40 is lower in priority than that of the Hamsons.

Cross-claims

[56] The Dickinsons cross-claim against Mr. Jones for the difference in value of Lots 40 and 41, sold as a package, and Lot 41, sold alone, as of the date of closing. Mr. Dickinson testified that the latter amount would have been roughly $90,000, being $35,000 less than he paid for the package of both lots. These figures were not challenged by Mr. Jones.

[57] Mr. Jones was not able to make good title to Lot 40 as he had contracted to do. The claim of the Dickinsons should therefore be upheld.

[58] Mr. Jones cross-claimed for $2,500 against the Dickinsons, being his half of the $5,000 deposit on the property. It would appear that the deposit cheque was never cashed. Counsel for the Dickinsons urged the court to find that the cheque is still valid and could be cashed by Mr. Jones. Such a submission defies the reality of the banking world. The cheque is stale- dated at this time, and no bank would be likely to honour it. The cross-claim of Mr. Jones should therefore succeed.

Result

[59] In the result, judgment will issue that Mr. and Mrs. Hamson are the owners of the land described in sch. "A" of their statement of claim, and enjoining the defendants from interfering with the Hamsons' use and enjoyment thereof. Damages of the Hamsons as against the Joneses and the Dickinsons not being proven, the remainder of the claim will be dismissed. The plaintiffs are entitled to their costs against the defendants. The claim of the Dickinsons is allowed, to the extent of an award of damages for the difference in value of Lots 40 and 41 together, and Lot 41 alone, in the amount of $35,000. This amount should be reduced by $2,500, being the amount of the Jones' cross-claim, which is allowed. Prejudgment interest will be payable on the remainder from the date of service of the cross-claim. The cross-claim was commenced in November of 1985, so the applicable prejudgment interest rate is 11% per annum pursuant to ss. 137 and 138 of the Courts of Justice Act, 1984, S.O. 1984, c. 11. The other portions of the cross-claims are dismissed without costs. The Dickinsons are entitled to their costs of the cross-claim against Jones.

Judgment accordingly.