Masidon Investments Ltd v. Ham

[1984] O.J. No. 3139, 45 O.R. (2d) 563, 2 O.A.C. 147

Thucydides (ca. 460 BC-ca. 395 BC) stated: "[T]hey devote a very small fraction of time to the consideration of any public object, most of it to the prosecution of their own objects. Meanwhile each fancies that no harm will come to his neglect, that it is the business of somebody else to look after this or that for him; and so, by the same notion being entertained by all separately, the common cause imperceptibly decays."

45 O.R. (2d) 563, 2 O.A.C. 147, 31 R.P.R. 200, 25 A.C.W.S. (2d) 38
Ontario Court of Appeal
Zuber, Blair and Goodman JJ.A.
April 6, 1984.

Garry J. Smith, Q.C., and Robert E. Hawkins, for appellant.

R. F. Wilson, Q.C., and J. Paul Dillon, for respondents.

The judgment of the court was delivered by

[1] BLAIR J.A.:— This appeal concerns a claim for possessory title to land. Specifically, the issues are whether the use made of the land by the appellant, the trespasser, was inconsistent with the use of the respondents, the legal owners, and whether the appellant had the required animus possidendi, the intention to exclude the respondents from possession. The Honourable Mr. Justice Carruthers rejected the appellant's claim and this appeal is taken from his decision: 39 O.R. (2d) 534.

Facts

[2] The relevant facts, as found by Carruthers J. in his full and careful discussion of the evidence, can be briefly set out. The appellant, in 1956, became the tenant of an approximate 100- acre parcel of land owned by Louis Mayzel, located on the north side of the Queen Elizabeth Highway near Oakville. The land was mortgaged by Mayzel to a mortgagee who was a trustee for a group of investors consisting of the respondents or their predecessors in title. On September 26, 1967, the mortgagee registered a final order of foreclosure against the parcel. As a result of subsequent negotiations between the mortgagee and Mayzel, title to the west half of the 100-acre parcel was conveyed to a company controlled by Mayzel. Title to the east half, the lands in dispute in this appeal, remained in the mortgagee and in 1968 was conveyed to the respondents.

[3] The appellant continued as a tenant of Mayzel. The residence he occupied throughout is located on the west half but most of the other farm buildings and the access road leading to the residence are located on the disputed east half.

[4] The appellant operated an airport consisting of two grass runways on the disputed property. The first runway was laid out in the late 1950s and early 1960s; the second runway was constructed between 1966 and 1972 and required extensive ditching, grading and the addition of dozens of large truckloads of fill. The appellant maintained the runways by regular cutting and the addition of fertilizer, loam and seed.

[5] A wind-sock, visible from the highway, was flown from a silo on the disputed property. Some time before 1960, the appellant constructed a small building for use as a hangar. An area of approximately five to seven acres was provided as a parking- space for aircraft. There was also an automobile parking lot.

[6] The airport was not operated commercially for use by the public but was restricted by the appellant for the private use of himself and his friends. Those using it were charged one bottle of Scotch whisky a month and were required to sign a release. The airport had no aircraft servicing facilities, radio or navigational aids. At the time of the trial, the number of aircraft using the airport averaged between 10 and 12. It was used year-round with the exception of a period of up to four weeks in the spring and the fall when conditions were muddy. Winter use was limited because there was no equipment to clear or roll snow. The airport was listed in publications and maps of various organizations including the Federal Department of Transport, Flying Farmers, Emergency Measures Organization and the military services.

[7] The appellant and his family used the balance of the property for recreational and other purposes. He built a dam creating a large pond in one corner of the property. The driveway was built up by the addition of rock fill to an all-weather road capable of carrying heavy trucks. Fill was also deposited elsewhere on the land. The appellant fenced one field for pasturing Mayzel's horses. He took wood from a wood lot for heating his residence. All this work was done at virtually no expense to the appellant: estimated at only $200. The fill was supplied by a company constructing a nearby highway. The runways were built and maintained by local farmers whom he permitted to grow crops on the property.

[8] The learned trial judge found that any fencing done by the appellant was primarily, if not solely, for the purpose of containing Mayzel's horses and not preventing other persons from coming on the property. He attempted to protect the runways by placing signs warning horsemen against riding over them. From time to time he also attempted to prevent snowmobilers and other persons from using the land and, in particular, the runways.

[9] The appellant was a member of the Bar of Ontario. The learned trial judge found that he was well aware of the consequences of the final order of foreclosure and the split of the property into two halves in July, 1968. The appellant testified that, upon learning of the final order of foreclosure, he decided to use the lands "as he had in the past -- as long as they were mine to use, until I was excluded by a judge's order or some other authorized command". The trial judge also found that some time later, probably much closer to the end of the 10-year period, he had "fashioned a design to acquire possessory title to the land in dispute".

[10] The respondents never entered or used the disputed property and, apart from two land appraisers, no one representing them went on the property after 1968. The learned trial judge found that there was no dispute about the use the respondents intended to make of the property, which was to hold it for sale at what the respondents considered the right price, and that the appellant knew of this intention. The property was valuable because of its location and was estimated to be worth $1.2 million at the time of trial. The respondents received a dozen unsolicited offers of purchase between 1967 and 1978, but none was acceptable.

[11] After 1968, the respondents paid all municipal taxes. Appraisals were made of the land in 1974 and 1977 but the appraisers, if they were aware of the use being made of the land by the appellant, did not report it to the respondents. In 1975, a small strip of land adjacent to the Queen Elizabeth Highway was expropriated by the Ontario Ministry of Transport and, after negotiation, the respondents accepted a payment of $12,784 in 1976 in full settlement. The respondents retained counsel in 1978, at a cost of approximately $5,000, for representation before the Ontario Municipal Board at rezoning hearings affecting the property.

[12] The respondents were unaware of the appellant's use of the property until it was drawn to their attention by a prospective purchaser in 1978. Following this discovery, the respondents commenced this action which resulted in the declaratory order of Carruthers J. that they held the property free from any right, claim or interest of the appellant.

Issues

[13] The appellant's claim is founded on the *Limitations Act*, R.S.O. 1980, c. 240, which provides, in effect, that the title of an owner to land is extinguished by the adverse possession of another person for a period of 10 years: ss. 4 and 15. The limitation period of 10 years is prescribed in the somewhat convoluted and archaic language of s. 4 as follows:

> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims, or if the right did not accrue to any person through whom he claims, then within ten

> years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

[14] Whether a prescriptive title has been acquired is a question of fact which must be determined in the light of the circumstances of each case. The legal principles which govern this determination were recently restated in this Court by Wilson J.A. in *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 at p. 692, 72 D.L.R. (3d) 182, and in *Fletcher v. Storoschuk et al.* (1981), 35 O.R. (2d) 722 at p. 725, 128 D.L.R. (3d) 59, 22 R.P.R. 75, where she said:

> ... a person claiming a possessory title as against the legal owner must not only establish actual possession for the statutory period but he must establish that such possession was with the intention of excluding the true owner and that the true owner's possession was effectively excluded for the statutory period.

It is clear that a claimant to a possessory title throughout the statutory period must have:

> (1) had actual possession;
>
> (2) had the intention of excluding the true owner from possession, and
>
> (3) effectively excluded the true owner from possession.

[15] The claim will fail unless the claimant meets each of these three tests and time will begin to run against the owner only from the last date when all of them are satisfied: see *Wright v. Olmstead* (1911), 3 O.W.N. 434 at p. 435, per Mulock C.J., and Wells J. in *Pflug et al. v. Collins*, [1952] O.R. 519 at p. 527, [1952] 3 D.L.R. 681; affirmed by this Court [1953] O.R. 140, [1953] 1 D.L.R. 841. The possession must be "open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner": see *Fletcher v. Storoschuk et al., supra*, at p. 725; *Ledyard v. Chase* (1925), 57 O.L.R. 268, [1925] 3 D.L.R. 794, per Riddell J. at pp. 269-70. In the latter case Riddell J. concluded at p. 270 by saying:

> *Sherren v. Pearson* (1887), 14 Can. S.C.R. 581, lays down the principle again, and adds that this possession must not be equivocal, occasional, or for a special or temporary purpose.

[16] Both parties agreed that the appellant's legal right to be on the disputed lands was terminated by the registration of the final order of foreclosure on September 26, 1967. Thereafter, he occupied the lands as a trespasser for a period of more than 10 years. Carruthers J. held that the appellant's claim to a possessory title failed because he had not satisfied the second and third tests set out above. I propose to discuss these tests in reverse order dealing first with exclusion from possession and then the intention to exclude.

1. Was the use of the land made by the appellant inconsistent with that of the respondents? The question of "adverse possession"

[17] The person claiming a possessory title must demonstrate that his possession effectively excluded the possession of the true owner. The term "adverse possession" shortly describes this test. It no longer bears the technical meaning it did before the enactment of the Limitations Act ["An Act to amend the Law respecting Real Property"], 1834 (U.C.), c. 1, which adopted the language of the Real Property Limitations Act, 1833 (U.K.), c. 27. Before 1833, some acts of possession were deemed to be acts on behalf of the owner and hence not "adverse". As a consequence of the reforming statutes of the 1830s, adverse possession is established where the claimant's use of the land is inconsistent with the owner's "enjoyment of the soil for the purposes for which he intended to use it": *Leigh v. Jack* (1879), 5 Ex. D. 264 at p. 273, per Bramwell L.J., and see Megarry and Wade, *The Law of Real Property, 4th ed.* (1975), p. 1013.

[18] Recent decisions in this Court have established that not every use of land will amount to adverse possession excluding that of the owner. Madam Justice Wilson summarized the effect of these decisions in *Fletcher v. Storoschuk et al., supra*, at p. 724, as follows:

> ... acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use and enjoyment of it intended to be made by the owner: see *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273 at 288; *Kirby v. Cowderoy*, [1912] A.C. 599 at 603. The mere fact that the defendants did various things on the ... land is not enough to show adverse possession. The things they did must be inconsistent with the form of use and enjoyment the plaintiff intended to make of it: see *Leigh v. Jack* (1879), 5 Ex. D. 264; *St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650; *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182. Only then can such acts be relied upon as evidencing the necessary "*animus possidendi*" vis-a-vis the owner.

[19] Examples of the application of this principle are provided by several decisions of this and other courts. In *Keefer v. Arillotta*, supra, this Court held that use of an eight-foot strip of land lying between the properties of the parties for parking by the party having a right of way over it did not deprive the other party, the legal owner, of his title. The legal owner was still able to make such seasonal and occasional use of the property as he wished. Speaking for the majority of the Court, Wilson J.A. stated at p. 691:

> The use an owner wants to make of his property may be a limited use and an intermittent or sporadic use. A possessory title cannot, however, be acquired against him by depriving him of uses of his property that he never intended or desired to make of it. The *animus possidendi* which a person claiming a possessory title must have is an

> intention to exclude the owner from such uses as the owner wants to make of his property.

Wilson J.A. acknowledged that the person claiming possessory title had exceeded their rights but said at p. 691:

> The test is not whether the respondents exceeded their rights under the right of way but whether they precluded the owner from making the use of the property that he wanted to make of it: *Re St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L.R. (3d) 650. Acts relied on as dispossessing the true owner must be inconsistent with the form of enjoyment of the property intended by the true owner. This has been held to be the test for adverse possession since the leading case of *Leigh v. Jack* (1879), 5 Ex. D. 264.

[20] In *Fletcher v. Storoschuk et al., supra*, the owner, who was a farmer, had erected a fence 18 ft. within his boundary line to prevent his cattle from bothering persons to whom he had sold adjoining building lots. One adjoining owner planted trees along the strip adjoining his property, grew buckwheat to keep down the weeds and planted a garden. The farmer objected when the householder built a cement pad on the strip to house the filter for a swimming-pool. Wilson J.A. held that the use previously made of the buffer zone between the farmer's pasture and the residential property of the householder was not inconsistent with the farmer's use which was to prevent cattle from wandering too close to the residential lot lines. She said at p. 725:

> In my view, the acts found by the trial judge to have been performed on the strip of land by the defendants posed no challenge to the use of it intended by the plaintiff. They lacked that quality of inconsistency with the intended use of the owner required to constitute adverse possession for purposes of the statute.

[21] In *John Austin & Sons Ltd. v. Smith et al.* (1982), 35 O.R. (2d) 272, 132 D.L.R. (3d) 311 (C.A.), the vendor, on the sale of property in 1964, reserved the right to enter the land and cut timber. The purchaser used the property for hunting and other recreational purposes. In 1974, the vendor for the first time entered the land and began to cut timber. The purchaser endeavoured to prevent him but this Court held that the vendor was entitled to enter upon the land. Arnup J.A. said at p. 281:

> Where the owner of land containing standing trees conveys away the land, excepting from the grant the standing trees, he has retained the fee simple in the trees, together with the right to go on the land, with such equipment as is reasonably necessary, to cut and take away the trees. It is inappropriate in such circumstances to speak of the right of entry "accruing" or of "a right of action to recover any land" as "accruing", so as to

> bring into operation s. 4 of the Limitations Act. The plaintiff in this case is the owner of the trees, with the right of entry to go and get them, because it has never parted with any rights of ownership. Until someone — whether the owner of the rest of the land or a stranger — does some act that is adverse to the plaintiff 's ownership, the 10-year period under s. 4 has not begun to run.

Arnup J.A. went on to hold that the purchasers had done nothing until 1974 "which was adverse to or inconsistent with the plaintiff's ownership of the trees" and that the statutory period could only begin to run from that time.

[22] In her judgment in *Keefer v. Arillotta*, supra, Wilson J.A. relied on the English Court of Appeal judgment in *Leigh v. Jack, supra*. In that case, the grantor had retained a strip of land adjacent to the land conveyed to the grantee intending it to be used as a street. For more than 20 years the grantee had used the strip as a refuse dump for his foundry. The court held that the grantee had not obtained a possessory title because the use to which he put the land was not inconsistent with that of the owner. Bramwell L.J. stated at p. 273:

> I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it:
>
> > that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment.

[23] In *Williams Bros. Direct Supply Ltd. v. Raftery*, [1958] 1 Q.B. 159, land was bought for development in 1937, and a row of shops with apartments above them was built. The builder's intention to develop the land at the rear of the shops was interrupted by the war. From 1940 onwards, an occupant of an apartment used a parcel of this land as a garden and the tenant who succeeded him continued to do so until 1949, when it was overrun with weeds. He then began to raise greyhounds and erected a shed. The Court of Appeal held that the use of the land was not inconsistent with the owner's rights and did not amount to dispossession. Morris L.J. said at p. 173 that it was

> ... impossible to say that there was actual possession in the defendant of a nature that ousted the plaintiffs from possession, or excluded them from possession: there was no intention on the plaintiffs' part to do other than keep the land until they could use it ...

The use the developers wished to make of it was development at the right time and in this connection Sellers L.J. said at p. 173:

> The true owners can, in the circumstances, make no immediate use of the land, and as the years go by I cannot accept that they would lose their rights as owners merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user.

[24] Another instance of land being held for development is found in *Wallis's Cayton Bay Holiday Camp Ltd. v. Shell-Mex and BP Ltd.*, [1974] 3 All E.R. 575. In that case an oil company, in 1961, purchased a strip of approximately 1.33 acres next to the proposed site of a new road with a view to development when the new road was built. A company operating a holiday camp had previously purchased an adjacent farm. From 1961 to 1971, the camp company pastured cattle on the property using it as if it were its own land and in one year grew a crop of wheat on it. In 1971, the camp company took over the whole strip for the purposes of its operations, cutting grass, collecting litter and using it as a front for the camp but not placing any structures on it. In 1972, after the lapse of the English limitation period of 12 years, the camp company claimed a right to a possessory title which the Court of Appeal rejected. Since the land was being held for development, the acts of the camp company did not oust the oil company from possession because the acts were not inconsistent with the purposes for which the land was held. Ormrod L.J. said at p. 591:

> In my judgment, the acts of the plaintiffs in cutting the grass or hay, grazing cattle and occasionally ploughing the defendants' strip of land, in no way prejudiced the defendants' enjoyment of it for the purposes for which they had originally acquired it, namely, for development as a garage or filling station when the time was ripe. In the context of this case it seems to me immaterial whether or not the plaintiffs had an *animus possidendi*, or that they believed the land to be theirs and treated it as such. Their trespass, relative to the defendants' practical interests in this land, can properly be regarded as trivial. ... In my judgment, therefore, the plaintiffs have not proved adverse possession against the defendants.

[25] Carruthers J. made firm findings of fact to which he applied the principles established by these decisions. He found that there was no dispute as to the use which the respondents intended to make of the lands which were held for sale at the appropriate time for the right price. He added [39 O.R. (2d) 534 at p. 552], " ... very little would be inconsistent with the use the plaintiffs were making of the lands in dispute during the 10-year period". He found that the use made of the lands by the appellant was not inconsistent with that of the respondents. There was ample evidence to support this finding. The appellant made no attempt to exclude the respondents from the lands by fencing or other means. He kept the facilities to a minimum

without any attempt to make them permanent. He consciously refused to make them commercial. Nothing was done on the land which conflicted with the respondents' purpose of holding it for sale for development. Carruthers J. found at p. 552: " ... the facilities could be abandoned quickly and easily and with little loss".

[26] In this case Carruthers J. had to decide whether he should take into account not only the respondents' use of the property as owners during the period of Ham's possession but also any future use. This could be a question of significance where land is held for development and where, conceivably, acts of the trespasser which did not interfere with the owner's use while the land lay idle might none the less interfere with its future development. He held at p. 547 that "it is the use being made of the land during the running of the limitation period that is significant, not some intended future use, if one exists, that is different".

[27] In reaching this conclusion he refused to follow the contrary decision of the High Court in *Giouroukos v. Cadillac Fairview Corp. Ltd. et al.* (1982), 37 O.R. (2d) 364, 135 D.L.R. (3d) 249, 24 R.P.R. 226; reversed on other grounds by this Court: 44 O.R. (2d) 166, 3 D.L.R. (4th) 595, 29 R.P.R. 224. In that case, the successive proprietors of a restaurant had used adjacent property as a parking-lot for many years. The property was part of a parcel which had been acquired for future development as a supermarket in conjunction with a shopping centre. Pending this development the owner had leased the property but neither the owner nor the tenants made any use of the parking-lot. Van Camp J. held that the restaurant proprietor had acquired a possessory title because his use would have conflicted with the use which the owner intended to make of the land in the future. She said at p. 372:

> In the case before me, the two uses are not consistent. The plaintiff uses it as a parking lot that would prevent any use in the future by the defendants for building and it would also prevent their use of it as their parking lot. It is difficult to think of any contemplated use by the defendants even as a buffer zone, which was not suggested, that would not be inconsistent with that of the plaintiff and to which the use by the plaintiff would not be adverse.

[28] In my respectful opinion, Carruthers J. was right in limiting his consideration to the use made by the owner during the period of the trespasser's possession and excluding any consideration of future use. In doing so he followed the decisions to which I have referred and in each of which it is clear that the courts directed their attention only to the owner's use during the trespasser's occupancy.

[29] The source of confusion of use during the trespass with future use is easily explained. Where, as here, the owner makes no active use of the land at all, his user can best be described not in terms of things actually done on the land but rather in terms of the purpose for which he

holds it. In many of the cases and in some of the extracts from judgments quoted above the purpose of holding land is described as its "intended use". The words "intended use" in these cases leads to confusion with future use as opposed to actual use during the limitation period. The difficulty is not one of legal doctrine but rather one of expression. In my opinion, it would be more appropriate in these cases to speak always of the use which the owner made or intended to make of the land in dispute when the trespasser occupied it.

[30] The obvious result of this and other cases I have cited has been stated in *A Manual of The Law of Real Property, 4th ed.* (1969), edited by P. V. Baker, in these words at p. 529:

> If the 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 ...

It may be wondered why the more limited the use made of land by its owner, the greater is the apparent protection from claims for possessory title. The reason is plain. Whether possession is adverse depends in every case on the circumstances and particularly on the use being made of the land by the owner. As Ormrod L.J. said in the Wallis case, supra, at p. 590:

> The same act or acts of trespass may be highly significant to the owner of a house and garden, yet utterly trivial to a property developer or an industrialist who has no immediate use for the land affected.

There is good sense in his conclusion on the same page that:

> This seems reasonable since the interests of justice are not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred.

[31] Carruthers J. dealt with a policy question raised by his decision at pp. 552-3:

> Counsel for Ham complains that ... this virtually means that possessory title cannot be obtained against "development land" which is in the holding stage. This may very well be the case.

[32] It suffices for this case to say that the appellant has not demonstrated acts of user which are inconsistent with the use of the respondents. It is as unnecessary, as it would be imprudent, to speculate on what acts of the appellant could have displaced the possession of the respondents in this case.

[33] 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:

> 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 encouragement to dishonest people to enter on the land of others with a view to deprive them of it.

[34] Robins J.A. speaking for this Court in the *Giouroukos* case, *supra*, reiterated this policy when he said at pp. 187-8:

> 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.

2. Did the appellant have the requisite intention to exclude the true owner from possession? The question of animus possidendi

[35] Mr. Justice Carruthers made a categorical finding that the appellant did not form an intention to exclude the respondents from possession until near the end of the limitation period. He said (pp. 547-8):

> The evidence of Ham does permit me to conclude that at some time during the period following September 26, 1967, he fashioned a design to acquire possessory title to the lands in dispute. I do not accept, as Ham suggests, that this occurred the moment he was deemed a trespasser, the date of the registration of the final order of foreclosure. I think it was sometime much closer to the end of the 10-year period.

This is a finding of fact and there is evidence to support it, most of which I have already referred to. It also supports his finding that the appellant's possession did not effectively exclude that of the respondents.

[36] The two issues are intertwined. The finding that the appellant did not in fact exclude the respondents from possession makes it unnecessary to consider whether he had the intention of doing so and extremely difficult for him to prove that he did. In most cases, it is to be expected that the intention to exclude the true owner will be evidenced by acts which effectively exclude the owner's possession. No such inferences can be drawn in this case.

[37] 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. Such was not the case in this instance.

[38] The acts of possession and the intention to possess are not mutually reinforcing in this case where the learned trial judge made such clear-cut findings against the appellant on both issues. There being abundant evidence to support his findings and no error in his application of the governing principles of law to them, it is not open to this Court to challenge or review them: see *Lewis v. Todd et al.; Canadian Provincial Ins. Co., Third Party*, [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257, 14 C.C.L.T. 294.

[39] For the foregoing reasons, I would, therefore, dismiss the appeal with costs.

Appeal dismissed.