Neutral Citation Number: [2021] EWCA Civ 1029

Case No: A3/2020/1841

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)
HIS HONOUR JUDGE HODGE QC (sitting as a Judge of the High Court)
F04B1050

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th July 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE DINGEMANS

- -

Between :

PENNISTONE HOLDINGS LIMITED	**Appellant**
- and -	
(1) ROCK FERRY WATERFRONT TRUST	**Respondent**

- -

MR JOHN de WAAL QC (instructed by **MSB Solicitors**) for the **Appellant**
MR RICHARD OUGHTON (instructed by **Johnson and Boon Limited**) for the **Respondent**

Hearing date : 1st July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Friday 9th July 2021.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Rock Ferry Waterfront Trust ("Rock Ferry") is entitled to possession of the former Vestor Oil Site at Bedford Road East, Birkenhead. Pennistone Holdings Ltd ("Pennistone"), which claimed to be in actual occupation of the land, counterclaimed for a declaration that it was entitled to be registered as sole proprietor of the land; and an order directing the Land Registry to alter the register so as to give effect to this on the footing that the register required to be updated.

2. HH Judge Hodge QC, sitting as a judge of the High Court, held that the claim to possession succeeded and the counterclaim failed, because Pennistone was not in actual occupation of the land. With the permission of Nugee LJ, Pennistone appealed on limited grounds. Rock Ferry raised certain points that failed before the judge by way of Respondent's Notice.

3. At the conclusion of the argument on the points raised in the appeal, we announced that the appeal would be dismissed, with reasons to follow. These are my reasons for joining in that decision.

The facts

4. I can take the facts from the judge's judgment.

5. Between 2002 and 2012 the registered proprietor of the land was a Seychelles company, Metropolitan Investments Ltd, of which Mr Denis Murphy was the ultimate beneficial owner and controller. By a transfer dated 15 June 2012, and registered on 18 June 2012, Metropolitan Investments transferred the land to a company incorporated in the Isle of Man, called Toluca Ltd. The consideration expressed in the transfer was a nominal sum of £1. Mr Murphy was not a director or a direct shareholder of Toluca Ltd but he was indirectly the ultimate beneficial owner and controller of that company.

6. On 17 November 2015 a transfer was executed whereby Toluca Ltd transferred its registered title to Pennistone. The consideration expressed in the transfer was £2,750. The judge found that the transfer was "properly executed and genuine". At the trial, it was common ground that the stated consideration was paid. Pennistone deliberately failed to register the transfer. The reason for the non-registration was because Mr Murphy did not want the land to appear to be owned by any company in this country which was owned and/or controlled by him. That was because of the potential environmental and contamination issues and liabilities affecting the land by virtue of its status as a former oil site. Nevertheless, the judge held that the transfer took effect in equity, with the result that Pennistone became entitled to the equitable interest in the freehold.

7. On or about 4 September 2016, Toluca Ltd was dissolved in accordance with the laws of the Isle of Man. As a result, the title to the land passed by escheat to the Crown.

8. By a transfer dated 25 April 2019, the Crown transferred the land to Rock Ferry for £5,000. The transfer contained the following recitals:

> "(1) Immediately before its dissolution, as mentioned below, Toluca Ltd ('the Company') was the registered proprietor with freehold title absolute of the premises comprised in the registered title and the former title registered under the former title number and shortly known as Land and Buildings Pier Extension and Pier Head at the site of the slipway at Rockferry
>
> (2)(a) The Company was incorporated as a company under the laws of the Isle of Man
>
> (2)(b) On 4 September 2016 notice was given by the General Registry of the Isle of Man Government that the Company had been struck off the Register of Companies and was dissolved
>
> (3) It is apprehended that the said premises thereupon became subject to escheat to Her Majesty
>
> (4) The Commissioners have agreed with the Purchaser for the sale to the Purchaser in manner hereinafter appearing of such fee simple estate in respect of the said premises subject to escheat as Her Majesty may now be able to grant the property for the sum mentioned below
>
> (5) The Commissioners have at no time prior to the date of this transfer taken possession or control of the said premises or entered into occupation thereof or effected any actual or presumed acts of ownership or management in regard thereto."

9. Clause (1) provided that, in consideration of £5,000, the Commissioners, to the extent that they were able to do so, transferred the property to Rock Ferry with no title guarantee. Clause (2) provided that this was:

> "Subject to so far as affecting the Property or any part thereof and so far as now subsisting and capable of being enforced and whether legal or equitable and whether or not subsisting at the date of the said dissolution above referred to or arising thereafter All if any: (a) estates and interests… (p) interests rights obligations encumbrances outgoings burdens or encumbrances of whatsoever nature not mentioned above and whether or not similar to anything mentioned above."

10. That Crown transfer was duly registered at the Land Registry under a new title number which was said to have been created on 24 May 2019. Pennistone claimed to have been in actual occupation of the land on that date. That was the main issue for the judge to decide.

11. Mr Robertson, an old friend of Mr Murphy's father, had been asked by Mr Murphy to look after the yard. He was an unpaid caretaker, keeping an eye on the land. Although he had a car, he never drove it on to the land. In the daytime he parked right outside the gate to the yard, and at night-time he parked in the bushes along the public

roadway. The only repairs he carried out to the site had been to stop people getting in to the yard. He was just there to look after the yard and check that no one was smashing the fence. The judge found that Mr Robertson had exaggerated the extent of his activities in relation to the land. In his summary of findings of fact at [36] he said:

> "I cannot accept that Mr Robertson visited the site as frequently as he claimed because it is inconsistent with the fact that (as I find) the digital combination padlock which was fitted by Mr Renshaw on 6 December 2018 was still in place three weeks later, on 29 December 2018. I find that when Mr Robertson visited the site at night, he merely observed it from bushes in the neighbouring road. He did not park on the site. I find that he must have visited less often than he told the Court."

12. Mr Murphy claimed that Pennistone had spent considerable amount of money on carrying out works to the land. But the judge rejected that evidence; and found that Pennistone had carried out no work on the land in 2018 or 2019.

13. Rock Ferry's chairman, Mr Renshaw, was in contact with Mr Murphy with a view to buying the land. Their discussions came to nothing; but Mr Renshaw eventually discovered that the land had been transferred to Toluca and that Toluca had been dissolved. It was that that prompted him to approach the Crown.

14. Mr Renshaw visited the site in November 2018. The site was enclosed by a security fence, which the judge found had been in place for nearly 20 years, although some alterations and repairs to it had been carried out to it at some time before 2016. Mr Renshaw discovered that there was an old Toluca padlock on the gate. On 6 December 2018, accompanied by a locksmith, he removed that padlock and replaced it with one of his own. The padlock remained in place until at least 28 December. On completion of the Crown transfer in April 2019 Mr Renshaw visited the site again. He discovered that his padlock had been removed and replaced by a new padlock. But the new padlock did not work, which left the gate unlocked. On 27 April 2019 Mr Renshaw placed a new padlock on the gate. On 24 May 2019 the Crown transfer was registered at the Land Registry.

15. Following the registration Mr Renshaw's padlock was once again removed.

16. At the time of the registration the only physical presence on the land was an abandoned and immovable digger; and two shipping containers which also appeared to have been abandoned. There was no indication on the digger or the containers that they belonged to Pennistone. The containers were being used by Mr Robertson to store some tools and other equipment; but they were his own tools rather than Pennistone's. Pennistone had no use for the land, and it simply allowed Mr Robertson to do whatever he chose on the land in return for keeping an eye on the place and deterring intruders.

17. The judge found that that did not amount to "actual occupation" of the land by Pennistone.

Escheat

18. Escheat is one of the last relics of feudal law. It is based on two propositions: (a) that all land in England is held of the Crown and (b) that no land can be without an owner. The first of these reflects the basic principle of tenure; namely that all land in England is owned by the Crown and that at some point in the past the Crown granted that land to a feudal tenant in chief. If the granted interest comes to an end, the land reverts to the Crown.

19. In the case of a corporation governed by the Companies Act 2006, the mere fact of its dissolution does not result in an escheat. Instead of escheat, what section 1012 of the Companies Act 2006 provides for is the vesting of "all property and rights whatsoever" of a dissolved company in the Crown as *bona vacantia*. Section 274 of the Isle of Man Companies Act 1931 contains a similar provision. Under those laws it is only if there were to be a disclaimer of the land (either by a liquidator or by the Crown once it had acquired the land as *bona vacantia*) that an escheat would result.

20. Toluca was an Isle of Man company, dissolved under Manx law. So the Companies Act 2006 did not apply to it. Nevertheless, land in England is subject to English law; not the Isle of Man Companies Act. Consequently neither the Companies Act 2006 nor the Isle of Man Companies Act 1931 govern the fate of the land. The editors of Megarry & Wade on Real Property (9th ed) para 2-025 take the view that where the corporation dissolved is not governed by the Companies Act there will be an escheat of its real property in England. That is, I think, why it was common ground that on the dissolution of Toluca there was an escheat of the land. The effect of an escheat is that the freehold interest is terminated.

21. Following an escheat, a transfer by the Crown creates a new freehold interest. That explains why a new registered title is created.

22. Curiously, however, although an escheat terminates an existing freehold interest, it does not terminate derivative interests, such as leases or mortgages created out of that freehold: *Scmlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793. It has been assumed that this principle applies to the equitable interest in the freehold created by the transfer from Toluca to Pennistone. We did not hear any argument on this point; but I am prepared to proceed on that assumption.

Actual occupation

23. Because the transfer from the Crown to Rock Ferry amounted to the creation of a new freehold, the registration of that freehold title at HM Land Registry was a first registration.

24. In the case of a first registration of an interest in land as a registered estate, it is the Land Registration Act 2002 that prescribes what does and does not bind the registered proprietor. Chapter 1 of Part 2 of the Act deals with first registration. Section 11 describes the effect of first registration of a freehold estate. Section 11 (4) provides:

> "(4) The estate is vested in the proprietor subject only to the following interests affecting the estate at the time of registration—

> (a) interests which are the subject of an entry in the register in relation to the estate,
>
> (b) unregistered interests which fall within any of the paragraphs of Schedule 1, and
>
> (c) interests acquired under the Limitation Act 1980 of which the proprietor has notice."

25. Among the paragraphs in Schedule 1 is:

> "An interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for an interest under a settlement under the Settled Land Act 1925 (c 18)."

26. If an interest falls within the scope of that paragraph the first registered proprietor takes subject to it. If not, not: *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 504. On the basis that Pennistone had an equitable interest in the land (which was one of the points of dispute raised in the Respondent's Notice), the question is whether Pennistone was "in actual occupation" of the land at the date of the registration.

The judge's conclusions

27. In the course of his discussion of that question the judge referred to a number of authorities, including *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355; *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216; *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, [2010] 2 EGLR 55 and my own decision in *Thompson v Foy* [2009] EWHC 1076 (Ch), [2010] 1 P & CR 16. The judge also referred, by reference to *Malory*, to the decision of this court in *Stand Securities Ltd v Caswell* [1965] Ch 958, where it was held that actual occupation by a licensee for their own purposes did not amount to actual occupation by the licensor.

28. At [73] the judge said:

> "At paragraph 31 [of *Link Lending*], Mummery LJ agreed with what he described as "the accurate and helpful summary of the authorities" on "actual occupation" by Lewison J in *Thompson v Foy* [2009] EWHC 1076 (Ch). That summary was set out at paragraph 23 of the judgment as follows (omitting citations): "(i) The words 'actual occupation' are ordinary words of plain English and should be interpreted as such. The word 'actual' emphasises that physical presence is required. (ii) It does not necessarily involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy on behalf of his employer; (iii) However, actual occupation by a licensee (who is not a representative occupier) does not count as actual occupation by the licensor. (iv) The mere presence of some of the claimant's furniture will not usually count as actual occupation. (v) If the person said to be in actual occupation at any particular time is not physically

> present on the land at that time, it will usually be necessary to show that his occupation was manifested and accompanied by continuing intention to occupy. Those are the applicable legal principles."

29. He went on to say at [74]:

> "The only physical presence on the land was an abandoned, and immovable, digger and two containers. Those containers, looking at the photographic evidence, again appeared to have been abandoned. I am satisfied that, as at the date of both the transfer and the registration of the Crown transfer, there was no indication that they belonged to the defendant company. They were being used by Mr Robertson to store some tools and other equipment but those were his tools and not the defendant's tools. I am satisfied that they were being used for Mr Robertson's purposes, and not for the defendant's purposes. Essentially, Mr Robertson was being used as an unpaid caretaker, just to keep an eye on the land, because of his friendship with Mr Murphy, originally through Mr Murphy's father."

30. At [75] he said:

> "The defendant had no use that for the land, and it simply allowed Mr Robertson to do whatever he chose to do on the land to keep himself occupied, in return for ensuring that he simply kept an eye on the place and deterred intruders. That, as it seems to me, does not constitute "actual occupation" by the defendant."

Discussion

31. Mr de Waal QC did not criticise the judge's self-direction at [73]; but he said that the judge overlooked Mr Robertson's role as a caretaker. Mr Robertson was in actual occupation of the land as representative of Pennistone and, consequently, his actual occupation is to be attributed to Pennistone.

32. Even in a case of actual occupation by a representative, it is necessary to consider why the representative is in occupation. This court discussed that question in *Lloyds Bank plc v Rosset* [1989] Ch 350 (reversed on a different point at [1991] 1 AC 107). Nicholls LJ said at 377:

> "I can detect nothing in the context in which the expression "actual occupation" is used in paragraph (g) to suggest that the physical presence of an employee or agent cannot be regarded as the presence of the employer or principal when determining whether the employer or principal is in actual occupation. Whether the presence of an employee or agent is to be so regarded will depend on the function which the employee or agent is discharging in the premises in the particular case."

33. Having referred to the views expressed in *Strand Securities* that a person could occupy through a caretaker, Mustill LJ said at 397:

> "These observations are not technically binding on this court, but I unhesitatingly adopt them as deciding that someone may be in occupation through another; although I would add this gloss, that the other must be someone who is specifically employed for a purpose which entails their being in occupation."

34. *Stockholm Finance Ltd v Garden Holdings Ltd* (26 October 1995) involved the domestic living arrangements of a Saudi princess living with her mother in Saudi Arabia and owning a house in London, where there was furniture and clothing and caretaking arrangements in place. Robert Walker J held that the caretaking arrangements were not enough to amount to actual occupation by the princess. Part of the princess' entourage consisted of a Mr Baghapour, a driver-caretaker and Ms Tabbada, a maid; although they were actually employed by her brother-in-law, Mr Durani. The princess asked Mr Baghapour "to keep an eye on the property". He complied with that request by visiting the property on average twice a week; switching on lights, setting the burglar alarm, watering plants; and in winter running the central heating system. The general purpose of his activities was to give the house "a lived-in look" and to deter burglars. He occasionally spent the night in accommodation over the garage. Ms Tabbada also came in from time to time to clean. Robert Walker J found that those activities did not amount to actual occupation by the princess. He said:

> "Neither Mr Baghapour's visits in order to give the property a lived-in look (with occasional overnight stays, for his own convenience, in the accommodation over the garage) nor Mrs Tabbada's visits in order to clean, could in my judgment result in Princess Madawi being treated as in occupation through resident employees: both of them were employed by Mr Durani, and neither was in actual occupation of the property."

35. It is the second of these reasons that is pertinent to this case. On the judge's findings in this case Mr Robertson did no more than keep an eye on the yard, and deter people from getting in. The functions he performed in a representative capacity did not entail his being in actual occupation of the land. The judge was careful to describe Mr Robertson's attendance at the land as "visiting". To the extent that he used the land at all, he did so for his own purposes as a gratuitous licensee. In my judgment, the judge was entitled to find that Mr Robertson's activities did not amount to actual occupation by Penistone.

36. Mr de Waal also drew attention to the decision of this court in *Malory* where, he says, on facts similar to those in this case a finding that there *was* "actual occupation" was upheld. That was a case in which the land in question was derelict. The trial judge's findings were quoted in full at [11]:

> "In this case the land remained in a state which did not admit to any serious use or occupation. The rear flats were incomplete, derelict and uninhabitable. The land and the buildings were not appropriated to any alternative use, such as, for example, the parking of cars or the drying of clothes. As it is the only use

> relied upon is the temporary deposit of refuse items from the Hometel Flats—old mattresses and beds awaiting collection and removal in a skip, and the deposit of fencing panels to be broken up and used as hardcore on site. Such casual use and intermittent activities could not of themselves be viewed as 'actual occupation'. I attach greater significance to the secure fencing on all three sides, coupled as it was with the unfenced boundary with the Hometel site and with the access (being the only means of access) from the Hometel flats which were within the same management and control. Although the rear land and Hometel flats were held by separate companies, both companies were under the same ownership (the Lee Chang Trust), both companies and both properties were under the same management as was Mrs Chang's own company, Home Management. Thus, Mr Donald, the joiner, carried out work on both properties and made use of the rear land for work on the flats. The wooden fence and the high security fence were partly on the front land. There was evidence, which I accept, that some work was done, as required, to keep down the weeds in the yard, to maintain the fences that were damaged and to board up the window openings. Taking the evidence as a whole, my conclusion is that the undoubted possession of Malory BVI amounted to 'actual occupation' within the meaning of section 70(1)(g)."

37. Arden LJ (with whom Schiemann and Clarke LJJ agreed) said at [80]:

> "That leaves the question whether the judge's finding that Malory BVI was in "actual occupation" of the rear land is susceptible to review on appeal. The judge's finding involves questions of primary fact and the application of the correct principles to the facts. What constitutes actual occupation of property depends on the nature and state of the property in question, and the judge adopted that approach. If a site is uninhabitable, as the rear land was, residence is not required, but there must be some physical presence, with some degree of permanence and continuity."

38. At [81] she said that the requisite physical presence must be such as would put a person inspecting the land on notice that there was some person in occupation. Having said at [82] that she had not been persuaded that the judge misdirected himself she went on to say:

> "Nor do I consider that he was wrong in the circumstances to attach significance to the fencing of the rear land. In this particular case, the fencing cannot be regarded as wholly separate from occupation of the rear land. The fencing was one of the factors relevant to be taken into account. The judge was also right in my judgment to attach significance to the access permitted from the front land. Even though there was another gate, the access from the front land supported the notion that some person connected with the front land claimed a right to be

> on the rear land. On that basis the question of whether applying those principles there was "actual occupation" was essentially a question of fact for the judge. At the relevant time, there were derelict buildings on the rear land which meant that it was not possible to occupy it by living in those buildings or by cultivating the land or by using the land for recreation. The judge had to consider other acts denoting occupation, such as boarding up the windows of the building and fencing the site (in both cases) to keep vandals and trespassers out, and also using the land for storage. In my judgment, the judge was entitled to draw the conclusion that Malory BVI was in occupation from the facts as found by him and, accordingly, his conclusion cannot be disturbed by this court. Moreover, no one visiting the rear land at the time of the sale to Cheshire could have drawn the conclusion that the land and buildings on the rear land had been abandoned; the evidence of activity on the site clearly indicated that someone claimed to be entitled to be on it."

39. As the court made clear in *Malory* at [80], even in the case of derelict land, some physical presence, with some degree of permanence and continuity is required in order to amount to actual occupation.

40. I cannot see that *Malory* lays down any new principle of law. It was a decision on particular facts. All that this court said was that the trial judge was entitled to find as he did. Whether or not particular facts amount to "actual occupation" is a question of fact for the trial judge. It is a finding based on an evaluation of all the evidence. Unless the judge has misdirected himself in law; or has plainly misunderstood the evidence; or has reached a conclusion that no reasonable judge could have reached (in the sense of being rationally insupportable), an appeal court should not interfere: see, for example *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 at [29] to [33].

41. The point in *Malory* was that on the findings made by the trial judge, the land had *not* been abandoned. Here by contrast, a person inspecting the land would have concluded that it *had* been. That is sufficient to distinguish *Malory*. Moreover, just as the mere presence of furniture does not amount to actual occupation, nor does the presence of apparently abandoned containers. The judge was entitled to find that Mr Robertson's intermittent visits to the land and his use of the land for his own purposes did not amount to actual occupation by Pennistone. The trial judge's factual conclusion cannot be disturbed by this court.

Result

42. It is for those reasons that I joined in the decision to dismiss the appeal. In consequence some of the interesting questions raised by the Respondent's Notice did not arise.

Lord Justice Coulson:

43. I agree.

Lord Justice Dingemans:

44. I also agree.