Michaelmas Term
[2016] UKPC 35
Privy Council Appeal No 0064 of 2013

JUDGMENT

Smith (Personal Representative of Hugh Smith (Deceased)) and others (Appellants) *v* Molyneaux (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Neuberger
Lord Kerr
Lord Reed
Lord Hughes
Dame Mary Arden

JUDGMENT GIVEN ON

21 November 2016

Heard on 1 November 2016

Appellants	*Respondent*
Catherine Newman QC Asha Johnson (Instructed by Blake Morgan)	David di Mambro Andrew Brown (Instructed by Howard Kennedy LLP)

DAME MARY ARDEN:

1. This appeal is from the order of the Court of Appeal of the Eastern Caribbean Supreme Court dated 18 April 2012 allowing an appeal from the order of Ross J dated 24 September 2009. In these proceedings, the appellants, to whom the Board will refer as the Smiths, claim possession of certain land at Parcel 40, Block 2335B, Mount Sage Registration Section ("the Property") from the respondent, Mr Molyneaux, who has resided there for very many years. The central issue raised by the appeal is whether the Smiths gave permission to Mr Molyneaux to occupy the Property so that he could not, as he claims, acquire a squatter's title by adverse possession.

2. Under section 135(1) of the Registered Land Act, an occupier of land may acquire title to it from the registered owner if (among other things) he has possession of it without the owner's permission. Section 135(1) provides that:

> "The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period of 20 years."

3. The registered owner cannot, however, allow 20 years to elapse before interrupting the possession of an occupier because under section 6(3) of the Limitation Act his right of action is barred after 12 years from the date on which the right of action accrues to him. Under section 7(1) of the Limitation Act, the right of action accrues to him on the date on which he is dispossessed.

Acquisition of the Property and oral licence in favour of Ms Cameron

4. The history of this matter covers a considerable period of time but the material facts may be briefly stated. The Property has been in the Smith family's hands for many years and accordingly, where appropriate, when the Board refers to them, it includes the family members who were their predecessors in title. The Property was originally acquired by Mr Alexander Smith, now deceased, in about 1920. The third appellant, Mr Leroy Smith, is his grandson.

5. When Mr Alexander Smith acquired the Property, Ms Victoria Cameron was one of the people living on the property. Mr Alexander Smith did not seek to remove her. Rather he permitted Ms Cameron to remain on the Property, until the family chose to develop it, under an informal arrangement described as a sharecropping arrangement:

she could live there and farm the land until it was required for development, and she would give some produce to the Smiths. Ms Cameron occupied two or three shacks but these proceedings are now concerned only with one of those shacks ("the Shack"), which she used as her bedroom.

6. In about 1956 Mr Molyneaux came on the Property. He and Ms Cameron were married in 1963. They lived in the Shack. It is common ground that, because Ms Cameron had been given permission to live on the Property, she could not acquire title to it by adverse possession, and that that permission terminated on her death.

Death of Ms Cameron: Mr Molyneaux becomes the sole occupier

7. Ms Cameron died on 16 August 1992. Mr Molyneaux continued to live at the Property without interruption from the Smiths. The 12-year period from Ms Cameron's death expired on 17 August 2004. A major issue at trial was whether there had been oral communications between him and Mr Leroy Smith in that period about Mr Molyneaux staying on the Property.

Commencement of possession proceedings

8. On 25 August 2006, and again on 2 January 2007, the Smiths served notices to quit on Mr Molyneaux as they now wished to develop the Property. Mr Molyneaux refused to comply and asserted that he had acquired title to the Property by adverse possession. At about this time, the Smiths' solicitors asked Mr Molyneaux to sign a licence to occupy the Property and he declined to do so.

9. In April 2007 the Smiths brought proceedings against Mr Molyneaux seeking declarations that he was a licensee of the Property and that the notice to quit dated 25 August 2006 had revoked that licence, together with an order for possession. In their statement of case, the Smiths relied on the grant to Mr Molyneaux of oral permission, but Mr Molyneaux in his defence denied that the Smiths had given him any such permission.

Trial before Ross J: judgment given in favour of the Smiths

10. Trial took place in July 2009. Ross J heard a number of witnesses, including Mr Leroy Smith and Mr Molyneaux. Ross J made a site inspection in the presence of the parties.

11. Mr Leroy Smith gave evidence in writing and orally. In his witness statement, Mr Leroy Smith described how he had visited the Property after 1992 to assess the logistics for the proposed development of the Property. He stated that on more than one occasion he had had meetings with Mr Molyneaux reminding him of the Smiths' plans to develop the Property.

12. In cross-examination, Mr Leroy Smith confirmed that he had had several conversations with Mr Molyneaux at the Property after Ms Cameron's death. He said that he had told Mr Molyneaux on several occasions that, when the Smiths wanted to develop the Property, he would be given notice that he would have to leave. He said at a later point in his evidence that, as it was the Smiths' property, Mr Molyneaux could only be a licensee. He accepted, however, that there had been no conversation in which Mr Molyneaux was given permission.

13. The transcript records~~.~~ Mr Leroy Smith's cross-examination as including the following:

> A. Well in my conversations with the defendant, I had alerted him that we intended to develop the Property and at which point we would give him notice so he could vacate. It was not just Mr Molyneaux, it was all of the occupants of that property.
>
> Q. Isn't it correct, Mr Smith, and I have to specifically put this to you, that ever since Miss Cameron died, Victoria Cameron, have you been asking this defendant, and when I say, I don't mean you, but are you aware that anyone has been asking this defendant to leave the property?
>
> A. Officially the first time that Mr Molyneaux got a letter from us was through our attorney and that letter, which you just showed me, was dated 2007. I don't think we ever asked, but we did alert him to the fact that we intend to develop the property and at which point we would give him due notice that he would have to leave. But the first official act of asking was when our attorneys issued that letter to Mr Molyneaux. (Transcript, p 157)

14. At a later point in his evidence, Mr Leroy Smith was asked some further questions about his conversations with Mr Molyneaux. He said that he could not remember any particular conversation in which Mr Molyneaux had been given permission to stay:

Q. Who had those discussions with Mr Molyneaux, according to you?

A. I don't think there was ever a particular discussion about Mr Molyneaux staying on the land. In our mind, it was our property and if we let them stay there, it's with our permission.

Q. So in your mind, according to you, it's your property, and you would just, as you just said, let him stay there. So there was no real discussion between you and Mr Molyneaux?

A. There was no discussions about me saying Mr Molyneaux, you have my permission to stay on the property.

Q. No discussion, thank you. (Transcript, pp 172-173)

15. Mr Molyneaux in his evidence consistently denied that he had ever met Mr Leroy Smith prior to 2007 or that he had ever had the conversations to which Mr Leroy Smith referred.

16. The judgment of the trial judge is particularly brief. Paragraph 13 of his judgment deals with Mr Molyneaux's relationship with the Smiths and sets out his rejection of Mr Molyneaux's claim:

> "13. The conduct on both sides appears to have been substantially relaxed. The claimants did not move to eject the defendant until by the defendant's actions, in 2004, he appeared to be exercising rights akin to ownership of the lands. Prior to that date, the relationship between the defendant and the claimant was not one of open notorious exclusive adverse position, but that of an occupier of lands to which the claimants had proper title and against which accommodations were being granted. Other persons occupying other lands in the area and who acknowledged the claimants as owners crossed the disputed land at will to access the lands in the larger parcel."

17. In the next paragraph of his judgment, the judge explained which evidence had weighed most heavily with him:

> "14. I find that the evidence as set out in the witness statements and as heard at trial through amplification and cross examination, the evidence of the claimants as a collective, is substantially stronger to that of the defendant. From time to time, the defendant appeared confused with respect to relevant meetings, their location and time. His evidence was in conflict with the survey advanced by him for the purpose of the court identifying the lands subject to this dispute and the evidence of licensees claiming possession under the claimants."

18. Ross J accordingly made an order that Mr Molyneaux give up possession of the Property to the Smiths. Mr Molyneaux then appealed to the Court of Appeal of the Eastern Caribbean Supreme Court. At the appeal hearing, Mr Molyneaux limited his claim to the Shack, and therefore gave up any claim to the surrounding parts of the Property. This does not affect the issue of any permission from the Smiths which, if given and given in time, would override Mr Molyneaux's claim to any part of the Property.

Appeal to the Court of Appeal: argument on implied licence

19. In his submissions before the Court of Appeal, counsel then appearing for Mr Molyneaux, Mr Sydney Bennett QC, relied on the answers given by Mr Leroy Smith and set out in para 14 above that there had been no particular conversation in which he had given Mr Molyneaux permission to remain on the Property. He further submitted that it followed from the speech of Lord Browne-Wilkinson in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30; [2003] 1 AC 419, now the leading authority on adverse possession, that the concept of an implied licence was normally a heresy and that an implied licence would only be found on exceptional facts. Basing himself on Lord Browne-Wilkinson's speech, counsel submitted that permission to remain on the Property was irrelevant unless it had led Mr Molyneaux to intend to occupy the Property only until the Smiths wanted to develop it, and there was no finding that that was so.

20. The Board does not consider that counsel's submission before the Court of Appeal was well-founded on the basis of the authorities to which he referred. The type of licence which Lord Browne-Wilkinson was addressing in *JA Pye (Oxford) Ltd v Graham* is to be distinguished from that at issue in this case.

21. Lord Browne-Wilkinson explained that the concept of a licence implied as a matter of law, which he called implied consent, was derived from cases such as *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94 and was to the effect that, if the owner for instance intended to develop a property at some time in the future, the taking of possession by a squatter was not adverse to the owner since it did

not interfere with that intention on the part of the owner. The owner was deemed impliedly to have given a licence. However, the concept of an implied licence was unprincipled since the taking of possession by the squatter did not depend on the intention of the owner but on the squatter's intention to possess the land. Moreover, the concept of an implied licence has since been abolished by Act of Parliament in England. As Lord Browne-Wilkinson explained:

> "Decisions (for example *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94) appeared to hold that use of the land by a squatter which would have been sufficient to constitute possession in the ordinary sense of the word was not enough: it was said that such use by the squatter did not constitute 'adverse possession' which was required for the purposes of limitation unless the squatter's use conflicted with the intentions of the paper title owner as to his present or future use of the disputed land. In those cases it was held that the use by the squatter was, as a matter of law, to be treated as enjoyed with the implied consent of the paper owner. Not surprisingly, Slade J [in *Powell v McFarlane* (1979) 38 P & CR 452] found this line of reasoning difficult to follow. It is hard to see how the intentions of the paper title owner (unless known to the squatter) can affect the intention of the squatter to possess the land. In my judgment, Slade J was right and the decision of the Court of Appeal in those cases wrong. In any event Parliament (on the advice of the Law Reform Committee) has intervened to reverse the principle of implied licence: see the 1980 Act, Schedule 1, paragraph 8(4)." (para 32)

22. Lord Browne-Wilkinson returned to this point at para 45 of his speech, which Mr Bennett cited to the Court of Appeal in argument. In this paragraph, Lord Browne-Wilkinson explained that it was improbable that the owner's intention to develop the property at a later date would have any effect on the critical question of the squatter's intention to possess the land:

> "The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user. Bramwell LJ's heresy [in *Leigh v Jack* (1879) 5 Ex D 264] led directly to the heresy in the *Wallis's Cayton Bay* line of cases to which I have referred, which heresy was abolished by statute. It has been suggested that the heresy of Bramwell LJ survived this statutory reversal but in the *Moran* case the Court of Appeal rightly held that however one formulated the proposition of Bramwell LJ as a proposition of law it was wrong. The highest it can be put is that,

> if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases."

23. The Board has also criticised the concept of licence implied as a matter of law (see its decision in *Ramnarace v Lutchman* [2001] UKPC 25; [2001] 1 WLR 1651 per Lord Millett at para 13). The concept of implied licence in law now forms no part of the common law. The Board considers that any spectre which remains of this concept should be firmly laid to rest.

24. Implied licence in law must be distinguished from any question whether an owner of land has given permission in fact which is sufficient to stop the running of time for the purposes of section 135(1) of the Registered Land Act. The owner may do this orally or in writing and by words or conduct. The parties did not submit that the court should apply any particular test for determining whether permission was impliedly given.

Decision of the Court of Appeal

25. The judgment of the Court of Appeal was given by Pereira J. The Court of Appeal held in favour of Mr Molyneaux on the issue of permission. It rightly held that all that was needed for adverse possession was factual possession and an intention on the part of the occupier in his own name and on his own behalf to exclude the world at large, including the owner.

26. The Court of Appeal also concluded that the judge had confused the issue of Mr Molyneaux's intention to possess the Property with the question whether the owner intended to part with the Property. The Court of Appeal summarised Mr Leroy Smith's answers as set out above, but concluded that in any event Mr Molyneaux had not acknowledged the right of the Smiths in writing. By implication, no such permission could then be effective. That meant that Mr Molyneaux was a trespasser as from 17 August 1992. He had been in possession of the Shack for more than 12 years before his possession was interrupted by the commencement of the possession proceedings and so the judge should have dismissed the proceedings.

27. The Court of Appeal also held in favour of Mr Molyneaux on other grounds but the Board will consider the permission issue first because, if the Smiths succeed on this, none of the other issues arises.

Acceptance by the parties that permission may be given unilaterally and does not require acceptance by the licensee

28. As explained, the Court of Appeal took the view that permission could not be given unilaterally by the owner of land and that it required to be acknowledged by the occupier. At the hearing of this appeal, the Board drew the parties' attention to the decision of the Court of Appeal of England and Wales in *BP Properties Ltd v Buckler* (1987) 55 P & CR 337, which was not cited to the Court of Appeal in this case. This case decides that it is sufficient that permission is given unilaterally. There, shortly before the expiry of the 12-year limitation period, the owner of land out of the blue wrote to Mrs Buckler, a former tenant who was continuing to occupy rent-free a house on the land, in which it granted her permission to live there for the rest of her life. Dillon LJ, with whom Mustill LJ and Sir Edward Eveleigh agreed, held that the crucial question in this situation was what the owner did and not what the squatter intended and, in addition, that she did not need to accept the terms of the licence:

> "The nature of Mrs Buckler's possession after receipt of the letters cannot be decided just by looking at what was locked up in her own mind. It must depend even more, on this aspect of the case, on the position as seen from the standpoint of the person with the paper title. What could that person have done? The rule that possession is not adverse if it can be referred to a lawful title applies even if the person in possession did not know of the lawful title; the lawful title would still preclude the person with the paper title from evicting the person in possession. So far as Mrs Buckler was concerned, even though she did not 'accept' the terms of the letters, BP Properties Ltd. would, in the absence of any repudiation by her of the two letters, have been bound to treat her as in possession as licensee on the terms of the letters. They could not have evicted her (if they could have done so at all) without determining the licence.
>
> I can see no escape therefore from the conclusion that, whether she liked it or not, from the time of her receipt of the letters, Mrs Buckler was in possession of the farmhouse and garden by the licence of BP Properties Ltd, and her possession was no longer adverse within the meaning of section 10 of the 1939 Act."

29. The parties accepted that the same principle must apply to the permission which will prevent a person acquiring land through adverse possession under section 135(1) of the Registered Land Act.

30. Thus the Court of Appeal fell into error in holding that Mr Molyneaux had to acknowledge any permission given to him by the Smiths.

31. The Board does not consider that the Court of Appeal made, or indeed had any grounds for making, any further findings of fact on the question whether Mr Leroy Smith gave permission in conversation with Mr Molyneaux. On that basis, the Board has to consider whether the trial judge made a sufficient finding of fact in this regard.

Did Ross J make a finding of fact that the Smiths gave Mr Molyneaux permission to occupy the Property and if so, was it sufficient in law?

32. The first question is whether it was open to the judge to accept the answer given by Mr Leroy Smith, which is set out at para 13 above, to the effect that Mr Leroy Smith told Mr Molyneaux that he would have to leave the Property when the Smiths decided to develop it.

33. Mr David di Mambro submitted that it was not open to the judge to accept this answer because Mr Leroy's Smith's later answers were to the effect that there was no meeting at which permission had been given (para 14 above). The answers given by Mr Leroy Smith in the passages set out in paras 13 and 14 above were not mutually inconsistent. The later answers merely state that there was no conversation positively giving permission. His earlier answers do not suggest that there was a positive grant of permission, simply that Mr Molyneaux would be told when he had to go.

34. The next question is whether the judge found that permission had been given and, if so, in what terms. In the penultimate sentence of para 13 of his judgment (set out para 16 above), the judge said that there were "accommodations" in respect of the Property. Although the judge did not set out the issues which he had to decide in his judgment, he would have been well aware from the pleadings, the oral and written submissions, the witness statements admitted in evidence and the oral evidence that a major issue at trial was whether the Smiths had given Mr Molyneaux permission to occupy the Property. In the opinion of the Board, para 13 of the judgment must be read in that light. The Board considers that the word "accommodations" in this context must mean informal permission in the terms set out in Mr Leroy Smith's answers at para 13 above. And, indeed, it is clear from the transcript that that is how the reference to "accommodations" was understood by Mr Bennett QC, leading counsel for the Smiths in the Court of Appeal.

35. The further question is whether those answers amounted to the giving of permission. Mr Molyneaux had not been given permission to stay in so many words (see para 14 above). But, in the opinion of the Board, this did not mean that no permission was given. Permission arose by inference from the fact that Mr Molyneaux was told that he would have to leave when the Smiths wanted to develop the Property. It was a necessary part of what Mr Smith was saying that Mr Molyneaux had permission to remain until then. The situation is comparable to that which arose in *Colin Dawson Windows Ltd v Kings Lynn, West Norfolk Borough Council* [2005] EWCA 9; [2005] 2 P & CR 19, where a licence was implied from a letter which the owner of land wrote to the occupier, who had been let into occupation before completing his purchase of the land, stating that he would have to vacate the property if his purchase of it did not proceed.

36. The Board finally has to consider whether the judge gave an adequate reason for his finding of permission. It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded: see, generally, the decision of the Court of Appeal of England and Wales in *English v Emery Reimbold & Strick Ltd* [2002] EWCA 605; [2002] 1 WLR 2409, especially at paras 15 to 21. The judge does not have to set out every reason that weighed with him, especially if the reason for his conclusion was his evaluation of the oral evidence:

> "… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. (*English v Emery Reimbold & Strick*, para 19 per Lord Phillips MR, giving the judgment of the court)"

37. If an appellate court cannot deduce the judge's reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself: see *English v Emery Reimbold* at para 26.

38. In this case the judge gave four reasons. They are set out in the last sentence of para 13 (user by other occupiers under licence), and in each of the three sentences of para 14 of his judgment. The reasons given in para 14 were (1) acceptance of the Smiths' evidence as the stronger, (2) occasional confusion on the part of Mr Molyneaux over meetings, their location and time, and (3) a discrepancy in Mr Molyneaux's evidence on the boundaries of the land which he claimed.

39. To find whether permission had been given orally, the most important evidence was the oral and written evidence of the Smiths and that of Mr Molyneaux. While the Smiths had filed several witness statements, only three members of the family gave evidence: Mr Leroy Smith, Mr James Smith and Mr Egbert Smith. Mr Egbert Smith (but not Mr James Smith) was present at some of the meetings between Mr Leroy Smith and Mr Molyneaux. So when the judge referred the witness statements and oral evidence given on behalf of the Smiths, the judge must have been referring to the evidence of Mr Leroy Smith and Mr Egbert Smith. The Board considers that the first sentence of para 14 of the judge's judgment, read in this context, constitutes the judge's acceptance of their evidence and in addition his preference for their evidence over that of Mr Molyneaux, where there was any conflict.

40. Such a conclusion would have been a complex judgment involving an assessment of nearly two days of evidence. The further reasons which the judge gave for his finding in the first sentence of para 14 no doubt reflected his overall impression of the evidence without identifying every feature of it which had led to his preference for that of the Smiths.

41. The reason given in the last sentence of para 13 (user by other occupiers under licence) was at best circumstantial evidence and of secondary importance. The reason given in the second sentence of para 14 (occasional confusion on the part of Mr Molyneaux over meetings) was not, as Miss Catherine Newman QC, for the Smiths, was constrained to accept, a proper assessment of Mr Molyneaux's evidence about meetings with Mr Leroy Smith, as he had been very clear that he had not met Mr Leroy Smith until 2007.

42. However, the judge's reason in the final sentence of para 14 was in the Board's opinion a supporting reason for his finding on the reliability of the witnesses. As the judge records at some length in para 5 of his judgment, at the site inspection in the course of the trial, Mr Molyneaux had been asked to indicate the area he had been occupying for so many years. He placed the eastern boundary in a materially different place from that which he claimed in his pleadings and which was shown in his surveyor's plan. In his subsequent cross-examination, he confirmed that the surveyor's plan was correct. He was thus confused in this respect in his evidence. The Board considers that the judge was entitled to regard this incident as undermining the reliability of Mr Molyneaux's recollection.

43. The Board notes in addition that the evidence of Mr Leroy Smith, which the judge accepted, was not that there was only a single conversation with Mr Molyneaux but that there were several conversations in which permission was discussed, and that Mr Egbert Smith could confirm some of those meetings at which development was discussed. Moreover, the result of the judge's findings was that Mr Molyneaux was in the same position as his late wife, Ms Cameron, whom the judge found to be a sharecropper, as well as that of other occupiers, to whom the judge had referred in para 13 of his judgment. It was inherently likely that the parties would have agreed to Mr Molyneaux remaining in occupation on the same basis as his late wife, that is, as licensee.

44. In all the circumstances the Board is satisfied that the judge gave sufficient reasons for his finding that Mr Molyneaux occupied the Property after his wife's death with the Smiths' permission.

45. On the judge's findings, the Smiths had not just acquiesced in Mr Molyneaux's staying on the Property after his wife's death and done nothing, as Mr Molyneaux contended. They had taken positive, overt steps to ensure he knew about their plans for development and the fact that he would have to move then.

46. Since the judge found that the Smiths' evidence as the meetings was to be accepted in preference to that of Mr Molyneaux, there could be no question that the permission was not communicated to Mr Molyneaux even though he had firmly denied those meetings had ever taken place.

Conclusion

47. The Board, having concluded that the judge found that the Smiths gave Mr Molyneaux permission to occupy the Shack, will humbly advise Her Majesty that this appeal should be allowed. The Board directs the parties to put in any submissions on costs within 21 days of today. The Board acknowledges the assistance which it has had from leading counsel for the Smiths, and both counsel and solicitors for Mr Molyneaux, who all acted in this matter pro bono.