

Privy Council Appeal No. 41 of 1999

Geoffrey Cobham

Appellant

v.

**Joseph Frett (as personal representative of
Thomas Frett, deceased)**

Respondent

FROM

**THE COURT OF APPEAL OF THE BRITISH
VIRGIN ISLANDS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 18th December 2000

Present at the hearing:-

Lord Slynn of Hadley
Lord Hope of Craighead
Lord Scott of Foscote
Sir Ivor Richardson
The Rt. Hon. Edward Zacca

[Delivered by Lord Scott of Foscote]

There are two points of importance which arise on this appeal. The first is whether the Court of Appeal adopted the right approach in considering whether a judge's finding should be set aside where it appeared that there had been excessive delay between the conclusion of the trial and the delivery of judgment and where the delay was alleged to have been responsible for errors in the trial judge's findings. The second is the yardstick to be applied where adverse possession is said to be constituted by intermittent or sporadic acts of possession taking place over an extended period of time.

The appeal is against the order dated 2nd July 1998 of the Court of Appeal of the British Virgin Islands (Byron C.J. (Ag.), Singh and Redhead J.J.A.) allowing the appeal by Mr. Thomas Frett against the order of Georges J. dated 21st August 1995. The order had declared that two parcels of land in Tortola, Nos. 30 and 57 of

Block 3240A of the Long Look Registration Section, belonged to Mr. Geoffrey Cobham, the appellant before their Lordships. Since the hearing before the Court of Appeal, Mr. Thomas Frett has died. The respondent before their Lordships is Mr. Joseph Frett, his personal representative.

The relevant history of the two parcels of land and the background to the dispute between Mr. Cobham and Mr. Frett can be quite shortly stated. Legislation in the British Virgin Islands in the 1970s required the registration of all land titles. Machinery was established for determining disputes over who was entitled to be registered as owner. Mr. Geoffrey Cobham applied to be registered as the owner of parcels 30 and 57 in the Josiah's Bay area. These were adjoining parcels, with 30 lying roughly to the north of 57. The topography is important. Parcels 30 and 57 are delineated on a plan (the Anker plan). Parcel 57 is shown hatched. Parcel 30 is unhatched. The total area of the two parcels is given as 5.55 acres. The evidence suggests that this may be an overestimate. The acreage of parcel 57, the hatched area, was generally agreed to be about 1.5 acres. The boundary between parcel 30 and parcel 57 consists of a rough track running approximately north-west/south-east. It was, apparently, a public right of way. An old dilapidated wire fence lies on the parcel 30 side, the northern side, of the track but is overgrown with scrub and is not such as to prevent movement of people, or, no doubt, of stock, from one parcel to the other. Parcel 30 consists of a hill with scrub and large boulders. Parcel 57 by contrast is flat, low lying and wet. Depending on the time of year, parcel 57 has on it a large pond. The area of the pond covers sometimes as much as 40 per cent of the surface of the parcel. Parcel 30 has a short sea front; parcel 57 has no sea front but its southern end is surrounded on three sides by parcel 58. Parcel 58 belongs to one or other members of the Frett family. For present purposes it is convenient to treat it as belonging to Mr. Thomas Frett. Save for the dilapidated wire fence already mentioned, parcel 57 is unfenced. In particular, there is no fence, and never has been a fence, between parcel 58 and parcel 57.

When Mr. Cobham applied, on the basis of a paper title, to be registered as the owner of parcels 30 and 57, Mr. Thomas Frett and his brother, Mr. Simon Frett, objected. They claimed to be the owners of parcel 57. The dispute was referred to adjudication (see Land Adjudication Ordinance) and, on 29th September 1972, the Adjudication Officer found in favour of Mr. Cobham:-

“I find therefore, that Geoffrey Cobham purchased the land indicated to me by him and confirmed by the vendor, Maxim

Rabsatt, and vendor's agent, Clarence Lettsome, and that the bounds are as shown on Anker's survey plan ...”

Following a petition presented by “the Heirs of Thomas Frett” who, their Lordships assume, included both Mr. Thomas Frett and Mr. Simon Frett, the Adjudication Officer, on 19th February 1973, confirmed his previous finding and certified that Mr. Cobham's title to the land shown on the Anker plan (i.e. parcels 30 and 57) was “absolute”. Under section 23 of the Ordinance an appeal from the Adjudication Officer's decision lay to the Court of Appeal. Time for appeal was 90 days from the date of the Adjudication Officer's certificate. No appeal was brought. Accordingly, the decision became final as between Mr. Cobham and “the Heirs of Thomas Frett”.

Mr. Cobham did not do anything with the land. He was resident in the United Kingdom. He had an agent in Tortola, a Mr. Clarence Lettsome (to whom reference was made by the Adjudication Officer) who was a local farmer. A lady, Jean Green, who lived at Nanny Cay and was personal assistant to Mr. Geoffrey Cobham's father, also appears to have acted as an agent. She gave evidence at trial that, in the late 1970s, she introduced prospective purchasers of the land to Mr. Lettsome and that in the 1980s she visited the land and found that someone had removed a quantity of sand from the land and that trees and bushes had been cut. She said that Mr. Lettsome died in the late 1980s.

In 1984 Mr. Cobham instructed a local estate agent, Ms. Pamela Romney, to sell the land. Over the period between 1984 and 1991 Ms. Romney visited the land on a number of occasions (7 to 10 times a year, she said).

In 1991 Mr. Geoffrey Cobham instructed Mr. Burton Chalwell to survey the land and sub-divide it into potential plots for sale. Mr. Chalwell did so, and a Mr. Fitzpatrick, his wife and a Mr. and Mrs. Hooper signed a contract negotiated by Ms. Romney to purchase the land. The contract was dated 31st July 1991. Mr. Fitzpatrick, like Mr. Chalwell and Ms. Romney, was local. Each of them had had some familiarity with the land for several years before the date of the contract of sale.

The contract fell through. The reason it fell through was a re-emergence of Mr. Thomas Frett's claim to be the owner of parcel 57. In October 1991 Mr. Fitzpatrick on one of his visits to the land noticed that part of the flat land (i.e. parcel 57) had been cleared of vegetation. He saw “backhoe tyre marks”. A few days later he went to Mr. Thomas Frett's house on parcel 58 and asked Mr. Frett

what he knew about the work that had been done on parcel 57. Mr. Frett said that he had done the work, that the land was his and that he intended “to occupy”. Mr. Fitzpatrick inferred, it seems correctly, that Mr. Frett was proposing to build a dwelling on parcel 57 for his own occupation. He notified Mr. Cobham’s solicitor.

Litigation then ensued and an ex parte interlocutory injunction was obtained by Mr. Cobham restraining Mr. Frett from entering parcel 57. Mr. Cobham relied on his paper title. He was the registered owner of parcel 57. Mr. Frett’s defence was that he had for many years, before and after the adjudication by the Adjudication Officer, been in possession of the land. He claimed a possessory title.

The case came on for trial before Georges J. on 9th May 1994. The trial was not a continuous one. The case was opened and all bar one, Ms. Jean Green, of the plaintiff’s witnesses gave evidence on 9th May. These included Mr. Chalwell, Ms. Romney and Mr. Fitzpatrick. The trial then had to be adjourned because Mr. Frett’s counsel, Mr. Archibald Q.C., had a commitment in the Court of Appeal in Anguilla. It was not resumed until 13th July. The trial concluded on 14th July. The witnesses in support of Mr. Thomas Frett’s possessory title claim included, besides himself, his brother Mr. Simon Frett, Mr. Hugo Hodge who had worked for Mr. Thomas Frett, Mr. Ural Frett, who is the nephew of Mr. Thomas Frett, and Mr. Berchel Wheatley who had worked for Mr. Thomas Frett. All these witnesses were islanders with a long standing acquaintance both with the Josiah Bay area and with Mr. Thomas Frett and his family. Georges J., after the conclusion of counsels’ submissions, reserved his judgment.

The judge did not give his judgment until 4th August 1995, over twelve months after the conclusion of the trial. There is no record of any reason for this delay, nor of any complaint or inquiry about the delay made by the parties or their legal representatives. It was put to their Lordships in the appellant’s case that Georges J. was the only resident judge in the Virgin Islands in 1994/1995 and that it was generally recognised that the volume of work in the jurisdiction required two full-time judges. No disagreement with this was expressed by or on behalf of the respondent whose counsel, Mr. Archibald Q.C., had been Mr. Thomas Frett’s counsel at the trial and in the Court of Appeal – and, for that matter, before the Adjudication Officer in 1973. Whatever may be the explanation for the delay, this is not a case in which the judge lacked notes of the witnesses’ evidence or of counsels’ submissions with which to

refresh his recollection. The record of proceedings prepared for their Lordships includes some 47 typescript pages of the judge's notes. Of these nine pages relate to counsels' submissions and the rest to witnesses' evidence. The notes of witnesses' evidence distinguish clearly between evidence in chief, cross-examination, re-examination and answers given in response to questions by the judge. The text of the notes records some of the linguistic characteristics of the witnesses. There is no reason to doubt their accuracy.

Georges J. found in favour of the plaintiff Mr. Cobham. He gave a detailed judgment running to 31 pages of typescript. In the judgment he described the manner in which Mr. Cobham had acquired his registered title and the nature of the possessory title defence. He reviewed the statutory provisions applicable in the British Virgin Islands to the limitation of actions to recover land (sections 6(3) and 7(1) of the Limitations Ordinance) and to the acquisition of a possessory title to land. Unfortunately he referred to section 135(1) of the Land Registration Act 1975, a provision which applied to Anguilla and requires 12 years possession, instead of to section 135(1) of the Registered Land Ordinance, which applies to the British Virgin Islands and requires 20 years possession. Save for the difference in the number of years the two provisions are in identical terms and nothing turns on the error. The judge then correctly identified the issue in the case, namely, whether Mr. Cobham's title to parcel 57 "has been extinguished and his right of recovery thereto has been statute-barred by the alleged adverse possession of the defendant" (p. 67) and "whether the defendant's alleged use and occupation of Parcel 57 are tantamount to adverse possession so as to confer on him a possessory title and bar the plaintiff's right of recovery to the land in question" (p. 69). He went on:-

"This is essentially a question of fact having regard to the nature, quality and use to which the land could be put, as well as all of the surrounding circumstances which the evidence discloses.

In order to acquire a prescriptive title to land under the prescriptive provisions of the Registered Land Act 1975 (sections 135 and 136) and the law prior thereto (Cap. 206), a person asserting the same must establish not only that he was in peaceable, open and uninterrupted possession without the permission of the owner or persons lawfully entitled for a continuous period of 12 years but equally importantly, the

acts of possession must be clear and unequivocal; ...” (pp. 69/70)

In that passage the judge was in error in citing the wrong Registered Land statute and the wrong period of years but, thereapart, in their Lordships’ view gave himself an impeccable direction. He then described the topography of the land, in more detail than is to be found in this judgment, and proceeded to analyse the evidence. He dealt first with the plaintiff’s witnesses. He described Mr. Chalwell’s evidence as follows:-

“On the whole, this witness impressed as witness of truth and someone who clearly had an intimate knowledge of both parcels of land. I accept his testimony as a fairly reliable account of the matters to which he deposed.”

As to Ms. Romney, the judge said:

“Her general description of the land broadly tallied with Burton Chalwell’s own description.”

As to Mr. Fitzpatrick, the judge said this:-

“The testimony of Derrick Fitzpatrick is obviously of crucial importance because apart from the defendant Frett, he was the only witness who had lived in very close proximity to Parcel 57 for over a decade and he therefore had the advantage and opportunity of observing what activities took place there. He freely admitted that he no longer had an interest in the land and he impressed as a credible and thoroughly trustworthy witness.” (pp. 77/8)

The judge described the evidence of Ms. Jean Green as “given with remarkable candour ... virtually unchallenged and uncontroverted ...” (p. 79). He then expressed this conclusion on the evidence of these witnesses:-

“Judging from the combined testimony of Chalwell, Fitzpatrick and Green whatever activities which were carried out on the land appear to my mind to have been sporadic and were clearly not of a continuous and uninterrupted nature.”

Georges J. was less than enthusiastic about the evidence given by the witnesses called for the defendant. Of Mr. Thomas Frett’s own evidence the judge said:-

“When subjected to close scrutiny, the defendant’s testimony was strewn with contradictions, inconsistencies and

prevarication. His evidence as a whole was therefore unconvincing.” (p. 83)

In the preceding three pages the judge had given examples of the inconsistencies and contradictions he had in mind and commented: “In the light of the evidence before the Court, the credibility of this witness is manifestly suspect”.

As to Mr. Ural Frett, the judge commented:-

“The general impression was that this witness had an interest of his own to serve and I accordingly treat his evidence with reserve.” (p. 84)

In dealing with the evidence of Mr. Simon Frett, the defendant’s brother, the judge set out substantial passages from his evidence, both in chief and in cross-examination and, having done so, said “There was no cross-examination of that witness”. In the context of the two and a half pages of his judgment in which the judge dealt with the evidence of Mr. Simon Frett, it is clear that the reference to “no cross-examination” was a mistake for “no re-examination”.

The judge dealt very shortly with the evidence of Mr. Hugo Hodg had confirmed some of Mr. Thomas Frett’s evidence and, finally, reviewed the evidence of Mr. Berchal Wheatley.

Mr. Thomas Frett and his supporting witnesses had testified to acts done on parcel 57 by Mr. Thomas Frett over the years since 1973, and indeed pre-1973. These acts had included the cutting down of trees, the preparation of charcoal, the grazing of cows, the picking and selling of sea grapes, fishing in the pond and from time taking loads of sand for building purposes. The judge accepted that acts of that description had taken place. But the crucial question was how regularly and how openly they had taken place. The judge plainly thought that Mr. Thomas Frett and his witnesses had exaggerated the extent of the user of parcel 57 that had taken place. He regarded the evidence of Mr. Cobham’s witnesses as proving a more reliable guide. He said:-

“Taken in its entirety, I accept the evidence of the plaintiff’s witness in preference to that of the defendant and his witnesses all of whom (bar the technical witness Julian Skelton) seemed to have their heads in a single barrel. The evidence of Simon Frett brother of the defendant Thomas Frett says it all and does not merit any comment.” (p. 88)

The last sentence of this passage was probably a reference to Mr. Simon Frett's evidence, cited by the judge, that:-

“I myself claim title to parcel 57. I claimed it during the Cadastral Survey of 1972. My claim was rejected. I still claim title today. I am in possession of parcel 57. I say so because it is part of my parent's property. I go on the property. I occupy it as my brother is there. I occupy it thru my brother.” (pp. 85/86)

Having expressed his view on the evidence that had been given, the judge expressed his conclusions on the critical issues:-

“As I have indicated earlier, I certainly do not share the view that the activities allegedly carried out by the defendant on Parcel 57 up to October 1991 evinced an intention to occupy the whole of the land. From the evidence, it cannot in my opinion be argued that there was discontinuance of possession by the plaintiff. Mere non-user of land by itself does not amount to discontinuance of possession. There was no necessity for the plaintiff to physically occupy the land given in its nature and its intended and potential use. In any event his agents did so. Nor in my view was the plaintiff dispossessed by the defendant's activities.

In my judgment, the first clear and unequivocal act of dispossession on the part of the defendant was in October 1991 –when trees were cut down and a site was cleared with a view to constructing a house for occupation. That was a clear manifestation of animus possedendi by the defendant and it was promptly halted by the plaintiff by an interlocutory order of injunction.

And the defendant's other intermittent activities such as cutting down some trees, burning coals, occasional grazing of cows on the land, picking and selling wild sea grapes, fishing in the pond and the taking of sand from time to time (especially bearing in mind that 'sand-thieving' appears to have been fairly rampant in the locality then), are not, in my opinion, clear and unequivocal acts of prescription and do not either separately or cumulatively constitute adverse possession. Nor for that matter were they inconsistent with the plaintiff's use or intended use of the land having regard to its relative isolation and its physical characteristics. To hold otherwise would in my view be contrary to well-established principles and authority.”

Georges J. found, therefore, in favour of Mr. Cobham, the plaintiff. A permanent injunction was granted against Mr. Thomas Frett.

Mr. Thomas Frett appealed. Four grounds were set out in the Notice of Appeal. It is not necessary to refer to the content of the four grounds. What is important is the dog that did not bark in the night (*The Silver Blaze Mystery*). No mention was made in the Notice of Appeal of the twelve month period between trial and judgment. It was simply alleged, in the fourth ground, that “The learned trial judge misinterpreted the evidence on behalf of the defendant’s case on the issue of adverse possession”.

The judgment of the Court of Appeal was given by Singh J.A. on 2nd July 1998. He recorded, at p. 107, that: “The law on this matter was not disputed and the judge’s application of that law was not challenged before us. What was seriously challenged was the judge’s evaluation of the evidence”. It appears that Mr. Archibald Q.C. had based his case on appeal on:-

“... the folly of a judge in seeking to recount and evaluate facts or remember the demeanour of witnesses when delivering a judgment over one year after he had heard the evidence.”

It is plain that the Court thought that Mr. Archibald had succeeded in demonstrating this. Singh J.A. gave two “alarming examples” of what were taken to be errors of the judge. The first was the judge’s reference to there having been no cross-examination of Mr. Simon Frett who had, in fact, been rigorously cross-examined. But as the judge had cited substantial passages from Mr. Simon Frett’s evidence, correctly attributing them to cross-examination, it is clear that the reference to “no cross-examination” was no more than a mistake for “no re-examination”. This is not an example of a mistake attributable to a delayed judgment, or indeed of anything at all except an innocuous slip. The second of the so-called “alarming examples” was the judge’s description of the defendant and his witnesses seeming “to have their heads in a single barrel”. Singh J.A. commented that “a scrutiny of their evidence shows that they did not testify parrot-like and that such evaluation was erroneous” (p. 108). A criticism of the judge’s comment might be that it was over cryptic for those unaccustomed to the idiom of the islands. But a fair reading of the judgment cannot possibly lead to the conclusion that he meant the witnesses had all given identical, pre-arranged evidence. He had set out substantial portions of the verbatim evidence of each of

them (bar Hodge), and his comment was, clearly in their Lordships' opinion, an indication that he thought they had put their heads together to support the defendant's case.

These two examples, whatever adjective be applied to them, do not cast doubt on the reliability of the judge's assessment of the evidence and they do not in any way invalidate the judge's findings.

Singh J.A., after giving these two examples, said:-

“For these reasons, we feel we have the legal basis which allows us room to disagree with the judge's evaluation of the evidence and his conclusions and inferences to be drawn from such evidence if the circumstances so warrant. Because of the delay in writing his judgment, we are also of the view that he was in no better position than us on the issue of demeanour.”

Singh J.A. said that the evidence of Mr. Thomas Frett and his witnesses “as to the acts of ownership exercised by him over the disputed property was to a certain extent supported by certain of the witnesses of the respondent” and said:-

“We can find no justifiable reason why this evidence should have been disbelieved.”

Singh J.A. then went on to express the court's opinion that the Adjudication Officer's decision to award parcel 57 to Mr. Cobham had probably been wrong. His whole judgment comprises some nine pages of which about three were devoted to the Adjudication Officer's decision. There was no attempt at an analysis of the evidence that the court had assumed the right to re-evaluate.

In their Lordships' opinion, a legitimate basis on which the Court of Appeal could assert the right to disagree with the judge's evaluation of the evidence and of the witnesses was absent. It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It will be important to consider the quality of the judge's notes, not only of the evidence but also of the advocates' submissions. In the present case the judge's notes were comprehensive and of a high quality. As to demeanour, two things can be said. First, in their Lordships' collective experience, a judge re-reading his notes of evidence after the elapse of a considerable period of time can expect, if the notes

are of the requisite quality, his impressions of the witnesses to be revived by the re-reading. Second, every experienced judge, and Georges J. was certainly that, is likely to make notes as a trial progresses recording the impressions being made on him by the witnesses. Notes of this character would not, without the judge's permission or special request being made to him, form part of the record on an appeal. They might be couched in language quite unsuitable for public record. In the present case, delay, with a consequent dimming of the judge's recollection of the evidence and of the witnesses' demeanour, was not a ground of appeal. In these circumstances it is, in their Lordships' opinion, impermissible to conclude from the fact of a 12 month delay that the judge had a difficult task, let alone an "impossible" one as Singh J.A. suggested, in remembering the demeanour of witnesses.

In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant.

Mr. Archibald endeavoured to show their Lordships, by reference to nine specific points taken in his skeleton argument that had been placed before the Court of Appeal, that Singh J.A.'s two "alarming examples" were the visible tip of a substantial unexpressed ice-berg of errors in the judgment. These nine points are to be found in paragraph 7 of the skeleton. Four of them, numbers (1), (2), (4), (5) and (8) are irrelevant, being mainly attacks on the 1972/1973 adjudication. Number (3) complained that the judge had failed to make a finding that he did in fact make. Numbers (6), (7) and (9) make complaints about findings, or the absence of findings, by the judge, but there is, in their Lordships' opinion, no substance in the complaints and no reason to doubt the correctness of the judge's conclusions, or to suppose that he forgot or overlooked any material evidence.

The position, therefore, is not only that the "alarming examples" given by Singh J.A. were a wholly inadequate basis for the Court of Appeal to decline to accept the judge's evaluation of the evidence and of the witnesses but also that nothing else of substance that could constitute an adequate basis for doing so was identified.

Mr. Archibald trawled through Georges J.'s judgment in an endeavour to demonstrate inaccuracies or inconsistencies that, coupled with the excessive delay, might make the judgment unsafe. In their Lordships' opinion, the attempt failed. In *Goose v. Wilson Sandford & Co.* (The Times, 19th July 1998), in which Peter Gibson L.J. gave the judgment of the court on 13th February 1998, the Court of Appeal set aside a judgment of Harman J. on certain issues and sent the issues back for re-hearing before another judge. There had been a delay between trial and judgment of some 20 months during which some of the judge's notes had been lost. Material factual errors in the judgment were demonstrated. In *Gardiner v. Jones* (The Independent, 23rd October 1998), in which Lord Woolf M.R. handed down judgment on 20th October 1998, a 22 month delay was severely criticised, but only a minor error in the judgment (on a point on the pleadings) was identified and the appeal was dismissed. In *Times Newspapers Ltd. v. Singh & Choudry* (unreported) 17th December 1999, in which Peter Gibson L.J. handed down the judgment of the Court of Appeal, the judge had taken seven months to complete an 80 page judgment. The court did not think he could be criticised for taking so long but Peter Gibson L.J. added:-

“More pertinently, in the absence of any sign whatsoever that the judge has misremembered any evidence it is, in our judgment, impossible to see how the appeal could succeed on this ground.”

These cases demonstrate, in their Lordships' view, the correct approach to be adopted by an appellate court to an appeal based on excessive delay in delivering judgment. In the present case, their Lordships conclude, the Court of Appeal was not entitled to substitute its own evaluation of the evidence and the witnesses for that which the judge had made.

It follows that the Court of Appeal's reversal of Georges J. cannot be upheld unless some error of law on the part of the judge can be demonstrated. The Court of Appeal did not find there to be any such error and nor do their Lordships. Their Lordships are impressed by the analogy that can be drawn between *West Bank Estates Ltd. v. Arthur* [1967] A.C. 665 and the present case. *West Bank Estates* was an appeal to the Privy Council from the Federal Supreme Court of the West Indies in its appellate jurisdiction for British Guyana. The case involved a claim to a possessory title of a strip of land. The acts relied on were acts of cultivation, the cutting of timber, wood and grass, fishing and growing rice. The trial judge disallowed the claim to a possessory title. The Federal

Supreme Court reversed him. They took the view that the respondents had made what was, for persons of their means and class, normal user of the land. Lord Wilberforce, who delivered the judgment of the Board said this at pp. 677-678:-

“The learned judge ... applied his mind correctly to the question whether the respondents had proved ‘sole and undisturbed possession user and enjoyment’ of the disputed strip. As the Federal Supreme Court itself stated, these words convey the same meaning as possession to the exclusion of the true owner. The learned judge gave recognition to the fact that what constitutes possession, adequate to establish a prescriptive claim, may depend upon the physical characteristics of the land. On the other hand, he was, in their Lordships’ view, correct in regarding such acts as cutting timber and grass from time to time as not sufficient to prove the sole possession which is required: ... The respondents had, in [the view of the Federal Supreme Court], proved that they had made what was for persons of their means and class normal user of the land ... This does not appear to be a correct approach to the evidence. Admitting the utility of the respondents’ operations, and that they did what was normal for small peasant farmers, this still does not establish a sufficient degree of sole possession and user to satisfy the Ordinance, or carry the matter beyond a user which remains consistent with the possession of the true owner.”

In their Lordships’ view, Georges J.’s approach to the evidence in the present case is supported by Lord Wilberforce’s remarks. The judge was entitled to regard the evidence as not establishing a sufficient degree of sole possession and user by Mr. Thomas Frett. Mr. Archibald’s plea to their Lordships “What else could have been done on the land?” is not the right question. An answer might be that Mr. Frett could have fenced-off parcel 57, incorporating it into his own property, parcel 58, and excluding every one, including the true owner and his agents. But in any event the right question would be whether what was done by Mr. Thomas Frett was sufficient to exclude the possession of Mr. Cobham and his agents. The judge answered the question with a “No”.

In these circumstances their Lordships will humbly advise Her Majesty that this appeal should be allowed and the order of Georges J. reinstated. The respondent must pay the appellant’s costs in the Court of Appeal and before their Lordships’ Board.