



[2016]JMSC Civ.157

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE CIVIL DIVISION  
CLAIM NO. 2015 HCV 02137**

<b>BETWEEN</b>	<b>SEATON CAMPBELL</b>	<b>CLAIMANT</b>
<b>A N D</b>	<b>DONNA ROSE BROWN</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>A N D</b>	<b>CARLTON BROWN</b>	<b>2<sup>ND</sup> DEFENDANT</b>
	<b>A N D</b>	
<b>BETWEEN</b>	<b>DONNA ROSE BROWN</b>	<b>1<sup>ST</sup> ANCILLARY CLAIMANT 1<sup>ST</sup> DEFENDANT</b>
<b>A N D</b>	<b>CARLTON BROWN</b>	<b>2<sup>ND</sup> ANCILLARY CLAIMANT 2<sup>ND</sup> DEFENDANT</b>
<b>A N D</b>	<b>SEATON CAMPBELL</b>	<b>1<sup>ST</sup> ANCILLARY DEFENDANT CLAIMANT</b>
<b>A N D</b>	<b>DAVID GEORGE CAMPBELL</b>	<b>2<sup>ND</sup> ANCILLARY DEFENDANT</b>

**IN OPEN COURT**

Andrew Graham, instructed by Bishop and Partners, for the Claimant/1<sup>st</sup> Ancillary Defendant

Gloria Forsythe, instructed by Forsythe and Forsythe, for the Defendants/Ancillary Claimants

**HEARD: May 4 and July 15, 2016**

**CLAIM FOR DECLARATION OF TITLE BASED ON ADVERSE POSSESSION – ANCILLARY CLAIM FILED BY DEFENDANTS AGAINST CLAIMANT AND SEEKING RECOVERY OF POSSESSION OF PROPERTY AND DAMAGES FOR TRESPASS – APPLICATION FOR ENTRY OF SUMMARY JUDGMENT AND FOR RECOVERY OF POSSESSION – CLAIMANT IN ACTUAL OCCUPATION OF PROPERTY – DEFENDANTS ARE REGISTERED TITLE HOLDERS OF SAID PROPERTY – DEFENDANTS PURCHASED SAID PROPERTY WITHOUT ACTUAL NOTICE OF CLAIMANT THEN HAVING BEEN IN ACTUAL OCCUPATION OF SAID PROPERTY – CONSTRUCTIVE NOTICE OF CLAIMANT’S OCCUPATION OF SAID PROPERTY – WHETHER DEFENDANTS OBTAINED REGISTERED TITLE TO SAID PROPERTY SUBJECT TO THE CLAIMANT’S OCCUPANCY OF SAME – EFFECT OF CLAIMANT’S REGISTERED TITLE IN RELATION TO CLAIMANT’S OCCUPANCY OF SAID PROPERTY – WHETHER DEFENDANTS OUGHT TO BE AWARDED SUMMARY JUDGMENT**

**ANDERSON, K.J**

### **The background to the claim**

- [1]** The property which constitutes the subject of this claim is presently occupied solely by the claimant. It is his contention, for the purposes of this claim, that in or about 1984, he took possession of that property, which has its address as: 8D Albert Street, Franklyn Town, Kingston 16, in the parish of Saint Andrew and which is registered in the Register Book of Titles, at Volume 557 Folio 67. As such, the property which constitutes the subject of this claim (hereinafter referred to as ‘the property’) is registered land. That is very important to note, for the purposes, not only of this claim, but also, for present purposes, which concern the defendants’ application for summary judgment, which was filed on August 5, 2015.
- [2]** The claimant has alleged in the particulars of claim pertaining to this claim, that after he took possession of the property in or about 1984, the then registered proprietor thereof had caused the property to be advertised for sale. As a result, the claimant asked his brother – David Campbell, to purchase the property and in 1993, David Campbell purchased the property.
- [3]** At all material times, the claimant has been the sole occupant of the property, since, even though his brother had purchased same in 1993, the claimant was

left in undisturbed possession of same, ever since the property was purchased and the claimant's brother – David Campbell, who was, at all material times, resident overseas, has not returned to Jamaica since the property was purchased and has not visited the property since it was transferred to him, arising from his having purchased same.

- [4] Affidavit evidence filed in support of their application for summary judgment, has disclosed that the property was transferred to David Campbell on April 28, 1993. This claim was filed on April 15, 2015. The defendant's acknowledgment of service, which was filed on April 20, 2015 has, disclosed that this claim and the particulars of claim, were served on the defendants on April 16, 2015. The defendants' defence and ancillary claim, were filed on May 26, 2015.
- [5] The claimant has also contended in his particulars of claim, specifically, that he, 'has been in undisturbed possession from 1993 to present.' That time period would not have been sufficient for him to have successfully pursued and/or maintained a claim founded on adverse possession of what is, private property.
- [6] It is **Section 3 of the Limitation of Actions Act**, which serves, in particular circumstances, to extinguish the title of the true owner, for property. By virtue of that statutory provision, in the prescribed circumstances, if the true owner has failed within the prescribed time period, to assert his title to that property and that property is wrongfully possessed by someone other than the true owner thereof, in a manner which is 'adverse' to the rights of the true owner to that property, then that other party's possession of that property, ripens into a valid title. This is known as 'adverse' possession' and in this claim, it is the well-established legal concept of 'adverse possession' which is founded upon a statutory framework, which constitutes the foundation of the claimant's claim.
- [7] As at the date when this claim was filed, if the period of the claimant's undisturbed possession is being calculated from as of April 29, 1993 – that being the day after his brother obtained title to the property, then that would mean that

less than twelve (12) years would have elapsed between April 29, 1993 and April 15, 2015 (the date when this claim was filed). Accordingly, if the date after the purchase of the property by his brother, is being used by the claimant as his reference point, for the purposes of this claim, as regards when he commenced his undisturbed possession of the property, this claim would, in reality, undoubtedly have no realistic prospect of success.

[8] This court though, does not understand the claimant's claim in that way, although it must be stated, that the claimant's particulars of claim appears to have erroneously suggested that the claimant has been in undisturbed possession of the property from 1993 to present.

[9] The claimant's claim, even as presently particularized, is undoubtedly contending that the claimant has been in open and undisturbed occupation of the property, ever since 1984 and that he (the claimant) has resided there since then, albeit with the knowledge of his brother - David Campbell, who had consented to the claimant's use and occupation of the premises, even after he became the registered owner thereof. Indeed, the claimant's claim form, in setting out the nature of the claim, has alleged that the claimant has occupied the property, *'continuously and without disturbance from 1984 to present and over these years exercised all the rights as owner for twelve (12) years and more until the defendants' title and ownership were extinguished....'*

### **The background to the defendants' application for summary judgment**

[10] The defendants have filed an application for 'entry of summary judgment and for recovery of possession.' By means of that application, they have specifically sought judgment on the claimant's claim, 'as the claimant/1<sup>st</sup> ancillary defendant SEATON CAMPBELL has no real prospect of succeeding on the claim.' (This question was extracted from Order No. 1 being sought in the application).

[11] There are other orders being sought in the defendant's application. In order to better understand the context in which those orders are being sought, it is firstly,

important to note that the defendants have filed an ancillary claim against the person who filed this claim against them. In, that ancillary claim, they have also named, as one of the ancillary defendants – David Campbell – the claimant's brother and it should be recalled, the person who had sold the property to the defendants and who had, while being the owner of the property, consented to the claimant's occupation of the property.

- [12]** Accordingly, the defendants are also, ancillary claimants and the ancillary defendants are the claimant and the claimant's brother, namely: Seaton Campbell and David Campbell. The ancillary claim seeks injunctive relief restraining the 1<sup>st</sup> ancillary defendant or any of his employees or agents, or anyone acting on his behalf, from squatting, trespassing and/or leasing and/or selling any portion, part, or section of the property, or from occupying any part thereof. That ancillary claim also seeks an order for recovery of possession of the property and damages for trespass to the property, interest and costs.
- [13]** Specifically in respect of the 2<sup>nd</sup> ancillary defendant, who is Mr. David Campbell, the ancillary claimants/defendants, are seeking from him, in the event that the claimant is 'adjudged to be the owner 'of the property, an indemnity or contribution in respect of the claimant's claim, any costs which they may be ordered to pay to the claimant and any cost incurred by them, in defending the claimant's claim.' Also, in that event, they are seeking to recover from David Campbell – the 2<sup>nd</sup> ancillary defendant, recovery of the purchase money and costs of the purchase, general damages for, 'the loss of the deal;' interest and costs.
- [14]** This court will not award summary judgment for the ancillary claimants as against the 2<sup>nd</sup> ancillary defendant. This court will not do so, because, at present, it is unknown by this court, whether the ancillary claim has been served on the 2<sup>nd</sup> ancillary defendant. If the 2<sup>nd</sup> ancillary defendant resides overseas, as the affidavit evidence of the claimant has averred, then leave to serve the ancillary claim on him, would have to be obtained by the ancillary claimants,

through this court, in order to have that ancillary claim, properly served on him. It would only be, if he has filed a defence to that ancillary claim, that an application for summary judgment on that ancillary claim, could properly be sought against the 2<sup>nd</sup> ancillary defendant, since, if he has not filed a defence to the ancillary claim, than it is the default judgment procedure that ought to be utilized by the ancillary claimants.

**[15]** When the hearing of this matter came before me, only counsel for the claimant/ 1<sup>st</sup> ancillary defendant and defendants/ancillary claimants were present and addressed me, on the application for summary judgment. Accordingly, this court had only, for the purposes of the summary judgment application, given consideration to the defendant's application for summary judgment on the claim and their same application on their ancillary claim as against the 1<sup>st</sup> ancillary defendant.

**[16]** Several grounds have been set out, in support of that application. One of those has already been set out above, which is that Seaton Campbell, who is the claimant and 1<sup>st</sup> ancillary defendant, 'has no realistic prospect of success on the claim'. That quoted wording was set out, by counsel for the defendant/ancillary claimants, as part of the wording for Order No. 1 being sought by them, upon their, 'Application for Court Orders for entry of summary judgment and for recovery of possession.' This court though, will, in the interests of justice, treat with same as one of the specified grounds set out in that application.

**[17]** The grounds for the application, it must be stated, were inappropriately drafted, as they were drafted, it seems, more in the form of averments being deposed to as a collective whole, in an affidavit, rather than as individual bases, supporting the application. This court though, has considered whether the claimant's claim has any realistic prospect of success and has also given careful consideration to what has been set out as ground number 12, supporting the application. That ground is worthwhile setting out herein, at this juncture. It states as follows: *'That the claimant/1<sup>st</sup> ancillary defendant/respondent Seaton Campbell is a*

*squatter and/or trespasser on the subject property and has no interest in the said property as he occupied the property by his own admission expressed or implied in the particulars of claim filed herein, on his brother's the 2<sup>nd</sup> ancillary defendant David George Campbell behalf with his consent.'* The other grounds set out in support of the application, have not been of any assistance whatsoever, to this court, in adjudicating on the application.

### **The applicant's counsel's submissions**

- [18] The applicant's counsel has submitted that the evidence discloses that the relevant property was advertised for sale via public auction, published in the Gleaner newspaper on June 26, 2014. The vendor of the property was David George Campbell, who is the claimant's brother and the party named as the 2<sup>nd</sup> ancillary defendant to the defendants' ancillary claim.
- [19] On July 10, 2014, the defendants made a formal offer to purchase the relevant property, which was accepted by David George Campbell. An agreement for sale was drafted and executed by David George Campbell as vendor and by Donna Rose Brown and Carlton Brown (the defendants) as purchasers. The property was sold to the purchasers for the sum of \$1,750,000.00. That agreement for sale was dated December 17, 2014.
- [20] The relevant property is registered land, being the land contained in Certificate of Title registered at Volume 557 Folio 67 of the Register Book of Titles. Arising from the defendants having purchased that property, title to same, was transferred to them, by the registered owner of that property – David George Campbell, by way of instrument of transfer numbered: 1927264. That transfer was effected on February 25, 2015.
- [21] There was no caveat registered on the title at the time of the transfer and the defendants were never made aware by the vendor, that the vendor had permitted someone namely: The claimant, to be in occupation of the relevant property, at any time prior to the sale of that property, by him.

- [22]** On or about March 8, 2015, the defendants served on the claimant, a notice to quit and deliver up possession of the property, on or before April 11, 2015. Prior to that, the defendants were provided by the vendor's attorneys – Messrs Frater, Ennis and Gordon, with a letter of possession of the relevant property, dated March 4, 2015.
- [23]** In or about 1984, the claimant took possession of the relevant property. At the time when he took possession of same, his brother was not then the owner thereof. His evidence is that subsequent to his having taken occupation of the property, the then registered proprietor of same, caused the property to be advertised for sale. As a result of that, the claimant asked his brother – David George Campbell, to purchase the said property. David George Campbell did in fact purchase the said property, in or about 1993.
- [24]** After having purchased that property in or about 1993, David George Campbell resided in the United States of America and has never returned to visit the property. David Campbell left the claimant to remain as the sole occupant of that property. As such, it is apparent that from the claimant's own statement of case, the claimant was permitted to remain as the sole occupant of the property, with his brother's full knowledge and consent. This fact is of great legal significance to the claimant's claim to that property, which is founded on the law relating to what is commonly described, in this jurisdiction and others, as, 'adverse possession.'
- [25]** While remaining as the sole occupant of the property, which in fact he occupies even now, the claimant took control of two (2) structures on the premises; paid property tax for the premises; refurbished the structures on the premises; erected a perimeter fence; planted fruit trees and reaped fruits and determined who entered upon the property.
- [26]** There is in fact, no dispute between the parties, as to any of the factual allegations made by the respective parties, as set out above. Additionally, there

is no dispute that on July 3, 2014, David George Campbell offered to sell the property to the claimant for the sum of \$400,000.00, but that offer was rejected by the claimant, who then asserted, '*his rights as owner.*' (Quotation from paragraph 6 of the particulars of claim).

[27] It is also undisputed that at a later stage, David George Campbell had, through his then attorneys – Frater, Ennis and Gordon, sent a letter to the claimant, informing him that David George Campbell was, 'no longer willing to sell the house for \$400,000.00 and instead was willing to sell it for \$1,000,000.00.' (Paragraph 7 of particulars of claim). Clearly also, the claimant did not purchase the property, since instead, it was the defendants who purchased same, from David George Campbell, at a price of \$1,750,000.00).

[28] The claimant is contending that since his brother had abandoned the property and left him in possession of same, his brother had no valid title to that property as at the date when it was sold by his brother to the defendants, on February 25, 2015. The claimant is not an attorney-at-law and this court would, of course, because of confidentiality as between attorney and client, not be aware as to whether or not the claimant got legal advice as to that particular contention of his. It matters not though, whether or not he obtained legal advice as to same, because, for the reasons set out below, his contention in that regard, is undoubtedly based on a fundamental legal misconception, which ultimately, will affect whether or not this court can properly conclude that his claim has any realistic prospect of success.

### **The nature of a licence**

[29] What the claimant had been granted by his brother in respect of the relevant land parcel was a licence. A licence is a mere permission which makes it lawful for the licensee to do what would otherwise be a trespass. See: **Thomas v Sorrell** – [1673] Vaugh 330, at 351. Such a licence is merely a defence to an action in tort and confers no estate or interest in land. A licence in connection with land,

while entitling the licensee to use the land for the purposes authorized by the licence, does not create an estate in land. See: **Ashburn Anstalt v Arnold** – [1989] Ch 1, at 22; and **IDC Group Ltd. v Clark** – [1992] 2 E.G.L.R. 184, at 186, per Nourse, L.J. and **Street v Mouniford** – [1985] AC 809, at 814, per Ld. Templeman. As stated in the text – Megarry and Wade, *The Law of Real Property*, 7<sup>th</sup> ed. [2008] – ‘A licence cannot therefore bind a successor in title of the licensor. Furthermore, at common law, a licensor might always revoke his licence, though he might have to pay damages for breach of contract.’ That claim for damages for breach of contract, it should be noted, pertaining to the revocation of a licence, would be a claim that would have to be pursued as between the former licensor and licensee. It is not a claim which could properly be pursued against the licensor’s successor in title.

**[30]** In the factual scenario as outlined by the claimant in support of this claim, the claimant was granted permission to utilize the disputed land parcel for his own purposes of habitation. Pursuant to that permission having been afforded to him, the claimant refurbished the structures on that property and constructed a fence. He did so, with, at the very least, the implicit permission of his brother. He may have, as such, equitable remedies available to him, as against his brother, who took no steps to prevent him from doing that construction work on that property, but nonetheless, at a later stage, sold that property, thereby having obtained for his benefit, by virtue of the value of that property at the time when it was sold to the defendants, an increased value for same, in terms of the sale price. Those equitable remedies may exist, separate and apart from any contractual remedy which the claimant may have, at common law, as against his brother – David George Campbell. In the final analysis though, the claimant’s statement of case and evidence given by affidavit, in response to the defendant’s application for summary judgment, do not disclose a case which has any realistic prospect of success.

## **Adverse possession**

- [31] What is known in law, as, 'adverse possession,' is a fairly complex legal concept, from which there has emanated, much caselaw.
- [32] Adverse possession can readily be distinguished from a mere licence. Rights over land, exercised pursuant to either a licence, contract of sale, trust, or easement, cannot be adverse. That is simply because, one cannot be in adverse possession of land, which one possesses with the permission or authorization of the paper title owner. Thus, there cannot be adverse possession of land which is enjoyed, occupied, or used under a lawful title, or with the permission of the true owner, such as the lawful title holder for that land. See: **Ramnarace v Lutchman** – [2001] 59 W.I. R. 511, at 515.
- [33] Title to land can be acquired by appropriating a piece of land of another person and remaining in undisturbed possession of it, for a period prescribed by statute, without acknowledging the title of the true owner. If the true owner fails within the prescribed period to assert his title to his land, which is wrongly possessed by a person, his title to the land will be extinguished by operation of the statute. That person's possession of that land, ripens into a valid title to that land, if his possession is adverse to the rights of the true owner. See: Sampson Owusu – Commonwealth Caribbean Land Law, 2007. In Jamaica, the applicable time period, is twelve (12) years. See: **Sections 3 and 30 of the Limitation of Action Act.**
- [34] For adverse possession to property arise, there should be acts which are inconsistent with the enjoyment of the soil, by the person entitled to the land. See: **West Bank Estate Ltd. v Arthur** – [1966] 3 W.L.R. 150. The land should have been used in a way which altered or interfered in a permanent, or semi-permanent way, with the land. A classic case is where substantial structures are constructed on it by the squatter, leaving in its trail, substantial traces of use. Such acts which are incompatible or inconsistent with the due recognition of the

title of the owner, constitute adverse possession. They should effectively exclude the possession of the true owner. The concept does not impose any element of aggression, hostility or subterfuge, as the word, 'adverse' suggests. It is a word used to describe conveniently, a situation where the land falls into the possession of some person other than the true owner under circumstances in which the true owner can treat that other person as a trespasser who is asserting a claim of right, or under circumstances which cannot be explained in a way which is consistent with the title of the paper owner. See: Commonwealth Caribbean Land Law (*op. cit*), at pp 279 and 280.

[35] Possession is single and exclusive. See: **Pye v Graham** [2003] 1 A.C. 419, at 445. It is therefore not possible in law, for an owner of land and an intruder, both to be in possession of a piece of land, at the same time. Possession cannot therefore be concurrent. There is a presumption of law, that the paper owner, is in possession. Accordingly, the person claiming title by adverse possession has the burden of rebutting the presumption that the paper owner is in possession. That burden is discharged by proving factual possession – *factum possessionis* and intention to possess – *animus possidendi*.

[36] The squatter must, in addition to factual possession, show an intention to possess the land to the exclusion of all other persons, including the true owner. See: **Powell v McFarlane** – [1977] 38 P and C.R. 452, at 471, per Slade J.

### **Summary judgment applications**

[37] **Rule 15.2 of the CPR** provides that the court may give summary judgment on the claim or on a particular issue, if it considers that – *'the claimant has no real prospect of succeeding on the claim or the issue.'* The words, 'real prospect of succeeding,' have repeatedly been held by courts in Jamaica and England, as requiring no explanation and as words which should be given their ordinary meaning, when being applied by courts of law. A real prospect of succeeding must, of necessity, always be distinguished from a fanciful prospect of

succeeding. The burden of establishing that the other party's case, has no realistic prospect of success, rests on the shoulders of the applicant. See: **Swain v Hillman** – [2001] 1 ALL ER 91 and **Three Rivers District Council v Bank of England (No. 3)** – [2003] 2 AC 1 **E.D. & F Man Liquid Products Ltd. v Patel** – [2003] EWCA Civ. 472. A claim may be fanciful, where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents, or other material on which it is based. Where there is some realistic prospect of success, summary judgment should be refused and the court should not conduct a mini-trial, into disputed questions of fact. See: **ASE Metals NV and Exclusive Holiday of Elegance Ltd.** [2015] JMCA Civ. 37.

### **Indefeasibility of title**

[38] A registered title is indefeasible, except in the case of fraud carried out by the person who acquired that title. See: **Frazer v Walker** – [1967] 2 W.L.R. 411. That registered title though, is subject to any rights to same, acquired under the **Limitation of Actions Act.**

[39] That a registered title is indefeasible and unimpeachable, other than on the ground of fraud, is made clear by the provisions of **Sections 68 and 70 of the Registration of Titles Act**, save and except that that Act, is subject to the statute of limitations. It is worthwhile setting out the entirety of **Section 68 and a significant portion of Section 70 of the Registration of Titles Act.** **Section 68** reads as follows:

*'No Certificate of Title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every Certificate of Title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in*

*such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.’ The first part of **Section 70 reads** as follows: ‘Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or indentified in the Certificate of Title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Registrar Book constituted by his Certificate of Title, but absolutely free from all other incumbrances whatsoever, except....’*

There are, it should be noted, two (2) stated exceptions, but neither of same are relevant to the case at hand.

### **Application of the law to the present case**

**[40]** The claimant has not alleged fraud in his claim against the defendants. Accordingly, he can only, based on what he has alleged in his statement of case, succeed in proof of his claim, if he can, at trial, prove that the defendant’s title has been extinguished by means of the operation of the statute of limitations.

**[41]** At this stage though, the claimant is not expected to actually prove his claim. He is though, expected to present, by means of affidavit evidence at this stage, coupled with his statement of case, or in other words, his particulars of claim, a claim with a realistic prospect, as distinct from a merely fanciful prospect of success at trial.

**[42]** If his claim has a realistic prospect of success, then his defence to the claimants’ ancillary claim against him, must also have a realistic prospect of success. The converse is, of necessity, also true.

### **The issue of notice**

**[43]** In this case, the parties’ counsel had respectively made submissions before me, as regards whether, since the claimant’s interest in the property, was not noted

on the property's title, the defendants, having lawfully acquired title to the property, without any fraud on their part, either actual or alleged, can have their title to the property defeated by being extinguished due to the operation of the statute of limitations.

[44] Before addressing that issue though, it is worthwhile stating that the claimant should have and could have had his interest in the property disclosed on the title, either by means of a caveat, or better yet, by means of having applied to the Registrar of Titles, pursuant to the provisions of **Sections 85 and 86 of the Registration of Titles Act**, to be registered as proprietors of the property, based upon his possession of same. **Section 85** states: '*Any person who claims that he has acquired a title by possession to land which is under the operation of this Act may apply to the Registrar to be registered as the proprietor of such land in fee simple or for such, estate as such person may claim*'. **Section 86** sets out the procedure to be adopted by a person making an application under **Section 85**. The claimant did not utilize any of those possible procedures, to have his interest in the property, recorded on the title.

[45] Whilst the claimant could have taken the appropriate steps to have his interest in the property, recorded on the title, does that mean that since he failed to do so, his claim against the defendants who have registered title to the property and who obtained that title with no actual notice of that interest of the claimant is automatically bound to fail?

[46] The answer to this question is 'No.' It is not automatically bound to fail, merely because the claimant's interest is not registered on the title to the property. The doctrine of notice is applicable, even in respect of registered land, as far as rights acquired due to the applicability of the relevant limitation period, pursuant to the Limitation Act, is concerned. It is the law of Jamaica, that a duty is cast upon a purchaser of registered land, to go behind the Register and satisfy himself that no adverse interest by limitation has been acquired, in every case in which more than twelve (12) years has elapsed since the title was first registered. That was

the conclusion reached by the Privy Council in the case – **Chisholm v Hall** [1959] 1 W.I.R. 413, and that conclusion was reached by Jamaica’s highest court, so as to ensure a proper reconciliation of the provisions of **Sections 67 and 69** (as at the date of judgment – now the same as **Sections 68 and 70**, quoted above).

[47] It is worthwhile quoting from what was stated by Ld. Jenkins in his judgment, as to the particular issue of the effect of being a registered title holder, subsequent to first registration, in circumstances wherein another person has acquired rights to ownership, or in other words, legally enforceable rights over property in the capacity of an owner, due to the application of the statute of limitations, in that party’s favour.

[48] Lord Jenkins states as follows, as reported at pages 421H to 422B –

*‘The scheme of S. 69 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance no doubt on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming a right of that description. But from and after that first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission. See as to transfer S.84 which provides that the transferee shall be ‘subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor.’ This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor; and although the words used are not particularly apt to described rights acquired by limitation, a transfer is in any case one (1) of the instruments to which the ‘deeming’ provision of S.69 is applicable. The combined effect their Lordships would attribute to SS. 67 and 69 may perhaps be criticized as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest*

*by limitation has been acquired, in every case in which more than twelve (12) years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the law of preserving rights acquired by limitation notwithstanding that they are not noted in the register.'*

[49] It is to be noted that the provision which was **S.84** at the time of the Privy Council's Judgment in **Chisholm v Hall** (*op. cit.*), is still in existence, as **S.88** of the same Act. In the circumstances, although twelve (12) years have certainly not yet passed since the defendants became registered owners of the land, that would not mean that adverse possession rights could not have been acquired in a manner sufficient to have extinguished their title. That is so because, said rights could have been acquired as against a prior registered owner of that property and if so, that title holder's title to that property would have been extinguished and that title holder could not properly, thereafter, pass on that extinguished title to anyone else, as though it was then, a valid title. That is one of the possible effects of **Section 88 of the Registered Land Act**, considered in conjunction with Sections **70 & 71 of that Act** and that indeed, is what Ld. Jenkins stated so clearly, as quoted above.

#### **Adverse possession compared to mere possession**

[50] In any event, mere occupation of land for a period of twelve (12) years or more, without disturbance by the title holder to that land, does not, in and of itself, entitle that occupant to successfully claim that he or she/ they has/have a better title to that land, than for instance, a registered title holder of same. No doubt, the claimant and his counsel are aware of this and that is why, in the claimant's particulars of claim, particulars have been set out as to what the claimant has done on, or in relation to the relevant land, since in or about 1994. What the claimant's particulars of claim and affidavit evidence though, have not set out, is that the claimant did any of those things, so as to extinguish the right of his brother, to use and/or occupy the relevant land, at any time between April 28,

1993 and February 25, 2015. The claimant has not particularized when it was that the fence was built. Accordingly, whilst the erection of a fence is strong evidence of an intention to exclude everyone else from the property, since, the time when that intention was formed, is critically relevant in all cases pertaining to the law of adverse possession, accordingly, it follows inexorably, that the time when that fence was erected, is of critical importance. The claimant's statement of case and affidavit evidence in response to the defendant's application, have utterly failed to disclose that. The same applies as regards the refurbishing of structures on the property.

**[51]** It is important to note that open and undisturbed possession of property, is not to be equated with, 'adverse possession.' Accordingly, whenever adverse possession is being alleged, it is imperative that there be set out in the statement of case of the party alleging same, circumstances which can properly lead a trial court, at a later stage, to conclude that the property was possessed in a manner adverse to the rights of the title holder. In the case at hand, not only has the claimant/ancillary defendant failed to do that, but worse yet for him, he has made it abundantly clear in his statement of case and affidavit evidence, that he had, throughout most of the years that he has been in open and undisturbed possession of the property, enjoyed such open and undisturbed possession, as a consequence of the licence given to him by his brother, to do so. It is for all of the reasons as noted above, that this court has reached the conclusion as set out below.

## **Conclusion**

**[52]** In the case at hand, the claimant's claim would have been bound to fail at trial, as too, would his defence to the ancillary claim brought against him, by the defendants. That is so because, at all times, although he occupied the disputed property openly and thus, had openly possessed same, he did not have adverse possession of same for the twelve (12) years as required by the statute of limitations, so as to have extinguished the title to that property. His possession

of same was disturbed by the defendants within a very short time after they had acquired title to the property. Additionally, at all times, while he was in open and undisturbed possession of the property, during his brother's ownership thereof, as the then registered title holder, he was in possession of same, by means of a licence, in the form of permission given to him, either expressly or implicitly, by his brother, to occupy the premises.

.....  
**Hon. K. Anderson, J.**