



[2017] JMSC Civ. 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010HCV02302

BETWEEN	GLORIA PLUNKETT (Executrix – Estate of Lewis Nelson)	CLAIMANT
AND	HUNTLEY REID	DEFENDANT

Messrs. Norman Hill Q.C. and Raymond Samuels for the Claimant

Mr. William Hines for the Defendant

Land -Adverse possession – Limitation of Actions Act - Bona fide purchaser for value without notice.

HEARD: April 23, 24, 25 and 28, 2017

COR: WINT-BLAIR, J (Ag.)

I have been greatly assisted by submissions from both counsel appearing in the matter. In this judgment I will reference the evidence and submissions only to the extent necessary to explain my findings and decision. The parties should rest assured that in order to arrive at my decision I have considered all the evidence and submissions of counsel.

[1] An application for a visit to the locus was made by the claimant’s counsel and a decision reserved for evidence to be heard by the court. There was no need for such a visit. The evidence as to the location of the land and the issues in respect of possession did not depend upon the geographical location of the disputed land; its boundaries or any peculiar features of it. The court would not have been assisted by such a visit.

[2] Gloria Plunkett was appointed by order of Rattray, J on June 2, 2014 in a representative capacity as regards the estate of Lewis Nelson. He had initiated these proceedings became ill and subsequently died after filing the fixed date claim form and supporting affidavit in this matter. In his claim Lewis Nelson had sought the following orders:

1. A declaration that the claimant is entitled to exclusive right [sic] of ownership and possession of the said property.
2. Recovery of possession of the said property.
3. Mesne profits in the sum of One Million Four Hundred and Twenty-One Thousand Four Hundred Dollars (\$1,421,400.00).

[3] The fixed date claim was converted into a claim by order of Cole-Smith, J, on June 19, 2012. The learned judge further ordered that the matter proceed by way of trial in open court and that all affidavits were to stand as witness statements. The order granted permission for further witness statements to be filed and the parties complied.

[4] Lewis Nelson died before his witness statement could be obtained. At trial, his affidavits dated May 7, 2010, December 8, 2010, April 29, 2011, April 16, 2012 and June 15, 2012 were agreed and admitted into evidence as his evidence in chief. These affidavits stated that Lewis Nelson had been made caretaker of land owned by Wilfred DaCosta. This land consisted of three acres seven and one-half square chains and was situate at Roslyn Road, Albion Mountain, in the parish of St. Mary

[5] This land was later divided among the children of Wilfred DaCosta. Gloria DaCosta's portion was nine and one-quarter squares. She enclosed her land and placed Lewis Nelson in possession of it.

[6] In 1973 Lewis Nelson purchased Gloria DaCosta's portion of the land from her for One Hundred Thousand Dollars (\$100,000.00). In 1995, he built a house on the land he had purchased. In 1999 he rented that house to Rhona Murphy. He planted crops and fruit trees on the land.

- [7]** These affidavits disclosed that Lewis Nelson claimed this nine and one quarter square chains of unregistered land at Roslyn Rd in Albion Mountain, St. Mary. The land is bound on the north by lands owned or in the possession of the Roslyn Road church of the First Born. To the east by Roslyn Road, to the south by a reserved road and to the west by land owned or possessed by the estate of David Nelson.
- [8]** On May 12, 2009, Mr. Huntley Reid took possession of all nine and one-quarter squares of land by force, preventing Lewis Nelson from using the pit latrine and collecting rent from his tenant. Lewis Nelson denied that Barbara Seivwright and a group including Huntley Reid confronted him in 2003, telling him to remove his wooden structure and to vacate the land. He denied promising to do so and asking for time in which to move.
- [9]** There was also no independent evidence of the value ascribed in the claim to the land, trees, crops or the house.
- [10]** The undisputed facts were that the land now being claimed by Lewis Nelson was originally owned by the DaCosta family (hereinafter referred to as “the DaCosta’s land.”) Lewis Nelson, farmer, now deceased was the neighbouring landowner to the DaCosta family. He shared the southern boundary of their land. The disputed land belonged to Gloria Sutherland daughter of Wilfred DaCosta. The entire estate had vested in the Crown and was later restored to the children of Wilfred DaCosta. The land was sub-divided and her land became Lot 4. Lewis Nelson had built a three bedroom wooden house with a verandah on a portion of the DaCosta’s land which he let to one Rhona Murphy. This tenant lived there for 11 years with her common law husband and son Leighton Williams. This house had electricity connected to it. Lewis Nelson eventually became ill and had to be hospitalized. He died before this trial.

Claimant's case
The Evidence

- [11] Here was where all agreed facts met their demise. Ms. Gloria Plunkett gave evidence that she is the executor of Lewis Nelson's estate. He had given her the rent receipts concerning his tenant Ms. Murphy upon his return from the hospital when he was in much better health. Her evidence in respect of Lewis Nelson's possession of the land was that he had occupied the land for a while. She could not recall the size of the land he claimed, nor could she recall when Huntley Reid began living on the land claimed by Lewis Nelson. She could not recall very many details of very much of Lewis Nelson's case. Whereas in her witness statement she had made several factual assertions under cross-examination, she admitted to having no personal knowledge or recall of most of those statements of fact and assertions.
- [12] Ms. Plunkett said that all the rent receipts given to her were signed in her presence either at Lewis Nelson's house or hers. These receipts are dated between February 26, 2001 and December 28, 2011. It is also of note that Lewis Nelson's affidavits contains no reference to Rhona Murphy as his tenant, however, the defendant, Mr. Reid agreed that she was. The monthly rental claimed by Mr. Nelson was thirty thousand dollars per month (\$30,000.00) at paragraph 10(1) of the fixed date claim form and thirty dollars per month (\$30.00) at paragraph 12 of the affidavit in support of said fixed date claim form (both filed May 7, 2010). It was unclear, which was the correct figure and there were no submissions to suggest how the court should interpret this inconsistency. This anomaly was further compounded as receipts for rent of \$1,500.00 per month paid to Lewis Nelson by Ms. Murphy were tendered in evidence by Ms. Plunkett. Mr. Reid in his evidence also agreed with this as he explained that Ms. Murphy was a tenant of Mr. Nelson's who paid the sum of \$1,500.00 per month for rent.
- [13] In Lewis Nelson's affidavit of May 7, 2010, averred that he lost the monthly rental of \$360,000.00 over the period of twelve months as Huntley Reid forcefully took possession of the land in 2009 and began collecting the rent. The rent receipts

exhibited by Gloria Plunkett show a monthly rental of \$1,500.00 for payments between 2001 and 2011. A far cry from \$30,000.00 per month as averred. These receipts are self-serving and certainly do not point to the evidence in Lewis Nelson's affidavit. These receipts also do not show a sufficient nexus between Lewis Nelson and Rhona Murphy in respect of a tenancy agreement between them or payments on the tenant's behalf in respect of this agreement. They do not take Lewis Nelson's case any higher.

[14] Gloria Plunkett gave evidence which was rather unhelpful, containing far too many gaps where there ought to have been recall concerning the events about which she testified her evidence was unremarkable.

[15] The next witness was Wycliffe Junior Allen. His evidence in chief was that he was a furniture maker who had known both Lewis Nelson and Huntley Reid all his life. He spent most of his life "in and out" of Lewis Nelson's house. He knew that when Wilfred DaCosta died in 1972, Lewis Nelson became caretaker of the DaCosta's land. Mr. Nelson had been given the job of caretaker by the children of Wilfred DaCosta as none of them lived there. In 1982, Mr. Reid was then living in the DaCosta family house having rented it from Mr. Nelson. That family house was in a state of disrepair and Huntley Reid asked Lewis Nelson instead to rent a house spot on the land to him. Mr. Nelson did so and Mr. Reid began to build a house. Mr. Nelson filed suit against Mr. Reid in the St. Mary Resident Magistrates Court (as it then was) for arrears of rent.

[16] Mr. Nelson and this witness planted june plum, mango, breadfruit, pear and ackee trees, along with vegetables and cash crops. Gloria Sutherland had by this point sold her portion of the land to Lewis Nelson. He used to take Mr. Nelson to her home to pay money and witnessed her giving receipts to him. She died before she could give evidence on behalf of Mr. Nelson in the suit against Huntley Reid.

[17] In 1995, Lewis Nelson engaged the services of Wycliffe Allen to build a wooden house on the land. This house was eventually rented to Ms. Rhona Murphy who

occupied it until 2012 paying rent to Mr. Nelson. The electricity to this house came from Mr. Nelson's original house on his parcel of land. Mr. Allen tendered receipts for materials he had purchased on behalf of Lewis Nelson when he had been engaged to build the house which he had. He also assisted in the building of a water tank, pit latrine and other structural additions for Mr. Nelson. He referred to receipts for materials he purchased for Lewis Nelson these materials remain on the land to this day. These receipts were made the subject of a notice to tender hearsay evidence and admitted thereby. They were dated April 18, 2004, September 19, 2005 and December 13, 2005 and clearly could have had nothing to do with the construction of the house purportedly built in 1995.

[18] It was Mr. Allen who had received Lewis Nelson from the hospital on the last occasion of his discharge. He said that Mr. Nelson had been in out and out of the hospital and that this had gone on for some time. Mr. Nelson had gotten sick and a few months later, died. Mr. Nelson had lived with his common law wife Miss Ven at the original house on Lewis Nelson's land. She was still living there up to the date of trial. When Mr. Nelson was taken back from the hospital by the witness he was taken to the house on the DaCosta's land. The witness goes on to give very telling evidence, he said:

"This house is at the roadside, so we just put him there so it's convenient for him."

This evidence was unchallenged and contrasts with that of Huntley Reid who had said that Lewis Nelson never occupied the house he had built on the land he claimed.

[19] In cross- examination Mr. Allen said that he knew from childhood of Mr. Nelson's connection to the DaCosta's land. He used to leave primary school and go to Mr. Nelson's home. He gave evidence in his witness statement that in 1970, Mr. Nelson had told him about his dealings with the DaCosta's land. The witness also gave evidence that he was born in 1967. It seems that at three years of age

he was told of all of Mr. Nelson's dealings with the land, a shameless and obvious fabrication.

[20] Mr. Allen built the house for Mr. Nelson in 1995 while Mr. Huntley Reid was living at the old DaCosta house. This witness said he helped Mr. Reid to build a two-room wooden house on the DaCosta's land in which Mr. Reid lived with his family. This house was near the main road. Mr. Allen witnessed Lewis Nelson visit Gloria Sutherland to deliver money, he would show the receipts he got from Ms. Sutherland to him. The dates of these visits were not accounted for nor the reason for the payment of money. He agreed that several parts of his witness statement were matters he had only heard about and he too could not recall many details at trial of the factual assertions made in his witness statement. He too was a most unhelpful witness.

[21] The evidence of Mr. Dennis Nelson, son of Lewis Nelson was that he had grown up on his father's land which adjoined the DaCosta's land. He was well acquainted with Huntley Reid as they were childhood friends. After the death of Mr. Wilfred DaCosta, Lewis Nelson was put in charge of the DaCosta's land by the children of the deceased. Mr. Nelson rented the portion of the DaCosta's land which was for Gloria Sutherland and he paid rent to her. The other three children of Wilfred DaCosta sold off their portions of the estate. Lewis Nelson subsequently purchased Gloria Sutherland's portion of the estate in 1973 for \$100,000.00 Mr. Nelson cultivated the land, planting june plum, banana and plantain trees. He would send the fruit from the land to Gloria Sutherland and installments of the purchase price to her from time to time. It was he who had assisted his father to pay off the balance purchase price of the land.

[22] Mr. Dennis Nelson had migrated to Canada in 1987. In 1993 he returned for a visit and took his father to Gloria Sutherland to pay One Thousand Dollars (\$1,000.00) as an installment for the land. It was he who made the payment on behalf of his father and a receipt was written up for the transaction. This receipt was written and overwritten by Gloria Sutherland because her hand was shaking.

This transaction was done in the presence of Mrs. Barbara Seivwright who had peeled and handed two oranges to Messrs. Nelson during the visit. Mrs. Seivwright denied that such an incident had occurred. He could not recall the date of his father's death despite his vivid recall of this particular incident.

[23] Dennis Nelson went on to say he had sent Three Thousand dollars (\$3,000.00) to his father in 1992 to pay down the balance purchase price. This receipt was dated February 24, 1992. In 1990 he began sending money for his father to build a house that had been built by the time he came home in 1993. The house had been rented to Ms. Rhona Murphy who lived there for some eleven years with her family. This house built by Wycliffe Allen was on the latter's evidence built in 1995.

[24] Payments on the purchase price were transported to Gloria Sutherland from Lewis Nelson by way of Mr. Huntley Reid or Lewis Nelson's other son. Mr. Nelson also gave evidence of this in his affidavit dated June 15, 2012. He said that he had rented a house spot to Mr. Reid for \$200.00. He wanted the rental sums to be paid directly to Gloria Sutherland and for these sums to be considered as installment payments towards the purchase of the land. To this end in, 1990, Lewis Nelson brought Huntley Reid to Gloria Sutherland who agreed to apply the rental payments towards the purchase price of the land. It was when Huntley Reid defaulted on his payments, that Lewis Nelson filed suit for the arrears in the then Resident Magistrates Court for the parish of St. Mary. That matter was adjourned sine die as Gloria Sutherland who was his witness became ill and subsequently died. Mr. Reid continued on the land without paying rent.

[25] The evidence of Dennis Nelson was unimpressive and of scant weight. In fact, none of Lewis Nelson's several affidavits recount having any of the conversations given in evidence by his witnesses. The best evidence came from Lewis Nelson himself.

Defendant's case

Evidence

Huntley Reid opened his case with the evidence of Barbara Seivwright, daughter of Gloria Sutherland. Her evidence was that from time to time Lewis Nelson would visit her mother's house in Galina, St. Mary. In her affidavit filed on March 7, 2012, she averred as follows:

"My mother saw it fit to have a good relationship with her neighbor Lewis Nelson, especially since she was not living there. She would ask Lewis Nelson to pick fruits and other items from the land and take them to her at home. She also asked him to take the rent from the Defendant, Huntley Reid and bring it to her."

- [26] Lewis Nelson brought fruit to her mother. She did not know whether he brought money. Barbara Seivwright denied being present when money was being paid to her mother for her land on an occasion when she would have given oranges to Messrs. Lewis and Dennis Nelson. She denied that her mother had sold any of her land to Lewis Nelson. She learnt in 2003 that he had built a wooden chattel house on her mother's land "many years ago" and viewed this as an act of trespass. Her view of his actions of dumping sand, blocks and gravel on the land was that this was without permission. It was her grandfather who had planted fruit trees, not Lewis Nelson who had no claim of right to her mother's land. It was she who sold the land bequeathed to her by her mother to Huntley Reid for One Million dollars (\$1,000,000.00) in 2009.
- [27] Barbara Seivwright admitted that there had been a court case between Lewis Nelson and Huntley Reid in 1997. After her mother's death in 1994, she had received complaints from Huntley Reid who had been her mother's tenant about Lewis Nelson her mother's neighbour. Lewis Nelson next sought to evict Huntley Reid from the land. She had attended court with Huntley Reid on more than one occasion during and after 1997. She considered Huntley Reid her tenant.
- [28] In cross-examination she said that it was in 2000-2001 that she had learnt of Lewis Nelson's house on the land from Mr. Reid, though she had been going herself onto the land since the 1990's. She was used to seeing Huntley Reid

come to her mother but she did not know whether it was to bring money on behalf of Lewis Nelson. Though she had been attending court with Huntley Reid in 1997, she was unaware that Lewis Nelson had been making a claim of ownership for the very land she had agreed in 2009 to sell to Huntley Reid for One Million dollars (\$1,000,000.00).

- [29]** In 2003, she and others went physically to Lewis Nelson to warn him to remove his house and items he had placed on the land. He asked for time and promised to vacate the land. Any money that was being paid to her mother by Lewis Nelson was on behalf of Huntley Reid who had been her mother's tenant as well as hers.
- [30]** Barbara Seivwright agreed that Rhona Murphy had lived on the land in the house built by Lewis Nelson. She had not permitted Lewis Nelson to rent the property to anyone. When Ms. Murphy vacated the house, her son Leighton Williams remained. Huntley Reid then sued to recover possession of the wooden house built by Lewis Nelson from Leighton Williams.
- [31]** Huntley Reid gave evidence that he was a farmer who still resides on the DaCosta's land. He has done so since 1990 when it was leased to him by Gloria Sutherland. He began building a house on the land. After her death, he became the tenant of her daughter Barbara Seivwright. He denied leasing the land from Lewis Nelson whom he has known all his life. After the death of Gloria Sutherland, Lewis Nelson began to disturb his possession of the land and in 1997 he was sued in the then St. Mary Resident Magistrates' Court.
- [32]** The matter was dismissed and he remained undisturbed by Lewis Nelson until 2013 when he had to seek two injunctions from the Supreme Court, which he obtained on January 18, 2013 and February 7, 2013 respectively. These injunctions restrained Mr. Nelson from entering or repairing the wooden house on the property. Lewis Nelson became ill yet his workmen still entered the property in breach of the orders of the court.

- [33]** He denied being sued for arrears of rental by Lewis Nelson. He admitted that Rhona Murphy and her son Leighton Williams had occupied the house owned by Lewis Nelson on the property stating that Lewis Nelson never occupied it himself. This was not so according to Wycliffe Allen.
- [34]** In 2009 Mr. Reid and his wife entered into an agreement for sale with Barbara Seivwright for the land left to her by her late mother. He had rented and occupied one square of this land since 1993 or 1990 depending on which of his affidavits is being reviewed. The land he purchased was Lot 4 on the subdivision plan of the DaCosta's land. Huntley Reid filed suit in the St. Mary Resident Magistrates' court against Leighton Williams, when he would not vacate the premises, his mother having done so. He categorically denied that Lewis Nelson ever occupied the land owned by Gloria Sutherland but he excluded the old wooden house which was the subject of repairs as it belonged to Lewis Nelson.
- [35]** In 2001, gravel, sand and other material were delivered to the land. He brought this to the notice of his landlady Barbara Seivwright. I find that this was in fact when the house was built by Lewis Nelson. In 2003, Mr. Reid accompanied Ms. Seivwright and others to see about Lewis Nelson. The latter was told to remove the old wooden house and to cease his acts of trespass. Mr. Nelson responded saying that he would move but he needed time. He began moving items from the land and placed nothing more on the property.
- [36]** Mr. Reid denied ever leasing the land from Lewis Nelson as the latter was never the caretaker of any of the DaCosta's property whether house or land. Also, Lewis Nelson never occupied the house he had built on the DaCosta's land. This statement that Lewis Nelson was never the caretaker of the land is inconsistent with the evidence of Barbara Seivwright who's said that her mother had asked Lewis Nelson to give an eye on the property.

In cross-examination, Mr. Reid said he built his house on the house spot, of one square in the 1990's and it was not until 1997 that he first saw Lewis Nelson on the land. His house was built before that of Mr. Nelson's which was only put

there in 2000. Neither party tendered receipts for the payment of taxes despite the lengthy periods of occupation claimed by them.

- [37] Mr. Nelson became ill and his son Dennis Nelson began to repair and improve the wooden house belonging to his father. Court orders barring further construction were ignored.

Submissions - Defendant

- [38] Mr. Hinds for the defendant argued that the primary issue was whether or not the defendant had purchased the disputed land with the knowledge that any other person had a legal or equitable interest in the land. Mr. Reid was a bona fide purchaser for value without notice. He relied upon **Pilcher v Rawlins** [1865] Ch. App. 117 for the proposition that such an ownership cannot be challenged.
- [39] Wilfred DaCosta died on November 9, 1972 survived by four children. Upon his death the land passed to the Crown and was later restored to the children. The land was surveyed and subdivided with approval. On May 26, 2009, Huntley Reid purchased Gloria DaCosta's portion of the land. Lewis Nelson was a neighbour to Gloria DaCosta, it was the evidence of Barbara Seivwright that her mother had asked him to give an eye. He brought fruit to her and he brought Huntley Reid to rent a house spot from her.
- [40] Gloria Sutherland died in 1994, having devised her land to Barbara Seivwright who was not aware of a sale to Lewis Nelson. She became aware that Lewis Nelson was disturbing Huntley Reid on the land and of the suit filed by Lewis Nelson against him. In 1997, she accompanied Mr. Reid to court until the matter was adjourned sine die. There was an understanding between Barbara Seivwright and Lewis Nelson that there would be no further disturbance between the latter and Huntley Reid. Lewis Nelson constructed a house on the land. This was brought to Ms. Seivwright's attention. She could not go to the land until 2003 when she, the defendant along with others spoke to Lewis Nelson about his acts

of trespass. Lewis Nelson agreed to vacate the premises, he asked for time to move his house to which she agreed.

[41] Huntley Reid purchased the land in 2009 for \$1,000,000. He sought to evict the tenant of Lewis Nelson. Instead of keeping his word, Lewis Nelson filed the fixed date claim form which commenced this action in 2010. Huntley Reid subsequently obtained injunctions to prevent Lewis Nelson from continuing his acts of trespass on the land. Mr. Nelson despite these orders had repairs done to his house on the land. It was this house that he occupied having returned from the hospital until his death.

[42] Mr. Hinds submitted that it was not credible that the receipts presented by Ms. Plunkett were all already written in the receipt book and then signed by Lewis Nelson in her presence. He conceded that Ms. Murphy had lived in Lewis Nelson's house. Mr. Hinds further submitted that Dennis Nelson was a witness who should not be believed as his evidence contained inconsistencies and he could not give the date of Lewis Nelson's death meanwhile he had perfect recall of paying money to Gloria Sutherland when Barbara Seivwright peeled two oranges for himself and his father. An occasion of which Barbara Seivwright had no knowledge and it was she who handled all her mother's affairs. In short, the claimant's case turned on the credibility of the witnesses, coupled with the reliance on hearsay in proof thereof.

Submissions claimant

[43] Mr. Hill, Q.C. argued that the issue of credibility was indeed the central issue for the court. Huntley Reid was not a bona fide purchaser for value without notice. Lewis Reid engaged in acts of ownership for more than 12 years. Huntley Reid ought to have noticed the building of Lewis Nelson's house that the house was rented to a tenant, the pit latrine, water tank and electricity to the house. Huntley Reid lived on the land he had also grown up with Lewis Nelson who was asked to take care of the land.

- [44] There is no dispute that, Lewis Nelson took fruit to Gloria Sutherland on the land or that Lewis Nelson took Huntley Reid to her. Barbara Seivwright is vague regarding payments but admitted that Lewis Nelson visited her mother with regularity. She would naturally support Mr. Reid as she had benefitted from the payment of the purchase price of \$1,000,000 paid to her by Mr. Reid.
- [45] It was unchallenged that Lewis Nelson was associated with the land from the 1970s, planted various things on the property and specifically those items claimed. It was challenged that Lewis Nelson built his house first.
- [46] Whether the purchase was completed or not does not preclude the operation of the Limitation of Actions Act. The overwhelming evidence clearly indicated Lewis Nelson was exercising rights of ownership not long after Wilfred DaCosta died. He was physically on the land indicating he had acquired Gloria DaCosta's share.
- [47] Huntley Reid has established that Ms. Murphy resided in the house for eleven years and he provided her with electricity. No efforts were made to stop Ms. Murphy from residing there, it was in 2009 that there was an effort to remove her son. Lewis Nelson openly possessed the land through his tenant. He also paid installments on the land. The limitation period has therefore run out.
- [48] The claimant has proved occupation. Mr Reid and Ms. Seivwright have to establish that when the sale of the land took place their right to purchase and sell the land respectively had not been extinguished. Counsel cited **Paulette Curchar v Winnifred Fullwood** (supra) and **Recreational Holdings Limited v Lazarus** [2016] UKPC 22.
- [49] The claimant is claiming occupation, rights of ownership while claiming rights of purchase. These concepts all go together and are not mutually exclusive. The unusual nature of the facts of the case where both exist. The **Recreational Holdings** case holds that unregistered interests oust registration. There is nothing to oust the agreement for sale as the prior equity would prevail except for

the issue of whether the defendant is a bona fide purchaser for value without notice.

- [50] Barbara Seivwright may not have had the requisite interest having regard to what transpired with the land being vested in the Crown. In addition, Lewis Nelson regarded the land as being sold to him. **Pilcher v Rawlins** is inapplicable as it stands on its own. In that case, there were instruments which cannot apply to a case of common law title. The equivalent of notice would be what steps Lewis Nelson took to assert an interest in the land. The principle is fine and cannot be applied to this case.

Analysis

- [51] The claim was based upon a purchase from Gloria Sutherland in 1973. Lewis Nelson began paying installments from then but he was unable to exhibit more than two of these receipts as the others had been lost. I find that Lewis Nelson was in fact the caretaker of Gloria Sutherland's land. He occupied this position until her death in 1994.

- [52] Any cultivation of fruit trees was, I find, evidence of Mr. Nelson taking good care of the land for and on behalf of Gloria Sutherland. His delivery of produce to her was a demonstration of this. He had not yet paid the entire purchase price, though Dennis Nelson said the house was built in 1993 and that the balance purchase price had been paid off. There was no evidence of when it had been paid. Lewis Nelson in an affidavit filed on May 2, 2011 contradicts Dennis Nelson's evidence on this point as at paragraph 14 he stated as follows:

“That although I cannot recall the date of the receipt on which it was written the balance showed owing was One Thousand Five Hundred Dollars (\$1,500.00)”

- [53] I find that, the balance purchase price had not therefore been paid to Gloria Sutherland. As a result, the sale had not been completed and the land had not been transferred to Lewis Nelson. There is no evidence that it had been, no documentary proof was provided to evidence such a transfer and none of the

parties or witnesses spoke to the date or circumstances surrounding any purported transfer. As the claim was presented, it was open on the facts to find that, Gloria Sutherland died possessed of the land at the date of her death on October 21, 1994.

[54] I find that Lewis Nelson by asserting that he purchased the land from Gloria Sutherland could not have also been asserting that his possession of the land was adverse to hers. His evidence of a claim to the land would have been against the estate of Gloria Sutherland and Barbara Seivwright as beneficial owner. This claim could not have commenced until October 1994 after the death of Gloria Sutherland. While, Lewis Nelson also relied on a contract for sale between himself and Gloria Sutherland, the doctrine of part performance was not relied upon in proof of the claimant's case.

[55] During the lifetime of Gloria Sutherland, Lewis Nelson would bring her produce from the land. This was consistent with an acceptance that she was the owner of the land. Any cultivation on the land and cash he gave to her can also be attributed to his evidence of selling fruit from the trees on the land. He gave her cash for the same reason. Lewis Nelson was the caretaker of the land he worked. It was his evidence that when he made money he gave some to Gloria Sutherland. It was after her death that Lewis Nelson began to assert rights of ownership over the land. He then built and rented out a house doing so openly for the next eleven years. Next, he sued Huntley Reid for recovery of possession.

[56] Mr. Hill, Q.C. argued that based on the fact of the sale of the land owned by Gloria Sutherland to him there was no land left to bequeath to Barbara Seivwright, therefore the gift to her failed. I find that it is of some note that Lewis Nelson acknowledged that the disputed land was the subject of Gloria Sutherland's bequest. The fact that her will left all her land to her daughter, Barbara Seivwright, is further evidence that she had not sold the land to Lewis Nelson. There was no completed sale, the balance purchase price had not been paid to Gloria Sutherland before she died and there is not one scintilla of

evidence to show that it had been paid to her personal representative. I find that as there had been no transfer of the land to Lewis Nelson. The land therefore vested in the estate of Gloria Sutherland upon her death.

- [57]** From all the evidence presented by the claimant, the status of Lewis Nelson in respect of the land was unclear. Dennis Nelson said Lewis Nelson rented the land from Gloria Sutherland. Wycliffe Allen said Lewis Nelson was the caretaker of the land. Gloria Sutherland said Lewis Nelson occupied the land for a while. Lewis Nelson described himself as the caretaker of the land. On the claimant's case, there is no agreement as to the role played by Lewis Nelson. The weight of the evidence points to him as caretaker and prospective purchaser.
- [58]** Wycliffe Allen's evidence was that he witnessed Lewis Nelson visit Gloria Sutherland to deliver money, Mr. Nelson would show the receipts he got from Ms. Sutherland to him. This contradicts the evidence of Dennis Nelson that it was Huntley Reid who used to transport money from Lewis Nelson's purchase of the land to Gloria Sutherland. This means that as regards the payments to Gloria Sutherland on the claimant's case there is an inconsistency.
- [59]** Mr. Allen also said Lewis Nelson rented a house spot on the land to Huntley Reid and Mr. Reid began building a house on that spot. This was either in 1990 or 1993. This means that the house built by Mr. Reid was built before that of Mr. Nelson though it was suggested to Mr. Reid that Lewis Nelson had built his house first.
- [60]** The claim as presented was one of a caretaker let into possession in 1973 who then became a landowner with unbroken possession from 1973 until 2009 when he was dispossessed by Huntley Reid. This does not accord with the evidence of his witnesses which when viewed corporately showed a weak case presented by the claimant who bore the burden of proof.

[61] Barbara Seivwright acknowledged that Lewis Nelson was the caretaker of her mother's land in her evidence. She saw no house on the land when she visited in the 1990's. The only house she knew of was that of Huntley Reid.

[62] Barbara Seivwright had knowledge that Lewis Nelson was looking after her mother's land, he was picking fruit and bringing the rent money from Huntley Reid to her. She was similarly aware that Lewis Nelson had begun to disturb the occupation of Huntley Reid after her mother died in 1994. This disturbance led to Mr. Nelson filing suit in 1997. She did not cause a written notice to be served on him at any stage, neither did she nor the executor file suit against Lewis Nelson. She did however, by attending court with Huntley Reid, assert her rights to the land. She, by this action sought to put the court on notice that Huntley Reid had her permission to occupy the land. This was some three years after her mother's death.

Her evidence was:

"That I attended Court with Huntley Reid on several occasions to state my legal interest in the land as the sole beneficiary."

[63] Lewis Nelson remained on the land "disturbing" the lawful tenant of Barbara Seivwright. In 2001, Huntley Reid notified Mrs. Seivwright that Lewis Nelson had dropped material on the land. In 2003, she attended upon the land and gave verbal notice to Lewis Nelson. At that time Mrs. Seivwright, who was not the executor of the estate, acted in her own right, and attended upon Lewis Nelson verbally advising him to vacate the land. In 2009 she sold the land to Mr. Reid based on the promise made by Lewis Nelson to vacate the land.

[64] The claimant Lewis Nelson could not claim as against Gloria Sutherland, but he was by virtue of his presence on the land claiming adverse possession as against the estate of Gloria Sutherland.

[65] Mr. Reid admitted in paragraph 15 of his affidavit filed November 19, 2010 as follows:

“That at the time of my purchase one Leighton Williams had a chattel house on the land, and that I had been told and do verily believe that the house belonged to Lewis Nelson.”

[66] Mr. Reid acknowledged that Lewis Nelson owned the house, as Mr. Reid had been in occupation of the land since 1993, he ought to have seen when this house was being built and would have been in a position not only to know who was doing this construction but also to alert Gloria Sutherland that there was a house being built on her land by Lewis Nelson. This would have been peculiarly within his own knowledge. It therefore is strange that in his witness statement he used the words:

“I was told and do verily believe that the house belonged to Lewis Nelson.”

[67] This bit of evidence signifies that Huntley Reid at the time of purchase of the disputed land from Barbara Seivwright, had knowledge and had been put on notice that there was a house on the land built by Lewis Nelson. He also knew that this house was occupied by a tenant. In fact, Huntley Reid would have known that though “Leighton Williams had a chattel house on the land,” the house did not belong to Leighton Williams for it was his evidence set out in his affidavit filed on June 3, 2011 that Rhona Murphy lived in the house built by Lewis Nelson. She vacated the premises in 2005, Leighton Williams would not vacate the premises so Mr. Reid filed suit. He went on to state in his affidavit filed on November 10, 2010 that the rental income from the house in which Ms. Murphy had lived was \$1,500 per month and not \$30,000 as claimed. All this evidence would seem to indicate that Mr. Nelson had not vacated the land in any wise.

[68] Huntley Reid did tender in evidence a survey diagram which showed that there was one house on Lot 4 on the date of the survey which was the 20th day of April, 2000. It is a house which is close to the parochial road but not at the roadside. This diagram shows only one house on the land in 2000.

- [69] I find that Lewis Nelson did not put his wooden house on the land until 2000. The evidence of Huntley Reid that the house was put there in 2000 coupled with the survey diagram and rental receipts relied on by the claimant which commenced in 2001 underpin this finding.
- [70] The house spot leased by Mr. Reid was one square in size. The evidence disclosed that it was upon this house spot that Mr. Reid had built his house. He could not have made a claim to any of the rest of the land until after 2009 when he became a purchaser as it was his case that up until then he was a tenant entitled to only a house spot. Mr. Reid led no evidence that he claimed any of the land while he was a tenant of either Gloria Sutherland, or of her executor. He made no claim to any other part of the land or to that part on which Lewis Nelson had built his house. It was not until Mr. Reid purchased the entire half-acre of land in 2009 known as Lot 4, that he began to lay claim to the land as against Lewis Nelson.
- [71] By this point, Lewis Nelson had been in possession of the rest of the land on the evidence of Mr. Reid since 1994 when Mr. Nelson had begun to “disturb” him on the land and since the death of Gloria Sutherland in 1994, in his own right. It stretches credulity to see how Mr. Reid could claim a retreat into ignorance in respect of the land he intended to purchase. Even so, ignorance is no ground upon which the provisions of the law may be avoided. It is the duty of every purchaser of land to take care to secure for himself a good, sufficient and indefeasible title to the property the subject of his intended purchase. On the law as it stands it cannot be that Mr. Reid has simply come to say, “I was ignorant, I did not know.” He must make it his business to know and in the instant case, know he did.
- [72] In the case of **Barclays Bank DCO v Administrator General and Hamilton** (1972) 20 W.I.R. 334, The Court of Appeal defined the degrees of knowledge required as notice:

“The first consists of facts within the physical sensibilities and reasonable inferences to be drawn from those facts—the apprehended and the comprehended. A second degree of knowledge is described when a person deliberately refrains from making enquiries which he ought to have made so that, by shutting his eyes to obvious means of knowledge, he avoids coming in possession of information which he might not care to have.”

[73] There was therefore nothing on the evidence which would lead to the conclusion that Mr. Reid was a bona fide purchaser for value without notice. The issue of the operation of the Limitation of Actions Act then arose for determination.

[74] Lewis Nelson’s claim has been viewed by this court as claiming to possess the land as against the executor of the estate of Gloria Sutherland and not as against Huntley Reid who held no title. There is clear evidence that Lewis Nelson was in possession of the land engaging in acts as owner. This possession however was not exercised until after the death of Gloria Sutherland. Lewis Nelson waited until she had died to put a house on the land and to begin collecting rent from it. This is a further acknowledgment on the part of Lewis Nelson that the land belonged to Gloria Sutherland and that he had no right to it during her lifetime.

[75] Lewis Nelson did not lease the house spot to Huntley Reid. I do not accept that he did and rely upon the affidavit of Lewis Nelson filed on June 18, 2012 in this regard. It says that “the defendant was to pay an annual rental of \$200.00 directly to Gloria Sutherland.” Mr. Nelson took Mr. Reid to her for her to write a receipt reflecting this agreement as she was a Justice of the Peace. He exhibited as “LN” a receipt from Gloria Sutherland dated August 20, 1990 in the sum of \$200.00 which said:

*“Received from Mr. Lewis Nelson for Mr. Huntley Reid the sum of
(\$200) Two Hundred for payment for a year [sic] rental.
\$200.00 G. Sutherland”*

[76] This receipt is further evidence of Mr. Nelson’s taking care of the land for Gloria Sutherland. I find that he was the caretaker of the land and as regards the land he looked after Gloria Sutherland’s affairs. I find that Mr. Reid leased the land directly from Gloria Sutherland. There is no dispute that Mr. Reid was on the land

before she died. The receipt aforementioned showed that Gloria Sutherland was aware that Mr. Reid was on the land. She therefore accepted the payment from Mr. Nelson in his capacity as caretaker. This explains why the receipt was written up as being “from Lewis Nelson.” Gloria Sutherland owned the land she had no need to write the name of Lewis Nelson on the receipt unless it was that she was accepting lease payments in her own right, from Mr. Reid, brought to her and paid in by Lewis Nelson. The receipt did not say the converse, which was received from Huntley Reid for or held on account for Lewis Nelson. The receipt therefore does not show that the payment of rental from Huntley Reid was being applied by Gloria Sutherland on account for Lewis Nelson.

[77] Gloria Sutherland died possessed of Lot 4 which vested in her estate. The sole beneficiary under the will of Gloria Sutherland was Barbara Seivwright. The will of Gloria Sutherland was admitted to probate on the 19th day of July, 2010.

[78] Barbara Seivwright, Huntley Reid and Beryl Reid all signed an Agreement for Sale in respect of Lot 4 on May 26, 2009. Barbara Seivwright was not the executor of her mother’s estate; that duty belonged to one Mr. Samuel McLean. It is not the executor who sought to sell the land. It has not been shown in what capacity Barbara Seivwright would be legally entitled to sell the trust property almost one year before the grant of probate was issued in respect of the estate.

The Law

The Judicature (Supreme Court) Act section 48(g) provides:

48(g) “The Supreme Court in the exercise of the jurisdiction vested in it by this every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters, so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.”

[79] The determination of this matter depended upon considerations of both law and equity. Mr. Nelson occupied the land as its caretaker, at its highest he would have acquired a licence from Gloria Sutherland. Possession pursuant to a subsisting licence from the paper owner cannot be adverse therefore Lewis Nelson acquired no rights to the land during her lifetime although he claimed to have been associated with the land since Wilfred DaCosta died. This licence would have been revoked when Gloria Sutherland died. In **Clarke v Swaby** [2007] UKPC 1 at page 11, Lord Walker stated:

“...However it is perfectly clear that under the law of Jamaica, as under the law of England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence, and not to an adverse claim.”

[80] Lewis Nelson, in order to succeed, had to show that there had been in open, undisturbed possession with no action against him for 12 years from the date of death of Gloria Sutherland on October 21, 1994. It is the actions and intentions of the parties during this period that will determine the outcome of this case.

*“So it is well settled on strong and binding authority that the combined effect of sections 3, 14 and 30 of the Act is that, a registered proprietor of the property, can lose his right to recover possession of it on the basis of the operation of the statute of limitations against him.” Per McDonald-Bishop, JA (Ag) (as she then was) in **Paulette Curchar v Winnifred Fullwood** [2015] JMCA Civ. 37.*

[81] This applies equally to an unregistered parcel of land. The central issue before this court was whether Lewis Nelson had acquired a possessory title that had not been extinguished by the actions of the paper owner thereby giving him the necessary locus standi to file a claim for recovery of possession. Though it has been determined that Huntley Reid is not a bona fide purchaser for value without notice, he bears no burden of proof in respect of the claim filed.

[82] In **Paulette Curchar v Fullwood Winnifred**, (supra) the learned Judge of Appeal went on to state:

“When a claimant brings a claim to recover possession, he must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title, not on the weakness of the defendants.” (emphasis added): *The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 609...* A claimant in a case for recovery of possession must state the basis of his claim which is his title to the property.

According to the relevant authorities, the concept of possession, in its fullest and legal sense, consists of two constituent elements: (1) factual possession, which is a sufficient degree of physical custody and control over the property in question, and (2) the intention to exercise such custody and control over the property on one’s own behalf and for one’s own benefit (*‘the animus possidendi’*). So, if the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess. The requisite intention is an intention to possess and not necessarily the intention to own. See, for instance, **JA Pye (Oxford) Ltd and Others v Graham and Another** [2002] UKHL 30; [2002] 3 All ER 865 and **Wills v Wills**

With regard to ‘dispossession’, in particular, Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd v Graham** (supra), stated that that means nothing more than simply whether the person against whom possession is sought has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. By ‘ordinary possession’ is meant possession as defined, meaning factual possession with the intention to possess for one’s own benefit and on one’s behalf.”

[83] As Lord Brown-Wilkinson said in **Pye** “it is not the nature of the acts which A. does but the intention with which he does them which determines whether or not he is in possession.” He affirmed the decision of Slade, J in **Powell v McFarlane** (1977) 38 P & CR 452 at 470 -471 as follows:

“Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient

degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ...Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.”

[84] The learned judge made it clear that the squatter need not have an intention to own the land in order to be in possession. Lewis Nelson sought to show that he remained in possession after Gloria Sutherland’s death. He claimed to have enjoyed quiet, undisturbed possession, having custody and physical control over the land with the intention to exercise it in his own right and for his own benefit. The evidence disclosed that Lewis Nelson was making a claim to the entire parcel of land from as early as 1994, as well as in court in 1997, however, Barbara Seivwright on the evidence also asserted her rights to the land in that court case and demonstrated that she had not abandoned her possession of it. The evidence of Barbara Seivwright going onto the land with Huntley Reid and others is evidence which I accept, albeit it was denied by Lewis Nelson. It is an action by a person with a right to possession to demonstrate possession. These actions were well within the 12 year period.

[85] Barbara Seivwright explains it in this way in her affidavit filed on March 7, 2012. She said at paragraphs 9 and 10 that:

“On my giving instructions Lewis Nelson started moving items he had on the land but asked me to give him some time to remove the house as his plot of land was not big enough to hold another house. I was sympathetic and told him to remove it in the near future. He promised to do so and I left and returned to my home in Idlewild.

The defendant, Huntley Reid being my tenant on the land is aware that Lewis Nelson had commenced removing items placed on the land and had given his word to remove the wooden house in the near future. It is on this understanding that I sold the land to Huntley Reid and to the best of my knowledge and belief it is on this understanding that Huntley Reid purchased the land from me.”

[86] The issue raised by the evidence was whether Baraba Seivwright was a person with the right to possession did she have the animus possedendi? Did Lewis Nelson in his case demonstrate evidence to the contrary?

[87] In other words, is there evidence that had she been in continuous possession of the land at all or had her possession of it been extinguished by Lewis Nelson's continuous occupation since 1994. Slade J in **Powell** said at page 472 that:

“The question of animus possidendi, in my judgment, is one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession.”

[88] I find that applying the dictum of Slade, J in **Powell**, to the acts of Barbara Seivwright shows that it can be readily assumed that she is a person with the right to possession and that she possessed the animus possedendi. I find that her actions have negated the discontinuance of possession asserted by Lewis Nelson.

[89] Barbara Seivwright as beneficial owner of the land demonstrated that she had not abandoned her interest in the land by doing certain acts to demonstrate her possession. When Lewis Nelson filed suit against Huntley Reid she sought to assert her right to the land by attending court in or about 1997 with Huntley Reid whom she considered her tenant. Barbara Seivwright accepted that Huntley Reid's tenancy had not been determined by the death of her mother. In 2003, she went onto the land along with Huntley Reid and gave Lewis Nelson verbal notice to quit. In 2009 she sold her interest in the land to Huntley Reid.

[90] For the foregoing reasons this court finds that Lewis Nelson has not established on a balance of probabilities that he has acquired a possessory title so as to establish locus standi to file this claim. The evidence presented by the claimant was weak, inconsistent and could not successfully weigh in the balance as

evidence to the contrary when weighed with and juxtaposed against the evidence of the defendant.

Orders

1. Judgment for the defendant.
2. Costs to be taxed if not agreed.