[2022] JMSC Civ 176

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV04130

BETWEEN	**CHISOLM AND COMPANY DEVELOPMENT LTD**	**CLAIMANT**
AND	**NORVAL HENRY**	**1ST DEFENDANT**
AND	**CLEVEROY DALE**	**2ND DEFENDANT**
AND	**KEVIN CHIN**	**3RD DEFENDANT**
AND	**I WILL SURVIVE-OWNER**	**4TH DEFENDANT**
AND	**PERSONS UNKNOWN**	**5TH DEFENDANT**
AND	**MY ASMUS H16-OWNER**	**6TH DEFENDANT**
AND	**DON'T RUSH IT RN 83–OWNER**	**7TH DEFENDANT**

IN OPEN COURT

Miss Julliet Mair instructed by Riam Essor Law for the Claimant

Mrs Denise Senior – Smith instructed by Oswest Senior-Smith & Company for the 1st Defendant

Heard: November 10 and 11, 2021 and October 12, 2022

Tort – Whether unnamed defendant can be sued – Whether unnamed defendant can be served with claim – Whether alternative service established – Groyne constructed under licence – Whether land amassed by groyne belongs to claimant – Whether beneficial interest in groyne – Trespass - The Beach Control Act - The Main Roads Act – Civil Procedure Rules, Rules 5.13, 5.14

WINT-BLAIR, J

INTRODUCTION

[1] The claimant, Chisholm and Company Development Limited claims against the defendants, Norval Henry, Cleveroy Dale, Kevin Chin, and the owners of fishing vessels, *I Will Survive*, *My Asmush H-16, Don't Rush It Rn 83* as well as persons unknown in damages for trespass to property. All admissible evidence has been considered and this decision will set out only that which was found to be relevant material for these findings.

[2] By way of an Amended Claim Form filed on July 16, 2014, the claimant seeks the following orders:

1. *Damages for trespass on land belonging to the Claimant being the land known as the old abandoned Main Road, adjacent to the Claimant's property registered at Volume 945 Folio 514 and leading down to the western boundary of Volume 421 Folio 28 which adjoins the Rio Nuevo fishing beach and newly amassed land adjacent to Volume 421 Folio 28 as a result of a groyne designed and approved by NEPA built and installed by the Claimant (hereinafter "Claimant's land").*

2. *Restitution and or damages for the loss, cost, expenses and hardship the Claimant endured and is enduring as a result of the Defendants' illegal use and occupation of the Claimant's land for the Defendants' sole benefit and gain and under the common law principle of unjust enrichment.*

3. *Recovery of possession from the Defendants of those portions of the Claimant's land as listed in paragraph 1 above.*

4. *Damages for use and occupation of the Claimant's land by the Defendants.*

5. *Aggravated and exemplary damages against the Defendants on the basis that the Defendant trespassed, illegally occupied, used and possessed the Claimant's land solely for their gain and benefit, and at the Claimant's*

detriment and the Defendants further enticed, lured, inveigled, encouraged, embolden[sic], maintained, sustained, encouraged and support other illegal occupants on the Claimant's land for many years commencing 2010:

I. with deliberate and contumelious disregard for the Claimants rights as owner;

II. driven by the desire to expand so as to earn and profit at the expense of the owner;

III. by the exercise of continuing and truly outrageous conduct directed at the Claimant;

and for this purpose the Claimant ask[sic] for an Order for an account to be taken of all earnings and benefit by the Defendants pursuant to the use, possession and trespass on the Claimant's land.

6. *An Order directed to the Defendants to remove all evidence of its occupation of the Claimant's land.*
7. *Liberty and Costs*
8. *Such other and further relief as this Court may deem just and appropriate.*

Service on the unnamed defendants

[3] The claimant is a company registered under the laws of Jamaica and the owner of lands in the parish of St. Mary, registered at Volume 421 Folio 28 and Volume 945 Folio 514 of the Register Book of Titles. The claimant has sued 'persons unknown' who fall into the category of the unnamed defendant. It is settled law that it is the service of the claim form which subjects a defendant to the court's jurisdiction. In the case at bar the question of service has arisen.

[4] In the case of **Cameron (Respondent) v Liverpool Victoria Insurance Co Ltd (Appellant)**[1] the United Kingdom Supreme Court considered a hit and run case

[1] [2019] UKSC 6

where the offending driver could not be identified. An injured motorist had applied to amend her claim to join "[t]he person unknown driving [the other vehicle] who collided with [the claimant's vehicle] on [the date of the collision]". The Court of Appeal granted the application, while the Supreme Court unanimously allowed the appeal and considered the history and the law related to the unnamed defendant.

[5] At paragraph 1, of the judgment of the UK Supreme Court, the question at issue on the appeal was: in what circumstances is it permissible to sue an unnamed defendant?

[6] Lord Sumption looked at the British Civil Procedure Rules ("UK CPR") and said that it neither "*expressly authorise[d] nor expressly prohibit[ed] exceptions to the general rule that actions against unnamed parties are permissible only against trespassers.*"

[7] I note here that the UK CPR contains a Part 55 entirely devoted to trespass to land. This statement of the law by Lord Sumption has to be read against that background. He also looked at the rules governing how a defendant was to be named in such a suit and noted the existence of a practice direction in that jurisdiction in respect of service. We have no such practice direction in Jamaica in respect of an unnamed defendant.

[8] Lord Sumption identified the critical question as a matter of law, that being *"the basis of the court's jurisdiction over parties, and in what (if any) circumstances can jurisdiction be exercised on that basis against persons who cannot be named.*[2]

> *"13. In approaching this question, it is necessary to distinguish between two kinds of case in which the defendant cannot be named, to which different considerations apply. The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named. The second category comprises*

[2] Para 12

defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not.[3]

14. This appeal is primarily concerned with the issue or amendment of the claim form. It is not directly concerned with its service, which occurs under the rules up to four months after issue, subject to extension by order of the court. There is no doubt that a claim form may be issued against a named defendant, although it is not yet known where or how or indeed whether he can in practice be served. But the legitimacy of issuing or amending a claim form so as to sue an unnamed defendant can properly be tested by asking whether it is conceptually (not just practically) possible to serve it. The court generally acts in personam. Although an action is completely constituted on the issue of the claim form, for example for the purpose of stopping the running of a limitation period, the general rule is that "service of originating process is the act by which the defendant is subjected to the court's jurisdiction": Barton v Wright Hassall LLP [2018] 1 WLR 1119, para 8.[4]

15. An identifiable but anonymous defendant can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form. Thus, in proceedings against anonymous trespassers under CPR 55.3(4), service must be effected in accordance with CPR 55.6 by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letter box.

[3] Para 13

[4] Para 14

16. One does not, however, identify an unknown person simply by referring to something that he has done in the past. "The person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZJZ on 26 May 2013", does not identify anyone. It does not enable one to know whether any particular person is the one referred to. Nor is there any specific interim relief such as an injunction which can be enforced in a way that will bring the proceedings to his attention. The impossibility of service in such a case is due not just to the fact that the defendant cannot be found but to the fact that it is not known who the defendant is. The problem is conceptual, and not just practical. It is true that the publicity attending the proceedings may sometimes make it possible to speculate that the wrongdoer knows about them. But service is an act of the court, or of the claimant acting under rules of court. It cannot be enough that the wrongdoer himself knows who he is.

17. This is, in my view, a more serious problem than the courts, in their more recent decisions, have recognised. Justice in legal proceedings must be available to both sides. It is a fundamental principle of justice that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard. The principle is perhaps self-evident. The clearest statements are to be found in the case law about the enforcement of foreign judgments at common law. The English courts will not enforce or recognise a foreign judgment, even if it has been given by a court of competent jurisdiction, if the judgment debtor had no sufficient notice of the proceedings. The reason is that such a judgment will have been obtained in breach of the rules of natural justice according to English notions. In his celebrated judgment in Jacobson v Frachon (1927) 138 LT 386, 392, Atkin LJ, after referring to the "principles of natural justice" put the point in this way:

> *"Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given*

> *him that notice, it does afford him an opportunity of substantially presenting his case before the court."*

20. The current position is set out in Part 6 of the Civil Procedure Rules. CPR 6.3 provides for service by the court unless the claimant elects to effect service himself. It considerably broadens the permissible modes of service along lines recommended by Lord Woolf's reports on civil justice. But the object of all the permitted modes of service, as his final report made clear, was the same, namely to enable the court to be "satisfied that the method used either had put the recipient in a position to ascertain its contents or was reasonably likely to enable him to do so within any relevant time period": see Access to Justice, Final Report (1996), Ch 12, para 25. CPR 6.15, which makes provision for alternative service, provides, so far as relevant:

> *"6.15(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
>
> *(2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."*

CPR 6.15 does not include the provision formerly at RSC Order 65, rule 4(3). But it treats alternative service as a mode of "service", which is defined in the indicative glossary appended to the Civil Procedure Rules as "steps required by rules of court to bring documents used in court proceedings to a person's attention." Moreover, sub-paragraph (2) of the rule, which is in effect a form of retrospective alternative service, envisages in terms that the mode of service adopted will have had that effect. Applying CPR 6.15 in Abela v Baadarani [2013] 1 WLR 2043 Lord Clarke of Stonecum-Ebony (with whom the rest of this court agreed) held (para 37) that "the whole purpose of service is to inform the defendant of

the contents of the claim form and the nature of the claimant's case." The Court of Appeal appears to have had no regard to these principles in ordering alternative service of the insurer in the present case.

21. In my opinion, subject to any statutory provision to the contrary, it is an essential requirement for any form of alternative service that the mode of service should be such as can reasonably be expected to bring the proceedings to the attention of the defendant. Porter v Freudenberg was not based on the niceties of practice in the masters' corridor. It gave effect to a basic principle of natural justice which had been the foundation of English litigation procedure for centuries, and still is.

26. I conclude that a person, such as the driver of the Micra in the present case, who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with."

[9] This court notes the UK Supreme Court in **Cameron** was examining the provisions of the Road Traffic Act, nevertheless, the reasoning is applicable in the context of the case at bar as regards the unnamed defendant. It is also noted that our Civil Procedure Rules ("CPR") in Jamaica contain no equivalent to Part 55 regarding trespass to land, and in particular no rules as to proceedings against anonymous trespassers as obtains in the UK CPR.[5]

[10] In the case at bar, the affidavits of service on the 4th, 6th and 7th defendants all indicated that the amended claim form and accompanying documents were pasted onto these vessels docked on the beach. There was no service on the 5th defendant. The Jamaican CPR allows a claimant to choose a method of alternative service. Having chosen this method of alternative service, the required affidavit failed to comply with rules 5.13(3)(b) and (c). The matter was raised before, K. Anderson, J on October 10, 2018 and my learned brother noted the method of service, however he correctly made no order under rule 5.14.

[5] Rule CPR 55.3(4) UK CPR

[11] In the case of **Rachel Graham v Erica Graham and another**,[6] G. Fraser, JA(Ag.) in delivering the judgment of the court of appeal set out the procedure in respect of service by alternative method in the CPR.

> *"[20] Pursuant to rule 5.1(1) of the CPR, "[t]he general rule is that a claim form must be served personally on each defendant". This means "handing it to or leaving it with the person to be served" (see rule 5.3 of the CPR).*
>
> *[21] When confronted by difficulties in effecting personal service of the claim form on a defendant, within the jurisdiction, the claimant may enlist the court's assistance and, instead of personal service, may choose an alternative method of service pursuant to rule 5.13 of the CPR or apply for an order for service by a specified method pursuant to rule 5.14 of the CPR.*
>
> *[22] Rule 5.13 of the CPR states that:*
>
> > *"Alternative methods of service 5.13*
> >
> > *(1) Instead of personal service a party may choose an alternative method of service.*
> >
> > *(2) Where a party –*
> >
> > > *(a) chooses an alternative method of service; and*
> > >
> > > *(b) the court is asked to take any step on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.*
> >
> > *(3) An affidavit under paragraph (2) must –*
> >
> > > *(a) give details of the method of service used;*
> > >
> > > *(b) show that –*

[6] [2021] JMCA Civ 51

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he or she would have been able to do so;

(c) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents; and

(d) exhibit a copy of the documents served.

(4) The registry must immediately refer any affidavit filed under paragraph (2) to a judge, master or registrar who must –

(a) consider the evidence; and

(b) endorse on the affidavit whether it satisfactorily proves service.

(5) Where the court is not satisfied that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to consider making an order under rule 5.14 and give at least 7 days' notice to the claimant.

(6) An endorsement made pursuant to 5.13(4) may be set aside on good cause being shown."

[23] Rule 5.14 of the CPR, which deals with the power of the court to make an order for service by specified method, states that:

"Power of court to make order for service by specified method 5.14

(1) The court may direct that service of a claim form by a method specified in the court's order be deemed to be good service.

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit –

(a) specifying the method of service proposed; and

(b) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim."

"[25] A party who chooses to employ an alternative method of service, pursuant to rule 5.13 of the CPR, does not require the prior permission of the court. However, where a party employs an alternative method of service and wishes for the court to take any step on the basis that the claim form has been served, that party must file evidence on affidavit proving that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form (see rule 5.13(2) of the CPR). In other words, where the court is dealing with service of proceedings within the jurisdiction, the court also has the power to declare that steps already taken to bring the proceedings to the notice of a defendant should count as good service. So, for example, if a claimant was desirous of obtaining a default judgment and needed to establish effective service, this would be a practical way of having the court validate the alternative method of service already utilized.

[26] Where the court is not satisfied that the alternative method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the registry must fix a date, time and place to facilitate the court making an order under rule 5.14 (see rule 5.13(5) of the CPR). It is on this basis that rule 5.14(1) of the CPR empowers the court to "direct that service of a claim form by a method specified in the court's order be deemed to be good service". The court is, therefore, empowered under rule 5.14(1) of the CPR to validate that steps already taken by a party to enable the contents of the claim form to be ascertained by the defendant,

by an alternative method, be deemed to be good service. In this sense the court is giving its permission retrospectively ("retrospective validation").

[27] Alternative service under rule 5.14 is however twofold, where the court may make an order permitting service by a method or at a place not otherwise permitted under Part 5 of the CPR. So that, upon a party's direct application to the court, rule 5.14(2) of the CPR empowers the court to make an order prospectively permitting service by a specified method. Such an order, if granted, also enables a claimant to effect service on a defendant by an alternative method. Accordingly, orders made pursuant to rules 5.14(1) or 5.14(2) of the CPR are really orders that an alternative method of service specified in a court order be deemed to be good service.

[28] In the case of an application for alternative service, the onus is on the claimant to persuade the court that there is good reason for the order. The question is whether there is good reason for the court to validate the mode of service elected, not whether the claimant had good reasons to choose that mode, and not merely what is convenient to claimants. What amounts to good reason will involve the judge considering all the circumstances of the case. Such consideration would include, but is not limited to, any previous efforts made by the claimant to effect personal service, whether service within the jurisdiction is feasible and knowledge of a defendant's whereabouts."

[12] The general provision for alternative methods of service, expressed in rules 5.13 and 5.14 of the CPR, was not meant to apply to "any person". Accordingly, operation of the general provision for alternative methods of service under rules 5.13 and 5.14 of the CPR must, therefore, be with respect to persons/entities which were not otherwise specifically addressed by the rules. The learned judge of appeal continued as follows:

"[42] The general rule, pursuant to rule 5.1(1) of the CPR, is that a claim form must be served personally on each defendant. There are obvious exceptions to this general rule as alternative methods of service are

permitted by the CPR. It is my view, however, that to fall within these exceptions, an effort must first be made by the claimant to comply with the general rule for personal service and that alternative methods of service under rules 5.13 and 5.14 of the CPR should be permitted where the claimant has shown that he or she is unable to effect personal service on the defendant, in addition to satisfying the other requirements stated in the rules.

[45] It is my view that the court must adopt a strict approach to the rules governing service of the claim form. The need for a "bright line rule" identifying the exact point at which service takes place means that the court will not validate a method of service not contemplated by the CPR simply because it can be shown that the alternative method of service utilized by a claimant brought the contents of the claim to a defendant's attention.

[46] As the CPR in this jurisdiction are similar to those of the United Kingdom, it is helpful to cite the latter's relevant rules and the interpretation thereof in the discussion of this issue. Rule 6.15 of the Civil Procedure Rules of the United Kingdom ('UK CPR') states:

> *"6.15 Service of the claim form by an alternative method or at an alternative place (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place. (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."*

[47] The ambit of rule 6.15 of the UK CPR and the principles to be applied to applications in service of a claim form were considered by the United Kingdom Supreme Court in Barton v Wright Hassall LLP, [2018] UKSC 12. Referencing to[sic] the decision in Abela and others v Baadarani,

[2013] 1 WLR 2043, the court took the opportunity to set out the principles that apply to an application for the court to validate alternative service retrospectively under rule 6.15 of the UK CPR (the equivalent of our rule 5.14). The relevant factors identified by that court were: (a) whether the claimant had taken reasonable steps to effect service in accordance with the rules; (b) whether the defendant was aware of the contents of the claim form within the time limit for service; and (c) whether the defendant would suffer prejudice by retrospective validation.

[48] There was no dispute that the claimant's actions, in that case, had brought the existence and contents of the claim to the defendant's attention before the service deadline. However, the court noted that such a factor will usually be a necessary but not sufficient condition to justify a departure from the rules. The court enunciated that service of originating process ought to be distinguished from other procedural steps because it is the act by which the defendant is subjected to the court's jurisdiction. For that reason, one of the purposes of the rules is to set a "bright line" identifying the exact point at which service takes effect. This is especially relevant to when time stops running within any limitation period and the timeline for subsequent steps to be taken in the proceedings. The UK Supreme Court emphasized that, otherwise, any unauthorized mode of service would be acceptable, even if it did not fulfil any of the other purposes of serving originating process."

[13] In the case of **Insurance Company of the West Indies Limited v Shelton Allen and others**[7] cited in the **Graham** case, the learned judge of appeal, Morrison, JA (as he then was) made it clear that:

"[33] Where a party chooses an alternative method of service and the court is thereafter asked to take any step on the basis that the claim form has been served, that party must file evidence on affidavit 'proving that the method of service was sufficient to enable to defendant to ascertain the contents of the claim form' (rule 5.13(2). The required affidavit of

[7] [2011] JMCA Civ 33

service must not only give details of the method of service used, but must also show either that (i) the person intended to be served was able to ascertain the contents of the document; or (ii) it is likely that he or she would have been able to do so (rule 5.13(3)(b). Once filed, this affidavit must immediately be referred by the registry to a judge or master or registrar, who must consider the evidence provided and endorse on the affidavit 'whether it satisfactorily proves service' (rule 5.13(4)). (Such an endorsement may be set aside 'on good cause being shown' – rule 5.13(6)). If the court is not satisfied that 'the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form', then the registry will fix a date for consideration of the making of an order under rule 5.14 (rule 5.13(5)).

[34] Rule 5.14 supplements rule 5.13, by providing that 'the court may direct that service of a claim form by a method specified in the court's order be deemed to be good service' (rule 5.14(1)). An application for such an order must be supported by an affidavit showing that the method of service proposed 'is likely to enable the person to be served to ascertain the contents of the claim form and particulars of claim '(rule 5.14(2)(b)).

[35] The plethora of references in rule 5.13 to the need for evidence of the likelihood of the claim form coming to the attention of the defendant by the claimant's choice of an alternative method of service seems to me to be a clear indication that the framers of the rule intended thereby to subject the option given to the claimant to the tightest possible control. Whatever may have been the history of the requirement under the pre-CPR rules and practice as regards the question of the likelihood of the substituted method of service bringing the documents to the notice of the defendant , it appears to me from the language of rule 5.13 to be unarguably clear that the option given by the rule to the claimant to choose an alternative method of service is expressly subject to the claimant being able to satisfy the court on affidavit, either that the defendant was in fact 'able to ascertain the contents of the documents'

(rule 5.13(3)(b)(i)), or that 'it is likely that he or she would have been able to do so' (rule 5.13(3)(b)(ii).

[14] In the case at bar, I find that the affidavits of service as filed do not contain the evidence required to satisfy this court that the owners of the vessels either would have:

a. Been able to ascertain the contents of the documents (rule 5.13(3)(b)(i)); or

b. Been likely to have been able to do so' (rule 5.13(3)(b)(ii).

[15] Additionally, I find that the affidavits of service as filed do not contain the evidence required to satisfy this court as to whether or not there were difficulties in effecting personal service of the claim form with reasons on the owners of the vessels.

[16] The UK Court of Appeal in **Elmes v Hygrade Food Products plc**[8], held that the court had no jurisdiction to retrospectively order that an erroneous method of service already adopted should be allowed to stand as service by an alternative method permitted by the court.

[17] The unnamed defendants in the present case, who are not just anonymous but cannot be identified, cannot be sued under a pseudonym or description, **unless** the circumstances are such that the service of the claim form can be effected or properly dispensed with. The evidence of such circumstances had to be adduced in affidavit form by the claimant. The affidavits of service were deficient in terms of these requirements. In my view, the CPR does not close the door to an interpretation regarding service on an unnamed defendant once there is evidence to meet the requirement of the rules. This is important in an age where an unknown tortfeasor or group of wrongdoers may act behind a computer screen or otherwise conceal their identity/ies and thereby escape justice.

[18] This court adopts the law as set out in the foregoing paragraphs in deciding the issue of the unnamed defendant in this case. The claimant has not satisfied the

[8] [2001] EWCA Civ 121

test for service by specified method to be permitted under rule 5.14 of the CPR as it has failed to show that it was unable to effect personal service on the 3rd to 7th defendants. Therefore, no order for service by specified method under rule 5.14 of the CPR could have been granted and my brother, Anderson, J quite correctly did not do so at the opportune time. This court similarly can make no such order.

[19] The 1st defendant is a fisherman and is the only defendant who is properly before the court. The 2nd defendant was personally served with the amended claim on August 13, 2014. The 3rd defendant was not served and is not before the court. The 3rd defendant is removed from the claim. The 4th, 6th and 7th defendants are alleged to be fishing vessels. This claim is not in admiralty. The 4th, 6th and 7th defendants are removed from the claim for the foregoing reasons. The 5th defendants are 'persons unknown' to the claimant whom it alleges utilizes its land to access the sea for fishing purposes. The court has no idea who is before it in this regard and neither does the claimant. The 5th defendant named as 'persons unknown' similarly will be removed. Before the court now are only the 1st and 2nd defendants.

ISSUES

[20] **T**he following issues arise for the court's determination: -

a. Whether the claimant is the owner of or is in possession of the portions of the old abandoned main road north of lands registered at Volume 945 Folio 514 and Volume 421 Folio 28 of the Register Book of Titles.

b. Whether the claimant is the owner or is in possession of the amassed land amassed by the groyne.

c. Whether the defendants are liable in trespass and, if so:

   i. Whether the claimant is entitled to recover damages for losses incurred as a consequence of the defendant's trespass.

THE CLAIMANT'S SUBMISSIONS

The old abandoned main road

[21] The claimant maintains that it is the owner of the portion of the old abandoned main road that abuts its lands registered at Volume 945 Folio 514 of the Register Book of Titles ("Volume 945 Folio 514 ") and also the portion of the main road adjoining its property leading down to the western boundary of that land which adjoins the Rio Nuevo Fishing Beach, registered at Volume 421 Folio 28 of the Register Book of Titles ("Volume 421 Folio 28").

[22] The claimant avers that by letter dated March 15, 1994 from the Chief Technical Director of the Ministry of Construction (Works) ("the Ministry"), the Ministry agreed to transfer certain segments of the main road in exchange for the claimant's land which would be transferred to the Commissioner of Lands. The claimant responded, accepting in writing in its letter dated March 21, 1994 addressed to the Ministry. The terms of the agreement were reviewed by the legal officer in the Ministry. By letter to the claimant, she set out the terms which the claimant did not agree to arguing that the former agreement had now been changed. The upshot is there is no agreement in place between the government and the claimant in respect of any land comprising the old abandoned main road.

[23] The claimant took possession of a segment of the old abandoned main road, and had it surveyed on April 12 and 26 1994. Notice of the survey was served on the Ministry as owner of the main roads and, all adjoining land owners including the previous owners of lands at Volume 421 Folio 28 and Volume 945 Folio 514 were also notified.

[24] The survey diagram generated thereby was amended on February 22, 1995. It was filed and checked at the survey and mapping division of the National Land Agency on March 2, 1995.

[25] The claimant states that it having delivered the agreed land in the exchange between itself and the Ministry, to the Government. The claimant also points to correspondence dated June 15, 2012 from the National Land Agency ("Commissioner of Lands") to itself admitting that the Commissioner of Lands is

in possession of the claimant's land offered up in the agreement for exchange. It contends that this crystallizes its position that the exchange as negotiated and agreed was acted upon by both parties. As a consequence, it is the claimant's position that the Ministry is estopped from denying the claimant's title. The claimant as purchaser in possession is entitled to a full beneficial interest in the land and as such can exclude all others from use of it.

[26] The claimant took possession of portions of the main road. It constructed concrete columns on either side of the main road close to the Sugar Pot Restaurant. This restaurant is located on the most easterly side of the claimant's land registered at Volume 421 Folio 28.

[27] The claimant argues that as purchaser in possession, in reliance on the agreement with the government of Jamaica, it has proved a lawful claim to the property that the 1st Defendant cannot overcome. It also argues that the 1st defendant has not provided any evidence of title or entitlement giving him a legitimate defence against trespass.

[28] Furthermore, the claimant submits that it does not consider or treat the portion of the main road adjoining its registered properties (of which it took possession) as a public road. It erected a gate across its section of the main road to ensure there is no through road and charged a fee to enter that gate and use the beach located at Volume 421 Folio 28. This is enforced by its tenants who operate the restaurant on the beach. The gate which remains in place to date is evidence of a claimant in possession denying access as owner. Some parts of the main road where it abuts parts of the claimant's land at Volume 945 Folio 514 is impassable to motor vehicles due to breakaways and only accommodates pedestrian traffic. The closed portion of the old abandoned main road has been controlled exclusively by the claimant for years predating this claim with no objection from the government.

[29] The claimant submits that the actions of surveying, taking possession, erecting a gate to exclude others, constructing columns on both side of the main road to accommodate its gate, and its use of the portion of the main road that adjoins its land as owner is further reliance on the representation from the Ministry that they

were in agreement. Therefore, based on the correspondence, it is clear that the claimant does have a beneficial interest in the segments of the main road that adjoins it registered properties. The claimant argues that there is no evidence before the court to suggest that the 1st defendant had any legal interest in those parts of the main road which it owns. The 1st defendant's use of the road, claiming that it is the government's road, cannot be substantiated, and is without merit.

The government's disposal of the old abandoned main road

[30] The claimant submits that the government as owner of the main road can dispose of it as it deems fit pursuant to the Main Road Act, 1932.

[31] The claimant states that by 1965 the sea consumed 90% of the western section of its registered land at Volume 421 Folio 28. By 1970 the sea had overflowed the property at Volume 421 Folio 28 and onto the main road beside its land. As a result, the government relocated the impacted section of the main road. The claimant applied to the government for permission to construct a groyne to protect its land from further erosion. A new main road was constructed further inland and away from the sea, running parallel to the old abandoned main road.

[32] It was submitted that that the exchange between the Ministry and the claimant relates only to the parties to the contract. There is privity of contract based on the agreement and the defendant is not a party. The claimant has a right to bring an action in trespass against any other person who enters the land without its permission unless that person has a better right to possession. It contends that the 1st defendant failed to demonstrate any such right and any use of the portions of the main road that adjoins its land is an act of trespass.

[33] Finally, it was submitted on the claimant's behalf that in accordance with section 24 of the Main Road Act, it is the Director (Chief Technical Officer) that must serve a notice on the occupier of land from which any encroachment proceeds, or an issue with ownership. As the 1st defendant is not the owner or occupier of the main road, he has no standing or defence to the claimant's claim in trespass.

The increased land mass

[34] The claimant contends that it is the beneficial owner of the land amassed adjacent to its property registered at Volume 421 Folio 28 on the seaward side. It was its proactive and persistent attitude in seeking mitigation methods to retain its land that resulted in the amassed land. Before the construction of the groyne between 1973 and 1974, this land was situated between the main road on the south and the foreshore of the Caribbean Sea on the north.

[35] The claimant sought and eventually obtained the permission of the government to construct a groyne that would encroach on a portion of the foreshore and sea floor. After substantial expenditure, it constructed the groyne with its purpose being the protection of its lands from further erosion. This was extremely successful. By 2005, the sea no longer consumed the claimant's land at Volume 421 Folio 28, or overflowed onto the main road to the south of its land. By this time its land was now situate between the main road on the south, an increased land mass to the north and the foreshore of the Caribbean Sea further north. The claimant relied on the evidence of the Commissioned Land Surveyor that this newly amassed land should be held together with its land at Volume 421 Folio 28 as one holding.

[36] The claimant notes that the application to install the groyne that would encroach on the foreshore and floor of the sea was made on March 28, 1972, almost a year and a half before the Beach Licence was granted. The First Schedule of the beach licence spoke to the location of the groyne at the date of application and confirms what the Certificate of Title shows, that is, at the time of application for the beach licence, the claimant was only in possession of the land registered at Volume 945 Folio 514 and the western land at Volume 421 Folio 28 was still registered to Mr Stanley Beckford.

[37] However, at the date of the Beach Licence on July 30, 1973, the claimant was the titled owner of the lands to the East and West of the groyne by transfer dated March 16, 1972 and registered on March 29, 1972. The transfer of both titles took effect from Mr Stanley Beckford to the claimant one day after the application for the beach licence was made.

[38] The claimant submits that it is the licensee for the groyne and submits that the 1st defendant has not established any legal right to the groyne nor led any evidence to show any right due to him or any benefit accrued from the construction or maintenance of the groyne. Furthermore, the 1st defendant has not provided any evidence of his entitlement to use the newly amassed land. The 1st defendant's contention that no one has a title for the newly amassed land cannot justify his usage of it.

[39] In opposing the claim for trespass to the newly amassed land between the Caribbean Sea and its registered land, at Volume 421 Folio 28, the 1st Defendant wrongly assumed that because the claimant does not habitually keep the Beach Licence current, the claimant has lost its beneficial interest. The Beach Licence is independent of and unconnected to the claimant's lands. Also, to access the newly amassed land from the north, south or east, one would have to traverse or walk on the claimant's land. Additionally, the claimant submits that as licensee it has a beneficial interest over and above any legal right that the 1st defendant is claiming that would justify his use of the newly amassed land and its registered land at Volume 421 Folio 28.

[40] It states that the 1st defendant and persons unknown trespassed on the newly amassed lands which it possesses and by extension onto the land registered at Volume 421 Folio 28 in order to access the sea. The 1st defendant does this in order to ply his trade in fishing. The 1st defendant utilized the newly amassed land treating it as the Fisherman's Beach. The 1st defendant does not know where the boundaries for the Fisherman's Village or the Fisherman's Beach lies and it may be the reason why he uses the newly amassed land and by extension the claimant's registered land at Volume 421 Folio 28. He may have valid justification for the usage when the tide is high and his fishing boat has to be docked elsewhere. The claimant also states erosion of the beach in the area is a problem. The boats are docked at the Fishing village when the tide is high. It is in accessing the Fisherman's Village from the sea that the trespass occurs.

Measure and quantum of damages

[41] The claimant avers that the defendants have trespassed on its land and have caused it to suffer the diminution of the value of the land. The defendants would also have to account in damages for such user. The defendants, having no right to possession of the claimant's land, mooring vessels on the land, discarding nets/ fishing apparatus, debris and trash on its land has resulted in the wrongful diminution of the value of its property and the aesthetic appeal including the diminution in value that results from their loitering on the land which is beach front property. The 1st defendants, their employees and/or agents have also dumped material on the claimant's land without its permission. This is a clear trespass to the claimant's land and is depriving it of the use of the premises as it is encumbered by the material placed there by the 1st defendant.

[42] It submits that the user principle must be used to assess damages in this claim. The claimant maintains that since 2010 to present, the 1st Defendant has been committing acts of trespass on the lands. An award of damages for the mis-use of the land should be granted as the mis-use did not improve the value of the land.

[43] It posits that although in a claim for trespass it is not necessary to prove loss, the user principle is applicable as the defendant has occupied the amassed land traversing the claimant's registered land to occupy and use the amassed land.

[44] Finally, the claimant maintains that his lands is frequently surveyed and each time it is surveyed and pegged to delineate boundary so as to establish ownership costs monies

Exemplary and aggravated damages

[45] The claimant admits that it has not led any evidence as to the monetary value of the loss that it incurred or suffered as a result of the 1st defendant's trespass. However, it submits that an award of exemplary damages should be made based on findings in **Errol Trowers v Noranda Jamaica Bauxite Partners Limited**[9]

[9] [2016] JMSC Civ. 48

[46] The claimant also submits that the court should award aggravated damages. It states that there was malevolence and highhanded disregard for its notices and its pleas to cease and desist were ignored. An award of this nature will communicate to the public that it is unacceptable to squat on or utilize the lands of others by force or might and in a high handed manner.

THE 1ST DEFENDANT'S SUBMISSIONS

[47] The 1st defendant avers that he is not a fisherman who owns and uses fishing vessels on the claimant's land. He is a fisherman and he owns a boat. He submits that as far as he is aware, he has never utilized the claimant's land at Content District, Retreat P.O. in the parish of Saint Mary.

[48] He denies that the claimant is the owner of the abandoned main road and the land amassed by the groyne. The 1st defendant contends that the main road adjoins the Fisherman's Beach and he along with the Fisherman's Co-operative members have always used the main road as access to the Fisherman's Beach.

[49] He posits that based on the list of fishermen provided by the Ministry of Fisheries he is a registered fisherman and has the legal right to engage in fishing activities on the Rio Nuevo Beach. The main road is still a public road up to the boundary with lands owned by the claimant. Consequently, the 1st defendant has the right to use the main road to access the Fisherman's Village and the Fisherman's Beach.

[50] Furthermore, the 1st defendant argues that the claimant has not set out in its pleadings how it acquired ownership of the main road or the newly amassed land. The claimant has also not disclosed any documentation setting out its ownership of the main road and the groyne. The notice referred to was never seen by the 1st Defendant nor was he served with it. As far as he is aware, neither himself nor any other fisherman received a notice to vacate the beach.

[51] He contends that the claimant has not provided any evidence to suggest that he trespassed on land belonging to it (the claimant) or that he stored vessels or

apparatus on its land. The 1st defendant further contends that the claimant has not provided any evidence to substantiate its claim that he illegally occupied, used and possessed its land solely for his gain and benefit and at its detriment. The claimant has also failed to provide evidence illustrating how the 1st defendant further enticed, lured, inveigled, encouraged, embolden, maintained, sustained, encouraged and supported other illegal occupants on its land for many years commencing in 2010 with deliberate and contumelious disregard for its rights as owner, driven by the desire to expand to earn and profit at the its expense by the exercise of continuing and truly outrageous conduct directed at it. It also has not demonstrated that the 1st defendant caused it any loss, injury or expense.

[52] He notes that the Commissioned Land Surveyor confirmed that the portion that adjoins the claimant's registered properties is impassable to pedestrian and vehicular traffic. Therefore, if the portion of the main road that is owned by the claimant is blocked or impassable, the 1st defendant questions how trespass occurred. It is for this reason the 1st defendant states that it not possible for him to be trespassing in that regard.

[53] The 1st defendant submits that the claimant has not shown any evidence that it owns the land amassed, on the coastline. The claimant also has not shown that it has been in exclusive possession of the increased land mass. The Commissioned Land Surveyor did not give evidence that the claimant owns the increased land mass. Based on his investigation, it still formed a part of the coastline and does not form any portion of the land registered to the claimant. Consequently, it cannot be said to be land owned by the claimant that is being trespassed on.

[54] Finally, the 1st Defendant stridently opposes the granting of the Orders sought and asks that the claimant's claim be struck out for failing to bring a reasonable cause of action or claim. In any event, the claimant has not proven that it needs to be compensated for any loss, cost, expenses and hardship it endured.

THE LAW

Trespass to land

[55] Trespass to land is a common law tort. The tort is defined at paragraph 161 of Halsbury's Laws of England, Volume 97A (2021))/5 as follows:

> *"A person's unlawful presence on land in the possession of another is a trespass for which a claim may be brought, even though no actual damage is done A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another. He also commits a trespass to land if, having entered lawfully, he unlawfully remains after his authority to be there expires."*

[56] In **Harold Francis Jnr and Elvega Francis v Dorrett Graham**[10], Edwards, JA (ag) (as she then was) provides a detailed analysis of the tort of trespass to land. She opined as follows:

> *"[83] The tort of trespass to land is defined by the learned authors of Clerk & Lindsell on Torts, 17th edition, paragraph 17-01 as consisting of "... any unjustifiable intrusion by one person upon land in the possession of another". It is generally described as an interference with possession. The right to sue in trespass is therefore based on actual possession or the right to possession."*
>
> *[84] In Halsbury's Laws of England 3rd edition, volume 38 at paragraph 1226 it is stated:*
>
> > *"A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right..."*

[10] [2017] JMCA Civ 39

[85] Any person in possession of, or who has a right to possession of land, may bring an action for trespass to land. To maintain an action for trespass the plaintiff must have been in possession at the date of entry of the defendant. Where the action is against a defendant who has no title to the land, the slightest possession by the plaintiff is sufficient to entitle him to bring a claim in trespass. See Wuta-Ofei v Danquah [1961] 3 All ER 596. At page 600, Lord Guest opined:

> *"Their Lordships do not consider that, in order to establish possession, it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In those circumstances, the slightest amount of possession would be sufficient."*

[86] To be successful, the plaintiff suing in trespass would also have to prove that the defendant actually entered on the land whilst they were in possession. The tort is actionable per se, so there is no need to prove actual damage, but if there is damage, in order to quantify the amount beyond nominal damages, actual damages will have to be proved. The plaintiff, in an action for trespass, must prove all the elements of the tort to the requisite standard in order to succeed."

[57] Furthermore, in **JA Pye (Oxford) Ltd and another v Graham and another**[11], Lord Browne-Wilkinson examined what constitutes 'possession' in the ordinary sense of the word. He cited with approval the following passage from the judgment of Slade J in **Powell v McFarlane**[12] where he discussed the two ways in which possession of land may be established. At page 875 he states that:

[11] [2002] 3 All ER 865

[12] (1977) 38 P & CR 452

*"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) 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 ("*animus possidendi*")."*

[58] In a claim for trespass, the burden of proof rests on the claimant to prove all the elements of the tort alleged on a balance of probabilities[13].

Damages in trespass

[59] The tort of trespass to land is actionable per se. This means that a claimant is not required to prove actual damage. However, if there is damage, in order to quantify the amount beyond nominal damages, the claimant will have to prove actual damages.

[60] Halsbury's Laws of England, 4th Edition, Volume 45 outlines the basis on which the court may assess the quantum of damages for trespass to land. Paragraph 641 reads as follows: -

> **"***In an action of trespass, if the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the plaintiff actual damage, he is entitled to receive such an amount as will compensate him for his loss. When the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use.*

[61] The general rule is that a successful claimant in an action in tort, recovers damages equivalent to the loss which he has suffered. No more and no less. If he has suffered no loss, the most he can recover are nominal damages. Where

[13] See- **Paul Blake v Donald Williamson and Frank Dunkley** [2016] JMCA Civ 55;

a claimant has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right.[14]

The Main Roads Act

[62] The Main Roads Act ("the Act") governs the maintenance, management and general governance of main roads in Jamaica.

[63] Section 7 of the Act provides that all property in main roads is vested in the Commissioner of Lands. It reads as follows:

> ***7.*** *The property in the main roads, and in the land pertaining thereto, and in all the erections and buildings, mileposts, fences and other things, erected upon and provided for and upon such roads, with the conveniences and appurtenances thereto respectively belonging, and the materials of which the same consist, and the materials, tools and implements, provided for the repairing of the said roads shall be vested in the Commissioner of Lands or the Accountant-General as the case may be for the time being, for the use of Her Majesty the Queen in right of the Government of Jamaica and in all legal proceedings it shall be sufficient to state generally such roads and things to be the property of Her Majesty the Queen.*

[64] Section 13 of the Act empowers the Commissioner of Lands or the Accountant General to convey an abandoned road to an owner whose land was taken for the purpose of a new road. The relevant portion of section 13 states that:

> *13.(1) When the owner of any land which it may be proposed to acquire, or enter upon, for the purpose of a new road, or alteration or widening of an existing road, is also the owner of any land through or adjoining which any road, or part of a road, passes as to which the Minister proposes to declare that it shall cease to be a main road or part thereof, it shall be lawful for the Commissioner of Lands or the Accountant-General as the case may be, as soon as such declaration has been made as aforesaid,*

[14] See -**George Rowe v Robin Rowe** (supra) per Brooks JA, at paragraphs [49] to [54]

to convey to such owner, as aforesaid, in satisfaction or part satisfaction of the compensation payable in respect of the land proposed to be acquired or entered upon, the soil of the road or part of a road as to which such declaration has been made; and thereupon, in the assessment of compensation or damages payable as aforesaid, the value of the land so conveyed as aforesaid shall be taken into consideration, and shall be deducted from the compensation or damages that would otherwise be payable.

[65] Section 24 provides for the removal of encroachments that may exist on a main road by the owner of the encroachment or by default, the Chief Technical Director. It stipulates that:

> *24.-(1) Whenever there shall exist any encroachment on a main road, the owner or occupier of the land, fence or construction, from which such encroachment proceeds, or the owner of the thing constituting the encroachment shall, after receiving a notice thereof in writing signed by the Director, forthwith remove or abate the same at his own*
>
> *(2) The notice shall specify the nature of the encroachment, and state a reasonable time within which it must be removed.*
>
> *(3) After the expiration of the time specified in any such notice or without any such delay if the encroachment endangers or impedes or threatens, or is likely to endanger or impede the traffic on the road or the drainage of the road, the Director may remove the encroachment, or cause it to be removed, in such manner as he may think fit.*

[66] Section 29 governs the making of instruments and deeds relating to main roads. It provides that:

> *29.-(1) In every contract, release, covenant or agreement, deed or instrument, in relation to the main roads, to which the Director is a party, it shall be sufficient to describe him by the style of Chief Technical Director without naming him, and every such contract, release, covenant or agreement deed or instrument, may be executed by the Director or by any*

duly authorized officer by signing his name, or if the instrument be in the form of a deed, by signing, sealing and delivering the same as his deed.

(2) For the purposes of this section a duly authorized officer shall be any officer of the Public Works Department appointed by the Director from time to time in writing under his hand for the purposes mentioned in subsection (l), subject to such limitations as the Director may impose.

THE EVIDENCE

The Expert Report of Mr Anthony Prendergast

[67] The expert report of Mr. Anthony Prendergast dated October 11, 2021 was admitted into evidence as Exhibit one. The relevant portions of his expert report have been transcribed verbatim below and states as follows:

"October 11, 2021

The Registrar
The Supreme Court of Judicature Jamaica
King Street
Kingston

Re: Commissioned Land Surveyor Expert Report

Claim No: 2013 HCV 04130

Chisholm and Company Development Limited v Norval Henry et al..

Instructions:

On September 30, 2021, I was instructed via the telephone by Julliet Mair, Attorney-at-Law of Riam Esor Law acting on behalf of Chisholm and Company Development Limited, Claimant in matter at caption, that the Court has appointed me to provide an expert opinion in the captioned matter. By letter received via email on October 4, 2021 I was requested to address the relevant history of the Claimant's "dealings with the lands known as the old abandoned main road and the portions

adjacent to the Claimants property registered at Volume 945 Folio 514 and leading down to the Western boundary of the Claimants property at Volume 421 Folio 28 which adjoins the Rio Nuevo Fishing beach in St Mary; as well as the newly amassed land adjacent to the Volume 421 Folio 28 and bordered north by the Caribbean Sea. This amassed land may have come about as a result of a groyne designed and approved by The National and Environmental Planning Agency (NEPA), constructed by the Claimant."

Qualifications

1. *I am a Commissioned Land Surveyor and have been practicing since March 1992. My qualifications include a Diploma in Land Surveying (UTECH), 1984.*

Professional Affiliations

1. *I am a member of the Land Surveyors' Association of Jamaica since 1992 and have served on the Council of the Organization from 2006-2013.*

Observations

1). I reviewed the following documents:

- *I. Volume 945 Folio 514*
- *II. Volume 421 Folio 28*
- *III. Prechecked Plan No. 373423 (survey dated February 12, 2014)*
- *IV. Prechecked Plan No. 240199 (survey dated April 12 & 26, 1994)*

I attended the Office of the Registrar of Titles and obtained the Certificates of Title related to the property in question sometime in 1994 before the date of the survey for the Prechecked plan at No.240199.

All documents reviewed are listed below and copies are enclosed.

Findings:

1) *The Prechecked Plan No.240199 represents the survey of the old main road from the intersection with the present main road (Rio Nuevo — Oracabessa) to a part of the frontage (along the old main road) of lands registered at Volume 421 Folio 28. A significant part of lands north of the old main road is owned by Chisholm and Company Developments Limited registered at Volume 954 Folio 514 and Volume 421 Folio 28.*

2) *The Prechecked Plan No.373423 represents the survey of land north of lands registered at Volume 421 Folio 28. This parcel of land is the difference between the lands registered at Volume 421 Folio 28 and the high water mark as It existed at the date of the survey. There is a groyne shown on the plan which may be the reason for the increased land mass.*

Conclusion

1) *The old main road is not suitable for vehicular traffic as the carriageway is narrow in some sections and erosion along a section northern boundary of .said old main road has resulted in a breakaway which makes it impassable for vehicles.*
2) *The parcel of land north of lands at Volume 421 Folio 28 is the increased land mass between the date of survey (February 21, 1944) for the plan attached to the above-mentioned Registered Title and lands represented on the Prechecked Plan at No. 373423, survey dated February 12, 2014.*
3) *The boundaries for surveys along coastlines are adjudged to be aligned with the high water mark"*

[68] The witness said that on the western part Volume 421 Folio 28. 'I.P.' means iron peg, it was placed against an almond tree. He pegged the boundaries of the abandoned road when he conducted the survey in accordance with the

registered properties to the north and the south of the road. 'Hp' means hardwood peg. The boundaries were pegged in accordance with the registered titles to the north and south which would be the boundary of the old abandoned road.

[69] The notation at 'NB' means when an application for title for the increased land mass is made, that amassed land would not have access to the main road, the access would be through lands at Volume 421 and Folio 28, so that parcel and the increased land mass would have to be held together as one holding.

[70] The witness said he had to re-establish the boundaries of Volume 421 Folio 28 "so as establish the increased land mass." The increased land mass was evident from the movement of the high water mark to the north from 1944 to the date of the survey. High water mark means the water mark where the tide comes in at its highest point and that is the standard practice when surveying lands against the coast line. Based on his survey, there were no access points to the increased land mass unless one walked along the beach from the west or through lands at Volume 421 Folio 28.

[71] The western boundary of the claimant's land registered at Volume 421 Folio 28 abuts the fisherman's beach. The evidence of the surveyor lent itself to the conclusion that one could walk from the fisherman's beach in the west to get to the land amassed by the groyne on the foreshore. This amassed land was north of both the claimant's land and the fisherman's beach. The amassed land was formed along the entire coastline.

The witness statement of Garnet Bucknor

[72] Mr. Bucknor gave evidence on behalf of the claimant. He stated that he is a driver and the nephew of the late Mr James Henry Chisholm, Managing Director of the claimant company.

[73] In his witness statement he said he derived his knowledge from driving his uncle to his visits to his properties in Trelawny and Saint Mary, being present when he spoke to persons at or near the property, taking pictures for him of the sites or whatever other and similar activities he required in relation to his properties.

[74] He knew that the claimant company considers itself to be the owner of part of the old abandoned main road and had blocked off the part of the road where it intersects with its lands at Volume 945 Folio 514 and at Volume 421 Folio 28 of the Register Book of Titles. The section blocked off by the claimant is overgrown and impassable.

[75] Mr Chisholm erected columns of concrete at the entrance of the main road for entrance onto his property at Volume 421 Folio 28. He stated that Mr Chisholm told him that he was amenable to the fishermen using the main road starting approximately 10m from his gate column for approximately 200 feet in a westerly direction, if they needed to access the portion of land assigned to them by the government to carry on their fishing activities.

[76] He was aware that Mr Chisholm had been renting the beach side of his property at Volume 421 Folio 28 for many years and still has tenants there. There was a charge to use the beach and that the beach is not treated as a public beach.

[77] The groyne was constructed, implemented and maintained by Mr Chisholm. It created a build-up of sand and extended his property to the sea, both at Volume 421 Folio 28 as well as created a build-up of sand that also expanded the lands assigned to the fishermen by the government for their fishing activities. I note here that this is evidence which accords with the survey diagram in evidence.

[78] Mr Bucknor posited that Mr Chisholm showed him correspondence from the government authority refusing the placement of the groyne. He also showed him other correspondence which came about as a result of his uncle’s insistence; the government authority granted him permission to construct the groyne but warned him that it would not stop the erosion.

[79] Mr Bucknor said he knew the 1st defendant from meeting him on several occasions when he accompanied his uncle to his property in St Mary at Rio Nuevo. He said that the relationship between his uncle and the 1st defendant was always cordial as his uncle had given the 1st defendant permission to dock his fishing vessel and to be on his land that had amassed along the seaward side of land registered at Volume 421 Folio 28.

[80] However, the relationship with Mr Chisholm changed. Whenever he visited his property he would see several fishing vessels docked on his land without permission. On each visit which was sometimes twice per month, there would be additional vessels and different makeshift structures, fishing pots and fish for sale. When his uncle would enquire into the ownership of the vessels and other fishing apparatus, he would not receive much information, not even from the Fisherman's Co-operative nearby and so he acted to remove everyone.

[81] Mr Chisholm always treated the part of the old abandoned main road as his and was in possession of it. The witness further stated that he, accompanied him to put up 'no trespassing' signs and private property signs on the property and to deal with the tenants on other parts of the land. Mr Chisholm also surveyed and pegged the newly amassed land and treated with it as owner and all others as squatters.

[82] I have assessed this witness as one who really did not know very much of the business of the claimant and was honest enough to admit that when confronted. Mr. Bucknor gave credible evidence and I accept found him to be a truthful and reliable witness.

Cross examination

[83] A portion of Mr Bucknor's evidence obtained during cross examination states as follows:

Q: do you know the boundaries of Volume 421 Folio 28

A: no

…

Q: in your evidence here there is nothing to show that the groyne extended the land registered at Volume 421 Folio 28

A: agree

Q: at paragraph 8 you said you knew 1st defendant

Sugg: you have never met him

A: *disagree*

Sugg: *never spoken with him*

A: *just hello when he comes over to talk but no conversation, I have met him several times*

Sugg: *you were never present for any discussions between the claimant and 1st defendant*

A: *no, you are wrong there*

Q: *in paras 8 and 9 is it your evidence that the 1st defendant got permission to be on land that amassed on the seaward side of claimant's property*

A: *yes*

Q: *so it's the land that is not a part of the land that Mr. Chisholm owns at Volume 421 Folio 28*

A: *agree*

Q: *while he gave permission to the 1st defendant he did not give permission to other fishermen*

A: *agree*

Q: *he gave permission to the 1st defendant alone*

A: *yes*

Q: *nowhere in your witness statement did you say that the 1st defendant trespassed on any land belonging to the claimant.*

A: *yes*

Q: *did you say so in your witness statement*

A: *no*

Q: *have you said in your witness statement that the claimant took away permission for the 1st defendant to be on the property*

A: *yes, not in the witness statement, but Mr. Chisholm said he wanted everybody off*

…

Q: *the parcel of land the Fisherman's Village occupies are you saying it is owned by the claimant*

A: *no*

Q: *agree you have not identified any of the fishing vessels by name that you said were parked on Mr. Chisholm's property*

A: *yes, that is so*

Q: *you didn't because you don't know their names*

A: *I don't*

Sugg: *at no time was the 1st defendant's fishing vessel or any other equipment parked on property belonging to the claimant*

A: *no, disagree*

Q: *have you identified the name of the 1st defendant's vessel*

A: *no*

Q: *do you know the name of his vessel*

A: *no*

Q: *when you say you went there, you said the properties you went to in St Mary were phase 1 and phase 2 and the Sugar Pot restaurant, suggesting none of the 1st defendant's boats were on Phase 1 or Phase 2*

A: *agree not at phase 1 or 2*

Q: *did you see the 1st defendant's vessel on Sugar Pot's property*

A: *no*

Q: *did you see any fishing apparatus belonging to the 1st defendant on Sugar Pot property*

A: *no*

Q: *Sugar Pot restaurant and property are same place*

A: *same stretch, coming from the old main road from Ocho Rios end, you turn onto the old main road, Sugar Pot restaurant is further down to the end of the property it is the same stretch of land.*

I cant give the precise length or width of the Sugar Pot property as I don't which title it is on I can only speak to the portion I went to.

Q: *did you see the 1st defendant's vessel on it*

A: *no, but vessels were on it*

Q: *did you see fishing apparatus belonging to the 1st defendant on the portion of the property you went to*

A: *no*

…

Q: *you were not present when survey conducted of the portion of the land that is considered to have built up bordering Volume 421 Folio 28*

A: *no*

Q: *is it the gate that Mr Chisholm put up to go up by Sugar Pot restaurant where exactly*

A: *the gate is basically on the old main road, that is where I think end up, you go through the 2 column and the gate is there*

Q: *do you know if the gate is on Volume 421 Folio 28*

A: *I wouldn't know the volume and folio number but the gate is on the entrance where the old main road would enter into the Sugar Pot restaurant.*

…

Q *asked to describe route to the Fishermans Village then after that Sugar Pot restaurant*

A: *if you continue further down then you go down to the Sugar Pot restaurant*

Q: from old main road the old buildings are the great house and the fisherman's building

A: yes, the fisherman's co-op

When you step out of fisherman's co-op you step basically on the old main road, the old main road divides the fisherman's co-op and the beach.

The property has a bend or curve, that section of beach kind of has a borderright there where we put up the sign, that section, the exact boundary I don't know,

Q: you don't know where the C's land ends.

A: The sign was put up on the beach side, I don't know the boundary

I say Sugar Pot restaurant is the claimant's land because he has tenants there and they pay rent.

[84] Mr. Bucknor admitted that he did not know the boundaries of the claimant's land, he further admitted that the 1st defendant committed no acts of trespass up to the filing of this claim and that any signs he put up were not on the old abandoned main road but on the beach.

Witness statement of June Chisholm-Reid

[85] Mrs June Chisholm-Reid also gave evidence on behalf of the claimant. She is a Director of the claimant company.

[86] Mrs Chisholm maintained that the claimant is the owner of a portion of the old abandoned main road that abuts its lands at both Volume 945 Folio 514 and at Volume 421 Folio 28. The claimant is also the owner of the portion of land that amassed on the seaside of its properties with registered titles at both Volume 945 Folio 514 and at Volume 421 Folio 28, as a result of a groyne designed, constructed implemented and maintained solely by the Claimant since 1973-1974. The claimant as owner of these lands, took possession and used the lands as owner from early as 1998.

[87] As owner, the claimant through its Managing Director, Mr James Chisholm initially gave the 1st defendant and other fishers temporary permission to use its portion of land that amassed on the seaside of its properties registered at Volume 421 Folio 28 for some time, but has since revoked its permission to which they have objected.

[88] It is her evidence that as owner, the claimant through its Managing Director, Mr Chisholm acted to take possession of the portion of the main road that abuts its lands at both Volume 945 Folio 514 and at Volume 421 Folio 28 to the exclusion of others with the knowledge of the Commissioner of Lands.

[89] Mrs Chisholm- Reid said that the portion of the main road that abuts the claimant's lands at both Volume 945 Folio 514 and at Volume 421 Folio 28 was given to the claimant by the government in exchange for other lands owned by the claimant in St Mary to facilitate the government's construction of a new highway in St Mary. She avers that to the claimant's knowledge, the government has taken ownership and possession of the claimant's land exchanged, pursuant to an Agreement. She said that to her knowledge and based on documentation she is privy to as director of the claimant company, the government has also written to the claimant to formalize its ownership of the portion of the main road that the claimant is in possession of. However, the claimant is refusing to pay as that was not its original agreement with the government.

[90] She stated that the claimant knows that the government is slow and deliberate in issuing title for land. This is the experience that she has had as director in other parishes with other lands when dealing with the government.

[91] Furthermore, Mrs Chisholm-Reid posited that it is the claimant's claim that the defendants are trespassers, that the trespass is continuing and that the defendants are causing damage to the claimant. The defendants' blatant refusal to cease its use and occupation of the claimant's land as well as the defendants' deliberate act of resisting the claimant's various attempts to prevent their use and occupation of its land has caused and is causing the claimant insurmountable losses and costs.

[92] Finally, she stated that notwithstanding various notifications, using signs, verbal notifications and notification through the fisherman coop, the defendants continue to deliberately and contumeliously disregard the claimant's rights to its land. The defendants continue to trespass on the claimant's land and continue to deprive it of the use and enjoyment of its land so that they (the defendants) may continue to directly profit, benefit, gain and or earn income from the Claimant's land. She said that she has visited the site on several occasions and even in 2021 and noticed the presence of the defendants on the claimant's property with their apparatus and equipment.

[93] In cross examination the witness when taxed, could neither alter nor explain the contents of the documents shown to her which are exhibits in this trial. Her evidence lacked cogency and reliability.

THE 1ST DEFENDANT'S CASE

Witness statement of Norval Henry

[94] Mr Henry stated that he resides at Content, Retreat P.O. in the parish of Saint Ann and that he is a Fisherman. He further stated that he has been a Fisherman all his adult life and that fishing is his source of livelihood. It provides an income for his family and he does it very well.

[95] He said that he operates from the Rio Nuevo Beach. There is an established Fisherman's Village at the beach. He also operates a fisherman's shop where he roasts fish and sells beverages to fishermen and to those who use the village.

[96] Mr Henry averred that he owns a fishing boat that he uses to fish name 'Conscious Ride'. As a fisherman, he has to apply for a licence each year from the Fisheries Division of the Ministry of Agriculture and Fisheries.

[97] He maintained that he does not operate or fish on any land, premises or beach belonging to Mr. Chisholm. He is aware that adjacent to the Fishing Village there is a beach front property that is leased to individuals known to him. The property is known to him as Sugar Pot beach, it is around 150m above the village. A bar, restaurant and beach are located there.

[98] Mr Henry goes on to state that he is not aware of the claimant owning the main road and denied occupying land amassed by the groyne belonging to the claimant. He intends to rely on a letter from the Fisheries Division describing the Fisherman's Village and where he operates from. He said Mr. Chisholm has never spoken to him and that he has never received a notice to vacate the beach. He also denied causing the claimant mental anguish, grave distress, frustration and undue burden daily.

[99] Finally, he stated that to date the claimant has not shown that at the time of the claim he was the owner of the groyne, the main road and the land comprising the fisherman's beach.

DISCUSSION

Land amassed by the groyne

[100] Sections 2, 3 and 4 of the Beach Control Act, 1956 prescribes the definition of "adjoining land" and "foreshore":

> *"2. In this Act, unless the context otherwise requires –*
>
> *"adjoining land" means land adjoining the foreshore of this Island and extending not more than one hundred yards beyond the landward limit of the foreshore;*
>
> *"foreshore" means that portion of land, adjacent to the sea, that lies between the ordinary high and low water marks, being alternately covered and uncovered as the tide ebbs and flows;*
>
> *Rights in the Foreshore on a Floor of the Sea.*
>
> *3. – (1) Subject to the provisions of this section, all rights in and over the foreshore of this Island and the floor of the sea are hereby declared to be vested in the Crown.*
>
> *(2) All rights in or over the foreshore of this Island or the floor of the sea derived from, or acquired under or by virtue of the Registration of Titles Act or any express grant or licence from the crown subsisting*

immediately before the commencement of this Act are hereby expressly preserved.

(3) Except as provided in section 7 nothing in this Act contained shall be deemed to affect –

(a) any rights enjoyed by fishermen engaged in fishing as a trade, where such rights existed immediately before the 1st June,1956, in or over any beach or adjoining land; or

(b) the enjoyment by such fishermen of the use of any part of the foreshore adjoining any beach or land in or over which any rights have been enjoyed by them up to the 1st June, 1956.

(4) No person shall be deemed to have any rights in or over the foreshore of this Island or the floor of the sea save such as are derived from or acquired or preserved under or by virtue of this Act.

4. Any person who is the owner or occupier of any land adjoining any part of the foreshore and any member of his family and any private guest of his shall be entitled to use that part of the foreshore adjoining his land for private domestic purposes, that is to say, for bathing, fishing, and other like forms of recreation and as a means of access to the sea for such purposes:

Provided that where any land as aforesaid is let, the letting of which is in pursuance of a commercial enterprise, the right to the use of the foreshore for private domestic purposes shall only be by virtue of a licence granted to the lessor under the Act."

[101] On a literal interpretation of sections 2, 3 and 4 of the Beach Control Act, the land adjoining the foreshore (extending to not more than 100 yards beyond the landward limit), would include land known as Fisherman's Beach and land owned by the claimant registered at Volume 421 Folio 28.

[102] Section 3(1) of the Beach Control Act, vests all rights in and/or over the foreshore in the Crown, save and except other rights acquired under the

Registration of Titles Act, or any express grant or licence from the Crown existing at the time of the commencement of the Act (1 June 1956), and any rights specifically preserved, for example in the case of fishermen who would have acquired their rights by prescription. Section 3(4) specifically excludes any person who may allege *deemed rights in or over the foreshore of this Island or the floor of the sea save those preserved in section 3(3).*

[103] Both the claimant and the 1st defendant would therefore be occupiers of land adjoining the foreshore, and thus be entitled to use that part of the foreshore for private recreational purposes, and as a means of access to the sea for such purposes as fishing. There is no provision in the statute enjoining fishers from having access to or from the foreshore. The claimant cannot claim any rights to the foreshore, nor can it prevent access to the foreshore, under the Beach Control Act.

[104] The claimant relies instead on a licence granted under what was then known as the Beach Control Law, 1955 which is Exhibit 4. It was granted on July 30, 1973 by the Chairman of the Beach Control Authority. This licence was granted to encroach on that part of the foreshore and the floor of the sea at part of Rio Nuevo in the parish of St. Mary described in the first schedule on lands first surveyed in 1944 and which did not include what would later become known as Fisherman's Bbeach. The licence was to construct a groyne to contain beach erosion, it does not fall within the exception to section 3(4) nor does it allow for encroachment onto Fisherman's beach by the claimant.

[105] The claimant cannot and does not claim to be the legal owner of the land amassed by the groyne, it claims to be the beneficial owner. The court would have to examine the evidence to see whether there was an equity arising albeit the licence was both statutory and restrictive. I will start with what is self-evident. The land over which the claim for a beneficial interest is now being made did not exist when the licence was granted. The extent of any beneficial interest has to be determined by the court at the time of the acquisition. The date of the acquisition of the land is unknown. The claimant certainly has not put this date into evidence. The land amassed by the groyne is unregistered and has

amassed along the coastline. The claimant bears the burden of adducing evidence to show how the coastline belongs to it.

[106] In the case of **Calvin Lenden Abrahams v Virginia Williams**[15], Sykes, J (as he then was) said:

> *"8. It is well established in Jamaica that whenever the court is called upon to determine the beneficial interest of parties in real property, the applicable law is the law of trust (see for example Harris v Harris (1982) 19 J.L.R. 319; Lynch v Lynch (1989) 26 J.L.R. 113; Edmonson v Edmonson (1992) 29 J.L.R. 234; Forrest v Forrest (1995) 48 W.I.R. 221).*
>
> *9. It is equally well established that the same principles apply to spouses, strangers, friends and business partners, though the inferences that one draws from the factual circumstances may differ since the court must have regard to the nature of the relationship between the parties and the context of the acquisition of the particular property over which the dispute has arisen in order to determine which inference is more likely in all the circumstances of the case before the court. In other words, the same basic facts in, for example, a marriage, may lead to a different inference from that drawn from a business relationship although the applicable legal principles are the same (see Pettitt v Pettitt [1970] A.C. 777 which has been accepted as stating the law applicable to Jamaica).*
>
> *10. It is also well established that the extent of the beneficial interest held is determined at the time of the acquisition even though the court is usually called upon to make these determination years after the property was acquired (see Lord UpJohn in **Pettitt v Pettitt**). The fact that the determination is being made after the property is acquired in and of itself does not confer any power on the court to alter the beneficial interest of the parties unless the alteration comes about by well settled principles of law, that is, (a) an agreement that complies with all the requisite statutory formalities where that is required, as for example, section 4 of the Statute of Frauds, (b) a proprietary estoppel, or (c) by way of constructive trust.*

[15] Unreported, Claim No. 2005HCV01779, judgment delivered on October 2, 2008

This well-established principle has now been put in doubt by the higher courts in England and Wales, if not across the board, but certainly, at least, in relation to unmarried couples where the disputed property is the home in which they lived."

[107] The evidence from the claimant is that pursuant to the licence granted to it, the groyne was constructed at its expense. There was no evidence of expenditure on its construction or maintenance from construction to trial. The claimant does not rely on a promise in relation to the groyne, there is no evidence which establishes a trust. One of the several difficulties with the claimant's position is that the Attorney General was not made a party to this action. The beneficial interest if any which is to be determined by the court does not touch and concern the 1st and 2nd defendants. The order sought is futile in the circumstances.

[108] The claimant did not control the groyne, it did what it was put there to do, and it also enhanced the entire coastline not just the land belonging to the claimant. The claimant has raised no exception under section 3(4) of the Beach Control Act by virtue of the vintage of its title from 1944. The land amassed by the groyne therefore vests in the Crown.

The old abandoned main road

[109] The claimant alleges through its witnesses that it owns land known as the old abandoned main road. This land has been described in the claim form as being adjacent to the Claimant's property registered at Volume 945 Folio 514 and it leads down to the western boundary of Volume 421 Folio 28 which adjoins the Rio Nuevo fishing beach and newly amassed land adjacent to Volume 421 Folio 28 as a result of Groyne.

[110] The survey diagram in this trial shows what is labelled abandoned old main road from Rio Nuevo to the main road. There is no doubt that the old abandoned main road abuts land registered at Volume 421 Folio 28 and also land registered at Volume 945 Folio 514. The old abandoned main road also abuts the fisherman's beach which itself adjoins lands owned by the claimant. In describing the abandoned old main road, it is the land described here to which I will be referring.

[111] The evidence of the claimant was that through its Managing Director, the late Mr James Chisholm acted to take possession of the portion of the old abandoned main road that abuts its lands at both Volume 945 Folio 514 and at Volume 421 Folio 28 to the exclusion of others with the knowledge of the Commissioner of Lands.

[112] In cross-examination, Exhibit 4 was put to June Chisholm-Reid. It is a document from the Ministry of Construction (Works) dated March 15, 1994 to the claimant for the attention of Mr. James Chisholm. The subject matter regards the development known as Rio Nuevo Beach and Cottage Colony, part of Huddersfield, St. Mary.

[113] The salient portion of the letter says:

> *"In response to your letters dated November 18, 1993 and February 2, 1994 and as a result of a site visit by officials of the Ministry, I am advise [sic] that the Ministry will now permit one only direct access to the Main Road from Lot 82A of your subdivision of part of Huddersfield, St. Mary. This shall be in accordance with detailed designs to be agreed, and subject to the following conditions:*
>
> 1. *The property boundary shall be set back 15.24 meters (50') from the centre line of the Main Road.*
> 2. *Lands that are to be given up for road purposes as a result of the boundary se-back of along the Main Road will be transferred to the Commissioner of Lands free of cost.*
>
> *Further reference is made to your request for the transfer to you of the segment of the abandoned main road adjacent to your property leading down to the Rio Nuevo fishing beach.*
>
> *This is to advise that the Ministry of Construction offers no objection to the transfer of that segment of abandoned roadway to you in exchange for lands to be transferred to the Commissioner of Lands mentioned in condition 2 above, subject to the following additional conditions:*

> a. *All necessary surveys and legal process will be carried out by you at your expense solely.*
>
> b. *That there be no land which can only be accessed via this segment of roadway that will be rendered inaccessible from any road as a result of your acquisition of the abandoned roadway.*

[114] The letter is signed by Mr W.B. Smith, Technical Director.

[115] The witness was taxed as to paragraph b. and asked whether that condition had been satisfied. She provided no answer which was of any assistance to the court and she could not have. There letter shows a clear acknowledgment of the fishing beach at Rio Nuevo. It also shows a clear acceptance by the claimant that the fishing beach was in active use before it ever wrote to ask for the transfer of the abandoned old main road.

[116] The evidence of the surveyor that the land amassed by the groyne can only be accessed by walking through land at Volume 421 Folio 28 was qualified as that was the land he was surveying. This underscores the point that the claimant could not lay claim to the portions of the old abandoned main road to the exclusion of all others and in particular not the fishers using the Rio Nuevo beach. This finding is based on the statement of case of the claimant which has been based on an agreement with the ministry which fell through, nevertheless it occupied and took possession of portions of the old main road in reliance thereupon. The correspondence does not demonstrate that the claimant could exclude the fishers from Rio Nuevo beach or anyone else.

[117] Exhibit 7 is a letter from the Ministry of Transport and Works to the claimant dated June 15, 1998. Its subject matter is set out below:

> *Dear Sir:*
>
> *Re: Old Main Road from Ocho Rios to Oracabessa, Section from Rio Nuevo Bridge to Huddersfield passing by the Fishing Beach*

With reference to letter from this Ministry dated March 15, 1994[16] and your reply dated March 21, 1994. I am to further advise that the section of the Old Main Road described above is still a public road up to the boundary with lands owned by Chisholm and Company Developments Limited registered at Volume 421 Folio 28.

Therefore, free passage should be permitted to all members of the public who may wish to use this section of the roadway.

There should be no blockage or obstruction of this section of the road.

Yours truly,

W.B. Smith for Chief Technical Director

[118] That the offer dated March 15, 1994[17] was accepted by the claimant is detailed in a letter from its attorneys Hamilton, Brown Hamilton & Associates.[18] Exhibit 8 acknowledges the provision that there be no lands which can only be accessed via this segment of roadway that will be rendered inaccessible. It also requested the title for the abandoned old main road in exchange for the lot agreed upon. This means that up to March 15, 1994, the claimant could not have been in possession of any portion of the old abandoned main road. In Exhibit 7 on June 5, 1998, the claimant was reminded that the abandoned old main road remained a public road. Therefore, no claim to possession could be brought by the claimant before that date.

[119] Exhibit 5 is a letter from the Ministry of Transport and Works dated December 21, 2011 to Hamilton Brown Hamilton & Associates. It responds to theirs at Exhibit 8 and confirms that the map attached depicts land sold to the claimant provided the National Water Commission is granted access to maintain and or relocated its infrastructure along the abandoned old main road in the future. It further recommended that other segments of the abandoned old main road remain government property to maintain public access to the Rio Nuevo Fisherman's

[16] Exhibit 4 (supra)

[17] in Exhibit 4

[18] Exhibit 8, dated February 24, 2011

Village. Finally, it stated that it will allow the claimant to purchase approximately 272.88 metres of road. The road width is 6 metres; therefore, the total land area recommended for sale to the claimant is approximately 1637.28 square metres. *"Approximately 365.06 square metres of the Old Main Road should remain Government owned, thereby reserving 2310.36 square metres of road for public access. The Ministry therefore offers to Chisholm and Company the land for sale, subject to the land being valued to ascertain the fair market value thereof."*

[120] The letter is signed by Ms. S. Hemmings, Legal Officer. There is no response to this letter in the evidence. The Exhibits to which I have referred do not indicate an exchange of land without payment from the claimant. The claimant agreed to give up land free of cost and in exchange requested the transfer of the abandoned old main road. The Main Roads Act sets out the need for compensation or damages to be payable and the need for a valuation is apparent for this exchange. There is no valuation adduced by the claimant before this court. It is the claimant who relied on the Main Roads Act and it is the claimant who in the same breath argued that the deal between the government and Mr. Chisholm had changed. The resolution of any issue between the claimant and the government does not concern this court nor these proceedings. However, it is clear that there is no legal ownership vested in the claimant.

[121] It is incumbent on the claimant to prove possession of the land it is claiming and to establish trespass to that land. Based on its own documents, the government retained a section of the land specifically for public access. Therefore, the basis of its claim to ownership can only be by virtue of being in possession as against the government. The instant claim is one in which the claimant says it has a better right to possession than the defendants. I recall here that it was the opinion of the expert witness that the land amassed by the groyne should be held as one holding with Volume 421 Folio 28 and that this informed the submission that the land amassed belonged to the claimant. This opinion by the expert is irrelevant to the issue of trespass by the 1st and 2nd defendants as the land amassed by the groyne is vested in the Crown and it is not the Crown which has brought this action against them.

[122] It is for the claimant to establish on a balance of probabilities that the defendants trespassed on the portion of the old main road of which it was in possession. Exhibit 5 indicates the land to be sold to the claimant and the land to be retained by the government.

[123] The evidence was that the claimant built a gate with columns on either side of the abandoned old main road. This gate restricted access to the eastern side of the claimant's land not the western side. The fisherman's beach adjoins the western boundary of the claimant's land registered at Volume 421 Folio 28. The claimant could not claim to possess the entire abandoned old main road for that has not been its case.

[124] The evidence does not indicate whether the alleged trespass took place in respect of the portion of the old main road it possessed or the land retained by the government in terms of a nexus to the Exhibits before the court. The particulars of claim refer to *land* owned by the claimant and that is all. The evidence of Garnet Bucknor, called by the claimant was most unhelpful. This portion of the claim has not been established.

[125] In respect of trespass generally, the submission of the claimant was that it is in accessing the fisherman's village from the sea that the trespass occurs**.** There was no witness who gave any such evidence. In cross examination the defendant was asked as follows:

- "*Q: where does fisherman's beach start*

  A: from the beachside coming up is Mr. Boswell, ½ chain to the fisherman line to the column, the beach end at the 2 column after you leave Mr. Boswell property
- *Q: when the tide is high*

  A: we push the boat across the old abandoned main road to the fisherman village
- *Q: ever pushed the boat to …*

  A: the beach is in front of the fisherman village, when the tide is high we push the boat across the old main road to where the fisherman's village is

Q: *when the tide is high you push the boat from the fisherman's beach across the main road to the village*

- *A:* *yes*

Sugg: *to get to the government beach from the fishing village on the right to the government sea on the left you go across the land amassed then to the sea*

A: *that's the route to the beach, the only access to the beach."*

[126] This is important evidence as it was not the claimant who established by its own witnesses that any allegation of trespass could arise on the facts. The claimant's case has been that it must not obstruct access or render any land impassable as a result of its possession of the abandoned old main road. The evidence of the 1st defendant shows that the claimant was in direct violation of what had been agreed on its own case.

[127] The witness called by the claimant, Garnet Bucknor was of great assistance to the 1st defendant. The witness said that he did not know the boundaries of Volume 421 Folio 28, but he knew that the 1st defendant had been given permission to be on the seaward side of the claimant's land. This is of course in direct contradiction to the submission that it was an act of trespass to cross the amassed land as had been later suggested to the 1st defendant for it was either that the 1st defendant was trespassing or that he was there with permission. It was for the claimant to adduce evidence to show when the act of trespass being alleged commenced. There is no evidence as to this.

[128] Mr. Bucknor in his witness statement does not say that the 1st defendant committed any acts of trespass. He agreed that the 1st defendant had neither boat nor fishing apparatus on the claimant's land and further that the Fisherman's Co-operative is on land right at the old abandoned main road.

[129] Even if the claimant could show that it is the registered owner of any portion of the old abandoned main road, it is plain from the evidence that the fishing beach was always there and that the claimant was to do nothing to impede access by the fishers who used that beach. The erection of a gate did just that. It is the

claimant who is in clear violation of the very agreement on which it relies to prove its claim.

[130] The court will refuse the orders sought by the claimant against the 1st defendant.

[131] **Orders**:

1. Judgment is entered for the first defendant and second defendant.

2. Costs awarded to the first defendant to be agreed or taxed.