[2021]JMSC Civ 89

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 00661

BETWEEN	**GARNETT DENNIS**	**CLAIMANT**
AND	**NEWTON BARNES**	**FIRST DEFENDANT**
	SONIA BARNES	**SECOND DEFENDANT**

Mr. Joseph Jarrett instructed by Joseph Jarrett & Company for the Claimant.

Mrs. Camille Wignall Davis and Mr. Mark Paul Cowan instructed by Messrs. Nunes, Scholefield, DeLeon & Co for the Defendants.

HEARD: May 18, 2021

Whether the claimant has acquired rights to a possessory title to the disputed parcels of land- Whether title fraudulently transferred to the Defendants- Whether Claimant or defendants entitled to damages for trespass or mesne profits.

Pettigrew-Collins J

THE CLAIM AND COUNTERCLAIM

[1] The claimant filed a Claim Form and Particulars of Claim on the 19th of February 2016. On the 20th of October 2016, he filed an Amended Claim Form and Amended Particulars of Claim. Another Amended Claim Form and Amended Particulars of Claim was filed on the 16th of February 2017. The initial claim was made in respect of land registered at Volume 953 Folio 595 of the Register Book of Titles, which was described as bearing valuation number 095D-3X-06-003-7, with an

unimproved value of $5 million and consisting of 13,152.28 square metres, or 3 acres and 40 perches.

[2] The claim was amended to include the land registered at volume 868 folio 76. The claimant claims that he has been in exclusive possession of the lands in question for a period in excess of 30 years prior to the filing of the claim. The latest amendment includes an averment of fraud, alleging that the defendants were aware of the claimant's claim to a possessory title in respect of the disputed lands prior to the transfer of title. It is not disputed that the lands were transferred to the defendants on October 9, 2015. I shall not set out in full the orders and declarations sought, which, if granted, such declarations and orders would be to the effect that the claimant has acquired the right to a possessory title in respect of the two parcels of land. Further, the defendants in whose names titles exist would be barred from the land, and the existing registered titles cancelled and new titles issued in the claimant's name. Damages for trespass would be granted in favour of the claimant against the existing title holders.

[3] Copies of the registered titles in respect of both registered parcels were entered in evidence. The title to the land registered at volume 868 folio 76 reveals that the parcel was transferred to the defendants' predecessor in title Mr. Ralford Ogilvie Campbell on the 4th of April 1986.

[4] The defendants have counterclaimed for a declaration that they are legally and beneficially entitled to possession of the disputed lands. They also claim for damages for trespass and mesne profits and for an injunction enjoining the claimant from entering or trespassing on the disputed lands.

[5] There is, it appears, a third and unregistered parcel in respect of which no claim has been made. This information regarding the existence of the unregistered parcel comes from the report of the defendant's expert. That parcel of land consists of 0.220 acres or 0.089 hectares of land. The unregistered parcel is located

between the two registered parcels and all three parcels were apparently owned by Mr. Ralford Campbell and sold together to the defendants.

[6] I have had the benefit of submissions which were filed by both sides; the claimant did so on the 14th and the defendants on the 16th of December 2020. The judgment is quite a lengthy one, having regard to the nature of the evidence and I would not wish to further lengthen it by reproducing those submissions in this judgment but will make very limited reference to them and only to the extent that I find it necessary to resolve the issues raised in this claim.

THE ISSUES

[7] The main issue which arises for consideration is whether at the time of the purchase of the property by the defendants the title of the individual from whom the property was purchased had been extinguished by operation of the provisions of the Limitation of Actions Act. In order to answer that question, the court has to determine whether the claimant had been in exclusive and undisturbed possession of the disputed property for the requisite period of 12 years prior to the purchase of the property. Another subsidiary issue is whether the property was fraudulently transferred to the defendants. There is also the question of whether the successful party is entitled to damages for trespass or mesne profits. Given the fact that the issues are intertwined, and the evidence in relation to the different issues is in essence the same, there will for the most part, be no separate discussion of the issues identified.

THE DECISION

[8] The claimant is not entitled to any of the orders and declarations sought in this claim. He has not established on a preponderance of the probabilities that he has been in exclusive and undisturbed possession of the disputed property for the requisite 12 years. The defendants are entitled to the declaration and injunction sought. They are also entitled to nominal damages for trespass.

THE EVIDENCE

THE CLAIMANT'S EVIDENCE

[9] The claimant's Witness Statement was filed on the 4th of June 2019. The contents of that Witness Statement along with evidence permitted by way of amplification constituted the claimant's evidence in chief. The claimant had filed a Supplemental Witness Statement but by far the greater portion of that document contained hearsay, matters of opinion and statements of law rather than matters which could properly form the subject of evidence, as well as repetition of information contained in the initial witness statement. Counsel for the defendants took objection to that statement forming a part of the claimant's evidence in chief and the court upheld that objection. The claimant was permitted to amplify his original witness statement so far as he could be permitted based on the provisions of Rule 29.9 of the Civil Procedure Rules.

[10] In his statement, the claimant gave his date of birth as the 16th of January 1967. He stated that he has been farming on the subject lands since he was 14 years old and that over time, he planted various trees which he itemized. These include ackee, breadfruit, pear, mango, coconut, red apple, rose apple, tamarind and sweet sop. He stated that the fact of his exclusive possession was well known to the residents of the area. He also said that prior to the transfer of the property to the defendants, he saw the first defendant on the land. The evidence reveals that the claimant has vacillated on this point.

[11] He claimed that the defendants had knowledge of his interest in the land before the transfer. He did not state how it is he knew that they possessed such knowledge. He denied that he had ever been chased from the lands by the previous owner Mr. Ralford Campbell. He also claims that the previous owner of the property was aware of his exclusive occupation of the property and had been negotiating a settlement with him through his then Attorney-at-Law who is now deceased.

[12] Certain aspects of Ms. Malcolm's witness statement were put to the claimant. He denied ever seeing Ms. Malcolm on the land. He stated that during the period he was on the land, no one had ever bushed it except himself and persons he employed to do so. It is to be noted that Ms. Malcolm never came forward to give evidence in the matter.

[13] He stated that the first time he ever saw Mr. Ralford Campbell on the land was just after Gilbert. (understood by me to mean Hurricane Gilbert). He said this was about 2009 but then he said that Gilbert came in 1989. This court takes judicial notice of the fact that Hurricane Gilbert occurred on the 12th of September 1988. When asked if he had ever entered into discussion with Mr. Campbell regarding the purchase of the land, the claimant's response was that he did not know if anything took place with his brother, but he was not aware of that.

[14] He said it was during the period Mr. Campbell spoke to his brother about the land that a piece of stick hit him in the eye whilst he was chopping out the land and he was hospitalized. He went on to say that he did not approve of the discussions between Mr. Campbell and his brother and that they were trying to get him to give up a part of the land on which he had planted citrus. He said because he did not approve of the discussions between Mr. Campbell and his brother, he contacted his lawyer, and he did not know what happened thereafter.

[15] He was asked about the contents of paragraph 17 of Mr. Campbell's witness statement, in which Mr. Campbell stated that prior to 2006, he had not seen the claimant on the land. He went on to explain that the two-bedroom house on the land was damaged by Gilbert and that he had repaired it. He said it was not one house, but there was a one bedroom and a two-bedroom house on the land. Later, he would go on to say he repaired the one-bedroom as well as the two-bedroom. He also said he had gone on to the property and seen those two buildings.

[16] When asked to comment on Mr. Campbell's statement that he did not see any pigs or pig pens when he visited the farm, he said 'it' was there, he had his pigs, fowls, and goats, but he had moved his goats to a different property since 'they' came and started to chop down the farm and disturb him.

CROSS-EXAMINATION OF THE CLAIMANT

[17] In cross-examination, it was suggested to the claimant that Mr. Campbell arranged to have the land bushed several times after he bought it in 1986. The claimant denied that Mr. Campbell had ever bushed the land or caused it to be bushed.

[18] The claimant explained that his father's property adjoins the disputed property and he agreed that he had lived on his father's property. When asked whether he still lived on his father's property, his response was that he lives on his farm now and that he built up a house a couple years ago and that that house is still unfinished. He was very clear that the farm he is referring to is the disputed property. He said that he built his house in about 1992. When pressed about when he started to live on the property, he said he thinks it was about 1981. He declared that he had been living on the property since about age 14. According to him, he had a little shack on the property which he built, and which is still there.

[19] He was asked to identify the location of the one-bedroom and two-bedroom houses in a photograph at page 14 of Mr. Langford's report. He identified as the two-bedroom house an area that is outside of the disputed property (marked A on exhibit 11 at page 14), albeit next door to the property, based on the reports provided by his own expert as well as Mr. Langford. When asked to identify the location of the one-bedroom on the same photograph, he identified an area close to the middle of the disputed property (marked B on exhibit 11 at page 14).

[20] He admitted that when he first knew the land, there were ackee trees and mango trees on the land. He said that there was one ackee tree and five mango trees and he named the types of mango trees. He said there was a total of 7 fruit trees. He even said he planted trees on the land in 1982. He said he first planted breadfruit

trees on the land after Gilbert and he continued planting and he went on to name various types of fruit trees that he planted over the years. He said that by 1999 he had planted trees on three-quarters of the land. He said he had not planted more than three-quarters because of the driveway.

[21] The claimant also agreed that when he knew the land as a child, there was no fence around the land. At some point in his evidence, he said that in 1986 there was a broken-down fence. He also accepted that when he first knew the land, persons would walk on the land from Red Hills Road. He said that one pathway led to Golden Acres and another led to Pleasant Valley. He said persons would break down the fence or walk under the fence. He said he planted fence around the land. When it was suggested to him that in 2013 there was no fence posts with barbed wire, his response was, "no, we had fence there but the posts rotten down." He went on to explain in essence that from time to time, he would repair the broken-down fence.

[22] He explained that his father carried out farming activities on land surrounding the disputed land when he was growing up. He did not say so in terms, but he pointed out the areas where his father used to farm on page 14 of Mr. Langford's report (exhibit 2), which was land outside of the disputed property.

[23] He was asked about whether he was continuously on the land and if he was sometimes overseas. His evidence was that when he left the land, he would have several persons there taking care of his goats. The claimant insisted that he had more than 18 pigs on the farm in 1986. He pointed to an area that he said is on the boundary when asked to show where he was rearing his pigs. He went on to explain that "it was on my line just adjoining to Mr. Campbell's line." He thereafter said that he removed his pig pen and placed it at another area. He indicated an area on the disputed property as being the place to which he had moved his pig pen. (see exhibit 2).

[24] Although the claimant initially denied ever seeing Ms. Malcolm on the land, he would go on to say that she came and saw him there. He denied that 2015 was the only time that he ever paid taxes for the land.

[25] In re-examination, the claimant said he moved back to his father's land where he built up a two-bedroom house. At that point, he said he lived on his farm (the disputed land) from 1989 "straight-up" and that he is living there even now.

[26] For the purposes of clarification, he was asked this question by the court. "You say people used to come onto the top section of the land, what would they come onto the top section to do?" He said, "steal cane and you had one mango tree there." The follow up question was "You told us earlier that you did not plant the top section of the land, so whose cane would they steal?" His response was "mango, mango." He was also asked for purposes of clarification, how many places on the land he had ever lived. His response was "one place."

EVIDENCE FROM THE CLAIMANT'S WITNESSES

[27] The claimant called a number of witnesses. Namely, Mr. Desmond Henry, Mr. Jeffrey Foster, Mr. Kenneth Styles, Mr. Arthur Mais as well as Mr. Ivan Powell, the Valuation Surveyor. The evidence in chief of Messrs Henry, Foster, Styles and Mais is to the effect that they have known the claimant to be farming on the land in excess of 30 years and that he rears pigs on the land and that he has been bushing the land from the "commencement of his exclusive occupation, possession and control of the land." Each of them spoke to the various fruit trees that the claimant planted on the land over his 30 plus years' period of occupation. They each averred that they have seen no other person occupying the land during that period. They each said that there are two buildings on the land. Messrs Henry, Mais and Foster said that there was a one-bedroom and a twobedroom house, and that the two-bedroom house was rebuilt by the claimant after it was demolished by a hurricane. Mr. Styles' account is that the claimant built the one-bedroom,

bathroom and kitchen house at the top of the land and that he built a much larger "property" on the bottom section of the land.

[28] In his witness statement Mr. Kenneth Styles said that he has known the claimant since he was in school and they were school friends. He also said that the claimant built a one-bedroom house with bathroom and kitchen to the top section of the land and a much larger property at the bottom of the land.

[29] When cross examined, Mr. Desmond Henry was asked what vegetation is presently on the land. He said "bananas, yams, coconut trees, apple, ackee, breadfruit, tamarind, plantain, gungo, mangoes and others that he could not remember. Asked if in 1986 all of the trees that he mentioned were on the land he said yes. He insisted that the claimant planted all of them. Asked if he saw the claimant plant them, he said no but went on to say he knew the land before, and they were not there so obviously it had to be claimant who planted them.

[30] He was later asked if he could say about what time period he first observed the claimant on the land, his response was "about 1990." He was asked about buildings on the land; he said that one of the buildings was used as living quarters and the other was a storeroom and that the living quarters is a two-bedroom. This evidence is contrary to his assertion in his witness statement that there was a one-bedroom house and a storeroom on the property. He also stated in cross examination that the two buildings are close to each other. According to him, the two-bedroom is closer to the Red Hills main road. It is hardly being disputed (based on the fact that both the claimant and the defendants' valuation surveyors agree) that the storeroom and the one-bedroom house are in close proximity to each other.

[31] Mr. Henry was asked if in his witness statement he had said "the land was farmed by the claimant, but he did not live on the land, and he agreed. The claimant was then observed by the Court attempting to communicate with the witness. The witness then went on to explain that the claimant's house was down below, so he

was on the land 100%. He was asked this question “you said in your witness statement that Mr. Dennis had been bushing the land from commencement of his exclusive occupation, when was the commencement of his exclusive occupation? His response was “Could be about the year 2000.” His response to a question seeking to ascertain whether he fully understood the concept of exclusive possession made it abundantly clear that he did.

[32] Mr. Henry admitted that the claimant would be away from his farm sometimes for periods in excess of 6 months. In re-examination, he was asked when was it that the claimant started living in the bottom house? And he said, “it could be in the early 2000s.” Asked where the claimant was living before that, he hesitated and then said in his parent’s house. Asked, where was the parents’ house? he said, it was on the same property. Asked when he first saw the place fenced with barbed wires, he said in the early 2000s.

[33] Mr. Arthur Mais was shown Exhibit 2 and he identified as the claimant’s home, a house which it is common ground, is on the Dennis’ property. He was asked if the area with the reddish roof top was the same area where the two-bedroom house that he mentioned in his witness statement was located and he pointed out that two-bedroom as being located closer to the middle of the disputed property. According to him, the one bedroom was located somewhere below the two-bedroom (based on the photograph).

[34] In cross examination he initially said he had not seen goats on the land but when confronted with the fact that he had said so in his witness statement, he sought to explain that the claimant had goats but afterwards he saw no goats. He explained that he lived in the area for about 50 years. With reference to his witness statement about seeing pigs on the land, he was asked if at any point in time, he could say how many pigs were on the land, and he exclaimed no, and said that it is not his business. Asked if he did not say in his witness statement that Mr. Dennis had about 18 pigs on the land, he vociferously denied that he had said any such thing. Asked why he had signed to something that is not true, his response was “I do not

read it, I don't make out the things them." He went on to say that the information must have gone into his statement by mistake.

[35] Mr. Mais maintained that Mr. Dennis planted trees on the land and said that he went over there and saw him planting trees. Without being asked specifically, he asserted that there were old ackee trees on the land. Asked if apart from Mr. Dennis he had ever seen anyone else on the land, his reply was "Mr. Dennis and a little yute that help him do the farming, only them I see." He admitted that persons would walk across the land but said that he heard Mr. Dennis say that persons would have to stop walking on it. Asked when it is he heard Mr. Dennis said that, he said that in the 1980s. He was asked this question, "in this witness statement, you said that Mr. Dennis has been bushing the land from the commencement of his exclusive occupation." His response was "I don't understand that Sir." Asked when he stopped living in Pleasant Valley, he said it was in the 1990s.

[36] Mr. Foster said that Mr. Dennis had a relationship with his daughter and is the father of his daughter's child. He could not say when it was that he went to the disputed land but stated that he went to the area to work on a house. He stated that he could not say if Mr. Dennis had lived on his parents' land. He said he heard the claimant was living in Red Hills, but he did not know the place where he was living. He said it was after Gilbert destroyed the house that he went to work on the house, presumably the claimant's house. He said of the disputed land, that he never saw the claimant plant trees but he saw trees planted there. Asked about his knowledge of the claimant bushing the land continually for over thirty years, his response was that he was not there. He said he was aware that the claimant's family lives near the land. He explained that the claimant's house that he went to fix, had two rooms, kitchen and toilet. He also said that he saw pigs in a pen, but he could not say how many. Asked in re-examination when was the last time that he went to the place where he went to work on the roof of the house, his response was after it fixed, he went away, and he did not go back. In short, through cross

examination, this witness made it abundantly clear that he had no knowledge as to the matters contained in his witness statement.

[37] According to Mr. Styles when cross examined, the claimant had what he referred to as "ends" (understood by me to mean a home or place to live and or gather for fun and/ or relaxation) at a different place from his parent's house. Asked if the ends had anything to do with why he was in court, he went on to explain that he used to chill out with the claimant and eat mangoes on the same place that he is in court about. He said that he and the claimant had a little shack on the property. According to him, the claimant was farming since he was going to school and the claimant would help out his (the claimant's) father on his father's land. Interestingly, he said that this was on the same property that he would go to check the claimant and that it was the claimant's parents' property. He was specifically asked this question, "You are saying that where he used to help out his father, is the land we are here about today?" His response was "yes." In summary, this witness did not seem to know what land is the disputed property.

THE CLAIMANT'S EXPERT WITNESS

[38] It is noted in the claimant's expert report that the inspection was carried out on the 24th of August 2016. The realtors contracted to do so was CD Alexander Company Realty Limited. When the expert witness Mr. Ivan Powell appeared in court to give evidence, it was revealed that the witness was not the individual who had carried out the appraisal. Mr. Powell's evidence was that he was a director and signing officer of CD Alexander Company Realty Limited at the time of the report. He stated that he did not in this case go out to look at the property and therefore any knowledge he had of the property was garnered from the report.

[39] In the report, the property was described as being comprised of two parcels of land. It was noted that there were 4 buildings on the property, namely the main building, a storeroom, a chicken house and a pigpen. He gave the market value of the property as $39,000,000.00 and assumed vacant, as $32,000,000.00. It was

described as being located in an upper income area where demand for real property is good. In relation to the main building, it was said that it required replacement of rusted zinc sheeting and installation of ceiling in the living area, otherwise it was in fair condition. It was noted that there were no doors in place. The chicken house was said to be about 20 years old and in need of repair. The pigpen was also said to be in need of repair. No estimate of its age was given. It was not stated whether the chicken house or the pigpen contained pigs or chickens. It is not insignificant that there is no mention of the presence of animals. I infer from the absence of reference to any that none was seen.

[40] It was stated that approximately 3 ½ acres of the property was fully cultivated with a wide variety of cash crops and various types of fruit trees such as East Indian and St. Julian mangoes, plum, lime, mangerine, apples, oranges, guava, breadfruit and avocado with approximately 2 acres bearing ackee, banana, sugarcane, naseberry, and pimento. Other cash crops such as sorrel, gungo peas, corn, melon, escallion and half acre cassava, yam, beans and cocoa. It was further stated that the boundaries are enclosed with stone walls and barbed wire fence.

THE DEFENDANTS' CASE

[41] Mr. Newton Barnes, the first defendant, gave a witness statement in this matter. That witness statement was accepted as his evidence in chief. He stated that he first became acquainted with the land in 2014. He went to look at the land with a view to purchasing same for the purpose of development. He did not speak to any observations made on the land then. He also stated as was evidenced by the endorsements on the certificates of title admitted in evidence that the two registered parcels were transferred to him in October of 2015. He further stated that in 2016 he became aware that someone was claiming the land. Mr. Barnes was allowed to amplify his witness statement. In doing so, in reference to the claimant's evidence that he had placed barbed wire fence along the perimeter of the property line from the Red Hills Road end, he stated that when he first visited the land in 2014, there was no fence, but that when he went back in 2016, after he

had sent the surveyor, he observed fencing. He was asked in cross-examination whether he had seen barbed wire and rotten fence posts on the ground. His answer was no.

[42] In cross-examination, Mr. Barnes said when he went onto the property, he saw only one building which was a house, but it was in a state of disrepair. He admitted that he saw what could have been a pig pen but denied that he saw a smaller structure as well as a chicken coop. He explained in re-examination that the house was unoccupied and that there were no windows but that when he returned, the house had windows and doors. Mr. Barnes stated that he bought the property for $US30,000.00. Asked if he considered that a bargain price, he agreed. The significance of that evidence is encapsulated in the suggestion put to him that that price was paid because both himself and Mr. Campbell were aware of the claimant's 'possessory claim' to the property. He denied any knowledge of the claimant's interest in and presence on the property before the time of his first visit to the property.

[43] A witness statement of one Ralford Campbell was tendered and admitted in evidence on the basis that Mr. Campbell was deceased. The death certificate produced in evidence shows that he died on the 14th of June 2018. He stated that he purchased the land in 1986. He said that about 20 years prior to the time of giving his statement (which was in June 2018), the claimant and his brother had expressed interest in cultivating the land but that he had not paid much attention to them on that matter. He said about 13 years earlier, he observed that the house on the property was occupied and he drove the occupant away. He also stated that in 2006, the claimant and his brother approached him with a view to purchasing the land and in fact the brother had paid a deposit towards the purchase price, but the sale fell through. He said that both the claimant and his brother were integrally involved in the negotiations to purchase the land, but he did not know why it is that only the claimant's brother signed the agreement for sale.

[44] He stated that after he had purchased the land, he would return to Jamaica every two or three years and check on the land. Mr. Campbell's evidence is that he did not see the claimant on the land except on two or three occasions between 1986 and 2015. He mentioned an occasion which he said was some 15 years prior to giving the witness statement when he saw the claimant on the land and told him to leave, and the claimant left. He said he did not see any chickens, pigs, or pig pen on the land, He however said, what is in essence hearsay, that Ms. Malcolm told him certain things in 2013. He said that he was not aware of the claimant challenging his right to ownership of the property whether during interaction with the claimant or otherwise.

THE DEFENDANTS' EXPERT WITNESS

[45] Mr. Gordon Langford prepared a report in this matter. He gave evidence and was cross examined. Mr. Langford is a chartered Valuation Surveyor and a Member of the Royal Institute of Surveyors since 1978. His business is a locally registered and licensed firm of property appraisers. He stated that he has extensive knowledge in agriculture, having owned and operated a coffee farm for 20 years (up to the date of his report) and he is a director and shareholder in a sugarcane /dairy/ cash crop property of over 10,000 acres in size in Jamaica.

[46] The nature and scope of his investigations was wider than that conducted by the appraiser from CD Alexander Realty Company Limited. It is indicated in his report that he was asked to ascertain "the nature and extent of the use and occupation of the said lands for the last 30 years or as far back in time as is feasible "and "the nature and extent of any cultivation/farming of the said lands for the last 30 years or as far back in time as is feasible. Also "the value of the said lands and the value of any discernible area of occupation of the said lands". He said that the inspection of the property took place on two dates, the 30th of August 2016 and the 6th of January 2017.

[47] Mr. Langford noted in describing the land that the western area of the land is being used by the adjacent landowner for planting of crops and the keeping of pigs and chickens. In explaining aspects of his report from the witness box, Mr. Langford said that the pig pen was derelict, and he saw no pigs, but he saw chickens walking around, not housed in any chicken coop. He said that on the less steep lower section of the land there are small buildings which were in very poor condition, due to neglect. It was noted that a rough pathway led down the slope to the centre of the land. It was also stated that to the west of the centre of the land, there was evidence of fruit trees and other crops growing. He noted that the fruit trees varied in age, that some of the fruit trees were young, 2 to 3 years old and there were older trees. He noted further that mature trees were to the western side of the land. He said that there were ackee, breadfruit and mango trees, some of which he surmised were wild and others seemed to have been planted in the last 2 years. He noted that there was inter planting of cash crops. He said that after examining photographs, it seemed there was little effort at serious cultivation. He went on to say that a 2009 photograph showed only a few large trees which were probably indigenous.

[48] In expanding on the information in the report, Mr. Langford said that he utilized photographs for May 2002, from 2009 and 2015 which he accessed from the Google Earth platform. He explained in response to a question put by the court that in using the Google Earth Platform, you can locate the general area and then in order to locate the specific parcel of land, you utilize the title diagram for the land and overlay it on the photograph in order to demarcate the boundaries on the photograph. He said that he also used the National Land Agency I-Map facility to help to determine the boundaries of the property. He said that in the 2002 photograph, he observed what he referred to as a minor tree and 3 or 4 other smaller trees and that seemed to be the extent of what was happening on the land. Those trees looked like indigenous trees. He said other photos were taken by him with the use of drones.

[49] In the report, it was stated that the claimant had used the southwestern and western section of the land as an extension of his backyard and that the crops growing in that area are of the nature of backyard crops. In re-examination, he said that the observation about the backyard crops was made on his 2016 visit. In cross-examination, he explained that it would appear that a portion of the Dennis' slab roof extended over to the disputed land. He said that one could look back to determine when that extension was built. He was able to determine from the 2002 google photographs that neither the area of the roof which extended nor one of the houses on the Dennis' property existed in 2002. He said that the extended roof area appeared in the 2009 photos. Asked about some coconut trees growing on the land, the witness said that they were not present in the 2009 photographs.

[50] In the report at page 7 under the heading 'assessment summary' it was stated that photographs show that at least for the last 15 years, the claimant has occupied only 25% of the subject land. This one-acre section (plus or minus) is located in the western and southwestern corner of the subject land. He gave the value of that area of the property as approximately $3,000,000.00. His evidence in response to a question by the court was that the one-acre that was cultivated in 2016 was confined to one parcel of land, that is volume 953, folio 595. The balance of the land shows no evidence of ever being cultivated. In explaining what he meant when he said in the report that the claimant occupied 25% of the land, which is approximately one acre, he explained that the Google Earth facility allows one to take measurements of a piece of land. He said that measurement reflecting the area under cultivation was from the 2015 photograph. He said that from the 2009 photographs, there was virtually no discernible active cultivation on the western side of the land; it looked exactly like the vegetation on the eastern side which was wild vegetation.

[51] Asked in cross-examination if he would agree that in 2016 about 3 ½ acres of the land was cultivated with a wide variety of cash crops and fruit trees, his response was "nonsense", observing further that the total acreage was some 3.7 acres. He

pointed out that the claimant had been expanding the area of cultivation after 2016 and that up to the time of giving evidence, there was not 3 ½ acres under cultivation. He said he had gone to the land very recently and noticed that a significant portion of the land had been taken up with a road he observed being built.

[52] In cross-examination, the witness said that on his first visit to the land, he observed cash crops such as gungo peas, corn, a few sticks of yam, bananas and maybe plantains, young ackee and mango trees, and older mango trees. Asked the age of the mango trees, he said 60 to 70 years old and the younger trees 4 to 5 years old. Asked about the age of the pigpen, he stated that it appeared derelict, and he could not say. He went on to say that it could be 5 or 6 years old but not maintained. I very clearly understood him to be saying that he could not tell the age based on its appearance only. He said that there was another limit on the age of the pigpen, as it did not show up in the google photos. Asked about the derelict chicken coop, he also said it could be the same age, but it did not show up in the google photographs either.

THE LAW

[53] It may now be regarded as trite law that the fact that an individual holds a certificate of title to land is not conclusive proof that that individual is entitled to possession of such land. Indefeasibility of title is conferred by section 68 of the Registration of Titles Act, but that same section makes it clear that the existence of a title in one's name as conclusive proof of ownership holder is subject to the operation of a statute of limitation. The provision of sections, 3, 4 and 30 of the Limitation of Actions Act are also quite relevant to this case. Those sections state as follows:

> *3. No person shall make an entry or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right*

> *to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.*
>
> *4. the right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-*
>
> *(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rents were or was so received;…*
>
> *30.At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.*

[54] It is now beyond dispute that the combined effect of sections 3, 4 and 30 of the Limitation of Actions Act is that a proprietor of land, whether registered or unregistered, may lose his right to bring an action to recover possession of land by virtue of the operation of these sections, if an individual who has no title to the land has been in undisturbed and exclusive possession for a period of twelve years or more, without the consent of the title owner and that title owner did not bring a claim to recover such land within that 12 years period. For example, see the case of **Recreational Holdings 1 (Jamaica Limited (Appellant) v Lazarus (Respondent)** (Jamaica-2016 UKPC).

[55] In addressing the question of possession necessary to ground the acquisition of a possessory title, Lord Bingham of Cornhill gave a full exposition in the case of **J A Pye (Oxford) Ltd. and Another v Graham and Another** [2002] UKHL 30. At paragraph 36 of the judgment, he observed that:

"The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner."

He said at paragraph 39:

"what then constitute possession in the ordinary sense of the word?"

In defining factual possession, he continued in paragraph 41:

"Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession. Though there can be a single possession exercised on or by several persons jointly. Thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, … Everything must depend on the particular circumstances, but broadly I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

In dealing with the intent to possess, he continued at paragraph 42.

"There are cases in which judges have apparently treated it as being necessary that the squatter should have an intention to own the land in order to be in possession….. In the Moran case (1988) 86 LQR 472 at p 479, the trial judge (Hoffman J) had pointed out that what is required is not an intention to own or even an intention to acquire ownership but an intention to possess… Once it is accepted that in the Limitation Acts, the word possession has its ordinary meaning (being the same as in the Law of Trespass or Conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess…"

[56] At page 14 of the judgment in **Powell v McFarlane**, [1977] 38 P&CR 452 (the reasoning in which case was approved in **J A Pye (Oxford) Ltd. and Another v Graham and Another,** Slade J had the following to say:

An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the

> *contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world. If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large, by his actions or words, that he has intended to exclude the owner as best as he can, the court will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.*

[57] It was also decided in the case of **Chisholm v Hall** [1959] AC 719 that the registration of a transfer of land to a purchaser for value cannot supersede a possessory title which a third party had acquired but was subject to same. The position that the registration of an interest in land is subject to any possessory title which had been acquired prior to the registration of that interest was also confirmed by the Judicial Committee of the Privy Council in the case of **Recreational Holdings** (supra).

[58] One of the issues which arose for consideration in the case of **Recreational Holdings (Jamaica) Limited v Lazarus and the Registrar of Titles** [2014] JMCA Civ 34 was whether the appellant's right to recover the disputed property from Mr. Lazarus would only be barred 12 years after the date of the appellant's acquisition of the disputed property in 2011. In other words, did time begin to run afresh upon the transfer of the property to the appellant.

[59] Before the Court of Appeal Jamaica, Morrison JA (as he then was) said at paragraph 93 of the judgment that:

> "…*The effect of this is therefore that, by the time RHJL purchased Windsor Lodge in 2011, Mr Lazarus having been in undisturbed possession of the disputed property for a period well in excess of 12 years, Mr McGann's title to the disputed property had already been extinguished. In these circumstances, RHJL took title subject to Mr Lazarus' rights over the disputed property and there was no*

> *necessity for the latter to establish a further 12 years of adverse possession against RHJL. In other words, there was no question of time beginning to run anew upon the registration of RHJL as proprietor in 2011.*

[60] The cases therefore make it abundantly clear that once a squatter or any person claiming to have acquired the right to a possessory title has been in undisturbed and sole occupation of property for the required period of 12 years or more, then any purchaser takes the property subject to the rights of the squatter or person in possession and time would not begin to run afresh as at the date of the transfer to the new owner. It is thus accepted that if it is found that Mr. Dennis was in exclusive occupation and possession for 12 years prior to Mr. Barnes and his wife acquiring the property by way of transfer to them, they would have purchased the property subject to Mr. Dennis's rights and Mr. Dennis would be entitled pursuant to the provisions of section 88 of the Registration of Titles Act, to have title to the disputed property transferred to him.

[61] Mr. Jarrett on behalf of the claimant has argued that it is the defendant (the person not in possession) who has the burden of proof in establishing that the claimant has not been in undisturbed possession for the required 12 years. He cites as authority for this proposition the case of **Fullwood v Curchar** [2015] JMCA Civ.37. That case made it clear that where a claimant brings a claim for recovery of possession, he must prove that he is entitled to recover the land from the person who is in possession and that he is entitled to recover on the strength of his own title and not on the weakness of the title of the person against whom he seeks to recover. (see paragraph 38 of the judgment). In this case, it is the claimant who pleads the statute of limitation. The general principle is that he who asserts must prove. It is the claimant who is seeking to establish that he has been in undisturbed possession of the property for the 12 years' period. The onus is on him to so establish. The situation would have been different had it been Mr and Mrs Barnes who were seeking to recover possession of the property. The onus would have been on them to establish that their registered title had not been extinguished by the operation of the statute of limitation.

[62] This court fully recognizes that a purchaser of registered land has a responsibility to carry out due diligence in order to determine whether there exists any adverse interest in that land, acquired by virtue of the statute of limitation. Whether or not the defendants in this case exercised due diligence does not change the fact that it is he who asserts who must prove.

WITNESSES' CREDIBILITY

[63] Without any reservations or equivocation, my view of the claimant is that he was not at all a credible witness, and hence not a reliable one. He lacked candour and consistency in his evidence. On occasions when he apparently did not wish to respond to questions, he would feign a lack of understanding of what was being asked of him in circumstances where the question posed could not possibly have been infused with greater simplicity and clarity. He frequently responded by saying that this was his first time in court and that he is not accustomed to court proceedings.

[64] I do not recall any other instance during the course of any trial that I have had to direct a witness to respond to the question asked of him on as many occasions as I did to the claimant in this case. There were instances when the questions were repeated more than once and the claimant either indicated that he did not hear, or he did not understand. The court being convinced that he had heard and understood the questions asked of him, insisted that he responded without the question being repeated. In numerous instances, he responded in a manner that made it abundantly clear that he had heard and understood the question. On occasions when he had a response which supported his case, he evidently had no difficulty hearing or understanding the questions or suggestions put to him. The belligerence was evident in particular when the claimant was confronted with discrepancies or inconsistencies on his case. It became clear upon cross-examination of the claimant's witnesses that they were witnesses of convenience.

[65] To the extent that there was no other credible testimony or other evidence supporting the claimant's evidence, this court rejects his evidence.

[66] I have chosen in this case to set out in fair detail the evidence of the witnesses in this matter. My purpose for doing so is to demonstrate that the claimant did not present clear, coherent and cogent evidence in proof of his case, but rather, the evidence, as the defendant's Attorney-at-Law observed in closing submissions, was fraught with inconsistencies, in some instances concocted and or embellished. On the other hand, I found the first defendant to be refreshingly candid. I find on a balance of probabilities that he at no time deliberately lied to the court. The only minor aspect of his evidence that I did not accept was that relating to the existence of a storeroom and a pig pen on the property. His refusal to admit the existence of these structures was in my view due wholly to faulty recollection.

[67] It became apparent during the course of his evidence that Mr Langford was quite incensed at the fact that a squatter could occupy land and as a consequence of such occupation, be able to oust the paper title holder. Notwithstanding his expression of disgust at such likelihood and his apparent abhorrence at the idea of squatting generally, I am firmly of the view that he placed squarely on the table his genuine observations, without regard for whose case his findings supported.

APPLICATION OF THE LAW TO THE FACTS

The Claimant's witnesses -generally

[68] A number of things are apparent from the evidence put forward by the claimant's witnesses. Mr. Mais and Mr. Henry did not seem to make any distinction between the disputed lands and the adjoining property occupied by the claimant and/or members of his family. Mr. Styles did not seem to have made a distinction between the disputed lands and other lands said to have been farmed by the claimant's father and which is located in the same area and according to the claimant's evidence, was not owned by his father. Mr. Foster had no knowledge of the disputed lands.

[69] The witness statements of the various witnesses for the claimant contained assertions in support of the claimant's supposed exclusive occupation and possession of the disputed property for an extended period. The evidence of the witnesses in cross examination in some instances directly contradicted the evidence in chief and in other instances witnesses, for example Mr. Mais stoutly denied making statements contained in his witness statement. His response was very telling when asked why he had signed to something that is not true. His response was that he did not read it, and that he didn't make out the things. He went on to say that the information must have gone into his statement by mistake. My distinct impression from that bit of evidence is that he had signed a statement that had been prepared for him without having much regard to the contents of the statement. To put it mildly and kindly, I will simply say that Mr. Mais is an unreliable and untruthful witness. My view of the other witnesses called by the claimant with the exception of Mr. Powell, is no different.

The buildings on the land

[70] The reports of both valuation surveyors show that there is one storeroom and a one-bedroom house located on the disputed land. It can hardly be rationally disputed that there is not and has never been any two-bedroom house on the disputed land except to the extent that the roof of a house located on land belonging to the claimant and other family members, or to Howard Dennis (the evidence does not disclose to whom it belongs), infringes upon the land.

[71] Indeed, the claimant's evidence and that of his witnesses, notably Messrs Henry and Mais, as it relates to buildings on the disputed property, was at best confusing and at worst demonstrative of the claimant's strenuous attempt to bolster his claim as to his continuous presence on the property over an extended period. When cross examined, the claimant identified on a photograph, the location of the two-bedroom house. The area he pointed to is located on the Dennis's property. He was definitely not mistaken as to the location of the Dennis' property as he had indicated that he was very familiar with the area and had agreed that the Dennis'

property was to the south western area as depicted in the photograph that was shown to him. He was adamant that he had built a two-bedroom house on the disputed property and that that is where he now lives.

[72] I am firmly of the view that the claimant is well aware that the house he constructed is located on land registered to either himself and other family members or his brother. I totally reject any assertion on the part of the claimant and his witnesses that he has ever lived in any house on the disputed land. Whereas it may be fathomable that the various witnesses could have been mistaken as to the property boundary and could therefore have believed or assumed that a house which is in fact on the Dennis' property was on the disputed property, it is far less likely that the claimant was mistaken in that regard. He was simply not speaking the truth as to the existence of a two-bedroom house on the disputed property.

[73] I am very clearly of the view that if it is that the claimant caused repairs to be done to any building after hurricane Gilbert (I very much doubt that he did) it would have been to a building located on the Dennis' land and not on the disputed land.

[74] Regarding the existence of a chicken coop and pig pen on the land, this court is cognizant of the evidence of the claimant's valuation surveyor that the chicken coop appeared to be some 20 years old. No estimate of the age of the pig pen was given. The individual who visited the property from whose information the claimant's report was prepared was not a witness in the matter. Therefore, no explanation was proffered as to the basis on which the age of that building was determined. That evidence must be compared with Mr. Langford's evidence under cross examination which was that those buildings appeared derelict and in essence that he could not tell the age from their appearance. Critically, he observed that those buildings did not appear in the google photos prior to 2015.

[75] I am fully alert to the fact that Mr. Ralford Campbell was not cross examined, and that I have to take such factor into account and thus determine what weight is to be attached to the contents of his statement. In his witness statement, he asserted

that he visited the lands in 2006 and did not see any chicken coop or pig pen on the land. He said other things which cannot be taken into account as the statement is hearsay. Further, I note the claimant's evidence when he was asked to comment on Mr. Campbell's statement that he did not see any pig or pig pen up to 2006. Apparently, Mr. Campbell's last visit to the property was 2006. The claimant said, "it was there". It is unclear whether the reference was to the pigs and pig pen or only to the pen, but he went on to say that he had moved his goats because person or persons came and started to chop down his farm and disturbed him. My very distinct impression as was the case with much of his evidence, was that he was not being truthful about the existence of pigs and pig pen on the property. Having regard to the totality of the evidence, to include my observation of the relevant photographs from the Google Earth Platform, I find on a balance of probabilities that there existed no pig pen or chicken coop, and by extension no rearing of chickens or pigs on the disputed property certainly up to 2006, and I would in fact say up to 2009.

[76] I am not of the view that Mr. Henry was mistaken as to whether the house located near to the storeroom was a one bedroom or a two bedroom, having regard to the size of that building (whether it is 400 or 460 square feet). If he was familiar with the building, he could hardly have been mistaken. I am distinctly of the view that he was being untruthful and was merely trying to assist the claimant.

The payment of taxes

[77] Although the payment of taxes does not of itself provide proof of the period over which the claimant was operating as if he was the owner of the disputed lands, it is a factor to be taken into account. A tax receipt was tendered and admitted in evidence. It evidences payment of land taxes for the period 2015 to 2016. The payment was made on the 10th of April 2015. Although the claimant's evidence was that he had been paying taxes for the land, there is no tangible proof of any other payment made by him up to that period. In light of the claimant's overall lack

of credibility, I reject any evidence or insinuation that he had been paying taxes for the property prior to 2015.

Fencing of the property

[78] Case law shows that one of the clearest ways of demonstrating that one intends to occupy land to the exclusion of all others, is to fence the property so as to exclude others including the title holder and to make the intention obvious to the world. I reject the claimant's evidence and that of his witnesses who assert that the claimant had at any point before the transfer of the property to the defendants, erected any fencing around the disputed property or any part of it. Mr Henry's evidence to the effect that he first saw the property fenced with barbed wire in the early 2000s of course must be compared with the claimant's evidence in cross-examination that he had over the years since 1986 repeatedly repaired the barbed wire fence and replaced rotten posts.

[79] I accept Mr. Barnes' evidence that at the time of his first visit to the property in 2014, it was not fenced, but that in 2016 when he went back, the property had been fenced. The evidence accepted by this court is that the claimant fenced the property very late in the day in keeping with his attempt to assert his presence on the land in the two or three years prior to the filing of his claim.

Other persons using the property as a walkway

[80] In **Inglewood Investments Company v Baker** [2002] EWCA Civ.1733, the defendant claimed that he had acquired lands by adverse possession. He relied on the erection of a fence beyond and along the boundary of his land which adjoined the disputed lands, among other conduct on the disputed lands. It was borne out in evidence that the defendant did not possess the land exclusively because among other reasons, there had been since the erection of the fence other activities on the disputed land including shooting and children playing. Such activities it was determined, were inconsistent with the claimant having exclusive possession for the purposes of acquiring a possessory title.

[81] There is evidence from the claimant and at least one of his witnesses that members of the public traversed the property form the Red Hills main road in order to get to Pleasant Valley and Golden Acres over the years. The claimant's evidence was that he had maintained a fence in an attempt to keep persons from accessing the land but that he had not been able to keep them from using the land as a walking path. Mr. Langford gave evidence as to the existence of a track on the property. Coupled with my finding that he had not fenced the property prior to 2014, this evidence is in my view inconsistent with the claimant having exclusive possession. He did not have an appropriate degree of physical control over the disputed property.

Encroachment of neighbouring house on disputed property

[82] It was the evidence of Mr. Langford in cross examination that in order to establish when the slab roof extension was built, a review of the google photographs can assist. He noted that neither the flat roof extension nor the house was present in 2002. It stands to reason that the slab roof extension was built sometime after 2002.It is not clear when. The witness noted that the flat roof extension appeared in the 2009 photograph. There is no clear evidence that the house which encroaches on the disputed land is the claimant's house. The evidence discloses that there are a number of houses on the Dennis' land. Based on the evidence, reference to the Dennis' land is understood to mean land owned and or occupied by the claimant and or other family members which does not include the disputed land. The documentary evidence by way of a plan showing adjoining properties, reveals that property to the south (volume 1097 folio 378) is registered to Howard Dennis, the claimant and others, and that lands to the southwest (volume 1138 folio 495) is owned by the claimant's brother Howard. Mr. Langford did identify a house which he said belonged to the claimant. He did not say how he ascertained that this was the claimant's house. Even if that house is in fact the claimants' house, there is no clear evidence that it existed on the land for the requisite period

of 12 years or more. Furthermore, the fact of the encroachment by itself would be more a matter of a boundary dispute.

Farming activities on the property

[83] It is evident that the claimant has carried out farming activities on the land over a period of time. The question is whether he did so undisturbed for the requisite period of twelve years. I reject the evidence that he has been farming on the land since he was a child. There is no reliable and accepted evidence from the claimant or any of his witnesses which lends to this assertion. The claimant's evidence that by 1999 he had planted trees on three-quarters of the land and that he had not planted more than three-quarters because of the driveway is not capable of belief simply because the evidence discloses that there was no driveway until quite late in the day. Mr. Langford's evidence, we will remember was that the driveway was built after his visit in 2016. There is no mention made of a driveway in the claimant's expert report, which is a factor from which it may be inferred that none existed.

[84] The statement in the claimant's expert report that 3 ½ acres of the disputed land is fully cultivated must be looked at carefully, in part, having regard to what it said the cultivation consists of. Reference was made to the growing of trees as part of the cultivation. No effort was made to distinguish between what Mr. Langford referred to in cross-examination as indigenous trees or to the existence of older trees (confirmed by at least one of the claimant's witnesses) which existed on the property prior to the claimant ever engaging in any activities upon the land and trees which the claimant claims he planted.

[85] Mr. Langford was present in court and suffered gruelling cross-examination. His evidence that at the time of his visit it was just about an acre of the land that was under cultivation is accepted by this court. He was clear to distinguish between what may be regarded as active cultivation and trees growing on the property. Even the claimant himself acknowledged that there were trees growing on the property when he first entered the property. His evidence that there were only

seven such trees is not inconsistent with the evidence of Mr. Langford in this regard. Mr. Langford's evidence in this regard it will be remembered, is that the oldest photographs from the Google Earth database (the 2002 photos) showed few trees; one large mango tree and three or four smaller trees which appeared to be indigenous to the land. However, I wholly accept Mr Langford's evidence that the trees seen on his August 2016 visit appeared younger, with most of them appearing to be 2 to 3 years old. I am mindful that in cross-examination, he gave the ages as 4 to 5 years old. The reference to 4 or 5 years old was not clarified and it is uncertain whether he was referring to the age at the time of cross-examination or to the age at the time of his inspection or whether his evidence in cross-examination represents a departure from his initial assessment of the age of the trees as given in the report. Ultimately, I accept his evidence that most of the trees were mature seedlings, an indication of recent planting.

[86] Even if the court were to accept that 3 ½ acres were under cultivation at the time of the visit of the valuator, that fact would not assist the court to determine whether the claimant had been cultivating the property continuously for the requisite 12 years or more. What is evident is that in the last three years or thereabout prior to the claim being brought, and particularly after the claimant observed the defendant on the disputed lands, he began to assert his presence all over the lands.

[87] There is also the evidence of what Mr. Langford referred to as a backyard garden immediately behind the building which encroaches on the disputed land. He said it was only upon his visit in 2016 that he discerned that there was this backyard garden. There is no reliable evidence from which I can conclude that that backyard garden existed on the disputed property for a period of 12 years or more undisturbed.

[88] The statement of Mr. Langford in the report that "photographs show that at least for the last 15 years, the claimant has occupied only 25% of the subject land" requires closer scrutiny. The difficulty lies with the time period of 15 years stated. A critical examination of Mr. Langford's evidence overall does not support such a

conclusion. His evidence during amplification was that measurement reflecting the area under cultivation was from the 2015 photograph, (understood to mean photograph from the Google Earth facility). He said that from the 2009 photographs, there was virtually no discernible active cultivation on the western side of the land; it looked exactly like the vegetation on the eastern side which was wild vegetation. His conclusion is inaccurate having regard to the evidence in its totality.

[89] In the case of **Charles Villeneuve and Kyoto Securities Limited, v Joel Gaillard and G Holdings Limited** [2011] UKPC 1, Privy Council Appeal No 0025 0f 2009, Lord Walker in emphasizing the need for a trial judge to have regard to other evidence when considering issues of credibility of witness cited dictum in the case of **Armagas v Mundogas SA, (The Ocean Frost)** [1988] Lloyd's Report 1, at page 57 said that the judge should:

> "*always… test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities"*

[90] It is a warning that cannot be ignored. Mr. Langford utilized photographs from an independent source in order to arrive at his position regarding the usage of the disputed lands. Although photographs were not produced for the greater number of years that the claimant is insisting that he has been occupying the property, I believe on a balance of probabilities that inferences and conclusions can be drawn from what appears in the photographs produce relative to the years 2002, 2009 and 2015.

One inseparable parcel?

[91] In any event, if the assertion that "at least for the last 15 years, the claimant has occupied only 25% of the subject land" was even borne out to be accurate, then it is the roughly one acre of land located in the western and southwestern corner of the disputed land which is part of volume 953 folio 595 that would be affected. I

say that because the land in question should not in the circumstances be considered as one inseparable parcel, as there is obvious demarcation by volume and folio number in respect of two of the parcels and the fact that there is a third parcel of unregistered land located between the two registered parcels. Further, even if the fact that the paper title holder of the three parcels is and was always one individual, and the separate parcels were apparently treated in the past as one continuous and indivisible parcel, one may acquire the right to a possessory title to a part of a single parcel of land. It was said in **Powell v McFarlane, (1977) 38 P & CR 452,** and referred to repeatedly in many cases that: "*It is clearly settled that acts of possession done on parts of land to which a possessory title is sought, may be evidence of possession of the whole*" but the statement of the law did not end there. Slade J also made it clear that

> *"whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalize with any precision as to what acts will or will not suffice to evidence factual possession.*"

[92] In the unlikely event I were to be wrong in saying that there is no evidence from which a court could find that the claimant was in undisturbed occupation of the area of land referred to by Mr. Langford as the one acre in the south western corner encompassed in volume 953, folio 595, the same cannot be said of the rest of the property, as there is clear and very convincing evidence that the circumstances surrounding the other portions of the land is significantly different. It seems entirely clear to me that the claimant sought to extend his reach to the other sections of the property after Mr. Barnes' appearance on the property. The planting of crops and trees interspersed throughout the property appears to have been a feature of recent years based on Mr. Langford's evidence.

Mr. Campbell' activities

[93] I note with much interest, that the claimant's evidence that persons came and were chopping down his farm at a time when Mr. Campbell came to the farm, would necessarily mean that he was admitting that in 2006 or prior to that time, Mr.

Campbell and or his agent or agents had interfered with his occupation, an assertion which he denied at other junctures in his evidence. I am totally mindful of course, that any interference with the claimant's occupation in 2006 by Mr. Campbell would have been 'too little, too late', if the court had found credible evidence to support the claimant's assertion that he was in undisturbed and continuous occupation in the manner he claims, from the 1980s or the earlier portion of the 1990s.That aspect of the evidence is nevertheless relevant even if only to the extent that it affects the claimant's credibility.

[94] What the claimant in the instant case has failed to appreciate is that for the purposes of acquiring a possessory title, he could not be said to have been in possession at the same time that Mr. Campbell was in possession. Mr. Campbell's evidence that some 13 years prior to giving his witness statement he drove away someone who was seen occupying a house on the property in my view amounts to that which may be regarded as a "slight act" of the type referred to by Slade J in **Powell v McFarlane** required of an owner to disprove dispossession. By removing a person in occupation, Mr. Campbell was exercising control over his property.

[95] I am mindful of Mr. Campbell's evidence that when he first bought the land in 1986, cassava was one of items he saw on the land. It matters not who was responsible for planting such crops. Even if in fact the claimant did (which is not a finding I make) his possession could not co-exist with Mr. Campbell's possession of the property. Mr. Campbell I find, had clearly assumed possession of the property upon acquiring same. It may now be regarded as trite law that an owner and a squatter cannot be in possession at the same time as demonstrated in **Powell v McFarlane** (supra). The fact scenario in this case is at the slightest glance clearly distinguishable from the case of **Perry v Baugh, Wilson et al** [2018] JMCA Civ.12, where Brooks JA affirmed the trial judge's findings that squatters in occupation of various different sections of a parcel of land at the same time that the title owner was in possession of a different section, had acquired the right to possessory title

in respect of the portion of land occupied by each of them so that the paper title holder's claim for recovery of possession failed.

[96] On the evidence presented by the claimant, it has not been established that he has been in continuous, open and undisturbed occupation of the disputed land for the requisite period of 12 years. There is no point in time prior to the land being sold to the defendants that it could be said that Mr. Campbell had discontinued possession or was dispossessed. Even though there is clear evidence of the claimant's presence on the disputed property, and a definite attempt to exclude all others after the first defendant appeared in the picture, and possibly for a short period prior, there is no evidence of the claimant's sustained presence, coinciding with the necessary intent for the required period. Even if this court should believe that at some point in the earlier years the claimant had utilized the land for cultivation or some other purpose, there is no evidence that he was present on the land for a continuous period of 12 years or more to the exclusion of the title holder. Any such presence would have been broken by Mr Campbell's act of causing the land to be bushed periodically. It was said in **Dunne v Iarnrod Eireann and Another** [2007] IEHC 314 that

> " *the assessment of possession is not one in which the possession of the paper title owner and the person claiming adverse possession are judged on the same basis. An owner will be taken to continue in possession even with minimal acts.*"

Negotiations to purchase/Negotiations to settle

[97] This court is cognizant of the fact that even if the claimant had entered into negotiations to purchase the lands from Mr. Campbell, that fact would not have affected any claim to a possessory title if he had already been in exclusive undisturbed occupation for the requisite period at the time of such negotiations. The same would be the case if a squatter continued in such occupation until the necessary time period was met at a time subsequent to such negotiations. Such negotiations would not have operated to interrupt the running of time. The notion

that such negotiations interrupted the running of time or that it constitutes evidence from which a lack of intention to possess could be inferred, was squarely rejected in **Alaric Astor Pottinger v Traute Raffone** [2007] UK PC 22. It was also observed in **J A Pye (Oxford) Ltd. and Another v Graham and Another** that a squatter's willingness to pay for his possession if asked by the owner is not inconsistent with his having the requisite possession for the purposes of the Limitation Act. (see paragraph 40 of **Pottinger v Raffone**)

[98] Mr. Dennis in his reply to the Amended Defence and Counterclaim had asserted that "Mr. Campbell had admitted to the claimant's exclusive occupation and control of the property and was negotiating a settlement with the claimant through his then Attorney-at-Law Mr. Franklyn Beckford, but Mr. Beckford died before a settlement could be arrived at." He further went on to state that "Mr. Campbell was willing to give the claimant half of the property and sell the other half to his brother Howard Dennis, but that the negotiations broke down with his brother." These averments were also made in his witness statement. Even though the matter was not specifically addressed in Mr. Campbell's witness statement, there is evidence contained in that statement which makes it abundantly clear that he is disputing that evidence. On account of the general lack of credibility of the claimant, and even though Mr. Campbell's evidence was not tested by cross-examination, this court does not find on a balance of probabilities that any such negotiations took place.

Property sold at an undervalue?

[99] The claimant's case in part is that Mr. Ralford Campbell sold the disputed property at an undervalue to the defendants because he was aware of the claimant's claim of the right to a possessory title. He cited as proof, the agreement for sale between Mr. Campbell and Mr. Howard Dennis which was exhibited. It was stated in that document that the agreed sale price was US$10,000,000. This compared to the significantly lower sale price many years later. It is true that both valuation reports indicate significantly higher market values than the property was actually sold for.

The claimant's valuation surveyor puts the market value of the land at $39,000,000.00, inclusive of the value of the buildings, whereas Mr. Langford puts the value at $20,000,000.00, a value which based on his evidence in cross-examination, did not include the value of the buildings. Mr. Langford also noted that the unimproved value of the land as assessed in 2013 (presumably by Land Valuation Division of the National Land Agency) was $16,000,000.00. The difference in value assigned to the property is only partly explained by the fact that each valuator seemed to have taken into account different variables in arriving at the respective value assigned.

[100] The true market value of property is clearly not the only factor considered by a vendor in disposing of property. Unfortunately, Mr. Campbell could not have been cross-examined on the matter and this court cannot make assumptions as to the reason why he sold the property at what Mr. Barnes agreed was a bargain price. While there is no evidence to contradict the claimant's assertions, this court considers the fact that the claimant overall has proven to be an untruthful and hence unreliable witness, and in the light of the overall picture painted by him, I find myself unable to accept without more his assertion, or more accurately put, his assumption in this regard.

Transfer fraudulent?

[101] As to the claimant's pleaded case that the transfer of the property to the defendants was fraudulent, the provisions of section 71 of the Registration of Titles Act combined with the meaning of fraud in this context, and the nature of the fraud required, makes it abundantly clear that there is no evidence to support a claim of fraud. The section provides as follows:

> *Except in the case of fraud no person contracting or dealing with, or taking or proposing to take, a transfer from the proprietor of any registered land, lease, mortgage or charge shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the*

> *application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding and the knowledge that any such trust of unregistered interest is in existence shall not of itself be imputed as fraud.*

[102] The effect of that and other provisions of the Registration of Titles Act is that purchasers such as the defendants would have to be complicit in the fraud. As to the nature of the fraud required, it was made clear in the case of **Assets Company Limited v Mere Roihi and Others** 1905 UK PC 11, that fraud:

> *"meant actual fraud i.e., dishonesty of some sort; not what is called constructive or equitable fraud…The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for a fear of learning the truth, the case is very different and fraud may properly be ascribed to him…."*

[103] No evidence was produced to establish that the defendants were in fact aware of the claimant's presence on the property. There is absolutely no evidence that there was any fraudulent activity and a fortiori, that the defendants were engaged in any fraudulent activity. I accept Mr. Barnes' evidence that he was not aware that the claimant was claiming ownership of the property. Part of what was averred is that Mr. Campbell had died several years before the lands had been transferred, and so Mr. Campbell could not have been a party to the transfer. This averment was established to be baseless. I note for what it is worth, that the claimant also averred that it was after he learnt that Mr. Campbell had died that he saw the defendant viewing the land. It would appear that it was based on the claimant's alleged sighting of the defendant viewing the property and from the allegation that the

defendant conducted a survey, that the claimant inferred that the defendant knew that the claimant was claiming a possessory title to the property.

[104] Apart from the very obvious flaw in that thought sequence, what is clear from established fact as to the timing of Mr. Campbell's death and the date of the transfer, is that by then, Mr. Barnes and his wife were the owners of the property when Mr. Dennis claims he saw Mr. Barnes on the property. Even if this court had found that the defendants were in fact aware of the claimant's presence on the property, that fact in conjunction with all the matters relied on by the claimant to say that the defendants' title should be cancelled on account of fraud would be grossly insufficient.

[105] In any event, the absence of a finding that the claimant remained for 12 years or more in exclusive and undisturbed possession would have nullified any claim on the part of the claimant that there was a fraudulent transfer of title.

CONCLUSION ON THE RIGHT TO OCCUPATION AND POSSESSION OF THE DISPUTED PROPERTY

[106] There is no doubt that the types of activities that the claimant insisted he was carrying out on the disputed lands would suffice to establish factual possession for the purposes of acquiring a possessory title if it were found that he was in exclusive possession carrying out those acts for the requisite period. It is also evident that at some point, the claimant had formed the requisite intention to possess.

[107] In the light of my rejection of the claimant's evidence as to the duration and extent of his activities upon the disputed land, there is no reliable evidence from which this court can conclude that the necessary elements, that is the factual possession and the animus possessendi which would be necessary to establish that he has acquired the right to a possessory title existed for the necessary period. It is the responsibility of the person who claims that he has acquired the right to a

possessory title to demonstrate that he has been in undisturbed and exclusive possession for the relevant limitation period. The claimant has not done so to the required standard.

[108] Since the claimant has failed to prove his claim to the required standard, it is the finding of this court that the defendants who are purchasers of the property in question, took title free of any claim to a possessory title by the claimant.

THE REMEDIES SOUGHT

[109] Section 48 of the Judicature Supreme Court Act empowers the court to grant any remedy where the court determines that a party is entitled to any equitable estate or right or to any relief founded upon such right. An injunction is one such remedy which a court will grant where the party/parties appear to be entitled to the remedy.

[110] Having regard to my findings and conclusion, the declarations, injunction and orders sought by the claimant in his Amended Claim Form are refused. The defendants are entitled to some of the remedies sought in their counterclaim. Such remedies include the injunction and declaration since the court has determined that the claimant has no rights to the disputed land and that the defendant is entitled to possession and occupation of same.

[111] The defendant sought damages for trespass as well as mesne profit. Those aspects of the claim were not pursued in any meaningful way. It is trite law that trespass is actionable per se, that is, without proof of special damages. Trespass being wrongful interference with possession of land, it has been established that the defendants' possession has been wrongfully interfered with. They have been unlawfully deprived of the use of their land.

[112] The term "mesne profits" is understood to be damages awarded where a former tenant holds over and becomes a trespasser. Therefore, where mesne profit is claimed, a person entitled to possession of land may recover the damages which

he has suffered as a result of being out of possession of the land or, the amount of money that he reasonably could have received for the use of the land. An award of mesne profits might be compensatory or in the nature of restitution, depending what the claimant seeks to prove. Where the property has been damaged, the claimant is usually awarded as damages, a sum representing the diminution in value and the sum required to correct the damage. However, even where there is no damage to the property, if the claimant can prove loss of income as a result of being deprived of possession of his land, compensatory damages can be awarded in the form of mesne profits.

[113] Mesne profits can be regarded as restitution where the claimant is seeking to recover a sum which is based on the extent to which the person wrongfully in occupation has benefitted from the use of the property. The claim for mesne profit, whether as restitution or compensation, or for damages for trespass could easily have been made out had the defendant sought to put sufficient material regarding quantum before the court. There is evidence that there has in fact been substantial interference with the land, for example by the cutting of a road into the land. The defendants have however given no evidence that would assist this court in quantifying the damages to which they are entitled. There is no evidence as to the cost to restore the land to its prior state. The defendants' only entitlement in the circumstances is nominal damages.

DECLARATIONS AND ORDERS

[114] The declarations, injunction and orders sought by the claimant in his Amended Claim Form are refused. The reliefs granted to the defendants based on the counterclaim are as follows:

I. A declaration that the defendants are legally and beneficially entitled to possession of the parcels of land registered at Volume 953 Folio 595 and Volume 868 Folio 76 of the Register Book of Titles as well as the unregistered parcel of land

consisting of 0.220 acres or 0.089 hectares which is situated between the two registered parcels.

II. An injunction restraining the claimant whether by himself, his servants and/ or agents or otherwise howsoever from remaining on or continuing occupation of the said lands.

III. An injunction restraining the claimant whether by himself, his servants and/ or agents or otherwise howsoever from entering or using the said lands.

IV. Nominal damages awarded in the sum of $5000.00 V. Costs to the defendants to be taxed if not agreed.

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Pettigrew-Collins, J