



[2022] JMSC Civ 159

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2017 HCV 01342

BETWEEN	MANFAS HAY	1ST CLAIMANT
AND	MAISENE MYRIE-HAY	2ND CLAIMANT
AND	CLOVER THOMPSON	1ST DEFENDANT
AND	JONATHAN PRENDERGAST	2ND DEFENDANT

OPEN COURT

Ms. Judith Clarke instructed by Judith Clarke & Co for the claimants

Ms. Regina Wong instructed by Grant, Stewart Phillips & Co for the defendants

HEARD: March 23, 24 2021 and September 23, 2022

RECOVERY OF POSSESSION OF PROPERTY- WHETHER THE CLAIMANTS AS TITLE HOLDERS ARE THE LEGAL OWNERS OF THE DISPUTED LAND- WHETHER THE DEFENDANTS ACQUIRED THE DISPUTED PROPERTY BY ADVERSE POSSESSION- WHETHER CLAIMANTS' REGISTERED TITLE IS EXTINGUISHED BY THE OPERATION OF THE STATUTE OF LIMITATIONS- SECTION 3 AND 30 OF THE LIMITATION OF ACTIONS ACT

HENRY-MCKENZIE, J

BACKGROUND

[1] The claimants are the registered proprietors of property located at 12 Dillon Avenue, Kingston 5 in the parish St. Andrew (hereafter also referred to as the

disputed property) comprised in the Certificate of Title registered at Volume 1491 Folio 85 of the Register Book of Titles. They had purchased this property from Fitzroy Best in 2014. At the time of the purchase the defendants were in occupation of the property and to date they still remain in occupation. The claimants served the defendants with a notice to quit the premises on November 13, 2014. The defendants did not vacate the property, consequently, the 1st claimant filed a suit in the Parish Court in 2015 for recovery of possession and mesne profits. The matter was eventually transferred to the Supreme Court for lack of jurisdiction and a claim number was assigned and case management held.

- [2] In keeping with Case Management Orders made by Master Mason the pleadings were timely filed on the 20th October 2017 in the form of a Fixed Date Claim Form and Affidavit of Manfas Hay in Support of Fixed Date Claim.
- [3] On the 22nd February 2018 Master Hart-Hines (as she then was) having determined that the matter was improperly initiated using a Fixed Date Claim Form, permitted the claimant to file a Claim Form and Particulars of Claim as well as to add the second registered proprietor, Maisene Hay as the 2nd claimant.
- [4] In the Amended Claim Form the claimants seek recovery of possession of the disputed property and mesne profits as well as a declaration that the defendants are not entitled to any interest in the property. The claimants aver that by reason of the defendants' unlawful occupation of the property they have been and continue to be deprived of the use and occupation of their property and have suffered and continue to suffer loss and damage and incur expenses.
- [5] The defendants mounted the defence of possessory title. They maintain that the title held by the claimants is subject to their adverse possessory title acquired through open, peaceful, quiet and undisturbed possession for upwards of 12 years. They state that this title had crystallized before the claimants' purchase of the subject property, consequently, it is their assertion that the claimants could not and cannot suffer loss or damages as they have no entitlement to ownership.

THE EVIDENCE

Claimants' Case

Manfas Hay

The evidence of Manfas Hay is that the disputed property, that is, 12 Dillon Avenue, as well as the adjoining property 12A Dillon Avenue was first owned by George Best and his wife, Carmen Best. Mr. Hay indicated that he grew up next door to both properties, at 10 Dillon Avenue and as such, he knew George Best and his wife since he was a child as well as their grandson Dwight Wedderburn who lived with the Bests' and whom he said was his friend (*cross – examination*). Having grown up in the community, he said he therefore knew that both properties had tenants before and even after George Best died. However, Mr. Best, his wife and eventually the 1st defendant (Mr. Wedderburn's girlfriend at the time) lived amongst them at 12A Dillon Avenue. In relation specifically to the disputed property, he described the property as a "tenement yard" with several tenants living in different rooms in the two structures located thereon. Among these tenants he said, were the 1st defendant's mother (Ms. Kong), stepfather and the 2nd defendant.

[6] Mr Hay indicated how he became involved with these properties. His evidence is that in 2002 he and his wife purchased 12A Dillon Avenue from Fitzroy Best, the son of George Best, and lived on this property since that time until 2010 when they moved to live elsewhere. Mr. Wedderburn and the 1st defendant had still lived at 12A when they began this process of buying the property, but they, along with the tenants who were still living there, vacated the property before the completion of the sale and Mr. Wedderburn and the 1st defendant moved to the disputed property. According to Mr Hay, at the time of this move, the 2nd defendant was not living with his mother (the 1st defendant) or Ms. Kong, but was instead living elsewhere in the community. He stated that he knew this because he and the 2nd defendant were friends.

- [7]** Further, Mr Hay's evidence is that when the 1st defendant and Mr. Wedderburn moved to the disputed property, tenants were also living there, including the 1st defendant's family. Even up to November 2004 after an incident when he was shot, he recalled the tenants still living at the disputed property. However, in 2005 after a fire extensively damaged the property, most of the tenants left the property including the defendants, though they occasionally visited the location. Only Ms. Kong, and her husband and Gretna remained, he said.
- [8]** Mr. Hay's evidence further, is that it was not until about 2012 that the 1st defendant returned. The 2nd defendant returned about a year or so later. In amplification, he denied that the defendants returned in 2007 as they alleged.
- [9]** He further stated, that it was since returning the defendants brought other persons to live on the property with them including the 1st defendant's uncle, Burru. When the defendants returned, Mr. Hay said he no longer lived in the community, but visited almost every day. As such, he was privy to the happenings within. In cross-examination, he indicated moving from the community in 2010.
- [10]** In relation to the disputed property- 12 Dillon Avenue, Mr Hay said it was sometime in about 2013 that he became interested in the property and soon thereafter he again entered into an agreement with Fitzroy Best to purchase it. When he entered into the agreement to purchase the property, the 1st defendant was still living there but the 2nd defendant was not, he having not returned.
- [11]** Although the transaction to purchase the property was commenced between 2012 and 2014, the title was not registered in the claimants' name until 2015 as an application had to be made for a replacement title, a process he was informed could take some time. In the meantime, he had sought to recover possession from the defendants and as such, he had his attorneys prepare a notice to quit dated November 14, 2014, though served on the defendants on November 13, 2014. The events thereafter were previously set out and will not be repeated.

- [12] In amplification, Mr. Hay indicated that when he gave notice to the tenants he had to pay an outstanding water bill of \$105,000. He further stated that after the fire, no reconstruction was done in 2007 by the defendants to the burnt out structures on the property which they had occupied. Instead, only a little section was fixed up with tarpaulin when the tenants had moved out in 2012 and sometime after the notice was served, some minor concrete work was done and palm trees and grass planted in the yard. He also stated that there is no legal light, or water supply to the property.
- [13] In cross- examination, Mr. Hay asserted not knowing where the 2nd defendant lived when he was a boy, but said that he knew he came to live at the disputed property when the tenants Chubby and Lloyd moved out. He believed the 2nd defendant came to the property to live about 2003/2004. However, he acknowledged that the 2nd defendant would visit Ms. Kong at the property prior to this.
- [14] He also stated that he observed Mr. Wedderburn who is his friend collecting rent from the tenants including the 2nd defendant.

Dwight Wedderburn

- [15] Mr. Wedderburn corroborated much of the evidence of the claimant. He says his grandparents owned both 12 & 12A Dillon Avenue which were always tenanted, even after both grandparents died. He indicated being responsible for the sourcing of tenants, collection of rent, serving of notices and evicting of tenants, before his grandparents' death. Even after their death, he said he continued to collect rent which he started from 1983-1984.
- [16] He further stated that when living at 12A Dillion Avenue, his girlfriend, the 1st defendant, came to live with him and this remained the case up until about 2002 when they separated. The 1st defendant's mother and her family also moved to the disputed property in the 1980's when the previous owner George Best rented a building on the property to the mother. Mr. Wedderburn said he collected the rent from them and he continued to do this until about 2003/2004 when the defendants

expressed their interest in purchasing the property. He also rented a section of the disputed property where Chubby and Lloyd had once occupied, to the 2nd defendant.

[17] Mr Wedderburn's further evidence is that in about 2002 he moved from 12A Dillon Avenue to the disputed property when Mr. Hay began his purchase of 12A from Fitzroy Best, his uncle. At that time, he said there were still tenants residing at the disputed property including the 1st defendant and her family, from whom he collected rent. Shortly thereafter, still in about 2002, he moved from the disputed property to Angels Estate in St. Catherine. After this move, he visited the property less frequently to collect rent. Eventually after the fire in 2005, he hardly visited the property in question, did not collect any further rent and basically left everything up to his uncle Fitzroy Best. As such, he was unaware of what happened at the property or when the 1st and 2nd defendants returned. He denied that Ms. Kong stopped paying rent in 1991.

[18] In his amplified evidence, Mr. Wedderburn was asked if the 2nd defendant had lived with the 1st defendant and himself when they moved to the disputed property. His response was that he did not. Mr Wedderburn also denied that the 2nd defendant lived at the property before they went to live there. However, when asked in cross-examination if John moved with the family to the property he answered in the affirmative.

[19] Further in cross- examination, Mr Wedderburn indicated that the 2nd defendant became a tenant in about 2001 and he collected rent from him from that moment. However, he did not at any time collect rent from the 1st defendant.

Defendants' Case

[20] The defendants' case is centred around the evidence of four witnesses; the two defendants, Barrington Thompson (brother of 1st defendant) and Henley Dias, a family friend.

- [21]** The crux of the defence is that the defendants have been in open, peaceful and undisturbed possession of the disputed property in excess of twelve years and have satisfied the ingredients of adverse possession, therefore they have obtained possessory title. In summary, the evidence of the 1st and 2nd defendants is that their family members moved to 12 Dillon Avenue in about 1986 and according to the 2nd defendant, they have never left since. The 2nd defendant indicated that these family members included himself, Ms. Kong (grandmother), uncles, granduncles and cousins. Notably however, the 1st defendant did not include the 2nd defendant in the list of family members who moved to 12 Dillon Avenue. The evidence is that the 1st defendant did not live with her family members at 12 Dillon Avenue at this time, but instead was living at 12A Dillon Avenue with her boyfriend, Dwight Wedderburn. Her evidence is that she did not move to 12 Dillon Avenue until around 2001 after a breakdown in the relationship between herself and Mr Wedderburn and after they were served with a Notice to Quit.
- [22]** The defendants' evidence further, is that the family paid rent to Mr. Wedderburn. However, in around 1991, the family stopped paying rent, but still remained in occupation of the property.
- [23]** In about 2005 there was a fire which destroyed the part of the building on the property which the defendants occupied, forcing the defendants to flee based on the circumstances surrounding the fire, which they considered a threat to their safety. The rest of their family remained at the property and as such the defendants indicated that they still frequented the property to spend time with them and to also assess the damage and determine the way forward.
- [24]** The defendants' evidence is that they moved back to the disputed property in 2007 and partially reconstructed their section of the house destroyed by the fire, for it to be habitable. According to the 2nd defendant in his amplified evidence, he strengthened the house with block, steel, sand and cement around 2012/2013 and received some zinc and lath (board) to assist in the repairs to the roof. In 2013 he

also erected an electricity pole for the proper rewiring of the house, which was completed in early 2014.

- [25]** The defendants indicated that upon moving back to the disputed property in 2007, they attended the office of the then owner's attorney to make enquiries about the status of the sale. They were informed not to make any further payments towards the purchase of the property, as Mr. Fitzroy Best had not signed the agreement for sale.
- [26]** In amplification, both defendants admitted that other persons (tenants) were living at the disputed property when they moved there. The 1st defendant listed these persons as including: Macka, Daddy Frank, Mr. Harry, Fire, Chubby and Lloyd. The 2nd defendant also listed Daddy Frank, Mr. Harry, Fire and Macka but also a Ms. Serena. The 2nd defendant also stated in his amplified evidence that he lived with his grandmother at the property and had moved there before Chubby and Lloyd left.
- [27]** In cross- examination, the 1st defendant indicated that she received permission from Mr. Wedderburn to occupy the front room that was once occupied by Mr. Harry which she had moved into around 2002/2003. She also stated that both herself and the 2nd defendant had begun paying their deposits on the purchase of the property around 2003/2004, but admitted that not all the purchase price was paid. She however stated that up to 2013 she still had intentions of completing this payment despite being informed to do otherwise in 2007. In her attempts to do this, she said she visited upon the office of the attorneys for a copy of the agreement for sale to obtain a loan.
- [28]** Upon being tested in cross- examination on her evidence given at the Sutton Street Parish Court, the 1st defendant denied saying herself, Ms. Kong and the 2nd defendant had moved out between January 2005 and April 2007. She also could not recall ever saying the 2nd defendant started living at the property in 1991, nor

did she remember saying to the Parish Court Judge, “I came back in 2007. Jonathan came back. I don’t remember. After me is when he came back.”

[29] When questioned by counsel as to why the 2nd defendant was not mentioned by her as a family member who had moved to the disputed property in 1986, she responded by saying, “Jonathan was always there, he goes and come from my house to his grandmother’s house whom he lived with.”

[30] The 2nd defendant maintained his assertions under cross- examination that he had always lived with his grandmother, having moved with her to the property in 1986. He also contended that he received permission from Mr. Wedderburn to live in the section once occupied by Chubby and Lloyd, which he lived in rent free because of the relationship between himself and Mr Wedderburn.

[31] The 2nd defendant also denied the assertions that he returned to the property in 2013 after his mother.

[32] Barrington Thompson and Henley Dias’ evidence corroborates much of the evidence of the defendants. Mr. Barrington Thompson in his testimony however, added that the family had pooled together to pay the property taxes which was done up until about 2014 when Mr. Hay began paying. Mr. Henley Dias also testified that the 2nd defendant had stayed away from the community a little longer than his mother.

SUBMISSIONS

Claimants’ Submission

[33] Ms. Clarke for the claimants in placing reliance on section 70 of the Registration of Titles Act, argued that the claimants being the registered owners on the title of the disputed property, this is conclusive evidence of the claimants’ ownership of same. She accepted that the title is subject to the operation of the Statute of Limitations, but submitted that the claimants’ interest was not defeated by the defendants’ claim that they have acquired prior rights under and by virtue of the

Statute of Limitations, as the defendants' defence of possessory title is not sustainable.

- [34] According to counsel, in order to prove title has been obtained by legal possession so as to dispossess the paper owner, there must be both physical possession and an intention to possess for at least 12 years. To support her proposition Counsel relied on the case of **JA Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 where Lord Browne-Wilkinson said at para 40- **

41. "... there are two elements necessary for legal possession. (1) a sufficient degree of physical custody and control (factual possession), (2) an intention to exercise such factual custody or control on one's own behalf and for one's own benefit (intention to possess) ...

In Powell's case (1977) 38 P & CR, 452 at 470-471, Slade J. said:

Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land 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, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ...

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". (Emphases supplied)

"I agree with this statement of the law which is all that is necessary in the present case".

- [35] Ms. Clarke argued further, that the defendants have failed to establish these two elements. In relation to the nature and quality of the defendants' occupation, she argued that based on the defendants' own evidence their occupation was grounded in permission from the prior owner which was never withdrawn or expended. She also contended that the defendants' occupation was never twelve

years of single and exclusive occupation as the disputed property was simultaneously occupied by several other tenants of the prior owner over that period of time. Additionally, she contended there was also no twelve years of continuous occupation by the defendants. She submitted that on the evidence their occupation began in 2001/2002 for the 1st defendant and for the 2nd defendant 2002/2003 and they both left around 2005 after the property was firebombed for some years, though they eventually returned.

- [36]** In relation to the point at which the defendants returned, counsel urged the court to accept the claimant's evidence that the defendants returned in 2012/2013 as being more credible than in 2007 as alleged by the defendants and that they also did not move back together. In this regard, counsel referred to the defendants' own evidence on the circumstances of their departure, their own expressions as to how long the ensuing tension in the community lasted, their own stated inclination to hide upon their return to the area to visit Ms. Kong and the sworn evidence in the Parish Court of the 1st defendant that the 2nd defendant came back after her.
- [37]** As to the requisite intention, counsel submitted that neither defendant showed an intention to possess in such a way as to exercise custody and control of the property on "one's own behalf and for one's own benefit" to the exclusion of all others including the paper owner. She stated that on their own evidence they have admitted paying towards the purchase of the disputed property from the owner at the time in 2004 and as recently as 2013, they attended the office of the prior owner's attorney to receive a copy of the agreement for sale to secure a loan to complete the purchase.
- [38]** In light of the foregoing, counsel submitted that the defence has failed entirely and further urged the court to give judgement for the claimants.

Defendants' Submission

- [39]** Ms. Wong for the defendants submitted on the other hand, that the defendants have satisfied the necessary ingredients of adverse possession so as to defeat the

title of the claimants. She relied in this regard on the case of **Ramnarace v Luthchman** [2001] UKPC 25.

- [40] She argued that the defendants' possession of the property can be deemed inconsistent with the title of the true owner as was evident in the following: (i) being without the payment of rent, there being no documentary evidence to prove otherwise (ii) permission to occupy was given by someone (Mr. Wedderburn) who had no authority to do so, (iii) the defendants unsuccessful purchase of the property, and (iv) repairing the roof and making the property habitable.
- [41] She admitted that the acts of physical possession are minor in nature, but submitted that these are sufficient acts of not only factual/physical possession but also the necessary element of the intention to possess to their own benefit.
- [42] Counsel relied on the Lord Hutton's dictum in the case of **JA Pye (Oxford) Ltd** to support the argument that physical acts in relation to the land can be sufficient evidence of the requisite intention to possess. He stated:

"I consider that such use of land by a person who is occupying it will normally make clear that he has the requisite intention to possess and that such conduct should be viewed by the court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion... It is in cases where the acts in relation to the land of person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess."

- [43] Counsel accepted that there was a point in time when physical possession was not possible when the defendants had to relocate due to the fire, but it is her submission that the comings and goings of the defendants at the disputed property during this period, shows a clear intention to possess, even though at the time they were unable to do so. She argued therefore that in such a situation, greater credence should be given to the defendants' intention to possess. She also submitted that further evidence of this intention can be seen from the defendants' attempt to purchase the property.

[44] In relation to the time period within which it took for the defendants to return after the fire, counsel submitted that the claimant, Mr. Hay's evidence should be rejected as the assertion is not supported by any other evidence and at the time Mr. Hay was not living on Dillon Avenue, so he could not be a credible witness. She argued that the defendants' evidence that they returned in 2007 is supported by the evidence of Mr. Barrington Thompson and Mr. Henley Dias and is more credible.

[45] Finally, counsel argued that it has been established that the occupation of the defendants was adverse in nature and that this possession is in excess of the twelve years as required by the Limitation of Actions Act to extinguish the title of the claimants.

Response by Claimants

[46] In response, counsel Ms. Clarke submitted that the argument that Mr. Wedderburn went outside the scope of authority from the paper owner is untenable, given the defendants' own evidence that they were in negotiations with Mr. Wedderburn in their effort to purchase the property from the paper owner, as well as the fact that it was Mr Wedderburn who was vested with the authority to collect rent from the tenants at the disputed property.

DISCUSSION

[47] The issues for my determination in a nutshell are:

- i. Whether the claimants hold a good title to the disputed property so as to recover possession from the defendants who occupy it.
- ii. Whether pursuant to the Limitations of Actions Act, the defendants have a good title to the disputed property, thereby effectively barring the claim of the claimants for recovery of possession.

Indefeasibility of Title

[48] It was recognized by the court in the case of ***Dawn Davis v Delrose Gray***, that where a claim is brought to recover possession of land, the claimant must prove that he/she is entitled to recover the land as against the person in possession. He recovers the land on the strength of his own title and not on the weakness of the defendant's. (See – *The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 609.*)

[49] It is clear from the evidence that the claimants are registered on the title as the proprietor of the disputed property. It is established that a registered title gives the proprietor thereon an absolute title which is incapable of being challenged by a third party claiming legal interest in property except on the grounds of fraud, prior registration, mistake, error and/or misdescription of parcel or boundary.

[50] The indefeasibility of a registered title is made clear in the provisions of section 68 and 70 of the **Registration of Titles Act**.

[51] Section 68 of the Registration of Titles Act reads as follows:

'No Certificate of Title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every Certificate of Title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power.'

Section 70 in part reads as follows:

'Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the Certificate of Title,

subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Registrar Book constituted by his Certificate of Title, but absolutely free from all other incumbrances whatsoever except...

- [52] However, this indefeasibility is only applicable to legal ownership and does not affect a legitimate challenge in equity to the legal owner (See **Gardener and Others v Edward Lewis** [1998] 53 WIR page 236) and is also subject to the operation of the **Limitations of Actions Act**. (See: Section 68, *Registration of Titles Act*)
- [53] Therefore, where a person against whom the claimant brings an action to recover possession of land pleads the Statute of Limitations, then, the claimant must prove that he has a title that is not extinguished by the statute. (See – *The Laws of England, The Earl of Halsbury (1912) Volume 24, paragraph 606*).

Adverse Possession

Principles of Law

- [54] Under the concept of adverse possession, the basis of title to land is possession. The effect of this is that a person who is in possession as a mere trespasser or squatter can obtain a good title if the true owner fails to assert his superior title within the requisite limitation period. In order to prove this title to land by adverse possession, it must be shown that there is both factual possession and the requisite intention to possess. In **Powell v McFarlane** (1979) 38 P & CR 452, 470-472 Slade J stated the principles of possession as follows:

(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 prima 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”).*
- (3) *Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of 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, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly ... 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.*
- (4) *The animus possidendi, ... was defined by Lindley M.R., in **Littledale v Liverpool College**, as “the intention of excluding the owner as well as other people.” What is really meant, ... is that the animus possidendi involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as the is reasonably practicable and so far as the processes of the law will allow.*

[55] This definition of possession was refined by Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd**. He said legal possession has two elements. The first element is factual possession, meaning, “a sufficient degree of physical custody and control.”

The second element is the intention to possess. That is, “an intention to exercise such custody and control on one’s own behalf and for one’s own benefit.”

- [56] Factual possession in this context must be exclusive, open, peaceful and adverse. Openness means that the possession of the claimant must be notorious and unconcealed so as to make the paper owner aware of the need to challenge the adverse possessor before expiration of the limitation period. See: **Lord Advocate v Lord Advocate** (1880) 5 App Cas 273. Possession being adverse means it must not be concurrent with that of the paper owner, that is to say, possession should not be with the consent of the paper owner. This was in **Ramnarace v Lutchman**.
- [57] The acts of possession must also be of such a nature as to amount to an ouster of the original owner of land and be inconsistent with his enjoyment of the soil for the purposes which he intended to use it. See: **West Bank Estate Ltd v Arthur** [1966] 3 WLR 150
- [58] It must not be equivocal or trivial but must be positive and affirmative evidence of the requisite intention to occupy and use the land as one’s own. It is not necessary to show that there was deliberate intention to exclude the owner of the property. If the acts are equivocal and open to more than one interpretation the courts will find it more difficult to infer the intention to possess and consequently as not having dispossessed the owner. See: **JA Pye (Oxford) Ltd; Farrington v Bush** (1974) 12 JLR 1492; **Clevebert Hayles v Gloria May McFarlane** [2017] JMISC Civ 45
- [59] In the assessment of the sufficiency of the possession, important factors to be considered are the nature of the factual possession, the type of property in question and the common use of the property. See: **Clevebert Hayles**
- [60] The dispossessor/adverse possessor is also required to prove or satisfy the court that there has been possession for the requisite limitation period. The **Limitations of Actions Act** outlines the relevant period and the consequence of its expiration in sections 3 and 30. Those sections read as follows:

3. No person shall make an entry, or bring an action ...to recover any land... but within twelve years next after the time at which the right to make such entry, or to bring such action ..., shall have first accrued...

....

30. At the determination of the period limited by this Part to any person for making an entry, or bringing an action ..., the right and title of such person to the land ... for the recovery whereof such entry, action ...might have been made or brought within such period, shall be extinguished.

[61] Accordingly, it is against this background that Gilbert Kodilinye said after the limitation period has expired the paper owner who has slept on his rights will be barred from asserting them against the adverse possessor and his right will be extinguished. The trespasser/squatter will then have the best claim to the land and be able to acquire a good title which can no longer be disturbed.

ANALYSIS

[62] The defendants are claiming title by adverse possession and so they have the burden of establishing their own possession of the property by the evidence presented. Their evidence must demonstrate that the two criteria mentioned were present for a minimum of twelve years before the claimants began to assert their superior title.

[63] The first sub- issue to be resolved therefore, is the defendants' status in relation to the land, specifically, when they were put in occupation and whether they remained in occupation.

[64] The contention of the claimants is that for the entire period of the defendants' occupation, it was with the consent of the previous owners. The defendants' case is at best conflicting in relation to when exactly the defendants assumed occupation of the disputed property. There is evidence before me in this trial from

the 1st defendant that her occupation at 12 Dillion Avenue started in or around 2001-2002. However, in her evidence in the Parish Court which is an exhibit in this trial, she told the court that she moved to the premises in 1991. I find her evidence on this point to be unreliable. The evidence of Mr Hay, one of the claimants and his witness Mr Wedderburn, is that the 1st defendant took occupation of the disputed property in 2002. They were consistent in this regard and I therefore find their evidence to be more reliable. I accept the evidence that she started living at the disputed property in 2002.

[65] In relation to the 2nd defendant, the evidence of the defendants is that he was put into occupation of the property when his grandmother, Ms. Kong, had been leased a part of the premises for herself and her family to occupy in 1986. However, the evidence given by the 1st defendant at the Parish Court which was closer in time to the events, indicates otherwise. She then stated that the 2nd defendant started living at 12 Dillon Avenue “since 1991 with his grandmother.”

[66] I have also observed that on the 1st defendant’s evidence, the 2nd defendant was not included in the members of the family who moved to the disputed property in 1986. When asked in cross- examination why the 2nd defendant was not named, the 1st defendant responded by saying, “Jonathan was always there, he go and come from my house to his grandmother’s house whom he lived with.” It seems to me that her failure to name the 2nd defendant, her son, was not a mistake or an omission. Given the evidence before me, I am of the view that the 2nd defendant was not among the persons who moved to the disputed property in 1986, but instead began his occupation in 1991.

[67] The defendants’ contention further, is that in 1991 Ms. Kong was no longer a tenant on the property as she had stopped paying rent, though their occupation continued. Mr. Wedderburn, the alleged agent of the owner, told the court that this was not so and that Ms. Kong continued to pay rent after 1991, but he stopped collecting rent in about 2003/2004 when the defendants expressed their interest in purchasing the property for themselves and their family.

- [68]** There is a deficit in the evidence on the part of the defendants as to when payment of rent had ceased and what led to this. The defendants have not provided an explanation as to what had caused Ms. Kong to stop paying rent in 1991. I find it difficult therefore to accept this evidence as true. Mr. Barrington Thompson had also indicated that his family stopped paying rent in 1991. However, given the inconsistencies in his evidence as to who was responsible for the payment of rent, I find his evidence unreliable.
- [69]** I accept the evidence of Mr. Wedderburn that it was not until around 2003/2004 that Ms. Kong had stopped paying rent. I find his evidence to be more consistent and reliable on this point. Therefore, I find that between 1991 and 2004, the 2nd defendant had lived at the disputed property under a tenancy arrangement which his grandmother had with Mr. George Best, which continued under the son Fitzroy Best.
- [70]** The 2nd defendant's evidence is that he was given permission by Mr. Wedderburn to occupy Chubby and Lloyd's room in one of the structures located on the disputed property rent-free when they left. The 2nd defendant did not remember exactly when Chubby and Lloyd vacated the property. However, the sworn evidence of the 1st defendant in the Parish Court was that Chubby and Lloyd lived at the property up to 2004. Mr. Wedderburn also testified that he had rented this room to the 2nd defendant in 2001-2002, but there is no documentary evidence to prove this. He himself seemed to have been uncertain as to when the 2nd defendant moved into the room. I therefore accept the sworn evidence given by the 1st defendant at the Parish Court that Chubby and Lloyd vacated the room in 2004.
- [71]** It is not clear on the evidence whether the 2nd defendant occupied this room as a tenant or a licensee. However, whether the 2nd defendant occupied the property as a tenant or as a licensee is irrelevant as the uncontroverted evidence is that his occupation was with the consent of Mr. Wedderburn. I have already found on the evidence that this was from 2004.

- [72] The 1st defendant also gave evidence that she received permission from Mr. Wedderburn to occupy a room on the property in about 2002, rent-free. This was accepted by Mr. Wedderburn. I find that she was a licensee from the year 2002 when she entered into occupation.
- [73] There was a challenge on the part of the defendants that Mr. Wedderburn did not have the requisite authority to grant permission. Counsel Ms. Wong argued that though Mr. Wedderburn acted as agent on behalf of Mr. Fitzroy Best and had the authority to collect rent and serve notices, no evidence was lead in relation to his authority to grant permission to occupy the disputed property.
- [74] Undoubtedly, Mr. Fitzroy Best would have been the best person to provide evidence of the extent of Mr. Wedderburn's authority. However, he was not called to give evidence and as such, reliance can only be placed on the evidence of the witnesses herein of the tasks done by Mr. Wedderburn over the years, as evidence of the scope of his authority. Based on the evidence, Mr. Wedderburn was the person who was responsible for renting both 12 and 12A since the time of Mr. George Best. It was he who collected rent from the tenants, served notices on them and was responsible for getting them out of the premises. On the evidence, as far as the disputed property was concerned, it was Mr Wedderburn whom the tenants interacted with. He was also the point man in the negotiations for the purchase of the disputed property by the defendants. His authority to carry out these tasks was accepted by the defendants, but interestingly, they do not now accept his granting of permission to occupy the property. I find that he was the agent of the Bests with the authority of fully managing the affairs of the property and therefore in all the circumstances, he was clothed with the authority to grant permission. Therefore, the permission to occupy was validly given to the defendants.
- [75] There is no evidence before this court that this permission was withdrawn at any time leading up to the fire in 2005. Mr Wedderburn was up to this time still the point man when it came to the disputed property. As such, I find that he knew what was

happening on the property and also knew that the defendants were still occupying it and that he continued to allow their occupation. It cannot be said therefore, that possession up to this time was adverse or without the consent of Mr. Fitzroy Best, on whose behalf Mr. Wedderburn was acting.

[76] I will now assess the status of the defendants after the fire up to the initiation of the claim in the Parish Court in June 2015.

[77] The undisputed evidence is that the defendants left the property in question after the fire in 2005. I cannot find favour with the argument that the defendants' return to the property after the fire was still under the cloak of this initial permission given by Mr Wedderburn. The evidence is clear that Mr. Wedderburn no longer acted on behalf of Mr. Fitzroy Best after the fire and that he had no knowledge of the happenings on the property, or of the defendants' return so as to renew his permission. There is no evidence that Mr. Best had extended this permission also. As such, the conclusion can be reasonably arrived at that the defendants' occupation of the property after their return was without any consent by Mr. Best. As such, they were squatters.

[78] The account of the parties as to when the defendants returned and if they returned together, are significantly different. The defendants say they returned in April 2007 together and the claimants' case is that the defendants did not return until about 2012 and at different times.

[79] I accept that the 1st defendant returned in 2007 and not in 2012 as is asserted by the claimants. I also accept that the defendants had returned to the property at different times. I find support for this in the sworn evidence of the 1st defendant given at the Parish Court where despite being asked more than once when was her return to the property, she maintained her response, being 2007. She also indicated that the 2nd defendant came back after her and not at the same time. There was however no evidence from her indicating when the 2nd defendant made his return. However, even assuming his return was at the same time as the 1st

defendant in 2007, as is alleged, and not thereafter, this will not assist the 2nd defendant's case as the length of time from 2007 to 2015 when the claimants had exercised their right to recover possession for the purposes of the **Limitation of Actions Act** is 8 years. As such, the requisite number of years would not have elapsed before the claimants exercised their right of entry. The 12 years of continuous possession was therefore not satisfied in relation to both defendants.

[80] In any event, I will go on to consider whether their possession was of the nature required to establish adverse possession.

[81] The defendants have set out for the consideration of the court certain acts of possession that they aver have been exercised over the disputed property since their occupation. They stated that they had done repairs to their section of the house destroyed by the fire. They said that in 2012/2013 they strengthened the house with block, steel, sand and cement and received zinc and lath (board) to do the repairs to the roof. In 2013 they erected an electricity pole for the rewiring of the house which was eventually completed in 2014. The defendants have exhibited receipts from different businesses in their effort to prove this. These receipts are all dated in either 2013 or 2014.

[82] To bolster their contention, the defendants have also asserted that they have paid taxes for the disputed property up until about 2014 when Mr. Hay began paying for same. They also relied on their attempt to purchase the property as further proof. Receipts evidencing payment towards the property tax and purchase price were exhibited in this regard.

[83] It is my opinion that this conduct does not necessarily amount to an ouster of the true owner of the property. It is not clear evidence of the defendants' intention to occupy and use the land as their own. The defendants themselves have accepted that these acts are minor in nature. In the sworn evidence of the 1st defendant at the Parish Court, she had also demonstrated that their occupation was not clear as to the requisite intention to use the land as their own. She said in that trial, "After

the fire we had to leave but we came back a wi place cause we have nowhere else to go". Therefore, I find that the defendants' return to the property was because there was nowhere else they could go and that they had done subsequent repairs to the burnt out structure on the property to make it more habitable for them to live in. It was Mr Barrington Thompson's evidence that the property was repaired to make it more habitable. I find that it was not done with the intention to use it as their own or to dispossess the true owner.

[84] The payment of the taxes also does not support this intention. On examining the property tax receipt, it is noted that it is dated May 2015 and was paid for the years 2015-2016. The defendants became aware of the claimants' purchase of the property when they were issued the notice to quit on November 13, 2014. The payment of the tax was as such done after the defendants were aware of the claimants' purchase of the property. There is also no evidence that taxes were being paid by the defendants prior to this knowledge or at least from 2004 when they had expressed their intention to purchase the property. In any event, it has long been established that payment of taxes is not necessarily evidence of ownership of land as it may be paid by anyone who desires so to do and the tax roll may actually be in the name of someone who has been disposed. See: ***Richardson v Lawrence*** (1966) 10 WIR 234.

[85] As for the defendants' attempt at purchasing the property, this does signify an intention to exercise custody and control of the property for their own benefit. However, by using this method of obtaining ownership, there is also an acknowledgement of the title of the previous owners. As such, this act was at best equivocal. In ***JA Pye (Oxford) Ltd*** the claimants sought ownership by adverse possession of land. Once the paper owner had been found, they indicated a readiness to purchase their interest. The court found that this letter contradicted an animus possidendi. Also in ***Edginton v Clark*** [1964] 1 QB 367 an offer to purchase the paper owner's interest, even if made 'subject to contract', can be a sufficient acknowledgement of his title to defeat a claim for adverse possession. Upjohn LJ said:

'If a man makes an offer to purchase freehold property, even though the offer be subject to contract, he is quite clearly saying that as between himself and the person to whom he makes the offer he realises that the latter has the better title, and that would seem to be the plainest possible form of acknowledgment.' However, 'it is not possible to lay down any general rule as to what constitutes an acknowledgment'. Whether any particular form of words amounts to an acknowledgement depends on the true construction of the document in all the surrounding circumstances'

- [86] Though this is in relation to an offer to purchase, I find that a similar position may be adopted where actual payments had been made towards the purchase price of the property.
- [87] I also find that the defendants' possession with and without the consent of the owner was not exclusive or single as there were tenants of the owner also residing on the property. The property was considered a tenement yard before the fire and remained as such after the fire. The defendants acknowledged there were tenants on the property even after the fire, but have never once claimed to have benefitted from the rent from these tenants. They have instead continued to operate with the other tenants under the tenement yard regime that was introduced by the previous owners. This behaviour is not inconsistent with an enjoyment of the soil by the original owner for the purposes which it was intended to be used which is an important part of the concept of adverse possession.
- [88] In this regard, the act of possession falls short of the requirement laid down in **Powell** and affirmed in **JA Pye (Oxford) Ltd**. The defendants have failed to establish the requisite intention to possess.
- [89] The defendants, I find, have therefore failed to satisfy the elements of adverse possession. Accordingly, the claimants are well within their rights to recover their property.
- [90] Accordingly, I make the following orders:

ORDERS

- 1 The claimants are entitled to possession of the property at 12 Dillion Avenue Kingston 5, registered at Volume1491 Folio 85 of the Register Book of Titles.
- 2 The defendants shall vacate and deliver up possession of the property at 12 Dillion Avenue, Kingston 5, to the claimants within 90 days of the date hereof.
- 3 Costs to the claimants to be taxed if not agreed.

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G. Henry McKenzie
Puisne Judge