



[2022] JMSC Civ. 118

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN THE CIVIL DIVISION  
CLAIM NO. 2010 HCV 01615**

<b>BETWEEN</b>	<b>JISCO ALPART JAMAICA</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MONICA WHITE (By Executor and Representative Horace Gayle)</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

**Walter Scott QC and Anna Gracie instructed by Michalene Lattore for the claimant**

**Annishka Biggs and Karen Scott instructed by Raphael Codlin and Co, for the defendant**

**Heard: July 5, 6, 7,8 2021 and May 24, 25, 26 and July 22, 2022**

**Unregistered land – Dispute as to ownership of land – Burden and standard of proof  
– Affirmative defence – Claim for recovery of possession – Claim for trespass –  
Adverse possession as a defence – Whether adverse possession applies to  
unregistered land – Credibility between witnesses – Limitation rights and  
unregistered land – Possession of vacant land – When does time start to run  
against the claimant – Factual Possession – Intention to exclude others – Fencing  
and cultivating vacant land – Payment of taxes by the claimant – Payment of taxes**

**by the defendant's mother – Series of possession – Whether possession was disturbed – Future use of the land – Acknowledgment of title**

**ANDERSON, K.J**

## **BACKGROUND**

### **The claim**

- [1] The claimant filed a further amended claim form on September 10, 2014, for trespass and/or recovery of possession of all those parcels of land, being section 1 part of Waltham also known as the grove in the parish of Manchester containing by survey 16,187.425 square meters and section 2 part of Waltham also known as the grove in the parish of Manchester containing by survey 2,868.251 square meters (hereinafter referred to as: '*the disputed land*'/ '*the disputed property*').
- [2] The claimant contends that it acquired the disputed land in 1956 for residential development and from that time to the date of the filing of this claim in 2010, it has enjoyed, continued and undisputed possession of the disputed land and paid property taxes. The claimant avers that it is common knowledge to all persons in the community that the disputed land is owned by the claimant.
- [3] The claimant contends that the disputed land has been unlawfully entered upon and occupied by the defendant, her servants and/or agents without any legal or equitable title or interest in same, and the defendant has failed to deliver up possession thereof, despite notice from the claimant.

### **The defence**

- [4] The defendant filed an amended defence on October 22, 2014. The defendant contends that the disputed land was devised to her father, whereafter, she became the successor in title and the claimant could not have purchased the disputed land from someone who did not possess the title to sell it.

[5] The disputed land was always in the undisturbed possession of her family and she is the successor in title. The claimant has no authority to enter into any sale as the defendant has not authorized it.

### **Historical background**

[6] It is agreed between the parties that in order for the court to arrive at the decision as to who is the owner of the disputed land, a careful analysis needs to be undertaken as it relates to the historical background of this claim. From that information, the court will be equipped to engage into a discussion as to the relevant issues arising and ultimately, who is the owner of the disputed land.

[7] On January 4, 1924, a deed of indenture was entered into by Joseph Anderson, wherein he conveyed to Mr. Alexander Grant DaCosta 10 acres of lands situated in Waltham in the parish of Manchester, known as Anderson Run.

[8] On November 8, 1947 A. Grant DaCosta sold 2 acres 3 roods and 30.8 perches of land of Anderson Run in the parish of Manchester to Mr. George Elliot for the sum of £117, of which £110 was already paid and the balance payable on completion.

[9] On August 11, 1947, Mr. Alexander Grant DaCosta made his last will and testament. By this document, he appointed Charles Mullings and Allan Archibald White as his executors. He devised to Archibald White and his wife for their lifetime and upon their death to their daughters: Hortense, Violet and Monica to share and share alike all that parcel of land know as Pitter Town along with the balance of land known as "Anderson Run" save and except the '*route and therefrom a. that portion marked off and sown to the said Archibald White to be said to George Elliot and b. that portion to be sold to Mr. Adam.*'

[10] In March 1948 Mr. Grant DaCosta sold 1 8/10 acres part of Anderson Run to George Elliot. The sale price was £60.00 of which a deposit of £30 was received.

- [11]** On July 5, 1956 Mrs. Mabel Elliot, the widow of George Elliot, entered into an Option agreement with Mrs. S. Latrielle granting her the option to purchase approximately 3 acres of land together with the right which the grantor shall have to purchase an additional acreage of approximately 2 acres, 3 roods and 30.8 perches part of Anderson Run from A Grant DaCosta by memorandum of sale dated November 8, 1947 and 1 8/10 acres of Anderson Run from A Grant DaCosta by memorandum of sale dated March 1948. The option was exercisable by notice in writing to Mrs. Elliot or to Dunn Cox and Orrett, for purchase price of £8000.
- [12]** On July 14, 1956 a letter was written from Dunn Cox and Orrett to Kaiser Bauxite Company wherein receipt of the option money of £1 was acknowledged. On July 27, 1956, Mrs. Elliot through Dunn Cox and Orrett, notice was given to Ryle Davis that the property was now sold to Kaiser Bauxite Company.
- [13]** On February 6, 1957, Dunn Cox and Orrett, wrote to Kaiser Bauxite Company advising of the transfer of land registered at Volume 381 and Folio 51. Kaiser responded to said letter on February 12, 1957 promising to pay the balance purchase price.
- [14]** On March 19, 1957 a follow up letter was addressed to Dunn Cox and Orrett as it relates to the assignment of rights under the memoranda of sale.
- [15]** Grant of Probate was granted to Charles Mullings in the estate of Alexander Grant DaCosta on April 21, 1959. Allan Archibald White died on August 6, 1955.
- [16]** In May 1961, Kaiser Bauxite Company wrote to the attorneys for the estate of Alexander Grant, McGregor and Williams concerning the status of the sale. On June 6, 1961, Kaiser wrote to McGregor and Williams that Naomi White was at the point of building on land belonging to Kaiser. On September 27, 1961 Mr Williams wrote that Naomi White and her daughters had acknowledged that they had no right to the land in the second parcel sold by Mr. DaCosta to Mr. Elliot, a letter was purportedly signed to that effect.

- [17] The claimant wrote to McGregor and Williams on October 2, 1961 advising that it is making arrangement for proper boundaries and fences to be in place.
- [18] There were correspondences between McGregor and Williams and the claimant between November 1961 and March 1968 concerning the disputed property and the pending title.
- [19] In 1970s, the Whites applied to bring lands under the operation of the Registration of Titles law.
- [20] On January 23, 2003, Mr Glendon Newsome a Commissioned Land Surveyor prepared a survey plan wherein he visited the area on June 12 and 26, 2002. The plan discloses that section 1 contains by survey 16, 187.425 square meters (3.9 acres) and section 2, 2,868.251 square meters (0.71 acres)

## **EVIDENCE**

### **The claimant's case**

- [21] The claimant led evidence through three witnesses, namely: Frank Ross, Carlton Maxwell and Glendon Newsome.

### **Frank Ross**

- [22] Frank Ross led evidence that he is the Lands Manager at the claimant and has been employed there, since 1993. In or around the 1950, Alpart was a partnership between Reynolds Metals Company, Kaiser Bauxite and Anaconda which traded as Alumina Partners Jamaica. He avers that the claimant paid £8000 for the property. There was no receipt.

### **Carlton Maxwell**

- [23] Carlton Maxwell led evidence in chief that he was the former land Superintendent at the claimant. He started working there in 1994. As part of his duties, he was to be aware of all properties held by the claimant and to visit the lands in the

claimant's possession, which included the disputed land. He noted that during his tenure, he visited the disputed land on many occasions and during said visits, he had no cause to believe there was any dispute as regards the claimant's possession.

[24] He had never seen anyone on the land. The land was pastured but there was no sign of animals or crops. He avers that though he was never in charge of leasing, he believed the land was leased by a neighbour Mr. Shirley Buchannan.

[25] During his tenure, he commissioned the survey which was done by Glendon Newsome. The lands were held for residential needs, and there was no need to survey same until 2002, when a purchaser was identified.

[26] He gave evidence that to ascertain ownership of properties, he would look at the documents kept by the claimant. The company kept a detail mapping which was prepared by the claimant, he would look at said maps to ascertain the location of properties owned by the claimant.

[27] He stated that he visited the disputed land approximately two (2) or three (3) times and on those visits, he looked, and had spoken with other adjoining owners. He was unable to say whether Shirley Buchanan's land was beside the disputed land.

[28] He later gave evidence that he was unable to say whether Mr. Buchannan was beside the disputed land because there were two (2) separate entry points and though Mr. Buchannan was known to him and he visited his adjoining property, it is not the same entry point for both properties.

### **Glendon Newsome**

[29] Glendon Newsome is a Commissioned Land Surveyor as was requested to survey the disputed land on May 29, 2002. He then prepared notices of survey in the prescribed manner, under **the Land Surveyors Act** and delivered them to adjoining owners including the defendant, Monica White on June 12, 2002.

[30] On both occasions when he attended the disputed land, there was no objection raised by adjoining land owners or any other party. While he was conducting the survey he saw long standing fruit trees. There was no evidence of lands being tilled or that it was used for farming at that time.

### **Defendant's case**

[31] The defence led evidence in this case.

### **Monica White**

[32] The defendant's statements were tendered as hearsay, she having died prior to this trial. In those statements, it is stated that since 1960 she has been in possession of the disputed land and continued to be in possession until the filing of this claim. She noted that her mother paid taxes on it during her lifetime and she died in 1987. She avers that she would give the land to men to work, plant various crops and ground provisions thereon. They also raised livestock on it.

[33] The land that is owned by the claimant is not the disputed land, that land was sold to Shirley Buchannan a former employee of the claimant.

[34] It was in 2009, that the claimant started to aver that the disputed land was theirs.

[35] She has never signed any letter that the land was not hers nor did she believe that her mother or sisters did. The land was fenced by her father and Mr. DaCosta many years ago and that fence remains intact to date.

### **Violet White**

[36] She led evidence that she is the sister of the defendant, she grew up knowing the land to belong to her family, it was used to plant trees and rear animals. No part of the land was sold.

[37] She admitted that she was a child when the alleged transactions occurred and is unable to speak to the alleged option agreement and sale.

### **Horace Gayle**

[38] According to Mr. Gayle's evidence, the Whites have always occupied the disputed land. He is very familiar with the disputed land as he visited the Whites at the property from he was a child and has walked, played and ate fruits from the property.

[39] The Whites would have persons on the disputed land, clearing it and planting quick crops as well as fruit trees. There was no dispute about the disputed land until 2009.

### **Hortense White**

[40] Her witness statement was tendered as hearsay. She has averred that from she was a child, she knew the disputed land, to be family land. Her father would also saw down trees and make lumber.

### **Robert Wilson**

[41] Robert Wilson led evidence that he was commissioned to carry out a survey on July 14, 2015. Based on his survey, the Whites were the owners of the disputed land.

### **SUBMISSIONS**

[42] The claimant contends that from the documentary proof submitted to the court, it is clear that Kaiser Bauxite, in reliance of the option to purchase, had purchased the lands in that option, which were the lands sold to Shirley Buchanan and the disputed land. The fact of the option was exercised is also evidenced by the correspondence between the attorney for the estate of Alexander Grant and the claimant.

[43] Notwithstanding that Mrs. Elliot did not have probate at the time when she entered into the option, this may be ratified. The claimant contends that the post



persuasion conduct, when considered in the entire context of this case, indicates that the claimant had indeed purchased the disputed land.

- [44] The claimant contends that at all times the Whites have understood that the disputed property is not theirs. This is why they registered all the property, except the disputed land. The act of bringing all other property under the operation of Registration of Titles Law shows that they knew the disputed property was not theirs and accordingly they cannot now, assert that it is theirs.
- [45] The claimant claims that the defence of laches as asserted by the defendant ,does not apply to this claim. This was not stated in the defence and cannot be relied on.
- [46] The claimant contends that when the surveyor Mr. Glendon Newsome attended the disputed property on June 12 and 26, 2002, he did not see any person there, or any other sign of occupation of same.
- [47] The issue of adverse possession does not apply. The disputed land being unregistered cannot be subject to a defence of limitation rights.

## **Defence**

- [48] The defendant contends that there is uncertainty whether the lands in the memorandum of March 1948 was sold, this being so, as there is no date stipulated on that document. Accordingly, on the face of the document no inference can be drawn as to whether a sale was contemplated or completed.
- [49] The option agreement is not effective in transferring title. Further, the option was exercised as it relates only to the title registered at Volume 381 and Folio 51 of the Register Book of Titles. The purchase price does not extend to the disputed land.
- [50] The evidence does not substantiate the assertion that Mabel Elliot inherited the property from her husband on his death who purportedly purchased it from Grant DaCosta. Also, when she entered into the option agreement, she did not have the

right to sell the lands in question and she could not therefore sell a right that was not legally hers to give.

- [51] There is also no sufficient nexus between S. Latrielle who entered into that agreement and Kaiser. It is not established on the evidence how they purchased it, so as to allow them the right to seek its enforcement.
- [52] The defendant contends that the claimant cannot show that it purchased the disputed land and is unable to show any document in writing to satisfy **Section 4 of the Statute of Frauds**, or to show any part performance.
- [53] The defendant contends that the claimant was not in undisturbed possession of the disputed land. Even if the claimant paid property taxes, the said taxes were not paid, as owners of the disputed land.
- [54] The fact that the surveyor did not see anyone does not change the fact of ownership. It is contended that the land was a vacant land and it was not uncommon to enter thereupon and not see anyone.

## **ISSUES**

- [55] Though the parties have presented the case initially to be convoluted, upon examination by the court, it is evident that the issues are not as difficult as counsel have presented them. The following issues arise for determination on this claim:
- a. Can a claim for adverse possession be made in respect of unregistered land?
  - b. Does the defendant's defence of adverse possession, properly serve, as a matter of law and fact, to avail the defendant in effectively disputing and rebutting the claimant's claim?
  - c. Are the memoranda of sale, valid in law?

- d. Was the option agreement, lawfully entered?
- e. Was the option agreement exercised?
- f. Who is the owner of the disputed property?

## **THE LAW AND ANALYSIS**

### **Burden and standard of proof**

[56] The burden of proof in matters such as these rests with the person who has instituted the claim, which is founded upon various allegations that are being vigorously disputed. Hence the well-known phrase, '*he who asserts must prove.*' The claimant has brought this claim and it therefore, has the burden of proving its case in that regard and the requisite standard of proof is, as applied, proof on a balance of probabilities.

[57] The learned authors of **Murphy on Evidence (12<sup>th</sup> ed.)** state at 4.5:

*'The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue, and to whose claim or defence proof of the fact in issue is essential... If the claimant fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. Since the claimant affirmatively asserts his claim, he bears the burden of proving the claim, and the defendant assumes no legal burden of proof by merely denying the claim. However if the defendant asserts a defence which goes beyond a mere denial (sometimes referred to as an „affirmative defence“) the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognized by the fact that it raises facts in issue which do not form a part of the claimant's case...It is a sound rule, therefore, that every party must prove each necessary element of his claim or defence.'*

[58] The defendant having averred the defence of being in undisturbed possession, goes beyond denial of the claimant's claim. This is in law referred to as an affirmative defence. She then has the burden of proving such undisturbed possession and must therefore prove every element necessary, on a balance of probabilities.

### **The defendant's statement of case**

[59] **Section 48 (d) of the Judicature (Supreme Court) Act** provides that:

*'The Court and every Judge thereof shall take notice of all equitable estates, titles and rights, and all equitable duties and liabilities, appearing incidentally in the course of any proceeding, in the same way as the Court of Chancery would have done in any proceeding instituted therein before the passing of this Act.'*

[60] Although the term “adverse possession” was not used in the defence or witness statements of the defence, that does not preclude the court from finding that it forms part and parcel of the defendant’s statement of case. From the defendant’s statement of case, it is clear that one of the plinths on which the defendant placed her case is her “undisturbed possession” of the disputed land. Also, during oral closing submissions, counsel for the defendant raised the issue of adverse possession, which the claimant’s counsel responded to. The defendant always contended that she and her family has possessed the disputed land for a number of years.

[61] In the circumstances, from the statement of case, the court notes that a viable defence for adverse possession may be maintained by the defendant and will thus treat with same as though it was expressly pleaded in the defence.

### **The issue of credibility**

[62] In assessing credibility, as between two (2) witnesses, one of whom is telling the truth in important respects and the other witness, who is not doing so, as regards those same matters, it is always important for the court of first instance to consider contemporaneous documents, probabilities and possible motives. The Privy Council made this clear, in the case: **Villeneuve and another v Gaillard and another – [2011] UKPC 1**, per Ld. Walker, at paragraph 67:

*'Furthermore it is implicit in the statement of Lord Macmillan in Powell v Streatham Manor Nursing Home [1935] AC 243 at p.256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. **Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to 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.** *It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.* [Emphasis added]

See also: **Armagas v Mundogas SA (The Ocean Frost) – [1986] 1 AC 717**, at page 757, per Dunn, L.J. This court has adopted the approach as suggested immediately above, in assessing the parties' respective evidence and the evidence of the claimant's witnesses. Only the defendant gave evidence in support of his defence to this claim.

[63] In this case, given that both parties are at odds as it relates to possession of the disputed land, the issue of credibility is live. The court must therefore examine each witness' evidence within the context of the independent documents before the court, their possible motives and the overall probabilities of their evidence.

### **Approach**

[64] The court has chosen to deal with the issue of adverse possession first. This is so, because even if the claimant is successful in proving their ownership of the disputed lands as acquired by virtue of that option agreement, by the operation of adverse possession, such title may be defeated by a claim of adverse possession. In that light, it is prudent, in the interest of dealing with matters effectively, to first address the issue of adverse possession and from the court's conclusion of that issue, it may deal with the other issues.

### **Adverse possession as a defence**

[65] Parties may rely on adverse possession as a cause of action as well as a defence to matters before the court. This was made clear in the Court of Appeal's decision of **Winnifred Fullwood v Paulette Curchar [2015] JMCA Civ. 37** at paragraph 94 by McDonald-Bishop JA (Ag.) (as she then was) on behalf of the presiding panel, of three justices of appeal. That case concerned a matter brought for

recovery of possession and the court noted that the appellant is entitled to rely on limitation right as a shield to the claim brought against her.

[66] The defendant is entitled by law to rely on limitation rights as a defence.

### **Limitation of Actions Act**

[67] **Section 3 of the Limitation of Actions Act (LAA)** bars the right to recover land, either by entry or by action, after 12 years:

*'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.'*

[68] The consequence of the expiry of the limitation period prescribed by **section 3 of the LAA** is set out in **section 30 of the LAA**:

*'At the determination of the period limited by this Part to any person for making an entry, or bringing an 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.'*

### **Limitation rights and unregistered land**

[69] A preliminary question which is fitting to be addressed by this court is whether the provision of the **LAA** are applicable to unregistered land.

[70] The claimant's counsel in his closing submissions averred that adverse possession is inapplicable to this claim because the relevant provisions of the **LAA** do not refer to unregistered land. He based this representation on the reading of **Recreational Holdings v Lazarus Judgments** ( [2016] UKPC 22, [2014] JMCA Civ 34 and [2012] JMSC Civ 165). The court notes that such an averment by the claimant's counsel is incorrect. That is incorrect because a careful reading of the **Recreational Holding judgments** reveals that none of the series of judgments refer in any part, to unregistered land. The case spoke specifically to unregistered

interests on registered titles. Unregistered interests cannot be equated with unregistered land.

[71] From a reading of the **LAA** it is noted that there is no specific mention that the Act only relates to registered land. **Section 2 of the LAA** defines land as:

*'land" shall extend to messuages and all other corporeal hereditaments whatsoever, and also to any share estate or interest in them, or any of them, whether the same shall be a freehold or chattel interest;'*

[72] In that light, the definition of land in the **LAA** includes registered and unregistered lands. Further, there is no provision in **LAA** or any other Act including the **Registration of Titles Act** which stipulates that the **LAA's** provisions are only applicable to registered lands. Accordingly, the provisions of the **LAA** are wide and they stand on their own and apply in respect of the disputed land.

[73] The view that adverse possession applies to unregistered land, is also supported by the House of Lords' judgment in **Pye (Oxford) Ltd and another v Graham and another - [2003] 1 AC 419** at page 426, as well as Sykes J (as he then was) in **McCoy v McCoy [2012] JMSC Civ 80**, at paragraph 12.

### **Establishing Adverse Possession**

[74] Panton P summarized the pertinent principles of **Powell v McFarlane (1977) 38 P & CR 452** as it relates to adverse possession, in the decision of **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** at paragraph 81 as follows:

*'(a) The two elements necessary for legal possession are (1) a sufficient degree of physical custody and control ('factual possession'); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess') (para [40]).*

*(b) Factual possession signifies an appropriate degree of physical control, that is, single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. The question of 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. What must be shown is that the person in possession 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 (para. [41]).*

*(c) The intention required is not an intention to own but an intention to possess, that is, an intention in one's own name and on one's own behalf to exclude the world at large, including the owner of the paper title if he is not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow (paras [42]-[43]).*

*(d) The sufficiency of the squatter's possession depends on the intention of the squatter and not that of the paper owner of the land (para. [45]).*

*(e) The willingness of the squatter to pay the paper owner for the use of the land if asked is not inconsistent with his being in possession in the meantime (para. [46]).'*

## **Vacant land**

**[75]** In **Leigh v Jack (1879) 5 Ex.D. 264** at page 274, England's Court of Appeal, noted that in deciding whether there has been a discontinuance of possession, the nature of the property must be looked at. At page 272, the following is noted:

*'It is difficult to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a house; if any chair or table, or other small article of furniture be left, there is strong evidence of an intention that there shall be no discontinuance of possession; but it is possible to conceive a case of discontinuance of possession as to a piece of land where the former owner does nothing to it for the space of twenty years. In the present case, if the plaintiff and her predecessors had done nothing for twenty years to Grundy Street and Napier Place, it might have been possible to argue that there had been a discontinuance of possession.'*

**[76]** From the learning above, possession involves a sufficient degree of occupation or physical control, coupled with an intention to possess. In the circumstances, the disputed land being vacant land, the test for possession is dependent on that major factor and the respective acts exercised by the parties, will be considered in that light.

## **When does time begin to start run against the claimant**

**[77]** In order for the defendant to establish adverse possession, it must be shown that there was absence of possession either:

*1. the paper owner was dispossessed of the disputed land or*



*2. The paper owner vacated, abandoned or got off of the disputed land and left it vacant.*

On that absence of possession, the adverse possessor then assumed possession of the disputed land for the statutory period of 12 years. See in that regard: **Sampson Owusu in Commonwealth Caribbean Land Law (2007), at page 276.**

**[78]** On the facts of this case, there is a challenge as to whether the claimant ever took possession of the disputed land. The evidence before the court suggested that some sale may have been contemplated by the claimant for the disputed land between 1956 and 1968. During this period of correspondence, it is to be inferred that the claimant took possession of the disputed land, this inference can be drawn from:

- i. Correspondence regarding the status of the sale.
- ii. Correspondence to the attorney for Mr. DaCosta advising that there is an encroachment by the Whites.
- iii. Correspondence regarding plans to put boundaries in place.

**[79]** In the opinion of this court, those acts, taken together, on a balance of probabilities allows the court to draw the inference that the claimant took possession of the disputed property.

**[80]** The exercise of examining the respective acts done by each party in the context of the time period of the case is important. From that exercise it is noted that between 1968 and 1990s, on the claimant's evidence, interaction with the disputed property is not established. This then, allows the defendant to step in and for the court to examine the respective acts done during that period, to see whether they satisfy the legal requirement of possession.

**Possession by the defendant**

**[81]** As regards the possession of the defendant, the evidence speaks to the general occupation of the disputed property. It must first be decided whether the evidence given by the defendants' witnesses and by the deceased - Monica White, the latter of which was admitted as hearsay evidence is credible as to occupation/possession of the disputed property by members of the defendant's family, over a period of time. Having carefully considered and listened to their evidence and to the fullest extent possible, also carefully considered the manner in which such evidence was given by them on the witness stand, I find the evidence given by the witnesses to be credible. As it relates to potential possession from 1968-1990 their evidence was, that the defendant:

- i. Paid taxes for the disputed land.
- ii. Allowed men to work on and plant various crops on the land.
- iii. Occupied the disputed land. They would have persons clearing and planting quick crops such as yam, corn and peas.
- iv. Raised animals on the disputed land.

**[82]** Given that possession is a question of fact, for the relevant time period, the court must then weigh the substance of these assertions to see whether they amount to possession for the time period, on the part of the person in court, who has asserted such to be so, who/which has the burden of proof.

### **Fencing**

**[83]** The defendant has averred that it was her father who fenced the disputed property and said fencing was relied on by them to keep the world out as the property was, at all material times, theirs.

[84] Per **Halsbury's Law of England 4<sup>th</sup> ed. paragraph 769**, fencing is often the best evidence of possession of surface land. The fencing of property by someone indicated that said person treated with and continued to treat with that property as if it is his/her own.

[85] It is to be noted that on the evidence, Mr. White died in 1955. That was before the defendant averred that she had gained possession of the disputed land.

### **Cultivation**

[86] The defendant has given evidence that over time, her family members have cultivated several crops on the disputed land. In **Re MacEachern and MacIsaac (1997) 81 D.L.R (3<sup>rd</sup>) 20**, it was found that pasturing of cattle was not considered sufficient to keep the statute running in favour of the squatters. At page 28 the court noted that there was no evidence of any cropping of the land, fencing of the land or any other acts which might give possessory title.

[87] The evidence of the defendant's occupation of the property by raising animals and planting various crops were not disputed by the claimant. Given the nature of the activities upon the land, the court is satisfied that the act of planting various crops, and allowing others to use the land, was not a mere temporary or insubstantial act, to cause time not to run in her favour, as was the case in **Re MacEachern and MacIsaac.(op.cit)**

[88] Further, although the fencing was not done, in the opinion of this court, on behalf of the defendant, the fact of the fence being present on the land, coupled with the activities being done thereon, is to my mind sufficient of an exercise of factual possession and an intention to exclude others. Taken together, these acts served notice to the world at large and moreso, to the claimant, that albeit that the fence may not have surrounded the entirety of the disputed property and did not effectively serve to exclude others from the disputed property, it would have caused the claimant to have notice that someone was treating with at least a portion it seems, of the disputed land as their own. This court though, has not

relied on the fencing of the disputed property by Monica White's father, as sufficient evidence, in and of itself, of undisturbed occupation of the disputed property, by members of the defendant's family. Instead, this court has considered same, in conjunction with the other evidence of undisturbed occupation and actually, even in disregard of the fencing, has concluded that the defendant and members of her family, apart from her father, have had undisturbed occupation of the disputed property for the relevant time period, under the **LAA**.

### **Payment of taxes**

**[89]** In **Richardson v Lawrence (1966) 10 WIR 234**, at pages 238 and 239 it is noted that payment of taxes does not create an interest in land, nor is it necessarily evidence of ownership of land, as taxes 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 dispossessed. In that light, payment of taxes, though important is not decisive of title. It needs to be looked at in conjunction with the other evidence of possession.

**[90]** Both the claimant and defendant in seeking to bolster their respective contentions, have asserted that they have paid taxes for the disputed property. The claimant and the defendant have both exhibited copies of tax receipts. The tax receipt exhibited by the claimant shows payment of taxes from 2000-2009. The defendant exhibited tax receipt for 1971. The defendant has noted that while her mother was alive, she paid property taxes for the disputed land until her death in the 1980's.

**[91]** The court noted that on the tax roll, the claimant is noted to be the registered tax payer for the disputed land. This by itself does not establish ownership of the disputed land. Further, the fact that taxes were paid in 2000's, by the claimant does not satisfy the court that the claimant was in possession of the disputed lands.

### **Series of possession**

**[92]** The learned authors of **Elements of Land Law**, fifth edition, state the same principle at paragraph 9.14 of their work:

*'For the purposes of establishing the expiration of the limitation period in unregistered land, immediately consecutive periods of adverse possession may be aggregated: the statutory period can be accumulated by possession on the part of a series of squatters.'*

[93] Kay LJ in **Willis v Earl Howe [1893] 2 Ch. 545** at page 553, specified that:

*'A continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner.'*

[94] In this case, the defendant not only relies on possession of herself but also of her agents and mother, as also, the fence erected by her father. Accordingly, since it is that neither Naomi White or any agent of the defendant, is/are claiming against the disputed land, the relevant acts which they have done with respect to the disputed land, may then be relied on by the defendant as part of the **LAA**, as time running against the claimant.

[95] This court accepts that from the 1968, the Whites have collectively used the lands as though in law, it was theirs. Though the land was vacant, their acts, are possessive, in the opinion of this court, so to cause this court to conclude that factual possession was being exercised by the defendant.

### **Intention to exclude others**

[96] In addition to factual possession, from the evidence given, there was an intention to exclude others. Though these acts of possession were exercised by the defendant, believing she was the holder of the disputed land, this belief (potentially mistaken) is immaterial. See in that regard: **Powell v McFarlane (op. cit)** and **Littledale v Liverpool College [1900] 1 Ch 19**. The fact remains that her occupation was adverse to the interest held by the claimant.

### **Purpose of the land**

[97] The claimant has given evidence that the land was acquired for future residential purposes. It must then be examined to what extent if any, that intended future use, affects the ability of the defendant to exercise possession over the disputed land.

- [98] In **Buckinghamshire County Council v Moran [1990] 1 Ch 623**, the council had acquired a plot of land for a proposed road. Said land was left undeveloped. The squatter then secured a complete enclosure secured with lock and chain. The question to be answered by that court was whether the future use of that land could affect the ability of the squatter to adversely possess it?
- [99] The court held that where the squatter had both factual possession and an intention to possess, any plans that the owner might have had for the future use of the land were irrelevant. In that regard, the claimant's acquisition of the land for future residential purposes, was of no moment. It did not change that fact that the defendant had possession of the disputed land for the relevant period. The claimant's future, expected residential use of the disputed property, does not serve to prevent the adverse possession raised by the defendant, from being a successful defence.

### **Acknowledgement of title**

- [100] Learned author J G Riddall of the text **Land Law**, 6<sup>th</sup> ed noted at page 473 as follows as regards acknowledgment of title:

*'If S, being in adverse possession of O's land, acknowledges that O is the owner of the land (either expressed or impliedly) and the acknowledgment is in writing, signed by S, and addressed to O or his agents then S period of adverse possession ends.*

*If S thereafter remains in possession, O's title will become statute barred at the expiry of 12 years from the date of the acknowledgment.'*

- [101] On the claimant's evidence, Naomi White and her daughters had, on advice of their attorneys been told that they had no right to the disputed land. They also had signed a letter to this effect in 1961. That letter was not placed into evidence. On the authority above however, taken at its highest, even if that letter was signed by the Whites, including the defendant, that letter having allegedly been signed in 1961, the defendant and her agents continued in possession and occupation of the disputed land, beyond 1961, as the court accepts. In that event, even if the defendant had acknowledged the claimant's title, in 1961, that acknowledgement

does not serve to bar the defendant's defence of adverse possession, from being successful in rebutting this claim.

### **Was possession disturbed?**

**[102]** In light of the factual substratum of this case, the question must then be asked whether the defendant's possession was disturbed by the claimant.

**[103]** There is no evidence of the claimant taking act in relation to the property between 1968 and at the very least the 1980s. There was evidence led by Mr. Maxwell that he was employed to the claimant in 1994 and from time to time he visited the disputed property. There is also evidence led by the claimant that they entered upon the property in 2002 and did a survey. Are these acts disturbance of the defendant's possession?

**[104]** The learned authors of **Halsbury's Law of England 4<sup>th</sup> ed., paragraph 777**, note as follows

*'For the purposes of the Limitation Act no person is deemed to have been in possession of land by reason of having made a formal entry on it. Therefore, if land is in a trespasser's possession, the rightful owner is barred at the end of twelve years even though he may from time to time during that period have made entry on the land in assertion of his title, unless any such entry amounted to resumption of possession of the owner.'*

**[105]** In **Doe D Baker v Coombes (1850) p CB 714** the court found that the acts of entering the subject property, removing a stone from a hut, and removing a portion of fence were insufficient acts, so as to disturb possession of an adverse possessor.

**[106]** From the case above it can be deduced that asserting ownership is one thing, disturbing occupation is another thing. The evidence indicates that the claimant had asserted ownership of the land through surveys in 2002, but the defendant's occupation was undisturbed, from 1968. This is why ordinarily, to put trespassers out of occupation, owners exercise self-help under the law and forcibly disturb

occupation. Merely asserting ownership of property cannot be disturbance of occupation. That is an assertion, but not a disturbance of occupation.

**[107]** Additionally **Solling v Broughton [1893] AC 556 PC**, it was held that the onus was on the appellants, who were caveators in possession to show that the applicant's title had been defeated - that is, that his entries on the land when vacant within the twenty years had been ineffective - in other words, had not been made animo possidendi, or had been made after his title had been extinguished.

**[108]** Where the land is vacant, and the title owner visits same, albeit, when the adverse possessor is not present that may serve to cause time to stop running and be deemed a formal re-entry.

**[109]** Taken at its best, the court having found the witnesses to be credible, believe that Mr. Maxwell visited the property two to three times and on his observation he saw no one, from 1994. These visits though, took place in excess of the 12 years from the claimant's last relation with the property in 1968. They cannot then serve as a formal re-entry or disturbance of the defendant's occupation of the disputed property, in the claimants' favour.

### **Title by adverse possession**

**[110]** The defendant having exercised possession and intention to possess the disputed land from the very least 1968 and 12 years beyond, the person holding title (whether the claimant or not) cannot be said to hold title to the disputed property from 1980 onwards.

**[111]** This court accepts that from, at the latest, 1968 and onwards in time, the Whites have collectively used the lands as though in law, it was theirs. Though the land was vacant, their acts, are possessive in the opinion of this court so to cause this court to conclude that factual possession was being exercised by the defendant, as well as an intention to exclude others.



## **CONCLUSION**

[112] At least from 1980, being 12 years from the date the claimant exercised possession of the disputed land, title to the disputed land was extinguished in favour of the defendant. Title having been extinguished, notwithstanding the different acts done by the claimant, could not be re-vested in the claimant merely by re-entry on the disputed land. That is so, because, from 1968 up until the date of filing this claim, the defendant and/or members of her family, have continued in open and undisputed possession of the disputed land.

[113] In the final analysis, the court means no disrespect to the attorneys who have submitted extensively on the other issues which the court had outlined earlier. Based however on the court's settled position, as it relates to the issue of adverse possession above, there is no need to delve into those issues.

## **DISPOSITION**

[114] In the circumstances the orders are as follows:

- (1) The claimant's claim for recovery of possession and/or trespass is unsuccessful;
  
- (2) The defendant is the owner of all those parcels of land, being section 1 part of Waltham also known as The Grove in the parish of Manchester containing by survey 16,187.425 square metres and section 2 part of Waltham also known as The Grove in the parish of Manchester containing by survey 2,868.251 square metres.
  
- (3) Arising from the defendant's undertaking, in order No.1 of this court's order dated July 28, 2010 and the claimant's undertaking

as to damages as set out in Order No. 2 of that same order, this court shall hold an enquiry as to damages, if any, which may be awarded in favour of the defendant, arising from this claim having been adjudicated on, in favour of the defendant.

(4) The costs of this claim are awarded in favour of the defendant and said costs shall be taxed if not sooner agreed.

(5) The defendant shall file and serve this order.

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