[2017] JMSC Civ. 100

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 02014

BETWEEN	**MICHAEL EMANUEL JOHNSON**	**CLAIMANT**
AND	**FREDRICA EUNICE CROOKS**	**DEFENDANT**

IN OPEN COURT

Mr. Mikhail Williams instructed by Taylor Deacon & James Attorney-at-Law for the Claimant.

Dr. Delroy Beckford instructed by Samuel Beckford Attorney-at-Law for the Defendant.

Heard: March 2, March 27 & July 6, 2017

Recovery of Possession - Trespass - Encroachment - Reputed Boundary - sections 3, 4, 27, 30 & 45 of the Limitation of Actions Act - Acquiescence - Concealment by Fraud - Mesne Profits

STEPHANE JACKSON-HAISLEY, J. (AG.)

[1] The Claimant Michael Emmanuel and the Defendant Fredrica Crooks are owners of adjoining properties which form part of Keystone Farm called Keystone Heights in the parish of Saint Catherine. The Claimant's property is lot 9 and is registered at Volume 1127, Folio 2 of the Register Book of Titles and the Defendant's property is lot 8 and is registered at Volume 1127 Folio 1. Both lots

were previously owned by Roland Barrett until he sold lot 8 to the Defendant in 1985 and lot 9 to the Claimant in 1986.

[2] At the time the Claim Form was filed on April 22, 2010, the Claimant was represented by Roland Fitzgerald Barrett under a power of attorney, however at the trial the Claimant conducted the matter in his own stead. Initially there were three Defendants with Fredrica Crooks as the 1st Defendant however at trial the Claimant proceeded only against the 1st Defendant and so I have referred to her throughout as the Defendant.

[3] On January 30, 2014 the Claimant filed an Amended Claim Form and an Amended Particulars of Claim in which he contends that in or about 2006, the Defendant trespassed on his land by constructing a concrete wall, a gazebo and a storage room on lot 8, certain sections of which fall on lot 9. As a result the Claimant expresses that he has suffered loss and damage and seeks the following reliefs:

1. That the Claimant recover 1100 sq feet or 354.73 sq meters of land encroached on by the Defendants, said lands form part of Lot 9 part of Keystone Heights in the parish of Saint Catherine registered at Volume 1127 Folio 2 of the Register Book of Titles;

2. That the Defendant remove within 30 days of the Order herein the offending section of building and/or buildings which encroach on Lot 9, part of Keystone Farm called Keystone Heights in the parish of Saint Catherine being lands owned and registered in the name of the Claimant at Volume 1127 Folio 2 of the Register Book of Titles;

3. Mesne profit to the Claimant for the period the Defendants occupied Lot 9 Keystone Heights, Saint Catherine;

4. Interest;

5. Costs; and

6. Any further and other relief this Honourable Court deems just.

[4] The Claimant indicated that the structures erected have encroached on 1110 square feet or 354.73 square metres of his land depriving him of proper access. Further, that this trespass has been confirmed by Survey Identification Reports commissioned by the Defendants and prepared by Wallace B. Smith and B.A. Dawkins & Associates, Commissioned Land Surveyors. Further, that the reports also reflect that the Defendant has trespassed on lot 7 which is owned by person or persons unknown. Further, that the Claimant shared the report with the then Defendants and they indicated a willingness to purchase the Claimant's land in its entirety but they have taken no steps to do so.

[5] The Surveyor's Identification Reports were annexed to the Particulars of Claim. They are as follows:

- Surveyor's Identification Report prepared by Dudley C. Brown dated February 7, 2007;
- Surveyor's Identification Report prepared by Wallace B. Smith dated January 30, 2011; and
- Surveyors Identification Report prepared by B.A. Dawkins & Associates relating to observations made on February 28, 2013.

[6] In an Amended Defence filed May 31, 2016 the Defendant indicates that there was no trespass in 2006 on lands owned by the Claimant and that if any trespass occurred, it occurred before and/or during the period of construction of the said structures which were all completed by November 1997. Further, the Defendant says she had no agreement with the Claimant to purchase his property. She also makes no admission with respect to the encroachment alleged in the Surveyor's Identification Report. She asserts that if any trespass occurred the Claimant is not entitled to any relief claimed because the claim is statute barred under the Limitation of Actions Act 1881 (LAA).

[7] At trial the Claimant's witness statement was allowed to stand as his evidence-in-chief. He indicated that he is a resident of the United States of America and that in or about October 1986 he purchased the land at lot 9 Keystone Heights. He

asked Mr. Roland Fitzgerald Barrett to oversee the property by ensuring that it was not taken over by squatters and that it did not become overgrown and he agreed. Over the years he said he would visit the land together with Mr. Barrett whenever he visited Jamaica.

[8] He stated that he vividly recalls visiting the land in 2001 at which time he noticed that the house on lot 8 was in the process of being expanded and the work on the house was in an advanced state of completion but there was no wall or gazebo on the land. According to him he observed a wall to the front of the house where the land "fronted" the road but there was nothing separating his lot from lot 8. Further, that there was no concrete wall on the opposite side of his boundary with lot 8 or to the back of lot 8. He said that he took several pictures of the land.

[9] He indicated that he even went to the Defendant's lot and spoke to the contractor who was present and expressed an interest in starting construction on his land and the contractor showed him around the property including a section of the property where he told him a gazebo would be built. He stated that he returned to the property in December 2005 and this was when he noticed that the house was complete as well as a gazebo and a concrete wall but the gazebo seemed further back than where the contractor had indicated it would be built. He subsequently spoke to Mr. Barrett about starting his own construction. Further, that Mr. Barrett agreed to have a survey done of his property and sometime later, Mr. Barrett told him that he had done the survey and there was a significant encroachment on his lot. He indicates that the findings of the survey were confirmed by surveyor Dudley Brown in his report dated February 7, 2007.

[10] He said he returned to the island later and had discussions with all the then Defendants and a man introduced to him by the current Defendant as Kern Christian. They assured him that they would conduct their investigations and if there was in fact an encroachment they would be willing to purchase his property for an agreed sum of two million dollars. To date he says this has not been done.

[11] In cross-examination he agreed that he could not say for sure when construction of the house, gazebo, storage room or wall began or when it was completed. He was asked if it would come as a surprise to him that there is a water meter on his lot which regulates the water for lot 8 and he indicated that it would come as a surprise to him.

[12] He relied on the evidence of Roland Barrett who confirmed in evidence that in 1986 he sold lot 8 to the Defendants and lot 9 to the Claimant. Further, that the Defendants were put in immediate possession of lot 8 but as the Claimant resided overseas he asked him to keep an eye on his lot. Further, that the Defendant first constructed a small house on the lot in the early to mid 1990s but there was no wall around the house and although he knew the land to be marked by a surveyor and knew there to be surveyor's pegs separating the lots there was no fence or marking above ground.

[13] As overseer of the Claimant's land Mr. Barrett said he visited the land at least once a year and when the Claimant visited Jamaica they would both go there. He would ensure that the land did not become overgrown and would cut the bushes sometimes once a year but less often when it was not too overgrown. Over the years he noticed the Defendant's house being expanded to a three storey house and in around 2006 he noticed a gazebo and a wall. He said that he was not aware that there was an issue as he did not know where the boundary was. In late 2006 he began preliminary steps to construct a house on the Claimant's land and so requested that a Commissioned Land Surveyor identify the boundaries and that was when the encroachment came to his attention.

[14] In cross-examination he indicated that he could not give a precise date when the construction on lot 8 commenced but that it was completed in 2004-2005. He also said the construction appeared to be a continuous process and he could not differentiate between the building and the gazebo. Further, that he can say precisely that the building of the gazebo was completed in about 2005. He was

asked if he could be sure that in 1994 lot 8 did not have a barbed wire fence around it and he said he could not be sure but what he does know is that it was not on lot 9. It was suggested that the gazebo and all the other buildings were built between 1994 and 1997 and he denied this suggestion and pointed out that the gazebo and wall were not erected in 1997 as he visited the land every year and he knows for a fact that there was no wall erected before 2006. He asserted that he accompanied the Claimant when he visited the then Defendants and they promised to buy the land for two million dollars but said they needed time.

[15] The Surveyor's Identification Report of Commissioned Land Surveyor B.A. Dawkins & Associates was tendered into evidence as Exhibit 3. According to the report this was prepared at the request of the Defendant. It reflects that the boundaries are not in general agreement with the plan attached to the certificate of title. The following is noted:

> *"Lot 8 encroaches on lot 9 in the amount of 1135.4 sq feet cutting off access to lot 9 from the reserved road. It also encroaches on the reserved road in the amount of 185.8 sq. ft. and on lot 7 in the amount of 3819.6 sq. ft."*

[16] At trial the Defendant testified that she purchased lot 8 in or about 1984 and that in 1993 she applied for and obtained a 'build on own land' loan from National Housing Trust (NHT). Further, that in accordance with the requirements of the loan application she obtained the services of Commissioned Land Surveyor, Masters Johnson and Associates to conduct a survey and provide the necessary Surveyor's Identification Report. According to her, the construction was commenced by Mr. Winston Marshall and a house was constructed "in an unfinished state". She indicated that in engaging the services of Masters Johnson and Associates and Mr. Winston Marshall she was relying on what she reasonably believed to be competent contractors to perform their respective scope of work.

[17] In 1995 she alleged that Mr. Kern Christian assumed construction of the unit and subcontracted Mr. Oliver Bayliss to complete the house. Mr. Bayliss to the best of her knowledge and belief continued construction in accordance with the boundaries. She indicated that completion took place in or about November 1997 and that was when she moved into the completed dwelling house at which time all the structures indentified as encroaching on lot 9 were already built, namely the concrete wall, gazebo and storage room and there have been no further additions or improvements on any of these structures since she has moved in.

[18] She said that it was never brought to the attention of any of the Defendants that there was any encroachment on lot 9 or that the boundaries as identified by the Commissioned Land Surveyor were incorrect. To the best of her knowledge, information and belief the construction took place in accordance with the boundaries. Further, that neither she nor any other Defendant made any representation or promise to purchase lot 9. She exhibited a copy of her Certificate of Title, a copy of the Masters Johnson & Associates Surveyor's Report dated October 10, 1991 and the Certificate of Completion dated February 2, 1998.

[19] Under cross-examination when she was asked if the gazebo was part of the initial plan she responded that Mr. Christian would have to answer that. It was said to her that she didn't intend to encroach on the Claimant's land and her response was that she didn't see it as an encroachment. She went on to say in her opinion she didn't think there was an encroachment even though the report says so. She said that the spot where the gazebo now stands is the same spot where the concrete used to be mixed. When it was suggested to her that the gazebo was never built in 1997 she responded that it was built before 1997.

[20] She was asked if she would say that the boundaries were obvious just by looking on and she said she cannot answer that question. She was asked if when Mr. Barrett and Mr. Johnson came to her with the diagram saying there was an

encroachment whether she protested and she replied that she did. It was suggested that it was not until 2005-2006 that she was able to build the gazebo and wall and she denied those suggestions. She continued to insist that she has not encroached on the Claimant's land.

[21] Mr. Kern Christian next gave evidence. He spoke about taking over construction of the dwelling house from a contractor from NHT in 1994. In taking over construction he says he observed that the land had a barbed wire fence enclosing it including the areas where the wall, gazebo and storage room were later constructed. He observed that the construction was in accordance with the boundaries indicated by the Surveyor's Identification Report of Master Johnson and Associates and he proceeded with the construction in accordance with the boundaries as established. He subsequently subcontracted a Mr. Oliver Bayliss who completed the storage room, gazebo and concrete wall in 1996.

[22] In cross-examination he indicated that he lived with the Defendant as his business partner. He reiterated that he did work on the house. He insisted that the gazebo was built before the house was completed and that if he is not sure of anything else he is sure of that. Mr. Christian, however, says he is aware that the report of B.A. Dawkins says there is an encroachment.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[23] Counsel on behalf of the Claimant submitted that the general provisions of section 3 of the LAA must yield to the specific provisions of section 45 of the LAA based on the Latin maxim *generalia specialibus non derogant.* On this point he relied on the cases **Cusack v London Borough of Harrow** [2011] EWCA Civ 1514, **R v Ramasany** [1965] AC 1, **Reid v Reid** [2016] JMSC Civ 204 and **Malcolm v Malcolm** [2013] JMSC Civ 161. Further, that section 3 has general application to suits for recovery of land whereas section 45 deals specifically with disputes regarding boundaries and the instant case falls squarely under this section in that it is within the "class of cases where the lands of several

proprietors bind or have bound upon each other". Further, that the Defendant would therefore be disentitled to the general provisions of section 3 and can only possibly be afforded a limitation defence under section 45 if all the criteria there under are met.

[24] He submitted further that the issues to be determined are whether there has been acquiescence of the encroachment and whether such acquiescence has continued for seven years. Further, that among the requirements to succeed under section 45 the Defendant must prove acquiescence on the part of the Claimant and that such acquiescence continued for seven years and also that the Claimant had knowledge of the breach of the boundary and did nothing for seven years upon discovering same.

[25] Further that the limitation period did not begin to run until the Claimant conducted a survey of the property in or around 2006/2007. Counsel contended that based on the evidence the breach was not obvious and intentional and that both parties became aware of the encroachment in 2006/2007 when the Claimant commissioned a survey. Further, that the Defendants encroached by mistake or they concealed the encroachment with an intention to avail themselves of a limitation defence or misrepresented that there was no encroachment and therefore did not possess the necessary intention to dispossess the Claimant of his property.

[26] Counsel submitted that the Court should consider whether or not section 27 of the LAA is applicable which is being relied on not as a sword but as a shield. Section 27 provides that in any case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land for which he may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have first become known or discovered. Reference was made to the decision of **Bartholomew Brown et al v Jamaica National Building Society** [2010] JMCA Civ 7 where the Court found that the equitable doctrine of fraudulent

concealment does have a limited area of operation and is only applicable to suits for the recovery of land or rent.

[27] He directed the Court's attention to the case **Kitchen v Royal Air Force Association and Others** [1958] 1 W.L.R. 563 as an appropriate case to assist in determining what amounts to fraudulent concealment. In that case the Court pointed out that no degree of moral turpitude was necessary to establish fraud for the purposes of that section since it covered conduct which having regard to the relationship of the parties was unconscionable. He submitted that the parties being neighbours would share a special relationship which is recognised by the Dividing Fences Act. Further, that among the findings this Court should make is that the denial of the encroachment by the Defendant, in the face of clear documentary evidence, is an effort to evade and conceal the obvious truth.

[28] It was further submitted that the components required to ground adverse possession have not been established because although there was physical possession by the Defendant, there was no intention to possess on her part as she acted under a mistaken belief.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[29] Counsel for the Defendant submitted that the relevant provisions of the LAA are sections 3, 4 and 30. He submitted that the Court in determining what constitutes factual possession should pay regard to the decision of **Powell v McFarlane** [1977] 38 P & CR 452, where Slade J made certain observations with respect to factual possession which were endorsed by the Privy Council in **Wills v Wills** 64 WIR 176, Further, that those cases have emphasized that the Court should not be ready to infer possession from relatively trivial acts, and that fencing, although almost always significant, is not invariably either necessary or sufficient evidence of possession. These decisions, he contended must now be read in the light of the important decision of the Court of Appeal in **Buckinghamshire County Council v Moran** [1990] Ch 623 and the even more

important decision of the House of Lords in **J A Pye (Oxford) Ltd and Another v Graham and Another** [2002] UKHL 30 .

[30] Further, that in the case of land acquired for building, the beginning of construction can constitute possession of the whole of the property on which construction is to take place. Additionally, acts identified as necessary or sufficient to establish factual possession need not be displayed over every part of the subject property in order for the Court to find that there is factual possession of the entire property identified. Reliance was placed on the case **Arthur Mckoy and Maria McKoy v Fitzroy Glispie** [2012] JMSC Civ 80 as authority for that proposition. He argued that in some cases, purchase of land evidenced by title is sufficient to establish factual possession of the land identified as belonging to a particular person as seen in **Chisholm v Hall** (1959), 7 J.L.R. 164. Regardless of the position accepted by the Court he contended that the Court may find that there is factual possession of the property or the area of the property in dispute regarding encroachment.

[31] He further argued that knowledge of the trespass is not relevant to determine if there is an intention to possess, neither is knowledge of the trespass necessary to negate a finding of an intention to possess a disputed strip of land in the case of a boundary dispute regarding adjoining lots. He submitted that in **Chisholm v Hall,** the fact that the Appellant had no knowledge of the encroachment or disputed the encroachment was not a factor taken into account by the Privy Council in determining intention to possess but rather the Privy Council took into account the fact that the Appellant conducted himself as though the disputed strip were his and, importantly, treated time as beginning to run from the date of purchase of the property.

[32] Counsel pointed out that **Chisholm v Hall** was cited with approval recently by the Court of Appeal in **Zephaniah Blake et al v Almando Hunt et al** [2014] JMCA Civ 25, on the issue of factual possession and intention to possess and was also endorsed and applied in **Recreational Holdings (Jamaica) Limited v**

Carl Lazarus and the Registrar of Titles [2014] JMCA Civ 34. The Court of Appeal in **Recreational Holding** noted the Privy Council's ruling that the conduct and operative date for the running of time for the purposes of acquisition of a possessory title under the LAA is continuous possession from the date of purchase of the subject property.

[33] He therefore asked the Court to find that at the very least, factual possession and intention to possess occurred on the date of acquisition of the property identified as lot 8. He argued that the Claimant's contention that the Defendant '*had no knowledge that there was a breach of the true and correct boundaries to the lands, the subject of the claim'* is without merit as knowledge of a breach regarding disputed boundary is neither necessary, sufficient, nor a relevant consideration as indicated by the Court of Appeal in **Zephaniah Blake et al v Almando Hunt et al.**

[34] Further, that in relation to the facts he submitted that the Claimant has not established on the evidence that there is any encroachment as alleged since the Surveyor's Identification Report identifying the alleged encroachment was not separately tendered into evidence of that fact independent of its attachment to the Claimant's witness statement accepted as his evidence in chief.

FACTUAL ISSUES

[35] Having examined the allegations presented and the submissions advanced the issues that arise for my determination are as follows:

Is there in fact an encroachment?

If so, when did the encroachment occur?

Was there a fence in place separating lot 8 and lot 9?

LEGAL ISSUE

[36] Has the limitation period within which the action can be brought expired in accordance with either section 3 or section 45 of the LAA or in accordance with both sections?

ANALYSIS

[37] Although the issues of facts are intertwined with the issues of law there are a few areas of dispute raised on the evidence that I find tidier to deal with before delving into the issues of law. Some of the factual issues will touch on the legal issues and so will bear repetition.

Is there in fact an encroachment?

[38] The question as to whether there is in fact an encroachment is a question of fact. Although the Claimant had attached a Surveyor's Identification Report to the Particulars of Claimant it was not tendered into evidence. It was the Surveyor's Identification Report requested by the Defendant and prepared by B.A. Dawkins and Associates which was tendered into evidence as Exhibit 3. It reflects that the boundaries are not in general agreement with the plan and that lot 8 encroaches on lot 9. In the face of this clear indication the Defendant is still in denial. She insists that there is no breach but has offered no explanation for this assertion nor has she suggested that she is an expert in the field and is seeking to challenge the assertion by the surveyor. What she has asserted is that at no time during or after the construction had anyone ever brought this encroachment to her attention and also that to the best of her knowledge the construction was done within the boundaries.

[39] This to my mind smacks of a lack of frankness on her part. The report is clear and in the absence of any other expert's report to the contrary, I am prepared to

accept it as reflective of the true position. I therefore find as a fact that the gazebo, the concrete wall and the storage room built by the Defendant have in fact encroached on the Claimant's lot.

When did the encroachment occur?

[40] The date of the actual encroachment is significant because it is among the factors that must be taken into account in determining whether the limitation period has expired. The Claimant has alleged that he first observed the offending structures in December 2005 when he visited the premises and that in 2001 there were no concrete wall and he even took pictures. These pictures however did not form part of the evidence in this case. His witness Mr. Barrett indicated in his witness statement that he first observed the structures in 2006, however in evidence he suggests that it was in 2005 that he observed them. There are discrepancies and gaps on the Claimant's case however on an examination of the Defendant's case there also exist discrepancies and gaps which I find to be more significant.

[41] The Defendant alleged that these structures were built at the same time the house was built and that construction was completed in around November 1997. In support of this she relies on a Certificate of Completion. On the other hand, her witness Mr. Kern Christian said construction of the structures began in 1995 and was completed in 1996. The Certificate of Completion is dated February 2, 1998 and it refers to completion of the works listed in the schedule however no schedule was attached. This is despite the fact that the document itself notes that the certificate is to be attached to the Schedule to which it refers. The absence of this schedule depreciates the value of the Certificate of Completion as there is no indication as to what structures were said to have been completed.

[42] The question as to when the offending structures were built turns on the question of credibility. I have already indicated that I found the Defendant's credibility to be affected and although this was on a different point, it is all wrapped up in the

same issue. In addition during cross-examination she was evasive in some areas and so failed to inspire confidence. The Defendant having lived on the property since the 1990s would be expected to be in a better position to bring some concrete evidence to the Court to strengthen her position. By way of example she could have gotten an expert to speak to when these structures were built. Her only witness is Mr. Christian who also resides at the said premises. Mr. Christian has attempted to paint himself as an independent witness by his assertion that he is merely the business partner of the Claimant although they have lived together for some time. I do not find him to be credible either.

[43] The Claimant's position is strengthened by his witness Mr. Barrett. It is he who previously owned both properties and alleged that he would visit the property more or less every year. I therefore find on a balance of probabilities that the Claimant's account is more credible. I accept that construction of the main structure was completed first and that construction of the gazebo, wall and storeroom took place at a later date being sometime after 2001 but before December 2005.

Was there a fence in place separating lot 8 from lot 9?

[44] It is the Defendant's case that there was in fact a barbed wire fence separating the two properties. However, the Defendant in her witness statement makes no mention of any fence or anything in place which separated the two properties. It is her witness Kern Christian who speaks of observing a barbed wire fence in place. The Claimant makes no mention of this in his evidence and the previous proprietor Mr. Barrett indicates in his witness statement that though he knew the land to be marked out by a surveyor and knew there to be surveyor's pegs separating the lots there was no fence or markings above the ground. When taxed in cross-examination he says he cannot say for sure that there was no fence. I will therefore have to consider the independent evidence that is available.

[45] The Surveyor's Identification Report of Masters Johnson & Associates which is attached to the Defendant's witness statement dated October 10, 1991 provides some evidence independent of the parties. It specifically indicates that the boundaries are in general agreement with the plan and that there are no fences. This is a survey that was done before the commencement of construction and before any contemplation of legal proceedings. I therefore accept the evidence contained therein and find as a fact that there was no wire fence or any fence at all separating lots 8 and 9.

Has the limitation period within which the action can be brought expired in accordance with either section 3 or section 45 of the LAA or in accordance with both sections?

[46] Section 3 of the LAA provides as follows:

> *"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."*

[47] Section 3 ought to be read in conjunction with section 4 (a) of the LAA which provides as follows:

> *4. The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say –*
>
> *(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt then such right shall*

be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received."

[48] Section 30 should also be read along with section 3 of the LAA and provides as follows:

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

[49] Section 45 of the LAA deals specifically with boundaries and provides as follows:

> *"In all cases where the land of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such lands, or the persons under whom such proprietors claim, for the space of seven years together, such reputed boundary shall forever be deemed and adjudged to be the true boundary between such proprietors; and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding."*

[50] In the case **Zephaniah Blake**, the dispute concerned an encroachment caused by an incorrect placement of a boundary fence. Brooks J. at first instance found that on a consideration of either section 3 or section 45 of the Act the Defendants had established that the Claimants were no longer entitled to have possession of the land based on their inactivity for a period of over twelve years and their acquiescence to the location of the boundary fence for the purposes of section 45 of the Act.

[51] The Court of Appeal in examining the decision of Brooks J. found that among the issues they had to determine were whether the fence erected in 2004 negated the reputed boundary and whether there was acquiescence on the part of the appellants. Harris JA made a pronouncement on the law concerning the bar to the recovery of possession of land as encapsulated in the LAA. This is how she put it at paragraph 41 of the judgment:

> "Two essential elements are contemplated by the statute namely:
> *(a) dispossession*
> *(b) discontinuance of possession."*

[52] Harris JA then went on to examine the provisions of sections 3, 30 and 45 of the LAA and agreed with Brooks J that the appellant's right to bring the action would have been extinguished under section 30 of the Act, the 12 year limitation period having expired as the chain link fence has been in place for more than 12 years. Further, that the right to bring the action would also be extinguished under section 45 of the Act as more than 7 years had expired at the time the appellants took an objection to the execution of the wall.

[53] Similarly I will proceed to examine these relevant sections to determine whether or not either of these provisions operates as a bar to the Claimant's action filed in 2010. The argument of counsel for the Claimant is that section 3 ought to give precedence to section 45 as the specific should take precedence over the general. However that argument is also true in the sense that this is a case where the specific cause of action is one for recovery of possession as opposed to one seeking a rectification of a boundary. The provisions of section 3 must be considered to determine whether the Defendant could succeed under this section. The contention of the Defendant is that in determining when the right to bring an action to recover possession of the land accrued, the date of actual possession must be the relevant date.

[54] The significance of section 3 is that any person who wishes to bring an action for recovery of possession of land must do so within twelve years after the right has

first accrued. Section 4 clarifies what is meant by "first accrued" in three different ways. The applicable section is subsection (a), the significance of which is that where a person in possession of such land is dispossessed then the right to bring an action shall be deemed to have first accrued at the time of such dispossession. Now the Claimant is alleging that he is the person in possession and that he was dispossessed of this portion of his land. Although he was not in physical possession, I accept that he, being the owner with a registered title, is deemed to be in possession

[55] Next I have to determine if and when the Claimant was dispossessed of his property. He can only be dispossessed if the Defendant is found to be in possession. The elements required to establish possession have been set out in a line of cases including the **J A Pye (Oxford) Ltd** case, in which Lord Browne-Wilkinson expounded on the two elements required to prove legal possession as being firstly, a sufficient degree of physical custody and control (factual possession) and secondly an intention to exercise such custody and control on one's own behalf and for one's own benefit (intention to possess). Lord Browne-Wilkinson also distinguished the intention to possess from the intention to own. This position was reiterated in the **Zephaniah Blake** case where at paragraph 46 of the judgment Harris JA observed:

> *"The operation of the law requires the co-existence of two components: firstly, a physical possession by the person who seeks to displace the true owner; and secondly, the presence of a mental ingredient showing an intention to possess. There must be explicit and definitive evidence of acts of possession and it must be established that these acts are unequivocally in harmony with an intention to exclude the true owner's possession of the land…"*

[56] The Court of Appeal agreed with the decision of the lower court and after highlighting that that there must be credible evidence evincing an intention to exclude the other party as owner found that among the facts demonstrating an intention to possess the land was the fact that after offering to purchase the land

they withdrew the offer. In the instant case the Defendant had built on the Claimant's lot a wall, a gazebo and a storage room. Those structures are on the face of it permanent structures and demonstrate physical possession as well as an intention to possess.

[57] Having found that there is sufficient evidence on the facts to show possession I then have to determine the actual date of possession. Counsel for the Defendant has argued that the beginning of construction can constitute possession of the whole of the property and that occupation of a part of the property identified as belonging to a person may be treated as occupation of the whole of such property. However, I am of the view that a distinction must be drawn between possession of lot 8 and the process of construction thereon and possession of the portion of lot 9 where the offending structures are and the construction thereon. This is because the undisputed evidence is that the construction of the house took place first and it was sometime later that the construction of the offending structures was effected. Dispossession of the Claimant's portion would have taken place upon the commencement of construction of the offending structures and not upon commencement of construction of the house.

[58] The right to bring this action for recovery of possession would have arisen when the Defendant and/or her agent took up possession of the portion of the Claimant's land on which the gazebo, wall and storage room were built for the purpose of construction between 2001 and December 2005. In light of that when the Claimant filed his action on April 22, 2010 the limitation period of twelve would not have expired.

[59] I move now to consider whether the provisions of section 45 provide the Defendant with a successful defence. Section 45 of the Limitation of Actions Act deals specifically with boundaries. This section requires firstly that there be lands belonging to more than one person and that the lands adjoin each other. It is clear that the lands in question adjoin each other and that they belong to different persons. In order for the Defendant to succeed under this section there must be

a "reputed boundary" and it must have been or shall be acquiesced in or submitted to by the proprietors.

[60] The case **Edward Lynch and Dennis Lynch v Dianne Ennevor and Eli Jackson** (1982) 19 J.L.R. 161 involved a registered owner of land who was off the island for some time and was not made aware of a survey that was done that resulted in the boundary being adjusted. Wright J. examined the provisions of section 45 and shed some light on how the words "reputed boundary" are to be construed. This is what Wright, J. said at page 172 of the judgment:

> *"The section speaks not of a boundary which is known to one land owner but which is reputed i.e. generally known, and is acquiesced in and submitted to by the several proprietors. There must have been a tacit agreement to this boundary and a usage that spells submission."*

[61] The Court found that the Defendant did not know of finding of the survey and so could not have either acquiesced or submitted to the delineation of the boundary.

[62] What seems clear to me is that a person can only succeed under section 45 where firstly there is in fact a boundary which is generally known, that is to say "reputed" and secondly where this "reputed boundary" has been acquiesced in or submitted to the proprietors. I have already found that there was no fence or other mark separating the two lots and although a fence or mark is not necessary to the establishment of a reputed boundary there must be some fact or the other that serves to delineate the boundary which was known by the parties

[63] In determining what is meant by acquiescence Harris JA in the **Zephaniah Blake** case examined the reference of the learned trial judge to several cases including **In Duke of Leeds v Earl of Amherst** [1846] 2 Ph 117 and enunciated the following at paragraphs 60-61:

> *"... In Duke of **Leeds v Earl of Amherst** Lord Cottenham said at page 124:*

"If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress, he cannot afterwards complain this is the proper sense of the word 'acquiescence'."

In ***Bell v Alfred Franks and Bartlett*** *at page 360 Shar LJ said:*

"What is meant by acquiescence? It may involve more than a merely passive attitude, doing nothing at all. It requires an essential factor that there was knowledge of what was acquiesced in."

Referring to ***Weldon v Dicks*** *(1878) 10 Ch D 247 in which Malins V-C said at page 262 that "this court never binds parties by acquiescence where there is no knowledge", the learned judge stated that it appears that knowledge is an essential criterion of acquiescence. At page 11 of his judgment, after reviewing the meaning and the various dicta in respect of the term acquiescence...*

[64] There is really no evidence that the Claimant herein was made aware or could have been made aware of any "reputed boundary" and that he acquiesced in this.

[65] On the issue of concealment of fraud, the Claimant having argued that there has been concealment of fraud by the Defendant I find it necessary to consider that issue. Section 27 of the LAA provides as follows:

"In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived of such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered."

[66] In the first instance I should note that it seems to me that this section is applicable for suits in equity. In the second instance there would be a need to prove some fraud on the Defendant's part. I find no merit in this argument for the

reason that there is no evidence of what this fraud is and several authorities have enunciated the position that fraud must be specifically pleaded. (See **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley et al and RBTT Bank Jamaica Limited v Estate Rudolph Daley et al** [2010] JMCA Civ 46). Nothing in the pleadings before the Court state or even hint at any fraud on the part of the Defendant and/or that the failure to bring the action before now had to do with any concealment of that fraud by the Defendant.

[67] The Claimant has argued in reliance on the case **Kitchen v Royal Air Force Association and Others** (supra), that because of this special relationship of the parties in that they are neighbours, then there is no need to prove any degree of moral turpitude having regard to this special relationship. I cannot agree with that position as I do not think this is what is meant by this special relationship as enunciated by Evershed M.R. in that case. In the **Kitchen v Royal Air Force Association and Others** case the Court looked at the conduct of the solicitor *vis a vis* the client, conduct which was described as reckless and which resulted in a breach of the confidence reposed in the solicitors. Those circumstances are clearly distinguishable from the instant case in which there is no allegation of any conduct on the part of the Defendant towards the Claimant, in fact there is no evidence that they had even met prior to the discovery of the encroachment. I find that there is no evidence of any fraud and equally no concealment of fraud that would operate to bring this matter within the provisions of section 27 of the LAA.

[68] On this point my finding is that there is no evidence of any acquiescence of any reputed boundary and so the Defendants could not succeed under this section.

[69] It is also the Claimant's submission that in determining the question of the acquiescence the court should be concerned with the placement of the offending structures and determine if there has been any acquiescence to them. If the construction of structures commenced before 2003 then the seven years would have expired by the time the Claim form was filed in 2010, then the question of

acquiescence would have to be considered. The Defendant would mount a challenge in proving acquiescence as there is no evidence that the Claimant was aware of these offending structures before 2005. In fact the evidence is that the Claimant only became aware of these structures in 2006 and that on becoming aware he brought it to the attention of the Defendant. Based on that there is no basis to say that there is any acquiescence to any of these structures being constructed on lot 9.

[70] In all the circumstances I accept that there is no evidence of any "reputed boundary" being acquiesced in and submitted to by the proprietors for a space of seven years together. In light of my findings the Defendant has also failed to satisfy the provisions of section 45 of the LAA. The Claimant's case is therefore not statute barred. I accept that the construction of the gazebo, wall and storage room on lot 9 constituted a trespass by the Defendant on the Claimant's property. The Claimant is therefore entitled to recover possession of this portion of his property. This brings me to consider whether the Claimant is entitled to mesne profits.

MESNE PROFITS

[71] Where an individual has been deprived of his property or has suffered loss of use and possession of his property because of wrongful occupation, damages are often awarded in the form of mesne profits. Hoffman J in **Ministry of Defence v Ashman** (1993) 66 P. & C.R. 195 and in reliance on **Woodfall on Landlord and Tennant** at paragraph 19.013 said the following about mesne profits:

> *"The amount of mesne profits for which a trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. This is so even if the landlord would not have let the property in question during the period of trespass."*

[72] The Claimant herein has been deprived of the portion of his property containing the offending structures since December 2005 at the latest. However he did not

approach the Defendant about the encroachment until February 2007 during which time only the question of compensation was discussed and not recovery of possession. The request for recovery of possession only came by way of this action filed on April 22, 2010 and so mesne profits would have to be calculated from that date.

[73] The Claimant has not brought any evidence to substantiate how much he would be entitled to. Mesne profits are akin to special damages which ought to be strictly proven. I am prepared to make an order for nominal damages at a rate of $5,000.00 per month from the date the Claim Form was filed to the date of judgment. My orders are as follows:

1. That the Claimant recover 1100 sq feet or 354.73 sq meters of land encroached on by the Defendants, said lands form part of Lot 9 part of Keystone Heights in the parish of Saint Catherine registered at Volume 1127 Folio 2 of the Register Book of Titles;

2. That the Defendant remove within 30 days of the Order herein the offending section of building and/or buildings which encroach on Lot 9, part of Keystone Farm called Keystone Heights in the parish of Saint Catherine being lands owned and registered in the name of the Claimant at Volume 1127 Folio 2 of the Register Book of Titles;

3. Mesne profits to the Claimant in the sum of $430,000.00; and

4. Costs to the Claimant to be agreed or taxed.