



[2024] JMSC Civ 43

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2017 HCV 04013**

BETWEEN	WENDY LEE (Administratrix of the Estate Of the late Thomas Chambers, Deceased)	CLAIMANT
AND	PATRICK FLETCHER	DEFENDANT
AND	PATRICK FLETCHER	ANCILLARY CLAIMANT
AND	WENDY LEE (Administratrix of the Estate Of the late Thomas Chambers, Deceased)	ANCILLARY DEFENDANT

IN OPEN COURT

Ms Jacqueline Cummings and Mr Stephen Palmer instructed by Archer Cummings & Company for the Claimant/Ancillary Defendant

Mesdames Symone Mayhew KC and Lesley-Ann Stewart instructed by MayhewLaw for the Defendant/Ancillary Claimant

Heard: June 20 and 21, 2022 and March 17, 2023, and March 22, 2024

Limitation of Actions – Land – Registered land – Trespass – Right to possession of land – Injury to possessory rights – What is deemed to be possession of land – Actual possession – Intention to possess land and the exercise of control over it to the exclusion of other persons – Nature and character of land – Unlawful and unjustifiable presence on land in the possession of another – Whether the

claimant has proven that the defendant's actions amount to the tort of trespass – Burden of proof – Standard of proof – Balance of Probabilities

Defence – Defence to trespass

Remedies – Damages for trespass to land

Adverse possession – Whether the ancillary claimant has proven that he has been in open and undisturbed possession of the land for twelve continuous years – Whether the ancillary claimant has proven the legal elements of factual possession and the intention to possess – The Limitation of Actions Act, 1881, sections 3 and 4

A. NEMBARD J

INTRODUCTION

- [1] This matter raises important considerations surrounding whether a registered proprietor's title to land has been extinguished by virtue of the operation of the Limitation of Actions Act, 1881 and in relation to trespass to land as well as the specific performance of a purported agreement for the sale and purchase of land.
- [2] There are two (2) properties which are central to these proceedings. These two (2) properties are sections 1 and 2 of parts of Spot Valley in the parish of Saint James. These two (2) parcels of land are registered land, being the land comprised in Certificates of Title registered at Volume 1374 Folio 9 of the Register Book of Title ("the subject property").
- [3] The Claimant, Ms Wendy Lee, is a daughter of the late Mr Thomas Chambers, and is the duly appointed administratrix of his estate. During his lifetime, Mr Chambers was the registered proprietor of the subject property. Ms Lee asserts that the Defendant, Mr Patrick Fletcher, trespassed on the subject property on divers dates and that he unlawfully removed the topsoil. As a direct consequence

of Mr Fletcher's actions and/or failure and/or refusal to cease these activities, Ms Lee alleges that she suffered loss and damage.

The Claim

[4] By way of a Claim Form, which was filed on 21 November 2017, the Claimant, Ms Wendy Lee, seeks the following Orders against the Defendant, Mr Patrick Fletcher: -

- I. Damages for trespass to land.
- II. An injunction to restrain the Defendant, whether by himself, his servants and/or agents and/or employees from continued and/or further trespass on ALL THOSE parcels of land parts of SPOT VALLEY in the parish of Saint James, (sections 1 and 2) together containing by survey Two Hundred and Thirty-One Hectares and Seven Hundred and Ninety-Two Thousandths of a hectare of the shapes and dimension and butting as appear by the plan thereof compromised in the Certificates of Title registered at Volume 1374 Folio 9 of the Register Book of Titles.
- III. Costs.

ISSUES

[5] The following issues are determinative of the Claim: -

- I. Whether Ms Lee has sufficiently proven that Mr Fletcher's removal of the topsoil of the subject property constitutes an unlawful or unjustifiable physical interference with the subject property amounting to the tort of trespass.

- II. Whether Mr Fletcher has a valid and enforceable agreement for the sale of the subject property from Thomas Chambers, deceased, demonstrating sufficient acts of part performance to enable him to obtain the remedy of specific performance.
- III. Alternatively, has Mr Fletcher adduced sufficient evidence to demonstrate that he has dispossessed the estate of Thomas Chambers, by his actual and intentional possession of the subject property for a minimum period of twelve (12) continuous years.

BACKGROUND

The factual substratum

- [6] During his lifetime, Mr Thomas Chambers was a businessman and real estate developer. He purchased One Thousand Two Hundred (1,200) acres of land in Spot Valley, in the parish of Saint James, where he built a house and developed a farm.¹ In or around May 2004, Mr Chambers obtained a registered title for a portion of the land, which is the land which comprises the subject property.²
- [7] On or about 1 July 2009, Mr Thomas Chambers died, testate.³
- [8] On 1 March 2010, having obtained a Grant of Letters of Administration with the Will Annexed, Ms Lee was named the Administratrix of her late father's estate.^{4 5}

¹ See – Paragraph 4 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022.

² See – Exhibit 1, which contains the Duplicate Certificate of Title for the property registered at Volume 1374 Folio 9 of the Register Book of Titles.

³ The sole executor named in the Last Will and Testament of Mr Thomas Chambers, dated 2 February 1990, was his wife, Ms Marjoke Jeannine Chambers. Tragically, she died along with Mr Chambers on or around 1 July 2009.

⁴ See – Paragraph 4 of the Affidavit of Wendy Lee, which was filed on 21 November 2017. See also, paragraph 10 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022. Ms Wendy Lee and her sister, Ms Lisa Taylor are the only beneficiaries of Mr Chambers' estate, as their mother died on the same day as their father.

⁵ See – Exhibit 2, which contains Letters of Administration with Will Annexed, dated 1 March 2010.

The case for the Claimant

- [9]** Ms Lee avers that before his death, her father, Mr Thomas Chambers, had a full development plan for the land in Spot Valley, in the parish of Saint James, and was preparing to subdivide and sell portions of the said land. She further avers that, in or around 2006, her father sold a portion of the said land to the Government of Jamaica on which to build the Spot Valley High School. Mr Chambers also sold other portions of the said land to other individuals and contractors⁶ and, in or around 1986, he sold one (1) acre of unregistered land to Mr Fletcher.⁷
- [10]** On these occasions, Ms Lee asserts that her father utilized the services of Mr Grantley Kindness, Commissioned Land Surveyor, to determine the boundaries of each parcel of the said land which was to be sold. Additionally, Mr Chambers retained the services of Mrs Margaret Moodie-Jervis, Attorney-at-Law. On each of these occasions, Ms Lee further asserts, each transaction was evidenced by an Agreement for Sale, receipts, and survey diagrams, in relation to each parcel of land which was sold.⁸
- [11]** In or around 2014, Ms Lee asserts that she became aware that Mr Fletcher was trespassing on the subject property. Consequently, she commenced proceedings against him in the Saint James Parish Court in Trespass. After the commencement of these proceedings, Mr Fletcher ceased his actions of trespass.⁹
- [12]** On or about 8 October 2017, Ms Lee alleges that Mr Fletcher commenced trespassing on the subject property once again and that tractors and trucks were engaged in removing the topsoil from the land. Ms Lee maintains that Mr Fletcher

⁶ See – Paragraphs 7 and 8 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022.

⁷ See – Paragraph 14 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022.

⁸ See – Paragraph 12 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022.

⁹ See – Paragraph 16 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022.

was not given permission so to do, nor did he have any lawful authority to enter upon the subject property or to remove any topsoil from the land.¹⁰

- [13] Consequently, Mr Fletcher was issued with a cease-and-desist letter, which allowed Mr Fletcher seven (7) days within which to comply. Mr Fletcher failed to and/or refused to comply with the requirements of that cease-and-desist letter and continued the removal of the topsoil from the subject property.¹¹

The case for the Defendant

- [14] Mr Fletcher asserts that he is a real estate developer who operates under the business names Paradise Real Estate Brokers and Reading Holdings Limited. Mr Fletcher further asserts that, during the nineties, he entered into successive agreements with Mr Chambers to purchase different parcels of land, including the land which comprises the subject property. Mr Fletcher maintains that once an agreement was reached on the purchase price and a deposit paid, in respect of each parcel of land, he was put in possession of the land by Mr Chambers, pending the completion of the sale and the delivery of the Duplicate Certificate of Title duly endorsed in his name or that of his nominee, as the registered proprietor.¹²
- [15] Mr Fletcher avers that in or about 2008, Mr Chambers gave him [Mr Fletcher] a Written Agreement for Sale for the sale and purchase of sections 1 and 2 of the land situate at Spot Valley, in the parish of Saint James, being the land comprised in Certificates of Title registered at Volume 1374 and Folio 9 of the Register Book of Titles. This Agreement for Sale reflected a purchase price of

¹⁰ See – Paragraphs 17 and 18 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022.

¹¹ See – Paragraphs 19 and 20 of the Witness Statement of Wendy Lee, which was filed on 13 January 2022. See also - Exhibit 6, which contains a Letter dated 18 October 2017, from Mesdames Archer Cummings and Company, Attorneys-at-Law and which is addressed to Mr Patrick Fletcher, in relation to the alleged trespass upon the subject property.

¹² See – Paragraphs 2 and 4 of the Ancillary Particulars of Claim, which was filed on 18 January 2018.

Thirty-Five Million Jamaica Dollars (J\$35,000,000.00), which Mr Fletcher avers was the aggregate purchase price of both parcels of land.

[16] Finally, it is Mr Fletcher's contention that in reliance on this Agreement for Sale, he made a deposit of One Million Five Hundred Thousand Jamaican Dollars (J\$1,500,000.00), together with other payments, totaling Twenty-Eight Million Jamaican Dollars (J\$28,000,000.00).^{13 14 15} Mr Fletcher maintains that he and Mr Chambers agreed that the balance of the purchase price was to be paid on completion of the said Agreement for Sale, in exchange for the Duplicate Certificate of Title, endorsed in his name and/or that of his nominee.¹⁶ This Duplicate Certificate of Title, Mr Fletcher further maintains, was never conveyed to him.

The Ancillary Claim

[17] By way of an Ancillary Claim Form, which was filed on 18 January 2018, Mr Fletcher seeks the following relief: -

1. An order for specific performance of the sale agreement, executed by the Ancillary Claimant and Thomas Chambers some time in 2008, for the purchase by the Ancillary Claimant from Mr Chambers land comprised in Certificate of Title registered at Volume 1374 and Folio 9 of the Register Book of Titles.

¹³ See – Exhibit 9 which contains an original receipt dated 3 June 2008 in the sum of One Million Five Hundred Thousand Jamaican Dollars (J \$1,500,000.00) and Twenty Thousand United States Dollars (USD \$20,000.00). Bank of Nova Scotia Jamaica Limited cheque numbered 073943 in the total sum of J \$2,968,005.00 allegedly transferred to Thomas Chambers during the period of February to April 2008.

¹⁴ See – Exhibits 10 A, B, C and D, which contain copies of National Commercial Bank Jamaica Limited cheques from Reading Holdings Limited dated 2 April 2008, 3 April 2008, 10 April 2008, and 2 February 2008 and numbered 0868705, 0868701, 0868724, 0868637, respectively.

¹⁵ See – Exhibit 11, which contains a copy of Bank of Nova Scotia Jamaica Limited cheque dated 7 April 2008 and numbered 073943 in the sum of Five Hundred Thousand Jamaican Dollars (J \$500,000.00)

¹⁶ See – Paragraphs 7 and 8 of the Ancillary Particulars of Claim, which was filed on 18 January 2018.

2. A declaration that the Ancillary Claimant is entitled to possession and has a legal and beneficial interest in the land comprised in Certificate of Title registered at Volume 1374 Folio 9 of the Register Book of Titles, upon payment of the balance of the purchase price.
3. An order that, upon payment of the balance of the purchase price by the Ancillary Claimant to the Ancillary Defendant, the Ancillary Defendant is to take such steps as are necessary to have the Ancillary Claimant and/or his nominee registered as the sole proprietor of the land comprised in Certificate of Title registered at Volume 1374 Folio 9 of the Register Book of Titles.
4. An order that, if the Ancillary Defendant fails or neglects to sign a registrable transfer or any other relevant document, the Registrar of the Supreme Court be empowered to sign the transfer and/or any other document necessary to effect the sale and transfer of the land registered at Volume 1374 Folio 9 of the Register Book of Titles to the Ancillary Claimant from the Ancillary Defendant to the Ancillary Claimant.
5. Damages for breach of contract in lieu of or in addition to specific performance.
6. Further and/or in the alternative: -
 - a. A declaration that the interest of the Ancillary Defendant in 64.4 hectares of land at Spot Valley and being part of the land comprised in Certificate of Title registered at Volume 1374 Folio 9 of the Register Book of Titles, has been extinguished, pursuant to the operation of the Limitation of Actions Act.

- b. A declaration that the Ancillary Claimant has dispossessed the Ancillary Defendant of the said land and has acquired an absolute title against the Ancillary Defendant.
- c. An order that the Registrar of Titles endorse the Certificate of Title registered at Volume 1374 Folio 9 of the Register Book of Titles to indicate that the Ancillary Claimant and/or his nominee is the sole registered proprietor of 64.4 hectares of land comprised in the said certificate of title, having acquired an absolute title against the Ancillary Defendant in respect of the said land.

7. Costs.

The Defence to the Ancillary Claim

- [18]** In her Reply and Defence to the Ancillary Claim, which was filed on 15 February 2018, Ms Lee denies that her father entered into an agreement for the sale of the subject property. She denies the agreement for sale of the subject property and further, that her father ever received the sum of Twenty-Eight Million Dollars (\$28,000,000.00), from Mr Fletcher. Ms Lee asserts that the receipts which have been produced in evidence by Mr Fletcher do not amount to Twenty-Eight Million Dollars (\$28,000,000.00), nor do these documents state the purpose for which those payments were made, as is required by the Statute of Frauds.¹⁷
- [19]** Ms Lee accepts that, prior to his death, her father sold a separate and adjacent, smaller parcel of land to Mr Fletcher, which does not form part of the parcels of land which are comprised in Certificate of Title registered at Volume 1374 Folio 9 of the Register Book of Titles, the subject matter of the Claim. Ms Lee denies that

¹⁷ See – Paragraphs 1-8, inclusive, of the Reply and Defence to Ancillary Claim, which was filed on 15 February 2018.

Mr Fletcher was a purchaser in possession of the subject property and maintains that Mr Fletcher trespassed upon the subject property in 2013.¹⁸

THE LAW

The principle of the indefeasibility of a registered title

- [20] The principle of the indefeasibility of a registered title is one of the fundamental principles which form the bedrock of the system of the registration of land.
- [21] Sections 68, 70 and 71 of the Registration of Titles Act are instructive, and provide as follows: -

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

...

70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other

¹⁸ See – Paragraphs 10 and 11 of the Reply and Defence to Ancillary Claim, which was filed on 15 February 2018.

incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:

...

71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

The tort of trespass to land

[22] The Halsbury’s Laws of England (2021) Volume 97A provides the legal context in relation to what constitutes the tort of trespass to land. At paragraph 161, it is stated as follows: -

“A person’s unlawful presence on land in the possession¹⁹ of another is a trespass for which a claim may be brought, even though no actual damage is

¹⁹ Per Slade J in the authority of **Powell v McFarlane** (1979) 38 P. & C.R. 452 (1977), stated that: “(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner. (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (“animus possidendi”) (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in

done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another. He also commits a trespass to land if, having entered lawfully, he unlawfully remains after his authority to be there expires.”

[23] Further, at paragraphs 172 through to 174, it is stated as follows: -

“Any form of possession, so long as it is exclusive and exercised with the intention to possess, is sufficient to support a claim of trespass against a wrongdoer. It is not necessary, in order to maintain trespass, that the claimant’s possession should be lawful, and actual possession is good against all except those who can show a better right to possession themselves. However, a mere trespasser who goes into occupation cannot by the very act of trespass and without acquiescence give himself possession against the person whom he has ejected.

“Actual possession is a question of fact. It consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons. The extent of the control which should be exercised in order to constitute possession varies with the nature of the land; and possession means possession of that character of which the land is capable. Thus, a person may be in possession of minerals even though he is not in possession of the surface and has no actual occupation of the minerals.

Trespass is an injury to a possessory right, and therefore the proper claimant in a claim of trespass to land is the person who was, or who is deemed to have been, in possession at the time of the trespass. The owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of the trespass, since a mere right of

particular, the nature of the land and the way that land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary to prevent intrusion... It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole.”

property without possession is not sufficient to support the claim. However, if the land is vacant, the owner does have sufficient possession to sue in trespass. The type of conduct necessary to evidence possession varies with the type of land, and to maintain a claim against a person who never had any title to the land the slightest amount of possession is sufficient. Where possession is doubtful or equivocal, the law attaches it to the title.”²⁰

[Emphasis added]

The Statute of Frauds

[24] Section 41 of The Interpretation Act of Jamaica provides as follows: -

“41. All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island.”

[25] The effect of this provision stipulates that legislation such as the United Kingdom’s Statute of Frauds²¹ still forms part of the legislative bedrock of Jamaica. In the authority of **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and Ors**,²² Harris JA examined the Statute and its effect and made the following observations: -

“[18] In his findings, it can be readily observed that the learned trial judge placed enormous reliance on the Statute of Frauds. He correctly found that, for the purpose of the statute, any document upon which reliance is placed as a sufficient memorandum in writing must contain essential terms of a contract. However, in finding that there was no enforceable contract between the bank and Harley Corporation, he failed to invoke a cardinal rule of pleadings in that, in

²⁰ See also – **Harold Francis Jnr and Elvega Francis vs Dorrett Graham** [2017] JMCA Civ 39, per Edwards JA.

²¹ Repealed by the Law of Property Act 1925 (c. 20), Sch. 7 and Law Reform (Enforcement of Contracts) Act 1954 (c.34), s. 1

²² [2010] JMCA Civ 46

order to be relied upon, the Statute of Fraud must be pleaded. Nowhere in the pleadings is it disclosed that the statute had been pleaded. Therefore, the learned trial judge could not have properly acted upon it. In light of his findings, we think it appropriate to deal with the statute and its effect.

[19] Section 4 of the statute provides:

'No action shall be brought...

The statute does not render invalid a contract which does not conform with its provisions. This has been definitively pronounced by Lord Blackburn in Maddison v Alderson (1883) 8 App. Cas. 467, when he said, at page 488:

'I think that it is now finally settled that the Statute of Frauds both the 4th and 17th sections is not to render the contracts within them void still less illegal but is to render the kind of evidence required indispensable when it is sought to enforce the contract.'

[20] *As regards compliance with the statute, the foregoing illustrates that there is a distinction between the validity and the enforceability of a contract. As shown in Maddison v Alderson, a contract may still be valid notwithstanding its noncompliance with the statute. However, as correctly submitted by Dr Barnett, the question of its enforceability cannot be successfully raised in an action. No issue has been raised on the pleadings as to the enforceability of the contract between Harley Corporation and the bank.*

[21] *A further error on the part of the learned trial judge is that in misconstruing the statute, he misdirected himself on the evidence. His finding that the requirements of the statute were not satisfied was primarily based on a receipt of 5 January 1995, issued by the bank, through its attorneys-at-law, to Harley Corporation, with respect to the deposit paid...He failed to recognize that the payment of a deposit subsequent to an oral agreement for the purchase of land is sufficient evidence in support of a claim for specific performance...".*

[26] In order to have a valid, enforceable contract for the sale of an interest in land, parties must ensure that their contractual agreement contains all the terms of agreement, to include descriptions of the parties (both vendor(s) and

purchaser(s)²³, a description of the property²⁴ which forms the subject of the contract and in the case of registered land, a reference to the corresponding Volume and Folio Number in which it is entered in the Register Book of Titles. Importantly, for this written contract, note or memorandum to be valid and enforceable, it should contain the agreed purchase price and any other terms of payment,²⁵ as agreed to by the parties intending to be bound by this agreement.

- [27] Transactions for the sale of land are normally a two-stage process. Firstly, a binding contract for sale is usually prepared and both the vendor and the purchaser affix their signature or mark to it.
- [28] The second stage of the process is completion, which entails the conveyance of the legal title by the vendor to the purchaser (in the case of unregistered land), or a transfer of the title by the appropriate form (in the case of registered land).²⁶
- [29] The pronouncements of Sir George Jessle MR in the authority of **Lysaght v Edwards**,²⁷ are illustrative the effect of a valid contract for the sale of land: -

“...the moment you have a valid contract of sale, the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid in the absence of expressed contract as to the time of delivery.”

- [30] In circumstances where there is an absence of statutory requirements or formalities, the contract for sale of land is deemed unenforceable, unless the

²³ Usually, the names of the vendor and purchaser, address, occupation, and tax registration numbers are included to sufficiently describe the parties in sale of land transactions.

²⁴ The civil or postal address, indications as to whether the property is commercial or residential, furnished, or unfurnished, registered, unregistered and/or strata property is normally viewed as sufficient description for a subject property.

²⁵ Parties tend to include a completion date, if it is fixed, terms relating to the stages of the payment of purchase money, costs of pursuing the transaction including attorney and other professional fees, official fees including stamp duty and property transfer tax as well as any conditions precedent or special conditions to be performed by either party to the transaction.

²⁶ See – Page 237 of the 4th edition of the Commonwealth Caribbean Property Law, authored by Gilbert Kodilinye.

²⁷ (1876) 2 Ch. 499

party seeking to enforce the contract can demonstrate sufficient acts of part performance, to bring an action for specific performance, an equitable remedy which is available.²⁸

The law in relation to adverse possession

[31] It is trite law that for a party to mount a successful claim in adverse possession,²⁹ he must demonstrate a sufficient degree of physical custody and control, (factum possessionis),³⁰ that is, factual possession of the property as well as an intention to exercise such custody and control on one's own behalf and for one's own benefit, that is, the intention to possess (animus possidendi).³¹ A person intending to dispossess a paper owner of their right to property must be able to demonstrate that he has been in open, continuous, undisturbed and exclusive³² factual and intentional possession of that property for a minimum period of twelve (12) years.³³ ³⁴ Time begins to run against the paper owner once he becomes

²⁸ **Maddison v Alderson** (1883) 8 AC 467. It should be noted that the legal doctrine of part performance is based on equitable principles, which means that equity looks at the intention rather than form. The doctrine of part performance provides that a contract required to be evidenced in writing will still be enforceable even if it is not so evidenced provided that one of the parties does certain acts by which the contract is partly performed. The acts of part performance must be performed by the person alleging the contract to exist and must relate unequivocally to the contract.

²⁹ See – Page 223 of the 4th edition of the Commonwealth Caribbean Property Law authored by Gilbert Kodilinye. He states that: “*The effect of adverse possession is that a person who is in possession as a mere trespasser or ‘squatter’ can obtain a good title if the true owner fails to assert his superior title within the requisite limitation period.*”

³⁰ The land should have been dealt with as an occupying owner of that type of land might normally be expected to do and no other person should have done so.

³¹ **Buckinghamshire County Council v Moran** (1990) Ch. 623, 642: “*The emphasis is on possession and not on an intention to own or acquire ownership. This requirement of animus possidendi can be inferred from acts of possession. Where therefore the acts of possession are certain unequivocal and affirmative, the requirement of animus possidendi loses its importance as an ingredient of a claim of adverse possession.*”

³² See – Page 290 of the Commonwealth Caribbean Land Law, ‘*Possession is single and exclusive: “plures eandem rem in solidum possidere non possunt” – exclusivity is of the essence of possession.*’

³³ If a person is in possession of land or property with the permission of the true owner, his possession cannot be adverse. It should be noted that possession in which the landowner acquiesces, may be adverse.

entitled to commence legal proceedings against the adverse possessor, that is, when the person enters into 'adverse possession'.³⁵ The court is usually engaged in a fact-finding exercise to determine whether an adverse possessor has successfully dispossessed a paper owner or registered proprietor.³⁶ This can be attributed to the fact that adverse possession runs counter to the principle of the indefeasibility of a registered title.³⁷

Factual possession

- [32] Factual possession must be (i) *nec clam* (open and unconcealed) and (ii) *nec precario* (not by permission or consent). The learned author Sampson Owusu, in his text, Commonwealth Caribbean Land Law writes as follows: -

“The land should have been dealt with as an occupying owner of that type of land might normally be expected to do and no other person should have done so.

The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest... are to be taken into account in determining the sufficiency of a possession.

The character and sufficiency or degree of user necessary to constitute possession so as to pass title under the statute therefore depends on many factors, and thus renders the concept a relative term. It is a question of fact depending on all the circumstances of the case, not only on the physical characteristics of the land, the appropriate and natural uses to which it can be put, but also the conditions and the habits and ideas of the people of the locality,

³⁴ See – **Sanders v Sanders** (1881) Ch D 373: Once a full period of twelve (12) years has run, no payment or acknowledgment can revive any right to recover land, for the lapse of time will have extinguished not only the owner’s remedies for recovering the land but also his right to it.

³⁵ See – Page 269 of the Commonwealth Caribbean Land Law authored by Sampson Owusu, 2007 Routledge-Cavendish

³⁶ See – **Rains v Buxton** (1880) 14 Ch.D. 537,539, where the court determined that it is not necessary for the paper owner to know he has been dispossessed.

³⁷ See – Paragraph 35-001, page 1457 of the 8th edition of the Megarry and Wade, The Law of Real Property.

and even to a greater extent the course of conduct reasonably expected of an owner of that type of property having due regard to his interests. Consequently, acts of possession which may amount to possession in one case may be wholly insufficient to constitute possession in another.”

[33] Their Lordships in **JA Pye (Oxford) Ltd. v Graham**³⁸ approved the following passage from the judgment of Slade J in **Powell v McFarlane**: -³⁹

“The question what [sic] acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.”

[34] With respect to the *animus possidendi* element, the following pronouncements of Slade J are equally instructive: -

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

³⁸ [2002] UKHL 30

³⁹ (1979) 38 P & CR 452

...

What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

[35] Nor is it necessary for the adverse possessor to have had an intention to dispossess or exclude the paper owner. The authorities have established that the relevant intention is not an 'animus dispossessendi' or a conscious intention to dispossess the true owner. The only intention which must be demonstrated is an intention to occupy and use the land as one's own.

[36] The approach to be adopted by the court, in determining a claim for adverse possession, has been comprehensively stated by Sykes J (as he then was) in the authority of **Lois Hawkins (Administratrix of Estate of William Walter Hawkins, Deceased, Intestate) v Linette Hawkins McIniss**.⁴⁰ At paragraphs 12 and 13, Sykes J is quoted as follows: -

*"[12] The law in this area is no longer in doubt. It was most recently expounded by the Court of Appeal in **Fullwood v Curchar** [2015] JMCA Civ 37. This court cannot improve on the clarity, precision, and exposition of McDonald Bishop JA (Ag). The court will simply refer to paragraphs [29] to [54]. From these passages the following propositions are established:*

- (i) the fact that a person's name is on a title is not conclusive evidence that such a person cannot be dispossessed by another, including a co-owner.*
- (ii) the fact of co-ownership does not prevent one co-owner from dispossessing another.*
- (iii) sections 3 and 30 of the Limitation of Actions Act operate together to bar a registered owner from making any entry on or bringing*

⁴⁰ [2016] JMCA Civ 14

any action to recover property after 12 years if certain circumstances exist.

- (iv) in the normal course of things where the property is jointly owned under a joint tenancy and one joint tenant dies, the normal rule of survivorship would apply, and the co-owner takes the whole.*
- (v) however, section 14 of the Limitation of Actions Act makes the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant.*
- (vi) the result of sections 3, 14 and 30 of the Limitation of Actions Act is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against him or her with the consequence that if one co-owner dies the normal rule of survivorship may be displaced and a person can rely on the deceased co-owner's dispossession of the other co-owner to resist any claim for possession.*
- (vii) when a person brings an action for recovery of possession then that person must prove their title that enables them to bring the recovery action and thus where extinction of title is raised by the person sought to be ejected, the burden is on the person bringing the recovery action to prove that his or her title has not been extinguished thereby proving good standing to bring the claim.*
- (viii) the reason for (vii) above is that the extinction of title claim does not simply bar the remedy but erodes the very legal foundation to bring the recovery action in the first place.*
- (ix) dispossession arises where the dispossessor has a sufficient degree of physical custody and control over the property in question and an intention to exercise such custody and control over the property for his or her benefit.*

- (x) *the relevant intention is that of the dispossessor and not that of the dispossessed.*
- (xi) *in determining whether there is dispossession there is no need to look for any hostile act or act of confrontation or even an ouster from the property. If such act exists it makes the extinction of title claim stronger, but it is not a legal requirement.*
- (xii) *the question in every case is whether the acts relied on to prove dispossession are sufficient.*

[13] *It is fair to say that in this area of law the analysis of and interpretation of the evidence is influenced by whether the person claiming to extinguish the title is a co-owner or a trespasser. The law seems to require more of a trespasser than a co-owner. The difficulty in co-owner cases, where the dispossessing co-owner has been in possession, is in identifying the point in time when the relevant intention was formed. The difficulty arise [sic] because more often than not the intention is an inference from the act of possession.”*

[37] Professor Gilbert Kodilinye, in the 4th edition of his text, Commonwealth Caribbean Property Law, stated: -

“In order to prevent an adverse possessor from acquiring an indefeasible title under the Limitation Acts, the paper owner must show that, before expiry of the limitation period, he performed acts amounting to dispossession of the squatter and resumption of possession by him. Mere entry upon the land is not sufficient.

A claim to adverse possession of land may also be defeated by a written acknowledgment, made by the person in possession to any person claiming to be the proprietor, to the effect that the latter’s claim is admitted.”

[38] Sampson Owusu, at page 291 of his text Commonwealth Caribbean Land Law stated: -

“Where there is doubt, as, for example, where the evidence is indecisive as to who is in possession, the person who has title to the property is adjudged to be in actual possession and the other person is a trespasser. The person claiming title

by adverse possession has the burden of rebutting the presumption that the paper owner is in possession. The burden is discharged by providing factual possession – factum possessionis and intention to possess – animus possidendi. In Basildon v Charge the Court noted that the holder of the paper title is deemed to be in possession in the absence of contrary evidence. It was for the person seeking to establish adverse possession to produce contrary evidence which must be cogent and compelling evidence of a single degree of occupation and physical control of the land unimpeded by others, with the relevant animus possidendi and for a period of 12 years.”

THE SUBMISSIONS

The submissions advanced on behalf of the Claimant/ Ancillary Defendant

- [39] Learned Counsel Ms Jacqueline Cummings relied on the authority of **Conway v George Wimpy Co. Ltd**⁴¹ for a definition of the tort of trespass. Ms Cummings stated that trespass is defined as a deliberate entry onto land and that it is irrelevant that the defendant is not aware that he is entering onto the plaintiff's land or believes that the entry is authorized or even honestly and reasonably believes that the land is his.
- [40] Ms Cummings asserted that Ms Lee has on a preponderance of her evidence, established the tort of trespass and that Mr Fletcher has not denied that he trespassed onto the subject property. Mr Fletcher has sought to justify his actions by claiming to be a purchaser in possession. It was further asserted that nominal damages would not suffice in the instant case, because Mr Fletcher has removed several truckloads of topsoil from the subject property thereby diminishing the value of the land. In this regard, Mr Fletcher's evidence was that he excavated at least twenty-six (26) truckloads of topsoil from the subject property. In the circumstances, Ms Cummings submitted that the Court should award Ms Lee no

⁴¹ [1951] 2 KB 266, at pages 273-274

less than the sum of Five Million Jamaican Dollars (J\$5,000,000.00), as General Damages for the diminution in the value of the land.

- [41] With respect to the Ancillary Claim, Ms Cummings submitted that Mr Fletcher has not produced sufficient evidence in writing to satisfy the Statute of Frauds to prove that he purchased the subject property from Mr Thomas Chambers. Ms Cummings maintained that Mr Fletcher also failed to produce sufficient evidence of the payments which he made to Mr Thomas Chambers, for the specific purpose of the purchase of the subject property.
- [42] Finally, Ms Cummings submitted that, by virtue of section 36 of the Stamp Duty Act, an unstamped agreement for sale is inadmissible evidence. To buttress this submission, Ms Cummings relied on the authorities of **Henrich Fitz-Gordon v Bernet Spence**⁴² and **Maria Grey Grant v Christopher Wood et al.**⁴³

The submissions advanced on behalf of the Defendant/ Ancillary Claimant

- [43] For her part, Learned King's Counsel Mrs Symone Mayhew submitted that Mr Fletcher has proven his Defence and Ancillary Claim and that he has done so on a preponderance of the evidence. Mrs Mayhew urged the Court to enter judgment in favour of Mr Fletcher, both on the Claim and the Ancillary Claim. Mrs Mayhew asserted that Mr Fletcher mounted a defence to the claim in trespass because the evidence demonstrates that he [Mr Fletcher] was a purchaser in possession of the subject property. It was further asserted that Mr Fletcher has displayed sufficient acts of part performance of the agreement which he had with Mr Thomas Chambers, to warrant an Order for specific performance of that agreement.
- [44] Alternatively, it was submitted that Mr Fletcher has proven possession of the subject property for over twelve (12) years.

⁴² Suit No E 114 of 1989, decided on April 26, 1996

⁴³ [2020] JMSC Civ 188

- [45] Additionally, Mrs Mayhew submitted that the evidence clearly demonstrates Mr Fletcher's intention to dispossess Ms Lee. It was further submitted that Mr Fletcher has proven both factual possession and an intention to possess, by the evidence of his occupation of the subject property, the farming of the land which comprises the subject property, obtaining survey diagrams with a view to obtaining title, his removal of topsoil from the subject property for his own benefit and his own reported efforts in relation to persons who were squatting on the subject property.
- [46] In the event that the Court is minded to award Damages in trespass, Mrs Mayhew asserted that that award should be limited to the amounts candidly admitted to by Mr Fletcher as to the going price for a truckload of topsoil.

ANALYSIS AND FINDINGS

Whether Ms Lee has sufficiently proved that Mr Fletcher's removal of the topsoil from the subject property constitutes an unlawful or unjustifiable physical interference with the subject property amounting to the tort of trespass.

Whether Mr Fletcher has a valid and enforceable agreement for the sale of the subject property from Thomas Chambers, demonstrating sufficient acts of part performance to enable him [Mr Fletcher] to obtain the remedy of specific performance.

- [47] The authorities establish that the tort of trespass is an injury to a possessory right over land. The law makes it pellucid that a person with a registered title has an immediate right to possession. This right can only be defeated if a person is able to demonstrate a 'better' or a 'superior' right to possession, such as to defeat the paper title owner by way of adverse possession.

[48] It is common ground between the parties that Ms Lee is the duly appointed administratrix of her late father's estate and that, at the time of his death, the late Mr Thomas Chambers was the registered owner of the subject property.

[49] Section 3(1) of the Real Property Representative Act states: -

"3. - (1) Where real estate is vested in any person, without a right in any other person to take by survivorship, it shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, as if it were a chattel real vesting in them or him."

[50] It is against this background that the Court has no difficulty finding *prima facie*, that Ms Lee, in her representative capacity, has the immediate right to possession of the subject property.

[51] Conversely, Mr Fletcher, by way of his Defence and Ancillary Claim, seeks to rebut that presumption by his assertion that he had and still has a possessory right to the subject property, having purchased the subject property from Mr Thomas Chambers, in or around 2008. Alternatively, Mr Fletcher maintains that he has dispossessed the estate of the late Mr Thomas Chambers, by virtue of the operation of the Limitation of Actions Act, 1881.

[52] In this regard, the Court is first compelled to examine the evidence adduced to determine whether Mr Fletcher has demonstrated, on a preponderance of the evidence, that he has a valid and enforceable agreement for the sale and purchase of the subject property and further that he has dispossessed the estate of the late Mr Thomas Chambers.

[53] The Court observes that the Agreement for Sale on which Mr Fletcher relies is both unstamped and undated. Nor was he able to produce the original Agreement for Sale or to give a satisfactory account for the absence of the original document.

[54] Section 36 of the Stamp Duty Act reads as follows: -

“36. No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.”

[55] In the present instance, the purported Agreement for Sale does not form part of the evidence which is before the Court.

[56] In support of his assertions that he purchased the subject property, Mr Fletcher relies on photocopies of receipts of payments which he alleges represent the deposit on the purchase price of the subject property. Notably, these receipts do not indicate the purpose for which the payments were made nor do the amounts reflected on them amount to the sum of money which Mr Fletcher contends he paid.

[57] In the result, on a preponderance of the evidence, the Court is unable to find that Mr Fletcher is a purchaser in possession of the subject property. Nor has Mr Fletcher established his claim in adverse possession.

[58] Having found that Mr Fletcher did not have a possessory right over the subject property, the Court must then determine whether the actions of Mr Fletcher constitute an unlawful or unjustifiable physical interference with the subject property.

[59] Mr Fletcher does not deny removing topsoil from the subject property. In the cross-examination, Mr Fletcher averred: -

“Q: How many truck loads did you remove in 2013?”

A: I always sell topsoil. More than 10. I think it was sixteen loads. Fifteen Thousand Dollars (\$15,000.00), per load of topsoil.

Q: In 2017, how many loads did you collect?”

A: That was to my other property. I was doing some landscaping.

Q: How many loads did you collect?”

A: Probably about ten (10) loads.

[60] The Court also finds that Mr Fletcher's removal of the topsoil from the subject property constitutes an unlawful and an unjustifiable physical interference and constitutes a trespass on Ms Lee's possessory right to the subject property.

DISPOSITION

[61] It is hereby ordered as follows: -

- i. Judgment is entered in favour of the Claimant against the Defendant on the issue of liability in respect of the Claim for Damages in Trespass.
- ii. General Damages are assessed and awarded to the Claimant in the sum of Three Hundred and Ninety Thousand Dollars (\$390,000.00), with interest thereon at the rate of 3% per annum from 6 December 2017 to the date hereof.
- iii. The Defendant, whether by himself, his servant and or agent and or employee is restrained from continued and or further trespass and all those parcels of land on ALL THOSE parcels of land parts of SPOT VALLEY in the parish of Saint James, (section 1 and 2) together containing by survey Two Hundred and Thirty-One Hectares and Seven Hundred and Ninety-Two Thousandths of a hectare of the shapes and dimension and butting as appear by the plan thereof compromised in the Certificates of Title registered at Volume 1374 Folio 9 of the Register Book of Titles.
- iv. The Ancillary Claim is dismissed.
- v. The Costs of the Claim and the Ancillary Claim are awarded to the Claimant against the Defendant and are to be taxed if not sooner agreed.

- vi. The execution of this judgment is stayed for a period of forty-two (42) days from the date hereof.
- vii. Mesdames Archer, Cummings, and Company are to prepare, file and serve these Orders.