



[2024] JMSC Civ 175

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2020 CV03545

BETWEEN ELENA MARAS CLAIMANT

AND ADMINISTRATOR GENERAL OF JAMAICA DEFENDANT
(Administrator of the Estate of Rudyard Muir, deceased)

BETWEEN ADMINISTRATOR GENERAL OF JAMAICA Ancillary Claimant
(Administrator of the Estate of Rudyard Muir, deceased)

And ELENA MARAS Ancillary Defendant
(Administrator Ad Litem in the Estate of Clive Smith)

IN OPEN COURT

*Claudia and Nelton Forsythe instructed by Forsythe and Forsythe for the Claimant/
Ancillary Defendant*

*Melissa White instructed by The Administrator General for Jamaica for the Defendant/
Ancillary Claimant*

HEARD: 14th and 15th of October 2024 and 13th of December 2024

Land Law – Instrument of transfer executed but not registered - whether the transfer effectively transferred a gift in land to the transferee. Recovery of possession of land – Adverse Possession - Whether at the time of an Application to the Registrar of Titles for transfer of title based on possession, the elements to satisfy adverse possession were present. Fraud – Indefeasibility of Title – Whether the current title holder knowingly, or wantonly not caring about the truth of the contents presented false and misleading information to the Registrar of Titles to obtain the title. – Whether the Registrar of Titles Acted on Misleading and False Information to Transfer Title to the Current Title Holder.

THOMAS, J

Background

[1] Lot No. 84, Beverly Hills formerly part of Mona and Papine Estates in the parish of Saint Andrew, registered at Volume 1464 Folio 86 (hereinafter referred to as the subject property) now registered in the name of Clive Smith was previously registered at Volume 963 Folio 181 in the names of Enid Beckford and Rudyard Muir as joint tenants. Enid Beckford died on the 15th of April 2000. Rudyard Muir (Snr), died on December 9, 2008. His death was reported to the Administrator General on the 10th of May 2009.

[2] By way of an application, dated the 20th of April 2011, claiming that he had adversely dispossessed Mr. Muir, Mr. Smith was successful in having the title to the subject property transferred to him by the Registrar of Titles. This application was approved on the 12th of March 2013. A new certificate of Title was issued with the registered proprietor being Clive Smith.

[3] On the 6th of September 2013 the Administrator General lodged a caveat against the title of Clive Smith. On the 23rd of June 2014 the Administrator General received a grant of Administration with Will annexed for the Estate of Mr. Muir. On the 12th of February 2020 Mr. Smith executed but failed to register an instrument of transfer purporting to transfer the title to the subject property to his wife Ms Elena Maras. Mr. Smith died on the 1st of May 2020.

[4] Ms Elena Maras, the Claimant/Ancillary Defendant was appointed administrator ad litem of the estate of Mr. Smith for the purpose of this Claim. In the Claim and accompanying Particulars of Claim filed on the 21st of February 2024, the Claimant/Ancillary Defendant, Elena Maras as the Administrator Ad Litem of the Estate of her deceased husband, Clive Smith is seeking declarations that she is the rightful/ equitable owner of the subject property. That the title of Mr. Rudyard Muir had been extinguished and that her husband Mr Smith had rightfully, transferred the property to her on the 12th of February 2020. She also seeks an order for the removal of the caveat.

[5] The Defendant, the Administrator General in addition to a Defence has filed an Ancillary Claim on the 19th of May 2022. The Defence and Ancillary Claim are posited on the assertion that the title to the subject property was acquired by Mr. Smith by Fraud. It is being alleged by the Defendant/ Ancillary Claimant that Mr.

Smith misrepresented the information regarding his occupation and possession of the property to the Registrar of Titles in order to obtain the transfer. In the Defence the Defendant has made the following averments;

“(i)Prior to his death in 2008, Rudyard Muir visited the property on multiple occasions and exercised acts of ownership including bushing the property while remaining in sole quiet, peaceful and open undisturbed possession of the land.

-(ii)here were no buildings or structures erected on the property and every boundary of the property was not fenced with chain link wire. Since the death of Rudyard Muir and the issuing of the Grant of Administration with Will Annexed in the deceased's estate, the Administrator General has undertaken to administer the estate and has been in control of the assets of the estate including the property since the death was reported in 2009. the land was thickly vegetated and in ruinate,

(iii)The adverse possession application submitted by Clive Smith should have been rejected as he did not have open, undisturbed, exclusive and intentional possession of the property for a period of twelve (12) years or more. As such, Elena Maras is not the rightful owner of the property as same could not have been transferred to her by Clive Smith as he should not have been registered as the proprietor of the property because of fraud. Rudyard Muir's legal right has not been extinguished and the Estate of Rudyard Muir is the beneficial owner of the property to be administered by the Administrator General in light of the Administration with Will Annexed.

(iv) An executed Instrument of Transfer without registration of the instrument is an incomplete gift which does not create an interest in the property “to Ms. Maras.”

[6] In the Ancillary Claim the Defendant/Ancillary Claimant seek the following reliefs:

- i. A declaration that land contained in the Duplicate Certificates of Title formerly registered at Volume 963 Folio 181 and now registered at Volume 1464 Folio 86 was legally owned by Rudyard Wordsworth Muir otherwise called Rudyard Muir and Enid Veronica Beckford otherwise called Enid Beckford during their lifetimes and is now vested in Estate Rudyard Wordsworth Muir otherwise called Rudyard Muir.
- ii. A declaration that the Duplicate Certificate of Title formerly registered at Volume 963 Folio 181 now registered at Volume 1464 Folio 86 and the lands contained thereon was obtained by fraud and/or fraudulent representation by Clive Smith.
- iii. An order that the Registrar of Titles cancels the Duplicate Certificate of Title registered at Volume 1464 Folio 86 with the name of Clive Smith

endorsed thereon as the Registered Proprietor and that new Duplicate Certificate of Title be issued in the names of Rudyard Muir and Enid Beckford pursuant to section 158 of the Registration of Titles Act.

- iv. An order for immediate recovery of possession of all that parcel of Beverly Hills formerly part of Mona and Papine Estates in the parish of Saint Andrew being the Lot Numbered eighty-four and being all the land comprised in Certificate of Title formerly registered at Volume 963 Folio 181 and now registered at Volume 1464 Folio 86 of the Register Book of Titles.
- v. An order directing the Registrar of the Supreme Court to sign (if any) all documents and/or transfer instruments on behalf of the Ancillary Defendant in order to facilitate the cancellation of the said Certificate of Title formerly registered at Volume 963 Folio 181 and now registered at Volume 1464 Folio 86 of the Register Book of Titles in accordance with paragraph 3 above.
- vi. An order that all Transfer Tax and/or Stamp Duty (if any) associated with conveyance and/or issuing of the new Duplicate Certificate of Title in accordance with paragraph 3 above herein be waived.
- vii. An order that the Registrar of the Titles be directed to dispense with the production of the Duplicate Certificate of Title registered at Volume 1464 Folio 86 of the Register of Book of Titles pursuant to section 81 of the Registration of Titles Act.

Particulars of Fraud

[7] They particularize the allegations of fraud as follows;

- a. The ancillary defendant fraudulently obtained the Title registered at Volume 1464 Folio 86 by way of an adverse possession application no. 1688980.
- b. The ancillary defendant fraudulently and/or falsely represented to the Registrar of Titles that he obtained the property by way of adverse possession by remaining in sole quiet, peaceful and open undisturbed possession of the land when the deceased, Rudyard Muir had consistently performed acts of ownership regarding the subject property.
- c. The ancillary defendant fraudulently and/or falsely represented to the Registrar of Titles that he obtained the subject property by way of adverse possession by bushing the land, fencing the land with chain link fencing and building on the land as status reports conducted by agents of the Administrator General revealed that at the time in which

the adverse possession application was filed by Clive Smith, the land was thickly vegetated and in ruinate, there were no structures on the land and the property was only partially fenced.

DEFENCE TO ANCILLARY CLAIM

[8] The Claimant's defence to the Ancillary Claim filed on the 12th of July 2022 is as follows;

(i) The property formerly registered at Volume 963 Folio 181 was adversely possessed and accordingly whatever beneficial and/or equitable interest that the late Rudyard Muir is alleged to have had was extinguished and the new certificate of title registered at Volume 1464 Folio 86 of the Register Book of Titles is duly endorsed in the name of the Ancillary Defendant's late husband as the proprietor and owner.

(iii) The caveat was prematurely lodged on the basis of mere allegations of the Administrator General as Clive Smith took possession of the subject property in October 1989 and a statutory period of twelve years would have elapsed in the year 2001. Rudyard Muir died December 9, 2008. Therefore, whatever interest he had in the property would have been extinguished during his lifetime.

(iii) The allegations of the fraudulent act and/or false representation against Clive Smith are denied. Clive Smith took possession of the property he remained in sole quiet, undisturbed, peaceful and open possession of the property from October 1989, a period in excess of twelve (12) years. He had actual possession of the property, in that, he bushed the land, fenced it in, constructed a temporary shed and used it to rear horses.

[9] Ms Maras further avers that;

"She visited the property many times with her husband and had observed that the property was indeed fenced with chain-link fencing and barbed wire. The building that was constructed on the land, was a temporary structure which was used as a shed and an enclosed portion was used for storage. On January 26, 2011, the Certificate of Payment of Taxes submitted with Clive Smith's application for registration of the land acquired by adverse possession shows that the property taxes, for the property were paid up to March 31, 2011. In the interest of justice and/or fairness, Clive Smith acquired title by adverse possession during the lifetime of Rudyard Muir. Clive Smith had the legal and beneficial interest in the property when he transferred same to her".

THE EVIDENCE

Claimant's Case

Elena Maras

[10] In her witness statement which was permitted to stand as her evidence in chief, Ms. Maras asserts that she met Clive Smith sometime in 2002 and they lived together for about six years before marriage in April 19, 2008. She indicates that when she met Mr. Clive Smith he was already in possession of Lot No. 84, Beverly Hills.

[11] She further indicates that since 2002 she has visited the property many times and when she first went to the property it was enclosed with chain linked fence. She continues by stating that there was an old structure used for storage and attending to the horses and that structure could be described as temporary as the walls and frames were constructed from board and zinc roof and the base of rough casted concrete. She states that the structure eventually deteriorated and collapsed, and that even though there is no sign of the building today parts of the concrete base are noticeable.

[12] Ms. Maras indicates that in January 2011 after being in possession of the land for twenty-one (21) years, her husband applied to the Registrar of Titles, to be registered as the owner. She asserts that he had sole, quiet, peaceful, undisturbed possession and open occupation for over twelve (12) years. She further asserts that the application was approved on March 12, 2013 and a new Certificate of Title registered at Volume 1464 Folio 86 was issued to Clive Smith as the registered proprietor.

[13] She states that on the 12th of February 2020 when Mr Smith signed a Transfer of Land, he transferred all his legal interest in the property registered at Volume 1664 Folio 86 to her.

[14] On cross examination Ms Maras says that she had not been to the Beverly Hills property before meeting her husband. She states that she visited the property couple times per month, many times per year and when she went to the property it was fenced. However, she admits that she did not see her husband erecting any fence. She also cannot say when the fence was erected.

[15] It was put to Ms. Maras that her husband never fenced the property. Her response is that the property was enclosed by a fence and that there was an old structure on the property when she arrived. However, she was unable to say who built it. She disputes the suggestion there never was a structure on the property.

[16] Ms. Maras asserts that the size of the structure is about eight feet by ten feet (based on her demonstration in court) and that the structure was used for storing tools, maintaining and caring for the horses, and putting the horses inside. She says there were usually two horses on the property at a time. She also mentions that when the structure deteriorated her husband did not fix it up. On re-examination, she testifies that the remnant of the structure that is the foundation is still presently on the property.

VISIT TO THE LOCUS

[17] The locus, at 3 Parkhurst Drive, Beverly Hills, Kingston 6 was visited on the 15th of October 2024 and the court made following observations;

- i. The surface of the land to the front of the property that is closest to the road is flat.
- ii. The left and middle front has a relatively smooth surface.
- iii. There is a slight slope to the front right side, towards the middle and to the back of the property there is what can be described as a steep double slope.
- iv. There are in fact 2 deep slopes like a ravine. The second slope is much deeper than the first slope.
- v. The land to the right front, and right has many rocks of varying sizes to include a big boulder.
- vi. There is a very large honeycomb rock embedded in the ground to the right front of the property.
- vii. Chain-linked fences separate the property from the neighbours to the left and back of the property. There is barb wire fence to the

front. There is a stone and concrete wall separating the property from the neighbour's property to the right.

- viii. The stone section is attached to the concrete but is at the end of the concrete towards the road.
- ix. The property to the middle and back was also observed to be highly vegetated. Numerous tree stumps were also observed at the right front of the property.
- x. What appears to be concrete flooring measuring 6ft by 6 and half feet was observed as one climbed down in the deepest descent towards the back of the property.

Evidence at the Locus of ELENA MARAS

[18] At the Locus, Ms. Maras indicates that it was she who caused the trees that were now only showing the stumps to be cut down and that she used chemicals to stop these trees from re-growing. This she said was done after Mr, Smith's death. She also indicated that she was the one who had the barbed wire fencing installed at the front after Mr, Smith's death.

[19] On further cross-examination Ms Maras agrees that the surface of the foundation measures 6 feet by 6 and half feet. She says the average length of one of the horses was 8ft. She admits that a horse that size could not fit in the size of a shed, 6 feet by 6 feet. She says also that the horses did not go inside the shed but that purpose of the shed was to keep the buckets, tools, and stuff for horses and to take care of horses. She further states that the structure deteriorated, rotted down, and fell to pieces over the years.

[20] She is unsure of what happened to the horses when it rained as they were taken care of by her husband. She also says that she is not sure if the horses were permanently on the property and that during hurricane time the horses were taken to a stable at Caymanas Park. Ms. Maras states that her husband and herself could not let the neighbours know that the horses were being tethered on the land, as the area was a residential. area. She further states that the structure was not demolished but that "it rotten down and fell to pieces over the years".

Richard Bonner

[21] In Mr. Bonner's witness statement which was permitted to stand as his evidence in chief, he states that he had known and had been well acquainted with Clive Smith. He states that he met Clive Smith at the Jamaica College Old Boys Reunion in 1975 where they discussed their aims and objectives in furthering their careers.

[22] He further states that he has had many conversations over the years with Clive Smith regarding business operations to include a horse riding club at Jamaica College for children and persons interested in horseback riding. He was also affiliated with the

Racehorse Owner's Association and obtained donations of retired horses from the association to assist him in the horse-riding club.

[23] Mr. Bonner's testimony is that as the club began to grow and establish itself, Mr. Smith would consult with him as to the necessity for him to acquire lands to tether the horses and transport them to the Jamaica College grounds. In 1985, Clive Smith approached him regarding undeveloped property he had noticed in Beverly Hills on Rutland Drive in the parish of Saint Andrew.

[24] In the statement Mr. Bonner indicates that he has visited the property with Clive Smith several times between 1985 to 1989. However, on amplification he says the period should be corrected to read 1989 to 2005. He says that on the occasion of these visits he witnessed Clive Smith tethering a horse, sometimes two horses at a time on the property. He says also that he has seen Mr. Smith transporting the horses from the property in a horse trailer. On those occasions he has never seen anyone coming onto the property to query and/or challenge Clive Smith regarding his occupation of the land.

[25] During cross-examination Mr. Bonner states that he visited the property four, five, or six times between the period 1989-2005. He further states that the horses could not be left wild and was put in an area where they could be harnessed, tethered and a structure was on the land. This structure, he says was about eleven (11) feet by 18 to 20 feet. It is also his evidence that when he went there he stayed

no more than two to four hours at a time He insists that Mr. Smith tethered horses at the property, and that he saw a structure on the property.

DEFENCE/Ancillary Claimant's case Trevor Bailey

[26] In his evidence, Mr. Trevor Bailey states that he was a close friend of Rudyard Wordsworth Muir from the 1970's until he died in 2008. He states that they both migrated to the United States of America before 1980 and that the deceased lived in New York, and he lived in Florida. He further states that he and Mr. Muir permanently returned to living in Jamaica in 1993 and 1997 respectively.

[27] He asserts that he knew the deceased to be the owner of the property located at 3 Parkhurst Drive, Beverly Hills formerly registered at Volume 963 Folio 181 and now registered at Volume 1464 Folio 86. He says that in 1997, he considered purchasing the subject property from the deceased or joining him in developing the land. As such he visited the property with the deceased in the same year.

[28] Mr. Bailey indicates that when he visited the property in 1997, he observed that it was overgrown with trees and bushes. That approximately two (2) weeks after this visit, he found two (2) workmen at Mr. Muir's request who in his presence cleared the land. After which they were able to adequately view the property so that he could determine if he wanted to proceed with the purchase. He also indicates that he visited the property in 1998 with his brother-in-law, Byron Constantine who was an architect, to assist Mr. Muir in determining the type of structure he could build on the land as he was no longer interested in purchasing it at that time.

[29] He states that at the time of his visits, he observed that the land was not fenced, there were no building, no structure nor partial structure erected on the property. There were no person on the property and there were no signs that the land was occupied. He says the deceased visited the property on multiple occasions and exercised acts of ownership including bushing the property.

[30] During cross-examination, Mr. Bailey maintained that he was a friend of Rudyard Muir and he visited the property in 1997. He further states that the terrain is generally rocky with huge boulders, overgrown shrubs and trees. The boulders are

located more to the rear, and middle to rear of the property. He says, it was years ago that he visited the property so he does not quite remember exactly where the boulders were. (He was shown a photograph attached to the status report of the Defendants (exhibit 12) He agrees that the exhibit shows heavily grown trees and bushes, but insists that the property he visited was bushed. He states that looking at the picture the surface is not rocky. He agrees that there is one boulder on both sides and the picture gives the impression of a flat piece of land.

[31] He further states that the picture could be of the same piece of land he visited in 1997. He recalls that there is a descent but says he is uncertain to what degree. He further states that he did not see any chain linked fence and that he does not recall a stone wall fence at the southern boundary of the property. He does not recall seeing any building but also says there very well may have been fencing but he does not recall.

Nichole Tulloch

[32] Ms. Nicole Tulloch's witness statement was permitted to stand as her evidence in chief. She states that she is the surviving spouse of Rudyard Muir, and that prior to his death in 2008, she accompanied him on multiple occasions between 1990 and 1999 to visit the property. On these visits, she was able to observe that there was no buildings or structures erected on the property. She states that every boundary of the property was not fenced with chain link wire and that the property was only bushed when done by Rudyard Muir.

[33] In her cross examination, Ms. Tulloch maintains that prior to Mr. Muir's death in 2008 she accompanied him on multiple occasions between the period 1990-1999 to the property. She states that she visited the property about fifty to one hundred times and that the terrain is rocky, bushy and has a slope. She further states that each time they visited the property between 1990 to 1999 her husband caused the property to be bushed She however states and that her husband did not bush the property by himself. She says she has never gone to the property with Mr. Bailey. She insists that the only chain link fence that is there belong to the neighbours. She asserts that the stone wall belongs to another neighbour and that the barbed wire fence at the front was done post pandemic, after 2020 She does not recall a stone

wall to the southern part of the property neither does she recall a large boulder to the front part of the property. However, she mentions that there are several large boulders on the property.

[34] Upon the visit to the locus she says everything looks the same apart from the front barbwire fence and that was added post pandemic after 2020, and that the almond trees were added in about 2020.

Rudyard Muir

[35] In his witness statement which was allowed to stand as his evidence in chief Mr. Rudyard Muir states that he is the son of the deceased, Rudyard Muir and that he knows the deceased to be the owner of the property. He further states that he visited the property with his father on a consistent basis from 1986 to 1995. They went on the property on multiple occasions to look at the view of the city as it was one of their favourite past times. He says that at the time of those visits, he observed that the land was not fenced and there were no buildings, structures, or partial structures erected on the subject property.

[36] He mentions that on these multiple occasions when he visited the subject property with his father, his father would pick up a gardener who he would take to chop down some of the bushes at the property. There are several occasions that he recalls seeing the gardener weed the property and plant trees and he also saw his father provide the gardener with money after he was finished.

[37] He says that in September 1995, he and his father drove to the subject property to discuss his future in Jamaica. On this visit, he observed that the land was bare of any building, structure or partial structure.

[38] On cross examination he states that he was born in the United States of America as he maintains that he visited the property with his father whenever he was in Jamaica. He further states that he is forty- five (45) years old and that in 1986 when he was seven (7) years old his father took him to Beverly Hills, as it was a part of their thing, their little adventure, that is what his father would call it.

[39] He recalls the state of the property in 1994 to 1996 as being bushy and rocky with rocks, gravel, weeds. He states that he attended the Priory High School in Jamaica for two and a half (2 ½) years. His father would pick him up and take gardeners to chop down the bushes. He says he saw them with machetes. He also says that a lot of the times the visit was, at nighttime. He states that the last time he visited the property was 2010 to 2011 and at that time there was no barb wire fencing.

[40] On the visit to the locus Mr. Muir states that the difference in state of the property between his last visit what he sees currently is that, there is now a fence at the front where there was none before and that at the front there is now less surface area to drive on. Like some of the ground is missing.

Carol Kiffen

[41] In her evidence Ms. Carol Kiffen states that the Administrator General's Department received the report of the death of Mr. Rudyard Muir (Senior) on the 10th of March 2009. The Grant of Administration with Will Annexed in Rudyard Muir's estate was issued to the Administrator General on the 23rd of June 2014. When the Administrator General discovered that the Certificate of Title registered at Volume 963 Folio 181 was cancelled and a new Title was issued at Volume 1464 Folio 86 as a result of a successful adverse possession application by Mr. Clive Smith, the Department lodged a caveat against that title.

[42] Ms Kiffen states that during the process of the administration the property was visited on several occasions and status reports were completed by the property administrator regarding the property as is customary with all estates to be administered by the Administrator General. (These reports were admitted into evidence).

[43] She mentions that the reports of the 22nd of April 2010, the 19th July 2013, and the 28th of November 2014, indicate that the property was partially fenced with chain link and stone wall, there were no structures erected on the land. The land was "thickly vegetated, in ruinate, and was not occupied by the alleged adverse

possessor or any other person". She also indicates that there were outstanding property taxes for the period of 2003 to 2010 in the amount of \$72,600.00.

[44] She asserts that:

"Clive Smith claimed an interest in the property by adverse possession by fraudulently providing incorrect information asserting sole quiet, peaceful and open undisturbed possession of the property since October 1989 to substantiate his application and caused the Registrar of titles to cancel title registered at Volume 963 Folio 181 and issue a new Title registered at Volume 1464 Folio 86. As such, the adverse possession application should have been rejected as he did not have open, undisturbed, exclusive and intentional possession of the property for a period of twelve (12) years".

[45] She contends that:

"Elena Maras is not the rightful owner of the property as Clive Smith could not have transferred it, as he should not have been the registered proprietor. Rudyard Muir's legal rights has not been extinguished and the Estate of Rudyard Muir is the beneficial owner of the property to be administered by the Administrator General".

[46] During, cross-examination, Ms. Kiffen states that she is familiar with the matter, as she was the one who ordered the first status report in April 2010 (exhibit 12A). She further states that she accepts as a true statement in the report that," the land is approximately 22,538 square feet, rectangular in shape, and appears to be steeply sloping in the southern direction". She agrees that the picture of exhibit 12A, show no steep slope and the northern section of the pictures show no thick shrubs. She says that she accepts the following statement in the report.; "That there is a stone wall at the southern end of the property, chain link fence at the eastern part of the property and a chain link fence at the western part of the property.

[47] She agrees that in the report of the 19th of July 2013, under the heading of "fence", it is stated that; *"the northern section is unfenced, southern section is unknown, eastern section is chain linked and the western section is chain linked"*.

[48] She also agrees that she is not able to see any steep slope from photographs. She further agrees that the northern section based on the report has high vegetation. She confirms that in the report of the 28th of November 2014, that under the heading of "fence" the southern boundary was unknown, the eastern and western boundary

were chain link fencing. She further agrees that the photographs attached to the report do not show any steep slope and the southern boundary shows very thick vegetation or shrubs and that was the boundary that was indicated unknown.

[49] Having being shown the report submitted with the Application for Title by Mr. Smith from **Total Properties** she agrees that the land is described as being “rectangular in shape and slopes steeply downwards from the road and there is large honeycomb rock rising above the road level that exist at the front of the lot close to the centre and that the land is rocky “. However, she disagrees with the report that all boundaries were fenced with chain link fence at the time.

Issue

[50] One of the issues in this case is whether an unregistered instrument of Transfer can effectively create an interest in land by way of a gift.

[51] The other issues which I consider to be the two major issues in this case as it relates to the Claim and Ancillary Claim surround principles of fraud and adverse possession. As such, these issues simply stated are as follows.

(i) whether the Title to the subject property now registered in the name of Mr. Clive Smith was legitimately obtained by Adverse Possession; or

(ii) whether the title was obtained by Fraud.

The law

Fraud

[52] According to Section 68 of the Registration of Title Act - the certificate of title is conclusive evidence that the person named therein is the registered proprietor of the estate named therein. It reads:

“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”.

[53] Section 70 guarantees the paramountcy of the registered title. However, section 71 provides that this paramountcy is subject to the exception of the title being obtained by fraud. These sections provide as follows;

“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 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:

Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument

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 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.

[54] **Section 161** also provides protection to a registered proprietor of land, as it creates a bar to recovery against any such proprietor except in certain circumstances, one such circumstance being the title having been obtained by fraud. The section reads:

*“No action of ejectment or other action, suit or proceeding, for the recovery of any **land** shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say —*

- (a) the case of a mortgagee as against a mortgagor in default;*
- (b) the case of an annuitant as against a grantor in default;*
- (c) the case of a lessor as against a lessee in default;*
- (d) the case of a person deprived of any **land** by **fraud** as against the person registered as proprietor of such **land** through **fraud**, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through **fraud**;*
- (e) the case of a person deprived of or claiming any **land** included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;*
- (f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,*

and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding.

[55] In case of **Harley Corp. Guarantee Inv. Co. Ltd v. Daley (Rudolph) et al and RBTT Bank Ja. Ltd v. Daley (Rudolph) et al** [2010] JMCA Civ 46 Harris JA in explaining the recognition that the law accords to a registered title holder provided the following explanation:

“Sections 70 and 71 of the Registration of Titles Act, confer on a proprietor’s registration of an interest in land, an unassailable interest in that land which can only be set aside in circumstances of fraud”. “In the absence of fraud, an absolute interest remains vested in a registered proprietor. All rights, estate and interest prevail in favour of the registered proprietor. Harley Corporation being registered as the proprietor of the land holds a legal interest therein which can only be defeated by proof of fraud.”

[56] In commenting on this issue the court in the case of **Thomas Anderson v Monica Wan** [2020] JMCA Civ. 41 at paragraph 37 stated that:

“Section 70 makes it plain that fraud is the principal exception to the indefeasibility of title secured by section 68. Fraudulent conduct on the part of the registered proprietor therefore defeats a registered title.”

ADVERSE POSSESSION

[57] As it relates to the issue of adverse Possession the Limitation of Action Act prohibits a proprietor of Land from bringing an action for recovery of possession of land where he or she fails to bring such an action within 12 years of the cause of action to enforce such right arose. Section 3 of the afore-mentioned Act reads;

“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 ...”

[58] **Section 30** more specifically indicates that at the end of the 12 years within which the action could have been brought the right to the title of such proprietor is extinguished. The section reads:

“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”

[59] **Section 85 of the RTA** then allows the occupier of land who is claiming title by possession (to include possession by dispossession of the legal title holder) to apply for the title of such land. The section reads;

“Any person who claims that he has acquired a title by possession to land which is under the operation of this Act may apply to the

Registrar to be registered as the proprietor of such land in fee simple or for such estate as such person may claim."

[60] In commenting on operations of the aforesaid section, Mc Donald Bishop JA (ag) as she then was, in the case **Fullwood v Curchar [2015] JMCA** Civ 37. at paragraph 30, had this to say;

"It is evident from that provision (as well as section 85 of the Registration of Titles Act) that the indefeasibility of a registered title and the concomitant right of the registered owner to possession of his property is subject to a subsequent operation of the statute of limitations which could pass title to someone else".

[61] The case of **Oxford Ltd v Graham [2003] A C 419** outlines the legal basis on which an occupier of land is able to dispossess the legal title holder of his title. These are (i) factual possession and (ii) an intention to possess. (See the Judgment of Pye JA.).

SUBMISSIONS

On behalf of the Claimant

[62] The following are submissions of counsel on behalf of the Claimant:

- i. The **Limitations of Action Act (LAA) section 3**, provides that the requisite period within which to bring an action or claim to recover land occupied adverse to the interest of the title owner is twelve (12) years. A duly registered title is indefeasible except, where it was obtained by fraud. The allegations of fraud must be particularized and proven. Counsel relies on the Privy Council decision, **Waimiha Sawmilling Company Limited v The Waione Timber Company Limited [1926] A.C. 61** where the decision in **Assets Co. Ltd v Mere Roihi [1905] A.C.** was applied. At page 201 where Lord Lindley states:
- ii. *Fraud in these actions (i.e. actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud, unfortunate expression, and one very apt to mislead but often used for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.*
- iii. The allegations of fraud must be established by showing actual fraud, not acts that amount to constructive or equitable fraud. Fraud must be

specifically alleged and strictly proven and cannot simply be inferred or derived from the words stated. In essence, clear and sufficient evidence must be adduced to support the allegations. When the court is considering fraud in a civil matter, it will require a higher degree of probability than in a case of negligence (Counsel relies on the cases of **Beverly Lewis and Harriet Hartley v Cleveland Harley [2016] JMSC Civ 34, Omad Limited v Bevad Limited**).

- iv. *"In deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it, the standard of proof was explained as follows: (Counsel relies on **Chin v Watson Off Course Betting 1974 JLR 135**. Quoting from **Halsbury Laws of England, Volume 12 (2009) 5th Edition** at paragraph 1109 – 1136).*
- v. Ms Maras evidence is that there was a structure on the property when she arrived (in 2002) but she did not see who built it. It is also Ms Maras' evidence that the property was gifted to her and she takes care of it as if it was hers, she bushed it twice per week.
- vi. Miss Maras's acts in a representative capacity and the acts of fraud as alleged would have been done prior to her meeting her husband. Her defence is limited to what her husband told her and she believes to be true. Under cross-examination, Mr Bonner stated that he visited the property four to six times between 1989 and 2005, that Clive Smith kept horses on the property and there was an area on the property where the horses were kept as they were not left to run wild. He further stated that the horses were put in an area where they would be harnessed. It is also his evidence that he did not see more than two (2) horses at a time on the property.
- vii. The Claimant contends that her late husband reared and/or kept horses on the property and the building referred to was a temporary structure that was used for storage and a shed for the horses. Further, the Claimant states that the land is located in the affluent residential neighbourhood of Beverly Hills, in the parish of Saint Andrew and over the years as the

neighbourhood developed, the temporary, non-residential structure on the subject property had to be demolished. The said structure/building was not in keeping with the characteristics of the neighbourhood. The Claimant contends that her late husband reared and/or kept horses on the property and the building referred to was a temporary structure that was used for storage and a shed for the horses. Further, the Claimant states that the land is located in the affluent residential neighbourhood of Beverly Hills, in the parish of Saint Andrew and over the years as the neighbourhood developed, the temporary, non-residential structure on the subject property had to be demolished, she also gave evidence that the building was never repaired. The said structure/building was not in keeping with the characteristics of the neighbourhood. **viii.** Mr Bonner stated that there was a structure on the property that measured about 11ft by 18ft.

- ix.** Mr. Bonner's credibility was never challenged as such the court should accept this evidence as the truth.
- x.** Based on Clive Smith's statutory declaration sworn to on January 24, 2011 and submitted to the Registrar of Titles, he took possession of the property in or about the year 1989 and he remained in sole, quiet, peaceful, open and undisturbed possession of the land for a period in excess of twelve (12) years. The requisite statutory time would have expired in or about 2001. It can therefore be concluded that the requisite period elapsed during the lifetime of Rudyard Muir who died on December 9, 2008. Clive Smith had successfully satisfied all the requirements of **section 3 of the LAA, and sections 85 and 86 of the RTA**. Not only did he dispossess the previously registered title owner but he also acquired an indefeasible interest in the property pursuant to **section 25 of the RTA**. Rudyard Muir's legal and proprietary interests in the property were extinguished in favour of the late Clive Smith approximately seven (7) years before Rudyard Muir died. Accordingly, the subject property does not form part of Rudyard Muir's estate.
- xi.** In commenting on the Defendant's case counsel submitted as following:
The Administrator General's allegations are baseless and unfounded as they try to gather and rely on evidence from the state of the property,

some twenty-one (21) years after Clive Smith took possession. The first property report done by the Administrator General was done on or about April 22, 2010, some twenty-one years after Clive Smith had been in possession. In the Status Report dated April 22, 2010 (exhibit 12a) none of the pictures show the property steeply sloping. These pictures show the northern section with thick shrubs. It reports a stonewall to the southern boundary, and a chain-linked fence to both the eastern and western boundaries. In the report dated July 19, 2013 (Exhibit 12b) and the pictures attached there was no picture reflecting any steeply slope land area and that this report also indicates that the southern section of the property is unknown. The report does not indicate why this boundary is unknown. The third property Report dated November 28, 2018. Also indicates that the southern boundary was also unknown and this report does not indicate why that section was unknown. **xii.** The Valuation Report, and prepared by Total Properties Limited (marked exhibit 6) described the land as *“almost rectangular in shape and slopes steeply downwards from the road. A large Honey combe Rock rising above the road level exists at the front of the lot close to the centre. The land is rocky. There is an unfinished building on the site. The land has a road frontage of 64.85 metres. All boundaries were fenced with chain link wire at the time of inspection”*. A visit to the locus revealed a description of the land similar to that outlined in the valuation report prepared by Total Properties dated March 29, 2011.

xiii. The Defendant's Property Administrators did not thoroughly inspect the land so has to have identified all the boundaries and structure located thereon. The Claimant further submits that on a balance of probabilities, the Valuation Report prepared by Total Properties has proven to be the most accurate and best reflects a true description of the property.

xiv. Mr. Bailey's evidence does not advance the Defendant's case due to inconsistency. In cross-examination, Mr Bailey gave evidence that he visited the property in 1997 and at that time the property was overgrown. It is his evidence that the property was rocky and had huge boulders with shrubs and trees. He also stated that there were about two (2) boulders to the middle and rear of the property. The visit to the locus would have

disclosed that there is only one (1) large rock rising above ground level which is firmly fixed in the ground at the front of the property. Mr. Bailey was shown the Property Report of April 22, 2010 (Exhibit 12a). His response was that the property was a rocky terrain that was not reflected in the picture shown to him. Mr Bailey also conceded that there was only one (1) boulder in the picture. He also admitted that from the pictures he could not tell if that was the same property he visited in 1997. It is his evidence that the property has a little decent but he cannot recall to what degree. Likewise, he could not recall if there was a stone wall to the southern boundary. After Mr. Bailey gave evidence that he had the property cleared by two men so that he and the late Rudyard Muir could adequately view the property, Mr. Bailey could not recall the state of the southern boundary and could not recall seeing any fencing on the property.

- xv.** Ms Tulloch is not a credible witness and her evidence, on a whole, appears to be doubtful and misleading. Her evidence does not advance the Defendant's case, particularly in respect to the relevant statutory period from October 1989 to September 2001. It is Ms Tulloch's evidence that she has visited the property multiple times, 50 to 100 times. She described the property as having a slope, it is rocky and bushy. She stated that there was no chain-linked fence on the property and that there was no fencing of the property. She stated that the fencing only came in 2020. She further stated that she does not recall if there was a stonewall on the property but she can recall that there were several large boulders at the front of the property. When she was shown the pictures from the property reports she said that

the land in the picture looks like the neighbour's property. Notwithstanding Ms Tulloch's evidence that she has visited the property between 50-100 times, she categorically stated that she cannot recall seeing a stonewall on the property, or the one large boulder at the front of the property.

- xvi.** The three (3) property reports and the valuation report respectively, on which the Defendant is relying, categorically state that there was chain-link wire fencing on the property.

- xvii. It is clear from Ms Tulloch's evidence that she did not visit the property as often as she said and that she was not as familiar with the property as she would have liked the court to believe.
- xviii. Mr. Muir's evidence lacks credibility and the court should not add much weight to his evidence. Mr. Muir, in cross-examination, stated he had visited the property numerous times with his father between 1986 to 1995. He also stated that a lot of the times he went by the property it was night. He described the property as having *bushes, rocks and gravel* and that the property slopes down. He did not recall seeing a stonewall fence at the southern end of the property neither has he seen a chain-linked fence nor any half (1/2) finished building. At the locus, Mr. Muir indicated that the property did not seem like where he had been with his father.
- xix. The weight of the evidence tendered by the Defendant did not establish a case of fraud against the Claimant. On a balance of probabilities, the Defendant did not adduce sufficient evidence to prove fraud as alleged against the Claimant.
- xx. To substantiate the claim of fraud against the estate of Clive Smith, the Defendant alleges in paragraph 20 of her Ancillary Particulars of Claim that there were outstanding property taxes from 2003 to 2010 amounting to \$72,600.00. The allegation is false and misleading. The relevant Certificate of Payment of Taxes, submitted with Clive Smith's Application for Registration of Land acquired by Adverse Possession, shows that the property taxes had been paid up to March 31, 2011. Nevertheless, the period between 2003 to 2010 does not fall within the applicable statutory period, that is, 1989 to 2001.
- xxi. Clive Smith during his lifetime of the subject property and acquired good title as the registered proprietor pursuant to the operation of the Registration of Titles Act of Jamaica. Therefore, the property does not fall to the estate of Rudyard Muir. The Defendant has not established fraud against the Claimant or her late husband as the Defendant has failed to satisfy the evidential burden of fraud, as alleged.

DEFENDANT/ ANCIILLARY CLAIMANT

[63] The following are submissions of Ms Melissa Whyte on behalf of the Defendant

- (i) If the Court finds the evidence of Ms. Tulloch, Mr. Muir, Mr. Bailey and Ms. Kiffen to be truthful, then the court ought to find that Clive Smith acted in a dishonest manner by fraudulently representing to the Registrar of Titles that he obtained the subject property by way of adverse possession by bushing, fencing and building on same and remaining in sole quiet, peaceful and open undisturbed possession of the subject property since October 1989.
- (ii) The statements contained in Clive Smith's Adverse Possession application were deliberate and dishonest with the intent of causing interest in the subject property to be transferred to him. As such, it is the Defendant's view that elements that required to establish fraud on the part of Mr. Smith in these statements have been established. These are; a false representation of fact, which may be by word or by conduct, the representations were made with the knowledge that they are false and they were made in the absence of a belief in their truth. (She relies on the case of the case of **Derry v Peek (1889) 14 App. Cas. 337**).
- (iii) The defendant accepts the indefeasibility of a registered title except in the case of fraud. (She relies on the authorities of S. 70, and s. 161 of the Registration of Titles Act; Thomas Anderson v Monica Wan (As Personal Representative in the Estate of Iris Anderson) [2020] JMCA Civ 41; Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley, Walters & RBTT Bank Jamaica Limited [2010] JMCA Civ. 46; Waimiha Sawmilling Company Limited v Waione Timber Company Limited [1926] A.C. 101).
- (iv) The documents submitted by Clive Smith to the National Land Agency in support of his adverse possession application documents included an Amended Declaration of Clive Smith dated April 20, 2011, Declaration of Herman DaCosta dated January 24, 2011 and Declaration of Jean Jolly dated January 24, 2011. In documents it was represented to the Registrar of Titles that since October 1989, Clive Smith took possession of the subject property and performed the following acts of possession:
 - a. Remained in sole quiet, peaceful and open undisturbed possession of the land;
 - b. Bushed the land;
 - c. Fenced the land with chain-link fencing;
 - d. Built on the land;

- e. Received profits as owner; and
- f. Settled all outstanding taxes.

(v) Nichole Tulloch, widow of the deceased (Rudyard Muir), provided evidence to the Court that prior to her husband's death in 2008, she accompanied him to the subject property on multiple occasions where he exercised acts of ownership in her presence whilst remaining in sole quiet, peaceful and open undisturbed possession of the land. From her visits to the subject property with the deceased, she observed no buildings or structures erected on the subject property and the entire property was not fenced with chain link wire between 1990 and 1999. From a visit to the property, the Court is made aware that in order to see all boundaries of the property and to observe whether there are any buildings thereon, one would need to walk down the steep slope of the property to view same. Accordingly, Ms. Tulloch would only be able to confidently give this evidence after walking around on the property and observing that there were no buildings thereon. In cross examination when questioned about the chain link fence to the east and west of the property, Ms. Tulloch was able to stridently advise that the chain link to the east and west of the property was the fence of the adjoining lot owners. She stated further that any fence to the front of the property was erected after 2020, which is years after Clive Smith submitted his adverse possession application which indicates that he had fenced the property between 1989 and 2011. In cross- examination, Ms. Tulloch revealed to the Court that she visited the subject property with the deceased when they went to Kingston from Santa Cruz which was approximately fifty (50) to one hundred (100) times prior to the death of Rudyard Muir as visiting the property was a sense of pride. She gave evidence that she would visit the property with her husband when he took men to de-bush the property. She was also able to give an avid description of the property including the slope thereon and the large boulder at the front of the property. The Court should consider Ms. Tulloch to be a truthful witness in light of her extensive details regarding the property juxtaposed with the frequency within which she visited the property up to 2008 when her husband died.

(vi) Mr. Rudyard Muir, son of, the deceased stated that he and the deceased visited the property consistently between 1986 and on multiple occasions when he went with his father he brought a gardener to the property for de-bushing he did not recall seeing a chain link fence at the property in 1995 and when asked about any structure on the property, he fervently refuted same. The is being asked to believe his evidence that the land was not fenced and there was not a partial structure thereon in light of the frequency in

which he visited the property and the consistency of this evidence with that of Ms. Tulloch.

(vii) Mr. Bailey gave evidence that he visited the property often with the deceased. indicated that he was interested in purchasing the subject property and as such, he visited same in 1997 and 1998 with an architect. He states that at the time of his visits, the land was not fenced, and there was no buildings or structures at the property Mr. Bailey should be found as a credible witness as he was able to provide an avid description of the property consistent with Ms. Tulloch and Mr. Muir (Jnr) indicating that in the 1990s, the property was without fencing. Mr. Bailey's evidence is that he was a friend of the deceased at the time of his death. As such, he has nothing to gain from the property being returned to the estate of Rudyard Muir as he is not a beneficiary of the said estate.

(viii) During the process of the administration of Estate Rudyard Muir by the Administrator-General for Jamaica, the subject property was visited on several occasions and Status Reports were completed by Property Administrators, as agents of the Administrator-General for Jamaica, regarding the property as is customary with all estates to be administered by the Administrator-General for Jamaica. Reference is made to Status Reports dated April 22, 2010, July 19, 2013 and November 28, 2014 which are Exhibits 12(a), 12(b) and 12(c). The first Status Report indicates that as at April 22, 2010, on the Property Administrator's visit to the property, there were no structures erected on the land and the land was thickly vegetated and in ruinate. This is evidenced by the pictures provided with the aforementioned Status Report and in contradiction with the Declarations submitted by Clive Smith to the National Land Agency to substantiate his claim of Adverse Possession in 2011. Further, this Status Report indicates that the chain link fence was at the east and west of the property which is in alignment with the evidence of Ms. Tulloch that the fencing of the property to the east and west belonged to the neighbour and there was no fencing to the front of the property. The first Status Report indicates that as at April 22, 2010, the subject property was not occupied by the alleged adverse possessor or any other person and there were outstanding property taxes for the period of 2003 to 2010 in the amount of \$72,600.00.

(ix) That the second and third Status Reports indicate that as at July 19, 2013 and November 28, 2014 respectively, there were no buildings erected on the land and the land was thickly vegetated. This is evidenced by the pictures provided with the aforementioned Status Reports and in contradiction with the Declarations submitted by Clive Smith to the National Land Agency to substantiate his

claim of Adverse Possession in 2011. Additionally, the property was unoccupied by the alleged adverse possession or any other person. Therefore, the evidence provided by all witnesses of the Defendant are in direct contradiction with the acts of possession alleged by Clive Smith and his supporting declarants. Further, all witnesses of the Defendant are consistent in their evidence that from 1989 to 2010, the property was heavily bushed, there were no structures thereon, and it was not entirely fenced.

(x) If the Court finds the evidence of Ms. Tulloch, Mr. Muir, Mr. Bailey and Ms. Kiffen to be truthful, the Defendant asks the Court to find that Clive Smith acted in a dishonest manner by fraudulently representing to the Registrar of Titles that he obtained the subject property by way of adverse possession by bushing, fencing and building on same and remaining in sole quiet, peaceful and open undisturbed possession of the subject property since October 1989. The statements contained in Clive Smith's Adverse Possession application were deliberate and dishonest with the intent of causing interest in the subject property to be transferred to him. As such the Defendants have satisfied the elements required to establish fraudulent misrepresentation identified in the case of **Derry v Peek**.

(xi) Further, the Adverse Possession application submitted by Mr. Smith indicated that he was in sole possession of the property from 1989 to 2011, that is, when the application was submitted. Accordingly, any evidence given by Ms. Maras regarding Mr. Smith's dealing with the land would only be for a period of nine (9) years (from 2002 to 2011) and as such, she cannot give evidence to the Court to satisfy that Mr. Smith adversely possessed the property for the limitation period required by law. Ms. Maras gave evidence that in 2002, the property was enclosed by a fence. This is in direct contradiction with the evidence of the Defendant's witnesses including the Status Reports for the property which all refer to chain link fence to the east and west of the property but no fencing or even remnants of a fence to the north. Further, Ms. Maras gave evidence of a wooden structure at the property with a concrete base which, in Court, she indicated was approximately 8ft by 10ft in size. She stated further in cross examination that the structure was used for storing tools, tethering horses, caring for horses, and putting the horses inside. However, upon a visit to the property, the Court was able to find that the concrete base of the structure was 6.5ft by 6ft and Ms. Maras was fervent in her evidence at the locus that the horses never went in the wooden shed. It is to be noted that Ms. Maras only made the statement that the horses never went into the shed when faced with information requested by the Court confirming that the average length of a

horse is 8ft. We ask the Court to find that Ms. Maras' change in evidence and all other evidence provided is solely rooted in her desire to acquire the highly desirable Beverly Hills property and it is our respectful submission that no reliance ought to be placed on her evidence.

(xii) Mr. Smith's adverse possession application states that he fenced the entire property. We ask that the Court can take judicial notice of the fencing at the property. The chain link fencing to the east and west of the property is that of the neighbour's fencing and the evidence of the Defendant's witness, Ms. Tulloch and the Status Reports from the Administrator-General's Department, was that the north of the property was never fenced. In fact, Ms. Tulloch goes further to state when the north of the property was fenced, that is, 2020, which is after the death of Clive Smith. In Mr. Smith's Adverse Possession application, he stated that he bushed the land, however, the Defendant has several witnesses who have given evidence that Rudyard Muir (the deceased) caused the property to be bushed in their presence. This is in alignment with the pictures seen in the Property Reports at Exhibits 12(a), 12(b) and 12(c) which show that the property was heavily bushed after Mr. Muir died.

(xiii) The Adverse Possession application submitted by Clive Smith indicates that he settled all outstanding property taxes at the property. However, the application is only supported by a Certificate of Payment of Property Taxes and as such, this is only evidence that the taxes were paid and not who they were being paid by. As such, Clive Smith did not prove that he personally paid the property taxes. Further, in the Trial herein, the Claimant did not provide one (1) receipt to prove that Clive Smith paid any property taxes Mr. Smith's Adverse Possession application indicates that he built on the land. The evidence of Ms. Maras is that this is referring to a wooden shed / structure. However, the Defendant in these submissions has already explored Ms. Maras' inconsistent evidence regarding the size of the purported structure and how it was used. That further, the Claimant has not provided one (1) picture to the Court of the alleged wooden structure or horses at the property. That accordingly, we ask the Court to reject the evidence that there was in fact a wooden structure at the property that was erected by Mr. Smith.

(xiv) That further, there is no evidence before the Court to establish when the purported concrete base was built. As is it clear that Ms. Maras has used the property consistently in recent years, it is our submission that this purported base could have been built

up after the death of Clive Smith. We ask the Court to find that without more evidence, it cannot be concluded that the purported concrete base is a remnant of a wooden structure / shed used by Clive Smith during the relevant period of 1989 to 2011.

(xv) The Valuation Report completed by Total Properties Chartered Valuation Surveyors indicates that the property was inspected on March 27, 2011 and at that time, there was an unfinished building on the site. However, it is to be noted that on page 6 of the Adverse Possession Application, the Registrar of Titles states that the said Valuation Report was not prepared by a duly appointed Valuer and as such, it cannot be accepted. The Defendant therefore asks the Court to reject the contents of this 'Valuation Report' entirely as the Registrar of Titles did in 2011 as it was established that the maker of the report was not duly appointed. ***Instead, we ask the Court to rely on the Surveyor's Identification Report that forms a part of the Adverse Possession Application. In order to prepare such a report, a Surveyor would need to explore the entire property in order to be able to confirm its boundaries and size. Further, such a report would identify any concrete structure or unfinished building on the property in the drawing of the report. It is to be noted that this report does not indicate the presence of any structure at the time of inspection on March 12, 2011. Instead, the diagram in the report is representative of a vacant lot.***

(xvi) Mr. Bonner's evidence is that he visited the property '4, 5 or 6 times 1989 and 2005 and that when he visited the property he saw horses tethered to a structure which he states was 11ft by 18ft-20ft. This is almost double the size of the purported concrete base that was seen by the Court at the visit to the property during the Trial (i.e. 6.5ft by 6ft). Further, this is also in contradiction with the size of the structure which Ms. Maras gave evidence of (i.e. 8ft by 10ft). This contradiction of the size of the purported wooden structure / shed is glaring. The Court should consider same when determining whether to accept Mr. Bonner and Ms. Maras as witnesses of truth. Further, Mr. Bonner's evidence is that he never saw anyone come to the property to query and/or challenge Clive Smith occupation of the property. In visiting the property only v '4, 5 or 6 times during the period' of 1989 to 2005. Mr. Bonner did not visit the property frequently enough to speak of the state of the property and whether anyone made claims regarding same.

(xvii) The court is being asked not to place heavy reliance on the evidence of Ms. Maras and Mr. Bonner as Ms. Maras can only speak of how the property was used from 2002 and 2011 and Mr. Bonner can only speak about his limited observations from the '4, 5

or 6 times' he visited the property from 1989 to 2005. Instead, the Court is being urged to rely solely on the Adverse Possession application submitted by Mr. Smith and the acts he and his declarants claimed he performed regarding to the property juxtaposed with the evidence of Ms. Tulloch, Mr. Muir and Mr. Bailey who would have visited the property on multiple occasions and could give evidence regarding its state. Further, the Court to rely on the property reports prepared by the Administrator-General's Department which indicate that there were no structures erected on the land, the front of the property was not fenced, and the land was thickly vegetated and in ruinate; which is supported by pictures.

(xviii) The Registrar of Titles acted upon the false statements indicated in Clive Smith's adverse possession application. The false representation directly caused the Duplicate Certificate of Title registered at Volume 963 Folio 181 in the names of Rudyard Muir and Enid Beckford to be cancelled and a new Duplicate Certificate of Title registered at Volume 1464 Folio 86 to be issued in the name of Clive Smith. In light of this, the estate of Rudyard Muir sustained damage as the subject property is no longer a part of the deceased's estate in light of the cancelled Title.

Discussion

The Burden and Standard of Proof

[64] Having reviewed all the legal authorities submitted by both counsel for which I am grateful, and giving due consideration to the submissions of both counsel I will now proceed to address my mind to the burden and standard of proof required concerning the issues that I am required to resolve.

FRAUD

[65] In light of the fact that the legal title is presently in the name of Mr Smith the entitlement of Mr. Smith's estate to the subject property is paramount unless the Defendants can on a high balance of probabilities demonstrate on cogent clear evidence that the title was transferred to Mr. Smith in 2011 by Fraud. This principle of law has been expounded upon in several authorities and has been recognized and accepted by both counsel in their submissions.

[66] In the case of **Timber Company Limited** [1926] AC 101, Salmon LJ, at page 106 had this to say:

*"Now fraud clearly implies some act of dishonesty. Lord Lindley in **Assets Co. v. Mere Roihi**(2) states that: 'Fraud in these actions' (i.e., actions seeking to affect a registered title) 'means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud.'"*

[67] In the Privy Council case of **the Assets Company v Mere Roihi and ors.** – [1905] UKPC,11. at pages 27 & 28 of that judgment, Lord Lindley, on behalf of their Lordship outlined what the Claimant must prove in order to establish fraud. He said:

"fraud in these Acts is meant actual fraud, i.e dishonesty of some sort; not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may properly be ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon".

[68] Additionally, in the case of, **Harley Corp. Guarantee Inv. Co. Ltd v. Daley** (Rudolph) et al and **RBTT Bank Ja. Ltd v. Daley** (Rudolph) et al; Harris JA at paragraph 60 stated that:

*"Fraud for the purposes of sections 70 and 71 of the Act must be born out of acts which are "designed to cheat a person of a known existing right" - see **Waimiha Sawmilling Company v Waione Timber Co; Bannister v Bannister** [1948] 2 All E.R 133 and **Binnons v Evans** [1972] Ch 359. It is clear that, as shown in **Asset Company Limited v Mere Roihi** (1905) AC 176, 210, acts founded on contrived ignorance or wilful blindness would be such acts arising out of constructive or equitable fraud."*

[69] In the case of **Hornal v. Neuberger Products Ltd.** (1957) 1 Q.B. 247. the court had this to say, “a court when considering a case of fraud in a civil matter will, of course, require a higher degree of probability than in a case of negligence.”

[70] Therefore, in the in the instant case, the burden rest on the Defendant/Ancillary Claimant to prove on a high balance of probabilities, that Mr. Smith knowingly and intentionally, or not caring whether or not it was the truth presented misleading information, in his application for title on the basis on adverse possession, to the Registrar of Titles. This is the settled principle of law regarding fraudulent misstatements laid down in the case of **Derry v Peek** (1889) 14 App. Cas. 337 and correctly recognized by Counsel for the Defendant/ Ancillary Claimant.

[71] In essence it is for the Administrator General of Jamaica to prove fraud on the part of Mr Smith and they must prove that;

- (i) The statements he furnished to the Registrar of Titles were false; and
- (ii) That he “... made them knowingly or without belief in its truth, or recklessly, careless, whether it is to be true or not”
- (iii) That, is was on the basis of these statements title was issued to Mr. Smith, thus wrongfully depriving the estate of Mr. Muir the benefit of his title.

[72] Harrison J A, in the case of **Bevad Limited v Omad Limited** SCCA No 133/05 in pronouncing on the issue at page 8 stated inter alia;

“There must be a false representation of fact. This may be by word or conduct; The representation must be made with the knowledge that it is false, that is, it must be wilfully false or made in the absence of belief in its truth (See also the case of (Nocton v Lord Ashborne [1914-1915] All E. R. 45.)

ADVERSE POSSESSION

[73] As it relates to an action for recovery of land, where the occupier is resisting the Claim for recovery by virtue of adverse possession, the burden of proof also rests on the person seeking recovery, to establish on a balance of probabilities that his title has not been extinguished. In the case of **Fullwood v Curchar** (Supra) at paragraph McDonald Bishop JA (Ag) (as she then was) reinforced this established principle. At paragraph 38, she stated that;

“when a claimant brings a claim to recover possession, he “must prove that he is entitled to recover the land as against the person in possession. He recovers on the strength of his own title, not on the weakness of the defendant’s”

[74] Therefore, considering the fact that it is the Defendant/ Ancillary Claimant who is seeking recovery of possession of land which they claim was wrongfully obtained by Mr. Smith by adverse possession, the burden rest on them to prove that at the time of the Application for Title by Mr. Smith to the Registrar of Titles Mr. Muir’s Title to the subject property had not been extinguished.

[75] Consequently, in view of Ms Whyte’s submission that *“there is no evidence before the court as to when the shed was constructed, that this purported base could have been built up after the death of Clive Smith.; that without more evidence, it cannot be concluded that the purported concrete base is a remnant of a wooden structure/shed used by Clive Smith during the relevant period of 1989 to 2011”*, I must take the opportunity at the juncture , to explain that it is not for Ms, Maras to prove dispossession at this stage. That is the burden is not on her to put evidence before the Court to establish when the purported concrete base was built, but it is for the Defendant to prove that there was no dispossession. That is, the Defendant must adduce evidence to prove that Mr Smith was not in open undisturbed possession for 12 years up to the time of his application in 2011. Essentially, the Defendant must prove that Mr. Muir’s title had not been extinguished.

Whether the Unregistered Transfer is capable of Transferring the legal interest in the Land by Way of Gift to the Claimant

[76] Regarding Ms. Maras' claim for a Declaration that the title was effectively transferred to her, the fact that the transfer was unregistered in effect makes it an unperfected gift. A proper construction of Section 88 of the **Registration of Titles Act** reveals that, where an interest in land is being transferred by way of an instrument of transfer, such instrument would have to be first registered in order to effectively pass title to the transferee.

[77] The section reads

"The proprietor of land, or of a lease, mortgage or charge, or of any estate, right or interest, therein respectively, may transfer the same, by transfer in one of the Forms A, B or C in the Fourth Schedule hereto; and a woman entitled to any right or contingent right to dower in or out of any freehold land shall be deemed a proprietor within the meaning hereof. Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, of the original lessee, mortgagee or annuitant."

[78] Additionally, the law is trite that, where there is a mere imperfect gift equity will not assist in perfecting it. (See the cases of ...**Dillwyn V Llewlyn** (1861-1873 All ER Rep , 384; **Milroy V Lord** ;45 ER) However, there are cases in which the courts have found that:

*"Subsequent acts of the donor may give the donee the right or ground of Claim which he did not acquire from the original gift". (See the judgment of Lord Westbury at page 387 in the case of **Dillwyn V Llewlyn**.) In the case of **Dillwyn V Llewlyn**, there was an imperfect gift of land by a father to a son who encouraged his son to build a house on it. In that case, the court found that the son acquired the right from the subsequent transaction to call on the donor to complete the imperfect donation that was made. This principle was applied in the Jamaican Court of case of **Raffington v McIntosh Resident** (Magistrate Civil Appeal No.5 of 2007)."*

[79] Therefore, in the event that the court finds that the Defendant Ancillary

Claimant have failed to establish fraud on the part of Mr. Smith, in the absence of any evidence by the Claimant of any further transaction by the Claimant in relation to the land, in reliance on the transfer prior to the death of Mr, Smith the furthest the court can go is to declare that the title remains vested in the estate of Mr. Smith.

[80] I will therefore have to commence the analysis of the evidence by first seeking to determine whether at the date when Mr. Smith presented his application to the Registrar of Titles Mr Muir's title had not in fact been extinguished. As such I will assess the evidence to determine whether the Defendant/Ancillary Claimant has proven on a balance of probabilities that elements to establish adverse possession on the part of Mr Smith had not been satisfied up to the time of his application.

The Application

[81] The Application to the Registrar of Titles by Mr. Smith is dated the 24th of January 2011. In this application, Mr. Smith stated that he took possession of the subject property in October 1989 and since then he remained in *"sole quiet, peaceful and open undisturbed possession of the land, bushed, fenced with Chain Link fencing, built on the land, received profits as owner (and) settled all outstanding taxes"*.

Requisition from the Registrar of Titles' Office

[82] Concerning his application, a requisition from Registrar of Titles dated the 15th of February 2011 directed to Mr Smith stated as follows:

"Paragraph 2 of the application instrument should be amended to conform to the prescribed form. The true value of the land with all improvements thereon is required. I require a surveyor's diagram or report on the area of land claimed. It does not appear that the valuation report on file was prepared by a duly appointed valuer, it cannot be accepted...."

Mr. Smiths' Response

[83] In response to the above-mentioned requisition, Mr. Smith submitted an amended declaration to the Registrar of titles stating that. Paragraph 2 is amended as follows:

"That the value of the aforesaid land is Five Million Dollars (\$5,000,000.00) and no more."

"That the value of the aforesaid land is Ten Million Dollars (\$10,000,000.00) and no more, including improvements and structure."

Other Declarants

[84] In support of the application, Mr. Smith also submitted declarations from two other individuals.

[85] The declaration of Herman Dacosta in support of Clive Smith's application for adverse possession dated the 24th of January 2011 reads as follows:

"That I live and have my true fixed place of abode at 15 Beverly Drive, Beverly Hills, Kinston 6 in the parish of St. Andrew, and I am an Optician of the age of 68 years and upwards.

That I have known the land and the subject of this application, from as far back as February 1984, and when I first knew the land, it was owned by Enid Beckford and Rudyard Muir, who exercised there over all the usual customary acts of ownership, enjoying the profits thereof as owner.

That since late 1986 Enid Beckford and Rudyard Muir apparently abandoned the land and it remained in ruinate until Clive Smith took possession of it.

That since that time the said Clive Smith reported that he has heard nothing from the said Enid Beckford and Rudyard Muir and has remained in sole quiet, peaceful and open undisturbed possession of the land. He has bushed the land, fenced it with chain link fencing, erected a building on it and is in receipt of the profit as owner, and as exercised all customary rights of ownership there-over up to present time...."

[86] The other declarant is. Jean Jolly. His declaration reads as follows:

"That I live and have my true fixed place of abode at 17 Rutland Drive, Beverly Hills, Kinston 6 in the parish of St. Andrew, and I am a Businessman of the age of 64 years and upwards. That I have known the land and the subject of this application, from as far back as January 1985, and when I first knew the land, it was owned by Enid Beckford and Rudyard Muir, who exercised there over all the usual customary acts of ownership, enjoying the profits thereof as owner. That since late 1986 Enid Beckford and Rudyard Muir apparently abandoned the land and it remained in ruinate until Clive Smith took possession of it. That since that time the said Clive Smith reported that he has heard nothing from the said Enid Beckford and Rudyard Muir

and has remained in sole quiet, peaceful, and open undisturbed possession of the land. He has bushed the land, fenced it with chain link fencing, erected a building on it and is in receipt of the profit as owner, and as exercised all customaryrights of ownership there-over up to present time....”

[87] Relevant to these discussions are the Valuation Report being relied on by the Claimant/Ancillary Defendant and the Status Reports being relied on by the Defendant/Ancillary Claimant.

VALUATION REPORT BY TOTAL PROPERTIES

[88] In the Valuation Report prepared by Total Properties on March 29, 2011, for the Claimant. Mr. Horace Battick notes that the land spans an area of 2,096.03 square meters (22,538.00 square feet). In terms of boundaries he reports that the property is bounded to the north by 5 Parkhurst Drive (residence), to the south by 1 Parkhurst Drive (residence), to the east by Parkhurst Drive, and to the west by 30 Montclair Drive (residence). In his report he continues by stating that the land is rectangular in shape and slopes steeply downwards from the road. A large Honeycomb rock rising above the road level exists at the front of the Lot close to the centre. The land is rocky and there is an unfinished building on the site. He notes that at the time of inspection, all boundaries were fenced with chain link fencing. The fair market value of the property is stated as Ten Million Dollars (\$10,000,000.00).

STATUS REPORTS

[89] In the status report dated the 22nd of April 2010, commissioned by the Administrator General of Jamaica on behalf of the Estate of Rudyard Muir. Ms. Nezinga Campbell, in her report, states that in relation to the boundaries of the property the north is unfenced, the south has a stone wall and the east and west are chain link, to the north is Parkhurst Drive, to the south is 32 Montclair Drive, to the east is 1A Parkhurst Drive and to the west is 5B Parkhurst Drive. She further reports that the land is vacant and there are no structures on the property. The condition of the land is thickly vegetated and in ruinate and that the land is approximately 22,538 square feet, is rectangular-like in shape, free draining, and appears to be steeply sloping in a southerly direction. Property tax is outstanding for the period 2003-2010 in the amount of \$72,600.

[90] The Administrator General's status report dated the 19th of July 2013 was prepared by Ms. Michelle Greaves. In relation to the fencing of the property, she states that," the north is unfenced, the south is unknown, and that the east and west are chain links. With respect to the boundaries of the property, she reports that to the northwest is 5B Parkhurst Drive, the south is 1A Parkhurst Drive, the Southwest is 32 Montclair Drive, the east is Parkhurst Drive, the southeast is 1 Parkhurst Drive and the west is 34 Montclair Drive. There is no building erected on the land and the land is unoccupied.

The property is irregular in shape, it is overgrown with shrubs, and it lies at the road level and slopes from the eastern boundary to the western and northern boundaries. This site has an area of approximately ½ acre (2093.848 square metres). Property tax is outstanding for the period 2011-2014 in the amount of \$90,220.15".

[91] In the status report commissioned by the Administrator General of Jamaica dated the 28th of November 2014 and prepared by Ms. Michelle Greave, Ms. Greaves reports that the property is partially enclosed with the north unfence, the south unknown, and both the east and west have chain link fencing. In addition to the fencing, the boundaries of the property are as follows:

To the north is Parkhurst drive, to the south is 32 Montclair Drive, to the east is 1 Parkhurst and to the west is 5B Parkurst Drive.

There is no building erected on the land and most of the property is overgrown with shrubs. The property is vacant and the land is irregular in shape; the frontage lies at the road level and then slopes to the western and southern boundaries. This site has an area of approximately ½ acre (2093.848 square metres.). Property tax is outstanding on the property for the period 2013-2015 is \$90,169.55.

Was there sufficient Acts of Factual Possession

[92] Ascribing due regard to the submissions of counsel for the Claimant, I bear in mind that despite the fact that Mr. Smith submitted his application to the Registrar of Titles in 2011, in light of his assertions in that application that his occupation commenced in 1989, if those assertions are true, the relevant statutory period that is required in order to dispossess Mr. Muir of his legal title would have been achieved in 2001.

[93] However, I am still of the view that, despite the fact that certain observations on which both parties are relying occurred after 2001, the nature of these observations are of such, that they can assist in determining whether Mr. Smith was in open, continuous undisturbed possession up to 2001, and even if he had not acquired that status up to 2001, whether he had acquired that status in 2011 up to the time of his application. They will as also assist in determining whether Mr. Smith lied in his application to the Registrar of Titles. In essence, the fact that the limitation period would have expired in 2001 does not bar the court from examining evidence beyond that period that would impact on, or somehow shed some light on the status quo during that relevant period.

The Structure

[94] In the first status report, dated April 22nd 2010, commissioned by the Administrator General's Department, the property Administrator indicates that on that visit no structure was observed on the land and that it was thickly vegetated. This was 1 year prior to Mr. Smith's application which indicates that he built on the land as also the valuation report of Total Properties that there was an unfinished structure on the land. In fact, the valuation Mr. Smith placed on the structure in his amendment to the application is \$5000,0000 (five million dollars). Therefore, if Mr. Smith's statement were to be accepted, up until 2011, the structure he claimed to have built on the land, one of the main elements he used to establish occupation was as sound or as good as the value of the land.

[95] Therefore, the observation of the property administrator is relevant in so far as if it is found to be true, it would establish that Mr. Smith had lied about building on the land even up to 2001. This also would impact on the nature of Mr. Smith's occupation of the land or whether he was in occupation at all up to 2001 or even up to 2011.

[96] Mr. Bailey's evidence is that he visited the property with Mr. Muir between 1997 and 1998. As such he was able to get a clear view after the de-bushing. He asserts that he did not observe any structure on the property. I do not share the view of counsel for the Claimant that his evidence lacks credibility arising from inconsistencies. Mr. Bailey was able to identify the special features of the land, yet

displayed sufficient candour to admit that he was not able to recall with complete clarity the exact details of the terrain as his last visit was in 1998. That is 26 years ago. I find this to be quite a plausible explanation as the failure to recall details of an event can naturally fade with time. However, Mr. Bailey was able to recall distinctive features of the land such as the rocky terrain, huge boulders, and the descent, despite not being able to recall the precise location, nor number of boulders nor the degree of the descent. Mr. Bailey strikes me as a credible witness.

[97] Essentially, I accept Mr. Bailey's evidence that he visited the subject property between 1997 to 1998. I accept his evidence that the purpose for which he visited in 1997 was because he had an interest in purchasing the property. As such I accept his evidence that he assisted Mr. Muir in having the property cleared so that he could have gotten a good view. I accept his evidence that when he visited the property in 1998 it was with his brother-in-law, Byron Constantine who was an architect. I accept his evidence that the purpose for that visit was to assist Mr. Muir to determine the type of structure he could build on the land. I accept his evidence that he "observed the land". In light of the purpose of their visit I take it to mean exactly what he said that he observed the land. That is the entire land not just a part. I accept his evidence that at that time he observed no structure or person on the land.

[98] Ms Tulloch contends that she visited the property with her spouse Mr, Muir Senior multiple times between 50 to 100 times during the period 1990 to 1999. Mr. Muir's (junior) evidence is that he visited the property with his father between 1986 to 1995. Both contend that during those times they observed no structure on the land. However, I take note of Muir's evidence that sometimes the visits would be at night and that the men his father took to the property would chop down some of the bushes. Additionally, Ms Tulloch did not indicate whether on all of these occasions that she visited. the property was bushed. Her evidence is that the property was only bushed at the instance of Mr. Muir Senior. As such I find it would have been more difficult for them to observe any structure in the descent if they did not visit to intentionally view the entire property as was the case with Mr. Bailey.

[99] As regards the evidence of the Claimant Ancillary Defendant I find that Mr

Maras' evidence cannot assist with regards to the presence of any structure on the land in 1998. Additionally, it is Mr. Bonner's evidence that I find that lacks credibility in this regard. He describes this structure that he had seen from 1989 as measuring 18 feet by 11 feet while the actual measurement of the foundation that was observed at the locus was significantly different from that which he described. I therefore reject his evidence in this regard. Consequently, having accepted the evidence of Mr. Bailey I find that the Defendant Ancillary Claimant would have established that up until 1998 Mr. Smith was not in possession of the subject property.

[100] I will now go further to examine the evidence to determine whether between 1999 and 2011 Mr. Smith was in continuous open undisturbed possession of the subject property for a period of 12 years. At the locus Ms. Maras pointed out what appears to be a flat concrete flooring, measuring six feet by six and a half feet as the remainder of the structure or building that Mr. Smith in his application stated that he constructed on the subject property. The valuation report, that is, that of Total Properties that Mr. Smith submitted with his application indicates that there was an unfinished building on the land. In light of the evidence of Mr. Bonner that between 1989 and 2005 he observed one structure on the land; and the evidence of Ms. Maras who arrived in 2002 that this structure was a shed, it is apparent that at the time of the valuation by Total Properties, the unfinished building that was being referred to was an incomplete shed down in the descent on the land.

[101] At the locus, it is observed that based on the topography of the land, even in the absence of trees and shrubs, this structure is not visible from the road, nor the front nor the side of the subject property. One had to climb down into the deepest part of the descent in order to get even a glimpse. Additionally, the presence of trees and shrubs would have posed an additional challenge to the detection of this structure. There is no evidence from Ms Tulloch that in last visit in 1999 that she walked or climbed down to the descent. Additionally, in the status report of the defendant dated the 12th of April 2010 the officer states that the land "appears to be steeply sloping in the southern direction." The use of the word "appears" suggest to me a lack of certainty regarding the extent of the slope. Therefore, I can only conclude that the property officer did not climb down in the slope in order to discover its depth.

[102] Additionally, the 2nd and third Status Report both indicate that the southern fencing is unknown. This is an indication to me that the property officers who prepared these reports viewed the property from a level where they were not able to see the southern end of the property. This leads me to the conclusion that they did not climb down into the descent. As such even if the structure was present between 1999 and their visits they would not have placed themselves in a position to discover its presence.

[103] Counsel Ms. Whyte has submitted that I should rely on the Surveyors ID report dated the 12th of March 2011, prepared by Mr. Derrick Dixon and the fact that there is no mention of any building in this report to find that the lot was vacant with no building thereon. However, it is my view that this cannot be a basis on which I can conclude that there was no building on the property. In essence, this is not a logical inference. In fact, the legislation which governs the conducting of surveys and the content of the reports only requires the identification of buildings on the property in specified circumstances.

[104] Regulation 35(14) of the Land Surveyors Regulations, 1971, provides that;

“Any permanent building on the land surveyed, situated within ten feet of the boundary, and of such a nature as to be of assistance in identifying the boundary, shall be shown on the plan.”

[105] Considering the fact that the evidence indicates that the building was temporary and in light of its location as pointed out by Ms Maras not being anywhere near 10 feet from any of the boundaries, even if the surveyor observes the presence of this structure it is rather unlikely that he would include it in his report.

[106] In this regard I have to agree with the submissions of counsel for the Claimant on this aspect of the evidence in finding that Property Administrators did not thoroughly inspect the southern portion of the land so as to have identified whether there was a structure located in the descent toward the southern portion of the land.

[107] Consequently, when one takes into consideration the size of the structure in

comparison to the size of the land, the location of the structure and the topography of the land, I find that it is quite conceivable that this unfinished shed or concrete foundation may have been present at the time of the property officer's visit but, he was not able to observe it because it was hidden from his view. It is also possible that it may have been present from 1999 but hidden from his sight and view of any visitor to the property or even the legal title holder, if they did not decide to take the deep descent towards the back of the property. As such I find that the Defendants have failed to establish that there was no structure on the land between 1999 and 2011. Therefore, in the event that the structure was constructed anywhere between January 1st 1999, and January 23, 2011, and where all the other elements of adverse possession were satisfied Mr. Smith would have derived the right to an application for title by adverse possession on January 24, 2011.

Fencing

[108] The evidence of Ms Tulloch is that she visited the property with her husband Mr. Muir (Senior) up to 1999. She is adamant that that up to that time, all the boundaries were not fenced; the only chain link fence that is there as also the stone wall belongs to the neighbours. It is also her evidence that the barbed wire fence at the front was done post-pandemic. She does not recall a stone wall to the southern part of the property.

[109] The evidence of the Defendant contained in the report from the Property Administrator dated April 22, 2010, prepared by Ms. N Campbell indicates that there was chain link fencing to the East and West. More significantly, however, is the evidence that the north, that is the front of the property was unfenced.

[110] The report of Total Properties, that was submitted with Mr. Smith's application indicates that at the time of inspection, all boundaries were fenced with chain link fencing. I note that there is no mention of Barb wire in this report. In his application for title Mr, Smith stated that he fenced the property with chain link fencing. He made no mention of stone wall and barb wire.

[111] Ms. Maras mentions barbwire fencing in paragraph 12 of her Defence to the Ancillary Claim. However, this stands in stark contradiction to Mr. Smith's statement to the Registrar of Titles as also the valuation report of Total Properties that he submitted along with his application. Additionally, totally absent from Ms Maras' witness statement and her evidence under cross examination is there any mention of her observing the property with any barb wire fencing. Furthermore, at the locus Ms. Maras has admitted that she was the person who caused the barb wire fencing to be installed.

[112] Having visited Locus, I observe there are neighbours to the back and two sides whose premises are completely fence. On this issue having weighed the evidence, I find the evidence of Ms. Tulloch to be credible. Moreover, in light of the fact that Mr. Smith never claimed to have built the stone wall I find that there can be no credible challenge to Ms. Tulloch's assertion that the stone wall to the right of the property belongs to the that neighbour. Additionally, the fact that Mr Smith nor Total Properties did not mention a barb wire fence which is the only fencing at the front of the property is also an indication by virtue of Mr. Smith's own description of the type of fencing, that up to 2011 this barb wire fencing was absent from the property.

[113] Essentially, I accept the evidence of Ms. Tulloch that up to 1999 all the borders of the Property were not fenced by Chain Link Fencing. I accept her evidence that the chain link fencing and the stone wall belongs to the neighbours. I accept her evidence that the barb wire fencing was installed after 1999. Consequently, I find that up to 1999 Mr. Muir (Senior) and Ms Tulloch had free and unhindered access to the property which could have been exercised by driving through or walking through the front of the property. Despite my findings that the shed could have been present on the property from 1999, but not discovered by Ms Tulloch or Mr Rudyard Muir Senior, I accept her evidence that they did gain unhindered access to the property, Mr. Muir as owner in 1999.

[114] In the case of **Powell v McFarlane** (1977) 38 P & CR 452 in clarifying the law at it relates to factual possession Slade J at page 470-471 stated that:

"Factual possession signifies an appropriate degree of physical control. It must be single and [exclusive] possession The question what acts constitute a sufficient degree of exclusive physical

control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, 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"

[115] I find that the fact that the Mr, Muir and his wife and spouse still had access to the land up until 1999, up until that period Mr. Smith was not in exclusive possession of the property. Therefore, even if the fence was built in 2000. At the time of the application in 2011, only 11 years would have expired. As such I find that the Defendant would have adduced enough evidence that sufficiently displaces the assertion of actual exclusive, continuous possession for 12 years prior to 2011 on the part of Mr Smith. However, I will go further to assess the evidence as it relates to another crucial element which must be present in order to establish adverse possession.

Was there an intention to Possess (Openly and Undisturbed)

[116] Mr. Smith did not detail in his application the nature of his occupation, that is the type of fruit that he reaped from the property. However, the evidence from Ms. Maras and Mr. Bonner has provided more information in this regard. That is tethering Horses. Both have testified that only two horses were kept on the property at any one time.

[117] Mr Bonner speaks of seeing only one structure on the property during his visits up until 2005. Ms. Maras' evidence is that her first visit to the property was in 2002. Therefore, despite the fact that his evidence as it relates to size vastly differ from that of Ms. Maras, and that seen on location. this one structure he refers to have seen could only be the remnants of the same structure Ms Maras pointed out at the locus. The fact is Mr. Bonner himself was present at the locus and did not give any evidence to the contrary.

[118] In a preceding section I have already pointed out that from my observation

of the locus, the remnants of the structure are located in the deepest descent of the land, not visible from the road or even from the front nor the side unless one climbs down in the descent. This to me, is an indication that Mr. Smith's operations on the land were not intended to be seen by the normal observer.

[119] Additionally, I find that his operations on the property was not intended to be permanent. The following factors account for the foregoing conclusion. Ms. Maras' evidence is that the structure was temporary and that when it deteriorated Mr. Smith did not repair it. I note that Counsel for the Claimant has submitted that the building had been demolished due to the changing character of the neighbourhood. However, this is evidence coming from counsel which was never given by Ms Maras, Mr. Bonner or any of the witnesses in the case. Ms. Maras' evidence is that the structure had deteriorated and was never repaired by her husband. She also says that it was not demolished but that it "rotten down".

[120] I also consider the fact that only 2 horses were tethered at a time on the property, against the background of Mr Bonner's evidence that Mr. Smith was operating a horse club that was growing. When I juxtapose these factors against the evidence of Ms. Maras that they could not let the neighbours know that there were horses on the property, and considering the very small size of the structure, that is 36 and half square feet in comparison to the size of the land, that is 22,538.00 square feet, I form a clear view of Mr. Smith conducting a temporary and secret operation on the subject property.

[121] In essence, I am of the view that Mr. Smith never intended to use the land continuously. He never intended to use it be openly to the world at large and certainly not to the title holder. In this regard I can only conclude that if Mr. Smith was in fact tethering horses on the subject property he was doing so in secret. I am buttressed in this view by the fact neither of the declarants in support of the application, that is Herman Dacosta nor Jean Jolly was an immediate or close neighbour to the subject property. Neither was Mr. Bonner a neighbour, but someone who visited the property periodically. Consequently, it is my view that Mr. Smith consciously and intentionally hid his operations from the general public,

revealing it only to a selected few such as Mr. Bonner, Ms Maras, Herman Dacosta and Jean Jolly.

[122] In the case of **Powell v McFarlane** Slade J, at page 472 said:

“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.”

[123] Consequently, I find that up to the time of his application for Title in 2011 Mr. Smith did not possess the requisite intention “to make it plain to the world at large that he intended to exclude the owner’ Mr. Muir or anyone claiming through him. His operation of tethering horse on the property, if there was such as operation was a secret one. Mr. Smith also indicated that he paid up the taxes at the time of his application. Much has been said in submissions by counsel on both sides as to whether this statement was credible. However, I do not find it necessary to repeat these submissions, but pause here to reiterate the principle of law expounded in the case **Richardson v Lawrence** (1966) 10 WIR 234 that payment of taxes without more is not sufficient to establish ownership or possessory title. Nonetheless, I find that Mr. Smiths’ occupation of the subject property, did not satisfy the essential elements required to dispossess the title holder. That is, it lacked the element of openness, as also Mr. Smith lacked the intention to possess the property and to treat it as his own.

[124] Furthermore, in the absence of openness, the element of being undisturbed could not be satisfied. Essentially the possession would have to be open to be capable of being disturbed.

Has The Defendant Adduced Sufficient Evidence to Establish Fraud

[125] I find that sufficient evidence has been adduced to prove on a high balance of probabilities that Mr. Smith knowingly provided false information to the Registrar of Titles in order to obtain title to the subject property. In stating that he was in open undisturbed possession Mr. Smith would have known that this statement was false because he knew that his operations were in secret not open to be disturbed. When it was stated in his application that all boundaries were fenced with chain-link fence he knew this was false.

[126] In Mr. Clive Smith's original application, the value he placed on the land was \$5000,000 (five million dollars). In his amended application in response to the request from the Registrar of Titles, he stated "The value of aforesaid land is ten million dollars including improvement and structure thereof" This would suggest that the improvement or structure valued 5 million dollars. Bearing in mind that his valuator described the structure as an unfished structure, the evidence of Ms Maras that the structure was of board and zinc with concrete flooring, and the precise measurement being 6and half by 6 feet, using my own common sense such a structure could not carry the same value of the land.

[127] Consequently, I find that Mr. Smith deliberately used the word building instead of shed and deliberately placed a value on the shed to mislead the Registrar of Title into believing that he had a permanent building on the land of significant value. I find that the Registrar being convinced by the false and misleading information provided by Mr. Smith acted upon such information and as such caused the title to the subject property to be transferred to him.

Conclusion

[128] I find that Mr. Smith was not in open continuous undisturbed possession of the subject property up to 2011 when he applied to the Registrar of Titles to have the said property transferred to him on the basis of adverse possession. I find that the Defendant has proven on a high balance of probabilities that Mr. Smith knowingly

provided false and misleading information to the Registrar of Titles in order to obtain the Title. As such I find that the Duplicate Certificate of Title formerly registered at Volume 963 Folio 181 now registered at Volume 1464 Folio 86 and the lands contained thereon was obtained by fraudulent misrepresentation to the Registrar of Titles by Clive Smith.

Orders

[129] Consequently, I make the following orders:-

- i. Judgment for the Defendant on the Claim and Ancillary Claim.
- ii. The Registrar of Titles hereby ordered to cancel the Duplicate Certificate of Title registered at Volume 1464 Folio 86 with the name of Clive Smith endorsed thereon as the Registered Proprietor and to issue a new Duplicate Certificate of Title in the names of Rudyard Muir and Enid Beckford.
- iii. The Registrar of the Supreme Court is hereby directed to sign any or all documents and/or transfer instruments on behalf of the Ancillary Defendant in order to facilitate the cancellation of the said Certificate of Title formerly registered at Volume 963 Folio 181 and now registered at Volume 1464 Folio 86 of the Register Book of Titles.
- iv. Any Transfer Tax and/or Stamp Duty (associated with conveyance and/or issuing of the new Duplicate Certificate of Title are hereby waived.
- v. The Registrar of the Titles is hereby directed to dispense with the production of the Duplicate Certificate of Title registered at Volume 1464 Folio 86 of the Register of Book of Titles.
- vi. The Claimant is to give up possession of all that parcel of Beverly Hills formerly part of Mona and Papine Estates in the parish of Saint Andrew being the Lot Numbered eighty-four and being all the land comprised in Certificate of Title formerly registered at Volume 963 Folio 181 and now registered at Volume 1464 Folio 86 of the Register Book of Titles forthwith.
- vii. Cost to the Defendant/ Ancillary Claimant to be agreed or taxed.

Andrea Thomas
Puisne Judge