[2012] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 00594/2008

BETWEEN	**ARTHUR McCOY**	**FIRST CLAIMANT**
AND	**MARCIA McCOY**	**SECOND CLAIMANT**
AND	**FITZROY GLISPIE**	**DEFENDANT**

IN OPEN COURT

Leon Green instructed by Green and Moodie for the claimants

Maurice Frankson and Laurel Gregg instructed by Hugh Abel Levy & Co for the defendant

TRESPASS – EXTINCTION OF RIGHT TO RECOVER POSSESSION OF REGISTERED LAND – SECTIONS 3, 4 AND 30 OF LIMITATION OF ACTIONS ACT – SECTION 68 OF THE REGISTRATION OF TITLES ACT – RULE 10 OF THE CIVIL PROCEDURE RULES

May 29, 30, 31, June 1 and July 5, 2012

SYKES J

[1] This present claim involves disputed land registered at volume 1033 folio 227 of the Register Book of Titles. Mr Arthur McCoy and Miss Marcia McCoy are the claimants who have brought an action against Mr Glispie, the defendant, in which they are seeking an injunction restraining him from trespassing on the disputed land. Mr Glispie responded to the claim by pleading that he purchased the property from the previous registered owner Mr Leslie Enasue Pinnock. Mr Leslie Enasue Pinnock appointed Mr Leslie Edgerton Pinnock by power of attorney to act on his behalf. These two gentlemen shall be referred to as Enasue and Edgerton in order to distinguish between the two. No disrespect is intended. Enasue appointed Edgerton under a power of attorney date June 30, 2000. This power of attorney gave Edgerton authority to take all such action necessary to recover possession the disputed land. The significance of this will be shown as this judgment progresses.

[2] Based on a commissioned land surveyor's diagram, the unregistered portion is called lot 46 and the disputed portion, lot 47. Thus the disputed land registered at volume 1033 folio 227 is lot 47 while the part of the land which it is conceded that the claimants have occupied is lot 46. The evidence has also disclosed that both parcels of land have different valuation numbers for the purpose of paying land taxes. Lot 46 has the valuation number 19105005046 and lot 47 has the valuation number 19105005047.

[3] The trespass is said to have taken place on February 6, 2002, October and December 2007 and January 2008. The pleaded claim seeks damages, aggravated damages, an injunction, interest and costs.

[4] However in final submissions Mr Green indicated that his primary remedy is an injunction because the claimants have received compensation, in an earlier claim, for damage done to their property. However, since trespass is actionable without proof of special damage the court may award some damage. What has happened now is that

it is being said that Mr Glispie is still on the property and carrying out all sorts of works.

[5] In making their claim Mr Arthur McCoy and Miss Marcia McCoy are relying on sections 3 and 30 of the Limitation of Actions Act. They say that they have been in possession of the disputed land, openly, without permission and without force for a period of twelve years. This means, they say, that the right of the paper owner to recover possession from them or even to re-enter the land has been extinguished and therefore Mr Glispie cannot recover the disputed land from them despite his alleged purchase of the land. The McCoys also say that this right to recover possession was extinguished during the time Enasue was the registered proprietor. The relevant period for the purpose of extinction of a right to remove a squatter in this current claim began in 1975.

[6] The court uses the expression 'alleged purchase' because Mr Green, for the claimants, submitted that there is no evidence that Mr Glispie is the purchaser. He submitted that there is no evidence that he has actually paid the purchase price. He has not presented any transfer. Mr Green also submitted that the agreement for sale presented was unstamped and is inadmissible in any court of law. The court agrees with every single point made by Mr Green in this regard and concludes that there is no evidence, other than Mr Glispie's assertion that he purchased the disputed land. What is clear is that whether he is a purchaser or not the McCoys accuse him of being a trespasser and they say that even if he were the registered proprietor he cannot trespass on the land because of their undisturbed, open and peaceful occupation of the disputed land for twelve years.

[7] For his part Mr Glispie admits going on to the land in October 2001 and demolishing a house. He claimed to have purchased the land by way of an agreement for sale dated September 17, 2001. It is nothing short of remarkable that more than a decade after the alleged purchase Mr Glispie is unable to produce either (a) a transfer with his name as transferee; (b) a receipt evidencing payment of the purchase price;

or (c) a stamped agreement for sale. None of this bodes well for Mr Glispie's assertion that he is the purchaser.

The claimants' contention

[8] Mr Green relies heavily on the outcome of a previous claim of **Arthur McCoy and Marcia McCoy v Leslie Pinnock and Fitzroy Gillespie** Suit No. CL 2002/M036. There has been no appeal from the judgment entered in the earlier claim. According to Mr Leon Green, counsel for Mr and Miss McCoy, the fact that the judgment was not appealed meant that Enasue is bound by the conclusion of the court. That is to say, judgment was granted on the basis of the claimants' pleadings in that case and therefore stand as 'findings of fact' notwithstanding that it was not decided after a full trial. This meant, according to Mr Green, that Mr Glispie, when purchasing the land from Enasue could not acquire any greater interest in the land than Enasue possessed at the time and is therefore taking the land subject to the effect of the judgment of the earlier case. The effect of the earlier judgment, according to Mr Green, is that the McCoy's were found to have sufficient interest in the land to maintain an action for trespass against Enasue and that interest was founded on undisturbed possession for at least twelve years. What this meant, Mr Green continued, is that Enasue's right to remove Mr Arthur McCoy or right to re-enter the property were now statute barred. If the right to remove the McCoys could no longer be exercised by Enasue then it could not be exercised by Mr Glispie because he could not acquire the right to remove them if that right was lost by his immediate predecessor in title.

[9] The basis of Mr. Green's submission is the combined effect of sections 3 and 30 of the Limitation of Actions Act. The provisions are set out. Section 3 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 to some person through whom he claims, or, if*

such right shall not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or to bring such action or suit, shall have first accrued to the person making or bringing the same

Section 30 states:

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.

[10] Section 4, although not cited by either side, is also relevant. It says in the relevant parts:

The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say –

(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of

> *possession, or at the last time at which any such profits or rent were or was so received;*

[11] Mr Green also relied on section 68 of the Registration of Titles Act:

> *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, shall 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.*

[12] Sections 3 and 30 of the Limitation of Actions Act indicate that the right to recover possession lasts just twelve years from when it first arose and after that time, that right is extinguished. The extinguishing of the right to recover possession does not confer title on the trespasser but it enables him to resist those who wish to move him. This principle applies to both unregistered and registered private land.

[13] Section 4 of the Limitation of Actions Act gives an indication of when the right to recover possession first arises. That right first accrues when the person entitled to such possession was first dispossessed. Dispossessed in this context does not mean that the paper owner was literally booted off the land but rather when the squatter takes sufficient physical control of the land accompanied by the relevant intention to possess. Once this occurs, the paper owner is in fact dispossessed and must act

within twelve years otherwise his right dies. In essence the dispossession occurs once and thereafter it is a question of running down the clock.

[14] This conclusion is not displaced by the Registration of Title Act. Section 68 says that the title is indefeasible but is subject to statutes of limitation. What this means is that indefeasibility does not mean absolute with no limitations. If that were so, the principle of extinction of title could not operate against registered land. There is no doubt that registered land is subject to that principle.

[15] Mr Glispie, in the current claim, relied heavily on the fact that he is now the registered proprietor under the Registration of Titles Act. He says that the claimant cannot claim the land in question by virtue of the operation sections 3 and 30 of the Limitation of Actions Act.

The previous claim

[16] Mr Green submitted that the outcome of an earlier claim ought to influence the outcome of this case. That claim will be examined in some detail because of the significant role it plays in the McCoy's case. As stated above the earlier claim is **Arthur McCoy and Marcia McCoy v Leslie Pinnock and Fitzroy Gillespie** Suit No. CL 2002/M036. It will be noted that the second defendant in this earlier claim is Mr Fitzroy Gillespie. He is the same person called Mr Fitzroy Glispie in this current claim. The claim was brought alleging trespass and sought damages as well as an injunction. This claim was brought in respect of land registered at volume 1033 folio 227 of the Register Book of Titles. The present claim is in respect of the same registered land. From the evidence before the court, the claimants are the same in the earlier and current claim. Also, Mr Gillespie and Mr Glispie is the same person. Mr Glispie was not served and so was not a party to the earlier claim. This means that he is not bound by the decision in the earlier case, that is to say, the issues between the McCoys and him in this current claim are not res judicata. However, as will be shown the outcome of that case means that Mr Glispie is in the same position as Enasue. That is it will be shown that Enasu lost the right to re-enter the disputed land and also

lost the right to repossess the land **before** the land was transferred to Mr Glispie. If this is so, then Mr Glispie cannot, in this context, acquire a right that his predecessor in title lost.

[17] In the earlier claim involving the McCoys and Enasue. It will be recalled that the McCoys brought an action in trespass against Enasue. The writ of summons and statement of claim in the earlier claim do not have the volume and folio number of the land but the description in paragraph two of the statement of claim is instructive. It is as follows:

> *The first plaintiff has been in sole, open, continuous and exclusive possession of the lands located at Port Henderson butting and bounding on the north and east by lands owned by Pearl Rowe; on the south east by the Caribbean Sea; on the south and west by lands owned by [Gillespie] in the parish of Saint Catherine since 1975 (hereafter referred to as the said land) and the 2nd plaintiff and other members of their family now live on the said land with the permission of the 1st plaintiff.*

[18] This is a clear and unambiguous assertion by Mr Arthur McCoy, in Suit No. CL 2002/M036 that he has been in sole, open and continuous and exclusive occupation of both lots 46 and 47 since at least 1975.This conclusion that Mr McCoy was claiming that he occupied the entire area (lots 46 and 47) is supported by a diagram prepared by a commissioned land surveyor in the instant case. The diagram was admitted into evidence, in the current case, by agreement. The remarks accompanying the diagram are important. The important thing to note is that the remarks point out that the area claimed by the McCoys at the time of the earlier claim included the disputed land (lot 47) and the undisputed land (lot 46) which it is conceded that they occupied. The remarks on the diagram point out that the part occupied by the McCoys after the entry and trespass by Mr Pinnock was lot 46.

[19] In response to the earlier claim, a defence and counter claim were filed by, it appears, Enasue alone. This is so despite the fact that paragraph two of the defence states that 'the defendants deny the plaintiffs' claim. The paragraph says that Enasue purchased the land. The land Enasue said he purchased was said to be registered at volume 1033 folio 227 of the Register Book of Titles, that is lot 47.

[20] The defence goes on to say that Enasue entered into possession pursuant to an order for possession granted by the Resident Magistrate's Court for the parish of St Catherine against five persons including Marcia McCoy and Mr Abraham Beeche. Mr Beeche gave evidence in this case and more will be said about him later.

[21] The defence notes that the McCoys were unlawfully in occupation of land registered at volume 1033 folio 227.

[22] In response to this defence and counter claim there was a reply and defence to counter claim. The McCoys say that they have been in possession of the land since 1935. The land being referred to is volume 1033 folio 227. Thus the McCoys have asserted their claim to both lots since 1935.

[23] The earlier claim had two important developments. The first is that on July 12, 2006, Enasue's defence was struck out and judgment entered for the claimants because he failed to comply with case management orders made on May 26, 2004. On July 12, 2006, Enasue was represented by counsel. This was at the pre-trial review. The relevant orders made at the pre-trial review were:

1. The 1st defendant having not complied with orders at Case Management Conference dated May 26, 2004 and not appearing in person the 1st defendant's statement of claim is hereby struck out and judgment entered for the claimants.

2. The claimants are to proceed to assessment of damages for a date to be fixed by the Registrar.

[24] The second development was that damages were assessed on January 23, 2009. The order did not explicitly say that judgment was entered against Mr Gillespie. There is no record of any judgment being against him and so there is no question of res judicata arising in respect of Mr Glispie.

[25] There is another point to note. The particulars of special damage are identical, that is to say, the claimants are claiming damages in respect of the same property allegedly damaged. In final submissions, Mr Green, counsel for the claimants, said that he is not claiming any special damages but said that trespass is actionable per se. In fact no evidence was provided on general damages. He provided no assistance to the court regarding the damages he is claiming, leaving it to the court.

[26] By the time the earlier claim was filed on February 20, 2002, according to the agreed documents, Edgerton was appointed under a power of attorney by Enasue 'to oversee, to take legal action and represent me in any court in Jamaica with regard for recovery of rent, recovery of my property concerning two parcels of land at Port Henderson, St. Catherine Volume 1033 Folio 277 of the Register Book of Titles.' This power of attorney is dated June 30, 2000. It also says in the last paragraph, 'I further declare that this power of attorney shall be irrevocable and continue in force from time to time and at all times or other revocation thereof in writing shall be recorded in island of Death.' The reference to death seems to be an error.

[27] The importance of this appointment means that two years before earlier claim commenced Edgerton had full authority to act on behalf of Enasue. In the earlier claim there is evidence that at all material times Enasue was represented by counsel except at the assessment of damages. Counsel appeared for Enasue when judgment was entered.

[28] In legal terms, the entry of judgment, assessment of damages and the drawing up of the final order means that at this point the McCoys' assertion in the earlier claim have become proven fact. The most important facts proved in the earlier claim are that

1. Mr McCoy has been found to be in open, continuous possession of lot 47 for twelve years;
2. Mr McCoy's possession is sufficient to enable him to resist the efforts of Enasue to re-enter the land or to recover possession.

[29] The practical result of this is that by the time Mr Glispie purported to purchase the land in 2001, Mr McCoy's possession for the purpose of sections 3, 4 and 30 of the Limitation of Actions Act, Enasue's right to remove Mr McCoy was lost. Therefore, Mr Glispie, by the purchase, could not have acquired the right to remove Mr McCoy. Put another way, Mr McCoy's possession is not only good against Enasue but against all subsequent registered proprietors. The judgment of the Supreme Court in the earlier claim has so declared.

[30] Since Mr Glispie is claiming through Enasu, he can only receive what Enasue had. Enasue, at the time of the sale (assuming there was one), was the registered proprietor of land over which he had lost the right to remove the squatter or to re-enter the land. It is well known that a seller cannot transfer more than what he has. It is clear that even without going into the actual facts of this case, Mr Glispie's case has run into serious difficulties.

[31] There are other agreed exhibits showing the further history of the disputed land. It shows that one Nathaniel Chevannes was the first registered proprietor in February 1967. There were a number of subsequent transfers as follows:

1. a transfer, registered in January 1968, from Mr Chevannes to The Roman Catholic Bishop in Jamaica;

2. a transfer, registered in October 1971, from the Bishop to Mr Louis Patrick;

3. a transfer, registered in September 1974, from Mr Louis Patrick to Enasue.

[32] Mr Glispie, the defendant, in the current claim alleged in his evidence that he bought the land from Enasue. However, as Mr Green pointed out there is no stamped sale agreement. There is no proof of payment. There is not even a proper copy of the duplicate certificate of title showing that a transfer was made to him. There is no transfer either. In effect, it is a naked assertion by Mr Glispie that he bought the land.

[33] In support of his proof of ownership, Mr Glispie says that he paid taxes for the disputed property.

The evidence

[34] Five witnesses appeared before the court. The court should say that generally speaking the witness statement contained significant hearsay evidence that should not be there at all. The court will ignore the hearsay and act only on evidence that is admissible. There were three witnesses for the claimant and two for the defendant.

[35] The first claimant, Mr Arthur McCoy was called. Unfortunately, despite the best effort of counsel and the court, the evidence from Mr McCoy was not of great assistance. He did not appear to be able to recall too many things. At the time of the earlier claim the documents indicated he was 75 years old. If that is correct, he would be 85 years old now.

[36] The second claimant Miss Marcia McCoy testified. She was not very helpful regarding the arrival on the property in 1975. However that is not surprising because she said she was a young child at the time. She was approximately 11 years old at the time. She was very clear however that as a child she was living at her father's

house which was on the unregistered portion of the land. She said that in the 1980s she went to live in another house which was located on the disputed property. She was able to say that she went to the other house in 1989. This house was made of concrete. From the totality of the evidence this concrete house would be located on lot 47, the disputed property.

[37] The third witness for the claimants was Mr Rupert McCoy. It is important to understand some points about his evidence. He said that he did not know about any distinction between lots 46 and 47 but his witness statement makes that distinction. His explanation was that he only became aware of the distinction when the current claim began and through his attorney. What he recalls however is that his family occupied the entire portion of land, that is, lots 46 and 47. This was at least since 1975 although he remembers going there from before 1975. Mr Rupert McCoy also recalls that his family lived in two houses on the property. From the totality of the evidence, one house would be on lot 46 and the other on lot 47. Despite her lack of clarity on some aspects of the case, Miss McCoy recalls living in the house on lot 47. As far as Miss McCoy and Mr Rupert McCoy were concerned, the house on lot 46 was their father's house. She said she moved to this house in the 1980s which would mean the latest 1989. Mr Rupert McCoy said that his sister lived there until 2003. He lived on lot 46 until 1996.

[38] The two witnesses for the defendant were Mr Glispie and Mr Abraham Beeche. Mr Glispie's witness statement admits that he demolished the concrete house and did other acts of waste on the property. He built a stable, added a water tank. He denies committing trespass.

[39] Mr Glispie's evidence is of no moment because it does not address the question of whether Mr Arthur McCoy was in possession of the disputed property for the limitation period. He alleged that he knew about the adjoining property. He states that he knew that Miss Marcia McCoy lived in the concrete house on the disputed land. If this is accurate it would mean that he came by this knowledge at the earliest 1990

when on Miss McCoy's evidence she was living there. What this means is that Mr Glispie cannot speak to the earlier period (1975 – 1990) when the limitation period is said to have been running.

[40] Mr Glispie's witness statement should be viewed with caution. For example, paragraph seven was a naked attempt to get before the court evidence of the content of documents without producing them or disclosing them.

[41] Mr Beeche's real significance was to say that lot 47 was never occupied by the McCoys for the time alleged by them, or if occupied by them, it was not sole, exclusive possession. He paints the picture of a number of persons moving on and off the registered land during the 1970s and 1980s. He also said that he moved onto the unregistered land in 1967 – 1968. When he did so no one was living there. He concedes that the McCoys had always occupied what is called lot 46 land for many years. Mr Beeche was never challenged on this evidence and so prima facie, in accordance with the rule in **Browne v Dunn**, may be accepted as true. However before a final decision on this is made the whole evidence needs to be examined in light of the relevant law which is set out below.

The Law

[42] It is remarkable that despite the efforts of the House of Lords and the Privy Council to change the vocabulary of attorneys and judges, we still use the now-inappropriate expression 'adverse possession.' It is desirable to speak now of extinction of title, extinction of the right to repossess and extinction of right of re-entry (**Pye (JA) Oxford Limited v Graham** [2003] 1 AC 419 [36], Lord Browne-Wilkinson; **Wills v Wills** (2003) 64 WIR 176). The law has now been authoritatively laid down in not only in **Wills** but also **Pye (JA) Oxford Limited** and **Buckinghamshire County Council v Moran** [1990] Ch 623. The last two cases were expressly approved by the Privy Council in **Wills**. The Board went on to say that the Jamaican Court of Appeal's decision in **Archer v Georgiana Holdings Ltd** (1974) 21 WIR 431 'must now be read in the light of the important decision of the Court of Appeal in *Buckinghamshire*

County Council v Moran [1990] Ch 623 and the even more important decision of the House of Lords in *Pye*' (**Wills** [18], [19]).

[43] Perhaps the most important point emerging from **Wills** is that sufficiency of possession in order to take advantage of sections 3 and 30 of the Limitation of Actions Act depends on the intention of the squatter and not the intention of the owner. In **Pye (JA) Oxford** Lord Browne-Wilkinson in paragraphs [31] – [46] as interpreted by **Wills** laid down the following definitive propositions:

1. the person in possession of land, whether rightfully or wrongfully, can bring an action in trespass against any other person who enters the land without his permission unless that person has a better right to possession;

2. the Jamaican Limitation of Actions Act, 1881 abolished the highly technical doctrine of adverse possession;

3. the doctrine of non-adverse possession, a concept, attached to the Limitation Statute of James 1 (21 Jac 1 c 16) was abolished by the Jamaican Limitations of Actions Act;

4. after the passage of the Jamaican Limitation of Actions Act the only issues that arise where a squatter is resisting efforts to remove him are whether the squatter is in possession in the ordinary sense of the word and if so, for how long, and whether the possession is sufficient and long enough to bar the right of the paper owner to remove him;

5. taking of possession by the squatter with actual consent of the paper owner does not constitute dispossession of the paper owner or possession by the squatter for the purpose of the Limitation of Actions Act;

6. there is no need for the squatter to engage in a confrontation with or ‘oust’ the paper owner in order for him to be in possession for the purpose of the Limitation of Actions Act;

7. the paper owner will be dispossessed even if there is no discontinuance of possession by the paper owner once the squatter takes possession in the ordinary sense of the word;

8. other than cases of joint possession, possession is single and exclusive;

9. ordinary possession occurs when there is (a) a sufficient degree of physical control and custody (factual possession) and (b) an intention to exercise such control on one’s behalf or for one’s own benefit (intention to possess);

10. the intention to possess is vital and without it there is no possession;

11. the intention to possess is often inferred from the fact of physical possession. It is this intention to possess that distinguishes an overnight trespasser (a homeless person seeking shelter) from the squatter who sets up

house. The former has no intention to possess while the latter does;

12. for factual possession, what needs to be shown is that the person was dealing with the land as if he were an occupying owner. What constitutes dealing with the land as if an occupying owner will vary from case to case. It is from this type of conduct that the mental element is usually inferred;

13. the squatter does not need to have any intention to own. It is not necessary to have an intention to own. To hold otherwise is wrong;

14. the squatter who has an intention to possess can maintain an action for trespass against a stranger and against the paper owner if, in respect of the paper owner, the requisite time has passed and the squatter has factual possession and the intention to possess;

15. sufficiency of possession depends on the intention of the squatter and not the paper owner;

16. the fact that the squatter may be willing to pay for the land if asked by the owner does not indicate an absence of intention to possess.

[44] In effect, these principles result in the legitimisation of theft of land if the squatter can survive the twelve years and he has factual possession and the requisite intention.

[45] There is one more case to mention. It is the judgment of Slade J in **Powell v McFarlane** (1977) 38 P & CR 452. It was given high praise by the House of Lords in **Pye** (see [37] Lord Browne-Wilkinson). Apart from one technical correction to satisfy the pedant and the sumpsimus, Lord Browne-Wilkinson (paragraph [40]) had no difficulties with Slade J's analysis of the law and analytical method for cases of this nature. Slade J said at page 470:

> *In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*

[46] His Lordship continued at page 472:

> *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.

A number of cases illustrate the principle just stated and show how heavy an onus of proof falls on the person whose alleged possession originated in a trespass.

[47] His Lordship is saying that the law starts out favouring the paper owner. Without hesitation the law will more easily ascribe possession to the paper owner and those claiming through him. Crucially, Slade J stated that if the evidence is equivocal on the issue of whether the person seeking to displace the paper owner had the requisite intent to possess then the courts should resolve the matter in favour of the paper owner and those claiming through him. This ties in with the law's ready inclination to favour the paper owner over others. Slade J concluded that the decided cases show that where the claimant to the property is a trespasser he has a particularly heavy onus.

[48] In examining the evidence in this case the court proposes to use the principles cited above and the analytical method of Slade J.

The analysis

[49] Mention was made of the order striking out the defence of Enasue and judgment entered for the McCoys. At that hearing, held on July 12, 2006, Enasue was represented by counsel as were the McCoys. Damages were ordered to be assessed. Enasue was the registered proprietor at the time judgment was entered. It is well known that the attorney, properly instructed, is an agent of his client. It must be taken that Enasue was aware of the court's order, through his attorney, striking out the defence. There was no application to set aside that judgment and neither was there any appeal. The conclusion must necessarily be that Enasue accepted the outcome

[50] The follow-up to this judgment was that damages were in fact assessed at JA$1,050,000.00 against Enasue. The defendants were not represented at the

assessment. In the case before me no issue has been taken with the authenticity, regularity or propriety of the judgment in the earlier claim.

[51] The significance of the judgment and assessment is that it must be taken that Enasue was liable for trespass and damages to the McCoys despite the fact that he was the registered proprietor at the time of the trespass. To use the language of the cases, Enasue, the paper owner, was found liable in trespass to a squatter who pleaded that Enasue's right to remove him was extinguished because twelve years had passed from the time the right to remove the squatter arose.

[52] Another fact of importance is the power of attorney from Enasue appointing Edgerton as his lawful attorney and authorising him to take 'legal action and represent [me] in any court in Jamaica with regard to the recovery of rent, recovery of my property concerning two parcels of land at Port Henderson, St Catherine volume 1033 folio 277 of the Register Book of Titles.' The date of this power of attorney is June 30, 2000.

[53] The earlier claim involving the McCoys and Enasue was filed on February 20, 2002. Based on the terms of the power of attorney Edgerton would have had authority to defend the suit in the name of his father. A defence and counter claim were filed on June 21, 2002. According to the terms of the striking out and entry of judgment order, a case management conference was held on May 26, 2004. The striking out was done for failure to comply with the case management orders made at least two years before the defence was struck out.

[54] There was also exhibited before the court, a witness statement of Mr Arthur McCoy dated December 17, 2004 and that witness statement was served on Enasue's attorney. There is a date stamp from Enasue's attorney dated December 17, 2004, indicating that he received the document. Before that, the McCoys filed affidavits in 2002 seeking an interlocutory injunction against Enasue to bar them from

ejecting them from the land. There are date stamps on the affidavits in support of the interlocutory injunction indicating that Enasue's attorney received both documents.

[55] The application for interlocutory injunction, from the totality of the evidence, was made in respect of the disputed land. Even though the affidavits do not refer to any registered title, it is clear from the terms of the affidavit and what Mr Glispie has admitted in his witness statement in this current claim that the land in question is the registered portion. The allegation was always being made that both Enasue and Mr Glispie (called Gillespie in the earlier claim) were trespassers on the registered land. The basis for calling them trespassers was stated to be occupation for the requisite period under the Limitation of Actions Act.

[56] It is necessary to point out that Enasue through Edgerton by way of another set of attorneys took action in the Resident Magistrate's Court for the parish of St Catherine (RMC) to eject Miss Marcia McCoy from the property and it appears that he obtained a default judgment. Miss McCoy applied to set aside that judgment in July 2002. She alleged in her affidavit in that action that she was never served with any originating process from the RMC.

[57] In her affidavit in support of her application for interlocutory injunction in the Supreme Court, Miss McCoy stated that she was never served with any notice to quit; she was never served with any originating documents from the RMC and only learnt of the order for recovery of possession on June 9, 2002.

[58] It is clear that the skirmishes in the RMC were overtaken by the earlier claim referred to at the beginning of this judgment.

[59] In the face of all this, it is difficult to understand why Enasue, if he was serious about recovering the property, did not challenge the striking out and entry of judgment order in the earlier claim. He was, as was stated, represented by counsel. He had given his son a power of attorney to take all necessary court action regarding taking

possession of the disputed property. Since the son had a power of attorney, it must be taken that he knew of the court action.

[60] This inactivity by father and son is even more inexplicable when this additional fact is bourne in mind. Even before the earlier claim was filed, Mr Arthur McCoy filed a caveat against the disputed property. It appears that it is this caveat that has prevented Mr Glispie from becoming the registered proprietor.

[61] The history of this caveat is vital. From the bundle of agreed documents it appears that Mr Arthur McCoy sought to register an earlier caveat based on what he claimed was an indenture which purported to show that his father, Mr Daniel McCoy owned the land from 1883. There was a requisition dated July 27, 2001 from the Registrar of Titles indicating that the caveat could not be based on the 1883 indenture because a registered title was now issued that would supersede the indenture. The registered title mentioned was quite likely the title issued to Mr Chevannes. The requisition did go on to say that the caveat could be supported if Mr Arthur McCoy claimed 'an interest by virtue of adverse possession.' It appears that it was in response to this advice that Mr McCoy filed his statutory declarations dated October 31, 2001 setting out his claim by extinction of title which was supported by tax receipts. The statutory declaration specifically identified the property as that registered at volume 1033 folio 227 of the Register Book of Titles. The statutory declaration referred to bears the certification stamp of the Registrar of Titles.

[62] The tax receipts put forward by the McCoys bear the valuation number 19105005046. Seven receipts were placed before the Registrar of Titles. The tax receipts show that taxes were paid for the years 1976 - 1997 and then from 2000 – 2002. Five of those receipts have the name of the tax payer as Daniel McCoy, the father of Mr Arthur McCoy and grandfather of Mr Rupert McCoy. Three of the receipts specifically noted that the tax was paid by A McCoy (numbers 57116, 57117, 206023). One receipt has the names of Mr Daniel McCoy and Mr Rupert McCoy (number 547028). All these receipts are for lot 46.

[63] According to Miss Greg the court should place some significance on this because the tax receipts put forward by the McCoys only relate to lot 46 whereas the receipts put forward by the defendant relate to lot 47. The tax receipts produced by the defendant are in the name of Enasue and are for the years 1996 to 2002 and then for the year 2009 – 2010. Thus it is not true to say, the implied argument goes, that the McCoys exercised control or possessed the disputed land. If so, they would have paid the taxes. Against this submission is the evidence from Mr Rupert McCoy that as far as he understood his family occupied the entire land. The references to lots 46 and 47, as far as he was concerned has no significance. He testified that he paid taxes for the land. Only one receipt bearing his name was produced. He took the view that the taxes paid were for the entire land and not just one part.

[64] The court is of the view that payment of taxes while helpful is not conclusive in this case. The impact of the outcome of the earlier claim cannot be ignored. Those allegations made by the McCoys are not facts and must be taken as true until that judgment is set aside. The statement of claim and the surveyor's diagram make it too plain that the McCoys in the earlier claim were saying that they occupied the entire land (lots 46 and 47). On the face of it, the McCoys successfully rebuffed the then paper owner of Enasue and went further to have damages assessed against him for trespass. This action for trespass would not have been sustainable without some rights arising by possession.

[65] A point commonly overlooked is that when the limitation period begins to run in favour of the squatter/trespasser and against the paper owner it matters not what the paper owner does with the title to the land. He must take steps to re-enter or take possession. The fact that he may have sold the property to another person (and even if there are multiple transfers) is of no moment because of an important inherent aspect of the operation of sections 3, 4 and 30 of the Limitation of Actions Act. It is this: once the squatter or trespasser takes possession in the sense of having factual possession and has the intention to possess, time begins to run against whomever

the paper owner is. The right to recover possession arises from the time the squatter took open and not secret possession. The open possession and treating with the property as if he were the owner evidenced by factual possession operates as notice to the paper owner that someone is treating with the property for his own purpose. This is why extinction of title or extinction of action to recover land rests on open, peaceful and continuous occupation. The logic is that if the paper owner wishes to stand by and allow another to behave as ostensible owner then with the passage of time he can resist the paper owner's attempt to remove him. Jamaican land law, drawing on its English ancestry, attaches great importance to factual possession. Anglo-Jamaican land law has never concerned itself with establishing absolute title but only relative title, that is to say, of the litigants before the court, the question for the court is not which of them has absolute title but rather, which of them has the better claim to title at the time of the litigation. The introduction of the Torrens System did not change this. Factual possession is prima facie equal to ownership or at least evidence of a better title to someone who is not in factual possession. Thus the squatter who continues in possession is not affected by dealings with the paper title. If the squatter remains in continuous possession during the entire limitation period then he can resist any attempt to remove him because that right would be extinguished. From this position it does not matter who has the paper title. To put it bluntly, once time begins to run in favour of the squatter, any new paper owner does not have the limitation clock reset in his favour; the clock keeps on ticking. The consequence of this is that the new paper owner's time within which to recover possession from the squatter begins when he becomes the new paper owner. The time already passed counts in favour of the squatter. An example will suffice: if the squatter is in possession for seven years and a new paper owner is registered in year eight of the squatter's possession the new owner only has that time remaining for the twelve years to pass to take action. The fact that there is a new paper owner does not mean that the twelve years begin when he becomes the paper owner. The count-down continues in favour of the squatter. For these reasons the numerous transfers of lot 46 are not of great importance once the McCoys can establish that they were in factual possession and had the intention to possess for the period of twelve years.

[66] What has been said in the immediately preceding paragraph explains why the defence filed to this claim by Mr Glispie has missed the mark. The issue is not the dealings with the paper title but rather whether the McCoys have been in open, continuous and peaceful factual possession and had the intention to possess.

[67] There are three ways to stop the clock. One is to bring an action for recovery of possession. Another is to physically reenter the land. The other is for the trespasser to acknowledge the paper owner's title.

[68] The pleaded defence of Mr Glispie, unfortunately, does not address the point of factual possession and intention to possess. The entire pleaded defence, which is set out in paragraph 79 along with the claim, is dedicated to tracing the paper ownership of the disputed land. None of that matters. The defence does not assert that there was (a) an action for recovery of possession; (b) physical reentry or (c) any acknowledgement of title of the paper owner.

[69] Paragraph six of Mr Glispie's witness statement puts paid to his evidence on the issue of extinction of the right to remove Mr Arthur McCoy. The first sentence of paragraph six reads:

> *That I have personal knowledge of this property registered at volume 1033 folio 227* ***since*** *the purchase of the lot on which Seahorse is situated.* (emphasis added)

Paragraph three of the witness statement reads in the relevant part:

> *I purchased the land on which the "Seahorse" is located from Ms Johnson in 1990. The land was later transferred to Hombre De Caballo Developers Ltd in 1999.*

[70] What this means is that Mr Glispie cannot speak to what happened between 1975 and 1989. He cannot assert that Mr Arthur McCoy was not in possession of the land between those years. He claimed to have signed the sale agreement with Edgerton in 2001. Mr Glispie stated that Edgerton showed him documents emanating from the Resident Magistrate's Court for the parish of St Catherine which purported to be orders directing the McCoys and others to remove from the property. The agreed bundle of documents shows that Plaint Number 2396/2001 **Leslie Pinnock v Marcia McCoy** was issued by the St Catherine court. If the year 2001 is correct it would be twenty six years after Mr Arthur McCoy is claiming to have been in sole, open and exclusive possession of the disputed land.

[71] Mr Glispie's witness statement is really an admission of trespass and waste committed on the disputed land. He admits entering the disputed property; demolishing a concrete house; demolishing a board house; dumping up the land which is by the sea; erecting a water tank and constructing a stable. Unless all this can be justified Mr Glispie is guilty of trespass of a very serious kind. This explains why Mr Beeche's evidence was necessary to the defence

[72] The court will now analyse Mr Beeche's evidence. This court views Mr Beeche's evidence with grave suspicion. The court will analyse Mr Beeche's evidence and indicate why it is not accepted. First he purports to say that he met Edgerton in the 1970s who tells him (Beeche) that his father had bought the property. He also says that Edgerton asked him if he was taking care of the property and he (Beeche) said yes. According to Mr Beeche, Edgerton then says to him that he is asking him (Beeche) to take care of the property. He also says that Edgerton would visit the property every two months and would walk and look around the property. If this evidence was available at the time the defence was drafted it is almost inconceivable that it would have been drafted without reference to these important assertion because they point directly to refuting Mr McCoy's claim of being in exclusive possession. It has been established that possession by an agent is possession by the principal (**Wilson v Cadogan** (2011) 79 WIR 366, 372 [14]).

[73] Second, according to the documentary evidence Enasue became the registered proprietor in September 1974. This would mean that at the time when Edgerton was allegedly having conversation with Mr Beeche and asking him (Beeche) to take care of the property, Enasue was the registered proprietor. The McCoys brought their earlier claim in 2002. The pleadings in that case made the unambiguous assertion that the McCoys were saying that they occupied lots 46 and 47 exclusively. The earlier claim specifically named Enasue as a trespasser. By the time the earlier claim was filed Edgerton was already in possession of the power attorney appointing him to take all steps necessary to get possession of lot 47. Enasue, at all times, from inception of suit right through to striking out the defence, was represented by counsel. Why didn't Enasue or Edgerton put forward this information to defend the earlier claim? Why did they sit back and allow judgment to be entered? Why did they not seek to set aside the judgment? Damages were assessed against Enasue in 2009. No appeal was filed against that judgment. The judgment was entered on the basis of the claim to lots 46 and 47. Damages were assessed on the basis that the trespasser damaged property on both lots 46 and 47. There is no evidence that these developments were unknown to either Edgerton or Enasue.

[74] What Mr Glispie is attempting to do in this current claim is to make assertions about lot 47 which his predecessor in title failed to make when the predecessor had full opportunity to do so. In practical terms by failing to defend the claim when he had full knowledge of the assertions, the predecessor in title is taken to have admitted the truthfulness and accuracy of Mr Arthur McCoy's claim in the earlier action. The result of this is, as already stated, that Mr McCoy's possession for twelve years has been upheld by the Supreme Court.

[75] Mr Beeche's assertions run contrary to the outcome of the earlier claim. Mr Beeche is seeking to put into the mouth of Edgerton words, and to attribute to him conduct which Edgerton himself declined to assert in the earlier claim. To put it another way, the court is suspicious of the fact that Edgerton (the appointed agent) has suffered judgment to be entered against Enasue (the principal) when he had

powerful evidence that could have rebuffed the claim. Edgerton, by the time of the earlier action, had his power of attorney and could have placed before the court by way of witness statements the very things being attributed to him by Mr Beeche. There is no evidence that Edgerton had died or was otherwise incapacitated at the time of the earlier claim. There is no evidence explaining why he declined to defend the earlier claim when it was within his power to do so and certainly no explanation in this current claim why Mr Beeche is attributing to him words and conduct which he could have given had he been called as witness. The court cannot find any acceptable explanation for this unusual phenomenon whereby a witness is making assertions in a subsequent case on behalf of a defendant who failed to make them in a previous case involving the same subject matter when the assertions now being attributed to the defendant, if true, would have provided a complete defence to the claim.

[76] A defendant in a claim is not bound to participate. On receiving a claim he may admit either formally by filing an acknowledgement of service in which he admits the claim or he may decline to expend any resources and simply await the outcome of the claim. He may also begin to mount a defence and then abandon that strategy and allow judgment to be entered against him. Whatever his choice, once judgment is entered on the allegations made by the claimant and damages, if the case attract them, are assessed, the defendant is taken to have accepted the truth of the assertions of the claimant. It must be very rare, if possible at all, that a court will accept the testimony of a witness in a subsequent case which is in effect saying that what the defendant has accepted in a previous claim is not true.

[77] Mr Beeche also spoke of a number of persons living on the disputed property. This evidence was undoubtedly to say that Mr Arthur McCoy and Miss Marcia McCoy did not have exclusive possession of the disputed property. Again, the reasoning above applies here. Mr McCoy in his earlier claim said that he was on sole, open, continuous and exclusive possession. Why didn't Edgerton or Enasue file witness statements and go to trial on the merits? Why did they sit back and allow their

defence to be struck out and suffer damages to be assessed against Enasue? The information being presented here was not within the sole knowledge of Mr Beeche.

[78] The point being made is that if Edgerton did and said the things attributed to him by Mr Beeche it is difficult to understand why Edgerton failed to put this information before the court in the earlier claim when it was clear that the McCoys were relying on extinction of the right to bring an action for recovery of possession. If the power of attorney was in effect, as it clearly was, it would mean that it was Edgerton, and not Enasue, who would have conduct of the earlier claim.

[79] There is another reason why Mr Beeche's evidence is questionable. Reference was made to the pleaded defence. One cannot help but note that Mr Beeche's testimony was not pleaded in the defence. It would have been quite easy for the defence to plead that at all material times the previous owner had a caretaker on the property and therefore the claimants could not have been in exclusive possession for twelve years beginning in 1975. The claim and the defence will be set out side by side to make the point that (a) the defence did not conform in some ways to rule 10 of the Civil Procedure Rules (CPR) regarding pleading and (b) the evidence of Mr Beeche was not pleaded at all.

[80] These are the pleadings in this case.

Claimants' pleading	**Defendant's pleading**
(1) The first claimant has been in undisturbed and exclusive possession as owner thereof of the lands known as lot 46 [amended to refer to lot 47].	(1) The defendant makes no admission in regard to paragraph 1 of the particulars of claim
(2) The second claimant and other	(2) The defendant makes no admission

members of their family lived on the said land with the permission of the first claimant.	in regard to paragraph 2 of the statement of claim
(3) The first and second claimant and other members of their family at all material times lived communally in two dwelling houses on the said land and the first claimant has also operated a workshop on the said land.	(3) Paragraph 3 of the particulars of claim is not admitted.
(4) That in or around February 6, 2002 the defendant wrongfully entered onto the said land with workmen and heavy machinery, demolished parts of the claimants' buildings and uprooted trees. The defendant and /or his servants and/or agents also damages other property belonging to the second claimant and committed other act of waste on the said land as a result of which the claimants have suffered damage.	(4) The defendant denies the allegations set forth in paragraph 4 of the particulars of claim
(5) In or around the month of October 2007 the defendant and/or his servants and/or agents have dug a pit on the said land.	(5) Paragraph 5 of the particulars of claim is not admitted
(6) In or around the third week in the	(6) Paragraph 6 of the particulars of

month of January 2008 the defendants and/or his servants and/or agents installed an iron gate to the fence blocking the entrance to the first claimant's land.	claim is denied
(7) The defendant and/or his servants and/or his agents have built horse stables on the said land belonging to the claimant	[no response]
	(7) Paragraph 8 of the particulars of claim is denied and the defendant says that at all material times the first and second claimants were occupiers of land adjacent to land which the defendant as servant and/or agent of a Limited Liability Company had contracted to purchase from the registered proprietor of the land registered at volume 1033 folio 227 Leslie Enasue Pinnock and by his attorney Leslie Edgerton Pinnock.
	(8) That the said land originally belonged to Nathaniel Chevannes who in or about the year 1967 sold same to Roman Catholic Bishop of Kingston and placed him in possession thereof.

(9) That in or about the year 1971 the said Roman Catholic Bishop sold the said land to Louis Alexander Patrick of 27 Brunswick Street, Spanish Town, St. Catherine and placed him in possession thereof.

(10) That in or about the year 1974 the said Louis Alexander Patrick sold the said land to Leslie Enasue Pinnock of 28 Manor Park Drive, Saint Andrew and placed him in possession thereof.

(11) That by power of attorney dated June 30, 2000, the said Leslie Enasue Pinnock gave his son Leslie Edgerton Pinnock, a power of attorney investing him with authority to sell the said land.

(12) That in or about the year 2001 the said Leslie Edgerton Pinnock entered into an agreement to sell the said land to Hombre de Caballo, a company duly registered under the laws of Jamaica and placed the purchaser in possession thereof on payment of a sum of money in part payment thereof and the said purchaser has remained in

possession thereof to the present day.

(13) Save as hereinbefore expressly admitted or not admitted the defendant denies each and every allegation contained in the particulars of claim as if the same had been set forth seriatim and specifically traversed.

[81] These were the pleadings at the commencement of the trial. It will be noted that paragraph one of the claimants' pleadings refers to lot 46 but that was accepted to be an error and should have been lot 47. The amendments were done. The defendant accepted that he was not disputing the claimants' possession of lot 46.

[82] As is clear from the pleadings the first six paragraphs of the defendant's pleaded defence do not conform to rule 10.5 of the Civil Procedure Rules. Under the new rules, a naked denial is no longer possible. Rule 10.5 (1) mandates that the defendant must set out all the facts on which he relies to dispute the claim. Rule 10.5 (3) says that the defendant must say (a) which allegations are admitted; (b) which are denied; and (c) which are neither denied nor admitted because the defendant does not know whether they are true and wishes the claimant to prove them. Under rule 10.5 (4) where a defendant denies any allegation he must state the reason for the denial and if he intends to prove a different version of events then that version must be set out in the defence. Rule 10.5 (5) goes further and insists that where a defendant does not admit an allegation or he denies the allegation without putting forward a different version then the defendant must state the reason for resisting the allegation. Paragraph fourteen of the defendant's defence is an anachronism that has no place under the modern rules of pleadings.

[83] There is no provision in the Jamaican CPR similar to rule 16.5 (3) of the English CPR which says 'that a defendant (a) who fails to deal with an allegation; but (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant shall be taken to require that allegation to be proved.' Neither does the Jamaican CPR state the consequence of failing to deal with an allegation (English CPR rule 16.5 (5)).

[84] There is no assertion in the pleadings that Mr Arthur McCoy was not in undisturbed and exclusive possession. There is no assertion in the pleadings that other persons lived on the property without Mr McCoy's permission. There is no assertion in the pleadings that Mr Beeche was asked by the paper owner to be caretaker of the disputed property. All these are fundamental pleadings that would be expected if the squatter's assertion that the right to remove him has been extinguished by the passage of time was to be rebuffed.

[85] Whenever there is such a significant difference between the pleaded case and the evidence, the court should be cautious in accepting the evidence. It is nothing short of remarkable that the pleaded defence did not foreshadow Mr Beeche's evidence and it is even more remarkable that the witness statement is dated July 16, 2010 yet the defence filed in August 2008 was not amended at all. The court has doubts about the reliability of the case for the defence and therefore does not accept it.

[86] It is true that there were actions taken in the RMC to remove Miss Marcia McCoy from the land but those was superseded by the Supreme Court action which ended in a final judgment. The RMC action was an attempt to recover possession but this was repulsed on the basis that the McCoys were in open, undisturbed possession for twelve years. If that is so in respect of Edgerton then it is difficult to see how any subsequent paper owner can be in any better position.

[87] Since the relevant intention is that of the squatter and not of the paper owner the fact that there have been various transfers of the paper title is neither here nor there. None of them took any steps in the period 1975 to 1987 to assert their right to recover possession.

[88] Slade J indicated that much depends on the type of land in question and the use to which it is ordinarily put. The evidence from Miss Marcia McCoy and Mr Rupert McCoy is that both lots 46 and 47 were used as a family residence. There is no evidence that there was any boundary between the lots. From the evidence, particularly of Mr Rupert McCoy, both lots were treated as one large area. One part was used as a workshop for Mr Arthur McCoy. It means that the evidence of possession would be to see whether the disputed property was used as such and by whom. Miss McCoy is saying that relatives lived in the concrete house and she herself moved from the house her father lived in to the concreted house located on the disputed property.

[89] From what she has said and from Mr Rupert McCoy's evidence, it appears that she would have moved into the second house (lot 47). In this case as in the earlier claim the claimants were asserting that Mr Arthur McCoy occupied the whole. It was the evidence of Miss Marcia McCoy and Mr Rupert McCoy in the current claim that their father lived on the land since 1975 and it was used as residential property. Implicit in what they were saying is that the father and the other family members had free reign over the land and did the things that families do – occupy, play and permit other family members and other persons to stay for varying periods of time. In this type of case where the claim is based on use of land as a residence and place of business then the court looks to see whether those kinds of activities took place. In this case they did and so the evidence adduced is sufficient to show factual possession.

[90] It should be noted that it is well established that, depending on the circumstances, occupation of a part may be treated as occupation of the whole. This

point was made by the Judicial Committee of the Privy Council in **John Clarke v G H D Elphinstone** (1880-81) L R 6 App Cas 164, 170 where Sir Montague Smith stated:

> *It has been argued at the Bar, that, even if the evidence fails to shew that the boundary had been established, acts done upon other parts of the land granted to the predecessors of the Defendant are evidence of acts done on this land. There is no doubt that in many cases acts done upon parts of a district of land may be evidence of the possession of the whole.*

[91] There is no evidence that Mr Arthur McCoy ever acknowledged the title of Enasue or indeed anyone (see **Bisnauth v Shewprashad** (2009) 79 WIR 339, CCJ). Until they were chased off, the McCoys would still have been in possession.

[92] The claim of Miss Marcia McCoy needs to be addressed specifically. Her evidence is that she lived in one house, on lot 46, from 1975 until she moved to the other house. She is saying that she went to live in the other house in the 1980s. She is not too clear on the year. She also recalls that her birth date was 1966. What this means is that she could not rely on the year 1975 to ground her claim that the right to remove her was extinguished since she was a minor. Therefore, she would have been living on the property on which the first house was with the permission of her father. It means that she did not have factual exclusive and sole possession since she was there with her father's permission. Certainly not between 1975 to the time when she moved out to the other house. When she moved to the other house, the evidence does not suggest that she intended to exclude all persons including her father Mr Arthur McCoy. If anything her possession in respect of lot 47 would have to be joint possession along with her father.

[93] It seems to this court that if an earlier judgment has, for practical purposes, decided that Mr Arthur McCoy was able to say that the right to remove him by the then paper owner was extinguished by the passage of the relevant time and there is

nothing to suggest that Mr Arthur McCoy voluntarily gave up possession, then surely, in respect of the same piece of land, the successor paper owner cannot be in a stronger position than the earlier paper owner.

[94] In applying the principles of law extracted from the cases, it can be said that in the earlier claim, Enasue did not establish that he had better claim to possession than Mr Arthur McCoy who was able to sustain his claim in trespass and have damages awarded to him.

[95] Did Mr Arthur McCoy have factual possession and the intention to possess of lot 47 from 1975 for twelve years? Based on the outcome of the earlier case and the totality of the evidence the answer must be yes and that same foundation enables him to sustain the case against Mr Glispie.

Conclusion

[96] Open possession by a squatter that begins with peaceful occupation and not by force and without the consent of the paper owner once accompanied by an intention to possess start the limitation clock. The paper owner has twelve years to recover possession and if he fails to act then his right to recover the property is extinguished. The only way for the limitation period to be interrupted, other than by the paper owner, is by the squatter giving up possession for some time during the twelve years, however brief, and then return. If he does this the limitation clock restarts on the second possession if he has the intention to possess. The requirement of openness is aimed at the paper owner and its purpose is to put him on notice that someone is seeking to claim title or seeking to extinguish his right to recover possession. If he does not act then the policy of the law is to support the squatter. Once the possession was of such a nature that the paper owner had he checked would have noticed then that is sufficient.

[97] Based on the judgment in the earlier case, Mr Arthur McCoy has been accepted by the Supreme Court as being in continuous possession of the disputed land for the

twelve year period. That judgment has not been set aside or challenged. That twelve year period was completed before Mr Glispie became the paper owner and there is no evidence that Mr Arthur McCoy left during the period which would have had the effect of stopping the limitation clock.

[98] Paying taxes while important is not decisive by itself. Payment of taxes for lot 47 by the paper owner without taking steps within the limitation period to recover possession cannot operate to stop the limitation clock running in favour of the squatter. The McCoys paid taxes. It has turned out that the taxes that were paid were for lot 46 and not lot 47. That does not undermine their case because they were in factual possession of lot 47 with the requisite intention. To put it another way, none payment of taxes by the McCoys for lot 47 does not weaken their case. The law does not require that the squatter pays taxes for the land he occupies.

[99] Mr Arthur McCoy was already compensated for the special damage done to his property. He is seeking an injunction to remove Mr Glispie from the property. Mr Green submitted that since trespass is actionable per se then the court can award some damage. It seems to me that the real remedy here is the injunction. There is no claim for special damages.

Disposition

[100] Judgment is made in favour of the claimants. The injunction restraining Mr Glispie and his agents or servants or anyone acting or purporting to act on his behalf or on behalf of his heirs, successors and assigns are restrained from entering on and continuing to remain on land registered at volume 1033 folio 227 of the Register Book of Titles. They are also restrained from committing further acts of trespass and waste on the same registered land.

[101] Damages awarded are J$50,000.00. Costs are awarded to the claimants to be agreed or taxed.