[2021] JMSC Civ. 156

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2003 HCV 01838

BETWEEN	**GEORGE NEWELL**	**CLAIMANT**
AND	**ESMERLDA MULLINGS**	**1ST DEFENDANT**
AND	**JERMAINE MULLINGS**	**2ND DEFENDANT**
AND	**TRACEY MULLINGS**	**3RD DEFENDANT**
AND	**CAOLUN MULLINGS**	**4TH DEFENDANT**
AND	**FAYLON MULLINGS**	**5TH DEFENDANT**

HEARD TOGETHER WITH CLAIM NO. 2013 HCV 00319

BETWEEN	**GEORGE NEWELL**	**CLAIMANT**
AND	**BOBETT NEIL**	**DEFENDANT**

AND WITH
CLAIM NO. SU2020CV02198

BETWEEN	**MELVERTON NEWELL** **Administrator of the estate of Adelaide Newell & Neville Newell**	**CLAIMANT**
AND GEORGE NEWELL		**1ST DEFENDANT IN OPEN COURT**

Ms Georgia Hamilton and Ms Tia Blake instructed by Georgia Hamilton and Company for Mr George Newell

Ms Gillian Mullings instructed by Naylor and Mullings for the first to fifth defendants in Claim 2003 HCV 01838

Mr Mikhail Williams and Ms Stephanie Stone instructed by JNW Taylor and Associates for Ms Bobett Neil

Ms Jennifer Housen instructed by Caribbean Legal Practice for Melverton Newell, (Administrator in the estate of Adelaide Newell).

HEARD: March 16, 17, 18, 19, and March 22, 2021 and September 21, 2021

Whether claimant acquired right to possessory title over land – whether claimant entered onto land by consent - Whether land purchased by defendants properly identified on ground – whether title to land obtained by fraud – Whether lands part of estate of deceased.

PETTIGREW COLLINS, J

INTRODUCTION

[1] This case involves three different claims. Mr George Newell is the common party to all three claims. He is seeking to recover a parcel of land described in his two Claim Forms as lands at Lynch and Ballard Patent of Junction St Elizabeth. Because of how events have evolved, the land has been divided into three separate parcels, and will be dealt with accordingly, except where context requires that I do otherwise.

[2] George Newell avers that the entire parcel of land was surveyed by Ainsworth Dick, Commissioned Land Surveyor on the 10th of February 1998. This survey showed that the land measures 8284.3114 square metres of the shape and dimensions and butting as appears by the plan and bearing Survey Department Examination Number 268587 and Valuation Number 201-06-013-033.

[3] The entire parcel of land is formerly part of the estate of George Newell's paternal grandfather William Benjamin Newell deceased, who died in 1918. George alleges that the portion of unregistered land that he entered upon was a part of the agreed entitlement of his late father Noel Newell. George claims that he has exercised sole, open, continuous and undisturbed possession of the land. I shall look at George's evidence generally regarding this aspect of the claim and outline the

relevant law. Because of the different factual scenarios of each claim, I will address the evidence unique to each parcel when dealing with the particular claim.

[4] The one acre portion registered to the Mullings family is the subject matter of claim number 2003 HCV 01828. Another roughly one acre unregistered portion is claimed by Ms Neil and is the subject matter of claim number 2013 HCV 00319. The third portion is the remainder of the parcel claimed by George Newell. Mr Melverton Newell brought claim number SU 2020 CV 02198 in his capacity as the Administrator of the estate of Adelaide Newell deceased. He claims that the entire parcel of land is part of the estate of Adelaide Newell, and in essence, that subject to the rights of the defendants in claims 2003 HCV 01828 and 2013 HCV 00319, the remaining portion is a part of the estate of Adelaide Newell.

[5] The three claims have not been consolidated but were ordered tried together because each claim involves part of the parcel of land claimed by George Newell. I shall first set out George Newell's evidence regarding his alleged occupation and possession of the entire parcel of land and outline the law relevant to the acquisition of a possessory title. I will then go on to examine each claim separately. In dealing with each claim, I shall apply the law regarding the acquisition of a possessory title to the facts found by me as it relates to each parcel. I will address the question of whether George Newell went onto the land with the consent of the paper owner when addressing claim no. 2013 HCV 00319, since it is convenient to do so and in any event, because it is only the portion of land claimed by Ms Neil which will be affected by the outcome of that particular issue.

[6] Because of the number of different persons involved in this case bearing the surname Newell, where it is convenient to do so, I shall refer to persons by their first names. I intend no disrespect. I shall adopt Ms Hamilton's use of the name "Mullingses" when referring to the first to the fifth defendants in claim no. 2003 HCV 01838 as I find it convenient. They will also be referred to as the Mullings family. All parties filed submissions in these matters. I will not set out the

submissions sequentially, but will make reference as I find it necessary in explaining my reasons for the position arrived at in each claim.

THE CLAIMS AND COUNTERCLAIM

[7] George Newell filed claim number 2003 HCV 01838, (hereinafter referred to variously as the 2003 claim, the claim against the Mullingses or the claim against the Mullings family) on October 3, 2003 against Mr. Lynton Mullings. On the 4th of December 2019, he filed an Amended Claim Form and Amended Particulars of Claim. The defendants in that amended claim are Mrs Esmerelda Mullings and her children, who are the beneficiaries of the estate of Lynton Mullings deceased. Mr Mullings purportedly purchased a portion of the land from Naomi Newell the aunt of George Newell. Mr Mullings died sometime in 2004. Mrs Mullings and Donnette Wellington gave evidence on behalf of the Mullings family in the 2003 claim.

[8] George asserts that Naomi Newell was never the owner of the land she sold to Mr Mullings and was never authorized to sell any of it, and further, that by the time of the alleged sale, Naomi Newell did not have the mental capacity to carry out the transaction and in any event he George had by the time of the sale, acquired the land by adverse possession. The claimant avers in the alternative, that the land Mr Lynton Mullings allegedly bought from Naomi Newell does not form part of the land he is claiming.

[9] George says that any purported sale by his aunt was done by acts of fraud and that further, a fraud was perpetrated on the Registrar of Titles, such fraud enabling the bringing of the land under the Registration of Titles Act. The claimant set out in detail in his particulars of claim what he alleges to be the particular of the fraud, as it relates to this quarter acre of land which was brought under the Registration of Titles Act on the 24th of February 1997.

[10] In their further amended defence filed on the 2nd of January 2020, the defendants in the 2003 claim (the Mullings family), deny that the land described in the survey diagram belonged to Noel Newell and said that it belonged to Naomi Newell as it was gifted to her by her father William Newell. The defendants aver that the land was conveyed to Mr. Mullings their predecessor in title by common law conveyance dated the 7th of October 1996. They also deny that George Newell is, or had ever been in possession of the land purchased by them. The defendants deny that any building exists upon their portion of the land.

[11] The Mullingses also counterclaim against Mr George Newell, seeking damages for trespass, an injunction and mesne profits on account of them being unable to occupy or develop the property.

[12] On the 21st of January 2013, George Newell filed claim number 2013 HCV 00319 against Ms. Bobett Neil. In that claim he seeks to recover possession of one acre of unregistered land. He claims that he let the defendant unto a part of the land he is now seeking to recover from her on or about the 31st of January 2004 by way of a license arrangement. Upon the expiration of that licence, he allowed the defendant to remain in occupation of the portion which was the subject of the license. He had made, he said, repeated requests of Ms Neil to vacate the land since September 2006 but she has failed to do so. He avers that in or about October 2011, Ms. Neil extended her occupation to one acre of the land and remains a trespasser upon the land. He is seeking to recover damages for trespass or mesne profit against her.

[13] In defence to George's claim against her, Miss Neil asserted that she is a purchaser in possession since 2004, of the portion of land occupied by her and that the land was purchased from Joy Newell, the sister of George Newell who had acquired that property under the will of Clanston Newell, deceased. She further asserted that the property was part of a subdivision in respect of which Clifton Newell deceased (who had held the property as joint tenant with Clanson Newell, and who predeceased Clanson Newell) had applied for and received approval. Ms

Neil accepted that she had entered into a licence arrangement with George Newell at a time when she was uncertain as to the ownership of the property. She averred that she later ascertained ownership of the property upon the production by Joy Newell of documents which satisfied her that Joy Newell was the owner of the property.

[14] Claim Number SU 2020 CV 02198 was brought by Melverton Newell in his capacity as administrator for the estate of Adelaide Marie Newell and Neville Newell against George Newell. He is seeking a declaration that the estate is the owner of, and is entitled to possession of all that parcel of unregistered land part of Lynch and Ballards Patent of Junction in the parish of St. Elizabeth of which George Newell claims ownership. He also sought to recover damages for trespass or mesne profit against Mr. George Newell.

[15] In response to this claim (hereinafter referred to as Melverton Newell's claim), George Newell asserted that the property in question was never part of the estate of Adelaide Newell, but is part of the undistributed estate of William Benjamin Newell. Further, that he had by 1988, acquired an equitable interest in those lands, having remained in undisturbed exclusive possession and occupation since in 1976. As he did in his particulars of claim in the two claims brought by him, he detailed the acts being relied on to ground his claim to a possessory title.

GEORGE NEWELL'S CASE THAT HE EXERCISED OWNERSHIP OVER THE ENTIRE PROPERTY

[16] George Newell gave evidence that sometime in 1953, his paternal grandmother Adelaide Marie Newell took out a Grant of Letters of Administration in William Benjamin Newell's estate. Further, that in 1963, his grandmother conveyed a piece of unregistered land which adjoins the subject land in Junction (referred to as the Development) to his now deceased uncles Neville, Clanson and Clifton. Adelaide Newell died intestate on April 12, 1971.

[17] He also gave evidence that he and his family returned to Jamaica from England two (2) years after his grandmother's death and at that time, Junction was a residential/agricultural community with commercial activity concentrated in the township square. Further that on his return to Jamaica, most residents in Junction did not have fenced in properties or gates to enter their yards. Some planted a hedge around their properties leaving a walkway/driveway.

[18] George also stated that sometime after he returned to Jamaica, he decided that he wanted to open a garage and he did so on unused land that formed part of his grandmother's estate. He gave further evidence that in 1985, he closed the garage. He stated however, that he continued to store water tanks, hoses and other accessories and tools from his water trucking business on the subject land. He also said that to this day, he still has a water tank and other accessories from his still operating water trucking business on the land.

[19] He gave evidence that in 1982, his Uncle Clifton, (who died on July 31, 1987), took out a grant of letters of administration de bonis non in William Benjamin Newell's estate. He stated that he continued to occupy the subject land and his uncle did not prevent him from doing so.

[20] George asserted that in the 1980's he realised motorists were habitually parking on a section of the subject land running along the Junction Main Road without his permission. He stated that as a result of this, he hired workmen to plant metal spikes connected by metal chains fitted with padlocks along the entire frontage of the subject land to prevent unauthorised access to the land.

[21] He further asserted that in 1990 he began planting cash crops on the subject land. He also said that in the mid-1990s he gave his brother Herman permission to set up horse rearing and breeding operations on a section of the subject land, farthest from the Junction Main Road. George also said that at one point, Herman had many horses there. He also asserted that he gave Herman permission to build a stable which he has maintained, and which is in use to this day. He asserted further

that Herman has repaired sections of the fence he had put in which fell into disrepair, so as to keep his horses in.

[22] George also gave evidence that in late 1997, he asked his father Noel Newell to arrange for the subject land to be surveyed and he paid for the survey. His father died on April 9, 1999. He also stated that he paid property taxes and amended the Valuation Roll to show that he was the person in possession of the subject land.

[23] He stated that in September 2011 he commenced taking steps to obtain a registered title to the subject land and had the boundaries of the land rechecked on November 18, 2011.

THE LAW RELEVANT TO THE ACQUISITION OF A POSSESSORY TITLE TO LAND

[24] The starting point in dealing with a case where a party is claiming to acquire the right to a possessory title in relation to land, is the Limitations of Actions Act. Sections 3,4(a) and 30 state as follows:

i. *"3. No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same."*

ii. *"4.(a) 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-*

2. *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;…

a. *"30. 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."*

[25] The combined effect of sections 3, 4 and 30, is that a proprietor of land whether registered or unregistered, can lose his right to recover possession of that land by the operation of the statute of limitation where someone not the owner of the land has acquired the right to a possessory title by virtue of being in possession for a period of 12 years or more. In ***Recreational Holdings 1 (Jamaica Limited (Appellant) v Lazarus (Respondent) (Jamaica-***2016 UKPC**,** in giving the opinion of the Board,

Lord Wilson approved a quotation from an article by Dr Lloyd Barnett in "The Land Registration System and Possessory Titles- A Jamaican Perspective", (1998) WILJ 72. In the article it is stated:

> *13. On the effluxion of the statutory period, the Limitation Act expressly extinguishes the title of the owner who has been out of possession and implicitly confers a good and legal title on the adverse possessor. Since he can no longer be ejected by the former owner, whether he was registered or not or by a third party, he acquires a right in realm."*

[26] An individual who has no paper title to property and who claims that the title of a paper owner has been extinguished by him/her, has to establish possession. The concept of possession for the purposes of acquiring a possessory title was discussed at length in **JA Pye (Oxford) v Graham** [2003] 1 AC 419.

[27] At paragraph 31 of the judgment, Lord Brown-Wilkinson, with the exception of the reference to 'adverse possession', expressly approved the definition set out by

Slade J in the case of **Powell v Mc Farlane** (1977) 38 P & CR 452. He quoted Slade J at page 469 of the judgment:

> *"Possession of land, however, is a concept which has long been familiar and of importance to English lawyers because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent…. In the absence of authority, therefore I would for my own part have regarded the word 'possession' in the 1939 Act as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise, I would have disregarded the word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent; likewise I would have regarded a person who has 'dispossessed' another in the sense just stated as being in 'adverse possession' for the purposes of the Act."*

At paragraphs 39 and 40, Lord Brown-Wilkinson continued

> *"39. What then constitutes "possession" in the ordinary sense of word?*
>
> *Possession*
>
> *40. In Powell's case Slade J said, at 38 P & CR 452, 470:*
>
> *"(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land as being the person with the prime facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.*
>
> *(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")."…*
>
> *A sufficient degree of physical custody and control ("factual possession");*
>
> *An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").*

[28] Later he said in relation to factual possession that:

> *"it must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. "Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question 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……."*

[29] At paragraph 37, Lord Wilkinson also said

> *"it is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act."*

[30] The Mullingses, Ms Neil as well as Melverton all contend that George entered the parcel of land with consent of the potential beneficiaries. The question is whether it can be said that he was on the property pursuant to a license, and therefore time could not have run while the license persisted.

[31] In accordance with the definition in **Maudsley & Burn's Land Law Cases and Materials** Fifth Edition E. H. Burn at page 478,

> *"In its simplest form, a license is a permission to enter upon land. It makes lawful what would otherwise be a trespass: and in the absence of special of circumstances, is revocable at the will of the licensor. It is not a proprietary interest.*

[32] In **Bryan Clarke v Alton Swaby** Privy Council Appeal No. 13 of 2005. It was authoritatively stated at paragraph 11 of the judgment that:

> *"… it is perfectly clear that under the law of Jamaica, as under the law of England, a person who is in occupation of land as a licensee cannot begin to obtain a title by adverse possession so long as his licence has not been revoked. Unless and until it is revoked, his occupation of the land is to be ascribed to his licence, and not to an adverse claim: see the opinion of the board in **Wills v Wills [**2003]*

> *UKPC 84, citing the board's earlier opinion (delivered by Lord Millett in* ***Ramnarace v Lutchman*** *[2001] 1 W LR 1651, 1654*
>
> *"Generally speaking adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner.*

[33] One question which looms large is whether George was in occupation of the entire parcel of land or whether he only occupied a portion of it. It was said in ***Powell v McFarlane,*** **(1977) 38 P & CR 452,** and referred to repeatedly in many cases that: "It is clearly settled that acts of possession done on parts of land to which a possessory title is sought, may be evidence of possession of the whole" but the statement of the law did not end there. Slade J also made it clear that "whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalize with any precision as to what acts will or will not suffice to evidence factual possession."

[34] In ***Perry v Baugh, Wilson et al*** [2018] JMCA Civ.12, Brooks JA affirmed the trial judge's findings that squatters in occupation of various different sections of a single parcel of land at the same time that the title owner was in possession of a different section, had acquired the right to possessory title in respect of the portion of land occupied by each of them, so that the paper title holder's claim for recovery of possession failed.

GEORGE NEWELL'S CASE AGAINST THE MULLINGS FAMILY - CLAIM NO. 2003 HCV 01838

The issues in this claim

[35] Can George Newell defeat the defendants' right to the lands registered at volume 1295 folio 949. In answering that question, the court will consider an aspect of the evidence and submissions on which much time and effort was expended. This area touches questions of whether the lands comprised in that certificate of title have been properly identified on ground and whether the lands purchased by Mr

Mullings is a part of the land claimed by George. Ultimately the answer to these two questions do not define the answer to the issue.

[36] Whether Linton Mullings committed fraud and whether any fraud was perpetuated by his successors in title, thereby rendering the registered title liable to be cancelled.

[37] Whether George Newell acquired the right to a possessory title in respect of the property registered to the Mullingses.

[38] I will also examine the assertion that Naomi did not have the capacity to sell the land as a fourth issue.

The orders and declarations sought

[39] George Newell in this claim seeks certain declarations. They are to the effect that he has obtained title to the land including that now registered to the Mullings family by adverse possession, that Lynton Mullings obtained the registered title to the property by fraud, that the registration of title in the name of Mr Mullings has not defeated his interest in the property and an order cancelling the certificate of title to the land on the basis that it was obtained by fraud. The declaration numbered 3, though it reads "a declaration that the said Lynton Mullings and by extension the 1st – 5th defendants are bona fide purchasers to the said land" must be understood in the circumstances to mean that they are not bona fide purchasers. George Newell also sought an order in the alternative, cancelling the certificate of title on the basis that it was irregular and procured by fraud.

Mr George Newell's evidence

[40] George gave evidence that in 1997, he went on the subject land and saw two loads of marl deposited there. Based on his investigation, he immediately contacted his Attorney at Law who wrote to Lynton Mullings on February 18, 1997. He stated further that Mr. Mullings responded through his Attorney at Law and denied his

George's ownership of the land, threatened to sue him, and asserted that he bought a portion of the subject land from George's aunt Naomi Newell. George claimed that he was surprised by this, as Naomi never owned or occupied the subject land, but that she lived in the family home, and was unmarried and childless. He further stated that he questioned anything Naomi did in her final years, as she suffered from senility before her death on March 29, 1997 and was under the care of Dr Dale Thames.

[41] It was also George's evidence that in 2002, Lynton Mullings filed a claim against him in the Resident Magistrates Court, claiming that he was trespassing on his land that he bought from Naomi. It was in response to this claim he said, that he filed the present claim against Mr. Mullings. He gave further evidence that Mr. Mullings organised a survey and he objected to the survey.

Mrs. Mullings' (first defendant) evidence

[42] Mrs Mullings gave evidence that she is familiar with the subject land from the time she lived in the area and she knew it to be vacant and under the control of Naomi Newell. She gave further evidence that Naomi was in possession of the land and it was Naomi's front yard. Further, that the driveway to the property started on the land now occupied by Bobett Neil and continued across an unregistered portion of land leading up to her front yard. She said that neither the subject land nor any part of Naomi Newell's home was fenced. The claimant was not in possession and there was no garage or any other business being operated on the subject land.

[43] In her evidence, Mrs. Mullings stated that Naomi Newell frequented a grocery shop operated by her husband Lynton Mullings in Junction square in St. Elizabeth and at that time Naomi was in possession and control of land at Airy Hill.

[44] She stated further that in 1996, Naomi Newell first leased, then subsequently sold the subject land to her husband Lynton Mullings. Further, that Naomi showed the subject land she was selling to Mr. Mullings and Mr. Mullings showed it to her.

[45] Mrs Mullings stated further that an indenture was prepared and throughout the process Naomi remained cognizant of what she was doing and always appeared to be of sound mind. Mrs Mulling's evidence in this regard was supported by the evidence of Donnette wellington, Naomi's caregiver. Mrs Mullings said that her husband applied for, and received a certificate of title registered at Volume 1295 Folio 949 of the Register Book of Titles in respect of the land.

[46] She gave evidence about taking photographs of the land at the start of the construction in 1996 and detailed the areas where she stood when these photographs were taken. She stated that she took photographs of the subject land as it stood in 1996 which shows that there was no structure whatsoever on the property at that time. These documents were admitted into evidence. Cross examination later revealed that there was no truth in her evidence about her taking the photographs. She admitted that the photographs were found among her husband's documents. She said further, that there is no structure on the subject land now.

[47] She also gave evidence that in 1999 George Newell caused a caveat to be lodged against the certificate of title to the land. However, after her husband's death in 2004, the caveat was warned by the Land Administration and Management Programme, George Newell failed to act within the stipulated time and she and her children became registered owners of the land.

[48] Mrs Mullings gave further evidence that George brought police officers on to the land and they were forced to abandon their construction. She stated further that she saw no activity on the subject property, there were no crops or any rearing of horses. She said that a Newell family member reared horses on a property beyond the burial ground, but this had nothing to do with the land. She claimed that the George occupies an area in the vicinity of the burial ground and there are some water tanks there.

[49] Mrs. Mullings continued that she paid taxes for the land since it was purchased but she has been kept from it by the actions of the claimant who has repeatedly chased persons off with the assistance of family members and police officers loyal to him. Further, that he refused to allow surveyors to survey the land.

[50] She gave further evidence that her husband, prior to his death became embroiled in litigation with the claimant regarding the subject land and was eventually prevented by an injunction from entering and/or building on the subject land pending a resolution of the matter by the court. The claimant allowed the subject land to be surveyed only after these proceedings commenced.

[51] In cross examination, Mrs. Mullings stated that she knew everything about her husband's business dealings concerning the lands at Airy Hill. She stated further that Naomi did not give her or her husband any paper to show ownership of the land.

[52] She said that the claimant has never done anything on her land. However, she later agreed that her husband wrote a letter to JPS because the claimant was building a shed behind their land and the pole was situated on their land. She stated further that the pole is there until now.

Can George Newell defeat the defendants' right to the lands registered at volume 1295 folio 949

The law

[53] A number of very relevant observations were made with regard to the provisions of the Registration of Titles Act and the effect of bringing land under its operation in paragraphs 19 and 20 of the judgment of the Judicial Committee of the Privy Council in the case of ***Pottinger v Raffone*** [2007] UKPC 22:

> *"[19] No certificate is to be impeached or defeasible by reason of, or on account of, any informality or irregularity in the application or in the proceedings leading up to registration (section 68). The certificate is evidence both of the particulars which it contains and of the entry*

in the Register Book and is - subject to the subsequent operation of any statute of limitations - conclusive evidence that the person named in the certificate is the proprietor (section 68). The Registrar has only very limited power under section 80 to amend the register in minor respects.

[20] the main aim of this system of registration of title is to ensure that, once a person is registered as proprietor of the land in question, his title is secure and indefeasible except in certain limited circumstances which are identified in the legislation. This is achieved by section 161 of the Registration Act which provides:

"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."

[54] Section 70 of the RTA is also reflective of the contents of section 161 in so far as it allows for an attack upon the registered title on grounds that it was obtained by fraud.

[55] Based on the foregoing, in order for Mr Newell to succeed in his claim against the Mullings, he must establish that he was deprived of the land through the fraud of Mr Mullings or the fraud of the present defendants in the claim. He may also succeed if he is able to establish that the statute of limitation has operated in his favour subsequent to the first registration of the land.

[56] The kind of misdescription referred to in section 161 of the act is not applicable in the circumstances of this case. George is not claiming that he was the occupier of registered land and that his registered land or a portion of it was incorporated into lands now registered to the Mullings by virtue of misdescription.

Discussion

[57] Mr George Newell's pleaded case is that the certificate of title was acquired in Mr Linton Mullings name on the 24th of February 1997 and that the land is registered at Volume 1295 Folio 949 of the Register Book of Titles. These assertions are supported by documentary evidence.

[58] On behalf of Mr George Newell, Ms Hamilton placed great focus on the assertion in the particulars of claim that the first to the fifth defendants have not been able to identify on ground the ¼ acre of land contained in the certificate of title registered to them. It was outlined in the particulars of claim that "in the putative title the land registered therein is described as butting northerly on land belonging to Naomi Newell; southerly on land belonging to Joan Reid, westerly on the main road from Southfield to Lititz, and easterly on land belonging to Naomi Newell whereas in the deed of conveyance the land conveyed therein is described as butting easterly by lands belonging to the estate; westerly by PWD road from Junction to Lititz Northerly by lands belonging to the estate and southerly by land belonging to Joan Reid."

[59] I have outlined this aspect of the claim from the pleadings because it is not set out anywhere in the witness statement or viva voce evidence in a concise manner. Those assertions however are supported by what appears in the relevant documents which were tendered into evidence.

[60] Ms Hamilton submitted that the Mullingses have not produced any evidence to show that land passed from either Adelaide Newell (as averred in the defence) or William Benjamin Newell (as averred in the further amended defence) to Naomi Newell. It is readily accepted that they have not done so. In the light of the evidence in its totality, nothing turns on the absence of evidence in that regard. The Mullings are now relying on their registered title and not on a root of title as set out in any conveyance or other document.

[61] In the absence of fraud and the other stated exceptions, based on the above provisions, a certificate of title issued is conclusive evidence of the particulars set out therein. What George Newell complains of in part is a question of incorrect description of the boundaries. This is so in the light of complaint of irregularities. As indicated earlier, that is not the nature of the misdescription that is required to impugn a registered title.

[62] Ms Mullings submitted that there is provision within the Registration of Titles Act (ROTA) which stipulate a procedure and forum to address issues of misdescription in certificates of title. She directed the court's attention to sections 15 and 153 of the act.

[63] By virtue of section 153, where it is determined that there is a misdescription of the land or boundaries in a certificate of title, the Registrar of Titles may require the proprietor to deliver up the certificate so that the error may be corrected. George Newell would hardly have an interest in having corrections made in the circumstances. The point is that even if it were to be established that there exist errors in description of the property, that is not in and of itself a basis on which a certificate of title will be cancelled. Thus notwithstanding the fact that certain

matters regarding the description of the boundaries of the lands purchased by the Mullings remain unresolved, the Mullingses hold indefeasible title to the lands described in the certificate of title.

[64] If for example, the land sold by Naomi to Mr Mullings was land that remained part of the estate of William Benjamin Newell or Adelaide Newell and assuming that George had even acquired an interest by virtue of being in open exclusive continuous and undisturbed occupation, that interest would have been overtaken by the subsequent registration and his remedy could not lie in an order for cancellation of the title in the absence of fraud.

[65] I will spend some time looking at the evidence regarding the question of whether the lands comprised in the certificate of title have been properly identified on ground and whether the lands bought by the Mullingses is part of the same land claimed by George, since Ms Hamilton expended much energy and focus in that area, but ultimately even if the location of the property purchased by Mr Mullings was not properly identified, that is not a basis on which this court could direct that the certificate of title be cancelled. I reiterate the position that the Mullings certificate of title registered at volume **1295 folio 949** of the Register book of Titles is conclusive evidence that they hold the interest in the land.

Was the land sold by Naomi which is now comprised in the certificate of title properly identified on ground/ whether the lands purchased by Mr Mullings is a part of the land claimed by George.

[66] George contends that Naomi sold land that did not belong to her. George himself does not contest that Naomi owned land in the vicinity, he is saying that she sold land which remained a part of the estate. The evidence discloses that the land purchased by Mr Mullings was in close proximity to the house Naomi occupied. Further and more significantly, in the survey diagram bearing Survey Department Examination number 263587, the product of a survey which George said was done

on his behalf at the instance of his father Noel in September of 1997, there is reference to a boundary with Naomi Newell.

[67] This survey it is to be noted, was done after George became aware of Mr Mullings' interest in the land. This diagram reflected Naomi as owning lands to the north of that claimed by George/ the Mullings. This is suggestive of a recognition that Naomi owned land that bordered that now being claimed by George. I make these observations to say that there was no question that Naomi owned or was believed to own land in that vicinity even subsequent to the sale of the land to Mr. Mullings.

[68] The contention about which main road the Mullings' land borders to the west may easily be put to rest as the main road from Southfield to Lititz and the PWD road from Junction to Lititz is one and the same road. That fact was confirmed by a response to a question by the court.

[69] One area of discrepancy which found no resolution in the evidence of the various witnesses is the matter of the land having a border with land owned by one Joan Reid. Mrs Mullings in her evidence claimed she knew Joan Reid. In the report of Mr Kindness, the southern boundary to the Mullings land is shown as being the land now claimed by Bobett Neil. Ms Neil when cross examined, stated that she is not aware of Joan Reid. It is evident that she does not claim to hold title through this Joan Reid and there is no reference to Joan Reid in any document produced by Ms Neil.

[70] It was the contention of George Newell in cross examination that Naomi Newell's land that she sold to Mr Mullings was located in Airy Hill and that Naomi Newell lived in Airy Hill all her life and that it was the Airy Hill land that Naomi had received as her own. He further insisted that her portion of the land is now occupied by Pines Plaza which is now owned by one Miguel Smith. Donette Wellington who gave evidence on behalf of the Mullings said that she is familiar with the land purchased by Lynton Mullings as the land was directly in front of the house she

lived in with Naomi. There is no question that she would have been able to tell the location of the house as it is not in dispute that she lived there for some time.

[71] The main contention it would appear, is did Naomi sell her land earlier, and then proceeded to sell what did not belong to her. George Newell stated that he knew that in 1997 the Mullings were claiming a portion of land at Airy Hill and that they turned up with title to land bought from Naomi Newell at Airy Hill. He is therefore by that assertion contending that the parcel of land claimed by the Mullings is not that which Mr Mullings actually purchased. Ms Hamilton observed that the lands claimed by George is nowhere described as lands at Airy Hill but is described as lands at Lynch and Ballards Patent/Junction.

[72] Mr Williams sought to ascertain from Ms Neil what lands are referred to as Airy Hill. With reference to the surveyor's diagram, Ms Neil pointed out the entire area in dispute and added that where her property is located where she presently carries on business, is also Airy Hill. Ms Hamilton sought to confirm from her that the spelling on her registered title was Ayre Hill and Ms Neil indicated that that could be correct. Ms Neil also agreed that her land is not referred to as Ballards patent, (presumably in her registered title).

[73] Ms Hamilton says that the above information, combined with the findings of the surveyor, casts doubt on the identification of the land purchased by Mr Mullings. She further surmised that there is the distinct possibility that Naomi Newell could have twice sold the same plot of land, firstly to Miguel Smith, then to Mr. Mullings. In fact, George's evidence was that Naomi had given land to one Lloyd Newell, which land Lloyd sold to Miguel Smith.

[74] I will say at this point that this court will not have regard to such conjecture about the same land being sold twice, as that was a matter for counsel to address from

very early in the proceedings, which she had the opportunity to do over a matter of many years before the claim proceeded to trial.

[75] As Ms Mullings pointed out in her submissions, Mr George Newell is asking this court to accept that only the lot of land which now houses Pines Plaza, which is the lot said to have been sold to Miguel Smith which is referred to as Airy Hill. That notion was dispelled. The different spelling as Ayre Hill on Ms Neil's registered title to land not in dispute does not to my mind in any way suggest that that is a reference to a different place. Ms Neil's evidence that her property is in the same general location has not been seriously disputed. There was some question as to where precisely her premises faced but no real dispute as to the general location.

[76] In relation to the claim involving the Mullings, Mr Kindness the Commissioned Land Surveyor who was appointed as an expert by virtue of an order of the court, was required to produce a report for the court and was specifically asked to look at the following:

> *(g)* The location on ground indicated by the said certificate of title.
> *(h)* The area of land claimed by Mr. George Newell, Miss Bobette Neil and the estate of Adelaide and Neville Newell.
> *(i)* Existing structures on the property.
> *(j)* Survey Diagrams showing all of the above.

[77] Mr. Kindness' said that his finding was guided by the description in the title presented to him which is registered at volume 1295 folio 949 of the Register Book of titles, as well as additional description derived by interviews conducted on site, and he believed with a fair degree of certainty that he was able to identify the location of the property. In relation to the survey diagram given to him by Mr. Newell's Attorney, (diagram bearing Survey Department Examination Number 268587) he said that he was unable to find any physical marks on the ground that were directly related to that diagram but that he believed, based on alignment with other plans, that he had correctly identified the location of the property claimed by Mr. Newell.

[78] He accepted that a title registered by plan can help to confirm the location of the neighbour's land. It was also Mr Kindness' evidence in answer to questions put by Ms Mullings that having identified the land being claimed by George Newell in the diagram bearing number 263587, he checked the points in that diagram against the ground. He concluded that the land represented in Mr Newell's survey diagram is not indicative of what is truly on the ground. He explained that based on Mr Newell's survey diagram, when represented on ground, part of the land he is claiming is a reserve road. It was also evident from the diagram that the land claimed by George Newell infringed on lands to the south which from all indications, is the land which has been referred to as the development. He further observed that Mr Newell's diagram could not be used for registration of a title. The general tenure of his evidence was that the survey diagram produced by Mr Newell was not accurate.

[79] Ultimately, what Mr Kindness did as far as the Mullingses' claim to the land is concerned, was to identify on ground, the lands in the registered title. The question as to whether any part of the estate of William Benjamin Newell/Adelaide Newell is included in that title has not really been determined but there is still no proper basis on which Mr George Newell can maintain that the property purchased by Mr Mullings is located elsewhere as he did not establish that. Contrary to Ms Hamilton's assertion, the onus was on him to prove his claim. It was not on the defendants to prove that the land purchased by their predecessor in title is not located at some other place, or that its correct location is where they have identified it to be, or that the land is not part of the land claimed by George Newell.

[80] It should be noted however, that this claim is not primarily concerned with the correctness of the boundaries to the land or any misdescription of the land in the registered title, but with whether George is entitled to the orders sought, or to any of them. In any event, as Ms Mullings observed, this court could not properly make an award to George Newell on the basis of the description and identification of the lands as set out in exhibit 29 which is the survey diagram delineating the lands

claimed by him. This is so for reason observed above, that is, that what he claims clearly infringes on the land referred to as the development as well as a reserved road. The persons interested in those properties are not before the court. Mr Kindness was quite clear that that survey diagram is unreliable.

Whether Linton Mullings committed fraud and whether this fraud was perpetuated by his successors in title thereby rendering the registered title liable to be cancelled.

The Law

[81] The provisions of sections 70 and 71 of the Registration of Titles Act combined with the meaning of fraud in this context, and the nature of the fraud required, clearly dictates that there is no evidence to support a claim of fraud. Section 71 provides as follows:

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

[82] As to the nature of the fraud required, it was made clear in the case of ***Assets Company v Mere Roihi and Others*** 1905 UK PC 11, that fraud:

> *"meant actual fraud i.e., dishonesty of some sort; not what is called constructive or equitable fraud…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 a fear of learning the truth, the case is very different and fraud may properly be ascribed to him…."*

[83] Sykes J as he then was, in the case of ***Wollaston Wollaston v Brown et al*** [2003] HCV 01302 has identified certain considerations which are evident from section 71 which must be borne in mind when considering whether particular conduct may properly be said to be fraudulent in a context such as the present. He observed that actual knowledge of a prior interest without more does not amount to the type of dishonesty required.

Discussion

[84] By the end of the trial, Mr. George Newell seemed to have abandoned the allegations of fraud against the defendants in claim 2003 and his claim for a cancellation of the title on the basis that he has acquired the right to a possessory title to the portion of the property now registered to the Mullingses.

[85] In final submissions Ms Hamilton focused on his claim in the alternative that the land allegedly bought by Lynton Mullings from Naomi Newell does not form part of the land he is claiming. However, since George Newell's pleaded case remains that there was fraud, the issue must be discussed.

[86] The particulars of fraud were set out in details in the pleadings. George Newell alleges that there was long standing dispute between himself and Lynton Mullings which resulted in a court case in the Parish Court in 2002. He averred that Mr Mullings failed to disclose that he George had been in open, continuous, undisturbed and exclusive occupation of the property for over 20 years when he sought to bring the land under the registration of Titles Act and that he failed to cause him to be given notice of the application for title. He also relied on Naomi's alleged incapacity and said that Mr Mullings was aware of her incapacity and / or

that Mr Mullings knew that Naomi was not entitled to sell the land. George Newell relied further on the matters asserted in relation to the alleged disparate description of the land, Mr Mulling's alleged inability to locate the land when he went with a surveyor to have the land surveyed and Mr Mullings' alleged 5 years' lease, said to have been obtained from Naomi. George further averred that the Muullingses, in causing the land to be transferred to themselves, acted with actual knowledge of the court proceedings. It was also averred that the Mullingses' failure to take steps so that they could be substituted as the defendants in place of Mr Mullings in the court proceedings after his death was a part of the fraud. It is said that they have wilfully participated in the continuous fraud.

[87] An examination of the matters relied on as constituting fraud makes it clear that the threshold has not been met. By the time of the court matters, the property had long been brought under the registration of titles Act. A perusal of the certificate of title discloses that the land was registered as far back as the 24th of February 1997. It was George's evidence that in early 1997, he saw marl deposited on the property. From all indications, that was when he became aware of Mr Mullings' involvement with the land. By then if the land had not already been registered, the process was certainly close to completion.

[88] Mr George Newell has not said how he knows that Mr Mullings was aware of his interest. Even if George did in fact have an interest in the land and even if Mr Mullings had been aware of that interest, in the absence of evidence that he actively concealed that information and made false declarations to the Registrar, then there was no fraudulent conduct. George has also not proven any fraud on the part of Naomi Newell and a fortiori, that Mr Mullings was privy to any fraud on Noami's part. I have already addressed the question of the discrepancy in the description of the land.

[89] In the final analysis, there is no evidence of any fraud on the part of Mr Mullings, much less, the type of fraud required. It would be absurd to say that because the wife and children of the deceased Mr Mullings caused registered property to be

transferred to them by virtue of the provisions of the Intestate Estate and Property Charges Act upon Mr Mullings dying intestate, that their conduct in doing so was a perpetuation of fraud. There was no fraud such that it could be said that fraud was capable of being perpetuated.

[90] Finally, and most importantly, as observed by Ms Mullings, even if the document underlying the Mullingses predecessor's title was void, he had notwithstanding obtained an indefeasible title (of course subject to the stipulated exceptions none of which George has established can assist him. See **McLeggan v Scarlett and the Registrar of Titles** [2017] JMSC Civ 115 referencing a decision of the Judicial Committee of the Privy Council, **Frazer v Walker** [1967] 1 AC 569.. The fact that the land has now been brought under the registration of title's act means that the Mullings are no longer relying on their common law title to the land.

Whether George Newell acquired the right to a possessory title in respect of the property registered to the Mullings

[91] Ms Hamilton and Mullings in their submissions discussed at length the law on the necessary elements to be satisfied where a claimant relies on the provisions of sections 3 and 30 of the Limitation of Actions Act to ground a claim to a possessory title to land. I have already set out the relevant law.

Discussion

[92] Regarding this particular section of the land, the evidence discloses that George Newell cannot satisfy the requirements of the law based on his evidence surrounding the nature of the factual possession and the necessary intention that must accompany that factual possession. Neither can he satisfy the necessary element of having remained on the land for the required period of 12 years or more undisturbed. I will deal with the latter first. He cannot for the simple reason that one must have regard to the effect of Mr Mullings bringing the land under the Registration of Titles Act, and consequently when time could have in the circumstances begun to run in George Newell's favour.

[93] The effect of the provisions of section 161 of the act which was previously set out, is that subject to the factors mentioned in that section, any right or title existing prior to the first registration of the property is extinguished with the registration of the property. As earlier observed, it therefore means that any cause of action in relation to recovery of possession of such property would have to accrue subsequent to the date of first registration. See **Chisholm v Hall** (1959) 1 WIR 413. Further the question of what conduct prevents time from running after a cause of action has accrued must be looked at.

[94] In this particular case, the evidence discloses that Mr Mullings purchased the property under a conveyance. It was therefore unregistered land that he purchased. By George Newell's own evidence, the property was brought under the registration of titles act in February of 1997.

[95] George Newell's evidence is that Mr Mullings brought a claim against him in the parish court and he in turn brought his claim in the Supreme Court against Mr Mullings in 2003. Such conduct unequivocally meant that time could not have run even if George Newell had been in occupation of the property during the currency of this case. (See paragraphs 15 and 16 of **Markfield Investments Ltd v Evans** [2001] 2 All ER 238).

[96] Although not strictly necessary to a disposition of this aspect of the case I shall examine George Newell's claim that he has been in open, exclusive, continuous and undisturbed occupation of the land. His evidence was that he had a number of different structures as well as items on the property. His evidence does not clearly disclose that any of those items or structures (except for a shed) is located on the land claimed by the Mullings. It is doubtful that the assertion that a shed was on that section of the land is supported by the evidence of Ms Wellington. Ms Wellington said that the land was empty when she first moved there and that in the vicinity of the land Mr. Mullings purchased was a property which had a small shed on it but she did not see any business being operated in the shed. She further stated that unknown persons would come to the shed from time to time to

scavenge old car parts which had been abandoned in the area around the shed. Further, she said at no time did she see the claimant around the shed. Finally, she said that the shed was no longer there. Of course George maintains that the "shed is there until to today".

[97] George spoke of tanks related to his water trucking business (see paragraph 18 of witness statement), also a horse stable (see paragraph 21 of his witness statement). He gave evidence of Mr Mullings going onto the land in 2004 and levelling marl that he had deposited and in the process, burying steel he had also deposited there. He made no mention of any building being destroyed or any item or fixture removed. He explained that Mr Mullings levelled the land. It may be inferred that none of the structures or items that he claims was on the land up to the time of giving his witness and up to the time of giving evidence was on that portion of the land. It is now clear that the land must be treated as three distinct parcels. I mention all of this to say that even if that evidence could have been helpful in establishing a right to a possessory title, he might have had a difficult time convincing this court that he was utilizing that section of the land as he claims.

Naomi's alleged incapacity to sell the land

[98] George also raised the question of Naomi's capacity to have entered into the agreement for sale of the portion of land now registered to the Mullings. Again I do not find it strictly necessary to resolve that issue but will nevertheless briefly address the matter since it was raised. The first point to note is that the nature of the proof provided to show that Naomi did not have the requisite capacity to contract would not have been sufficient in all the circumstances.

[99] The medical report suggests that the assessment may have been made from a single visit. This court does not know the basis on which the doctor came to such conclusion that she was senile. This court does not know that even if she was at some point senile, she entered into the transaction in a lucid moment. The evidence of her caregiver Donnette Wellington has to be considered. She said that

Naomi was able to bathe and dress herself appropriately and that she spoke articulately and appeared to understand what people said to her. She also spoke of Naomi having a good memory and a solid recollection of details. George said that his father gave Donette and her brother permission to stay at the house in Airy Hill to look after Naomi because she was senile but when it was suggested to him that he cannot really speak to Naomi's mental condition at the time she signed the indenture, he said in essence that he knew she was ill but to what degree, he could not say.

[100] Secondly, even if I accepted that she did not have the capacity to contract, as Ms Mullings has pointed out in her submissions, a contract entered into for consideration by a person without the mental capacity to understand the transaction is not void. It is valid and binding unless the other party was aware of the incapacity and in that instance, the contract would be voidable. Further, it would take action by or on behalf of the person deemed to lack capacity to have the contract rescinded.

[101] The upshot of my findings regarding Mr George Newell's claim against the Mullingses in this claim is that he cannot be granted any of the declarations sought.

THE MULLINGS' COUNTERCLAIM

The orders sought

[102] The Mullings family in their counterclaim, seek an order for damages for trespass against George Newell. They also seek mesne profits for being prevented from occupying and/or developing the property because of the actions of George. They also seek an order for an injunction to prevent him from entering their portion of the land.

Law and Discussion

[103] Where mesne profit is claimed, a person entitled to possession of land may recover damages which he has suffered as a consequence of being out of possession of

the land or, the amount of money that he could have reasonably received for the use of the land. Mesne profits may be awarded on a compensatory or on a restitutionary basis, depending on what the claimant seeks to prove. Where the property has been damaged, the claimant is usually awarded damages, that is a sum representing the diminution in value and the sum required to correct the damage. However, even where there is no damage to the property, if the claimant can prove loss of income as a result of being deprived of possession of his land, compensatory damages can be awarded in the form of mesne profits.

[104] Mesne profits can be regarded as restitution where the claimant is seeking to recover a sum which is based on the extent to which the person wrongfully in occupation has benefitted from the use of the property. No evidence has been provided to show that George has had the use and benefit of the property although his actions excluded the defendants from the property.

[105] Mrs Mullings' evidence is that they entered on the land in 1996 and began clearing it and placed two loads of marl on the surface of the soil to start construction. They bushed the land and cleared trees on it. Her evidence that George brought police officers on to the land and that they were forced to abandon their construction clearly showed interference with their occupation and possession meriting an award of mesne profit or for damages for trespass. The defendants have not however sought to put sufficient material regarding quantum before the court. They have given no evidence that would assist this court in quantifying the damages to which they are entitled. This court is mindful that a trespass is actionable per se and that there is an entitlement to damages once there is a trespass notwithstanding how innocuous that incursion might be. In the circumstances, the defendant's right would be one of damages for trespass (although the period which was covered by the injunction could not be factored in as increasing the amount of damages to which they would be entitled). There is no question that more than nominal damages could have been awarded in this case but in the absence of

evidence to quantify the loss, their only entitlement in the circumstances is nominal damages.

[106] Section48(a)-(g) of the Judicature Supreme Court Act provides in essence that a claimant who seeks equitable relief and who has demonstrated an entitlement to such relief should be granted relief and that a defendant is entitled to rely on any defence which would defeat a claim in equity. Where the court determines that an equitable defence has merit, the court may grant any relief to a defendant against a claimant relating to, or connected with the subject matter of the claim. Mr Newell has not proven that he is entitled to be on the land. To the contrary, the defendants have demonstrated that they are entitled to the injunction sought.

CLAIM NUMBER 2013 HCV 00319

[107] The issues arising in this claim surround are:

(1) Identification of land purchased by Bobbet Neil

(2) Did George Newell acquire the right to a possessory title over the portion of land claimed by Bobett Neil

(3) Does George have a better right to possession of the land than Bobbet Neil

(4) The question of whether George Newell enter the land with the consent of the paper owner will also be discussed at this juncture.

The orders and declaration sought

[108] George Newell seeks a declaration that he is the owner of the entire parcel of land. He also seeks an order for possession and damages for trespass and in the alternative, mesne profits as well as his costs.

George Newell's Evidence

[109] George asserted that in late 2003/early 2004, Bobbett Neil who operates a business across from the subject land approached him, and they entered into a licence agreement for six (6) months at $30,000 monthly for use of the subject land as an area for customer parking. He said that Ms Neil did so as she was expanding her business. George said that as a result of this agreement, he removed some of the metal posts previously installed to keep out trespassers, but the other fencing towards the front of the subject land remained in place. He stated further that prior to, and at the time of the licence agreement, a large area to the front of the subject land was covered in grit to make it easier to drive his truck and Herman's bus on the subject land. He asserted that there was no overgrowth for Ms Neil to clear.

[110] He continued that on the expiration of the licence, Ms Neil continued to park on the subject land. He contacted his Attorney at Law who wrote to Ms Neil and demanded that she vacate the land by September 30, 2006 and pay a licence fee for the time she overstayed. However, Ms Neil remained on the subject land. He stated further that she extended her occupation of the land beyond the two square chains licensed to her, to one (1) acre. He stated further that Ms Neil is saying that she bought the land by description from his sister Joy Newell (now deceased) who proved to her that she is the owner. However, the diagram annexed to paragraph 5 of Ms Neil's Defence is that of the Development. He stated that it was in or about 2005, he learnt that Joy was making a claim to the subject land under his uncle Clanson's will. He said Clanson died on February 1, 2002 and was never owner of that portion of land. George said further that he is well acquainted with the subject land as well as the Development, having been raised on the lands and they are two separate parcels.

[111] During cross examination by Mr. Williams, George Newell denied meeting Ms Neil any at all at her business place before coming to court. He said that in 2004 he put piping to the entrance of the land to prevent vehicles entering onto it. He revealed that he knew that Joy Newell had a will from his uncle Clanson for the development

portion of land and that she was entitled to everything that Clanson left. George agreed that at the time when he entered into the agreement with Ms Neil, she was the one who put the grit on the subject land quite contrary to his evidence in chief.

Bobett Neil's Evidence

[112] Bobett Neil gave evidence that Neil's enterprise, the business she operates, has always been situated directly across the road from the subject land which the claimant claims he acquired through adverse possession and is separated by the Junction main road. Further, that she has spent all her life in Junction, St. Elizabeth and she has personal knowledge of the history of the subject land, the title to which she can trace to Joy Newell from whom she purchased the land in May 2004. She stated in her evidence that Joy Newell was the executrix of the estate of Clanson Newell and she passed away in February 2019.

[113] Ms Neil stated further that she purchased the subject land from Joy to use for parking. She knew it belonged to her cousins, the Newells. She made enquiries of Lloyd Newell as to who owned the subject land and was informed that Joy Newell owned it and she made contact with Joy overseas. Ms Neil also gave evidence that at all times the property was overgrown with bushes and trees and was completely empty; there were no amenities, no fencing or barriers; one could simply walk off the street into the lot. She said no one was on the property either.

[114] Ms Neil stated that she made arrangements with Joy for the use of the subject land for parking for 3-4 months as Joy was expected to return to Jamaica within that time. She then cleared the subject land of some of the bushes and made it even to accommodate parking. She stated further that it was at this time that the claimant started to object, asserting that he is the owner of the land. He then placed rocks at the entrance of the land to prevent her from accessing it.

[115] According to Ms Neil, the next day, George visited her office to discuss ownership of the land. He also proposed to grant her a licence to use the subject land which

she said she agreed to, for six (6) months so that she could iron out the issue of ownership of the land in exchange for the immediate removal of the boulders. She signed a licence agreement and paid $5000 for six (6) months.

[116] She gave further evidence that when Joy arrived, George and Lloyd met her at her office and Joy produced documents which showed that she was the executrix of the estate of Clanson. She also stated that at this point, George was adamant that he was still the owner, refused to look at the documents and left the meeting. Ms Neil stated that she made no further payments under the licence agreement. She then entered into a sale agreement with Joy.

[117] In her evidence to the court, Ms Neil stated that the property which she purchased was unregistered property described as all that parcel of land part of Junction in the parish of Saint Elizabeth containing by estimation one acre and butting an bounding on the North East by the main road leading from Junction to Mandeville and facing Neil's Enterprise on the South and West by the remainder of the said property in possession of the vendor and being a portion of the land comprised in Conveyance dated 28 January 1983. She states that she has been in possession of the subject land from around 2003 up to present.

[118] Ms Neil continued her evidence by saying that in or around 2012, George claimed he was cultivating cash crops on the subject land and claimed that she damaged his crops on it and that she denied his claim. He then erected a fence around the subject land, and she filed suit and was granted damages for trespass and an injunction. The matter was transferred to the Supreme Court for the question of ownership in respect of the property to be determined.

[119] She further stated that she has been at Neil's enterprise from 1982 and she has never seen George at the subject land. The subject land was always a vacant lot. She continued by saying a small shed is at the back of the subject land which is not visible from the road and which is not a part of the land she purchased. She stated further that when she entered into possession of the subject land there were

very large trees which did not allow for any kind of farming. She stated that she had to get a bulldozer to fall the trees and electric saw to cut them up for transport off the property.

[120] She also stated that from she has been down the road from the property she has never witnessed any auto mechanic business being operated from the property and there was no mechanic shop on the property. She asserted further, that George is not a mechanic but a businessman and the operator of a water truck.

Ms Neil also stated that she has never seen any evidence of crops on the property.

[121] In cross examination, Ms Neil stated that the lands she bought is below the subdivision. When asked by counsel for the claimant if she is now changing what she said in her Defence that the land forms part of the subdivision she was unresponsive.

[122] In response to a question put to Ms Neil by the court, she said that the house in which Naomi Newell lived was located behind Pines Plaza and it was far in relation to the land that she purchased. She also informed the court that the cemetery was close to Naomi's home to the back.

Discussion - whether George Newell acquired the right to a possessory title of the portion of land claimed by Ms Neil

[123] In this claim against Ms Neil, I find it necessary to explore in some detail, George's assertion that he has been in open, undisturbed continuous and exclusive occupation of the land and in particular, of the portion occupied by Ms Neil.

[124] George's evidence is that he has been in occupation of the entirety of what is undeniably now three separate parcels of land. His evidence is such as to suggest that he had treated the land as one indivisible parcel initially, but as the circumstances have evolved, the lands claimed by him have to be considered as three separate parcels.

[125] George's case against Ms Neil in large measure turns on the facts that I accept. I accept Ms Neils' evidence over and above that of Mr Newell as it relates to the state of the portion of the land that she said that she purchased. Generally, I accept Ms Neil as a witness of truth. Apart from obvious internal conflicts in George's evidence, I formed the distinct impression that he was not a truthful individual. I could not help but form the view that he on occasions pretended to be quite feeble and to have some difficulty grasping what was being asked of him when he was reluctant to answer certain questions.

[126] This court recognizes that he is a senior citizen of advanced years but my observation was also that he was surprisingly energetic and robust both physically and in his responses when he wished to be. On the other hand, I firmly believe that Ms Neil made effort to give honest and truthful responses to questions under cross examination by Ms Hamilton, notwithstanding that there were a few instances when she was lacking in promptitude when responding. She in fact on some of those occasions said that she was trying to remember. There was one occasion on which she was non responsive. The court observed that initially she appeared to be absorbed in reading the document that had been placed in her hand then and that afterwards she just stared and did not respond after being prodded. Her response to a question by the court at the end of re-examination as to why she failed to respond to Ms Hamilton's question regarding her statement of defence that the land she had purchased was a part of the subdivision was satisfactory. She explained that she was reading the document and became "a little blurry" as she described it. I understood that statement to mean that she lost concentration. I accept that explanation.

[127] My acceptance of Ms Neil's evidence over that of George necessarily means that George Newell could not be said to have been in open, exclusive, continuous and undisturbed possession of the land as he claims. Let me now take a closer look at George's evidence, some of which was previously adverted to in dealing with the claim against the Mullings.

[128] George asserted that when he first went on the land, he cleared the overgrowth and erected wooden posts and barbed wire fence along the boundaries, except at the frontage running along Junction Main Road. During cross examination when asked about the time period that the fence was erected around the property, he stated that it was in the early 1970s. It is not in dispute that the frontage to the land that Ms Neil said she purchased from Joy Newell is along the junction Main road. So from his own evidence, George had not initially fenced the frontage to the land Ms Neil claims.

[129] It was George's evidence in cross examination that he placed metal spikes and chain to the frontage of the land in the 2000s and that the metal spikes still remain. When it was suggested to him by Ms Mullings that there were no metal spikes along the entire frontage of the property, he responded by saying that it would not be the entire frontage; it runs part, and that the metal spike is still where the side of the supermarket is. It is to be noted that this evidence is in conflict with his witness statement where he had said that it was in the 1980s when he noticed motorists parking along a section of the land along the junction main road that he hired workmen to plant metal spikes connected by a metal chain along the entire frontage of the land running along the junction main road. (see paragraph 24 of his witness statement filed in the claim against Bobett Neil). Based on the usage to which the land was put, i.e parking, it is safe to say that the metal spikes were not placed in the area let to Ms Neil. It is undeniable that such conduct is of the nature as to show that one is exercising dominion over land but the placement of metal spikes at any time after the year 2000 would not assist George in his assertion that he had exercised dominion over the land. This court rejects his assertion that he had done so in the 1980s.

[130] He asserted further that he built a storeroom on the land which he has been using since 1976 (in cross examination he said 1977 or 78) to store all sorts of equipment and tools as well as personal belongings such as motor vehicle parts which remain there and is in use until today.

[131] He said that at some point, he started repairing cars on the subject land. He stated that he did so initially under a mango tree and thereafter, he built a work area from lumber with zinc roof. He then hired staff and even allowed students to do their work experience at the garage. He gave further evidence that the work area was pulled down in 1988 due to the threat of Hurricane Gilbert and it was never rebuilt.

[132] It would be evident from all that Mr Newell said about the use he made of the land and buildings that he said remain there to date that those activities (with the exception of farming activities and his brother parking his van there, which I will address in short order) was not being carried out on the section of the land that he was letting to Ms Neil. It was his evidence that he had let it to her for the purpose of being used as a parking lot. In fact, he insisted that the shed he constructed on the land was located on the portion claimed by the Mullings. From his evidence, it would appear that much of his activities on the land was concentrated around the area where the buildings he mentioned are located. There is no indication from George's own evidence that any of the structures were, or up to the time of giving evidence still located on that portion of the land. It was George's Evidence that he still operates the water trucking business on the land. It is fair to say from the totality of the evidence that that business was not and is not now being carried out on this portion of the land.

[133] There is evidence to suggest that the building referred to as a stable was located towards the back of the land and on the section where the burying ground is located. In his witness statement in the present claim (against Bobett Neil), George said that the horse rearing and breeding operation was on a section of the land farthest away from the junction main road. It would be reasonable to say based on exhibit 21, that it was located on the section where the burying ground is located.

[134] It was suggested to George by Ms Mullings that there was no stable on the land round about the time the survey was done by Mr Dick because Mr Dick made no reference to the existence of a stable or any other building. It cannot be inferred that there was none because the surveyor made no reference to any. In some

instances, what is noted may be a function of what the surveyor was requested to do. In answer to Mr Williams George agreed that neither the storeroom, the stable nor the graves were located on the section of the land that Ms Neil was claiming she purchased. Ultimately I am presented with no difficulty or obstacle in accepting Ms Neil's evidence that the land was overgrown when she first decided to enter into an agreement in relation to it.

[135] Regarding his claim about farming activities on the land, George did not say specifically that he had engaged in farming on the section of the land Ms Neil is claiming. It may be inferred however that in 2011, he was engaging in farming activities on the section of the land that she was claiming. I say so because he spoke of bringing a claim against her in the parish court over allegations of trespass when he discovered his path of pumpkin damaged. In any event he said that his farming activities were carried out for about a year. Even accepting that he engaged in farming activities on the section claimed by Ms Neil, those activities based on the time frame could not possibly assist his claim.

[136] I accept Ms Neil's evidence that she first entered into an arrangement with Joy regarding the land and that she was the one who had arranged for NCB customers to be parking on the land. George's evidence was that he had observed persons parking there and so he blocked the area. He in essence said that he didn't know how persons came to be parking there. In any event as indicated before, I accept Ms Neil's evidence about the land as explained in paragraphs 6, 20 and 21 of her witness statement.

[137] Mr George Newell said that apart from fencing the subject land, building on it, and operating a garage there, he also continued to de-bush it. To support this bit of evidence, he recounted being served with a summons from the Malvern Resident Magistrate's Court (now Parish Court) to have overgrowth on a part of the subject land cleared, which he stated he complied with. The claimant asserted further that he gave his younger brother Herman Newell who operated a transportation service, permission to park buses on the subject land until 2008 when his brother

ceased conducting that business. There is no evidence to suggest that the parking activities took place on that section of the land, if such activities did in fact occur.

[138] George did in fact carry out activities on the land claimed by Ms Neil, but those activities were done after the dispute developed between himself and Ms Neil. By the time he wired the front of the property in 2012, there had already been at least two claims between them in the Parish Court and the present claim was filed in 2013.

[139] One of the bases on which George says that he has acquired a possessory title to the land (the entire parcel), is that he has been paying taxes for the land for many years. He tendered into evidence a certificate of payment of taxes dated May 3, 2012. This document does not provide this court with information as to the period over which he paid taxes. The document shows George Newell as the person who paid taxes. It also indicates that taxes were paid up to the date of the issue of the certificate. That information cannot be taken to mean that George is the person who has always paid the taxes. It is not stated over what period of time he was responsible for making payments. It was George's evidence that he had his name put on the tax roll round about the time he gave Ms Neil the licence. This by his evidence, was sometime in 2003/2004. The payment of taxes is certainly a factor to be taken into account when seeking to determine whether someone has been exercising control over property and treating it as his own. However, in this case, the assertion of paying taxes over many years remains as such. It was open to him for example, to produce receipts evidencing payment over time. He has not done so. I reject any assertion or any inference that he had been paying taxes for many years prior to the bringing of the claim against Ms Neil.

[140] George Newell has not demonstrated by his evidence that he was in sole, open exclusive and undisturbed occupation and possession of the portion of the land claim by Bobbet Neil for the required period of 12 years so that the title of the owner was extinguished. What has been established is that he took steps to assert dominion over the land when he observed activities on the land and he intensified

his efforts after dispute involving the land had developed. It could not be said by then that he was in exclusive possession.

Identification of land purchased by Bobbet Neil

[141] Ms Hamilton has identified as critical to the outcome of this case, the question of whether the land Ms Neil purportedly purchased from Joy Newell is a part of the land George claims. Ms Hamilton contends that Ms Neil's defence has always been that the lands she bought are partly comprised in the Deposited Plan dated the 28th of June 1989 annexed to her defence.

[142] Mr Kindness stated that he was presented with two plans by Ms. Bobett Neil. These were;

> *(b)* a diagram bearing Survey Department PE Number 272788 representing 3764.15 metres squared (demarcated on the plan in red.)
>
> *(c)* A subdivision of adjoining lands bearing Survey Department Examination Number 204036 (shown in green on the sketch plan.)

[143] He also concluded that he was able to find a number of old iron pegs in support of those two documents and he was therefore able to identify with a high degree of certainty the location of those properties. He concluded that the lands claimed by Mrs. Mullings and the lands claimed by Bobett Neil forms part of the land being claimed by Mr. George Newell.

[144] He said that he was provided with plan bearing survey Department Examination Number 263587 which was prepared by Commissioned Land Surveyor, Ainsworth Dick, a survey which George Newell said was one at the instance of his father Noel at his request.

[145] Miss Hamilton sought to place great emphasis on the fact that the court appointed surveyor Mr Kindness utilized the survey diagram provided to him by Ms Neil in circumstances where Ms Neil had accepted that George was not given notice of

the survey consequent on which the survey diagram was produced and where the surveyor had said that there are circumstances where if a party claiming an interest in land was not advised of the survey, then he would seek to withdraw the diagram.

[146] Each party was required to present to the surveyor copies of all documents, if any evidencing his/her interest in the respective portion of land in which he/she was claiming interest. Each party was also required to present a copy of any diagram or written description evidencing the purported boundary of the parcel he/she was claiming an interest in. From all indications, the relevant documents were provided to the surveyor. Each party was further required to attend personally at the survey and point out the portion of land he/she was claiming by reference to diagram or written description. The surveyor was thereafter required to indicate whether each party attended and whether the surveyor could properly, with each party's assistance identify the boundaries.

[147] The main purpose of the survey was to delineate on ground the area of land being claimed by the respective parties and to determine if there was any overlap. Implied in the not very obvious terms of reference was that he should determine if the land claimed by Ms Neil was included in the subdivision. In particular, he would have been required to determine if the land being claimed by Ms. Neil as land purchased by her was a part of the land that George Newell claimed he had acquired a possessory title to. He was also required to prepare a diagram reflecting the correct boundaries of the portion of land which each party claimed.

[148] It is correct that Mr Kindness utilized as the main basis of identifying the land claimed by Bobbet Neil a survey diagram bearing Survey Department Examination Number 372788 (Exhibit) which was based on a survey done in 2011. This survey was done at the instance of Ms Neil. He described it as a pre checked plan. This court does not know how it is that Ms Neil was able to precisely identify on ground the land being sold to her as in fact being lands, which was part of the subdivision lands or if it did not fall within the development or subdivision, whether it was part of the estate of Clanson. This court is fully cognizant of her evidence that she knew

that the land belonged to the Newells and that she made enquiries of Lloyd Newell, who directed her to Joy. Land may be reputedly owned by someone but a survey is required for the purpose of establishing precise boundaries.

[149] Mr Kindness' evidence was that he did not understand Ms Neil to be saying that the land she purchased was a part of the deposited plan dated the 28th June 1989 which is represented at pages 46 and 47 of exhibit 23 (the surveyor's report). It is certainly the understanding of this court that she was saying that the land she purchased was a part of the deposited plan. The survey has revealed that the land purchased by her does not in fact form part of the lands in the deposited plan. What is clear from Mr Kindness' survey is that the lands in the deposited plan falls to the south of the lands Bobbet Neil identified as the lands she purchased. The fact that the land does not fall within the deposited plan does not answer the question whether it forms a part of Clanson's estate which Joy was at liberty to convey to Ms Neil.

[150] In contending that she had traced her root of title, Ms Neil asserted both in her defence and in her witness statement that she had seen a number of documents to include the indenture between Adelaide Newell on the one hand and on the other, Clanson, Neville and Clifton Newell, which of course showed the conveyance of land. She also saw the will of Clanson which revealed that Clanson left his entire estate to Joy. There would have been no issue with the fact that Clanson was the last of the three brothers to die and so the land they owned as joint tenants passed to Clanson.

[151] Those documents are of assistance in determining that Joy could have then owned land in the general vicinity, assuming that there were still unsold parcels or portions of land remaining of Clanson's estate. By way of documents tendered in evidence, it is apparent that portions of the development had been sold to persons unconnected with this claim. What none of those documents showed was the precise location of the land Ms Neil was purchasing or whether that land formed a part of Clanson's estate. I believe Miss Hamilton is correct in her assertion that

effectively, the survey conducted by Mr Kindness did not really resolve the question of whether the land identified on ground as that which Ms Neil purchased was a part of lands in the subdivision. Mr Kindness conceded that he did not understand that by virtue of paragraph 5 of George Newell's reply that he was required to determine the identity of the land Ms Neil is on, relative to the subdivision. He clearly did so relative to the lands in the deposited plan.

[152] Mr Kindness was asked questions in response to which he said that there is a triangular section on the diagram prepared by him which represents the land that George Newell is claiming. He was then asked if the subdivision falls to the south of the lands George Newell claims. He explained that the lands in the deposited plan falls to the south of the lands claimed by George Newell. Ultimately Mr Kindness evidence could possibly lend to the understanding that the subdivision included more land than that contained in the deposited plan. There is to my mind some degree of uncertainty which has not been resolved by the evidence in the case.

[153] It may reasonably be said that the fact that all the pleadings were submitted to the surveyor as part of the terms of reference must have rendered the surveyor's job unnecessarily complicated. It was not necessary for counsel to submit all the voluminous (and arguably prolix) pleadings in the claim for the surveyor to decipher and to forage through in order to find the minimal information he needed therefrom in order to assist him to carry out the survey and determine the important questions.

[154] The fact that there remains uncertainty as to whether Ms Neil's land is part of the subdivision does not however affect the ability of this court to resolve the central issue in this case. The question this court must ultimately answer is whether Ms Neil purchased land in respect of which George Newell has acquired a possessory title. The answer is clearly that she did not. There may very well be issues to be resolved regarding Ms Neil's land but those are matters touching and concerning the estate of William Benjamin Newell and/or the estate of Adelaide Newell.

Whether George Newell went into possession of the land with the consent of the paper owner

[155] Even if one were to assume for a moment that George exercised the necessary acts of possession over the entire plot of land since 1976, then this court must consider what is the effect if any of his evidence that he entered into possession of the land in 1976 with the knowledge and consent of all the surviving children of William Benjamin Newell. He also said that he spoke with his Uncle Clifton and his father Noel Newell and told them he was going to set up a garage on the subject land which was to the left of his grandparent's family home. He said they both gave him their blessings and pointed out the boundaries of the subject land to him.

[156] Ms Hamilton has argued that notwithstanding George's evidence in this regard, this supposed permission is not in law permission, as at no time were these persons the title owners of the property since in 1976 when George went onto the property, it was owned by the estate of William Benjamin Newell. (The inference is of course that there was then no representative of the estate). It was George's evidence that after the grant of administration to Clifton, Clifton did nothing to prevent him from remaining on the land. This must be taken to mean that time continued to run and that by virtue of section 30 of the limitations of Actions Act, any cause of action was extinguished Counsel correctly pointed to the nature of the interest of a beneficiary to an estate as being a chose in action and submitted that all that a beneficiary whose interest has not vested can do, is ensure to that the personal representative properly administers the estate. She pointed to the case of ***Sze To Chun Keung v Kung Kwok Wai David and another*** [1997] 1 WLR 1232 as authority for the proposition that permission can only be given by the title owner.

[157] I will assume the position that the property was owned by the estate of William Benjamin Newell to be true. Counsel included in her footnote a most relevant aspect of the law. In the case of ***Morgan v Thomas*** (1853) 8 Exchequer Reports (Welsby, Hurlstone and Gordon) 302 155 E.R. 1362 the facts were as follows: The

plaintiff brought an action as administrator of his father Thomas Morgan's estate for the recovery of the value of certain furniture which had been seized by the defendant as sheriff of the county under a writ of fieri facias. The seizure was made after a judgment was obtained against the widow who occupied the house following the death of the deceased. After the seizure, the plaintiff served a notice on the defendant not to sell the goods as they were a part of the intestate's estate and the not the widow's. However, the defendant sold the goods after taking an indemnity from the execution plaintiff. A month later, the plaintiff took out administration in his father's estate and brought these proceedings.

[158] One issue left for the jury was whether the plaintiff had after his father's death and before the taking out of administration, assented to the property of the intestate being taken by his mother and other children in satisfaction of their shares in the intestate's personal estate under the statute enabling distribution. In the course of the judgment, Parke, B at page 1364 agreed with Pollack CB. He said:

> ***"****An act done by a party who afterwards becomes administrator, to the prejudice of the estate, is not made good by the subsequent administration. It is only in those cases where the act is for the benefit of the estate that the relation back exists, by virtue of which relation the administrator is enabled to recover against such persons as have interfered with the estate, and thereby to prevent it from being prejudiced and despoiled. It was not the duty of the plaintiff, acting in the character of administrator, to assent to a legacy till he had seen all the just debts owing by the estate duly satisfied."*

[159] In ***Hubert Samuels v Pauline Karenga*** [2019] JMCA App 10 Sinclair Haynes JA also recognized a beneficiary or potential beneficiary's right to protect the assets of the estate. By extension, it is the view of this court that the potential beneficiaries of the estate could have acted together to permit an individual to occupy the property. Such occupation may properly be viewed as a means of protecting the property of the estate.

[160] Based on the authority of ***Bryan Clarke v Alton Swaby*** Privy Council Appeal No. 13 of 2005 and ***Ramnarace v Lutchman*** 2001 1 WIR 165, possession is not

adverse if enjoyed by a lawful title or with the consent of the true owner. Though not properly the true owners, George's father and siblings whom George said consented to his presence on the property were the only potential beneficiaries until administration de Bonis non was taken in the estate of William Benjamin Newell by Clifton Newell in 1982. Clifton was one of the persons whom George said gave him permission. Clifton was one of the surviving children of William Benjamin Newell. On one view, time would not have begun to run until the consent was terminated or until the death of the last of those persons who gave consent. There was no evidence of the consent being terminated. Clanson died in 2002. If it is doubtful that the other siblings could have given permission to George, the other scenario is that the cause of action would have accrued upon the death of Clifton who was the administrator of the estate. I say this because by virtue of the operation of the doctrine of relation back, the permission given by Clifton would have retroactive effect to validate the permission given by him prior to the grant of administration de bonis non. This of course on the acceptance of the position that the granting of permission to George to occupy the property was an act of protecting the assets of the estate.

[161] Even if I were to be wrong in my conclusion that on George's own case, time could not have begun to run until the death Clanson, it would not change my view that George did not acquire the right to a possessory title over the land claimed by Ms Neil.

Does George Have a better right to possession than Bobbet Neil

[162] Ms Hamilton has also argued that George does not have to prove that he has acquired the right to a possessory title in order to recover possession of the property from Ms Neil, since Ms Neil agreed to having entered into possession of the property on the basis of a contractual licence from George. Ms Hamilton cited the case of ***Asher v Whitelock*** (1865) L.R 1 QB 1, which is authority for the proposition that possession of land is in itself a good title against anyone who cannot show a prior and therefore better right to possession and that possession

which is wrongful against the true owner can be the basis of an action for trespass or nuisance against someone else. Further, that a claimant's previous possession is evidence of his title (or of his prior seisin), but it is rebuttable evidence, and if rebutted by other evidence, the right to claim possession dissolves.

[163] Counsel says therefore that on Bobett Neil's own case, she is a mere purchaser in possession, thereby making her an equitable owner as she has only paid a portion of the purchase price. She further submitted that if the court finds that George Newell had, prior to May 7, 2004, acquired title by adverse possession to the land, then he would have acquired an equitable interest therein and since both these equities would be equal, George Newell's interest, being first in time, would prevail. Since my finding is that George did not acquire a right to a possessory title to the land, the route to defeating Ms Neil's defence cannot assist George.

[164] In any event, it would not be entirely correct to say that Ms Neil went into possession of the property at George's instance, since I accept Ms Neil's version that it was Joy who first let her onto the land and that it was only after George objected to her activities on the land that she entered into an arrangement with him which she agreed to for 6 months, until she could resolve the issue as to ownership. Further, that having satisfied herself that Joy was the owner, she thereafter entered into the agreement with Joy to purchase the property. George has no greater right to possession of the property since my finding is that he was not in possession and essentially that his interest in that portion of the land emerged when he observed Ms Neil's activities and he has not acquired a possessory title to same.

CLAIM NO. SU 2020 CV 02198

[1] The issues which arise in this claim are:

(1) whether George Newell acquired title to the portion of the property delineated by broken magenta lines on exhibit 21 but excluding the portions

claimed by the Mullings and that claimed by Bobbet Neil, by having been in open, exclusive, continuous and undisturbed possession.

(2) Whether the land or any portion of it belongs to the estate of Adelaide Newell.

Whether George Newell owns this portion of the property by having acquired the right to a possessory title

[166] There is no question that the court is able to make a declaration that an individual has acquired the right to a possessory title to a portion of a parcel of land. That position is supported by the decision in ***Peter Perry v Carol Baugh et al*** (supra). Ms Hamilton also cited two other cases; ***Ridley Charles Ulric Charles and Sonia Charles v Kristy Antoine*** unreported, Claim no. 37/2010, as well as ***Tiabo v Clarence Flowers and Helen Buller et al***, Claim no. 197 of 2017, in support of this point. However, a court can only make such order where there is evidence to support it.

[167] It is abundantly clear from the evidence that the disputed land is demarcated and there are, as earlier observed, for all practical purposes, three separate parcels.

George's claims made it evident that there were at least two separate parcels of land. Two sections of the land are the subject matter of George's separate claims and there is the remaining portion. Exhibit 21 to be found at page 73 of the surveyor's report, depicts a sketch plan of the land separated in these three parcels. One of the three parcels shown is depicted as holding a cemetery, a mango tree, a shed and a concrete building. Having regard to George Newell's evidence in cross examination in relation to this section of the land, it may readily be said that he has abandoned his claim that he has acquired the right to a possessory title in respect of that portion

[168] During cross examination by Ms Housen, George agreed that his grandparents died leaving behind several children and grandchildren. Also, that his grandparents

and all their children are buried in the graves on the land. He also agreed that the last person to be buried there was his uncle Clanson, in 2002 and that no one asked his permission to bury him there. George also agreed that when family members who live abroad are visiting, they would visit the graves without his permission, and they did not have to pass through any gates to get to the graves. He also agreed to a suggestion put to him that he never owned any property where the cemetery is located. He agreed that the area where the graves are belongs to the estate of Adelaide Newell.

[169] Even if this court were to consider that the land, prior to Mr Mullings' entry on it, was one indivisible parcel, that position would not improve George's situation, because of his concession that he was not in exclusive occupation and possession of the area housing the burying ground.

[170] Even if he has not abandoned his claim to this portion of the land his evidence makes it pellucid that his claim cannot be supported. The evidence reveals that George's activities on the land must have been almost exclusively confined to this area of the land as it was determined that his activities were not being carried out on the other two sections now occupied by the Mullings and Ms Neil. It cannot be seriously disputed that he carried out certain activities such as repair work to vehicles on this area of the land, or that he carried on his water trucking activities and stored accessories related to that activity there. In 2003, Mr Newell brought his claim against Mr Mullings and against Ms Neil in 2013. He brought his claim in a bid to assert the title he claims he has acquired.

[171] Miss Hamilton's query as to whether the use of the family plot amounts to acts of possession by the paper owner and her assertion that William Benjamin Newell and Adelaide Newell could not have exercised acts of possession after their passing is suggestive of a lack of appreciation of the law as enunciated in ***JA Pye (Oxford) v Graham*** relating to the acquisition of a possessory title to land. Making the bizarre assumption that either of those two named persons could still be regarded as owner of that land, there is no requirement in law that it must be the

conduct of an owner which prevents an individual from acquiring a possessory title. The requirement is that a person claiming to have acquired the right to a possessory title in respect of property must establish that he has been in **open**, **exclusive, continuous** and **undisturbed** possession. That is, he must have manifested an outward intention to exclude and did exclude **all** other persons (except anyone present with his permission) for the requisite period of twelve years. The burial of someone on the land which George admitted in cross examination was done without his permission or consent unequivocally negatives any concept of exclusive and undisturbed possession on the part of George.

Whether the land or any portion of it belongs to the estate of Adelaide Newell

[172] As to whether there is evidence that the land is part of, or what remains of the estate of Adelaide Newell is less certain. I accept Ms Hamilton's submission that as at the date of the death of William Benjamin Newell in 1918, the law as it obtained in Jamaica was that Adelaide Newell's rights to the property of her deceased husband was a right in dower. The concept of dower meant that a wife was entitled to a one third life interest in the estate of her deceased husband. That concept was abolished with the passing of the Intestate's Estate and Property Charges Act on the 1st of June 1937. Section 3 of the act provides that the abolition is in respect of property of persons who died after the 1st of June 1937.

[173] The evidence disclosed that William Benjamin Newell died in 1918, so that it is the principle of dower which at the time of his death defined Adelaide Newell's interest in and right of succession to his property. Ms Housen is therefore incorrect that the principle is not applicable in circumstances where Adelaide Newell died in 1971, some 34 years after the change in the law.

[174] What then was the state of the property in 1976 as far as ownership is concerned, when George Newell began to occupy a portion of it. It is necessary to decide this issue because the outcome affects the portion of the land which Melverton Newell seeks to recover because the answer directly touches and concerns whether the

property belongs to the estate of Adelaide Newell. Melverton brought this claim in the capacity of Administrator of the estate of Adelaide Newell. If the property is not part of her estate, then he has no interest in the property and would not be entitled to any of the declarations sought.

[175] It is observed at once that the claimant in this fixed date claim form is seeking a declaration in relation to all of the unregistered portion claimed by George. While the manner in which the declaration is framed excludes the portion being claimed by the Mullings family, it does not expressly exclude that which is being claimed by Ms Neil. That must have been the observation which led Ms Hamilton to say that Melverton's claim is indicative of a lack of recognition of Ms Neil's claim to an interest in the property. Ms Housen in her submissions sought to clarify the claim by saying that Melverton makes no active claim against the Mullings family and Ms Neil. I must also add that there is inherent conflict in the position assumed by the claimant Melverton Newell with regard to the portion of land claimed by Ms Neil. I have come to this conclusion because if it is accepted by him (as it seems is the case) that Ms Neil purchased land which was part of the estate of Clanson Newell, then that portion of the land could never have been part of the estate of Adelaide Newell, since there was never any dispute that Clanson, Clifton and Neville had purchased this land from Adelaide Newell. Nothing turns on this apparently conflicting position for the purposes of my decision in any of these claims.

[176] In furtherance of the position that no active claim is being made in relation to the portions owned by the Mullingses and that claimed by Ms Neil, Ms Housen framed one of the issues in relation to claim SU 2020 CV 02198 as being whether the portion delineated by the location of the shed, cemetery and concrete building was acquired by Mr George Newell by adverse possession.

[177] The undisputed evidence as Miss Hamilton observed in her submissions, is that Adelaide Newell took a grant of letters of administration in the estate of Benjamin Newell. In explaining the position of a personal representative as well as that of a beneficiary to an estate, Sinclair Haynes JA in the case of ***Sonia Edwards et al v***

Stephanie Powell [2016] JMCA Civ. 33 at paragraph 27 of the judgment cited Halsbury Laws of England third edition, volume 16 where it is stated that:

> *"The property which devolves upon the personal representative is held by him in right of the deceased and not in his own right. He has full control of all the items making up the estate and can give a good title to them. The beneficiaries have no specific interest in any of the property comprising the residue until the residue has been ascertained in due course of administration but they do have a general title to residue, and this general title is not affected by the completion of the administration, so that their interests remain the same before and after the administration is complete."*

[178] Based on the law as set out in the above extract, unless the administration of the estate of William Benjamin Newell was complete, even after the death of Adelaide Newell, their children possessed only an interest (if it may be so described) in their father's estate, which based on the principle extracted from ***Commissioner of Stamp Duties (Queensland) v Livingston*** [1965] AC 694, is not an interest in the property per se, but remained a chose in action. The fact that the property was registered on transmission to Adelaide Newell did not make it a part of her estate.

[179] Miss Hamilton submitted that the administration of the estate of William Benjamin Newell was never completed. She stated as proof of that assertion, the fact that Clifton Newell obtained a grant of administration de bonis non in the estate in 1982. It may be inferred that up to that point, administration had not been completed. There is no evidence from any source as to what precisely was left to be done in order to complete the administration of the estate. There is evidence in these claims to show that Adelaide Newell had partially administered the estate. For example, she sold portions of it to Clanson, Clifton and Neville. It is also George's evidence that before her death, Adelaide's name was entered on the valuation role as the owner of the land. (See paragraph 34 of his witness statement filed on the 30th of May 2019). It was George's evidence in cross examination that Naomi Newell (his aunt) had received a part of the land but that she had sold her portion to one Miguel Smith. Strangely, there is evidence from George himself to the effect that the area of land he now claims, was part of his grandmother Adelaide Newell's

estate. (See paragraph 9 of the witness statement which was signed by him on the 29th of May 2019). It is part of George's pleaded case that he considered that section of the land a part of the agreed entitlement of his late father. It is noteworthy that that section of the land was surveyed in his late father Noel Newell's name. George's explanation for that is that he had requested of his father that he cause the survey to be done. Finally, there is George's admission in cross examination by Ms Housen that the area where the burying ground is located belongs to the estate of Adelaide Newell.

[180] There was distribution of at least a part of the realty of the estate. It is not entirely clear to this court what portion of it had not been distributed. I made reference to the evidence surrounding the treatment of the disputed property, being cognizant that Adelaide's interest in the estate being subject to the principle of dower, also means that upon her death, her life interest would have reverted to the estate of William Benjamin Newell and there would be none of that property that could properly be considered as her estate. As to whether the property belonged to her estate is not just a question of perception but rather must be a question of law as well as of fact, as the events unfolded in the past in all the circumstances. It was for the claimant Melverton Newell to establish that Adelaide Newell had a beneficial or legal interest in the disputed land or any portion of it, that fell to be distributed upon her dying intestate. It is my view that that interest could only have been acquired by her over the years treating the land as belonging to her to the exclusion of all others. There is no evidence to that effect and so this court treats the land as being a part of the estate of William Benjamin Newell. I will say that there is a dearth of evidence in relation the matter.

[181] It was for Melverton who asserts that the remaining portion of land part of the estate of Adelaide Newell and so it was for him to so establish on a preponderance of the probabilities. He has failed to do so.

I confess that I fail to understand the essence of the declaration (as worded) sought by Melverton Newell. In any event my findings mean that the court makes none of the declaration or orders sought in the claim filed by him.

Costs

[182] I am of course mindful that the question of cost in each claim is to be treated separately as the claims were never consolidated as accepted by the Attorneys at Law in the matter, but were ordered tried together out of convenience because the matters revolved out of one parcel of land. Mr George Newell has failed to establish his claim against The Mullings as well as that against Ms Neil. They are entitled to their costs. Melverton Newell has failed to establish that the Estate of Adelaide Newell is entitled to possession of any portion of the land but George has failed to establish his claim that he is entitled to any portion of the land. The general rule of course, is that costs follow the event and the successful party is entitled to costs.

[183] Mr Williams has asked that the court grants a special costs certificate for the attendance of two Attorneys at Law for the three days initially scheduled for trial of the matter. He says that the fact of having to handle 37 exhibits, deal with the cross examination of an expert witness for two days, and the cross examination of a number of other witnesses, made it reasonable for two Attorneys to be in attendance. Counsel also requested that the defendants be allowed to recover the cost of the survey as well as the costs for the attendance at court of the surveyor.

[184] The defendants in claim 2003 HCV 01838 and Ms Neil are entitled to recover their costs against Mr George Newell. They are also entitled to recover their costs for the Survey. They are also not responsible for the costs of the surveyor's attendance at court.

[185] The question is how if at all the responsibility for costs should be apportioned between Mr. Melverton Newell and Mr George Newell. Having giving some thought to the matter, I will abide by the general rule. Mr George Newell is entitled to

recover his costs on claim number SU 2020 CV 02198 against Mr. Melverton Newell.

[186] I do not view it as necessary that Mr Williams' request that a special costs certificate for the attendance of two Attorneys at Law for the three days be granted. I am of the view that there is no necessity for that order to be made because rule 65.11 of the Civil Procedure Rules provides that on assessing basic costs or taxing a bill of costs, no fees may be allowed for the attendance of **more than two** attorneys-at-law at the trial unless the court has so directed under rule 64.12(3), or the Registrar is satisfied that it would be reasonable. Before the court may allow costs of the attendance of more than two attorneys-at-law at trial, the court must consider the circumstances outlined in rule 65.17(3).

[187] In **Treebros Holdings Limited v National Housing Trust** [2018] JMSC. Civ.211 Lawrence-Beswick J said at paragraph 190-191

"*The CPR provides that when making an order as to the costs of an application in chambers the court may grant a "special costs certificate." My understanding of that provision is that special costs certificates apply to chambers matters…. Even if I am wrong in my view that special costs certificates are only permissible in chambers matters, in the trial at bar only two Attorneys-at-law appeared, the third being a substitute as became necessary. Here, in the normal course of taxing or agreeing of costs, there would be brief fees allowed for two counsel without the necessity to make any special order. I therefore will make no award for special costs certificate."*

[188] Whereas I do not share the view that special costs certificates apply only to chambers matters, I am firmly of the understanding that there is no need to grant a certificate where two Attorneys at law attend at the trial, as the rule stipulates that no fees may be allowed for the attendance of **more than** two Attorneys at Law at trial unless the court so directs. The provision necessarily means that no direction of the court is required where two Attorneys appear.

CONCLUSION

[189] George Newell has failed to demonstrate that he exercised open, exclusive, undisturbed and continuous possession over the disputed property or any portion of it for the required twelve years and therefore his claim that he has acquired the right to a possessory title fails. In any event, even if he had demonstrated his presence on the land for the required period with the attendant elements to establish his claim, he had gone onto the property with the consent of all of the potential beneficiaries and later by virtue of the principle of relation back, with the consent of the administrator of the estate of William Benjamin Newell.

[190] The land claimed by Bobett Neil as well as the portion now owned by the Mullings are part of the same parcel claimed by George Newell. Although it has not been clearly established that the lands purchased by Ms Neil is a part of the estate of Clanson Newell and consequently lands owned by Joy Newell, that uncertainty does not lead to the conclusion that George Newell acquired title to the portion of land claimed by Ms Neil. Any unresolved issue regarding the portion of land claimed by Ms Neil is a matter that has to be resolved between her and the estate of William Benjamin Newell. George has also not proven that he has a better right to possession of that portion of the property as he did not initially put Ms Neil in possession.

[191] There is no evidence that Linton Mullings obtained the land by fraud or that he was aware of any fraud on the part of Naomi Newell and a fortiori, that his successors in title perpetuated a fraud. The Mullingses have therefore obtained an indefeasible title to the and registered at volume1295 folio 949 of the Register Book of Titles. The Mullings are entitled to succeed on their counterclaim. They are entitled to the injunction sought but they are entitled to nominal damages only, not having assisted the court to be able to quantify damages. The damages awarded is $5000.00.

[192] By his evidence in cross examination, George Newell has made it abundantly clear that he has not acquired a right to a possessory title over the remaining portion of the disputed lands. Melverton Newell in his capacity as administrator of the estate of Adelaide Newell has not established to the required standard that the disputed lands and in particular the remaining portion of that land forms part of the estate of Adelaide Newell and he is therefore not entitled to the orders sought.

ORDERS

[193] Consequent on my findings, I make the following orders:

1. In claim number 2003 HCV 01838 I give judgment for the defendant on the claim and counterclaim. The defendants are awarded nominal damages in the sum of five thousand dollars ($5000.00). Costs to the defendants to be taxed if not sooner agreed.

2. Judgment for the defendant in claim number 2013 HCV 00319. Costs to the defendant to be taxed if not sooner agreed.

3. Judgment for the defendant in claim number SU 2020 CV 02198. Costs to the defendant to be taxed if not sooner agreed.

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Pettigrew-Collins: J