



[2020] JMSC Civ. 20

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2005HCV00713**

<b>BETWEEN</b>	<b>MATTHEW STEPHENS</b>	<b>1<sup>ST</sup> CLAIMANT</b>
	<b>ICILDA STEPHENS</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>THE ADMINISTRATOR GENERAL OF JAMAICA</b> <b>(Administrator of the estate of Josiah Bromfield)</b> <b>(previously listed as Hezekiah Bloomfield)</b>	<b>1<sup>ST</sup> DEFENDANT</b>
	<b>GARFIELD BROWN</b>	<b>2<sup>ND</sup> DEFENDANT</b>
	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Mr Emile Leiba and Mr Jonathan Morgan instructed by DunnCox for the Claimants  
Ms K. Delahaye and Mr Allan Hunter for the 1<sup>st</sup> Defendant  
Ms G. Buckle instructed by Ballantyne, Beswick & Co., for the 2<sup>nd</sup> Defendant  
Mr Dale Austin instructed by the Director of State Proceedings for the 3<sup>rd</sup> Defendant

**Heard: February 19 and 22 and April 6, 2018, December 20, 2019, January 17 and February 14, 2020.**

**Land law – Indefeasibility of Title – Registration of Titles Act ss.68, 70 and 71–  
Whether title holders are the legal owners of all the land comprised in the title –  
Whether Claimants are entitled to damages for trespass and loss of use of lot  
occupied by 2<sup>nd</sup> Defendant – Whether lot occupied by 2<sup>nd</sup> Defendant included in  
title by error of and/or wrong description of the parcels or boundaries – Whether  
disputed lot of land acquired by 1<sup>st</sup> and 2<sup>nd</sup> Defendants by ‘adverse possession’**

**LINDO, J.**

- [1] This is an unfortunate land dispute in which the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Defendant occupied adjoining lots which they subsequently purchased from the then Ministry of Water and Housing (The Ministry). The 1<sup>st</sup> Claimant entered into an agreement for sale dated June 14, 1992 and the 1<sup>st</sup> Defendant entered into an agreement dated August 14, 1975 with the Ministry. By Transfer dated July 16, 2002, the Claimants became the registered proprietors of all the land comprised in the Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles.
- [2] The background facts are not in dispute and the Ministry has conceded that the Claimants ought not to have been registered as proprietors of all the land contained in the title. The Claimants however contend that they are entitled to all the land and have therefore brought this claim.
- [3] In 2003, the 1<sup>st</sup> Claimant filed an action against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the then Resident Magistrates' Court, for recovery of possession of the property occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is that matter which was transferred to this court by the consent of the parties on March 1, 2005.

### **The Claim**

- [4] By the Fixed Date Claim Form filed March 21, 2005 and 'relisted' March 20, 2006, Matthew Stephens sought the following relief:

“1. A Declaration that the Claimant and his wife are the registered proprietors of the property situate at 1-3 Lancelot Avenue, Kingston 3 in the parish of Saint Andrew registered at Volume 1122 Folio 207.

2. An order that the 1<sup>st</sup> Defendant vacate the property immediately; or in the alternative that the Ministry of Housing relocates the 1<sup>st</sup> Defendant and or his agent

3. An order for the Claimant to be compensated by the 1<sup>st</sup> or 2<sup>nd</sup> defendant for trespass to his property and for loss of use of the property from July 2002 to date

4. Cost ...”

- [5] The Fixed Date Claim Form is supported by the affidavit of the Claimant filed on March 21, 2005 to which the Defendants filed affidavits in response.
- [6] On March 16, 2011 the Administrator General of Jamaica was appointed “administrator of the estate of Josiah Bloomfield, deceased, named herein as Hezekiah Bloomfield” and by order of the court dated April 23, 2012, Icilda Stephens was added as a Claimant. The Claimants were permitted to file a Particulars of Claim consequent on the matter being allowed to proceed as if commenced by Claim Form.
- [7] In the Particulars of Claim filed on May 21, 2012, the Claimants aver, among other things, that Josiah Bromfield occupied a part of the premises until his death in 2010, Garfield Brown, occupied prior to the death of the First Defendant “and currently occupies, a part of the said premises”. The 3<sup>rd</sup> Defendant was named as the “duly authorised representative of the Ministry of Water and Housing from whom the Claimants purchased the said premises”.
- [8] The 1<sup>st</sup> Claimant claims that he completed payments for the property he purchased in February 2002, the property was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Claimants and on September 1, 2003 a survey was conducted which indicated that the premises occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants formed part of the land comprised in the Certificate of Title registered at Volume 1122 Folio 207, which they own.

#### **Defence and Counterclaim and Ancillary Claims of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants**

- [9] By the amended defence and counterclaim filed on June 24, 2014, the 1<sup>st</sup> Defendant aver, *inter alia*, that the property registered at Volume 1122 Folio 207 “by error of description” encompasses both Lot 11 McIntosh Drive purchased by the Claimants and Lot 1-3 Lancelot Avenue formerly known as 23 McIntosh Drive, purchased by the deceased, Josiah Bromfield.

[10] The 1<sup>st</sup> Defendant states that Mr Bromfield paid a deposit of eighty dollars (\$80.00), and subsequently paid off the balance and was awaiting the issuance of his certificate of title, up to the time of his death and that Mr Bromfield owned and occupied the property from about 1974, and is therefore the legal and equitable owner and that Lot 11 McIntosh Drive, “with approximately 3000 square feet ...” was only occupied by the Claimants in or about 1991 after the previous occupants had died and that the stepson of Mr Bromfield has been occupying the property from 1982.

[11] By way of counterclaim, the 1<sup>st</sup> Defendant is seeking the following relief as against the Claimants:

1. *A declaration that Josiah Bromfield ... during his lifetime is and was the owner of Lot 1-3 Lancelot Avenue, Kingston (formerly 23 McIntosh Drive, Long Mountain Pen ...;*
2. *A declaration that Lot 1-3 Lancelot Avenue, Kingston 3 ... was included in the Certificate of Title registered at Volume 1122 Folio 207 ... by error of and/ or wrong description of the parcels or boundaries;*
3. *A declaration that the Claimants are not entitled to possession of all the land contained in Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles;*
4. *An order that the Certificate of Titles registered at Volume 1122 Folio 207 of the Register Book of Titles be cancelled and that a separate Certificates [sic] of Title be issued for Lot 1-3 Lancelot Avenue, Kingston 3 (formerly known as 23 McIntosh Drive, Long Mountain Pen) in the name of Josiah Bromfield and/or his beneficiary;*
5. *An order that the Ministry of Water and Housing shall bear all the costs associated with the fulfilment of the order being sought in paragraph 4 above.*
6. *Costs ...”*

[12] In an Ancillary Claim against the 3<sup>rd</sup> Defendant, the 1<sup>st</sup> Defendant is claiming damages, interest and costs, and states, *inter alia*, that if the Claimants’ claim succeed, the beneficiary of the estate of Josiah Bromfield will lose the use and

occupation of the land at issue, and may be accountable to the Claimants. Additionally, the 1<sup>st</sup> Defendant states that Josiah Bromfield used and occupied the subject property for over thirty years on the “basis and existence of a valid contract and/or agreement for sale of the said property ... and on the presentation that all the appropriate checks had been carried out that would enable the Ministry of Water and Housing to pass a registered Certificate of Title to the 1<sup>st</sup> Defendant and/or Josiah Bromfield ... and/or his estate at the completion of the sale”.

**[13]** The 1<sup>st</sup> Defendant claims that “it was the negligence of the Ministry of Water and Housing that has wholly caused the 1<sup>st</sup> Defendant’s liability to the Claimants herein”.

**[14]** The negligence of the 3<sup>rd</sup> Defendant has been particularised as follows:

- (a) entering into an Agreement for Sale without first correctly identifying the land to be sold;*
- (b) failing to ensure that the land could be transferred under a Certificate of Title to the purchaser after completion of the sale;*
- (c) failing to ensure that the property purchased by Josiah Bromfield was not included in the Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles to the Claimants;*
- (d) failing to obtain a pre-checked survey plan of the subject properties before effecting a transfer of the property to the Claimants;*
- (e) failing to carry out an on the ground examination of the subject property before transferring the property to the Claimants; and*
- (f) failing to exercise reasonable care and skill in carrying out its duty and function as the vendor and/or the body responsible for providing housing to Jamaicans.*

**[15]** On July 30, 2012, the 2<sup>nd</sup> Defendant filed his Defence and Counterclaim and an Ancillary Claim against the 3<sup>rd</sup> Defendant. His Defence and Counterclaim as well as his Ancillary Claim mirror the statements of case of the 1<sup>st</sup> Defendant and will therefore not be re-stated.

**3<sup>rd</sup> Defendant's Defence to the Claim and Ancillary Claim and to the 2<sup>nd</sup> Defendant's Ancillary Claim**

[16] On July 16, 2012, the 3<sup>rd</sup> Defendant by way of Defence states, *inter alia*,

*“that the property registered at Volume 1122 Folio 207, by error of description, encompasses both Lot 11 McIntosh drive, Long Mountain Pen, purchased by the Claimants and 23 McIntosh Drive, Long Mountain Pen, purchased by Mr Josiah Bromfield, deceased. ... that there was an agreement by the Ministry and the 1<sup>st</sup> claimant for the sale of premises Lot 11 Long Mountain Pen, in June 1992 ... the 1<sup>st</sup> Claimant completed payment for the lot and the Ministry proceeded to transfer title for the lot to the 1<sup>st</sup> and 2<sup>nd</sup> claimants ... it was subsequently discovered that there were several anomalies between the Ministry files, the Deposited Plan from which the files (sic) for lots in the scheme were issued, and the position on ground. These anomalies out of error led to the sale of Lot 11 to two different persons ... Due to several re-surveys and re-numbering exercises several lots in this scheme were re-numbered. ... what was originally known as 23 McIntosh Drive came to be part of 3 Lancelot Avenue or Lot 11 Long Mountain Pen and part of 11A Long Mountain Pen ... the records were however, not amended to reflect the change. When Lot 11 was marketed in 1992, the officers of the Ministry, ... did not realize that part of the lot was already sold to Mr Bromfield...”*

[17] The 3<sup>rd</sup> Defendant contends that the Claimants are not entitled to possession, and or ownership, of all the land contained in Certificate of Title registered at Volume 1122 Folio 207 and that “both Lot 11 and 23 were intended to have separate purchasers”

[18] By way of defence to the Ancillary Claim of the 1<sup>st</sup> Defendant, the 3<sup>rd</sup> Defendant states as follows”

*“... should the Claimants in the main claim succeed in their claim and in an award of damages against the 1<sup>st</sup> Defendant/Ancillary Claimant, the 3<sup>rd</sup> Defendant will admit liability and the Particulars of Negligence in the Ancillary Claim and indemnify the Ancillary Claimant/1<sup>st</sup> Defendant to the extent of the damages that are strictly pleaded and proved ...”*

[19] On July 11, 2014, the 3<sup>rd</sup> Defendant filed a Defence to the 2<sup>nd</sup> Defendant's Ancillary Claim. In this Defence, it was admitted that Josiah Bromfield occupied the property for over thirty years on the basis of an agreement for sale between himself and the Ministry and further that Josiah Bromfield is a bona fide

purchaser of 23 McIntosh Drive, Long Mountain Pen and the legal owner of same and that “at no material time was it intended by the Ministry that the Claimants were being sold Mr Bromfield’s property”.

**[20]** The Claimants filed a Reply and Defence in respect of each Defence and Counterclaim filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in which they denied the allegations, generally, but admitted that Lot 11 and part of 23 McIntosh Drive comprise the land registered at Volume 1122 Folio 207 of the Register Book of Titles.

### **The Trial**

**[21]** On February 19, 2018 the matter came on for trial. Items 9 to 29 of the Bundle of Documents filed on February 20, 2015 by the Claimants, were agreed by the parties and admitted in evidence.

**[22]** The witness statement of Matthew Stephens dated February 12, 2013 was admitted as his evidence in chief after paragraph 9 and a portion of paragraph 11 were removed as they violated the hearsay rule. His evidence is as set out in his statements of case and will therefore not be restated.

**[23]** Under cross examination by Ms Delahaye, he agreed that he asked to purchase the lot he lived on and then said the purchase money was “for the whole entire place”. He said he lived on lot 1 and 3, but he bought and paid for Lot 11 and that in 1992, when he signed the agreement for sale, Mr Bromfield did not live there. He stated that there was a house on 23 McIntosh Drive, Garfield Brown lived in a little house on the larger portion that Mr Bromfield owned, and Mr Bromfield, “supposed to rent it to Garfield”.

**[24]** He stated that he has a house on the small part, which was fenced and had a gate to enter, and that Mr Brown had another way to enter his property. He then said he did not know that Mr Brown was in control of the larger portion, denied that the money he paid in 1992 was to purchase the smaller portion of the land

he occupied, and also denied that it was in 2003 when the Ministry alerted him that the other lot is on his title, that he started to claim the larger portion.

- [25] When cross examined by Ms Buckle, he indicated that when he said he lived on the property since 1966 “the Ministry of Housing move [him] and put [him] there” and that the address he, his mother and his aunt were moved to was 3 Lancelot Avenue. He said in 1992 he went to the Ministry “to sell me the rest of my grandfather’s property”. He said he signed an agreement and bought the property for \$15,000.00 and that he bought one lot, lot 11 which is 1 and 3 Lancelot Avenue.
- [26] He said it was in 2002, when he got the title that he would have approached Mr Bromfield or his tenant. He denied that when he purchased the property he only intended to purchase the land he lived on, insisted that Mr Bromfield bought 23 McIntosh Drive, he bought Lot 11, which has two numbers, and that the portion Mr Bromfield’s tenant lived on was not 23 McIntosh Drive. When asked where 23 McIntosh Drive is, he stated that it is facing Lancelot Avenue.
- [27] He denied knowing that Mr Brown, his mother and other family members lived on the large lot and that Mr Brown lived there from he was a child. He said that he came there as “a big young man” and in 1998 he knew that Mr Brown lived there.
- [28] When cross examined by Mr Austin, Mr Stephens denied that when he came to live at Long Mountain Pen the area was a ‘squatter community’ stating that he was born there, “at 168 Mountain View Avenue”. He said his grandfather, Frederick Sealy, was the owner of 168 Mountain View which was about 16 1/3 acres, and that Mountain View and Mountain Pen were the same property.
- [29] Mr Stephens further stated that he did not come to the area in the 1980s, and when he first came to the property, Mr Brown’s house was not on the land. He denied that Mr Bromfield had a house there, and said the house he was living in at 1 and 3 Lancelot, “*turn to the east ... gate is on Lancelot Avenue ... the house, it don’t face Lancelot*”. He said there was a fence separating his portion from the

house Mr Brown rented, that he was the one who put it up and Garfield Brown tore it down and put up another fence. When asked if there was any fencing before he put up that fence, he said “*no, it was an open sepulchre*”

- [30] When asked if he built the house there, he said “*Judge give order to move house from Mountain View and put it there*”. When pressed, after indicating that no concrete structure is there, he stated that he lives in a board house which is near Lancelot Avenue and there is a concrete house below it, and “*face you as you come through the gate*”. He stated further that there is one apartment on the concrete structure, four apartments on the wooden structure and that his family lives there and he has no tenants. He disagreed that the portion of land that he lives on, which is fenced, is now larger than the section Mr Bromfield’s house is on.
- [31] He said the Ministry owned all the empty land, and when they were selling the land, he did not buy the property he lived on, but asked to be sold “*the balance of [his] grandfather’s property*”. He denied filling out a form and said he could not recall if questions were put to him and he responded and someone else filled out the form.
- [32] He said he did not know that Mr Bromfield entered a similar agreement to buy his property, denied that he claimed land owned by people who were dead or that he was made aware of the error on the title by the Ministry. He also denied being aware that proposals had been made to have the error corrected which he refused to accept, and that it was when he was made aware of the error that he took Mr Bromfield to court.
- [33] When he was shown the Notice of Change of Possession of Land, dated 10<sup>th</sup> August, 1993, signed by him, he admitted that he could not read it and stated that his wife read the documents. He said that he employed a surveyor by the name of Carnegie, sometime around 2003 and the surveyor gave his wife a signed survey document.

- [34] He stated that when he agreed to purchase the land, he did not agree to any square footage, “*everything was on the title*” and when pressed, he said when he went to do the interview to purchase the land, the portion he indicated was not “1 Lancelot” but “1 and 3 Lancelot Avenue”.
- [35] Mrs Icilda Stephens’ witness statement dated February 12, 2013 stood as her examination in chief after paragraph 7 was removed as it was found to be in violation of the rule against hearsay. Her evidence is stated in terms of the facts as set out in the Claimants’ statements of case and will not be restated.
- [36] When cross examined by Ms Delahaye, she agreed that her name was not on the agreement for sale in 1992, and that it was her husband who purchased the property and her name went on the title by his instruction. She also said she did not accompany her husband to fill out the documents but accompanied him to collect the title.
- [37] She said she did not know if a surveyor’s report was done when her husband was buying the property and that no one visited her in 1992, on the small part of the property that she was living. She added that before 2003, neither herself nor her husband ever tried to remove Mr Brown or Mr Bromfield’s tenant from the large part of the property. She also said she did not know if Mr Bromfield owned the big part because “*he rented it*”.
- [38] She agreed that her husband spoke to her before he went to the Ministry but denied that the discussion was about the portion of land they were living on. She denied that he discussed that he was going to purchase the bigger part controlled by Mr Bromfield and stated that he spoke to her about the “rest of his grandfather’s property”. She also denied that it was in 2003, when they discovered that the title included Mr Bromfield’s lot, that they decided that they owned it, and then said “*it was before when the land valuation letter it show Lot 11 is 1 and 3 and also the title number and the amount of land*”. She said the letter is dated 2002.

- [39] When cross examined by Ms Buckle, Mrs Stephens agreed that in her evidence in chief she said at the time they were buying the land they did not know that the part occupied by Mr Brown was a part of it.
- [40] Under cross examination by Mr Austin, she said she could not remember when she was married to Mr Stephens. She stated that she was aware that her husband signed a declaration when he was agreeing to buy the land. She also agreed that she did not know if the house she said is controlled by Mr Bromfield, was already there when her husband came there to live, which was before she came there, and that she did not know whether or not a house was there.

### **The Defendants' Case**

- [41] The affidavit of Josiah Bromfield sworn to on April 4, 2006 was admitted in evidence pursuant to an order of the court made on April 23, 2012. The evidence contained therein is as follows:

*“That by agreement for sale dated 14<sup>th</sup> August, 1975 I entered into an agreement for sale with the Ministry of Housing ... for the purchase by me from the Minister of Housing of land then occupied by me known as 23 McIntosh Drive, Long Mountain Pen in the parish of Saint Andrew... at a purchase price of Eight Hundred Dollars (\$800,00)... That pursuant to the terms of the Agreement for Sale I paid the deposit of Eighty Dollars (\$80.00) and subsequently over the years paid off the balance and awaited the issue to me of the Certificate of Title in my name as called for in the Agreement for Sale. That I was placed on the Tax roll as the person in possession of the said land and paid taxes accordingly. That eventually both the property address and my postal address were amended on the Tax roll from 23 McIntosh Drive, Kingston 3 to 1-3 Lancelot Avenue, Kingston 3”. The Notice of the Valuation Roll also listed the area of the land to be ... 4845 sq. ft. and indicated that the land was registered at Volume 1122 Folio 207 of the Register Book of Titles and on Deposited Plan No 4931....in or about the early part of 2003 I was served with a Summons ... in which the Claimant Mathew Stephens was seeking an order ... to recover possession of the land that I had purchased from the Ministry of Housing from as far back as 1975 ... ..I discovered that the Minister of Housing had in 1992 entered into an agreement to sell my land to the Claimant Matthew Stephens and Icilda Stephens and that they had subsequently been registered on Certificate of Title registered at Vol 1122 Folio 207...”*

- [42] Garfield Brown's 'Amended' witness statement dated March 7, 2016 was admitted as his examination in chief after he was sworn and it was identified by him and "Blue Cross" stated in paragraph 6, was corrected to read "Red Cross".
- [43] He states that in or around 1982, at the age of fifteen, he went to live with his mother at 1 Lancelot Avenue, Kingston, an address that she had lived "from about 1974" and that the Claimant was not living there. He adds that in 1992 the house in which he lived was destroyed by fire and it was rebuilt shortly after and "[his] mother, [himself] three other children of hers and Mr Bromfield continued living there until [his] mother left in 2001/2002 ..."
- [44] When cross examined by Mr Morgan, he said he is 50 years old, was "*around 15 years*" when he began occupying the property at 23 McIntosh Drive, and that this was "*around 1982*", and he is still occupying the property.
- [45] He agreed that having been in occupation for approximately 36 years he is familiar with the neighbours and said he could not easily identify lot numbers, but could identify gate numbers, meaning "street and civic address". When asked if he knew where Lot 11 Long Mountain Pen was and if he was aware that he was occupying a part of Lot 11 Long Mountain Pen, he said "*since this matter come to court*". He explained that the gate he uses is at No 1 Lancelot Avenue, the gate the Claimants use is at No. 3 Lancelot Avenue, and that there is a gate on McIntosh Drive, which is not the original gate, but the address is Lancelot Avenue and when he came there, there was a gate on Lancelot Avenue.
- [46] He stated that there is a neighbour, Janet Sullivan, to the back of the property he occupies, her gate number is 21 McIntosh Drive and that the neighbour across from him, is Marion Walker and she too has a gate on McIntosh Drive. He said that Ms Walker's property is in front of the entrance to the property he occupies, which is the gate he usually used before the house burnt down, and that it is 1 Lancelot Avenue.

- [47] When it was suggested to him that the Notice of Amendment of Valuation Roll dated 23<sup>rd</sup> April 1982 corrected the reference to the property occupied by Ms Walker, he said *"I can't attest to that"*. He indicated that Ms Walker was occupying neighbouring property, in 1982, and he came there and saw her. He agreed that the property he occupies does not have an address on McIntosh Drive and when asked if it did not have an address on McIntosh Drive in 1982 either, he said he came there in July 1982 and the gate was on Lancelot Avenue.
- [48] Notice of Amendment of Valuation Roll dated "13<sup>rd</sup> (sic) day of November, 2002" (Page 42 of Exhibit 1), was shown to Mr Brown and he identified Lot/Apt 11; area of land noted as 333.9200 sq. m; owner Ministry of Housing; name of person in possession as Matthew Stephens; effective date of amendment as 2003-04-01. Mr Brown was also shown (page 59 of Exhibit 1) the sketch plan of Lots 11 and 11A Long Mountain Pen, and he pointed to the top section, right hand side of Lot 11, at the corner of Lancelot Avenue and McIntosh Drive as the area he occupies, and pointed to the left hand side of Lot 11 (closer to Lot 12) as the part the Claimants occupy. When asked if he agreed that he and the Claimant shared occupation of Lot 11 Long Mountain Pen, he said there is a fence between and *"the two of us live on the lot"*
- [49] He stated that he was "not clear" of the year Mathew Stephens arrived at the property but it could be 1991. He further stated that in 1992 the house he occupied was damaged by fire and he agreed that at present there are both wooden and concrete structures on the side occupied by the Claimants.
- [50] Mr Brown said he had no personal knowledge of how Mr Bromfield came to be in occupation of the property and that based on the documents, he is aware that the property was owned by the Ministry and he acquired that knowledge from the late 80s. He also stated that Mr Bromfield told him he purchased the land but that he had no personal knowledge of any action taken by Mr Bromfield between 1975 and 1992. He said he knew of no address known as Lot 11 McIntosh Drive, and it was only based on the court documents that he knew any details about any

agreement for sale executed by the Claimant. He agreed that he did not know personally, and could not say, that Mr Bromfield owned and occupied 23 McIntosh Drive.

- [51] Under cross examination by Mr Austin, Mr Brown stated that 1 Lancelot Avenue was previously listed as 23 McIntosh Drive and there was a renaming and renumbering exercise in the scheme. He admitted that at present the 1<sup>st</sup> Claimant and himself do not enjoy a good relationship and that the relationship broke down in or around 2003 when Mr Stephens removed a section of fence between them both, entered on his side and said he was the owner. He said he is aware of Everly Hall, who is the owner of 21 McIntosh Drive.

### **Third Defendant's Evidence**

- [52] Ms Patricia Ramsaran, Legal Officer at the Ministry of Transport, Works and Housing, (now Ministry of Economic Growth and Job Creation) gave evidence on behalf of the 3<sup>rd</sup> Defendant/Ancillary Defendant. Her witness statement dated August 10, 2012 and filed August 17, 2012 was admitted as her examination in chief after she was sworn and the statement identified by her.

- [53] Her evidence consists of information contained in the records kept by the Ministry in relation to the property in question and it is from her evidence that many of the technical issues relating to this claim are sought to be explained. The records referred to are a substantial part of the documents agreed by the parties, admitted in evidence and referred to by the parties in their evidence.

- [54] She states that Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles "falls under Deposit Plan 4931" and in or around August 4, 1988, the 1<sup>st</sup> Claimant applied to purchase Lot 11 Long Mountain Pen, the application was approved on June 2, 1992, on June 15, 1992 the Claimant entered into an agreement with the Ministry of Housing to purchase the lot for \$15,000.00, paid the final instalment on the purchase price in or

around October 6, 1998 and title was transferred to him and his wife in July 2002.

- [55]** She states further that in or around January 2003 a review of DP4931 was conducted and it was discovered that Lot 11 which has an area of 3594.29 sq. ft., "is divided on ground into two lots", one lot was occupied by the Claimants and the other by Mr Josiah Bromfield.
- [56]** Ms Ramsaran adds that the Ministry's records reveal that Mr Bromfield applied to purchase "a cottage located at Lot 23 McIntosh Drive" the application was approved on February 3, 1975, the Minister of Housing and Mr Bromfield entered an agreement dated August 14, 1975 and in or about November 2002 he paid the final instalment, the account was closed and he was informed by letter dated December 5, 2002.
- [57]** She indicates that up to December 2002, and at the time the Ministry marketed Lot 11 to the 1<sup>st</sup> Claimant in 1992, "the Ministry did not realize that Lot 11 was one and the same property as 23 McIntosh Drive" and the land described in the Ministry's records as 23 McIntosh Drive "was incorrectly so described and it appears that after several re-numbering and re-surveying exercises ... it came to be known as 1 – 3 Lancelot Avenue. As a result, the land was erroneously sold twice".
- [58]** She also states that the 1<sup>st</sup> Claimant provided the Ministry with Notice of Amendment of Valuation Roll dated April 23, 1982, which shows that 23 McIntosh was amended to 1 – 3 Lancelot ... and the acreage was also amended. Mr Josiah Bromfield was shown to be the person in possession of the land also referred to as Lot 11. These amendments were effective as at April 2, 1974. She says that the property registered at Volume 1122 Folio 207 "by error of description encompass both Lot 11 McIntosh Drive purchased by the Claimants and 23 McIntosh purchased by Mr Bromfield.

- [59]** She states further that the property in issue was registered in the names of the Claimants in error and that it was “by error of and/or wrong description of parcels and /or boundaries that led to Lot 11 and 23 being transferred and/or included in one certificate of title registered at Vol 1122 Folio 207 ... in the name of the Claimants by the Ministry of Housing ...”
- [60]** She explained that “erroneously sold twice” meant that the Ministry entered two agreements for sale, one for 23 McIntosh Drive, with Mr Bromfield in the 70s, and another, in the 80s, for Lot 11, Long Mountain Pen with Mr. Stephens and that the Ministry intended to sell two separate lots to two parties. She added that the Ministry undertook several renumbering exercises and the lot intended for Mr Bromfield was inadvertently collapsed into the title that was transferred to the Claimants and that the net effect of these exercises was that the title transferred to the Claimants, unintentionally, merged the two lots into one, so that the property Mr Bromfield had, became a part of the title the Claimants received.
- [61]** In relation to what she described as an “error of description”, she said that the Ministry had intended to sell two parcels, but because of renumbering and resurveying, the error came, that, instead of two titles, the Ministry erroneously splintered one title, in the manner as it now appears. With regard to “anomalies...”, she said that because of the said renumbering and resurveying, the parcel at 23 McIntosh and the parcel denoted as Lot 11 were placed together as one lot, as noted as Lot 11 on the title.
- [62]** In cross examination by Mr Leiba, Ms Ramsaran agreed that she had said that the renumbering and resurveying is what led to the difficulties in relation to the sale. She however indicated that this is what she “gathered from the file”.
- [63]** When shown the agreement for sale between the Ministry of Construction and Mr Bromfield, she identified two dates, July 16, 1974, the date under

heading of the signature of a Justice of the Peace, and February 3, 1975, the date of the "Approval Stamp". She also identified Memorandum of Agreement dated August 14, 1975, as the document which sets out terms of agreement between the Ministry and Mr Bromfield, and when asked where it identified the property to be sold, she indicated that it says "all that parcel of land at Long Mountain Pen" but agreed that there was no lot number and that nowhere in that document is it written that Mr Bromfield purchased 23 McIntosh Drive and said "not in this document by itself"

**[64]** Ms Ramsaran said the property would have been registered land and indicated that there is no title reference of Volume and Folio, no reference to square footage, and there is no signature on behalf of the Ministry of Housing. When it was suggested to her that the document cannot and does not purport to sell 23 McIntosh to Mr Bromfield, she said "*not in its entirety, no*". When asked if it partially sells the property to Mr Bromfield, she said "*not this document alone*". She then indicated that there would have been the application form and inspection report, and the memorandum of agreement which would show what was going to be sold and to whom.

**[65]** When pressed, Ms Ramsaran stated that there was no reference in the Memorandum of Agreement as to the description of the property Mr Bromfield intended to purchase and when asked if the Memorandum of Agreement had referenced another document, whether that document would be included, she said "*that is what we were taught but that is not quite accurate*".

**[66]** Ms Ramsaran also stated under cross examination, that the inspection report is not one of the documents listed as one of the three documents combined for the agreement between the purchaser and the Ministry. She disagreed that there was nothing before the court based on a perusal of the Plan, that reflect that Mr Bromfield had agreed with the Ministry to purchase a specific property, identifiable on the Pre Checked Plan.

- [67] She agreed that based on the records of the Ministry, the Valuation Report is copy of the valuation secured by the Ministry in relation to Lot 11, Long Mountain Pen Scheme. She also agreed that it reflects 3000 sq. ft. and a valuation of \$15,000.00 and said it was her understanding that the valuation informed the price for which it was sold to Mr Stephens.
- [68] When shown the Application to Purchase House (page 28 of Exhibit 1) and asked whether it identifies property the applicant is seeking to purchase, she said there were 2 lots, and pointed out that '30A' was written, lines were drawn through it, and '11' put in place. She identified the signature of Matthew Stephens and the approval stamp and said that to the best of her knowledge, the approval stamp reflects the Ministry's intention to sell the property which the applicant requested on the application form.
- [69] She also identified (Page 59 of Ex 1) the sketch plan of two lots, Lot 11 and 11A, prepared for the Ministry, and identified (page 25 of Ex 1) the title registered at Volume 1122 Folio 207, and agreed that based on the sketch plan and the title, the sketch plan is referring to the title currently in the name of Matthew and Icilda Stephens and that based on the Ministry's record, what Matthew Stephens was agreeing to purchase is a lot approximately 3000 sq. ft. She also indicated that based on the sketch plan the area occupied by Mr and Mrs Stephens is approximately 1515 sq. ft.
- [70] She agreed that she had said that the property purchased by Mr. Stephens subsumed the land sold to Mr Bromfield and indicated that she was unable to identify, on the sketch plan, the approximately 3000 sq. ft. of land the Ministry intended to sell to Mr Stephens. When it was suggested to her that based on the documents before the court the Minister intended to sell, and did in fact sell Lot 11 Long Mountain Pen to Mr Stephens, she agreed. It was also suggested to her that based on the documents before the court, there was nothing to reflect there was an error on the part of Mr Stephens, when he

entered into the agreement for sale with the Ministry of Housing and she said “no”

- [71] When cross examined by Ms Buckle, Ms Ramsaran agreed that (Page 42) the Notice of Amendment to Valuation Roll speaks to Lot/Apt 11, 1-3 Lancelot Avenue, Kingston 3, “Tankerville Pen” and when asked if Tankerville Pen was a correct description, she stated that Tankerville Pen would be one of the names “that entire thousand and odd acres would have been known by”.
- [72] She agreed that in the Memorandum of Agreement, the address, 23 McIntosh Drive is given, and indicated that from her perusal of the document and other files in relation to Long Mountain Pen, there is a slight difference in the spelling and in relation to ‘Mackintosh’ and ‘McIntosh’, “it is one and the same”
- [73] With regard to “comments of area manager” stated on the “Interview Form”, (Page 79-80) Ms Ramsaran said the form is one of two that could have been filled out by persons who want to buy property from the Ministry. She noted that it had the signature of Mr Stephens, it is dated August 10, 1988 and said the section for ‘comments’ would be filled out by the person with responsibility for that area. This person, she said, would do a site visit and make an assessment and recommendation.
- [74] Ms Ramsaran said that Exhibits (pages 80 – 85) all speak to Lot 30 Long Mountain Pen while the Surveyors Identification Report dated June 8, 2004, which she agreed was prepared at the behest of the Ministry, states that it refers to Lot 11 and states “The subject property encroaches on Lot 11A. Lot 11 is informally (sic) subdivided into two lots”.
- [75] When shown (page 67) ‘Notice of Amendment of Valuation Roll’ she indicated that it speaks to 4845 sq ft, the address of the parcel of land is 23 McIntosh Drive, and the name is Josiah Bloomfield. She said the document was created under the Land Valuation Act, and where there is change of ownership there is

notice to the Valuation Roll to allow government to collect property taxes. She indicated that the date was 23<sup>rd</sup> April, 1982.

- [76] In re-examination, Ms Ramsaran agreed that she read documents which identified a particular parcel of land the Ministry intended to sell to Mr Josiah Bromfield and which Mr Bromfield intended to buy from the Ministry of Housing and that the “Form of Particulars...” (Page 60) would have the signature of the Minister, approving the sale.
- [77] She said the agreement for sale of property to Mr Bromfield would not have a volume and folio number noted, while that to Mr Stephens would have it noted, as the Memorandum of Agreement entered into by the Ministry was with respect to “slum clearance project” that was undertaken to regularize lands, and the records indicate that persons would have squatted on government land, personnel from the Ministry would meet with the people in occupation, and Mr Bromfield being one such person, indicated his desire to purchase the lot he was living on, which was 23 McIntosh Drive. She further stated that the Ministry would not have had the requisite plan in place at that time to allow for a description in terms of volume and folio number, but when Mr Stephens made his application, the Ministry was in possession of a Deposited Plan from which they would splinter title.

### **The Submissions**

- [78] At the close of the Trial, the court sought the assistance of Counsel by ordering that written closing submissions be filed by the Defendants on or before April 6, 2018 and a response by the Claimants on or before April 20, 2018. Submissions were filed on behalf of the 1<sup>st</sup> Defendant on April 6, 2018. The court was informed that as at December 20, 2019 those submissions had not been served on the Claimants’ attorneys-at-law. The court allowed additional time for the service of the submissions and the filing of the submissions in response by the Claimants.

- [79] On January 14, 2020 the Claimants' closing submissions were filed and on January 17, 2020, the court was informed that the 3<sup>rd</sup> Defendant adopts the closing submissions made on behalf of the 1<sup>st</sup> Defendant and also relied on skeleton submissions filed earlier in the proceedings. There were no closing submissions filed on behalf of the 2<sup>nd</sup> Defendant.
- [80] The court notes that the Claimants place reliance on the legal principles and authorities set out in the Skeleton Submissions filed February 19, 2015 and that the submissions filed on January 14, 2020 focussed on an analysis of the authorities and the evidence presented as well as addressed what Counsel described as "a number of inaccuracies set out in the 1<sup>st</sup> Defendant's Closing submissions".
- [81] I am grateful to Counsel for the submissions which I found to be extremely helpful and I will not restate them but will make reference to them where necessary, to show the reasons for the decision arrived at.

### **The Issues**

- [82] The background facts in this case are largely undisputed. A central issue is whether the 1<sup>st</sup> Claimant can prove on a balance of probabilities that he purchased the land comprised in Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles which is registered to him and his wife Icilda and is entitled to possession of all the land noted in the title. In addressing that issue, the court has to determine whether the indefeasibility of the title conferred on the Claimants prevents a claim by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant that they are equitable owners of 23 McIntosh Drive; whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have an interest in the property which could defeat the Claimants registered ownership; whether the Claimants are entitled to damages against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for trespass and loss of use of land since they became the registered proprietors and for completeness, whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired the lot they occupied by adverse possession and whether

the Ministry of Housing was negligent in selling the lots to the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Defendant.

### **Findings**

**[83]** Having assessed the demeanour and credibility of the witnesses and bearing in mind that the evidence contained in the Affidavit of Josiah Bromfield could not be tested by cross examination, and having examined the documentary evidence presented in great detail, I find the following facts proved on a balance of probabilities:

- (a) *There are two lots in issue which adjoin each other and are located at the corner of McIntosh Drive and Lancelot Avenue. The reference to the property as Lot 11 is by virtue of Deposited Plan No.4931. (DP) At the time of contracting with Mr Bromfield, there was no indication or description of the lot he was purchasing with reference to any DP or title. There was also no such reference in the contract entered into with Mr Stephens although there is the reference to Lot 11.*
- (b) *The title reference and DP, as well as the area of the land comprising the parcel of land referred to in the Notice of Amendment to Valuation Roll dated April 23, 1982 which gives the valuation date as March 1, 1974, has Josiah Bloomfield as the person in possession.*

**[84]** The Ministry of Housing contracted with the 1<sup>st</sup> Claimant and 1<sup>st</sup> Defendant for the sale and purchase of the lots occupied by them at the material time. The title which passed to Mathew and Icilda Stephens the legal title to the land, was transferred by registration to the Ministry of Housing on March 11, 1976 and at the time the property noted in the title was registered to the Ministry, it was described as one parcel, Lot 11.

**[85]** I find that the lot of land originally known as 23 McIntosh Drive, is the land which was occupied by Josiah Bromfield, now deceased, and is the land purchased by

him from the Ministry of Housing and is currently occupied by Garfield Brown. I also find that the 1<sup>st</sup> Claimant, Mathew Stephens, agreed to purchase the lot on which he was also residing which has been variously described as Lot 11, Lot 30 and Lot 30A.

- [86]** I have noted the differences in description and size of lots as noted by the surveyors, as well as the differences in lot numbers noted in the various documents. I have paid particular attention to the survey diagram attached to the Certificate of Title registered in March 1976, as obtained by the Ministry, and note that Lot 11 is at the corner of “Makintosh” Drive and what appears to be Lancelot Avenue and I bear in mind that all the surveys post-date the agreement between the 1<sup>st</sup> Claimant and the Ministry.
- [87]** The Notice of Amendment to Valuation Roll dated 23<sup>rd</sup> April 1982, with effective date of amendment being April 1974, and valuation date being March 1, 1974, shows Josiah Bloomfield as the owner in possession and that the civic address of the property was changed from 23 McIntosh Drive to 1-3 Lancelot Avenue. It includes a title reference and the DP, while the Notice of Amendment to Valuation Roll dated 13<sup>rd</sup> (sic) November, 2002 shows Mathew Stephens et al as owner in possession and it gives the postal address as 1-3 Lancelot and includes the same title reference and DP.
- [88]** I note also that on August 10, 1993, Matthew Stephens signed to a document, ‘Notice of Change of Possession of Land’ where the Ministry of Construction “passed out of possession of land” described as Lot 30 Long Mountain Pen and the area of the part transferred is 3000 sq. ft. There is also a handwritten document referring to application and interview form for Mr Matthew Stephens which is dated August 12, 1988. The report of the area manager also dated August 12, 1988, states: “Mr Stephens has been living on Lot 30A for the past 51 years...”. The interview form gives the address of Mr Stephens as 3 Lancelot Avenue.

[89] There is further documentary evidence, which I accept as true, that on December 5, 2002, Mr Bromfield was advised by the Ministry that his account was closed and he was to contact the legal department with regard to his title and this letter was addressed to him at 23 McIntosh Drive as well as further documentary evidence, in the form of an undated Receipt No 389912, which shows that Mr Bromfield paid to the Ministry, the sum of \$2,500.00, for the addition of name on Lot 11, and by letter dated December 19, 2007, he requested that Garfield Brown's name be added (as joint tenant) to the title to the lot he purchased.

[90] I find from the extensive documentary and other evidence, that the Ministry sold separate lots to the 1<sup>st</sup> Claimant and Josiah Bromfield, but that there was carelessness in the conduct of the transactions and errors in the documentation in relation to the transactions, including the error on the title transferring property to the Claimants, stating that the property was "all that parcel of land... being Lot 11..."

### **The Law and Discussion**

[91] It is established that under the Torrens system of land registration the legal estate which is vested by virtue of the Certificate of Title, gives the registered proprietors an absolute title to the property. The consequence of being so registered is that it affords them a title which is incapable of being challenged by a third party claiming legal interest in the property. This legal title can only be challenged on the grounds of fraud, prior registration, or mistake, error and/or mis-description of parcel or boundary. (See **sections 68, 70 and 71** of the **Registration of Titles Act**).

[92] It is also well established that "indefeasibility" refers to legal ownership and does not affect interests which may exist in equity and that indefeasibility does not mean that there can be no legitimate challenge, in equity to the legal owner. (See **Gardener and Others v Edward Lewis** [1998] UKPC 26)

[93] Lord Wilberforce in **Frazer v Walker**, [1967] AC 569 at page 585 expressed the principle, thus:

*“...their Lordships have accepted the general principle, that registration under the Land Transfer Act, 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under s.62 and s. 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant. That this is so has frequently, and rightly, been recognised in the courts in New Zealand and of Australia ...”*

[94] I am of the view that the nature and circumstances of the case at bar brings the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counterclaim within the in personam exception referred to by Lord Wilberforce, as I find on the evidence that as a result of the errors associated with the process of conveyancing, there has been a misdescription of the parcel of land purchased by the 1<sup>st</sup> Claimant, as reflected in the Certificate of Title transferred to them.

[95] It is clearly a case of office irregularities which have led to the situation now faced by the parties, as at the time of contract with the 1<sup>st</sup> Claimant, the Ministry was not then the registered title holder of the lots in question but was the owner of lands on which persons, including the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Defendant had been living and sought to have their possession and occupation regularised.

[96] There is no evidence of any proper subdivision having been undertaken prior to the agreements between the Ministry and these two purchasers. The documentary evidence presented shows that there have been errors leading up to the registration of the Claimants on the title and that the subsequent re-numbering exercises and subsequent surveys and re-surveys led to the errors being made and subsequently being discovered.

[97] It is the Ministry which created an unregistered interest in property to Mr Bromfield, by entering into agreement with him on August 14, 1975, for the sale and purchase of the property on which he was residing, then known as 23

McIntosh Drive. It is also the said Ministry which created what has now become a registered interest with Matthew and Icilda Stephens for the sale and purchase of Lot 11, (variously described as Lot 30 and Lot 30A on related documents) the lot on which I find as a fact that the Claimants were also residing.

**[98]** It is clear to me that in intending to identify the lot purchased by the 1<sup>st</sup> Claimant, the lot 11 which is comprised in the Certificate of Title registered to the Ministry, was transferred to the Claimants. The description of the property as such on the title would have been prior to the Ministry being registered as title holder and in any event, prior to the purchase and sale by the parties.

**[99]** Both the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Defendant led evidence that they purchased property from the Ministry for valuable consideration. The Ministry was noted on the title in 1976, and having transferred the property noted therein to the Claimants, they were given a valid title as there was no apparent defect in it.

**[100]** I bear in mind that there is evidence, which has not been contradicted, that the Ministry in communicating with Counsel for Josiah Broomfield by letter dated April 1, 2003, specifically stated, *inter alia*, that

*“...The lands at Long Mountain Pen were irregularly occupied ... and as part of a Slum Clearance exercise, the Long Mountain Pen Housing Scheme was developed ... Several of the lots were sold to the previous occupiers ... It was recently discovered that there were several anomalies between our files, the Deposited Plan from which the titles for lots in the scheme were issued, and the position on the ground. It is these anomalies that have led to what would appear at first blush to be the sale of Lot 11 to two different persons.... Due to several re-surveys and re-numbering exercises several lots in this scheme were re-numbered. As a result of this what was originally known as 23 McIntosh Drive came to be part of 3 Lancelot Avenue or Lot 11 Long Mountain Pen and part of 11A Long Mountain Pen. However the records were not amended to reflect this change...”*

**[101]** I therefore find no persuasion in the argument of Counsel for the Claimants that “the contract described the land accurately, in keeping with the correct Certificate of Title...”. The agreement for sale entered into by Mr Stephens and the Ministry does in fact speak to Lot 11, but it is not correct to say it is in keeping with the

correct Certificate of Title. At the time of the agreement between the parties, the Ministry was not yet vested with title, there is no indication in the document that it was referring to that Certificate of Title and the parties were clearly contracting for the sale and purchase of the lot of land then occupied by Mr Stephens. I note also that the very receipt dated August 1988, showing payment of \$3,000.00, indicates that it is "payment on Lot 30A Long Mtn Pen" the original lot number stated in the application to purchase house which is also dated August 1988.

**[102]** Counsel for the Claimants made heavy weather of the fact that the 1<sup>st</sup> Defendant's Counsel refer to the property as 'Lot' 23 McIntosh Drive, thereby confusing the civic or postal address with a lot number. I find that nothing turns on this. While I agree that Counsel for the 1<sup>st</sup> Defendant has fallen in error by referring to the property as "Lot 23", what has been borne out in the evidence and which I accept as true, is that the parties have been in exclusive occupation of two lots which had been delineated and demarcated by them, and have been held separately by them prior to the purchase by each, of the lot he occupied, and to the transfer of title to the Claimants of Lot 11.

**[103]** The evidence before the court is also clear that they have provided civic or postal addresses in documents signed by them from which this court has found that 23 McIntosh Drive is the civic address of the lot which Mr Bromfield purchased and the address to which correspondence had been sent to him. It is therefore the various re numbering exercises which took place subsequent to the purchases by the parties which have led to the present dilemma in which the Claimants and 1<sup>st</sup> and 2<sup>nd</sup> Defendants have found themselves.

**[104]** The Claimants have not led any evidence which I can find, on a balance of probabilities, establishes that they are entitled to all the land comprised in the certificate of title which was transferred to them. I find on a preponderance of probabilities that there is an error in the description of the land purchased by the 1<sup>st</sup> Claimant, as transferred to the Claimants, and noted on the title they received. The transfer to the Claimants in my view was made with the object of providing

title by registration of the lot the 1<sup>st</sup> Claimant had purchased from the Ministry but the transfer does not have that effect.

[105] The Claimants are therefore not entitled to succeed on this action because the overwhelming evidence, which I accept as true, is that the property transferred to them in the title has not properly described the property the 1<sup>st</sup> Claimant bought. The evidence is also clear and un-contradicted, that the Claimants and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were aware of each other's presence and occupation of the specific lot each sought to purchase.

[106] I also find it reasonable to conclude that Mr Stephens was contacted by the Ministry when the error was discovered. Mr Stephens is however maintaining that he had no discussion in relation to this and that he was not aware. In this regard, I do not find Mr Stephens to be a witness of truth.

[107] I find that this claim must therefore turn on the particular circumstances of the case and the Claimants would have needed to show that even if they gave valuable consideration for the legal estate transferred to them, they acted in good faith in that their consciences were not affected by knowledge or notice of any prior equitable interest. They have failed to do so.

#### **Whether Mr Bromfield/Mr Brown has an equitable interest in the property**

[108] The learned authors of **Megarry and Wade, The Law of Real Property**, 8<sup>th</sup> Edition, pointed out that if the purchaser is potentially entitled to the equitable remedy of specific performance, he obtains an immediate equitable interest in the property contracted to be sold. Equity "looks upon things agreed to be done as actually performed". It is therefore my view that Mr Bromfield would become the owner in equity of the lot he contracted to purchase from the Ministry of Housing.

[109] In **Lysaght v Edwards** (1876) 2 Ch. D 499 at 506 Jessel MR states:

*“...The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser...”*

**[110]** Mr Bromfield had a valid contract for sale. He paid the sums due under the contract and there is evidence that he was informed by the Ministry that he had completed his payments and was to contact the legal department in relation to his title. There is also evidence that he had paid the sum of \$2,000.00 to have Garfield Brown registered as joint tenant with him.

**[111]** Relying on principles of equity, the fact that there was no transfer to Mr Bromfield should not defeat the clear intention of the parties, which is, Mr Bromfield to purchase and the Ministry of Housing to sell, the property contracted for, i.e the property on which he was residing, then known as 23 McIntosh Drive. Mr Bromfield had been using the land in the manner in which an owner of land would have done and has shown that he had the requisite intention to possess, even after paying the purchase price. There is also evidence that his name was on the tax roll. Additionally, I find that as a purchaser in possession he would have been potentially entitled to the equitable remedy of specific performance.

**[112]** I accept that errors in earlier registration cannot entitle a party to ask a court to cancel the Certificate of Title of a person who was not privy to those errors. However, in the instant case, I find on the evidence that the property was registered to the vendor one year after the agreement for sale to Mr Bromfield. The agreement for sale with the 1<sup>st</sup> Defendant was therefore entered into without reference to any certificate of title as the vendor was not the registered title holder at the time of contracting.

**[113]** Registration creates title and as such an indefeasible title is conferred by the act of registration and I am satisfied that the Claimants, despite the time between the date of purchase and being registered on title, would have acquired an indefeasible title. They did no wrong in having been so registered but neither has the 1<sup>st</sup> Defendant who had a valid contract and was expecting to be registered on a title for the property on which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lived and for which Mr

Bromfield paid the purchase price and the sum required to have Mr Brown added to the title as joint tenant.

[114] Having regard to the scope and purview of Registration of Titles Act in relation to the indefeasibility of a title, I do not find that it was ever intended to sweep away the rights a purchaser, such as the 1<sup>st</sup> Defendant, had at the time of entering the agreement, and who having completed his payments had the expectation that he would receive a registered title.

[115] An equitable interest in the property was created by the signing of the Agreement for Sale and the passing of consideration between Mr Bromfield and the Ministry and by his factual possession prior to Mr Stephens, and his contract with the Ministry also prior to that of Mr Stephens. I am therefore of the view that Mr Bromfield's interest must override the interest which is now registered to the Claimants.

[116] When all the facts and circumstances are borne in mind, including their acceptance of the Certificate of Title and the communication with the vendor subsequently, which I find to be true, in the determination of the Claimants to risk the interpretation of the Registration of Titles Act, despite the rights of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, which they well knew of and must have understood or are taken to have understood, they cannot escape the conclusion that they are seeking to use the indefeasibility of their title to "reap a windfall".

[117] I do not find that it would be inconsistent with the Torrens System of Registration for this court to uphold a claim in circumstances such as this, against the registered interest of the Claimants. It is my view that the necessary elements of the in personam jurisdiction of the court have been satisfied as it is my understanding that such jurisdiction also recognises that the registered proprietor does not take free of interests which his own conduct binds him to acknowledge.

[118] I find support for this view in the case of **Oh Hiam v Tham Kong** [1980] 2 MLJ 159 at 164 where Lord Russel, said, *inter alia*,

*“ ... indefeasibility of title does not interfere with the ability of the court in exercising its discretion in personam, to insist upon proper conduct in accordance with the conscience which all men should obey ...”*

[119] I bear in mind that it was subsequent to the efforts of the Ministry to correct the error in relation to the title registered to the Claimants that the 1<sup>st</sup> Claimant sought to exercise rights over the lot of land occupied by Mr Bromfield and thereafter brought a claim seeking recovery of possession, among other reliefs. The conduct of the 1<sup>st</sup> Claimant, I find would give rise to certain obligations which equity requires him to observe and I therefore believe this is a classic case where such an interest is created as the registered proprietors' consciences have been engaged as a result of the circumstances and they are seeking to benefit from the error.

[120] I therefore find that on being registered on the title, Mr Stephens did not receive precisely what he contracted for as the property noted in the title does not properly describe the lot he was residing on and purchased.

#### **Whether Mr Bromfield has an equitable interest by virtue of adverse possession**

[121] For the sake of completeness, I will briefly address this aspect of the 1<sup>st</sup> Defendant's counter claim, separately.

[122] I note that as an alternative, Mr Bromfield's counterclaim was that he has an equitable interest in the property by virtue of adverse possession. He has however provided no evidence to show that his occupation of the property was undisturbed or without the consent of the owner.

[123] In the case of **Recreational Holdings (Jamaica) Limited v Lazarus and the Registrar of Titles** [2014] JMCA Civ 34, Morrison JA (as he then was) at paragraph 55 of the judgment, in affirming the submission of Counsel, stated, *inter alia*:

*“ ... ‘adverse possession cannot be claimed by a person whose possession was obtained and continued by virtue of the consent, grant or otherwise from the true owner ...’ . The important factor on all the*

*authorities is that ... in order to ground a claim for adverse possession, must be (i) inconsistent with and in denial of the title of the true owner; and (ii) such that the owner is entitled to recover possession against the squatter.”*

[124] The Ministry was the owner of the entire property and they were aware of the presence of the parties and clearly consented to the occupation by Mr Bromfield. The property was transferred to the Claimants in July 2002 and in 2003 the Claimants sought to recover possession.

[125] There would be no ‘adverse’ rights which would have accrued to the 1<sup>st</sup> or 2<sup>nd</sup> Defendants. I therefore find that Mr Bromfield would have no equitable interest by virtue of adverse possession.

**Whether the Claimants are entitled to damages for trespass and loss of use of property**

[126] The Claimants’ claim for damages is based on a claim for loss of use of the property as well as trespass. The 1<sup>st</sup> and 2<sup>nd</sup> Claimants became the registered proprietors of the property noted in the Certificate of Title registered at Volume 1122 Folio 207 in 2002. They are claiming for loss of use of the lot occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as at the date they were registered as proprietors.

[127] It is the Claimants’ evidence that during their occupation and subsequent registration of title to the property, they treated the adjoining property occupied by the 1<sup>st</sup> Defendant as a separate parcel of land. There is even an admission that a fence was erected creating two distinct and separate properties. This was the existing state of affairs between the parties until 2003 when the Claimants were informed that the Certificate of Title issued to them giving them legal ownership of property they bought, included the parcel of land being occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

[128] It would be manifestly unfair that a person who had acquired or was in the process of acquiring what would amount to an overriding interest in a parcel of

land prior to the present registered proprietors, should be made to forfeit such interest simply because the Claimants have been registered on the title.

[129] Mr Stephens' improper attempt to rely on legal rights based on being registered as proprietor ought not to be countenanced, as notions of inherent fairness and justice should not be undermined by the principles of indefeasibility.

[130] The Claimants have also not established at all, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant have committed a trespass in relation to land of which they are now the registered owners. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants would have been occupying as purchasers in possession from the Ministry before the Claimants were registered on title.

[131] The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have always maintained the disputed property and have always been in possession and occupation and this has been even before the Claimants came into possession or occupation of the lot on which they resided. The Ministry sold the property occupied by the Claimants to the 1<sup>st</sup> Claimant and at the time of transfer additional property was conveyed to him and his wife. The 1<sup>st</sup> Claimant would have bought the lot which he occupied with actual notice that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were in actual possession of the lot which has been transferred to him and his wife.

[132] The circumstances of this case clearly negate a finding of trespass in favour of the Claimants. The Claim for damages for trespass and loss of use of property therefore fails.

**Whether the Ministry of Housing was negligent in selling the property to the Claimants and the 1<sup>st</sup> Defendant**

[133] It is clear on the evidence presented that the Ministry intended to sell two separate lots to the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Defendant. The title to the property which was registered to the Claimants was first registered to the Ministry in 1976,

subsequent to the agreements to purchase the lots, and the transfer to the Claimants was made in 2002.

- [134]** The Ministry took approximately ten years from the date of the agreement of sale with Matthew Stephens to discover that there was an error on the title registered to the Claimants. I find that it is more likely than not that there was resurveying and renumbering exercises conducted throughout the years which have led to incorrect description of the lots and there is documentary evidence to show this.
- [135]** Additionally, an examination of the Notice of Amendment to valuation roll dated April 23, 1982 which clearly states Josiah Bloomfield as person in possession and for the change of postal address and property address from 23 McIntosh, to 1-3 Lancelot, and the Notice of Amendment dated November 3, 2002 which states the person in possession as Matthew Stephens et al with postal address 1-3 Lancelot shows that there are errors in the description of the parcels of land which were occupied by the Claimants and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- [136]** Had the Ministry acted with due diligence to ascertain the correct description and square footage of the lots they were selling, especially in view of the fact that there was slum clearance activity which in fact led to the sale of the properties in question, it would have discovered the true occupation of the lots and even up to the time the title was registered in the name of the Ministry, and transferred to the Claimants, would not have property sold to Josiah Bromfied “subsumed ... collapsed...” in the title registered to the Claimants.
- [137]** I therefore find that the state of affairs that has resulted in the circumstances is due to the negligence of the Ministry in their transactions and record keeping. They failed to correctly identify the particular lots being sold to the parties or to carry out any surveys or proper checks before effecting a transfer of the land contained in the Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles to the Claimants.

**[138]** The clear evidence in this case is that both Mr Stephens and Mr Bromfield were in occupation of the lots of land which they purchased and they occupied their respective lots exclusively, having fenced their respective holdings and using separate entrances. They did so openly and without any disturbance from each other until after the parcel of land noted on the title, was transferred to the Claimants in 2002, and in 2003, the 1<sup>st</sup> Claimant discovered that the title he had, included land occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and he sought to recover possession of it.

**[139]** The Claimants are therefore not entitled to possession of all the land contained in Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles and it would be unconscionable for the Claimants to be allowed to take possession of the lot purchased by Mr Bromfield.

### **Conclusion**

**[140]** On the totality of the evidence presented, it has been established that the lots in issue were being divested by the then Ministry of Housing. The overwhelming finding from the evidence is that the lot each party was purchasing was the lot which he occupied, and that each party has always treated the other as if the lot occupied by him, belonged to him. It is also clear that the Ministry sold the lands which were occupied by the 1<sup>st</sup> Claimant and the 1<sup>st</sup> Defendant to them.

**[141]** The problem which is to the heart of this claim clearly points to the fact that it is the re-surveys and re-numbering exercises which took place are part of what have led to the state of affairs as now exists as, as at April 23, 1982, Josiah Bloomfield was noted as the person in possession of the disputed property described as Lot 11, while in November 2002, by virtue of another Notice of Amendment to Valuation Roll, the name of the person in possession of Lot 11 was stated as Matthew Stephens. I therefore find that the evidence of Mr Brown that “the two of us live on the lot” referring to the occupation of the lot described as Lot 11 Long Mountain Pen, sums up what has taken place.

[142] The 1<sup>st</sup> Defendant had a valid agreement for the purchase of the property he occupied, which remains extant, while the Claimants are now registered as proprietors of the lot referred to as Lot 11, although it is clear that the agreement Mr Stephens entered into with the Ministry was for the purchase of the lot he was residing on (which has been variously described as Lot 30A; Lot 11, and the notice of change of possession dated August 10, 1993 speaks to Lot 30).

[143] If measures associated with the verification of the identity of the lots in question and the connection of the persons to the land had been undertaken by the vendor, the state of affairs that have arisen would have been non-existent.

[144] Although indefeasibility is at the core of the Torrens system of land registration, I accept that it is not an absolute principle and it is my considered view that an equity arises in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as a result of the circumstances surrounding the sale and purchase of the lots occupied by the Claimants and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which has been further compounded by the conduct of the 1<sup>st</sup> Defendant in seeking to claim a lot of land which he had not purchased. To insist on the principle of indefeasibility under the circumstances of this case will result in injustice to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and a windfall to the Claimants.

[145] In all the circumstances and for all the reasons set out above, the declarations and orders sought by the Claimants are refused.

[146] There will therefore be judgment for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants / 1<sup>st</sup> and 2<sup>nd</sup> Ancillary Claimants on the claim and on their counterclaim and on the ancillary claim against the 3<sup>rd</sup> Defendant/Ancillary Defendant

### **Disposition**

[147] It is hereby declared as follows:

- (i) That property purchased by Josiah Bromfield formerly known as 23 McIntosh Drive, Long Mountain Pen, was included in the Certificate of

Title registered at Volume 1122 Folio 207 of the Register Book of Titles by error of and/or wrong description of parcels or boundaries;

- (ii) That the Claimants are not entitled to possession of all the land comprised in the Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles;
- (iii) That Josiah Bromfield, previously named as Hezekiah Bloomfield, was the owner in possession of the parcel of land described as 23 McIntosh Drive which has been included in the transfer of Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles in error.

**[148]** It is hereby ordered that:

1. The Claimants shall within ten days of the date hereof, deliver up the Duplicate Certificate of Title registered at Volume 1122 Folio 207 of the Register Book of Titles to the Registrar of Titles;
2. If the Claimants fail, neglect or refuse to deliver up the said Duplicate certificate of title, the Registrar of Titles shall cancel the Certificate of Title registered at Volume 1122 Folio 207;
3. The Ministry of Economic Growth and Job Creation shall within 14 days of the date hereof, prepare the requisite documents to facilitate the re-conveyance to them by the Claimants of the land transferred by Transfer No.1194561, registered the 16<sup>th</sup> day of July, 2002;
4. The Claimants shall within 21 days of being required so to do, execute the relevant documents to re-convey the land transferred to them by the said Transfer No 1194561;
5. The Ministry of Economic Growth and Job Creation shall employ a reputable commissioned land surveyor and provide instructions to him/her

for an updated survey diagram to be prepared to delineate, demarcate and identify the lots occupied by the Claimants and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants;

6. The Ministry of Economic Growth and Job Creation shall prepare the necessary documentation and make the necessary applications to the relevant authorities for subdivision approval, if necessary, and for the splintering of the Certificate of Title registered at Volume 1122 Folio 207 to permit separate titles to be issued to the Claimants and the 1<sup>st</sup> Defendant for the lots purchased;
7. The Ministry of Economic Growth and Job Creation shall, within 21 days thereafter, prepare the relevant instruments of transfer to convey the lot identified as the lot purchased by Josiah Bromfield, to the Administrator General of Jamaica, Administrator of the estate of Josiah Bromfield, or the beneficiaries of the estate of the said Josiah Bromfield, and Garfield Brown as joint tenants, and the lot identified as the lot purchased by the 1<sup>st</sup> Claimant, to the Claimants;
8. If any of the parties fail, neglect or refuse to sign any documents necessary to give effect to this order within 21 days of being required so to do, any one of the Registrars of the Supreme Court is empowered to sign any and all such documents;
9. All costs and fees incidental to the preparation of the requisite documents and registration of transfers and survey referred to above, are to be paid by the Ministry of Economic Growth and Job Creation;
10. Costs of the proceedings to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be paid by the 3<sup>rd</sup> Defendant;
11. There shall be liberty to apply;

12. The attorneys-at-law for the estate of Josiah Bromfield are to prepare, file and serve the formal order.