

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT**

Common Law and Equity Division

2015/CLE/gen/00845

BETWEEN

MONTAGUE INVESTMENTS LIMITED

Plaintiff

AND

WESTMINSTER COLLEGE LTD.

First Defendant

AND

MISSION BAPTIST CHURCH

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Dwight Ginton of Lennox Paton for the Plaintiff

Mr. Anthony Thompson for the First Defendant
Second Defendant, although properly served, did not participate
in the proceedings

Hearing Dates: 11 June, 12 June, 15 June, 20 July, 10 October, 12 November
2018

**Trespass – Trespass to land – Defendants admitted erecting wall, fence and road on
land – Whether land belongs to Plaintiff**

**Pleadings – Purpose of pleadings – Defendants raised adverse possession in affidavit
evidence and submissions but not in pleadings – Parties are bound by pleadings**

**Adverse Possession – Real Property Limitation Act, 1874 – Real Property Limitation
(No.1) Act, 1874 – Section 16 of the Limitation Act, 1995 – Whether Court should grant
relief sought by Plaintiff**

The Plaintiff instituted the present proceedings against the Defendants seeking, among other things, a Declaration that the Defendants have committed acts of trespass on its land and for damages for trespass. The Plaintiff also seeks an injunction to restrain the Defendants, its servants and/or agents from such further acts of trespass.

The First Defendant admitted to the acts of trespass but stated that the Second Defendant purchased the land in 1984. The First Defendant did not allege in its pleadings that it adversely possessed all or part of the Plaintiff's land. The First Defendant did so in affidavit evidence and in submissions.

HELD: Finding that the Plaintiff is the owner of the land and that the Defendants committed acts of trespass, this Court will grant the relief sought by the Plaintiff including an order for damages to be assessed and costs.

1. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The First Defendant or indeed both Defendants cannot now turn around and raise adverse possession in affidavit evidence and/or in submissions: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018 relied upon.
2. Any unjustifiable intrusion by one person upon land that is in possession of another amounts to a trespass. It is a trespass to place anything on or in the land which is in the possession of another: **Simpson v Weber** (1925) 41 TLR 302. It matters not how trifling the nature of the action is, a suit in trespass will lie: **Robert Addie and Sons (Collieries), Limited v Dumbreck** [1929] A.C. 358; **Macnab and another v Richardson and another** [2008] EWCA Civ 1631 and **Paradise Island Ltd. v. El Condor Enterprises Ltd.** [1992] BHS J. No. 133 applied.
3. On the evidence adduced by the parties, the Court found that the Plaintiff is the owner of the land and the First Defendant committed acts of trespass by constructing a fence, wall and a paved road.
4. Even if the First Defendant can successfully rely on the doctrine of adverse possession (which this Court has found that the First Defendant cannot because it is bound by its pleadings); it has failed to show that it has been in continuous possession of that portion of the Plaintiff's property for a continuous period of 12 years to oust the Plaintiff: section 16 of the Limitation Act, 1995 applied.
5. It is trite law that a person's title to land including the person who has the documentary title ("the paper owner") is only good in so far as there is no other person who can show a better title. The effect of adverse possession is that another person may dispossess the paper owner if the paper owner fails to assert his superior title within the requisite limitation period.
6. In order to dispossess the paper owner, the First Defendant must establish both (a) factual possession and (b) the requisite intention to possess. **J A Pye (Oxford) Ltd and another v. Graham and another** [2002] UKHL 30 and **Powell v. McFarlane** (1977) 38 P & CR 452. The First Defendant has fallen woefully short of doing so.

JUDGMENT

Charles J:

Introduction

[1] The Plaintiff, Montague Investments Limited ("Montague"), is a Bahamian company. It commenced this action by generally indorsed Writ of Summons filed on 17 June 2015 against the First Defendant, Westminster College Ltd.

("Westminster"), seeking, principally, a Declaration that Westminster has committed acts of trespass on its land, the subject matter of this dispute ("the land").

- [2] Westminster is a Bahamian company. It operates a College under the name and style of Westminster College ("the College") which is located on Blake Road on property adjacent to the land owned by Montague. Westminster filed its Defence on 28 July 2018 and alleged that the land which it occupies was purchased by the Second Defendant, Mission Baptist Church ("the Church") in 1984.
- [3] The Church was made a party to the proceedings on 18 April 2016 when Montague obtained an Order from the Court (Deputy Registrar Meeres) to amend its pleadings.
- [4] The Amended Writ of Summons and Amended Statement of Claim were filed on 3 May 2016. In paragraph 2, Montague averred that the Church is and was, at all material times, a Bahamian company and the owner of a tract of land situate on Blake Road which lies immediately north of the land.
- [5] The Church was served with the Amended Writ of Summons and Amended Statement of Claim but has not entered an Appearance or a Defence in the action. The pastor of the Church is Reverend Dr. Rueben E. Cooper, Jr. ("Dr. Cooper"). He is also the President of Westminster who swore an affidavit in the proceedings on 24 July 2015.

Some background facts

- [6] By an Indenture of Conveyance dated 18 September 2013 between Ira H. Smith and Montague, the latter became the owner of "ALL THAT piece parcel or tract of land comprising 6.06 acres and situate on the western side of Blake Road in the Western District of the Island of New Providence and is bounded Northwesterly by land now or formerly the property of Richard Carlson and running thereon One Thousand One Hundred and Thirty-nine and Eighty-seven Hundreths (1,139.87) feet Northeastwardly by Blake Road and running thereon One Hundred and Sixty (160) feet Southeastwardly by land comprising a One

(1) Acre tract now or formerly the property of J and O Properties Co. Ltd and running thereon Four Hundred and Thirty-five and Sixty Hundredths (435.60) feet again Northeastwardly by the said One (1) acre tract now or formerly the property of J and O Properties Co. Ltd. and running thereon One Hundred (100) feet again Southeastwardly by land now or formerly property of Larry Roberts and running thereon Seven Hundred and Fourteen and Sixty-eight Hundredths (714.68) feet Southwestwardly by land now or formerly the property of Bahamas Land and Investment Company Limited and running thereon One Hundred and One and Seventeen Hundredths (101.17) feet and Northwestwardly again by land now or formerly the property of Bahamas Land and Investment Company Limited and running thereon Two Hundred and Five and Twenty-five Hundredths (205.25) feet.”

[7] By an Indenture of Conveyance made on 17 February 1984, James Pratt conveyed to the Church ALL THAT piece parcel or part of a tract of land situate at Blake Road in the Western District of the Island of New Providence and lying immediately north of the land.

[8] In or around 2014, Mr. Steven Carey, a director of Montague, visited the land and discovered various encroachments. He discovered a wall which is a part of the entrance gate of the College. He also discovered a road leading to the entrance of the College which, according to him, also encroaches upon the land. Further, persons associated with the College have been parking on the land along its northern boundary.

The pleadings

[9] By its Defence filed on 28 July 2015, Westminster admitted that Montague is the owner of ALL THAT piece parcel or tract of land comprising 6.06 acres and situate on the western side of Blake Road.

[10] In paragraph 6 of the Statement of Claim, Montague averred that during a site visit to the land in early 2014, Mr. Carey noticed that Westminster, its servants or agents had wrongfully constructed on the land a fence and a wall, which is a part of the entrance gate of the College. According to Mr. Carey, the access road leading to the entrance of the College also encroached on the land. Upon

further inspection, Mr. Carey noticed the boundary marker could be seen in the tarmac of the road. He alleged that Westminster, its servants or agents had wrongfully paved over the boundary marker.

[11] In paragraph 6 of its Defence, Westminster denied what is contained in paragraph 6 of the Statement of Claim but admitted that the construction of a fence and a wall on the land (which is part of the entrance gate of the College) and the paving over the boundary markers, were carried out by its predecessors in title, its agents and servants. Westminster then alleged that “*the land occupied by the Defendant was purchased in 1984 by the Mission Baptist Church and has been used by that body since. A part of the mission work of the said Church is the Westminster College which was incorporated by the Defendant in 2005*”.

[12] In paragraph 7 of the Defence, Westminster admitted that its patrons parked vehicles on the land that had been cleared down.

[13] In my opinion, the main contention between the parties relates to the ownership of the land. Nowhere in its Defence did Westminster plead any right of adverse possession which was the core submissions made by learned Counsel, Mr. Thompson, who appeared for Westminster. The doctrine of adverse possession surfaced for the first time in Dr. Cooper’s affidavit which formed the evidence in chief for the First Defendant in the trial.

[14] It is therefore necessary to say a bit about pleadings.

Purpose of pleadings

[15] The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded, because that will come from the affidavits and cross-examination thereon or by oral evidence.

[16] In **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the

pleadings. At para. 39 of the judgment, Sir Michael Barnett JA (as he then was) stated:

“The starting point must always be the pleadings. In *Loveridge and Loveridge v Healey* [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:

“In *Mcphilemy vs Times Newspapers Ltd.* [1999] 3 ALL ER 775 Lord Woolf MR observed at 792-793:

‘Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear **the general nature** of the case of the pleader.’ “[Emphasis added]

[17] At paragraph 40 of the Judgment, Sir Michael went on to state:

“It is on the basis of pleadings that the party’s decide what evidence they will need to place before the court and what preparations are necessary for trial.”

[18] Thus, pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear **the general nature** of the case of the pleader and the court is obligated to look at the witness statements to see what are the issues between the parties.

[19] In the present case, Westminster did not plead that it had established any right of adverse possession. Reiterating, it was raised for the first time in the affidavit of Dr. Cooper. In addition, the issue of adverse possession was the focus of submissions raised by Mr. Thompson. Affidavit evidence and submissions of Counsel do not amount to pleadings. Therefore, Westminster will be estopped from raising any right to adverse possession.

The issues

[20] Two issues arise for consideration namely:

1. Whether Montague is the owner of the land and;
2. If the answer to issue 1 is in the affirmative, whether Westminster, its

servants or agents committed acts of trespass?

The law relating to trespass

[21] Trespass to land is a medieval concept, much developed by the common law. Any unjustifiable intrusion by one person upon land that is in possession of another amounts to a trespass. It is a trespass to place anything on or in the land which is in the possession of another: **Simpson v Weber** (1925) 41 TLR 302. It matters not how trifling the nature of the action is, a suit in trespass will lie.

[22] In **Robert Addie and Sons (Collieries), Limited v Dumbreck** [1929] A.C. 358 **Asquith LJ** defined a trespasser at page 371 as:

“The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to.”

[23] In **Macnab and another v Richardson and another** [2008] EWCA Civ 1631, at paragraph 19, **Lloyd LJ** defined trespass as follows:

“... the slightest encroachment on another's land is a trespass. So even if the extent of the encroachment in this case is that the mesh, which constitutes the fence in this present case, was over the Richardsons' land but the fence posts were still on the Macnabs' land then the mesh of the fence was an encroachment and a trespass.”

[24] Similarly, in the Bahamian case of **Paradise Island Ltd. v. El Condor Enterprises Ltd.** [1992] BHS J. No. 133, **Thorne J** held that the encroachment of a wall on the plaintiff's property was a trespass by the defendant.

[25] In the present case, the encroachment of the fence, wall and road constitutes trespass by Westminster on the land. Parking can also give rise to trespass as was held in **Patel and others v W H Smith (Eziot) Ltd and another** [1987] 2 All ER 569.

The evidence

[26] Montague called two witnesses, namely Mr. Steven Carey and Mr. Hubert Williams to testify on its behalf while Westminster called Dr. Cooper to testify on

its behalf.

- [27] Mr. Carey filed a witness statement on 20 August 2015 which stood as his evidence in chief at the trial. He is a director of Montague. He stated that, by an Indenture of Conveyance dated 18 September 2013, Montague obtained title to 6.06 acres of land situate on the western side of Blake Road. He said that after Montague purchased the land, a survey was conducted which showed encroachment on the land. Subsequently, he visited the land in or around 2014 and discovered various encroachments including a wall, fence and road. Mr. Carey testified that he saw vehicles parked on the land which appeared to belong to visitors of Westminster.
- [28] Mr. Carey stated that, during one of his subsequent visits to the land, he met with Dr. Cooper. He mentioned to him that certain areas of the College were encroaching upon the land and requested that all encroachments be rectified. By email dated 24 March 2014 to Dr. Cooper, he made a further request for the fixtures on the land to be removed.
- [29] By letter dated 5 February 2015, Montague, through its attorneys, Messrs. Lennox Paton wrote to the Principal of the College demanding a removal of the wall and road from the land and for employees and/or visitors of Westminster to cease their trespass on the land. Another letter was sent by Lennox Paton, this time to Dr. Cooper.
- [30] Not having received a response, Montague instituted the present proceedings in trespass.
- [31] During cross-examination by Counsel for Westminster, Mr. Carey confirmed that Montague purchased the land in 2013. He also confirmed that he did not view the land before its purchase and the realtor did not mention any activity on a portion of the land.
- [32] During further cross examination, Mr. Carey indicted that there were plans prepared by an architect who recommended that a survey be done of the land. The surveyor was the one who indicated that there were encroachments.

- [33] The second witness to give evidence on behalf of Montague was Mr. Hubert Williams, a self-employed licensed Land Surveyor and Photogrammetrist, who previously worked at the Department of Lands and Survey for 27 years. He relied on his witness statement filed on 8 June 2018 and testified that its contents are true and correct.
- [34] He stated that, on or about 31 May 2018, he was requested by Counsel for Montague, Mr. Glinton to assist in identifying the land use history of activity over a parcel of land located on the western side of Blake Road in the vicinity of Family Medical Centre and Store Away Ltd.
- [35] Mr. Williams stated that the land is identified on a survey plan by Warren and Associates dated February 2014. Resulting from that plan, he reviewed aerial photographs of the land that were taken and lodged for Public Record in the Department of Lands and Survey for the years 1982, 1995, 1999, and 2004.
- [36] The aerial photographs are normally taken approximately every four (4) years for the purpose of updating large scale maps of New Providence and also to monitor development in the Family Islands. Using these aerial photographs, he was able to identify the following land use scenery:
- a. Areas of land recently cleared;
 - b. Areas cleared sometime before the date of photography and now appear overgrown with bush;
 - c. Areas covered with tall bush; and
 - d. Structures such as buildings, roads, docks, and wall etc.
- [37] Mr. Williams further testified that he reviewed aerial photographs of the land which were taken on 21 December 1982 from a flying height of 5,000 feet: see photos BA.112-6-41 and BA112-6-42 attached at Exhibit 2. These photographs show the land covered with bush which includes brood leaf trees mingled with young pine trees. The land to the north of the land in question is covered by low vegetation which means that this land was cleared by tractor sometime before the date of the photographs.

- [38] Mr. Williams next reviewed an aerial photo of the subject land which was taken on 8 November 1995: Photo Nos. 10 and 11, 4031/BA – 3 attached at Exhibit 3. According to him, the photograph shows the northern boundary line for the land; which is the common boundary with Westminster property. The land in question is covered with young pine trees with a small area along the common boundary line that is covered by thick bush. The southern boundary and the western boundary of the land in question cannot be identified on the 1995 photos. The 1995 photos show an 8 sided foundation for a building on the Westminster property with a small shed that is located midway of the property. The Westminster property has been cleared of vegetation but the back section is overgrown in 1995.
- [39] He next reviewed photographs taken on 3 November 1999, NP116 BA-N0.6 Photo Nos. 13 and 14 attached at Exhibit 4 which show the land in a condition similar to that in the 1995 Photo. There is a curvy road on the Westminster property that runs from Blake Road westwards to a building that is constructed near to the western boundary. The common boundary line between the land and the Westminster property is cleared but not defined.
- [40] Mr. Williams next reviewed photographs taken on 25 January 2004, Run 11 Photos No 108 and 109 attached at Exhibit 5 which show no activity on the land in question except along the northern boundary. There is a paved roadway that runs along the southern boundary of the Westminster property with a clearing on the southern side of this pavement to the bush line, that is approximately (15-20) feet onto the land.
- [41] During cross-examination, Mr. Williams confirmed that there was possibly some occupation on Westminster's land prior to 1982. He further confirmed that, according to the 1995 aerial photo, Westminster's property had been cleared of vegetation except for the back portion. He also testified that the 1999 aerial photos show that a curvy road on Westminster's property runs from Blake Road westward to a building that is constructed and that the common boundary line between the parties is "*cleared but not defined*". Mr. Williams went on to explain that when he said "*defined*" he meant that he "*doesn't know exactly where the common boundary is*".

- [42] Mr. Williams asserted that he was not aware that the paved road was named R.E. Cooper Boulevard.
- [43] Upon re-examination, Mr. Williams confirmed that he did not see a road between Montague and Westminster' tract on the aerial photos of 21 December 1982, 8 November 1995 and 3 November 1999. In addition, he did not see a paved road on Westminster's property adjacent to Montague's property in the 25 January 2004 aerial photo.
- [44] Dr. Cooper testified on behalf of Westminster. He relied on his affidavit filed on 20 August 2015. He did not comply with the Directions Order of the Court to file a witness statement. Indeed, the record reflected that he or his Counsel did not attend any of the court's hearing leading up to the trial but showed up on the day of the trial.
- [45] In his affidavit, Dr. Cooper alleged that the hereditaments were purchased in 1984 by the Mission Baptist Church and has been utilized by that body and Westminster from that time to the present. On 26 August 1988, the Department of Physical Planning gave Approval in Principle to the proposed development for Mission Baptist Church-Blue Hill Road subject to the provision of a 20 feet wide service road parallel to Blake Road, and a 50 feet buffer strip adjacent to the service road: Exhibit REC-2.
- [46] He stated that the wooden structure was remodeled to a more durable structure in or about 1986 in which a caretaker resided. A chain was also put in place across the road and permanent structures were placed on the property as finances allowed. Construction continued over the years and save and except for an abandoned structure at the end of Blake Road and John F. Kennedy Drive, there were no developments in Blake Road when construction had commenced in 1989. During the raining periods, the hereditaments became overly saturated and impassable and much work was done to provide fill on the hereditaments to allow passage to and from the road, which was subsequently named R. E. Cooper Boulevard by the Government of the Bahamas. It was paved with asphalt in 2000.

- [47] Dr. Cooper claimed that, from the date of the purchase of the hereditaments in 1984, the Church has used the property for religious service and educational development. An Academy approved by the Ministry of Education commenced on the hereditaments in 2000 with some ninety (90) students. The name was later changed to Westminster College. A company to operate the college named Westminster College Limited, the First Defendant in the proceedings, was established on 17 June 2005 to continue and develop the work of the College.
- [48] Dr. Cooper asserted that *“The strips of land the subject of this Action are shown on the Plan now produced and shown to me marked Exhibit “REC.3”. It shows the 20 feet wide road Paved Road Way and an adjacent strip extending from Blake Road Way to the end of the Lot purchased as church property. The two strips together with the other church property extend to 240.72 feet on Blake Road. The church bought 209.28 feet which shows the encroachment to be 31.44 feet approximately 50% or 10 feet off the roadway at the front, and about twenty per cent past the security gate. These together with the parking area are outside the boundary of the said hereditaments but were used to facilitate the activities on the said hereditaments from the 1980’s.”*
- [49] He further stated that there is a chain link fence extending over the length of the roadway and parking area which was broken by a chain gate controlled by a guard house. This prevented Montague from going beyond the fence which was enforced by a low stone wall with concrete posts. The fence and parking areas with the guard house are essential to the work of Westminster.
- [50] Dr. Cooper stated that no one has ever questioned their occupation of the encroached strips until the first quarter of 2014 when he was approached by Mr. Carey who subsequently emailed him to request that he ceases the trespass and to remove the wall and road. **He said that Montague’s predecessor in title, Mr. Ira H. Smith, who acquired Montague’s tract of land in 1985, never interfered with the possession of the encroachment by Westminster or its predecessor in title, Mission Baptist Church.**

- [51] Dr. Cooper was cross-examined as to his position with the Defendants. He said that he is the pastor of the Church and President of Westminster.
- [52] He further testified that Dr. R. E. Cooper Boulevard is located on Blake Road, the main entrance to the College, and that it [the road] was a tribute by the nation to their late founding pastor. He further indicated that **the road was commissioned around 2006 to 2007 and is considered part of the paved road that is being referred to on the boundary between Westminster property and the Montague property.** Dr. Cooper further maintained that the college and its predecessor, the Mission Baptist Church, have been occupying and using the properties for a number of years. He noted that they were commissioned in 1990 and held a ground breaking ceremony on 3 December 1990. He testified that the construction of the College begun around 1997/1998.
- [53] Under cross-examination, Dr. Cooper was directed to the letter of approval from the Department of Physical Planning dated 26 August 1988. He admitted that that letter only gave the Church approval in principle to a proposed development and it was subject to providing sketch plans. According to him, it was not an approval for immediate construction on the property.
- [54] Under further intense cross-examination, Dr. Cooper confirmed that there was no school on the property prior to 2000. Classes begun in 2000 so prior to 2000, there was no school operating on the Blake Road property. Learned Counsel for the Plaintiff, Mr. Ginton directed Dr. Cooper's attention to the shaded strip to which an arrow points on the plot plan diagram at Exhibit A of the Adler Realty Appraisal Report dated 19 April 2017("the Appraisal Report"). Dr. Cooper confirmed that *"that's the area that Westminster and the Church (together "the Defendants") filled in and the trees are on it"*. Dr. Cooper further indicated that it was filled in because the whole area was 'swampish'.
- [55] Dr. Cooper admitted that he cleared an area of land and was encroaching on property belonging to Montague along the boundary between the property belonging to the Church and Montague. He further stated that they did their best to stay within what they comfortably felt was their property.

[56] Under cross-examination, Dr. Cooper concluded by admitting that the portion of Montague's land along the boundary line was cleared and filled in or around 2004.

Discussion, analysis and findings

[57] I had the advantage of seeing, hearing and observing the demeanour of the witnesses who testified before me. I found both witnesses who testified on behalf of Montague to be credible and frank in their testimony. I also found Dr. Cooper to be a credible witness with some hesitancy from time to time during cross-examination. However, I hasten to add that additional clarity on the acts of trespass was brought to light during the cross examination of Dr. Cooper.

[58] In his evidence in chief, he stated that "*The strips of land the subject of this Action are shown on the Plan now produced and shown to me marked Exhibit "REC.3". It shows the 20 feet wide road Paved Road Way and an adjacent strip extending from Blake Road Way to the end of the Lot purchased as church property. The two strips together with the other church property extend to 240.72 feet on Blake Road. The church bought 209.28 feet which shows the encroachment to be 31.44 feet approximately 50% or 10 feet off the roadway at the front, and about twenty per cent past the security gate. These together with the parking area are outside the boundary of the said hereditaments but were used to facilitate the activities on the said hereditaments from the 1980's*".

[59] However, under cross-examination, he clarified that the portion of the Plaintiff's (Montague's) land along the boundary line was cleared and filled in or around 2004.

[60] This evidence leads me to conclude and therefore, I find as a fact, that any substantial acts of trespass by the Defendants on Montague's land including the construction of the wall and the fence must have commenced in or around 2004 after the clearing and filling in of the land. This conclusion accords with the testimony of Mr. Williams who asserted that, upon his review of the photographs taken on 25 January 2004, there may not have been any activity, any building, any clearing between 1999 and 2004 on the land.

Visit to locus in quo and Survey Plan of Surveyor General

- [61] A visit to the locus in quo on 15 June 2018 assisted the Court tremendously. The land and the Defendants' property were viewed. Dr. Cooper mentioned that there was uncertainty with regard to the boundary for the two tracts.
- [62] Later in the morning of 15 June 2018, the Court reconvened and directed that the Surveyor-General carry out a survey of the tracts belonging to the parties.
- [63] The Surveyor-General prepared a survey plan dated 30 July 2018. It accords with the survey plan in the Appraisal Report. The Surveyor-General's survey plan confirms the correctness of the existing boundary between the land and the Defendants' property. In addition, the Surveyor-General's survey plan clearly indicates that Westminster's entrance "Wall" and the entrance fence "Pole" are on the land belonging to Montague. Further, the Surveyor-General's survey plan indicates that Westminster's entrance road encroaches upon the land where it intersects with Blake Road.
- [64] Thus, by 30 July 2018, it was manifest that Montague was/is the owner of the land. Given the admissions of Westminster in paragraph 6 of its Defence and also, during the testimony of Dr. Cooper, the acts of constructing a fence, wall and paved road amounted to a trespass.
- [65] Westminster however maintained that the fence, wall and entrance road have been on the land for more than 20 years and it gained an interest in the land. However, this was not pleaded. So, learned Counsel for Westminster, Mr. Thompson, in his submissions, did a 'volte-face'. He argued that the alleged encroachments, expressed in the affidavit of Dr. Cooper confirmed that Westminster has been in open, undisturbed and continuous possession for upwards of 12 years.
- [66] Regrettably, learned Counsel is estopped from raising this issue in submissions since it should have been pleaded.

Adverse possession

- [67] In the event that I am wrong to come to the conclusion that Westminster had to plead adverse possession in order to now raise it, I shall carry on.

[68] It is trite law that a person's title to land including the person who has the documentary title ("the paper owner") is only good in so far as there is no other person who can show a better title. *The effect of adverse possession is that a person who is in possession as a trespasser without the permission of the paper owner can obtain a good title if the paper owner fails to assert his superior title within the requisite limitation period.* After the limitation period has expired, the paper owner, who has slept on his rights, will be barred from asserting them against the persons in adverse possession and his rights will be extinguished.

[69] However, in order to do so, a trespasser must establish both (a) factual possession and (b) the requisite intention to possess. This basic proposition was re-stated by Lord Browne-Wilkinson in **J A Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 quoting Slade J. in **Powell v McFarlane** (1977) 38 P & CR 452, 470 stated at paragraph 40:

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

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")."

[70] Later on, in the same paragraph, Lord Browne-Wilkinson simplified the two elements necessary for legal possession in this manner:

"1. a sufficient degree of physical custody and control ("factual possession");

2. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")."

Factual possession

[71] In **Pye**, Lord Browne-Wilkinson, in adopting the definition of factual possession by Slade J in **Powell**, said at para. 41:

"(3) Factual possession signifies an appropriate degree of physical control. 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....Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.”

Intention to possess

[72] Slade J. in **Powell** defines the “*animus possidendi*” in this way:

(4) The *animus possidendi*, which is also necessary to constitute possession, was defined by Lindley M.R., in *Littledale v. Liverpool College* (a case involving an alleged adverse possession) as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one, because in the ordinary case, the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that, the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow." [Emphasis added]

[73] In the present case, the facts, as I found them, are that any substantial acts of trespass by Westminster on Montague’s land including the construction of the wall and the fence commenced in or around 2004 after the clearing and filling in of the land.

[74] Montague filed its Writ of Summons and Statement of Claim on 17 June 2015 so any limitation period would have expired in 2016 in accordance with section 16 of the Limitation Act, 1995.

[75] In any event, Westminster also has to satisfy the Court that its possession was open, undisturbed and continuous for 12 years. The evidence demonstrated that in and around 2014 when Montague discovered encroachments to its land, Mr. Carey approached Dr. Cooper and mentioned that certain areas of the College were encroaching upon the land. This does not satisfy the requirement of “uninterrupted” or “peaceful” for 12 years.

[76] In my opinion, none of the acts done by Westminster amount to actual possession sufficient to ground a claim to adverse possession.

[77] In light of the above, I therefore find that Montague has proved its case on a balance of probabilities.

Other issues

[78] The other issues raised do not warrant any further consideration for reasons which are plain in this judgment.

Conclusion

[79] Westminster admitted, in its Defence, and in the affidavit of Dr. Cooper, that it cleared an area of the land which its patrons used for parking (which was also evident on a visit to the locus in quo). The survey plan of the Surveyor-General clearly shows that the cleared area is on the land and not on the Defendants' property. In addition, the wall and fence pole are squarely on the land. Further, a part of the Defendants' entrance road encroaches upon the land. This is also reflected in the Surveyor-General's survey plan. I should add that the Surveyor-General was a neutral party in the proceedings.

[80] The issue of adverse possession only arises if I am wrong to conclude that since Westminster did not plead adverse possession in its Defence, it is too late to raise it in evidence and/or submissions. That said, I found that the Defendants' acts of trespass cannot constitute adverse possession as they, by their nature, do not constitute possession of a part or whole of the land. The construction of the wall, fence, entrance road and cleared parking area in or around in 2004 are insufficient to show that the Defendants intended to use the land to the exclusion of Montague (who became the owner in 2013). The Defendants did not provide any documentary evidence of when the encroachments were constructed or when they even began to use the land although Dr. Cooper averred in his affidavit that more than two hundred thousand dollars (\$200,000) were spent over the years to construct the road including the fill, tractor services, grading and other materials. Indisputably, he should have been able to produce an invoice.

[81] That said, I found, as a fact, that any use of the land would have taken place in or around 2004. Therefore, it cannot be said that Westminster occupied the land openly, undisturbed and continuous for 12 years since Montague began to assert its ownership in 2014.

[82] In the circumstances, the Court will make the following orders:

1. A Declaration is granted to the effect that the Defendants have no claim or right to the Plaintiff's land (as described above).
2. The Defendants are to pull down and remove the wall, fence and the portion of the road that encroaches on the Plaintiff's land within three (3) months from Tuesday, 14 April 2020.
3. A perpetual injunction is granted restraining the Defendants whether by themselves, their servants and/or agents or otherwise howsoever from trespassing on the Plaintiff's land.
4. Damages for trespass are to be assessed by the Court upon an application by the Plaintiff.
5. Costs to the Plaintiff to be taxed if not agreed.

Postscript

[83] The Judgment of the Court will not take effect until Tuesday, 14 April 2020.

Dated this 31st day of March, A.D., 2020

**Indra H. Charles
Justice**