COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/CLE/gen/01378

IN THE MATTER of a tract of land containing 6.98 acres situate at Staniard Creek on the Island of Andros one of the Islands of the Commonwealth of The Bahamas.

AND IN THE MATTER of the Rules of the Supreme Court Ord. 11, r8

AND IN THE MATTER of an intended action

BETWEEN

SHAWN RILEY

First Plaintiff

AND

WENDY RILEY

Second Plaintiff

AND

The Estate of DONALD HITZHUSEN

AND

MARK J. ALCORN

(in his capacity as named Executor of the Last Will and Testament of the late DONALD HITZHUSEN dated 21st July, 2008)

Defendants

Before Hon. Justice Ian R. Winder

Appearances: Norwood Rolle for the Plaintiffs

Wayne Munroe QC with Palencia Hunter for the Defendants

10 September 2019 and 6 February 2020

JUDGMENT

WINDER, J

This is the plaintiffs' claim for a declaration as to ownership of a 6.98 acre tract of land (the Property) situated in the settlement of Staniard Creek, Andros Island in The Bahamas.

Background

1. Shawn Riley and Wendy Riley (the plaintiffs) are siblings and are the children of Gertrude Riley (Gertrude). By Order dated 20 May 1999 Mr Justice Alfred gave judgment for recovery of possession of the Property in favour of the late Donald Hitzhusen against Gertrude. It was ordered that Gertrude was not entitled to enter or cross the said land and that she be restrained whether by herself or her servants agents or otherwise from being or remaining on the Property.

2. Gertrude appealed the decision of Alfred J on 16 June 1999. On 14 June 2000 the Court of Appeal dismissed Gertrude's appeal for want of prosecution.

3. The Order of Alfred J was perfected on 4 August 2010 and served upon Gertrude on 7th October 2010.

4. Donald Hitzhusen died on 16 July 2012.

5. Following an application to the Supreme Court it was ordered (by the Court of Appeal) on 10 March 2016, that Gertrude vacate the property within sixty (60) days.

6. In or about June and August 2016 the servants or agents of the Defendants gave notice of the intention of the Defendants to demolish structures on the property. In response to that action the plaintiffs commenced this action and obtained interlocutory injunctive relief.

7. The (Amended) Writ of Summons which was filed on 8 December 2016 sets out the Plaintiffs' claim as follows:

> 1. The Plaintiffs are and were at all material times the owners in and entitled to possession of the land containing 6.98 acres, and buildings situate thereon, described as:
>
> "ALL THOSE two pieces parcels or tracts of land containing 6.98 acres situate on the southern side of Old Government Dock Road and more particularly delineated and shown on a Plan attached hereto and edged in Pink."
>
> having in their own right entered into physical, uninterrupted and exclusive possession in or about 2001.
> 2. In or about June 2016 and again in or about August 15th 2016 a Mark Scott, the servant and/or agent of the Defendant, stated that he is instructed by the Defendant to, and that he will, demolish the Plaintiffs'buildings situate on the Subject land on the 15th October 2016.
> 3. This threatened act by the Defendant, by his servant and/or agent, is calculated to infringe the Plaintiffs' rights and would cause the Plaintiffs sustain damage. The Defendant intends to carry out the wrongful act aforesaid unless restrained by this Honourable Court.
> 4. By reason aforesaid the Plaintiffs will suffer damage and loss.

8. The relief claimed were as follows:

> (i) A declaration that the Plaintiffs are the owners of the land and building claimed herein, by long, undisturbed and uninterrupted possession, ...;
>
> "ALL THOSE two pieces parcels or tracts of land containing 6.98 acres situate on the southern side of Old Government Dock Road and more particularly delineated and shown on a Plan attached hereto and edged in Pink."
>
> (ii) An injunction to restrain the Defendant whether by himself or by his servants or agents or otherwise howsoever from entering or crossing the subject land or from demolishing the plaintiffs' building situate upon the subject land described at paragraph (i);
> (iii) Damages
> (iv) Further or other relief; and
> (v) Costs

9. The defendants aver that they are the lawful owners of the land described in this action situate in Staniard Creek, Andros. They say that the Court of Appeal has granted possession of the land to them. In their Defence which was filed on 29 November 2016, they state the following:

1. Paragraph 1 of the Plaintiffs' Statement of Claim is denied and the Defendants put the Plaintiffs to strict proof.
2. Paragraph 2 of the Plaintiffs' Statement of Claim is admitted. The Defendants were granted possession of the subject property by the Court of Appeal on the 10th March, 2016.
3. Paragraph 3 of the Statement of Claim is denied.
4. Paragraph 4 of the Plaintiffs' Statement of Claim is not admitted and the Defendants put the Plaintiffs to strict proof.

...

10. The defendants admit that they have advised the plaintiffs as per paragraph 2 of their Defence that they are the owners of the land and as such will demolish the plaintiffs' buildings thereon. This particular threat by the defendants was admittedly the catalyst for the bringing of this action by the plaintiffs.

The Evidence

11. The trial which took place over the course of a day saw the testimony of several witnesses. I will consider the evidence below in the order that it was presented at trial.

12. The first witness to give evidence was Hubert Williams (the Surveyor), an expert in the fields of Land Surveying and Photogrammetry who testified on behalf of the Plaintiffs. The Surveyor's evidence was given in a witness statement filed on 18 June 2019 and he was subject to cross-examined thereon.

13. The Surveyor testified that the 6.98 acres in dispute in this matter comprises two parcels of land. Parcel A comprises 2.548 acres and Parcel B comprises 4.435 acres. H. Dawkins Street (a public road reservation) runs between the two parcels. The western side of Parcel A is situate on a creek and the eastern side of Parcel B is beachfront. According to the Surveyor, this information was ascertained from a survey plan prepared by surveyor Godfrey Humes dated November 2015 and another survey plan prepared by surveyor Barwick Warren dated June 1997. Both plans were entered into evidence.

14. The Surveyor further stated that he had visited and inspected both parcels with reference being made to the above mentioned survey plans. Additionally, he reviewed aerial photographs of the land from the years 1942, 1967 and 1986 that were taken and lodged for Public Record with the Department of Lands and Surveys. These images he looked at alongside Google Earth images/ maps for the years 2001, 2006 and 2016.

15. The above-mentioned survey plans and images were exhibited in the Surveyor's witness statement. The Surveyor stated that the aerial photographs allowed him to identify: areas of land recently cleared; areas cleared sometime before the date of photography and now appears overgrown with bush; areas covered with tall bush; and structures such as buildings, roads, docks, and walls etc. Based on his examination of the aerial images the Surveyor says that he was able to identify both parcels A and B of the land and the dividing road that is seen on the survey plans previously mentioned. Further, as far back as the photographic images captured in winter of 1942 (taken from an altitude of 30,000 feet), he had identified structures on Parcel B. There were buildings on Parcel B in the June 1997 survey plan. Upon reviewing the Google images from 2001 thru 2016 there were a number of buildings constructed on Parcel B.

16. Shawn Riley ('Shawn') evidence in chief was given in an affidavit filed on 28 September 2016 and a witness statement filed on 14 May 2019. He was subject to cross-examination on his evidence. Shawn acknowledged that there was a 1994 Supreme Court action involving his mother Gertrude Riley (Gertrude) and the defendants concerning the land in question. He stated that the action presently before the court was brought as neither he nor Wendy were parties to any litigation involving the land on any previous occasion.

17. Shawn stated that he and Wendy started building around 1997/1998 on the property because they had been told all of their lives that the land in question belonged to them as descendants of the Riley's. He maintained that the land known to him as the Riley Estate, is commonage or what is otherwise known in The Bahamas as

Generation Land/Property. He stated that Wendy built first and around that time three structures were on the land. He stated that his mother's house was the only complete structure around 1997/1998 while the other two were foundations.

18. Shawn stated that he lived on the land all of his life in another structure that burned down in or around 1981/ 1982 which was situate on Parcel A. The family moved around for a while until another house was built on Parcel B some years later. He says that he was not residing on the land for a while after he left school in 1992. He spent time in employment on a boat owned by a relative while continuing to live with Gertrude. In or around 1997/1998 he says that he and Wendy lived and built their homes without interference or interruption from the defendants. In or around the beginning of 2000 he moved out of Gertrude's house until his house was completed. He stated that he completed his house in 2000/2001 and approximately two years later, also on Parcel B he erected a pine bar.

19. Shawn stated that he had three buildings on the land at the time of the hearing – his house, the pine bar and his tool shed. He stated that in 1997/1998 there was also a foundation on the land that his deceased brother Marvin Riley had constructed. Marvin's house burned down sometime in 2007. This foundation he said had been overgrown by bushes after his brother's death in 2008/2009.

20. During cross-examination Shawn stated that he got electricity to his home from his bar. He stated that his house was built before his bar and he got electricity from his mother's house until his bar was completed. He admitted that his house was not directly connected to Bahamas Power and Light Company (BPL).

21. When questioned regarding planning permission for the structures that he had built on the land Shawn's evidence was that he had been given permission to build on the land by a deceased Uncle – Leslie Riley by way of a letter stating his permission. When pressed by Counsel for the defence as to whether he produced any of the evidence that he alluded to having such as a bill from BPL, the letter from his

deceased uncle or any form of planning permission Shawn admitted that none of these documents were produced for the hearing.

22. During cross-examination Shawn stated that he did not become aware that Gertrude was being sued until 2013, notwithstanding the fact that judgment was given against her by the Supreme Court in 1999, she never discussed the suit with either him or Wendy. He further gave evidence that Gertrude appeared normal during this time and that there was no rift between himself and his mother that may have prevented her from communicating this information to him.

23. Shawn stated that, in 2013 Mark Alcorn called him and demanded that they move off of the land. It was at this time that he and Wendy determined that they needed to defend themselves through the bringing of this action.

24. When questioned he further testified that Gertrude had unrestricted access to land which he referred to as 'the Riley property'.

25. Wendy Riley (Riley) evidence in chief was given in an affidavit filed on the 22 June 2016 and a witness statement filed on 14 May 2019 upon which she was subject to cross-examination. Wendy stated that she did not find out about the law suit between her mother and the Hitzhusens until sometime in 2013/2014 after she had built her own house on the land. Notwithstanding this revelation when questioned by counsel for the defendants she agreed that she had a 'good relationship' with Gertrude.

26. She stated that in 1997/1998 she acquired the building plan she used for her house from the Post Office in Fresh Creek, Andros. This same plan Wendy stated was submitted for approval also at Fresh Creek. She stated that around 2000/2001 she completed her house and moved in.

27. Wendy's evidence did not deviate materially from that of Shawn's. She too testified that she believed the land that she built on was 'Riley Property' and stated that she had held this belief all of her life. She also stated that there was no direct connection from the BPL to her house and in fact her house does not have an electrical meter

from BPL. She stated that she too gets electricity from her mother's house by running an electrical cord between the two buildings.

28. Wendy concluded her evidence by stating that she lived with her mother up until the time that she moved into her house. She further testified that Shawn briefly rented an apartment in close proximity to her mother's house around 1999/2000 after which he moved into the house he built on the land.

29. There were several other witnesses for the Plaintiffs who stated that they were long-time residents of Staniard Creek. They gave their evidence as follows:

30. Freddie Munning's evidence in chief was given in a witness statement dated 1 May 2019 upon which he was subject to cross-examination. He testified that he worked with the government owned telecommunications provider and serviced Staniard Creek for the majority of his working life.

31. He stated that there was no building on the Parcel B (which he identified as the eastern side of the street most of his life). He stated that Gertrude lived on Parcel A (the western side of the road) until the family moved to Parcel B. He could not recall the year that building started on that portion of the land. He had a difficulty in acknowledging whether or not he was friends with the plaintiffs. He testified that he visited the houses on the property and that in 1999 Shawn and Gertrude were living in the same house.

32. Wilfred Johnson's evidence was contained in a witness statement filed on 1 May 2019 upon which he was subject to cross examination. He confirmed previous testimony that the plaintiffs lived on the western side of the street on Parcel A with Gertrude. He gave a starting date for Shawn's construction as sometime in 2001. He says the building took Shawn approximately two years to complete. He stated that Wendy started building in 2000.

33. He agreed when questioned that the plaintiffs lived with their mother prior to moving into the buildings they erected aside from the time when Shawn was renting.

34. Naomi Whyms' evidence was contained in a witness statement filed on 1 July 2019 upon which she was subject to cross-examination. She explained that her mother, Hester Hamilton, was Gertrude's aunt and that her mother directed Gertrude to take over the 'generation property' more than 50 years ago.

35. Dennis Williams evidence was contained in a witness statement dated 14 May 2019. He stated that Gertrude is his aunt and that he did not see anyone disturb Shawn and Wendy while they were in occupation of the land.

36. Dennis Kemp's evidence was contained in a witness statement filed on 1 May 2019. His evidence went unchallenged. He deposed that he saw the plaintiffs build and more particularly he knew Shawn started building from around 2000. He also stated that he did not see anyone disturb the plaintiffs while they were in occupation of the land.

37. There were no witnesses called for the defence. The parties have however entered an agreed bundle of documents which have become evidence in the trial.

The Law

38. The plaintiffs claim is that of adverse possession. That say that they entered into physical, uninterrupted and exclusive possession of the land on or about 2001 and that such entry has been in excess of the statutory period of 12 years provided for under the Limitation Act. Whilst the plaintiffs rely on a possessory title to the disputed land the defendant relies on a documentary title. The courts role is simply to determine whether the plaintiff is able to establish a better title than the defendant.

39. The appropriate starting point in this case is the Privy Council decision in ***Ocean Estates Ltd. v. Pinder [1969] 2 AC 19***. In that decision Lord Diplock opined at page 25 paragraph A, as follows:

> "Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose

authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."

The law therefore is that the plaintiffs, in order to succeed in their claim, must demonstrate that, they or their predecessor went onto the land as trespasser and by virtue of such possession beyond the limitation period, had extinguished the documentary title of the defendant or its predecessors in title.

40. In considering the meaning of possession, Slade J. in ***Powell v. McFarlane (1977) 38 P & CR p452 at 470*** held that:

"(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").

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive 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. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": West Bank Estates Ltd. v. Arthur, per Lord Wilberforce. It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must, however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence

factual possession. On the particular facts of Cadija Umma v. S. Don Manis Appu the taking of a hay crop was held by the Privy Council to suffice for this purpose; but this was a decision which attached special weight to the opinion of the local courts in Ceylon owing to their familiarity with the conditions of life and the habits and ideas of the people. Likewise, on the particular facts of the Red House Farms case, mere shooting over the land in question was held by the Court of Appeal to suffice; but that was a case where the court regarded the only use that anybody could be expected to make of the land as being for shooting: per Cairns, Orr and Waller L.JJ. 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.

(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."

22 The principles enunciated in Powel v. Mcfarlane have been approved in the Bahamian Privy Council decision of Armbrister et al. v. Lightbourn et al. [2012] UKPC 40.

41. In the instant matter time would have begun to run against the Hitzhusens possession when Shawn and Wendy would be deemed to having taken possession of the land adverse to documentary title holder. Section 17(1) of the Limitation Act provides as follows:

> "Where the person bringing an action to recover land, or some person through whom such person claims, has been in possession thereof and has while entitled thereto been dispossessed or discontinued possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

42. Resolution of this claim revolves upon the determination to the seminal questions of whether the plaintiffs:

(1) have had factual possession of the land for the requisite statutory period of 12 years; and

(2) possessed the requisite animus i.e. the intention to exclude all others from the land based on the evidence before the court.

Factual possession

43. The plaintiffs contend, as a necessary part of their pleadings, that they have occupied the land to the exclusion of all others, undisturbed, and uninterrupted for the requisite statutory period and as such should be declared the rightful owners of the land. Whilst they say that this occupation commenced in 1998 the pleadings speak to it beginning in or about 2001. I have considered the report of the Surveyor and listened to and observed his demeanour as he gave his viva voce evidence. The evidence of the Surveyor weighs significantly on whether or not Shawn and Wendy were in factual possession of the land for the requisite 12 years, thereby proving they have dispossessed the defendants. There is an assertion that the structures were under construction of two (2) years. Respectfully, it does not support the assertion of the construction of the homes of the plaintiffs at any time in 2001 or before.

44. The following may be said of the Surveyors evidence:

a) Three Google earth images of the land were provided; the first having been captured in 2001; the next image is from 2006; and the final image in evidence was taken in 2016.
b) The 25 March 2001 image does not show the houses that are present on the 2006 or the 2016 images. Indeed there are two additional buildings that can be seen in the 2006 and 2016 images on Parcel B. The 2001 image accords with the June 1997 survey plan which displays two complete single storey structures on Parcel B. One of which I would consider to be typical in size when compared to other houses captured in the image area of the settlement of Staniard Creek, while the other is a very small building. Parcel A being vacant save for bushy vegetation that appears to have grown naturally i.e. the flora captured in the images are not the result of farming or cultivation by humans.
c) Certainly the two additional larger structures that appear on the 2006 and 2016 images - Shawn and Wendy's homes, do not appear in the 2001 image.

45. The imagery does not support theirs or their witnesses' version of the commencement of building in the late 1990's/2000 and occupation from 2001. Indeed there is no visual evidence of their buildings or foundational footprints on survey plans or via Google or any other imagery before 2006. Additionally, the plaintiffs admitted lack of regulated building approval from the relevant governmental authorities presents a lacuna in the evidence, as they had nothing to rely on that concretised a starting point for their occupation of the land. At best is can be said to have commenced prior to 2006.

46. In this regard the plaintiffs' pleadings do not line up with their oral testimony given at the hearing. The plaintiffs say that they were in exclusive possession, that is, they excluded the whole world from the land, including the paper title holders the Hitzhusens, thereby ousting them from the land. The plaintiffs claim the entirety of the Property of 6.98 acres. This necessarily includes Gertrude's home. The suggestion must be that Gertrude now resides in this premises at their permission. This is not supported by any evidence. Shawn admitted during cross-examination that Gertrude never left the land and in fact she was never restricted in her movements anywhere on the land. Further, as previously stated in their viva voce evidence there was a time when neither Shawn nor Wendy had independent electricity connections to their houses, but instead got electricity from Gertrude's house. Wendy still did up to the time of this hearing. The close proximity of the construction of the homes of the plaintiffs does not suggest that they were anything more than an extension of Gertrude's occupation.

47. Further, I did not identify, based on the imagery placed in evidence nor from any oral evidence led, that Parcel A was occupied and/or used at any time by the plaintiffs within the years of claimed adverse possession. There was also no evidence that it had been transformed from the bushy, overgrown state that is seen in the Google images of 2001 through 2016 in evidence.

Intention to possess

48. As stated previously the plaintiff must also demonstrate that they had the necessary intention to possess the land to the exclusion of all others. As pointed out above (paragraph 46) it was stated in evidence by both plaintiffs that they share the land with Gertrude. Consequently, their intention to possess the Property to the exclusion of all others immediately falls short. The law required the plaintiffs to claim exclusive possession of the disputed property in their own right. In ***Morris v. Pilches (1969) 212 EG 1141, Buckley J*** held as follows:

> "[T]his was a family affair and none of the Pilches had exclusive use of the plot. That meant that a claim to a possessory title under the limitation Act 1939 could not be made by the defendant alone. He (the defendant) had not been in adverse possession of the disputed land in his own right as against the plaintiff throughout the period from 1948 to the present time or during any part of that time. The use had been in common by the defendant and his father and mother as they between them found it convenient to use the land. .....[t]he defendant sought a declaration that he was entitled to possession and had acquired a good possessory title.
>
> He (Buckley, J.) thought the defendant could not make out that claim successfully because the evidence did not show that he had, throughout the necessary period, been in possession in his own right adversely to the plaintiff. In the result the plaintiff was entitled to a declaration that the defendant had no title or right to possession of the land".

49. It seems clear on the evidence that the plaintiffs were not claiming the property in their own right but not through their mother. The evidence was that they were connected to Gertrude's power supply and she had unrestricted access to the Property. The plaintiffs in their evidence, along with their witnesses spoke to the land belonging to the Riley's or being the Riley estate. The evidence of Naomi Whyms in particular, was that Gertrude was placed in charge of the land by her mother, Gertrude's aunt, Hester Hamilton.

The effect of the existing Court Orders

50. The final question then is, whether it is fair to bind the plaintiffs by the Supreme Court Order of 1999 and/ or the Court of Appeal in 2016? The situation in this case is nuanced in that there is a prior Order of this Court concerning this land and involving their mother Gertrude. Counsel for the plaintiffs argues that the Supreme Court

judgment given in 1999 and subsequent Order of the Court of Appeal against Gertrude are not effective against them as they should be considered different parties. They rely on the case of ***Land Securities plc v Westminister City Council*** *[1993] 4 All ER* at page 126 to this end as follows:

> "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is *Hollingsworth v F Hewthorn & Co Ltd [1943] 2 All ER 35, [1943] KB 587.*"

Reliance is also placed on the English Court of Appeal case of ***Hollington v F. Hewthorn and Company Limited*** *et al [1943] KB 587* as follows:

> "A judgment obtained by A and B ought not to be evidence against C, for, in the words of the Chief Justice in the Duchess of Kingston's Case (1), "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous: and therefore the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers." This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party."

The plaintiffs say that the 1994 action is irrelevant to the instant matter and contended that there were no pleadings and/or no evidence led to indicate that they were or are privies to the judgment against Gertrude.

51. Counsel for the Defence also submitted that the plaintiffs were aware of, but chose to be 'defiant' where the Court's 1999 Order was concerned. They rely on the case of ***High Point Estates v Higgs et al*** *CL/246 of 2000 PG 3* to assert that the plaintiffs possession of the land is tainted with illegality as they were bound by the 1999 Order but remained on the land having been in the defence's opinion fully aware that they were ordered to vacate. They contend that even if the plaintiffs possessed the requisite factum and animus, because of their 'wilful breaches' of the 1999 Order, their claim should fail as did the plaintiff's case on similar facts in *High Point*. They rely on the following from the *High Point* ruling per Mohammed J:

> "It would appear from the circumstances of this case that the Defendant may have had both the factual possession and the requisite intention to possess. But even if I were minded to so hold I would be forced to find that such possession was tainted by illegality and therefore the Defendant ought not to be able to claim the fruits of

his illegality: In Clarke v Chadburn (1985) 1 WLR 75 at 80-81 Sir Robert Megarry V-C stated the principle thus-

> "I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Wilful disobedience to and order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them."

52. Further, in the case of ***Neelys of Nassau Limited v Kenneth Higgs [2005] 4 BHS J 78*** the defendant, claimed a right, under the Limitation Act, not to be removed from property they occupied on the basis that they had extinguished the plaintiff's title. The claim was asserted notwithstanding an outstanding court order. At paragraphs 31 and 32 of the decision in ***Neelys of Nassau Limited***, ***Lyons J***, stated:

> 31 In action 627 of 1962 (Caves Company Limited v K. Higgs and O. Higgs and others), an injunction was obtained by Caves against K. Higgs and O Higgs for entering Caves' land. This injunction remains. Both K Higgs and O. Higgs have defied that injunction. They have been previously held in contempt of court in relation to a previous trespass.
>
> 32 It goes without saying (and it has been said often enough to both K. Higgs and O. Higgs by courts in the Bahamas) that a person cannot claim a benefit from their own contempt. In simple terms that K. Higgs and O. Higgs hopefully can understand, they cannot come to this court claiming to be entitled to land by virtue of a possession which has been carried on in open defiance of a court order against them.
>
> 33 . Higgs has no valid possessory claim to Neely's land.

53. It is perhaps at this juncture I should indicate my assessment of the witnesses having observed their demeanour and the way they gave evidence to the court. I did not accept that the plaintiffs were unaware of the court actions involving their mother. I did not accept that their mother, with whom they resided, and with whom they claim to

have had good relationship would sit by and not appraise them of the litigation which was ongoing against her. The litigation was bitterly contested by her, she defended it and sought to appeal to the Court of Appeal. She contested the application before ***Barnett CJ*** seeking to give a time for her eviction. I did not accept that Gertrude would say nothing and watch them expend moneys where there was a strong risk that would lose their investment. I did not accept that she would not tell them until 2013, she having been ordered to restrain from continuing to be on the property since 1999.

54. I find that at the time the 1994 action begun and the resulting Order made in 1999, the plaintiffs were living with Gertrude. Wendy admitted that she was living with Gertrude during her oral evidence. Shawn stated that he was renting for a few months in 1999 and/or 2000 but when questioned was unable to give a more precise timeframe. Notwithstanding Shawn's inability to give a more accurate account of the time that he says he was not living with Gertrude, I am satisfied that he too was living with Gertrude when the 1999 Order was made.

55. For these reasons I find the plaintiffs assertion that they were not aware that Gertrude was involved in any litigation in relation to the land until 2013 to be unpalatable. It is even more difficult to digest considering the plaintiffs' claims of total ignorance of the litigation over the Property and its resulting Orders when viewed from the contextual background of living with Gertrude and in a small family island community.

56. Respectfully therefore I do not find the plaintiff's contentions to be wholly supported by the evidence. The evidence led during trial was to the effect that the plaintiffs are claiming through Gertrude. When the 1999 Order was made both Shawn and Wendy were living with Gertrude therefore the Order was binding upon them as well. It would be astonishing that the Order of the Court would be applicable to Gertrude, their mother with whom they lived but not applicable to them. This is particularly obvious in the reading of the Order which at paragraph 4 states the following:

> "Judgment is given for the Plaintiffs as against the First Defendant in the following terms:-

...
4 An injunction restraining [Gertrude] whether by herself, or by her servants, agents or otherwise from being or remaining on the said land.
...

57. In my view, to permit the plaintiff to claim, as they now do, that the property is theirs, and not their mother's so as to divorce themselves from the force of the Court's Order, is untenable. It is clear that the Order of Alfred J, being enforced by the Court of Appeal, affected the plaintiff who were the children of Gertrude and living in her residence on the Property at the time of the making of the Order. They were clearly *"her agents" or otherwise* on the Property at her permission. That they never left the property, amounts to a breach of the order and any occupation by them thereafter flaunts the authority of the Court. It could not therefore constitute the basis of a claim to adverse possession.

58. I find that it would be both fair and reasonable to hold that the plaintiffs were bound to abide by the previous Orders of both the Supreme Court and the Court of Appeal. Gertrude, having been ordered to quit and deliver up title to the Property, a claim by her children, to having been in possession in open defiance of the Order of this court cannot be countenanced. Orders of this Court are meant to be obeyed and the court cannot close its eyes to such blatant disregard.

59. On a balance of probabilities therefore, I am unable to find that the plaintiffs, in their own right, entered into physical, uninterrupted and exclusive possession of the Property in 2001 as pleaded or within the 12 years immediately preceding the commencement of this action. At best I could merely say, on balance that they occupied the property in excess of 10 years. As indicated I did not find that there was the requisite animus possidendi or that they could claim a possession to the property in the face of the extant Orders made against Gertrude.

60. The claim of the plaintiffs are dismissed with costs to the defendants to be taxed if not agreed.

Dated the 13th day of August 2020

Ian R. Winder

Justice