

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2019/CLE/gen/00741

BETWEEN

EFFIE JANE SHERMAN WALLIS

(as Personal Representative of the Estate of the late Levittie Sherman)

Plaintiff

-AND-

WINTON WELLINGTON ROBERTS

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Ashley Williams of Atlaw Chambers for the Plaintiff

Mr. Murrio Ducille KC of Murrio Ducille & Co. for the Defendant

Hearing Dates: 9 December, 10 December, 13 December 2021, 9 February 2022

Trespass to land – Lawful possession defence – Determination of ownership of land – documentary and possessory claims of ownership – Loss of sale of property

The Plaintiff commenced these proceedings alleging that the Defendant trespassed on her land. She seeks, among other things, possession of the land, mesne profits, a declaration that the Defendant is not entitled to occupy the land, an injunction and consequential damages. Her claim to ownership is both documentary and possessory.

The Defendant does not deny occupying the land but contends that he is the owner of the larger tract of land comprising 10.880 acres which includes the land claimed by the Plaintiff. He based his ownership to the land on (i) a 1982 Conveyance whereby his father conveyed to him a tract of land and (ii) possessory title on his exclusive, open, visible and undisturbed possession of the land for over 18 years. He also alleged that he planted and farmed fruit trees on the property in 1982 up to 1997 when he commenced retaining and sifting soil on the land. He also erected a fence around the larger tract (10.880 acres) which is still present today. The Defendant further alleged that his father had exclusive possession for over 30 years.

Finding that the Defendant trespassed on the Plaintiff's land comprising 1.62 acres, the Defendant is to deliver up possession of the land by 31 December 2022. In addition, a perpetual injunction is granted restraining the Defendant whether by himself, his servants and/or agents or howsoever otherwise from trespassing and/or occupying the land, a declaration that the Defendant is not entitled to enter or cross upon the land, mesne profits

to be assessed by the Registrar, consequential damages for the loss of the sale of the property in the sum of \$250,000 and costs to be taxed if not agreed.

1. In determining ownership of property, because there is no such concept as an “absolute title” in unregistered systems of land, the court is concerned only with the relative strength of the titles: **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19 applied.
2. The fact that the Defendant’s predecessor in title (his father) did not actually validate his possessory claim to the land by obtaining a Certificate of Title does not assist the documentary claim of the Defendant.
3. Although the Plaintiff could not conclusively prove that the estate of Josiah Rahming obtained a Certificate of Title in respect of the centre portion, the cumulative effect of the judgments in the 1965 and 1998 actions is that, at least, they demonstrated that his estate (Josiah Rahming) claimed it and that the executors may have returned to Court to obtain the Certificate of Title in respect of the area.
4. In order to dispossess the Plaintiff of her documentary title, the 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 relied upon.
5. Any possession by the Defendant could not have met the limitation period for adverse possession because the Defendant did not begin “possessing” the disputed land until 2002 at the earliest. Since the death of her father in 2002, the Plaintiff has been enthralled with legal disputes relating to this and other related properties. She erected fences and did acts showing her intention to possess the property. The Defendant, therefore, could not have dispossessed the Plaintiff.
6. The loss of the contract for the sale of the property is, in my judgment, a consequential loss that is not too remote. It was reasonably foreseeable from the Defendant’s acts of occupying the land that the contract for the sale of the disputed area would not have been successful due to the Plaintiff being unable to deliver vacant possession: **The Wagon Mound (No. 1)** [1961] UKPC 2.

JUDGMENT

Charles Snr. J:

Introduction

[1] This is an action in trespass. It concerns 1.62 acres of land situate at Prince Charles Highway in the Eastern District in the Island of New Providence which the Plaintiff (“Mrs. Wallis”) alleged, belongs to her. In his Defence, the Defendant (“Mr. Roberts”) averred that, although he occupied the land (“referred to interchangeably as the land”, “the disputed property” or “the property”), he did not trespass because he owns it. The key issue to be resolved centres on the ownership of the disputed property.

The pleadings in a nutshell

- [2] By Specially Indorsed Writ of Summons filed 31 May 2019, Mrs. Wallis commenced this action against Mr. Roberts alleging that he trespassed on her property comprising 1.62 acres of land at Prince Charles Highway. She alleged that since, in or around 2014, Mr. Roberts whether by himself, his servants and/or agents wrongly entered her property on numerous occasions and wrongfully remains there despite repeated requests for him to leave it. She claims, as a loss consequential to the trespass, the loss of the sale of the disputed property, mesne profits at a rate of \$3,000.00 per month from the date of trespass, a declaration that Mr. Roberts is not entitled to enter or cross upon her property, an injunction preventing him from entering and occupying her property, damages and such other relief as the Court deems fit.
- [3] In his Defence filed on 7 April 2021, Mr. Roberts denied having trespassed on Mrs. Wallis' property. Instead, he asserted that the disputed property which is being claimed by Mrs. Wallis is part of a larger tract of land totaling 10.880 acres which he owns. He primarily asserted possessory title to the disputed property. He alleged that he has been in open, visible, continuous and undisturbed possession and control of the disputed property and indeed the larger tract of 10.880 acres for in excess of 18 years to wit, since 1996. He further alleged that, since the 1800's, the 10.880 acres has been exclusively possessed by his family and, in later years, his father continued to occupy and farm the property for over 50 years. Mr. Roberts next alleged that, in 1997, he erected a fence around the entire property.
- [4] Mr. Roberts also asserted what he termed "persuasive" or "strong" documentary title to the disputed property contending that his root of title commences with a Conveyance made between himself and his father Mickle Roberts (a.k.a. Michael Roberts) on 14 January 1982 and recorded in Vol. No. 3600 at pages 236 to 259 and lodged for record at the Registrar General's Department on 10 February 1982. ("the 1982 Conveyance"). At the outset, I observe that the land conveyed in the 1982 Conveyance measures 100 feet x 100 feet. Additionally, Mr. Roberts

asserted that he came into possession of more acreage consequent upon the demise of his father.

Historical background

- [5] Over the years, there has been a good bit of litigation concerning various lots in the surrounding area of the disputed property.
- [6] In 1965, by Quieting action No. 562 of 1965, the executors of the estate of Josiah Rahming (the grandfather of Mrs. Wallis) filed a petition under the Quieting Titles Act for 34.18 acres of land situate in the neighbourhood of Fox Hill between New Road (otherwise Marshall Road of Farmers Union Road) on the north of Prince Charles Drive (then Pine Barren Road) (“the 1965 quieting action”).
- [7] In 1998, by Action No. 973 of 1998, Mr. Roberts commenced an action against Bursil Wallace, claiming that Bursil Wallace trespassed on his land situate near to the disputed property (“the 1998 action”).
- [8] In 2004, Mr. Roberts claimed adverse possession of two distinct parcels of land, one being claimed by Vera Curtis and the other claimed by Norbert Cooper. Parcel A in that action, was part of the 10.880 acres which he now claims (“the 2004 consolidated action”).
- [9] Both parties claim to own the disputed property.
- [10] By Agreement for Sale dated 30 March 2017, Mrs. Wallis and her brother, Ferdinand Sherman agreed to sell the disputed property to Xishan Ma at a purchase price at B\$250,000.00. That sale was frustrated because of this ongoing dispute.

The 1965 quieting action

- [11] By the judgment of Smith J delivered in July 1972 in quieting action No. 562 of 1965, the Petitioners (John Sherman and Josiah Havelock Rahming as executors of the late Josiah Rahming) were granted Certificates of Title in respect of three

(3) areas of land. Smith J. found that the Petitioners' evidence in respect of the centre portion of five acres linking Tract No 1 to Tract No. 2 was insufficient to justify granting a Certificate of Title. That claim was adjourned. There is no evidence that the Petitioners later successfully obtained a Certificate of Title in respect of the centre portion.

The 1998 action

[12] In 1998, Mr. Roberts commenced Action No. 973/1998 against Bursil Wallace claiming that Bursil Wallace trespassed on his land and caused damage. Bursil Wallace admitted entering the land and removing certain items but he alleged that he is the owner. He claimed to have purchased the land over 20 years ago from the estate of Josiah Rahming.

[13] Mr. Roberts' claim was based on possessory title. According to the learned trial judge, Lyons J, the manner in which Mr. Roberts claimed to be entitled to the land in dispute was interesting. In 1982, his father, Mickle Roberts sold an allotment (100 feet x 100 feet) to Mr. Roberts.

[14] Lyons J determined that, based on Mr. Donald Thompson's plan, Mr. Roberts was entitled only to five (5) acres at the eastern end of the property. Bursil Wallace was entitled to five (5) acres at the western end. At para 45 of the Judgment delivered on 7 July 2004, Lyons J stated:

“Applying this and by simple mathematical deduction, the whole land shown on Mr. Thompson’s plan is divided as to five acres in the west is the defendant’s (Mr. Wallace”), five acres in east is the plaintiff’s and there is an area of .880 acres in the middle which is “no man’s land” - at least as between these parties. It probably is part of the estate of Josiah Rahming’s holding but I do not have to decide this issue.” [Emphasis added]

[15] Although there has been no appeal from the decision of Lyons J, Mr. Roberts persisted in the fantasy that he owns 10.880 acres of land. During this trial, he emphatically expressed that he does not accept the Judgment of Lyons J.

The 2004 consolidated action

[16] Mr. Roberts claimed adverse possession of two distinct parcels of land, one claimed by Vera Curtis and the other by Norbert Cooper. Parcel A was part of the 10.880 acres. He alleged that, by the adverse possession of himself and his father for a continuous period of over 20 years, he dispossessed Mrs. Curtis and her predecessor, Mr. Smith of their title.

[17] As against Norbert Cooper, Mr. Roberts claimed that his father farmed the land, if not from the 1960's, at the very least, from the 1970's. Mr. Cooper stated that he visited the property regularly and he saw no evidence of adverse occupation by Mr. Roberts until 2002. This was the year that Mr. Roberts stated that he ceased hiding his heavy equipment and came into the open. That was also the year when Mrs. Wallis' father passed away.

[18] By Judgment dated 9 December 2005, Thompson J stated, at para. 21:

“I am satisfied that Mrs. Cooper farmed the land claimed by Mr. Norbert Cooper, under color of title and as I prefer his evidence to the contradictory evidence of Mr. Roberts and his witness, I find that the farming by Mrs. Cooper provided the constructive possession spoken of by James Smith Jr. in the 1964 action and I find that Mr. Cooper has established a title to the land claimed by him....”

[19] At para. 22 of the Judgment, the learned judge concluded:

“I also find that the evidence of Mr. Roberts and his sister of his purported occupation of the land claimed by Ms. Curtis and Mr. Cooper is insufficient to oust the fee simple titles of these Plaintiffs”.

[20] She granted possession of the lands claimed by Ms. Curtis and Mr. Cooper to them and also mesne profits to be assessed by the Registrar. She also ordered Mr. Roberts to pay costs of the actions brought by Ms. Curtis and Mr. Cooper. Although Beatrice Brown had also brought an action against Mr. Roberts, she did not advance her claim and so the court was not concerned with her claim.

[21] This is yet another occasion where Mr. Roberts has expressly stated that he has not accepted the decision of the learned judge.

The issues

[22] The issues that arise for determination are:

1. Whether Mr. Roberts trespassed on Mrs. Wallis' property?
 - i. Who is the owner of the property?
2. If Mr. Roberts trespassed, whether he is liable for the loss of the sale of the property?

Law on trespass

[23] The learned authors of Halsbury's Laws of England (2015), 5th Ed. Vol. 97 (Tort) define trespass as the unlawful presence on land in the possession of another.

[24] In **Montague Investments Limited v Westminster College Ltd. and another** [2020] 1 BHS J No 11, this Court expounded that trespass is any unjustifiable intrusion by one person upon land that is in possession of another. Thus, an action for trespass is based on the Plaintiff being the owner of the land. At paras. 21-23 of the Judgment, the Court expressed trespass in this manner:

“[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: 7

“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.” [Emphasis added]

[25] Succinctly, a person trespasses on land “**if he wrongfully sets foot on it, or rides or drives over it, or takes possession of it, or expels the person in possession....**”

Whether Mr. Roberts trespassed on Mrs. Wallis' property?

[26] The cause of action of trespass is predicated on Mrs. Wallis being the owner of the property. Mr. Roberts does not deny occupying the disputed property but asserts that he is the owner. Therefore, in order to determine whether Mr. Roberts has trespassed, the owner of the property must be determined.

Documentary claims

[27] Mrs. Wallis asserted that she and her brother, Ferdinand Sherman are the owners of the disputed property, which, according to her, is confirmed by a title search dated 7 September 2021. Further, she relied on the Survey Report dated 22 October 2020 of the former Surveyor General (Ag), Thomas Ferguson, (the expert agreed between the parties) which confirms that the dimensions of the disputed property is separate and distinct from the property claimed by Mr. Roberts in the 1998 action.

[28] Mr. Ferguson opined that the disputed property being claimed by Mrs. Wallis is 1.62 acres which falls within a larger area of 10.881 acres claimed by Mr. Roberts (along the southern portion of the land claimed by Mr. Roberts). Of the 1.62 acres claimed by Mrs. Wallis, 1.531 acres is disputed as between the parties, the remaining portion being approximately 10 feet, coincides with the Prince Charles Drive Highway.

- [29] In her testimony, Mrs. Wallis traced her root of title to the property with a Certificate of Title obtained by her late grandfather, Josiah Rahming, and recorded in the Registry of Records in Volume 2406 at pages 401- 407. The tracts as contained in the Certificate of Title were divided and vested out to her grandfather's children. Her late mother, Levittie Aurelia Sherman and her aunts, Christina Moss and Alice Woodside, all obtained portions as part of their inheritance. She and her brother inherited their mother's portion of the property which is the disputed property.
- [30] Mrs. Wallis stated that there was a 2015 action between Bursil Wallace and Mr. Roberts (the Defendant) and, by order of the Court dated 6 February 2019, it was determined that Mr. Roberts trespassed on Bursil Wallace's land. According to Mrs. Wallis, the significance of the 2015 action is that Bursil Wallace's predecessor-in-title of the property which he purchased was her aunt, Christina Moss, and the same property shares a similar root of title as the disputed property as its root in the Certificate of Title obtained by her late grandfather.
- [31] Mr. Ducille KC, appearing as Counsel for Mr. Roberts, objected to Mrs. Wallis' documentary claim. He argued that the disputed property does not fall within the land granted to Josiah Rahming by the Certificate of Title. He contended that the property fell within the middle section, to which Josiah Rahming was unable to prove title, as is evidenced in the 1965 quieting action. In the 1965 quieting action, Smith J. adjourned the Petitioners' claim to the centre portion of the 5 acres adjoining Tract 1 with Tract 2. Mr. Ducille submitted that because her root of title did not grant title to the area now claimed, Mrs. Wallis' chain of title shows a broken link.
- [32] Mr. Ducille accurately pointed out that the 1.62 acres claimed by Mrs. Wallis was not included in the Certificate of Title granted in the 1965 quieting action.
- [33] Learned Counsel Mr. Williams, who appeared for Mrs. Wallis, does not deny that the disputed property now claimed by Mrs. Wallis falls within the centre portion that was excluded from the Certificate of Title granted by Smith J. However, he urged

the Court to have regard to extrinsic evidence which, he argued, suggests that the estate of Josiah Rahming did obtain title to that section.

[34] Mr. Williams submitted that Mrs. Wallis' claims to be the owner by documentary title of the 1.62 acres is borne out by the following facts namely:

1. She and her brother, Ferdinand Sherman are confirmed as the owner of the disputed land by a title search dated 7 September 2021;
2. That other properties in the immediate vicinity bearing the same predecessor in title to that of Mrs. Wallis had been sold by adjoining owners (Mrs. Wallis' family) to Bursil Wallace whom the Court determined has a superior title to that of Mr. Roberts in the 1998 action; and
3. Proof on the available evidence that Mr. Roberts has no title (documentary or possessory) or title as good as Mrs. Wallis to the disputed land.

[35] According to Mr. Williams, in the 1998 action, Bursil Wallace claimed that he purchased his property from the estate of Josiah Rahming. That property also falls within the centre portion that was excluded from the 1965 quieting action. Mr. Williams stated that the fact that Bursil Wallace successfully defended his title (which he claimed through the estate of Josiah Rahming) in the 1998 action strongly suggests that the estate obtained title after the judgment in the quieting action, thereby enabling the property to be inherited from the estate by John Sherman, which enabled him to devise to Levittie Aurelia Sherman.

[36] I agree with Mr. Williams that the outcome of the 1998 action between Mr. Roberts and Bursil Wallace gives some credence to the validity of Mrs. Wallis' documentary chain of title notwithstanding the gap from the Certificate of Title to the purported inheritance by John Sherman and the subdivision thereafter. Undoubtedly, the absence of proof that the estate of Josiah Rahming obtained title to the centre

portion renders Mrs. Wallis' documentary claim imperfect but the 1998 action makes it probable that the estate did obtain title.

[37] Mr. Roberts alleged that he has possessory title and 'persuasive' (paragraph I of the Defendant's Statement of Facts and Issues filed 13 October 2021) or 'strong' documentary title (paragraph 3 of his witness statement) to the property claimed by Mrs. Wallis. He asserted that his root of title commenced with the 1982 Conveyance which only speaks to land measuring 100 feet x 100 feet. Mr. Roberts contended that, by Letters of Administration obtained after the death of his father, he became the administrator of his estate. In that capacity, he conveyed to himself (in his personal capacity) the land which his father died possessed of.

[38] As I have said, Mr. Roberts' claim is partially documentary and partially possessory. His documentary claim relates to 5 acres but he alleged that, apart from that 5 acres, he is entitled to a larger area of 10.880 acres by possession. Mr. Roberts relied on the following documents to establish his root of title namely:

- i. Affidavit of George B. Adderley dated 10 June 1981 and recorded in the Registry of Records in Volume 3764 at pages 437 to 439;
- ii. Conveyance dated 14 January 1982 between Mickle Roberts and Mr. Roberts recorded in the Registry of Records in Volume 3600 at pages 236 to 259 ("the 1982 Conveyance");
- iii. Equitable Mortgage dated 16 December 1983 between Mr. Roberts and CIBC Bank recorded in the Registry of Records in Volume 4013 at pages 82 to 84 and Volume 4406 at pages 465 to 467;
- iv. Renunciation of Dower of Joy M. Roberts to CIBC Bank recorded in the Registry of Records in Volume 4507 at pages 554 to 556; and
- v. Affidavit of Mickle Roberts dated 23 December 1987 (not recorded).

- [39] With respect to the documentary claim, however, Mr. Williams submitted that the 1982 Conveyance is fraudulent and was lodged in the Registry of Records merely to seek to ostensibly prove some title. He next submitted that this is shown by the absence in the 1982 Conveyance of how Mickle Roberts came to own the property that he purported to convey. It is a fact that the 1982 Conveyance does not show how Mickle Roberts came to own the property that he conveyed.
- [40] Further, the fact that Mr. Roberts successfully obtained a loan using the 1982 Conveyance as proof of ownership of land for the bank's security and borrowed against is not probative for proving that the 1982 Conveyance contributes to his entitlement to the property. The bank was merely seeking to secure its own interest by investigating Mr. Robert's title to the property but it does not follow that, having accepted his title documents, they did so effectively. The letter from the law firm of Dupuch and Turnquest does no more than prove that Mr. Roberts' father conveyed the property to him by the 1982 Conveyance, which is quite different from certifying that he has a good title to the property.
- [41] Mrs. Wallis also relied on the outcome of the 2004 action to demonstrate that Mr. Cooper and not Mr. Roberts was found to have title to the property and, in that vein, she urged the Court to find that because the property in that case was near to the present disputed property and Mr. Roberts' claim essentially is the same here as it was there, it is unlikely that he has title to the disputed property. I agree that this is not favourable to Mr. Roberts' case.
- [42] In determining ownership of property, because there is no such concept as an "absolute title" in unregistered systems of land, the Court is concerned with the relative strength of the titles. In **Ocean Estates Ltd v Norman Pinder** [1969] 2 A.C. 19, Lord Diplock said, at page 25:

"At common law as applied in the Bahamas, which have not adopted the English Land Registration Act, 1925, there is no such concept as an "absolute" title. 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.” [Emphasis added]

[43] I make no factual finding as to the authenticity of the 1982 Conveyance but the fact that Mickle Roberts did not actually validate his possessory claim to the disputed property by obtaining a Certificate of Title does not assist Mr. Roberts’ documentary claim. Although Mrs. Wallis could not conclusively prove that the estate of Josiah Rahming obtained a Certificate of Title in respect of the centre portion, the cumulative effect of the judgments in the 1965 and 1998 actions is that, at least, they show that the estate claimed it and that the executors may have returned to Court to obtain the Certificate of Title in respect of the area applying the intrinsic evidence test. The claim of Mr. Roberts, however, does not provide any evidence whatsoever that his father ever validated his possession to the 5 acres. With respect to the documentary claims (isolated from the possessory claims), on a balance of probabilities, I find that Mrs. Wallis has a better documentary claim to that of Mr. Roberts.

[44] However, as both parties also claim possessory title, the determination of who has the better title and is the rightful owner of the disputed property ought to be assessed having regard to both the documentary and possessory claims mindful that this is not a quieting matter but one of trespass.

Law on adverse possession

[45] In **Montague Investments Limited v Westminster College Ltd & Anor** [2015/CLE/gen/00845], (Bahamas Judiciary Website 2020 Judgments), this Court encapsulated the law with respect to adverse possession. Shortly put, claimants must establish both factual possession and the requisite intention to possess. At paras 68 to 70, I stated:

“[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”).”

[46] In **Pye**, Lord Browne-Wilkinson, in adopting the definition of factual possession by Slade J in **Powell**, said at paragraph 41 that factual possession connotes 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.

[47] The question as to what acts constitute a sufficient degree of exclusive physical control is one of fact and must depend on the particular circumstances of the case, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.

[48] With respect to the intention to possess, **Slade J.** in **Powell** defines it 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]

[49] With respect to the burden and nature of proof and the desired quality of possession, the adverse claimant by himself and his predecessors had to meet the criteria indicated in **Sherren v. Pearson** 14 Can S.C.R. 581 where Ritchie C.J. said at p. 585:

"To enable the trespasser to recover he must show an actual possession, an occupation exclusive, continuous, open or visible, and notorious for the twenty years. It must not be equivocal, occasional or for a temporary or special purpose."

- [50] As to the quality of the possession, it is significant to note that possession in itself is not sufficient to give a title. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him.
- [51] Thus, when the true owner of land intends to use it for a particular purpose in the future but, in the meanwhile, he has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose like growing vegetables. It matters not if this temporary or seasonal purpose continues year after year for 12 years or even more: see **Leigh v. Jack** (1879) 5 Ex.D. 264; **Williams Brothers Direct Supply Ltd. v. Raftery** [1958] 1 Q.B. 159; and **Tecbild Ltd. v Chamberlain** (1969) 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words.
- [52] On the basis of these settled principles, a party without documentary title, i.e. a party wishing to establish adverse possession, needs to demonstrate actual possession, an occupation exclusive, continuous, open or visible and notorious which must not be equivocal, occasional or for a temporary or special purpose. Furthermore, that party must demonstrate that such acts amounted to actual possession with the requisite intention to possess the property in question.

Possessory claims

- [53] The evidence of the parties relating to possession of the disputed property was in sharp contrast.
- [54] In her testimony, Mrs. Wallis stated that the disputed property was exclusively farmed by her late father who sold the produce to Milo Butler and the land on which Mr. Roberts operates a sand pit is owned by the late Milo Butler and Mr. Roberts' right to operate the sand pit is predicated on a lease granted to him by the Butler family.

- [55] Under cross-examination by Mr. Ducille, Mrs. Wallis maintained that the property was farmed exclusively by her father, John Alfred Sherman, since she was a child and she is now 75 years old. She stated that before her father died in 2002, he told her to beware of Mr. Roberts. After her mother died in 2005, she got one of her father's cousins, Mr. McQueen, to erect a fence between her property and that of Mr. Roberts to ensure that there was no trespassing. In 2010, Mr. Roberts demolished the fence and erected his own. In 2014, her then attorney took action on her behalf. It was continued by her current attorney.
- [56] When cross-examined about the 1997 Survey by Donald Thompson & Associates confirming the 10.880 acres, Mrs. Wallis said that her father was alive in 1997 and Mr. Roberts would not have dared to touch the property.
- [57] When asked by Mr. Ducille what she had to say about Mr. Roberts growing peas, corn, bananas, cassava, pumpkin, watermelons, sapodillas, mangoes, oranges and vegetables such as tomatoes, sweet peppers and cabbages, Mrs. Wallis said that there were never any mangoes. She said that there were very few sapodillas, some corn and vegetables but they were planted by her father and the gardener who worked with him.
- [58] She stated that Mr. Roberts (both in his personal capacity and by a company beneficially owned by him) committed other fraud in relation to other property owned by her family. According to her, he fraudulently sold property of her father located on Prince Charles Drive and is currently enclosing property in Andros that belongs to her father. Mr. Roberts has produced a number of maps of Prince Charles Drive which has displaced various tracts of land which were identified and recorded on earlier maps on the area and lodged within the Department of Lands and Surveys. By doing so and by lodging a myriad of affidavits in the Registry of Records, Mr. Roberts has created a "hornets' nest" for her in the performance in her duties as the Personal Representative of the estates of both of her late parents.

- [59] Mrs. Wallis' evidence on possessory title was corroborated by Mr. Craig Butler whom she called as her witness. Mr. Butler said that he always understood the property to be owned by Josiah Rahming and/or John Sherman and Levittie Aurelia Sherman.
- [60] He testified that his late grandfather, Sir Milo Butler was friends with Mrs. Wallis' father, John Sherman. According to Mr. Butler, Milo Butler and John Sherman conducted business together and Mr. Sherman would sell his crops to his grandfather who operated a retail grocery business.
- [61] He further stated that Mr. Sherman was the executor of the estate of Mrs. Wallis' grandfather, Josiah Rahming, who had extensive land holdings in the eastern district of New Providence as evidenced by the Certificate of Title granted to him in the quieting action.
- [62] With respect to the property where Mr. Roberts operates his sand pit, Mr. Butler stated that it is owned by his father's trust. He said that his grandfather purchased from Josiah Rahming a tract of land in the Prince Charles Drive area referred to as Pine Barren Road. According to him, his father inherited it from his grandfather. The tract is presently part of his father's trust and was the subject property of Supreme Court action CLE/gen/00833 of 2004 which was a title dispute between the trust and Mr. Roberts. The action concluded with settlement between the parties. By the terms of the settlement, Butler's Real Property Limited leased the property to Mr. Roberts. Mr. Butler said that, despite many attempts, he is unable to produce a copy of the executed lease.
- [63] Under cross-examination by Mr. Ducille, Mr. Butler rejected the suggestion that the property totaling 10.880 acres was possessed by Mr. Roberts' family.
- [64] In summary, Mr. Roberts' evidence was that he has exclusive possessory title and strong documentary title to the property being claimed by Mrs. Wallis. He testified that his great-grandmother, Harriet Huyler and his great grand aunts occupied and

farmed parcels of land totaling 10.880 acres of land, 1.61 acres of which is being claimed by Mrs. Wallis.

[65] After the death of his great grandmother, his grandfather and his father, Mickle Roberts, continued to occupy and farm on the disputed property in open, continuous and undisturbed possession since the 1800s. His father farmed the property for over 40 years and he (Mr. Roberts) farmed with his father since he was 6 years old. Mr. Roberts stated that the possession of tract 2 of the 1965 quieting action is evidenced by several affidavits recorded in the Registry of Records:

1. Affidavit of Isaac Davis recorded in Volume 3495 at pages 118 to 120 and lodged for record at the Registrar General's Department on 14 July 1981;
2. Affidavit of Conrade W. Alleyne recorded in Volume 3674 at pages 437-439 and lodged for record at the Registrar General's Department on 17 June 1982;
3. Affidavit of George B. Adderley recorded in Volume 3495 at pages 432 to 434 and lodged for record at the Registrar General's Department on 10 June 1981;
4. Affidavit of Michael Roberts also known as Mickle Roberts recorded in Volume 3747 at pages 180 to 182 and lodged for record at the Registrar General's Department on 19 October 1982;
5. Affidavit of Wilfred Ivan McKinney recorded in Volume 7277 at pages 60 to 63 and lodged for record at the Registrar General's Department on 11 August 1998; and
6. Affidavit of George Holland Barry recorded in Volume 7277 at pages 64 to 67 and lodged for record in the Registrar General's Department on 11 August 1998.

- [66] Mr. Roberts asserted that the produce which he and his father grew were peas, corn, bananas, cassava, pumpkins, watermelons, sapodillas, mangoes, oranges and grapefruit and some vegetables such as tomatoes, sweet peppers and cabbages. The farming was continuous and uninterrupted.
- [67] He said that he knows that Mrs. Wallis' father, John Sherman and Sir Milo Butler farmed land nearby since 1964 but separate from the disputed land.
- [68] Mr. Roberts stated that his father sold to him a portion of his property being 100 feet x 100 feet of the 10.880 acre tract as is evident by the 1982 Conveyance which includes the disputed property. In the conveyance, his father stated that he has been in full, free and undisturbed possession for over thirty (30) years.
- [69] After his father died in 1996, he probated his father's estate. In 1997, he engaged Donald Thompson to survey the whole of the property. His report was that the property was 10.880 acres. He then fenced the entire 10.880 acres.
- [70] In 1996, Mr. Roberts said that he began soil sifting. He ceased farming sometime in 1998 and commenced a heavy duty equipment business. He said that he transported to and from the property sieved soil, sand, cement and pebble rocks through the Springfield Road entrance (northern gate situate near a road leading from Frank Edgecombe Way).
- [71] In 1999, he erected a wall at the east end of the property.
- [72] Since 1999 he operated from a trailer on the property but he eventually constructed a wooden structure. He said that he conveyed two small portions of his property: one to his son, Ezekial Roberts and the other to Solomon Fuluzzi.
- [73] Since his possession in 1996, he has always kept the property surveyed with defined boundaries and fenced in, which was confirmed in the 2013 survey report of Donald Thompson. In 2014 he said that he re-installed wire mesh fencing around the southern boundary.

- [74] Mr. Roberts also called Andrew Thompson, a former Counsel and Attorney-at-Law to testify on his behalf. Andrew Thompson admitted, under cross-examination, that he is disbarred from practicing. He said that he is aware that Mr. Roberts has had a significant part of the property for approximately 16 years.
- [75] I had the advantage of seeing, hearing and observing the demeanour of the witnesses as they testified. I also saw the disputed property on the visit to the *locus in quo*. I found Mrs. Wallis to be a very convincing witness. I also found her to be straightforward and candid in her testimony. I therefore prefer her evidence to that of Mr. Roberts. Mrs. Wallis' evidence that her father exclusively farmed the disputed property was consistent with that of Craig Butler. Mr. Butler was unequivocal and forthright in his testimony but I did exercise some caution when analyzing his evidence since he had an issue with Mr. Roberts that is directly related to property within the same vicinity.
- [76] I also accepted Mrs. Wallis' evidence that her father warned her about Mr. Roberts. This is evident from the plethora of different actions in which Mr. Roberts was involved concerning properties in the area. I also accept Mrs. Wallis' evidence that Mr. Roberts did not begin to claim the disputed property until after the death of her father in 2002 as he dared not do so during the lifetime of her father.
- [77] Applying the legal principles of possession to the facts of this case, I find that Mr. Roberts never dispossessed Mrs. Wallis of the disputed property.
- [78] Mr. Williams correctly stated that the threshold for what is required of a paper title owner to enable him to bring an action for trespass against someone without title is low. In **Ocean Estates**, at page 25, Lord Diplock said that the slightest acts of the title owner indicating his intention to take possession is sufficient.
- [79] I also agree with Mr. Williams that Mrs. Wallis was never dispossessed because any possession by Mr. Roberts could not have met the limitation period for adverse possession because, as I stated, I find that Mr. Roberts did not begin "possessing" the disputed property until 2002 at the earliest. Since then, Mrs. Wallis has been

enthralled with legal matters related to this and other properties on Prince Charles Highway since the death of her father. Further, I accept her evidence that she put up fences and did acts showing her intention to possess the property.

[80] The evidence of Donald Thompson that he was not questioned or interrupted over the three (3) days that he spent surveying the property is not very probative for Mr. Roberts' case that he was in continuous possession of the disputed property, as it was only for three (3) days. Donald Thompson not being interrupted for three (3) days does not mean that Mrs. Wallis failed to show her intention to possess the disputed property. Further, I did not believe Andrew Thompson that he had known Mr. Roberts to have a significant part of the property for approximately sixteen (16) years.

Analysis on aggregate claims

[81] Both parties based their claims on documentary and possessory titles.

[82] Mr. Roberts' evidence is that his family farmed the property continuously. The Court is not concerned with the ownership of the 10.880 acres outside of the disputed 1.62 acres. In the affidavits relied on by Mr. Roberts, the affiants swear to being aware that Mickle Roberts and his family were in possession for many years. The affidavits were all sworn in 1981 and 1982 respectively save for one which was sworn in 1951. As is hoped, the affidavits speak to possession by Mickle Roberts up until the time that it was sworn. However, Mickle Roberts never validated his possessory title up until the time that the affidavits were sworn. As such, even if the contents of the affidavits until that time were true, the continuous possession of Mr. Roberts' family ceased whenever Mrs. Wallis' father possessed the property, which I have already stated that I accept.

[83] Mr. Roberts agreed that the affidavit of surveyor Conrade Alleyne was executed around the same time that Bursil Wallace purchased his property located adjacent to the disputed property, which, in my opinion, makes it unlikely that he is entitled to this property due to the proximity of the two properties. In that respect, I agree

with Mr. Williams that the judgment in the 1998 action is unfavourable to the case of Mr. Roberts. This is because his claim is that he owns the entire 10.880 acres including the disputed property in the 1998 action and the area disputed in this action.

[84] As stated before, I prefer Mrs. Wallis' evidence that Mr. Roberts did not begin claiming the disputed property until 2002 at the earliest. Also, Mr. Roberts' documentary claim is weaker than that of Mrs. Wallis which is expected since his claim is largely possessory. For adverse possession, he would have to prove uninterrupted, open and visible possession of the property for a continuous period of twelve (12) years. Mr. Roberts' claim only began to run in or about 2002. Even then, he has to prove open, visible and exclusive possession which he is unable to do. I accept Mrs. Wallis' evidence that she did acts to show her intention to possess in or around 2005, after her father's death, such as erecting fences and sending a gardener. Accordingly, I do not find that Mr. Roberts was in uninterrupted, continuous, open and visible possession of the disputed property.

[85] Having regard to both parties' documentary and possessory claims, on a balance of probabilities, Mrs. Wallis has better title to the disputed property. I therefore find as a fact that Mr. Roberts trespassed on the disputed property. Mrs. Wallis is entitled to possession of the disputed property. She is also entitled to the declaration sought namely that Mr. Roberts is not entitled to enter or cross upon her land/property.

[86] Further, I will also grant a perpetual injunction to restrain Mr. Roberts whether by himself, his servants and/or agents and howsoever otherwise from entering or crossing Mrs. Wallis' land/property.

Mesne profits

[87] Mrs. Wallis alleged that she has been deprived of the use and enjoyment of her property and has suffered loss and damage. She claims a sum of B\$3,000 monthly as a reasonable sum for its use and enjoyment. Mrs. Wallis is entitled to mesne

profits until delivery of possession upon the presentation of proper documentation. The assessment of such damages will be done by the Registrar.

Whether Mr. Roberts is liable for loss of sale

[88] Mrs. Wallis pleaded a consequential loss to the trespass namely that because of Mr. Roberts' trespass, she was unable to deliver vacant possession of the property to the intended purchaser, which resulted in the loss of the sale of the property. Mr. Williams submitted that each required element of the tort of loss of sale is present in the circumstances: (i) the existence of a valid contract between the plaintiff and third party (ii) knowledge of that contract by the third party (iii) intent of the defendant to induce the third party to breach the contract with the plaintiff (iv) lack of any justification for the defendant to induce such a breach (v) damage to the plaintiff caused by the breach and (vi) the defendant is capable of being liable for damages caused by his tortious interference. With respect to the intention required of the defendant to interfere with the contract, Mr. Williams submitted that Mr. Roberts had actual intent to cause breach to the plaintiff's contract as required in **Mainstream Properties Limited v Young and others** [2005] All ER (D) 148 (Jul). It is clear, however, that the elements required listed by Mr. Williams are those required of inducement to commit breach of contract, which is a tort itself. This was not pleaded by Mrs. Wallis. A party is bound by its pleaded case: **Bahamas Ferries Limited v Charlene Rahming SCCivApp &CAIS** No. 122 of 2018 – Judgment of Sir Michael Barnett JA (as he then was).

[89] However, the loss of the contract is, in my judgment, a consequential loss that is not too remote. The test for remoteness in tort is set out in **The Wagon Mound (No. 1)** [1961] UKPC 2: whether the damage was of a kind that was reasonably foreseeable. It was reasonably foreseeable from Mr. Roberts' acts of occupying the land that the contract for the sale of the disputed area would not have been successful due to Mrs. Wallis being unable to deliver vacant possession.

[90] Mr. Roberts denied being aware of the Agreement for Sale of the property between Mrs. Wallis and the purchaser. I do not believe him. Mr. Williams relied on a Police

Statement dated 18 July 2018 in which Mrs. Roberts stated that he was aware that some Chinese persons were interested in purchasing the property. He emphasized that, based on the evidence, it is clear that Mr. Roberts acted in a manner to induce the purchaser to breach the Agreement for Sale.

[91] With respect to Mr. Roberts' knowledge (or lack thereof) of the contract), I prefer the evidence of Mrs. Wallis that he was aware. Mr. Roberts did not deny occupying the property. In fact, I accept Mrs. Wallis' evidence that he deliberately behaved in a manner to frustrate the contract. It follows that he had the intent to induce the third party (the purchaser) to rescind the contract. As a result of Mr. Roberts occupying the property, Mrs. Wallis could not deliver vacant possession, thereby giving the purchaser basis to rescind the contract. Accordingly, Mr. Roberts is liable for the loss of the sale, which, by the terms of the Agreement for Sale, is B\$250,000.00.

Reprimand for flouting court orders

[92] Mr. Williams urged the Court to reprimand Mr. Roberts in "some way" for willfully disregarding previous judgments and orders of the Court. He contended that Mr. Roberts ought to be reprimanded for same, which he said the Court is empowered to do pursuant to its supervisory role to ensure that Court Orders are strictly complied with. He relied on the Ruling of our Court of Appeal in **Cummings and another v Sumner Point Properties Limited** SCCivApp No. 170 of 2018, where the Court considered the inherent power of the Supreme Court to punish for contempt of proceedings. In **Cummings**, the explanation of the inherent power was based on a provision of the Rules of the Supreme Court with respect to Contempt of Court. I am not convinced by Mr. Williams' submission that Mr. Roberts ought to be reprimanded.

[93] That said, if the Order of this Court is not obeyed, Mr. Williams ought to be fully apprised of the next steps that he should take.

Conclusion

[94] The Order of this Court is:

1. The Plaintiff is declared the owner of the disputed land comprising 1.62 acres which is more particularly described in paragraph 1 of the Statement of Claim filed on 31 May 2019;
2. The Defendant is to deliver up possession of the land by 31 December 2022;
3. Mesne profits are to be assessed by the Registrar;
4. A Declaration is granted to the effect that the Defendant is not entitled to enter or cross upon the Plaintiff's land described in paragraph 1 of the Statement of Claim;
5. A perpetual injunction is granted preventing the Defendant, his servants and/or agents or howsoever otherwise, from trespassing and/or occupying the said land;
6. Consequential damages in the sum of B\$250,000.00 with interest at the statutory rate of 6.25% per annum from the date of judgment to the date of payment;
7. Costs to be taxed if not agreed.
8. A Penal Notice is to be attached to this Order.

Dated this 12th day of October, 2022

**Indra H. Charles
Senior Justice**