**[2015] JMCA Civ 51**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 37/2012**

**BEFORE: THE HON MR JUSTICE MORRISON JA**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MRS JUSTICE MCINTOSH JA**

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| **BETWEEN** | **THOMAS LAZARUS ANDERSON** | **APPELLANT** |
| **AND** | **GAIAN LUDOFF THOMPSON** | **RESPONDENT** |

**Miss Emily Crooks for the appellant**

**Brian Barnes instructed by Brian Barnes & Associates for the respondent**

**14, 15 and 16 October 2014 and 9 October 2015**

**MORRISON JA**

[1] I have had the opportunity of reading in draft the reasons of my learned sister Phillips JA. I agree with them and there is nothing that I can usefully add.

**PHILLIPS JA**

[2] On 14, 15 and 16 October 2014, we heard an appeal against the decision of G Brown J, dated 20 December 2011, in which he dismissed the appellant's claim against the respondent for damages and recovery of possession. At the close of submissions,

we dismissed the appeal, with costs to the respondent to be agreed or taxed. We promised to put our reasons in writing in due course. These are my reasons in fulfillment of that promise.

**The appellant's case**

[3] The appellant resides overseas and is the registered proprietor of all those parcels of land parts of Wydah or Whydah in the parish of Portland being the figure marked B (Section B) and C (Section C) on the plan annexed to the title comprised in the certificate of title registered in volume 577 folio 3 of the Register Book of Titles, containing by survey nine acres three roods twenty five perches and eight tenths of a perch and two acres two roods and three tenths of a perch respectively of the shape and dimensions and butting as appears by the plan annexed and being parts of the land comprised in the certificate of title registered in volume 472 folio 73 of the Register Book of Titles.

[4] On 4 April 2008, the appellant filed a claim form and particulars of claim in the Supreme Court, seeking from the respondent damages for trespass or mesne profits, or in the alternative, possession in relation to Section C, on the basis that in or about June 2005, on his visit to Jamaica, he discovered that the respondent had taken possession of Section C without his consent and had rented it to a tenant for the purpose of farming.

[5] At paragraph 3 of the appellant's witness statement, dated 17 November 2009, which stood as his examination-in-chief, he stated that he had purchased a parcel of

land being part of Wydah in the parish of Portland, in 1980 for $20,000.00 from his predecessor in title, Vernon Harris, who was registered on the certificate of title from 1950 to 1990. However, the appellant was not registered on the certificate of title until 31 August 1990. He further stated at paragraph 4 that before the sale transaction had been completed, Vernon Harris had shown to him and Lloyd Anderson (the appellant's brother) the land contained in the certificate of title and all the boundaries which pertained to it, at which time the property had a wire fence around it.

[6] Throughout paragraphs 5 to 12 of his witness statement, the appellant further stated that sometime in the 1980's, the respondent's brother, Terence Thompson had reared cows on a property adjacent to Section C and had asked Lloyd Anderson for permission to water his cattle on Section C. That permission had been given, and subsequently, in the 1990's, he said that due to the unprofitability of cattle rearing, Terence Thompson had quit the business. The land was left unoccupied and became overgrown with bushes. As a result of the over grown bushes the appellant stated that on his visit to Jamaica in 1990 he had the property cleaned. He observed that the trees which had been planted to mark the boundaries of the property had been cut down and that it was impossible to identify the boundaries. On that basis, a commissioned land surveyor was employed to re-establish the boundaries of the property. The commissioned land surveyor identified the exact boundaries and put in wooden pegs, around the appellant's property, separating it from that of the respondent's.

[7] In 2005 on the appellant's return to Jamaica, he discovered that the respondent had, without his knowledge or permission, entered his land and taken possession of one acre of his property. The respondent had placed his servants or agents on that parcel of land and remained there in possession, having planted bananas. The respondent continued to trespass on his property so he had to file suit against the respondent for recovery of his land, and for damages and mesne profits.

[8] Lloyd Anderson in his witness statement, dated 16 November 2009, which also stood as his examination-in-chief, corroborated the appellant's evidence with the exception that he noted that it was in the late 1980's, that Terence Thompson had stopped rearing cattle. At paragraph 5 he stated that in order to get to Section C at the initial inspection with Vernon Harris, they had to go under a bridge because an estuary was formed at the mouth of the stream on Section C. Further, at paragraph 6, Lloyd Anderson stated that the appellant had taken possession of the property in 1980, after the entire purchase price was paid and that he was put in charge of the land, including Section C, and he had continued to be in charge and in possession up to the time the action was brought.

[9] Lloyd Anderson at paragraph 7 of his witness statement further claimed that after the appellant took possession of the land, he went overseas and having left him in charge, he began to rear cattle on the property, including on Section C, while Terence Thompson reared cattle on an adjacent property. In 2005 when it was discovered that

Section C was being used by the respondent, a survey was again commissioned, however, as stated at paragraph 12, the respondent had objected to that survey.

**The respondent's case**

[10] The respondent is one of the registered joint proprietors of all that parcel of land part of Burlington Estate in the parish of Portland containing by survey six acres thirty three perches and one tenth of a perch of the shape and dimensions and butting as appears by the plan annexed to the title comprised in the certificate of title registered volume 935 folio 67 of the Register Book of Titles. Terence Thompson, his brother, is the other registered proprietor. That property is known as Burlington Estate and is adjacent to Section C.

[11] In his witness statement dated 15 March 2010, which stood as his examination-in-chief, the respondent denied that the appellant was the owner of, or that he was entitled to, possession of Section C. He asserted in paragraph 3 that on 12 November 1977, he and Terence Thompson had entered into an agreement with Helen May Whittingham and Michael Whittingham (the Whittinghams) to purchase two parcels of land, which had been separately described in the sale agreement, for the consideration of $2,500.00.

[12] The first piece of land (Burlington Estate) had been described as set out above in paragraph [10] and the second piece of land, (referred to herein as Section C) was described as "all that parcel of land part of Wydah or Whydah in the parish of Portland comprising 2 roods 1.6 perches and being the land comprised in the Diagram of D. K.

Byles, Commissioned Land Surveyor". The diagram of D K Byles had been commissioned prior to 1977, for the purpose of transferring title in respect of Section C from Vernon Harris to the Whittinghams.

[13] On 7 March 1978, Burlington Estate was transferred to the respondent and Terence Thompson; however Section C was not transferred as the Whittinghams did not have title to that parcel of land, as it was still registered in the name of Vernon Harris. Nonetheless the respondent and Terence Thompson took possession of the two parcels of land.

[14] The respondent further gave evidence that as a result of discovering that the Whittinghams did not have title to Section C, he contacted Vernon Harris who had stated that he had no interest in the land, that the land was in fact owned by the Whittinghams, and that he would cooperate in the completion of the transfer at the appropriate time. It was subsequent to that conversation with Vernon Harris that the respondent and his brother concluded the purchase of the two parcels of land. The survey diagram was then handed over to an attorney-at-law to obtain registered title, in respect of the land marked C on the certificate of title registered at volume 577 folio 3 in the Register Book, then in the name of Vernon Harris. However, the attorney died without obtaining a transfer of Section C to the respondent and his brother, and the diagram since then cannot be located.

[15] The respondent claimed that for about a year prior to the purchase of Burlington Estate and Section C, he and Terence Thompson had occupied those two parcels of

land as the tenants of the Whittinghams, for the purpose of rearing animals. The respondent further asserted that since they became the owners of Burlington Estate and Section C, Section C continued to be used for rearing animals and subsequently a portion was rented for the purpose of planting agricultural crops. As a consequence thereof, the respondent claimed that Section C belonged to him, or, in the alternative, he had acquired rights to it by virtue of adverse possession.

**Findings of the learned trial judge**

[16] In his assessment of the evidence presented at the trial, G Brown J noted that the appellant's sale agreement had never been exhibited although it had been referred to in his witness statement, and he found that the production of the agreement could have corroborated the appellant's account that he had purchased the property in 1980. The learned trial judge rejected the evidence of the appellant and Lloyd Anderson that Terence Thompson had received their permission to water his cattle on Section C. The learned trial judge found that evidence to have been a concoction, as he reasoned that Terence Thompson would have had no need to seek permission to use Section C in circumstances where he had contended that he was one of the owners of that property.

[17] The learned trial judge accepted the respondent's account that he had leased the land from the Whittinghams, who had later agreed to sell the land to him and his brother, and that they had been advised by Vernon Harris that he had no interest in the land. On that basis the learned trial judge found that Vernon Harris had discontinued possession of Section C in favour of the Whittinghams, who had later sold their interest

in the same in 1978 to the respondent and his brother. The respondent, he said, as a claimant to land by adverse possession, would have been required to show that he had legal possession of the property for the requisite period. The learned trial judge found that the respondent and his brother had occupied the land openly, peaceably, exclusively and that they had been undisturbed in their occupation of the land.

[18] By virtue of the appellant's evidence in cross examination, the learned trial judge also found that the appellant had become aware that the respondent was claiming ownership of Section C in 1994, yet it was not until 2008, after the respondent's tenant had been seen cultivating the land in 2005, and the respondent had objected to the survey, that the action for recovery of possession had been filed by the appellant. The learned trial judge also found that Lloyd Anderson had never visited or paid any attention to the disputed land which, he said, would support the respondent's assertion that the land was never in the appellant's possession.

[19] In the light of the above, the learned trial judge found that the failure of the respondent to secure the transfer of that part of the land and to have his title registered had caused the appellant to claim the land. However, between 1994 and 2008 the appellant had taken no action to interfere with the respondent's possession and, as such, the appellant's claim was statute barred by virtue of section 3 of the Limitation of Actions Act (LAA), as the 12 year limitation period had passed. The claim was therefore dismissed and judgment entered for the respondent.

**The appeal**

[20] On 8 March 2012, the appellant filed in this court, notice and grounds of appeal, challenging the learned trial judge's findings of fact and law. The grounds of appeal as advanced by the appellant in the notice of appeal and expounded in the appellant's written submissions are stated as follows:

1. The learned trial judge misdirected himself on the evidence given by the appellant and the witness for the appellant in coming to the conclusion that the appellant and his brother concocted part of the evidence.

2. The learned trial judge erred in failing to state the basis on which he preferred the evidence of the respondent over the appellant's and/or the basis on which he found that the appellant concocted part of the story.

3. The learned trial judge erred in law in holding that the appellant's claim is statute barred having regard to the evidence in the trial in that the learned trial judge:

    (a) misdirected his mind to an incorrect period of time in coming to his conclusion, (such period of time does not accord with the defence advanced by the respondent);

(b) fell into error in holding that at one and the same time that the appellant's claim is statute barred as he did nothing to protect his property between 1994 and 2008 and in holding that the appellant's predecessor in title discontinued possession to the Whittinghams who later agreed to sell the land to the respondent; and

(c) failed to take appropriate notice of and give full effect to the indefeasibility of the registered title of the appellant subject only to limited statutory circumstances none of which has been pleaded in defence by the respondent.

**Submissions of the appellant**

[21] In relation to ground one of the notice of appeal, counsel for the appellant submitted that the finding of the learned trial judge with regard to the issue of whether the appellant or Lloyd Anderson had given permission to Terence Thompson to use Section C demonstrated that the learned trial judge had misdirected himself on the evidence by taking into consideration an incorrect period, since the respondent had failed to plead adverse possession against the appellant with regard to the period between 1990 and 2008 (the period between the appellant's registration on the title

and the filing of the claim) and had failed to plead that he had dispossessed the appellant.

[22] Further, with regard to ground two, counsel for the appellant submitted that the learned trial judge had failed to state the reason(s) on which he preferred the evidence of the respondent over that of the appellant, with particular regard to the finding that the appellant had concocted a part of his story, namely that he or his brother had given permission to Terence Thompson to use Section C to water his cows.

[23] With regard to ground three, counsel submitted that the learned trial judge had erred in finding that the claim was statute barred since he had taken the wrong period into consideration. Counsel argued that the respondent's claim was not adverse possession against the current registered owner of Section C, thus the date when the appellant was entered on title was irrelevant. The relevant period for consideration by the learned trial judge should have been some time before 1978, the year the respondent claimed to have entered into an agreement with the Whittinghams for the purchase of the disputed property.

[24] Additionally, counsel submitted, the finding that the claim was statute barred was not in accordance with the evidence in that, the period that the respondent began occupying the appellant's land was in 2005 and since the action was brought in 2008, the limitation period had accordingly not expired; further, the limitation with regard to adverse possession cannot prevent a legitimate title holder from bringing a claim against an adverse possessor unless the adverse possessor has already taken steps

under section 85 of the Registration of Titles Act (ROTA) to register the land in his name.

[25] Counsel further submitted that the finding of the learned trial judge that the appellant's predecessor in title had discontinued possession to the Whittinghams, who had later agreed to sell to the respondent undermined the doctrine of indefeasibility of title. Counsel submitted that the learned trial judge had failed to reconcile the position advanced by the respondent that the appellant's predecessor in title had sold the disputed property to the Whittinghams with his finding that the appellant's predecessor in title had discontinued possession of Section C to the Whittinghams.

**Submissions of the respondent**

[26] Counsel for the respondent submitted that the defence of adverse possession had been pleaded in the court below in relation to the period prior and post the appellant's acquisition of title in 1990, that is between 1978 to 1990 when the respondent's possession was adverse to Vernon Harris' title and from 1990 to 2008, when the respondents' possession would have been adverse to the appellant's title. Alternately, counsel submitted that the respondent's right had crystallized in the ownership period of the appellant, without any acts challenging the respondent's possession.

[27] Counsel for the respondent relied on **JA Pye (Oxford) Ltd and another v Graham and another** [2002] 3 All ER 865; [2003] 1 AC 419, to submit that the adverse possessor need only have an intention to exclude the world from the property,

it being irrelevant who the paper owner was, whether the appellant's predecessor in title or the appellant himself. Counsel further submitted that the respondent had been in factual, undisturbed possession from 1978 to 2008 and had possessed the requisite intention to exclude everyone including the paper owner.

[28] With regard to the status of the respondent from the period 1978 to 1990, counsel submitted that the respondent had a sale agreement in respect of the disputed property and was in factual possession of the said property with the requisite intention to possess the property and thus was owner of the property by way of adverse possession. Counsel further submitted that it was irrelevant whether the respondent had acquired the land by virtue of Vernon Harris discontinuing possession, or by virtue of him having been dispossessed thereof. The respondent's ownership or title, he argued, did not mirror the duplicate certificate of title, and was therefore inconsistent with the certificate of tile in respect of that parcel of land.

[29] Counsel for the respondent further contended that once the limitation period had expired the title of the appellant would have been extinguished in 1990 and on that basis Vernon Harris' title would also have been extinguished in 1990, before the appellant was registered on the certificate of title in respect of the land, including the disputed parcel, Section C. Further, counsel submitted, it is a misdirected perspective that once a person's name is entered on the certificate of title it cannot be challenged. Counsel also noted that the right to register a title which has been acquired by adverse possession does not dissipate in the absence of registration of that interest.

**Relevant statutory provisions**

[30] The relevant statutory provisions of the ROTA are set out below.

Section 68:

> "No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."

Section 70:

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the *folium* of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be

> deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as encumbrances in such certificate or instrument."

Section 85:

> "Any person who claims that he has acquired a title by possession to land which is under the operation of this Act may apply to the Registrar to be registered as the proprietor of such land in fee simple or for such estate as such person may claim."

[31] Section 3 of the LAA bars the right to recover land, either by entry or by action, after 12 years, by stipulating that:

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

The consequence of the expiry of the limitation period is set out in section 30 of the LAA, which provides that:

> "At the determination of the period limited by this Part to any person for making an entry, or bringing any action or suit, the right and title of such person to the land or rent, for

> the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished."

**Discussion and analysis**

**Issues**

[32] The main issue to be decided by this court was whether the learned trial judge was correct to have dismissed the appellant's claim for recovery of possession of Section C from the respondent on the basis that the claim was statute barred. However based on the submissions presented the sub issues which arose to be decided were as follows:

1. Whether the learned trial judge had misdirected himself, on the evidence given by the appellant and his witness Lloyd Anderson, in finding that the appellant and Lloyd Anderson had concocted a part of their story that permission had been given to Terence Thompson for him to water his cattle on section C.

2. Whether the respondent was precluded from claiming adverse possession where he had also purported to be the owner of the property in dispute.

3. Whether the learned trial judge had correctly found that the claim was statute barred, having taken the following into consideration:
    a. the indefeasibility of the appellant's registered certificate of title;
    b. whether Vernon Harris, the appellant's predecessor in title had discontinued possession of Section C to the Whittinghams; and
    c. whether the respondent had exercised legal possession over Section C for the requisite limitation period.

4. Whether the appellant was barred from bringing a claim against the respondent where the limitation period had expired but the respondent had failed to seek registration under section 85 of the ROTA.

**1. Whether the learned trial judge had misdirected himself on the evidence given by the appellant and the witness for the appellant, Lloyd Anderson, in finding that the appellant and Lloyd Anderson had concocted a part of their story that their permission had been given to Terence Thompson for him to water his cattle on section C**.

[33] It is necessary in respect of this issue to evaluate whether the finding of the learned trial judge with regard to the alleged concoction of the appellant's story was supported by the evidence.

[34] There were two competing versions of evidence. Lloyd Anderson at paragraph 6 of his witness statement stated that the appellant had taken possession of Section C in 1980, after he had paid the entire purchase price for that property. In contrast, the respondent at paragraph 6 of his witness statement asserted that he and his brother had taken possession of Section C after Burlington Estate was transferred to them on 7 March 1978.

[35] The appellant at paragraph 5 of his witness statement stated, that sometime in the 1980's, Lloyd Anderson had granted Terence Thompson permission to water his cattle on Section C. On the other hand, the respondent's account refuted that allegation. Throughout his witness statement the respondent maintained that he and his brother had been tenants of the Whittinghams prior to the purchase of Burlington Estate and Section C from them and had only been accountable to the Whittinghams.

[36] The appellant's evidence was corroborated by Lloyd Anderson at paragraph 8 of his witness statement. In it he stated that Terence Thompson had asked his permission to allow his cows to enter on the appellant's land to access water, which necessitated the removal of a small part of the dividing fence in order to allow access. He stated that thereafter he had granted permission.

[37] The respondent's evidence was corroborated by Terence Thompson, Eugene Williams and Caswell Noland. Eugene Williams in his witness statement dated 15 March 2010, stated at paragraphs 2 and 5 that he had known the land in dispute since the early 1950s and that he knew when "the Thompsons" became owner of Section C, the

land near the waterway in or about 1978. He stated, also at paragraph 5, that the respondent and his brother had reared goats previously on the land and that they had been farming the land up until currently. Eugene Williams also stated, at paragraph 8 of his witness statement, that he had never seen any members of "the Harris family", the appellant or his family or anyone else assert any ownership of or over the land occupied by "the Thompsons".

[38] These two competing accounts of the evidence gave rise to the issue of credibility, which had to be decided by the learned trial judge, and since the appellant's version of events could not subsist with the respondent's version, one version would have had to be rejected by the learned trial judge. In **Powell v Streatham Manor Nursing Home** [1935] All ER Rep 58, Lord Macmillan at page 64 stated that:

> "…Where…the question is one of credibility, whether either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced, and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error…"

[39] It was therefore open to the learned trial judge as the sole judge of the facts, in assessing the evidence adduced before him, to either accept or reject the same as he saw fit. It must always be borne in mind that the learned trial judge had the benefit of observing the demeanor of the witnesses during their testimonies, while on appeal, this court is constrained to analyse the evidence as recorded on paper. In my view, on an

assessment of the evidence, in keeping with Lord MacMillan's statement, the appellant has failed to demonstrate that the learned trial judge had fallen into error.

[40] It is a well accepted principle that the appellate court is reluctant to interfere with the findings of a trial judge except where there was a clear failure by the trial judge to make use of the opportunity to see and hear the witnesses. In the Privy Council decision of **Beacon Insurance Company Ltd v Maharaj Bookstore Ltd** (2014) 84 WIR 478, Lord Hodge at paragraph [12] cited Lord Thankerton at page 487-488 of **Watt** (**Or Thomas**) **v Thomas** [1947] AC 484, where Lord Thankerton had stated that:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[41] In **Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd** [1996] 4 All ER 769, Lord Steyn at page 786 stated that:

> "The principle is well settled that where there has been no misdirection on an issue of fact by the trial judge the presumption is that his conclusion on issues of fact is correct. The Court of Appeal will only reverse the trial judge on an issue of fact when it is convinced that his view is wrong. In such a case, if the Court of Appeal is left in doubt as to the correctness of the conclusion, it will not disturb it… There are two reasons for this approach. First, the prime function of the House of Lords is to review questions of law of general public importance. That function it cannot properly discharge if it often has to hear appeals on pure fact…"

[42] At page 10 of the judgment, the learned trial judge found that it would have been strange for Terence Thompson to have sought permission to use Section C, in circumstances where he was contending that he was one of the owners of Section C. That finding of the learned trial judge was supported by the evidence at the trial which was the agreement for sale of the two pieces of land from the Whittinghams, one in respect of six acres and the other in respect of approximately one acre, namely the disputed land at section C. That finding appeared to be justified on the evidence which the learned trial judge had found to be credible. He also noted that the appellant had failed to put before the court his agreement for sale of the property from Mr Harris which could have supported his allegation that the purchase of the property took place in 1980, which, in the learned trial judge's view, undermined his case.

[43] Furthermore, it is always helpful when the learned trial judge gives reasons as to why he prefers one bit of evidence over another. In the light of the foregoing it was not demonstrated that the learned trial judge's findings were wrong or unjustified so as to warrant interference by this court.

**2. Whether the respondent is precluded from claiming adverse possession where he had also purported to be the owner of the property in dispute**.

[44] In the Court of Appeal decision of **Recreational Holdings (Jamaica) Limited v Carl Lazarus and the Registrar of Titles** [2014] JMCA Civ 34, the property in dispute was dually registered in the certificates of title of the appellant and the respondent. However the appellant's title had been registered prior to that of the respondent. The trial judge at first instance, relied on section 70 of the ROTA, and viewed the appellant's title which was first in time "as the only valid title which exist[ed] in relation to the disputed property".

[45] On that basis the trial judge found that the respondent therefore did not have a lawful title to the disputed property and was accordingly in a position to seek to establish adverse possession. Additionally, the trial judge held that the respondent had been in possession of the disputed property for more than the requisite limitation period and as such the appellant's claim for recovery of possession was statute barred, by virtue of section 3 of the LAA.

[46] On appeal, Morrison JA (as he then was), on behalf of the court, in examining whether the respondent, who had in fact a legal title to the property in dispute was precluded from claiming adverse possession made reference to **JA Pye (Oxford) Ltd v Graham** (a decision which was approved and applied by the Privy Council, in **Wills v Wills** (2003) 64 WIR 176 on appeal from this court), where Lord Browne-Wilkinson, at page 876, set out the two elements which were necessary to establish legal possession

on a claim of title acquired by adverse possession. Lord Browne-Wilkinson stated that the party claiming adverse possession must have had legal possession, which is:

> "(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'). What is crucial is to understand that, without the requisite intention, in law there can be no possession."

[47] Additionally, Morrison JA, at paragraph [37] of **Recreational Holdings**, cited Arden LJ at paragraph [63] of **Ofulue and another v Bossert** [2008] 3 WLR 1253, where she had affirmed the principles which emerged from **JA Pye (Oxford) Limited v Graham**, by stating that:

> "…What emerges from *JA Pye (Oxford) Ltd v Graham* is that it is necessary only to show that the person who claims to have acquired property by adverse possession was in possession without the consent of the paper owner and intended to possess. A person who wrongly believes he is a tenant can occupy property in such a way that he has possession, just as much as a squatter. He does not have to show that he had an intention to exclude the paper owner..."

[48] Morrison JA, at paragraph [36] of **Recreational Holdings**, referred to **Farrington v Bush** (1974) 12 JLR 1492 (on appeal to the Court of Appeal from the decision of the Grand Court of the Cayman Islands in favour of the respondent), where Graham-Perkins JA stated that the appellant had lacked the necessary mental element on which to ground adverse possession and that since the appellant had maintained that he had possessed a perfectly good title to the fee simple by virtue of the

conveyance to him in 1952, that was inconsistent with his later assertion that he was entitled to the land by adverse possession.

[49] However, Morrison JA, at paragraph [37], respectfully disapproved of the above position in **Farrington v Bush** stated by Graham-Perkins JA, finding that:

> "…I doubt very much that these statements represent the modern law of adverse possession."

Morrison JA opined that **Farrington v Bush** should not be regarded as giving support to the view that a holder of a legal title to land in dispute could not rely on the principle of adverse possession. Consequently, after examining a number of authorities Morrison JA stated at paragraph [55] that:

> "…The important factor on all the authorities is that the squatter's possession, in order to ground a claim for adverse possession, must be (i) inconsistent with and in denial of the title of the true owner; and (ii) such that the owner is entitled to recover possession against a squatter."

As such the court held that a person can claim to have acquired land by adverse possession even where that person has a legal title or has purported to hold a legal title to the land in question.

[50] Thus, in my view, there is no inconsistency in the position of the respondent where he purported to be the owner of section C and likewise claimed to have acquired title by adverse possession, with regard to the same land, since the crucial issue is that possession is not derived from the title of the person against whom adverse possession is claimed, for example, by way of a licence which has not expired, or with the consent

of the owner. What is important is whether the respondent had a sufficient degree of physical control and custody of the land claimed which excluded all the world including the paper owner, and whether he possessed an intention to exercise such control and custody on his own behalf and for his benefit, independently of anyone else except someone engaged in a joint enterprise on the land. (This issue is dealt with below.) In the instant case therefore the respondent's evidence which the learned trial judge accepted was that he was in exclusive possession since 1978 with the requisite intention to possess either by virtue of the agreement with the Whittinghams or by his exclusive occupation of the property with his brother. The finding of the learned trial judge that the respondent and his brother had "occupied the land openly, peaceable [sic], exclusively and undisturbed since that date" cannot be faulted.

**3. Whether the learned trial judge had correctly found that the claim was statute barred, having regard to:**

**a. the indefeasibility of the appellant's registered certificate of title**

[51] The principle of indefeasibility of title enunciated in sections 68 and 70 of the ROTA (set out at paragraph [30] herein) confers on the certificate of title absolute evidence that the person named therein is rightfully entitled to the land to which that title relates. This principle of indefeasibility is more clearly set out in section 70 of ROTA. Section 70 provides that all preferential and prior rights are defeated in favour of the registered proprietor, except in the case of fraud. Additionally, generally any encumbrance or interest, unless noted on the certificate of title, cannot fetter the registered proprietor.

[52] However, that principle of indefeasibility is not absolute (see **Frazer v Walker** and **Radomski and Radomski** [1967] 1 AC 569). The certificate of title pursuant to section 68 of the ROTA is subject to the "subsequent operation of any statute of limitations". The Privy Council in **Chisholm v Hall**, [1959] AC 719 addressed sections 67 and 69 of the Registration of Titles Law, which is the exact equivalent of sections 68 and 70 of ROTA, respectively. The Board recognized that in the light of sections 68 and 70 of ROTA, the phrase employed in section 68, 'subsequent operation of any statute of limitations' meant that the certificate of title was subject to rights acquired over it since the land was initially registered under the operation of the ROTA. Thus, while a first registration under the ROTA would extinguish any prior rights acquired over the land, the land is subject to an interest acquired subsequent to the initial registration under the ROTA.

[53] The Board in **Chisholm v Hall** at pages 739 and 740 stated that:

> "…The scheme of section 69 is reasonably plain. The registration of the first proprietor is made to destroy any rights previously acquired against him by limitation, in reliance, no doubt, on the provisions as to the investigation of the title to the property and as to notices and advertisements, which are considered a sufficient protection to anyone claiming any rights of that description. But from and after the first registration the first proprietor and his successors are exposed to the risk of losing the land or any part of it under any relevant statute of limitations to some other person whose rights when acquired rank as if they were registered incumbrances noted in the certificate, and accordingly are not only binding upon the proprietor against whom they are originally acquired but are not displaced by any subsequent transfer or transmission…This language indicates an intention to put the transferee in the same position for all purposes as the previous proprietor…

> The combined effect their Lordships would attribute to sections 67 and 69 may perhaps be criticised as inconvenient, in that it places upon a purchaser of registered land the onus of going behind the register, and satisfying himself that no adverse interest by limitation has been acquired, in every case in which more than 12 years have elapsed since the title was first registered. But that is simply the result of the policy adopted by the Law of preserving rights acquired by limitation notwithstanding that they are not noted in the register…"

Thus, adverse possession being an exception to the principle of indefeasibility, section 3 of the LAA stipulates the limitation period in actions for recovery of land. That section operates to prevent a registered proprietor from bringing a claim to recover land where 12 years have expired since the right to bring that action accrued. Further section 30 of the LAA provides that a certificate of title will be extinguished where the limitation period has expired and no action has been brought to recover land.

[54] The principle of indefeasibility is clearly subject to rights acquired by limitation in respect of registered land.Thus, although the appellant's name having been entered on the certificate of title would generally be conclusive proof of ownership, in circumstances where certain rights of ownership have been acquired by limitation, the principle of indefeasibility of title is curtailed and another person apart from the name stated on the title may become the true owner.

**b. whether Vernon Harris, the appellant's predecessor in title had discontinued possession of Section C to the Whittinghams**

[55] Nourse LJ explained in **Buckinghamshire County Council v Moran** [1990] Ch 623 at 644 that:

> "…In order that title to land may be acquired by limitation, (1) the true owner must either (a) have been dispossessed, or (b) have discontinued his possession, of the land; and (2) the squatter must have been in adverse possession of it for the statutory period before action brought…"

The respondent had claimed that the appellant's predecessor in title had discontinued possession for a period in excess of 12 years, thus when the appellant became the owner of Section C, the respondent's interest had already crystallized. Dispossession was defined by Fry J, at page 540, in **Rain v Buxton** (1880) 14 ChD 537, as "where the person in possession goes out and is followed into possession by other persons". However, it was stated at page 472 in **Powell v McFarlane** (1977) 38 P & CR 452, and approved by Lord Browne-Wilkinson in **JA Pye (Oxford) Ltd v Graham**, that "the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession". Thus, it is necessary to examine whether the learned trial judge was correct to have found that Vernon Harris, the paper owner had discontinued his possession of Section C.

[56] The respondent stated at paragraph 7 of his witness statement that the Whittinghams had exercised control over Section C and had rented it to him in 1977. At paragraphs 3 and 12 respectively, he stated that the Whittinghams had subsequently contracted for sale of the land to him and that when he discovered that the

Whittinghams did not have title for Section C, he was reassured by Vernon Harris that Section C was in fact owned by the Whittinghams and he, Vernon Harris would cooperate with the transfer of Section C at the appropriate time. Furthermore as mentioned previously, when the respondent was registered on the title for Burlington Estate on 7 March 1978, he had also taken possession of Section C.

[57] Throughout paragraphs 3 to 5 of his witness statement Eugene Williams stated that in the early 1950s both "the Harris family" and the Whittinghams owned land adjacent to each other. However, he noted that Vernon Harris' land ran from the sea up to the bridge with a strip of that land that ran across the bridge and alongside the road opposite to the land owned by the Whittinghams. That strip of land was separated from the Whittinghams' land by a water way that ran under the bridge and back into the river. He stated that that strip of land was considered to be a part of the Whittinghams' land but was in fact owned by Vernon Harris. Thus, due to the difficulty of accessing the land across the water way Mr Whittingham took over the piece of land from Vernon Harris and had planted banana on it. He further stated that since the mid 1950's he had never seen anyone else on that piece of land other than persons working for the Whittinghams and currently, the Thompsons. He also stated that he knew when the Thompsons became the owners of the land near the water way in 1978 and that he himself had rented a piece of land by the tributary from the Thompsons in 2005.

[58] The above evidence was accepted by the learned trial judge and in my view amounts to clear evidence that Vernon Harris had discontinued possession of Section C

to the Whittinghams in the 1950's, and certainly, by 1978 when the respondent had entered into possession on his own behalf and that of his brother's, and not by leave of the Whittinghams. On that basis, time would have begun to run against the true title owner. Thus Vernon Harris' certificate of title would have been extinguished in March 1990. As a result, when the appellant was registered on the certificate of title at volume 577 folio 3 of the Register Book of Titles, on 31 August 1990, the limitation period in favour of the respondent, in respect of Section C, would have already expired. Consequently, the appellant's title in respect of Section C would have been defeated by the respondent's claim for adverse possession, and would have been extinguished accordingly.

**c. whether the respondent had been in legal possession of Section C for the requisite limitation period**

[59] As was previously addressed at paragraphs [46] and [47] herein, the party claiming to have acquired title by adverse possession must have had "a sufficient degree of physical custody and control" and an "intention to possess" for the requisite limitation period. The appellant gave evidence that he had bought the property in 1980 and received title in 1990. He was shown the boundaries at the time of purchase which included Section C. Lloyd Anderson gave evidence that he had reared cattle on the property including Section C and that in the 1980's he stopped rearing cattle as this was no longer lucrative, claiming that as a result the land became overgrown and persons were employed to clean the land.

[60] The learned trial judge from the evidence presented was satisfied that the appellant was never in possession. He found that the only actions taken by the appellant were in 1990, when he had the property cleaned and in 1995 when a commissioned land surveyor was employed to identify the boundaries of the land in dispute, although no notice was given to the neighbouring land owners. He further found that the appellant had made no attempt to enclose or fence the land and that although Lloyd Anderson had resided in the parish, he was unaware that the boundary fence had been removed and that the trees marking the boundary had been chopped down. Additionally, the learned trial judge found that the appellant, having returned overseas and left Lloyd Anderson in charge, Lloyd Anderson had not visited the property or paid any attention to it.

[61] On the other hand the learned trial judge accepted the evidence of the respondent that he had been in possession of Section C at the time that the action was brought. The onus was on the respondent, however, to prove both factual possession and the intention to possess for the requisite limitation period. The respondent gave evidence that he entered into possession of Section C, prior to 1978, as a tenant and that he had purchased the property in 1978 from the Whittinghams, to whom Vernon Harris had discontinued possession of the property. The land had been used to rear cattle and was rented in 2005.

[62] Further, Eugene Williams' witness statement, as recounted at paragraph [57] herein, supported the respondent's claim of possession. Eugene Williams had been well

acquainted with the history of the land since the early 1950's and had known it to belong to Vernon Harris, the Whittinghams and subsequently the respondent. Furthermore, he provided a logical explanation for the Whittinghams having taken over Section C from Vernon Harris, as the tributary had posed a difficulty to Vernon Harris accessing that property from the other remaining part of his property. He also supported the respondent's use of the land to rear goats and further supported the respondent's claim of possession when he stated that in 2005 he rented a piece of Section C from the respondent. Importantly, so as to leave no doubt as to who possessed Section C, he stated that since the respondent and his brother have owned Section C, he has never seen "the Harris family" or the appellant asserting ownership of Section C. That account was likewise corroborated by Caswell Noland.

[63] The evidence from those two witnesses, being elderly men with extended knowledge of the history of the land, was significant with regard to the learned trial judge deciding what evidence he found to be credible. There was clearly sufficient evidence for the learned trial judge to find that the respondent was and had been in possession of Section C since 1978. In my view in the light of the evidence, such a finding and the reasoning and conclusion of the learned trial judge could not be faulted, or said to be unjustified.

[64] On the evidence adduced, the learned trial judge concluded that the appellant, in 1994, had become aware of the respondent's contention that he (the respondent) owned Section C, yet the appellant had not filed the claim until 2008. When assessing

the actions taken by the appellant on the land since that period, the learned trial judge found that the appellant was statute barred from bringing the claim, time having run from 1994 to 2008 (the date the appellant became aware of the respondent's claim to the land, to the date the claim for possession was filed).

[65] In my view, however, it is unnecessary to consider multiple periods of limitation where the limitation period had already expired in that party's favour, the limitation period having expired in 1990. Thus, whether there was a specific period between 1994 to 2008, in the second instance in which the paper owner had been dispossessed by the respondent, does not arise for consideration. The interest acquired by the respondent during the period 1978 to 1990 would have subsisted against the appellant, **Chisholm v Hall** having established that the transfer of a certificate of title does not have the effect of defeating an interest already acquired by limitation. In fact the appellant's interest in Section C would have been extinguished from at least March 1990, before he became registered on the certificate of title for the property including section C.

**4. Whether the appellant is barred from bringing a claim against the respondent where the limitation period has expired but the respondent had failed to seek registration under section 85 of the ROTA**

[66] Section 85 of the ROTA gives a person who claims to have acquired title by adverse possession the right to apply to the Registrar of Titles to be registered as proprietor of that land. Further, section 3 of the LAA provides that an action for recovery can only be brought before the expiration of 12 years after the right to recover

possession first accrued. However, section 30 of the LAA goes further to provide for the extinction of titles of persons who were entitled to claim for recovery of possession where there has been an expiration of the 12 years limitation period stipulated in section 3 of the LAA.

[67] Thus, based on the above statutory provisions, even in circumstances where the person claiming to have acquired title by adverse possession has failed to register that title claimed under section 85 of ROTA, the legal title holder would be prohibited from claiming possession by virtue of that title once it had been extinguished upon the expiration of the limitation period. Thus, the title acquired by adverse possession would subsist irrespective of whether the interest had been registered, save and except where that interest was claimed prior to the first registration of the title of the legal proprietor. This principle was also endorsed in **Recreational Holdings**.

[68] As a consequence, the respondent's title to Section C which had been acquired by adverse possession would not be defeated by non-registration under section 85 of the ROTA.

[69] In light of all the reasons outlined above, I agreed with my learned brother and sister to dismiss the appeal with costs to the respondent as set out in paragraph [2] herein.

**MCINTOSH JA**

[70] I have had the opportunity of reading in draft the reasons and conclusions of my learned sister Phillips JA and I agree that they form the basis for the decision we handed down on 16 October 2014 and I have nothing to add.