[2017] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 7/2016

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**HAROLD FRANCIS JNR**	**1st APPELLANT**
AND	**ELVEGA FRANCIS**	**2nd APPELLANT**
AND	**DORRETT GRAHAM**	**RESPONDENT**

Jeffrey Daley instructed by Betton-Small, Daley & Co for the appellants

Michael Brown for the respondent

10 November 2016 and 20 November 2017

MCDONALD-BISHOP JA

[1] I have read in draft the reasons for judgment of Edwards JA (Ag) and the reasons she has given do accord with my own reasons in concurring in the decision of the court, that the appeal should be allowed.

SINCLAIR-HAYNES JA

[2] I too have read in draft the reasons for judgment of Edwards JA (Ag). I agree and have nothing to add.

EDWARDS JA (AG)

[3] On 10 November 2016, we allowed this appeal from the Parish Court (formerly Resident Magistrate's Court) for the parish of Westmoreland, set aside the judgment and orders of the judge of the Parish Court (formerly Resident Magistrate), entered judgment for the appellant and awarded costs of the appeal and in the court below to the appellants in the sum of $50,000.00. These are the reasons for judgment as promised at the time.

Background

[4] In this appeal, Harold Francis (Jnr) and Elvega Francis ("the appellants") challenged the decision of the judge of the Parish Court for the parish of Westmoreland ("the parish judge") wherein she entered judgment for the plaintiff, Dorrett Graham ("the respondent") and awarded her the sum of $250,000.00 for damages and costs in the sum of $23,016.00.

[5] The plaint was filed in the Westmoreland Parish Court on 1 May 2013, against the appellants, seeking to recover damages for trespass. The respondent also sought an injunction to restrain the appellants, their servants and/or agents from further trespassing on her land, special damages for injury due to excavation, loss of top soil and for reinstatement work in the sum of $250,000.00 as well as interest and costs. On

5 June 2013, an injunction was granted ordering the appellants to cease construction on the disputed land until the resolution of the matter.

[6] The respondent’s claim was based on her contention that she bought two squares of land in Culloden in the parish of Westmoreland ("the land"), from the appellants’ father Harold Francis (Snr).The land formed part of a larger parcel of land measuring one acre, registered at Volume 682 Folio 21 of the Register Book of Titles. The entire parcel of land which included the section purportedly bought by the respondent, was registered in the name of Harold Francis (Snr) from 1953. Harold Francis (Snr) and his family, including the appellants, resided on the property.

[7] The respondent's evidence was that she paid the full purchase price of $5,000.00 for the land in 1983. She tendered into evidence a common law indenture purporting to convey the land to her for the purchase price of $5000.00 and a receipt showing payment of $2,600.00 in 1983 as proof of the transaction. Her evidence in court was that she paid the full purchase price of $5,000.00 for the two squares of land.

[8] After the death of their father, the appellants remained in possession of the entire acre of land, including the section being claimed by the respondent. They refuted the respondent's claim that she had purchased the land from their father. They also denied destroying a fence placed on the land by the respondent or that there had ever been any line of demarcation dividing any portion of the property. They also said that they were the registered owners in possession and were, therefore, not trespassers on the land.

Application to adduce fresh evidence

[9] The appellants had filed an application to, among other things, have the certified copy of the Duplicate Certificate of Title registered at Volume 682 Folio 21 of the Register Book of Titles for land at Culloden in the parish of Westmoreland, adduced as fresh evidence in this court. On 7 November 2016, we considered the application and granted the order, albeit that it was recognised by the court that the evidence was not, strictly speaking, fresh evidence as the certificate of title was available at the time of the trial. In the interests of justice and in fairness to the appellant, however, we allowed the application for the certificate of title to form part of the record of this court although it was not tendered in evidence below, in light of the following circumstances: (a) the parish judge had taken note of its existence and has referred to it in her judgment; (b) the respondent has acknowledged the existence of the appellants' registered title; and (c) the appellants were unrepresented in the court below.

[10] The evidence led in the Parish Court, in brief, was that at the time the respondent purchased the land, the appellants were mere children, just nine and 11 years old, respectively. She was given a common law indenture by the appellants' father in 1985 when she took possession of the land. There was, however, no subdivision or transfer of the land the respondent claimed to have purchased.

[11] The respondent said the land was surveyed by the appellants' father, who gave her a copy of the surveyor's report, after which, she had it fenced at her own expense. She said she was not present or represented at the survey commissioned by the

appellants' father but claimed that the 2nd appellant was present. That surveyors report was not tendered into evidence at the trial.

[12] The respondent also said that after she received the common law indenture and took possession of the land in 1985, she erected a fence. That fence, she said, was removed by the 1st appellant after she returned to the United States. She said the appellants' father was not present when the fence was removed as he had died. She subsequently fenced the land again and it was removed once more. She could not recall when the second fence was removed. She, however, said that she took the appellants to court in 1999 because they were removing the fence. She was overseas when the matter came before the court and did not attend. After the fence was removed, she spoke to the 1st appellant about the land and told him she had bought it from his father. Her evidence was that the 1st appellant however refuted this assertion, stating that she had not bought the land.

[13] The respondent did not reside on the land and her evidence was that although she visited Jamaica at least every year or every other year, she did not visit the land after the purchase but would pass and look at it. She said she started paying taxes for the land about five years after the purchase and produced tax receipts for the years 2005, 2006, 2008 and 2010, which were admitted in evidence. She paid no taxes for the land before the appellants' father died. It was after she sent the common law indenture to Montego Bay to 'get it rectif[ied]' that she started paying taxes.

[14] Her evidence was that the appellants were always on the land. They had cut down trees and placed marl on the land and were using it as a parking lot. They were written to and asked to desist by her daughter and her attorney-at-law. She herself did not speak to them in person. She did not give them permission to be on the land and she wanted them off. She knew the appellants were in possession of a "lawful title". She placed a caveat on the land to stop the appellants from building on it but 'lose her money'.

[15] The appellants' daughter also gave evidence of her knowledge of the purchase of the land and the fact that it was fenced twice and removed each time by the appellants. She said she visited the land in the 90's and saw the fence her mother erected around the land and that it was removed in the "mid to late 90's". She spoke to the appellants in 2007 when she saw the fence was gone and showed them the common law indenture given to her mother, the survey documents and a letter to her mother written by the their father which she said detailed the sale of the land and the price at which it was sold. The 1st appellant told her the documents were "bogus" as he knew nothing about them and also made threats. She said she had a receipt for the second payment for the land. This was, however, not tendered into evidence although, after a document was shown to the 1st appellant he suggested to her, and she did not deny it, that the receipts would amount to only $4,600.00. There was no accounting for the balance of $400.00.

[16] The appellants' evidence was that their father died in 1987 and that they inherited the property after his death. They had been building on the land since 2000. A previous claim had been brought against them by the respondent in 1999, similarly for trespass, but it had been adjourned, for "insufficient evidence". At that time, the estate was being administered and according to the 1st appellant, it was an attempt by the respondent to prevent the transfer of the land to them. They began the process of transferring title in 1998 but the respondent lodged a caveat and thereafter did nothing further to pursue a claim. With the advice and assistance of their attorney-at-law they applied for the Duplicate Certificate of Title to be transferred to them in 2006.

[17] They occupied the land from birth. They were aware that their father would lease land from time to time including a "house spot", but were unaware of any sale of any portion of the land. The entire property is an acre more or less and there is a house on the land which they occupy. There had never been any demarcation of any portion of the land and they knew of no surveyor's pegs being placed on the land and had never seen any. The 1st appellant claimed his father would never sell the land and so the documents produced by the respondent had to be a forgery. He agreed that a survey report shown to him had been commissioned by the respondent, but stated that he did not know when the land was surveyed. He saw no pegs and did not pull out any pegs or tear down any fence. He said they now have two buildings on the land.

[18] The 2nd appellant denied all knowledge of the sale or the common law indenture and denied there was ever a fence on the land or that it was torn down by them. The

lessees were removed by their father before he died because he did not "want any problem after he died", she said.

[19] Her evidence was that in 1983 they were children. She was 11 years old and her brother was nine years old. No one had ever confronted them about the land until they received the summons in 1999. After receiving the summons, their lawyer wrote to the respondent's lawyer requesting that he send what documents he had in support of the claim but nothing was sent. She said the respondent's representative came to court but had insufficient documents to prove the claim and the case was adjourned. She and the 1st appellant were subsequently brought back to court for trespass to the land and damages in 2013. She however, stated that the documents that had been presented to the court in the current claim were not presented to the court in the previous claim. She denied being present at the time the survey was done and says she was only told about it by her neighbour.

[20] The appellants called two witnesses in the person of their neighbours, Mr Kenneth Samuels and Mr Randy Smith. Mr Samuels was the brother-in-law of the appellants' father. He stated that he knew of no sale and saw no fencing around the land. His evidence was that the appellants' father "never utter a word ...about selling" the land. He said "it sound funny to [him]" that years after the appellants' father's death, the respondent claims to have been sold the land. He said the appellants were born on and lived on the land and so could not be trespassers. He knew two persons

who were tenants on the land but were both told to leave by the appellants' father prior to his death.

[21] Mr Smith's evidence was that he was the appellants' neighbour. He resided in the neighbouring property to the left of the appellants' property, which was his mother’s, from his birth in 1967 until he left in 1996. He is aware of a survey of the appellants’ property which was done in the year 1990 and which had been authorized by the respondent. He said a Mr Walter Scott was present at the survey to represent the respondent. He said no one from Harold Francis' (Snr) estate was present but he was present to represent his mother. He said the appellants were away at school at the time and that it was he who told them about the survey. He saw no fence at any time on the appellants' property although he visited his mother’s property regularly and the only fence that was there was between his mother’s and Harold Francis’ (Snr) property. Even after the survey, he said, no fence was erected.

The parish judge’s decision

[22] The parish judge, after summarising the evidence, came to the conclusion that the respondent had made out a case in trespass. That conclusion was arrived at as a result of several findings of fact and law made by the parish judge. The first finding of fact the parish judge made was that the tenants were removed from the land by the appellants’ father, before his death, so that the respondent could have access to her land without "issue". This was how the parish judge put it:

> “Indeed the evidence of witness Kenneth Samuels is that Francis Snr. insisted that two tenants on the property should

> vacate before his death, clearly so that the buyer [respondent] can have access to her land without issue."

[23] However, it is difficult to see how the parish judge came so definitively to this conclusion, when the 2nd appellant said that her father had removed the tenants because he wanted no problems after he was dead. This was confirmed by Mr Samuels who recounted that the appellants' father said that the tenants had to be removed before he died. There was no evidence from the respondent that the tenants were removed on her account. The fact that they were removed for the benefit of the respondent was, therefore, not an inference which could inescapably be drawn by the parish judge.

[24] The parish judge also found that the assertions by the appellants that they were not aware of the sale of the land or were not informed about it could not vitiate the sale. She went on to note that the respondent had placed a caveat on the title which barred the transfer of the title to the appellants. This, she stated, showed that the respondent was "seeking to assert her right to the two squares she brought [sic], and that stand as "Notice" to the [appellants] that there was someone with an interest in the property". This is a statement of law made by the parish judge but she failed to indicate what the effect, in her view, was of this "notice" on the appellants' title. As will be seen later in this judgment, this "notice" could not affect the appellants' lawfully registered title.

[25] The parish judge went on to find that the respondent had produced sufficient proof in writing, based on the receipts and her common law indenture, of her

ownership of the land. She then outlined the law as it relates to the tort of trespass and the recovery of damages. The parish judge then went on to state that:

> "It is not in issue that Harold Jnr. and Elvega both together or individually are utilising all or part of the two squares bought by Ms. Graham thus depriving her of the use and benefit of the property and as such are trespassing on her property."

[26] The parish judge also accepted the evidence of the respondent and her witness that the land was fenced twice and that the fence was removed or destroyed on both occasions. She made no finding, however, as to when these incidents of fencing took place and how that would affect the appellants' claim that they had occupied the land for all of their lives. The parish judge concluded by listing her findings, on a balance of probabilities, as follows:

> "1) Ms Dorrett Graham (and Maureen Clarke) bought two squares of land from Harold Francis Senior in the 80s [sic].
>
> 2) Ms. Graham has provided sufficient and the legally required proof of purchase – receipts and Indenture, Exhibits 1 and 2.
>
> 3) That Elvega and Harold Francis Junior were aware of the claim some years before they acquired their title, there being a Caveat lodged against the land.
>
> 4) That Elvega and Howard Francis Jnr are Trespassers [sic] on the property of Dorrett Graham
>
> In the circumstances, the court finds the claim of $250,000 reasonable since the plaintiff:
>
> a) has been deprived of the use of the land for many years
>
> b) has expended sums to fence the property on more

than one occasion"

The notice and grounds of appeal

[27] The appellants filed notice and grounds of appeal challenging the parish judge's decision and a number of the findings which she made. The grounds are as follows:

> "1. That the learned [parish judge] erred in finding that the Appellants had trespassed on land allegedly owned by the Respondent and in awarding the Respondent damages in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) based on the evidence that was before her.
>
> 2. The learned [parish judge] erred in failing, neglecting or refusing to accept and enter into evidence the Duplicate Certificate of Title registered at Volume 682 Folio 21 of the Register Book of Titles which was presented by the Appellants, who were unrepresented at trial. The said document was conclusive proof of the Appellants' ownership of the said land.
>
> 3. The learned [parish judge] fell into error in embarking upon a trial that involved a bona fide dispute of Title between the parties within the meaning of **Section 96 of the Judicature (Resident Magistrates) Act** [now Judicature (Parish Courts) Act] without evidence from the Respondent that the annual value of the property put the matter within the Court's jurisdiction. The issue of the statutory value limiting the Court's jurisdiction was not addressed.
>
> 4. The learned [parish judge] erred in finding that the Respondent had satisfactorily proven her ownership of the subject property by production of a common law Title comprising an Indenture dated 5th January, 1985 made between the Respondent and the Appellants' deceased father, Harold Francis Snr. and one receipt dated the 13th September, 1983 purportedly signed by Harold Francis Snr., (deceased). The learned [parish judge] treated the Common Law

Title as superior to the registered Title of the Appellants which showed them as being registered proprietors since the 15th February, 2007.

5. That the learned [parish judge] erred in finding that a (discharged) Caveat purportedly placed against the Title of the subject property before it was transferred into the Appellants' names through Administration of the deceased owner's estate, could have given the Respondent priority to the Appellants in any claim to ownership of the said land in order to defeat the registered Title. By so doing she acted contrary to the provision of **S. 70 of the Registration of Titles Act** that extinguishes any prior rights claimed over land and holds a registered title to be indefeasible except in instances of fraud. The learned [parish judge] also fell into error in finding that the Respondent's lodging of a Caveat against the registered Title, without more, could have given the Respondent's equitable interest priority over the Appellants [sic]registered Title.

6. The learned [parish judge] erred in finding trespass for the Respondent where the Respondent had neither proven possession or occupation of the subject land to the exclusion of the Appellants whose occupation was longstanding [sic] (i.e. in excess of 26 years) and thereby acted contrary to the provisions of **Section 7 of The Trespass Act**. The facts before her of the Respondent's involvement with the property did not demonstrate sufficient acts of physical control to amount to possession.

7. The learned [parish judge] erred in finding damages for the Respondent in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) where the Appellants had demonstrated ownership by their registered Title, Volume 682 Folio 21 and she thereby acted contrary to the provisions of **Section 7 of The Trespass Act**.

8. That the learned [parish judge] erred in finding based on the Respondent's evidence presented to her that damages in the quantum of Two Hundred and Fifty Thousand Dollars ($250,000.00) had been proven

> since there was no evidence of actual loss presented by the Respondent to support such finding.
>
> 9. The learned [parish judge] erred when she refused to allow the Appellants an adjournment to facilitate the attendance of their Attorney-at-Law, whom they were to instruct in the matter and proceeded with the trial with the Appellants being unrepresented. The Appellants were thereby prejudiced in their right to a fair trial." (Emphasis as in original)

The appellants' submissions

[28] Counsel for the appellants submitted that the parish judge was wrong to find that the appellants had trespassed on the respondent's land and therefore erred when she awarded damages in the sum of $250,000.00. This, he argued, was because the respondent gave no evidence to support the claim for an award of damages in that sum.

[29] Counsel argued further, that the authorities including **Bonham-Carter v Hyde Park Hotel Ltd** [1948] 64 TLR 177 at 178 and **Hepburn Harris v Carlton Walker** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 40/2009, judgment delivered 10 December 1990, clearly established that special damages must be specifically pleaded and proved. Counsel pointed the court to the fact that there was no evidence of any diminution in the value of the land by any acts of the appellants.

[30] It was also submitted that the parish judge had contradicted her own statement of the law on damages for trespass when she awarded damages in the absence of proof of physical damage to the land or proof that the respondent had been deprived of

the use of the land. There was also, he noted, no evidence of any cost in relation to the erection of the fence that the respondent claimed was torn down on two occasions.

[31] Counsel argued that the appellants: (a) were the registered owners of the land, the subject of the suit; (b) were actually in possession of the land; and (c) were not aware of any sale of any portion of the land to the respondent; and that their registered title could not be displaced by any equitable interest the respondent may claim to have in the land, even if they had knowledge of it.

[32] Counsel also argued that the parish judge erred in not admitting into evidence the appellants' Duplicate Certificate of Title which he said showed that they were the registered owners of the land. Counsel submitted that in the light of the appellants' stated defence, this was the linchpin of their case. In addition, it was submitted that at the trial, during cross-examination, the respondent admitted that she was aware that the 1st appellant was in possession of a registered title, and so the parish judge should not have, thereafter, ignored the appellants' legal interest and regard them as trespassers.

[33] Counsel also submitted that the parish judge embarked on a trial which involved a bona fide dispute as to title, within the meaning of section 96 of the Judicature (Resident Magistrates) Act [now Judicature (Parish Courts) Act] without determining whether or not she had jurisdiction pursuant to that section; as there was no evidence of the annual value of the property.

[34] It was further argued that the parish judge was wrong to accept that the respondent had proven that she had bought the land based on a common law indenture, dated 5 January 1985. Counsel also noted that the common law indenture stated that the sale price was $5,000.00 but the receipt presented to the court by the respondent was for $2,600.00. The appellant also submitted that the respondent had asserted that she had a further receipt which was never put into evidence but which, in any event, when totalled, would still leave a balance of $400.00.

[35] Counsel also asked this court to take note of the law that once land was brought under the operation of The Registration of Titles Act ("the RTA"), the registered title to the land could not revert to the common law position. Counsel submitted that, the respondent, having failed to ensure that she was registered as the proprietor of the disputed land pursuant to section 49 of the RTA, could not now assert a common law title to defeat a registered title. Counsel noted further, that, where a registered title was acquired for land after someone had obtained a common law title for the same land, the prior rights of the common law title holder were extinguished and the registered title becomes indefeasible, except where the person acquired the registered title by fraud. Counsel pointed to the fact that in this case, there was no allegation of fraud made against the appellants who are the registered owners and there is no dispute that the subject land was part of a greater portion of land included in the registered title held by the appellants.

[36] Counsel submitted that the parish judge had a duty to resolve the issue of which registered title should stand and, based on section 70 of the RTA, it was obvious that the registered title must take precedence over the common law title, as both could not coexist.

[37] Counsel contended that section 139 of the RTA provides for the lodging of caveats and that the lodging of a caveat did not give the caveator priority in any claim to land over which the caveat has been placed unless the caveator takes legal action to claim his right to some legal or equitable interest in the property.

[38] Counsel pointed out that since the RTA followed the Australian Torrens system of land registration, the caveator, in this case the respondent, was obliged within 14 days of receiving the notice, pursuant to section 140 of the RTA, that there was an attempt by the appellants to transfer title, to take legal action to assert her rights in respect of the land. In the circumstances, counsel contended that the parish judge was wrong to treat the caveat, after the expiration of the notice, as giving the respondent some superior right over and above the appellants' rights as the registered title holders of the land. Counsel also asked the court to take note of the fact that the caveat was never tendered nor admitted into evidence.

[39] Counsel submitted that the parish judge erred when she treated the caveat as notice to the appellants that there was someone with an interest in property, as the caveat by itself could not establish the respondent's legal interest in the property to the exclusion of the registered owners. Counsel argued that even if the appellants' had

knowledge of any equitable interest of the respondent it was not sufficient to defeat their registered title. He argued that it was incumbent on the caveator to assert that right in a court of law which, in this case, the respondent did not do. Since, counsel submitted, the caveat expired without the respondent having taken any action to assert her registered title, then the appellants obtained their title free of any encumbrances.

[40] Counsel referred the court to section 71 of the RTA, which, he argued, rebuts any proposition that if the appellants were aware of the sale by their father of the land to the respondent and participated in the transfer of the land to themselves, this could amount to fraud against the respondent. In support of this position, counsel referred to this court's decision in **Div Deep Limited and others v Tewani Limited** [2010] JMCA Civ 10 and **Doris Willocks v George Wilson and Doreen Wilson** (1993) 30 JLR 297.

[41] Counsel submitted that only fraud could defeat the registered title and argued further that knowledge of a prior interest in the land did not amount to fraud. Counsel also pointed out that the lodging of the caveat by the respondent demonstrated that she was fully aware that Harold Francis (Snr) had held a registered title, yet she took no steps to seek a registered title for the portion that she claimed to have purchased.

[42] Relying on the decision in **George Rowe v Robin Rowe** [2014] JMCA Civ 46, counsel submitted that trespass to land involves interference with possession of land and not necessarily ownership. Possession, he argued, also involved occupation or physical control of land. Counsel contended that whilst he accepted that a person did

not have to be the owner of land to bring a claim in trespass, such a person, he said, had to be in possession of the land. Counsel pointed out that the respondent failed to prove she was owner of the land and that nowhere in the evidence was it proved that she was or had ever been in possession of the land.

[43] Counsel argued further, that the parish judge erred in finding that the tort of trespass had been committed, as this conclusion contradicted the facts she found proved, as it relates to the appellants' occupation of the land. Counsel pointed out that the parish judge, in her findings, accepted that the appellants were in possession of the land for a number of years. Counsel complained that the parish judge appeared to place little or no weight on the fact that in addition to demonstrable acts of possession by the appellants, they also held the registered title to the disputed land.

[44] Counsel submitted that the respondent had demonstrated no acts referable to her use and enjoyment of the land that could have excluded the appellants and that, in fact, the respondent had done nothing to adversely affect the possession of the registered owners to dispossess them and/or extinguish their registered title. The parish judge, counsel argued, was therefore plainly wrong.

[45] Counsel also submitted that the award of damages made by the parish judge was contrary to section 7 of The Trespass Act. He pointed out that the parish judge had accepted that the land was fenced by the respondent on only two occasions in 20 years and that the fence was removed or destroyed on both occasions. He however, argued that the respondent's evidence failed to demonstrate any act of possession or physical

control exercised by her with respect to the land in the year preceding the filing of the claim for possession.

[46] Counsel argued that, in contrast, the evidence demonstrated that the appellants were in occupation of the land a year prior to the claim being brought by the respondent. Notwithstanding, the parish judge, in her reasons for judgment, contradicted herself when she found sufficient acts of possession and control to amount to possession in law, in the two occasions of fencing alleged by the respondent, over 20 years. The respondent, he argued, was therefore not entitled to any damages. In support of this contention, council cited the case of **Eligon v Bahadoorsingh** (1963) 6 WIR 299 from the Court of Appeal of Trinidad and Tobago.

[47] Counsel further pointed to the parish judge's finding that the respondent had been deprived of the use of the land for many years, which he argued was clearly wrong on the ground that the respondent had failed to establish occupation, custody and control or possession, as required by law. Counsel noted that the appellants grew up on the land and operated a bar on the property and had done some construction on it. If the respondent, he said, could not provide some evidence of possession, she should not have succeeded in her claim in trespass.

[48] Counsel also cited this court's decision in **Mendoza Nembhard v Rafel Levy** [2014] JMCA Civ 49 and argued that the discussion by McIntosh JA regarding the criteria to establish possession of land and what was required to dispossess the paper owner of land, was relevant to this case, although that was a case regarding adverse

possession. It was also argued that the principles as stated in **JA Pye (Oxford) Ltd and another v Graham and another** [2002] UKHL 30 were also applicable.

[49] Counsel finally complained that the appellants' right to a fair trial was prejudiced when the parish judge refused their application for an adjournment to facilitate the attendance of their attorney-at-law. Counsel argued that given the technical nature of the matter and the issues arising, it was incumbent on the parish judge to ensure that both sides were afforded a level playing field. It was also submitted that the parish judge could have addressed any prejudice to the respondent occasioned by the adjournment by way of an award of costs. The appellants relied on the judgment of Forte, P in **Audrey McLean v Crane-Orr Properties Limited** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Court Civil Appeal No 25/2000, judgment delivered 14 December 2000, at page 6, as to the factors that should be taken into account when deciding whether or not to grant an adjournment.

The respondent's submissions

[50] Counsel for the respondent submitted that the parish judge was right to award substantial damages to the respondent in this matter and that it was incorrect to say that she did not have evidence on which to base such an award. The evidence before the parish judge, it was argued, was that the respondent had been deprived of the use of the land by the appellants for a long period of time. Counsel pointed to the fact that the section of land claimed by the respondent was surveyed and cut off and that she had been paying taxes on the land.

[51] Counsel also argued that it was not true to say that the parish judge neglected or refused to admit the Duplicate Certificate of Title as there had been no attempt to put it in evidence. Counsel also submitted that the court was never asked to accept the title as there was no dispute as to title.

[52] Counsel submitted that the parish judge did not err in embarking on a trial in the instant case as the matter was an action for trespass and not for the land itself. He argued that section 96 of the Judicature (Parish Courts) Act deals specifically with actions for recovery of possession and the matter before the court was an action grounded in trespass. Moreover, the amount of damages claimed was within the jurisdiction of the Parish Court.

[53] Counsel argued that the parish judge was at liberty to make the finding that the respondent had satisfactorily proven her ownership of the land. This, it was argued, was based on the fact that the parish judge accepted that the receipt and common law indenture were valid. Counsel submitted that in the light of this, the parish judge had to accept that there was a genuine sale of the land to the respondent. It was also argued that the parish judge was not treating the common law indenture as superior to the registered title but merely accepting that the respondent was the owner of the land by virtue of the sale to her by Harold Francis (Snr). Counsel argued that when section 70 of the RTA speaks to prior interest it was in reference to the period prior to the land first coming under the RTA. Counsel submitted further, that it was unchallenged that

the respondent was put in exclusive possession and the appellants came and dispossessed her, which, he says, they had no right to do.

[54] On the issue of the caveat lodged by the respondent and the treatment of it by the parish judge, counsel stated that the appellants misunderstood the findings of the parish judge as she did not conclude that the lodging of the caveat against the certificate of title gave the respondent priority and defeated the appellants' registered title. It was submitted that what the parish judge concluded was that the caveat gave the appellants notice of the respondent's interest.

[55] Counsel asked this court to accept that the respondent's right to possession was not based on her defeating the appellants' registered title but was based on the fact that she was given possession of the land by their father on the basis of the sale of it to her and she had taken steps to establish possession.

[56] Counsel pointed out further, that the respondent was not only relying on acts of physical control of the land to ground her claim to possession. According to counsel, the parish judge also had other evidence of possession or entitlement to possession by the respondent. The appellants, he declared, were estopped from denying the respondent's entitlement to possession of the land based on the fact that it was purchased from their father.

[57] Counsel argued that section 7 of The Trespass Act is not applicable to this matter. This, it was pointed out, is because sections 6 and 7 of that Act deals with criminal liability for trespass. The Trespass Act does not prohibit a plaintiff from

exercising his/her right in a civil action and obtaining any remedy from the court. In this regard, counsel for the respondent is correct and no further mention will be made of section 7 of The Trespass Act.

[58] As far as the award of damages was concerned, counsel argued that the parish judge was at liberty to award the sum of $250,000.00 as the appellants had deprived the respondent of the use of the land for several years. Counsel also argued that the trespass had been for a prolonged period and therefore the respondent would have been entitled to mesne profits, noting that the appellants had been earning profits from their use of the land.

[59] With regard to the parish judge's refusal to adjourn the trial, counsel pointed out that the matter had been adjourned on several occasions on the application of the appellants and on each of those occasions the respondent had to travel from overseas to attend court. This, he said, had been considered by the parish judge and was a factor on which she could rely in the exercise of her discretion.

Issues

[60] The main issue this court had to determine in this appeal, was whether the parish judge was correct to find that the disputed land was in the possession of the respondent thus entitling her to sue and succeed in the tort of trespass. As a corollary to that, there was also the issue of whether the respondent's claim raised a bona fide dispute as to title so as to oust the jurisdiction of the parish judge, there being no evidence of the annual value of the land.

Discussion and analysis of grounds one, two, four, five, six and seven

[61] All these grounds deal with the issue of whether the parish judge was wrong to find that the appellants were trespassers and will, therefore, all be discussed under one rubric.

The registered title as against the common law indenture

[62] The tort of trespass is based on possession and not ownership. It is trite law that the registered owner of land has an immediate right to possession of that land with only a few exceptions one of them being fraud. No fraud was alleged in this case to defeat the appellants' title. They, therefore, had not only the right to possession by virtue of their registered title but were in actual possession of the land before the plaint was filed. In the light of the circumstances of this case, the assessment of the case made by the parish judge was not sufficient to properly resolve the main issue that arose in the case. As the appellants have complained, the parish judge did not deal with the issue of their registered title based on their stated defence. The stated defence as per the Notes of Evidence was as follows:

> "We were brought here for trespassing. Area [respondent] refers to, we have been living there from birth. We don't know of the [respondent] occupying or in possession of the land and I do not consider myself trespassing. Have Registered Title by way of Administration. We are rightful owners and where we occupy we pay taxes for. Not trespassing".

[63] Based on the relevant principles, the fact of the appellants' ownership and continued possession was crucial to the outcome of the case. So, even though the Duplicate Certificate of Title was not tendered or admitted into evidence as an exhibit

there was no issue between the parties that the appellants were now the registered owners of all the land previously owned by their father, which included the land described in the common law indenture.

[64] It is clear from the parish judge's reasons for decision that there was a failure to assess the significance of the fact that the land was registered land for which the appellants held the registered title without fraud. In her reasons she did not mention the RTA. It doesn't appear that she gave any consideration to the principles regarding the indefeasibility of registered title as provided by the RTA.

[65] There was ample evidence before the court that the land was registered land and that the appellants were at the time of the trial the registered proprietors in possession. This evidence included the fact that the respondent said that she was aware that the appellants had a lawful title and that she had lodged a caveat against the land so as to prevent the transfer to the appellants. Further, the parish judge accepted that the appellants were now the registered owners of the land.

[66] It is well known that one of the fundamental tenets of the registration of land system is, with few exceptions, the fact of the indefeasibility of the Certificate of Title, issued pursuant to the RTA. This principle is enshrined in sections 68 and sections 70 and 71 of the RTA. These sections provide as follows:

> "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.

...

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:

...

71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, **or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered**

interest is in existence shall not of itself be imputed as fraud."(Emphasis supplied)

[67] The law on the effect of these sections is well settled and accepted. In **Frazer v Walker and others** [1967] 1 All ER 649, Lord Wilberforce, in discussing the effect of the New Zealand equivalent of these sections, stated at page 652:

> "It is these sections which, together with those next referred to, confer on the registered proprietor what has come to be called 'indefeasibility of title' ... This conception is central in the system of registration ..."

[68] In discussing the equivalent of section 68 of the RTA he said:

> "... The certificate, unless the register shows otherwise, is to be conclusive evidence that the person named in it is seised of or as taking estate or interest [sic] in the land therein described as seised or possessed of that land for the estate or interest therein specified and that the property comprised in the certificate has been duly brought under the Act ..."

[69] In **James Wylie et al v David West et al** [2013] JMCA App 37, at paragraph 27, Harris JA in dealing with the effect of these provisions, made the following observation:

> "[27] Section 68 of the Act grants to a registered proprietor an absolute title. Sections 70 and 71 of the Act also accord to a registered proprietor an unimpeachable certificate of title but impose fraud as the only factor which would affect the title's validity. The latter sections clearly demonstrate that the registration of a certificate of title, unless fraudulently obtained, stands impervious..."

[70] Harris JA then went on to refer to the Privy Council's decision in **Gardener and Another v Lewis** (1998) 53 WIR 236 in the following manner:

> "[28] In Gardener and Others v Lewis (Jamaica), their Lordships, speaking to the effect of sections 68, 70 and 71 of the Act, had this to say at paragraph 7:
>
> > '7. From these provisions it is clear that as to the legal estate the Certificate of Registration gives to the appellants an absolute title incapable of being challenged on the grounds that someone else has a title paramount to their registered title. The appellants' legal title can only be challenged on the grounds of fraud or prior registered title or, in certain circumstances, on the grounds that land has been included in the title because of a 'wrong description of parcels or boundaries': section 70.'"

[71] The learned judge of appeal went on at paragraph 32 to cite the decision of this court in **Registrar of Titles v Ramharrack** SCCA No 50 /2002 delivered 29 July, 2005 as follows:

> "[32] In **Registrar of Titles v Ramharrack** SCCA No 80/2002, delivered 29 July 2005, Harrison JA, as he then was, in treating with the question of the indefeasibility of a registered title said:
>
> > 'Under the Registration of Titles Act, the registered proprietor of any estate or interest has a valid indefeasible title (subject to some reservations) unless such registration by the proprietor has been tainted by fraud.'
>
> [33] From the foregoing authorities, it is unquestionable that the title of a registered proprietor is absolute and can only be disturbed if it is obtained by fraud."

[72] There was no dispute that there existed a registered title at the time the respondent claimed to have purchased the land. However, she only received a common law indenture in relation to a purported conveyance of registered land. Section 88 of the RTA outlines the means by which registered land should be transferred.

[73] The relevant parts of section 88 of RTA states:

> "88. The proprietor of land ... may transfer the same, by transfer in one of Forms A, B or C in the Fourth Schedule hereto; ... Upon the registration of the transfer, the estate and interest of the proprietor as set forth in such instrument, or which he shall be entitled or able to transfer or dispose of under any power, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee; and such transferee shall thereupon become the proprietor thereof, and whilst continuing such shall be subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if he had been the former proprietor, or the original lessee, mortgagee or annuitant."

[74] The common law indenture could not, therefore, transfer legal title to the land to the appellant.

[75] In **Half Moon Bay Ltd v Crown Eagle Hotels Ltd** [2002] UKPC 24, the Privy Council, in discussing section 88 of the RTA, stated that:

> "[Under the Torrens system of land registration] [t]itle to land and incumbrances affecting land are entered or notified in the Register Book, and everyone who acquires title bona fide and in good faith from a registered proprietor obtains an indefeasible title to the land subject to the incumbrances entered or notified in the Register Book but free from incumbrances not so entered or notified whether he has notice of them or not."

[76] In **G Boothe and C Clarke v C Cooke** (1982) 19 JLR 278, this court discussed the meaning of section 71 of the RTA and how it has been interpreted by the Privy Council in various cases. The general acceptance on the cases is that it confers indefeasibility with only the stated exceptions.

[77] In the instant case, title to the land, which was part of a registered land, could not be transferred to the respondent by way of the common law indenture. Based on the indefeasibility of registered title, she could not establish a better claim or title to the land than the appellants who were the registered owners for the purposes of a claim in trespass. This is because, based on the applicable principles, the respondent could not defeat the appellants' registered title by proving that the previous owner had executed a common law indenture in her favour. Worse yet, she could not properly plead that a common law indenture gives her a greater right to possession than a registered owner in actual possession.

[78] Even if the respondent could properly claim an equitable interest in the land, that could not defeat the registered title. In **Div Deep Limited and others,** this court considered whether a claim for possession by the registered owner should proceed by way of fixed date claim form or whether there were such substantial disputes as to facts which required the claim to be heard by way of a claim form. In dismissing the appeal brought by the appellant, who was the defendant to the claim for recovery of possession in the court below, this court affirmed the judgment in the court below where, in reliance on the authority of **Doris Willocks v George Wilson and Doreen Wilson**, the judge held that a registered title was indefeasible under and by virtue of the RTA, except in the case of fraud; and that mere knowledge of another parties' rights to assert a beneficial interest in the titled property did not amount to fraud.

[79] That fixed date claim form was eventually heard in **Tewani Limited v Div Deep Limited and 8 others** Claim No HCV 1056/2007 (Judgment delivered 20 October 2010) where the claimant asserted that it had a right to recover possession as the lawful registered title holder to the property. Beswick J had to consider whether a valid certificate of title could be revoked in circumstances where another was claiming a prior equitable interest in the property of which the title holder was aware. Citing sections 68, 70 and 71 of the RTA, Beswick J held that the registered title could not be defeated unless fraud was proved. In so holding she relied on the decision of this court in **Div Deep Limited and others** referred to above.

[80] The cumulative effect of sections 68, 70 and 71 of the RTA meant the appellants were the legal owners of the land and there being no allegation of fraud or adverse possession, their title is indefeasible. This is so whether or not they had notice of the respondent's interest in the property. See **Doris Willocks v George Wilson and Doreen Wilson.**

[81] The respondent had every opportunity to pursue her interest in the land even after the caveat was lodged and failed to do so. Sections 139 and 140 of the RTA deals with the lodging of and the expiry of caveats. A person alleging an interest in property may lodge a caveat over the said property but such a caveat gives no interest in land and will expire 14 days after notice by the Registrar of an application to register a transfer or other dealings with the land. The caveat was the only means by which the

respondent could have pursued her claim to the land under the RTA and prevent the registration of that disputed portion of the land to the appellant. She failed to do so.

[82] The fact that the respondent only had a common law title in relation to the disputed land means that she did not have a greater right to possession than the appellants. The appellants' registered title would be fatal to the claim unless the respondent could prove that she was in actual exclusive possession of the land.

The fact of possession

[83] The tort of trespass to land is defined by the learned authors of Clerk & Lindsell on Torts, 17th edition, paragraph 17-01 as consisting of "... any unjustifiable intrusion by one person upon land in the possession of another". It is generally described as an interference with possession. The right to sue in trespass is therefore based on actual possession or the right to possession.

[84] In Halsbury's Laws of England 3rd edition, volume 38 at paragraph 1226 it is stated:

> "A defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such a right..."

[85] Any person in possession of, or who has a right to possession of land, may bring an action for trespass to land. To maintain an action for trespass the plaintiff must have been in possession at the date of entry of the defendant. Where the action is against a defendant who has no title to the land, the slightest possession by the plaintiff is

sufficient to entitle him to bring a claim in trespass. See **Wuta-Ofei v Danquah** [1961] 3 All ER 596. At page 600, Lord Guest opined:

> "Their Lordships do not consider that, in order to establish possession, it is necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. Moreover, the possession which the respondent seeks to maintain is against the appellant who never had any title to the land. In those circumstances, the slightest amount of possession would be sufficient."

[86] To be successful, the plaintiff suing in trespass would also have to prove that the defendant actually entered on the land whilst they were in possession. The tort is actionable per se, so there is no need to prove actual damage, but if there is damage, in order to quantify the amount beyond nominal damages, actual damages will have to be proved. The plaintiff, in an action for trespass, must prove all the elements of the tort to the requisite standard in order to succeed.

[87] In the instant case, the plaint having been brought in trespass, the first fact in issue that the respondent was required to prove at trial was the fact of possession. The respondent was required to prove that she was in actual possession of the land when the appellants entered upon it or that she had a greater right to possession than the appellants.

[88] The respondent's claim was based on her alleged ownership of the land and her act of possession by twice fencing the land, once in 1985 and again at an unidentified period. She claimed to have been put into possession by the appellants' father by the grant of the common law indenture, the handing over of the survey report done by him and the fencing of the property at her own expense. The appellants, on the other hand, were at the time of the action, the registered proprietors and there was no dispute that they had been in actual occupation of the land their entire life and they were, with certainty, at the time of the plaint, in exclusive possession of the property. They first occupied the land as the children of the then registered owner, then as the legal representatives of his estate and later as the registered owners in their own right.

[89] The respondent, therefore, had to prove not ownership of the portion claimed, but exclusive possession of the disputed portion of the land she alleged to have purchased. If the respondent could not prove exclusive possession of the land, she would have to prove a right to possession greater than that held by the registered title owners.

[90] In **JA Pye (Oxford) Ltd and another** the court cited Slade J's dictum in **Powell v McFarlane** (1977) 38 P & CR 452 where he made the following observation at page 469 of that judgment, in relation to the concept of possession of land:

> "Possession of land, however, is a concept which has long been familiar and of importance to English lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his

> consent, unless such other person has himself a better right to possession ...”

[91] The right to possession can arise in two ways, namely: by title or ownership of the land or by factual possession coupled with an intention to possess. In **JA Pye (Oxford) Ltd and another,** Lord Browne-Wilkinson again cited with approval the following passage from the judgment of Slade J in **Powell v McFarlane** where he discussed the two ways in which possession of land may be established:

> “(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 prime [sic] facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to the 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’).” (Emphasis supplied)

[92] These principles were discussed and applied by this court in **Mendoza Nembhard v Rafel Levy,** which was a case dealing with a claim for adverse possession.

[93] In this case, there are two competing claims to possession. Both parties could not possess the same land and even if both were in actual possession up to the time of the filing of the plaint what was said by Maule J in **Jones v Chapman** (1849) 2 Exch 80, all those years ago, would still be applicable. In that case, Maule J in discussing the

legal position where a person without title persist in occupying land alongside one who is entitled to immediate possession by virtue of his title said at page 821:

> "As soon as a person is entitled to possession and enters in assertion of that possession…the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has title is in actual possession and the other person is a trespasser".

[94] A person with a registered title has an immediate right to possession. That right can only be defeated by a person who can show a better right to possession, such as a person in actual possession for a number of years sufficient to oust the paper title of the person claiming a right under it, that is, a person claiming to have extinguished the paper title by adverse possession. The respondent in this claim is not claiming by virtue of adverse possession but as owner of the land which she contends is evidenced by her common law indenture. Therefore, with the appellants holding the registered title and the respondent not claiming a greater right by adverse possession, the main issue confronting the parish judge was whether the respondent had proven actual possession of the disputed land to the exclusion of the appellants, sufficient to bring a claim in trespass.

[95] The parish judge concluded that the appellants had trespassed on the respondent's land based on her finding that the respondent had indeed purchased the property from Harold Francis (Snr) evidenced by the common law indenture. That finding, however, was not sufficient to determine the matter. The parish judge was also

required to assess the respondent's claim to have been in possession of the disputed land in the light of the appellants' physical occupation of the land and their registered title; that is, taking into account the fact that they were the registered proprietors in possession.

[96] In her reasons for judgment the parish judge found that the common law indenture that was exhibited by the respondent was proof of her title to the land. This was plainly wrong. The common law indenture conveying part of a land registered under the RTA could not provide proof of ownership of the land. At most, it may serve to establish that the holder has the basis of a claim for an equitable interest in that part of the land identified in the conveyance. Suffice it to say, this was not a claim brought by the respondent against the appellants either as administrators of the estate of the deceased or in their own right for any equitable relief such as specific performance of the sale agreement made by the respondent with Harold Francis (Snr). A claim would have had to be brought for a court to determine whether the conveyance was valid and if it were so valid, whether it passed the equitable interest in the land to the respondent so that the father held only the bare legal interest on trust for the respondent. That was not the application before the parish judge neither was she asked to make that determination. However, in finding that the respondent was the owner of the land, the parish judge failed to appreciate that ownership did not equate to possession.

[97] In her reasons for decision, the parish judge stated that:

> "The Francis' are also saying they administered on their father's property and are now in possession of a Title for the

> entire property. They have stated that at one stage they were barred or prevented from procuring said title as there was a caveat on the property by Dorrett Graham.
>
> Clearly that would have been so as Ms. Graham was seeking to assert her right to the two squares she brought[sic], and that stand as 'Notice' to the [appellants] that there was someone with an interest in the property.
>
> It is trite law that all transactions in land must be in writing – Statute of Frauds 1677.
>
> Ms. Graham has produced sufficient proof in writing (receipts and indenture) of her ownership of the two squares of the land."

[98] She then went on to discuss the elements of the tort and that both appellants, together or individually, were utilising the property bought by the respondent. Further, she accepted the evidence of the respondent and her daughter that the property was fenced on two occasions at the expense of the respondent and that the fence was removed on both occasions. It would appear then that the parish judge found that the respondent had a right to possession through, what could have been at most, her equitable title and was in actual possession through the two occasions of fencing of the property. The parish judge seemed to have also taken the view that the appellants could not complain because they had notice of the respondent's interest.

[99] Whilst this court is always mindful of not disagreeing with the tribunal's finding of fact, to my mind, it is difficult to see the basis upon which she came to the conclusion that the respondent was the owner of the property in possession and thereby entitled to bring a claim and succeed in trespass. The doctrine of notice does

not apply to a registered title unless it involves actual fraud and is only relevant where there are competing equitable interests.

[100] The evidence of the respondent and her daughter, regarding the fencing of the property, was also very sketchy, to say the least. The respondent's evidence was that she first fenced the property in 1985, presumably whilst on a visit to Jamaica because she said the fence was removed "right after she go back". She resided at all times in the United States, so it can be inferred that 'go back' refers to her returning to the United States. She said the fence was removed by the 1st appellant. But this seems hardly likely as in 1985 he was, on the evidence, a child of no more than 11 years old (the evidence being that in 1983 he was nine years old) and his father was still alive at this time. Yet the respondent's evidence was that the father was not around when the fence was removed, as he had already died. The father died in 1987. Up to that time she was not yet paying taxes on the land.

[101] The evidence of the respondent's daughter is that she saw the fence her mother erected when she visited the property in the 90's and that it was removed in the late 1990's. It is unclear whether this reference was to the first fence or the second fence. The respondent's evidence however, was that she took the appellants to court in 1999 because they were removing the fence. The appellants' evidence is that they were taken to court in 1999 because they were transferring the land to themselves having administered the estate. Again, it is unclear which fence was being removed in the

1990's as there was no evidence when the second fence was erected neither was there any clear evidence when the first fence was removed.

[102] As regards the payment of taxes, the receipts tendered began in 2005. Although the respondent said she was given a survey by the appellants' father, the survey tendered in evidence was one commissioned by her and which was done in 1991. She was not present. The appellants' would have been teenagers at this time but the report states that E Francis was present. The evidence of the appellants' witness, Mr Smith, is that he was present but no Francis was present. The parish judge made no mention of this and how or whether she resolved it in her own mind. Neither does she resolve the conflict in the respondent's evidence where she spoke of a survey commissioned by the appellants' father but produces a survey commissioned by herself. The survey document tendered in evidence refers to no previous fencing around the property and does not seem to identify any prior pegs or markings from a previous survey. The parish judge made no findings with regard to this survey.

[103] At the conclusion of the evidence of the respondent, it is clear that the parish judge needed more information regarding the fence and proceeded, herself, to question the respondent. However, this attempt yielded no fruit, as the only evidence the parish judge was able to extract from the respondent was the fact that she did not know when the appellants' father died and it was persons in the district who told her that the 1st appellant had taken down the fence. She also said that after the father died she had discussions with the 1st appellant about the land. This, of course, could only have been

in the 1990's when the appellants became adults, as in 1987 when their father died, they would still have been children. In any event, she later said she did not personally speak to them but it was her daughter and her attorney-at-law who spoke to them.

[104] Where a person with an inferior title claims possession of land for which someone has a greater title, the acts of possession relied on must be more than just slight. That being the state of the evidence, it is difficult to see how the parish judge came to the conclusion she did.

[105] It is accepted that factual possession can be established in a number of ways based on, amongst other things, the type of land and how it is used. This court in **George Rowe v Robin Rowe** in referring to factual possession said that it could be "manifested in a number of ways" and that "[t]he circumstances constituting possession will vary from case to case". The court referred to a passage from Clerk & Lindsell on Torts, 17th edition, in which the learned authors, by reference to authorities, enumerated a number of ways that it has been held that possession had been established, including enclosing the land and taking grass from it. In addition, the possession must be exclusive. In **George Rowe v Robin Rowe** there was clear evidence that the smaller portion of land had been separated from the larger portion and was being used by the claimant, thus giving him sufficient possession of that portion of the land to bring a claim in trespass. That is not the case here.

[106] In **Eligon v Bahadoorsingh** the claim against the respondent was for trespass to logs which were seized from the appellant and conversion of some trees he claimed

to have brought off property bought by the respondent. The respondent counterclaimed for trespass to the property against the appellant. The Trinidad and Tobago Court of Appeal held that neither had the right to bring a claim in trespass. The trespass to land was essentially an injury to or interference with possession. There being no interference or injury to possession in the appellant's case he could not sustain a claim in trespass. A person with merely the right to possess (subject to a few specified exceptions not relevant to the case) could not sue in trespass. The respondent, who had entered into an agreement to purchase the land had not been let into nor did he have possession of the land or any right to possession greater than the estate manager's right to possession against the owner, so he too, could not maintain an action for trespass.

[107] In the instant case, it seems to me, that the parish judge made no finding as to how the respondent had proved, on a balance of probabilities that she had been in exclusive possession of the disputed parcel of land. Her evidence was that she lived abroad and, in the same year she received the common law indenture (1985), she first fenced the land. This was removed and she fenced it again. This was also removed. She never went on the land but she drove pass and looked at it. In the meantime, the appellants continued to live on and use the land. In the light of the authorities, this would not amount to sufficient acts of physical control in these circumstances to establish possession. From this evidence, it would be difficult to see how a tribunal of fact could find that she had sufficiently established that she was in possession to the exclusion of the appellants.

[108] Further, the fact that her evidence as to her being in actual possession was tenuous at best, meant that she could not bring or succeed in a claim for trespass against another in possession with a better title.

[109] It is clear therefore, that the parish judge erred in law as she failed to apply the correct legal principles to the circumstances of the case. As a result, she erred in her approach to and assessment of the case and as a result came to the wrong conclusion.

Ground 3- Whether there was a bona fide dispute as to title within the meaning of section 96 of the Judicature (Parish Courts) Act so as to have ousted the jurisdiction of the parish judge

[110] In ground three, the appellants complain that the parish judge erred in embarking on a trial involving a bona fide dispute as to title when there was no evidence from the respondent as to the annual value of the property. This raises the question as to whether in determining the matter, the court was being called upon to settle a dispute as to title bearing in mind the nature of the claim so as to call into play section 96 of the Judicature (Parish Courts) Act.

[111] The relevant part of section 96 of the Judicature (Parish Courts) Act provides as follows:

> " 96. Whenever a dispute shall arise respecting the title to land or tenements, possessory or otherwise, the annual value whereof does not exceed five hundred thousand dollars, any person claiming to be legally or equitably entitled to the possession thereof, may lodge a plaint in the Court ...then, on proof of the plaintiff's title and of the service of the summons on the defendant or the defendants, as the case may be, the Parish Judge may order that

> possession of the lands or tenements...be given to the plaintiff..."

The dispute must, therefore, be one in which the parish judge, in determining the matter, could possibly have ordered that possession be given to the plaintiff.

[112] In **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37, Morrison JA (as he then was) conducted a thorough review of the authorities and applied the principles stated in those cases in determining when the section is applicable.

[113] In that case, at paragraph [37] Morrison JA said:

> "[37] Section 96 on the other hand, is appropriate to cases in which a dispute as to title to property has arisen, in which case the plaintiff claiming to be entitled to possession on either legal or equitable grounds may lodge a plaint setting out the nature and extent of his claim, whereupon a summons will issue to the person in actual possession of the property. If when the matter comes on for hearing that person does not show cause to the contrary, the plaintiff, upon proving his own title, will thereupon be entitled to an order for possession of the property. However, in any such case, the jurisdiction of the [parish judge] is limited to property the annual value of which does not exceed [$500,000.00]."

[114] I venture to say that this is a correct description of what generally obtains in a claim under section 96 of the Judicature (Parish Courts) Act.

[115] Morrison JA, referring to the decision in **Ivan Brown v Perris Bailey** (1974) 12 JLR 1338, went on to say at paragraph 39 that:

> "[39] In that case (later followed in **Williams v Sinclair** (1976) 14 JLR 172), it was held that in order to bring the section into play, the *bona fides* of the defendant's intention

> is irrelevant in the absence of evidence of such a nature as to call into question the title of the plaintiff."

Morrison JA, then went on to cite the following passage from Graham-Perkins JA's judgment in **Ivan Brown v Perris Bailey**:

> "All the authorities show with unmistakeable clarity that the true test is not merely a matter of bona fide intention, but rather **whether the evidence before the court, or the state of the pleadings, is of such a nature as to call into question the title, valid and recognisable in law or in equity, of someone to the subject matter in dispute**. If there is no such evidence the bona fides of a defendant's intention is quite irrelevant." (Emphasis supplied)

[116] Section 96 of the Judicature (Parish Courts) Act also states that the parish judge only has jurisdiction if the "annual value" of the property does not exceed $500,000.00. The authorities have held that this means that the plaintiff must lead evidence showing that the annual value of the land does not exceed the statutory limit in order to establish the parish judge's jurisdiction.

[117] Although the section 96 jurisdiction is usually invoked in claims for recovery of possession, it may also arise in a claim for trespass. In **Naldi Hynds v Felmando Haye**, (unreported), Court of Appeal, Jamaica, Resident Magistrates' Court Civil Appeal No 15/2006, judgment delivered 20 February 2007, an appeal concerning the tort of trespass to land, Harrison P found that there was a dispute involving the question of title in respect of each party. The land was unregistered land and each party was claiming title by virtue of a purchase of the land, a receipt in the case of one party and a common law conveyance in the case of the other. Harrison P referred to section 96 of

the Judicature (Parish Courts) Act and described the requirement to satisfy the section in the following manner:

> "Under the provisions of section 96 of the Judicature [(Parish Courts)] Act, where the question of title arises, a [parish judge] is authorized to proceed to try the issue of title to the land to completion **provided that the plaintiff provides evidence** to the court that:
>
> > '... the annual value whereof does not exceed [five hundred thousand dollars] ...'" (Emphasis supplied)

[118] In that case, both parties were relying on common law titles to ground their claims. Neither could prove a greater right to ownership and possession than the other.

[119] In the instant case, the annual value of the disputed land was not particularized by the respondent in the plaint neither did she give evidence in relation to it. The annual value determines whether or not the Parish Court has jurisdiction to try a matter involving a genuine dispute as to title. The Judicature (Parish Court) Rules, Order VI rule 4, as well as the relevant authorities are clear that in all actions for recovery of land, in order to establish jurisdiction the annual value must be particularized and it must not be in excess of the statutory amount, presently, $500,000.00. Therefore, if there is a dispute as to title and the annual value is not stated, the parish judge must decline to interfere with possession until the question of title is determined by a court that has the jurisdiction to do so.

[120] In my view however, section 96 is not relevant to this case. This is a case where one party has a superior title which is indefeasible except by fraud or adverse possession. There is no claim of fraud or adverse possession in this case. In a suitable

case of trespass a parish judge may be entitled to make a finding of adverse possession if the evidence so warrants (see **Vida Bowes v Allan Spencer** (1976) 14 JLR 216). Questions which would arise for determination include whether one party had acquired title by adverse possession so as to resist a claim for trespass made by the paper owner whose title would therefore have been extinguished. In such a case section 96 would be relevant, for then there would be a valid dispute as to title even though the claim was in trespass.

[121] In this case the respondent was not claiming ownership by adverse possession so as to extinguish the appellants' lawful title. In my view there was no genuine dispute as to title. The cause of action was filed in trespass and the respondent was claiming to be in possession by virtue of a purchase of a part of the land whilst the appellants were claiming to be in actual possession of the land under a certificate of title for the property which was indefeasible. For section 96 to be invoked, to oust the parish judge's jurisdiction, the dispute as to title must raise a real and substantial doubt as to whom the property belonged. See **The Warrior** (1828) 2 Dods 288 cited in **Ivan Brown v Perris Bailey** at page 1342.

[122] In **Noel Williams v The Attorney General** (1995) 32 JLR 79, this court, in determining that the [resident magistrate] was wrong to adjourn the hearing of a plaint for recovery of possession brought by a registered owner against a defendant in possession without title, until the trial of a claim for declaration of ownership of the said property brought by the defendant in the High Court, said that:

> "It is trite law that a registered owner of land has an immediate right to possession and that right can only be defeated by fraud. Since there is no allegation of fraud in either claim the issue in the plaint could only be one for possession."

[123] The dispute in the instant case involved a registered title holder in possession against a person claiming under a common law title to the same land who was not in possession. A common law title cannot defeat a registered title and there was no claim for adverse possession to extinguish the registered title. In the face of section 68 and 71 of the RTA the parish judge could only determine who was in possession so as to decide whether a trespass had been committed but at no point could she determine that the common law title defeated the registered title. In that regard, therefore, there was no valid dispute as to title. See **Austin Ferguson and Maureen Ferguson v Christine Burke** (1991) 28 JLR 614.

Grounds 8, and 9

[124] In light of the decision arrived at on the previous grounds it was not necessary to consider these two remaining grounds.

Disposition

[125] It is clear from the circumstances of this case that the respondent should not have been successful in her claim for trespass against the appellants and that the action filed was misconceived. For these reasons we made the orders outlined in paragraph 3 above.