[2023] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

PARISH COURT CIVIL APPEAL NO COA2020PCCV00027

BETWEEN YVONNE TAYLOR APPELLANT

AND MERNA MIGNOTT-GALLOWAY RESPONDENT

Ms Judith Clarke instructed by Judith M Clarke & Co for the appellant

Ms Marjorie Shaw instructed by Brown & Shaw for the respondent

28 June 2022 and 17 November 2023

Civil procedure – Recovery of Possession – Doctrine of adverse possession - Limitations of Actions Act sections 3, 4 and 30 – Registration of Titles Act sections 68 and 70 - Implications of the formality of a first registration - whether time is arrested or continues to run

F WILLIAMS JA

[1] I have read in draft the judgment of my sister G Fraser JA (Ag) and agree with her reasoning and conclusion. There is nothing I wish to add.

FOSTER-PUSEY JA

[2] I agree that this appeal should be allowed and an order be made granting the appellant recovery of possession of the property in question. I thankfully adopt paras. [13]-[34] of my sister's judgment in which she carefully outlined the factual background and the submissions of counsel for the appellant and the respondent.

[3] It is important to highlight the fact that the land was first registered under the Registration of Titles Act on 22 July 2013 and this first registration was in the name of the appellant.

[4] Ground of appeal one is framed as follows:

> "The learned judge erred in law and in fact in her determination that by operation of the Limitation of Actions Act the [appellant] is estopped from recovering possession of the property and her title to the property has been extinguished."

[5] The main point on which counsel for the appellant, Miss Clarke, focused in her submissions in support of this ground of appeal, concerned the failure of the learned Parish Court Judge to recognize the effect that the first registration of the property in question would have on anyone claiming to have acquired the land by adverse possession. Counsel for the appellant submitted that the respondent's purported occupation of the land prior to 2013 could not be considered in the running of time, in a claim of adverse possession.

[6] The respondent claimed that she was entitled to the property due to her adverse possession of it "for the required period"- see the defence stated at the commencement of the trial on 24 January 2020, page 6 of the record of proceedings. Counsel for the respondent, Ms Shaw, acknowledged that the respondent was granted a licence to live on the property by Ms Cynthia Taylor, the appellant's mother. Counsel submitted, however, that the licence expired upon Ms Taylor's death in 2004, and the appellant would have been entitled to require that the respondent pay rent or leave the property. Counsel then submitted that the appellant allowed 15 years to pass before she interrupted the respondent's continuous occupation. Further, the fact that the appellant secured a registered title in her name in 2013 did not interrupt the running of time for the respondent.

[7] The learned Parish Court Judge, in considering the question as to whether the appellant was estopped from bringing a claim for recovery of possession, stated at para. 23 of her reasons:

> "…It is clear therefore that the twelve year limitation period commenced in 2004 upon the death of Mrs. Dallhouse Taylor. **Any certificate of title obtained by the [appellant] shall be deemed to be subject to any rights acquired over the land by limitation since first registration** (Section 70 of the Register [sic] of Titles Act). The court finds therefore that the [respondent] was in physical possession of the disputed premises for a period of twelve years as at the date of when the [appellant] had the right to commence action in 2004…I find as a fact that the [respondent] was at all times during the statutory period in actual physical and exclusive possession of the property." (Emphasis supplied)

[8] The learned Parish Court Judge correctly summarized the impact of section 70 of the Registration of Titles Act. It provides:

> "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 incumbrances in such certificate or instrument." (Emphasis added)

In the Privy Council decision of **Chisholm v Hall** [1959] 3 WLR 391, on appeal from the Court of Appeal of Jamaica, their Lordships addressed the impact of section 69 of the Registration of Titles Act (now section 70) and stated:

> "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…"

[9] In **Recreational Holdings (Jamaica) Limited v Lazarus and the Registrar of Titles** [2014] JMCA Civ 34, this court made it clear that **Chisholm v Hall** "is still good law" (para. [96] per Phillips JA).

[10] While the learned Parish Court Judge correctly summarized the effect of section 70 of the Registration of Titles Act, respectfully, she did not correctly apply the section to the facts before her. Since the land was first brought under the Registration of Titles Act in 2013, that certificate of title would be deemed subject to rights acquired over the land by limitation after that first registration of the property. Consequently, the respondent would have had to prove 12 years physical and exclusive possession of the property since

2013. She was, however, served with a notice to quit in 2018 when, clearly, 12 years had not yet elapsed. The appellant was, therefore, not estopped from recovering possession from the respondent.

[11] In any event, although it is not necessary to consider ground of appeal 2, I agree with my sister's analysis and opinion that on the facts before the learned Parish Court Judge, the respondent had not "exercised complete physical control of the property to the exclusion of the legal owner" (see G Fraser JA (Ag)'s judgment).

[12] It is for the above reasons that I agree that the appeal should be allowed and costs awarded to the appellant.

G FRASER JA (AG)

Background

[13] This is an appeal against the decision of a Senior Judge of the Parish Court (as she then was), for the parish of Saint Catherine ('the learned Parish Court Judge'). By her decision, made on 5 August 2020, the learned Parish Court Judge granted judgment and costs to the defendant, Mrs Merna Mignott-Galloway, who is the respondent herein.

[14] On 26 June 2019, the appellant, Ms Yvonne Taylor, initiated a suit for recovery of possession of property located at Byndloss, in the parish of Saint Catherine, registered at Volume 1470 Folio 237 of the Register Book of Titles ('the property'). The property had belonged to the appellant's mother, Ms Cynthia Setilda Taylor ('the paper owner' or 'Ms Cynthia Taylor') by way of an indenture (common law title) dated 15 August 1970. In the 1990's the respondent entered the property with the permission of the paper owner and remained there even after her death in 2004.

[15] The appellant anchored her claim on the basis that she had acquired title as the administrator of her mother's estate and was registered as the owner thereof. By virtue of her legal entitlement to possession of the property, she averred as follows in her particulars of claim (annexed to plaint note no SC2019CV01498):

> "1. At all material times the [appellant] is and was the Owner for the premises known as Byndloss District, Linstead in the parish of St. Catherine.
>
> 2. At all material times the [respondent] occupied the premises situate at Byndloss District, Linstead in the parish of St. Catherine as a licensee of the said [appellant].
>
> 3. That by Notice to Quit dated 30th April, 2018 and served on the [respondent] on 31st April, 2019 the occupancy was terminated on the 31st May, 2019 but the [respondent] has wrongfully remained in possession.
>
> 4. The [appellant's] claim is against the [respondent] to recover possession in respect of the aforesaid premises."

[16] On 24 January 2020, at the trial before the learned Parish Court Judge, the above para. 2 was amended to read:

> "2. At all material times the [respondent] occupied the premises situate at Byndloss District, Linstead in the parish of St. Catherine as a licensee of the said [appellant], the said land be [sic] now comprised and registered in the Register Book of Titles at Volume 1470 Folio 237."

[17] In response to the plaint and the corresponding particulars of claim, the respondent stated her defence in the following terms:

> "The [appellant] is not entitled to possession of [the] property. The [respondent] is the person in possession and entitled to possession. The [respondent] has acquired Title by way of adverse possession or any title alleged has been extinguished by virtue of the [respondent] having been in possession for the required period and the [respondent] having demonstrated acts of ownership of the premises as an owner and has done so undisturbed for the requisite period. The paper title is not good based on the [respondent's] right and ownership of the property."

[18] The trial of the plaint took place on divers dates between 24 January 2020 and 17 February 2020. The claim was determined in favour of the respondent. The learned Parish Court Judge found that the respondent was a licensee of the paper owner, but that licence

expired upon her death. She also found that the appellant, who became the administratrix of the paper owner's estate and was one of the beneficial owners, took no legal steps to recover possession from the respondent. Further, the respondent had lived in undisturbed possession of the property for 12 years, from 2004 to 2016. Accordingly, by the operation of the Limitations of Actions Act ('LAA'), the respondent would have dispossessed the appellant and estopped her from recovering possession.

The appellant's evidence

[19] The appellant, who resided in England from childhood, testified that her mother (the paper owner) gave the respondent permission to stay at the property with her children because the respondent's own mother had put her out of their home following an altercation. To her knowledge, when the respondent moved onto the property, the house was being built. The appellant's mother furnished two rooms, a bathroom, and the kitchenette.

[20] After the appellant's mother died in 2004, the appellant became one of the beneficial owners (along with her siblings) of the property, and in that capacity, she executed several activities relative to it. The appellant testified that there was no change in the respondent's status immediately following her mother's death. Rent was not collected from the respondent because the appellant and her siblings were "givers" and continued this benevolence to the respondent by allowing her to continue her occupation of the property. The appellant applied for and obtained a grant of letters of administration on 26 October 2009. She paid the yearly property taxes and commissioned a survey of the property as also the services of a structural engineer to determine the integrity of the structure. On 22 July 2013, she brought the disputed property under the Registration of Titles Act ('ROTA') for the first time, naming herself as the registered owner.

[21] Subsequent to the registration of the property, the appellant and her siblings met with the respondent virtually and informed her and her husband that they would have to start paying rent. Even though the amount of the proposed rent was not stated at that time, the respondent, she said, agreed to rent the whole house. The appellant said that

she had her attorney-at-law prepared the lease agreement, but when she visited the respondent in 2013 to have it executed, the respondent resiled from their agreement. On that occasion, the parties had a brief altercation, the details of which, though in dispute, are immaterial. Importantly, they agree that the respondent declared then that she would not sign the lease agreement or pay rent.

[22] The appellant testified that she did not intend to remove the respondent from the property until that incident. As a result, on 30 April 2018, a notice to quit was prepared and served on the respondent. Nevertheless, she remained on the property. As a result, the appellant sought recovery of possession on the basis that the respondent wrongfully remained in possession of the property.

The respondent's evidence

[23] The respondent's evidence was that the paper owner, who was her aunt, built the house on the property and told her that she should live there and take care of it. Her defence against the claim for recovery of possession is that she acquired title by way of adverse possession by virtue of being in undisturbed possession of the property for the required period of over 12 years. She supported her defence with evidence that she never paid rent to anyone, and dialogue about rent only occurred in 2013, long after her aunt had died.

[24] She admitted that she did not pay property taxes or make any effort to obtain a title on her own behalf or in her own name. However, according to her, the appellant also did nothing to maintain the property for years. Apart from visiting and staying at the property approximately three times between 2004 and 2013, the appellant did not claim possession of it.

[25] The respondent said she believed the owners of the property (after the paper owner's death) to be Ms Dahlia Bennett, Ms Erlinda Hylton, and the appellant, but she never asked any of them permission to remain there. Although she had been served with a notice to quit in 2018, she refused to give up possession of the property.

The grounds of appeal

[26] Dissatisfied with the decision of the learned Parish Court Judge, on 9 June 2021, the appellant filed her notice of appeal and the following grounds of appeal:

> "1. The learned judge erred in law and in fact in her determination that by operation of the Limitation of Actions Act the [appellant] is estopped from recovering possession of the property and her title to the property has been extinguished.
> 2. The findings of the learned judge are not supported by the evidence."

Discussion

Ground One: "The learned judge erred in law and in fact in her determination that by operation of the Limitation of Actions Act the [appellant] is estopped from recovering possession of the property and her title to the property has been extinguished."

The appellant's submissions

[27] Counsel for the appellant, Ms Judith Clarke, posited that the conclusion of the learned Parish Court Judge was "fundamentally flawed in law having regard to the date when the land was first registered". According to counsel, the property was first registered in 2013 and, therefore, the formality of first registration under the ROTA would have restarted the "running of time" for the purposes of the LAA and the 12 years required for adverse possession.

[28] The essence of that argument is that the appellant's entitlement following the first registration of the property, which was formerly an indenture, meant time started afresh in respect of the rights of the respondent to secure a possessory title. In support of that submission, counsel relied on **Chisholm v Hall** [1959] AC 719, a decision of the Judicial Committee of the Privy Council emanating from this jurisdiction, which was later applied in **Recreational Holdings (Jamaica) Limited v Lazarus and Anor** [2014] JMCA Civ 34 ('**Recreational Holdings**'). These authorities, she posited, made it clear that the appellant's title would only succumb to adverse rights acquired since first registration.

[29] Counsel submitted that the respondent's occupation prior to 2013 was erroneously calculated as part of the time during which she claimed undisturbed possession of the property. Consequently, the learned Parish Court Judge erred when she reckoned that time had begun to run from 2004 and the appellant's title had been extinguished by 2016. According to counsel's reasoning, although the learned Parish Court Judge had "aptly" referred to the proviso in section 70 of the ROTA, she had, however, erred in concluding that "[a]ny certificate of title obtained by the [appellant] shall be deemed to be subject to any rights acquired over the land by limitation since first registration".

[30] Counsel further submitted that the learned Parish Court Judge's reliance on the authority of **Bryan Clarke v Alton Swaby** [2007] UKPC 1 for the affirmation that "the formality of registration did not start time running again" was erroneous as she had not had proper regard to the context. Counsel posited that in that case, the factual and legal context of the foregoing pronouncement was in circumstances where a registered title existed prior to Mr Swaby becoming the registered owner. The factual circumstances of that case would therefore be distinguishable from the case at bar since the dictum of the court was not made in the context of a first registration.

The respondent's submissions

[31] In response to this ground of appeal, counsel Ms Marjorie Shaw, on behalf of the respondent, submitted that the learned Parish Court Judge was correct in her findings. She submitted that this is so on the basis that a licence expires when the licensor dies, and thus the licence granted to the respondent would have expired upon Ms Cynthia Taylor's death in 2004. At that time, the nature of the respondent's occupation changed, as was made clear by her conduct in inviting others to live on the property and building a large structure without permission.

[32] Counsel further submitted that, although the death of the paper owner resulted in a break in the chain of representation, it was the responsibility of the person with the beneficial interest to have terminated the respondent's occupation of the property in the same year. She referred to **Recreational Holdings** (paras. 10 and 27 to 32) and

submitted that accruing rights were not suspended or lost by the issuance of a registered title. In the case at bar, counsel argued that no claim for possessory title existed in favour of the respondent until after the property was brought under the ROTA. In addition, counsel submitted that section 4 of the LAA states that the passage of time, specifically the conclusion of 12 years, operates against an inactive registered proprietor. As a result, when the licence was terminated in 2004 (upon the paper owner's death), the appellant had a right to require payment of rent or recover possession. Also, counsel submitted that the appellant's right of action accrued in 2004, and she was appointed as the administrator of the paper owner's estate in 2013, yet 15 years passed before she interrupted the respondent's continuous occupation.

[33] Additionally, since the accrual began before the property was brought under the operation of the ROTA, the appellant's securing the title in her name did not interrupt the running of time in favour of the respondent. Apart from obtaining the services of an engineer and quality surveyor in order to obtain that title, the appellant took no formal steps to recover the property, nor did she exercise any exclusive control over it.

Law and analysis

[34] The crux of the contention between the parties in this ground of appeal appears to be whether the learned Parish Court Judge erred in her determination that, by operation of the LAA, the appellant's title to the property had been extinguished, thus estopping her from recovering possession of it.

[35] The learned Parish Court Judge, having heard the testimony of both parties, made the determination that although the respondent had occupied the property since 1993, she did so with the permission of the paper owner, and so she was a mere licensee up until her death in 2004. Subsequently, the licence had ceased, and the appellant's right to enter the land or bring an action or suit for recovery of possession began to accrue.

[36] The frictional aspect of the learned Parish Court Judge's findings was her determination that the appellant's 12 years within which to bring a suit for recovery of

possession had expired in 2016, and since she had taken no action in that regard until 2018 when she served the respondent with a notice to quit, "it would appear therefore on the face of it that the [appellant] having not acted within those twelve years [was] estopped from bringing a claim for recovery of possession"

[37] If one were to look at the time when the claim was initiated in 2019 (assuming that the respondent indeed had factual possession and the intention to possess), it would also seem that at face value, the respondent would have met the requirements for adverse possession because by then she would have been in occupation of the property for a total of 15 years. However, a closer look at what occurred between 2004 and 2019 is necessary in determining what the relevant period of possession was. In so doing, I must put my mind (as the learned Parish Court Judge did) to when that period of possession began and whether it was interrupted before the 12 years had passed.

[38] That being said, I now turn to a critical examination of sections 68 and 70 of the ROTA, because I am of the view that the significance of the first registration of the property warrants further consideration.

[39] Section 68 of the ROTA provides:

> "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."

[40] Section 70 of the ROTA states:

> "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 incumbrances in such certificate or instrument." (Emphasis added)

[41] Section 68 of the ROTA speaks to the indefeasibility of a certificate of title. This simply means that the person whose name is on the title has all the interest in the land vested in them to the exclusion of all others. Section 70 of the ROTA makes it clear that rights that existed prior to the issuance of the title are defeated in favour of the registered proprietor, except in instances of fraud. Additionally, any interest that may have existed but was not noted on the title will not fetter the registered proprietor. The proviso to that section underscores this; it specifically states that land included in a certificate of title or registered instrument is only subject to the operations of the statute of limitations from after the land is brought under the operation of the ROTA.

[42] Crucial to the determination is the evidence proffered by the appellant that she had brought the property under the ROTA for the first time in 2013 and obtained the certificate of title in her sole name. The appellant has contended that this act on her part would have the effect of rewinding the clock, so to speak, and that any adverse interest claimed by the respondent would have recommenced from that point onward.

[43] The learned Parish Court Judge, however, disagreed, having relied on the authority of **Bryan Clarke v Alton Swaby** for the proposition that the formality of registration did not start time running again and that any "certificate of title obtained by the [appellant] shall be deemed to be subject to any rights acquired over the land by limitation since first registration...". Before us, counsel Ms Clarke submitted that the accrual of time necessary for dispossession should be calculated from the date that the first certificate of title was issued. She relied on section 70 of the ROTA and the authorities of **Chisholm v Hall** and **Recreational Holdings** in support of this submission.

[44] In **Chisholm v Hall**, the Board explained that, in the light of the express reference in the proviso to section 70 to rights under any statute of limitations "acquired over such land since the same was brought under the operation of this Act", the word "subsequent" in section 68 meant "subsequent to the first registration". At page 739, the Board enunciated thus:

> "The scheme of section 69 [now section 70] 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."

[45] As counsel Ms Clarke correctly pointed out, the above *dicta* was "extensively distilled" by this court in the decision of **Recreational Holdings**. Morrison JA affirmed that **Chisholm v Hall** is binding on this court and his reasoning and conclusions were approved by the Privy Council. He observed as follows (para. [65]):

> "…Thus, reading the two sections together, Lord Jenkins considered (at page 738) that section 68 must be read as if it was followed by a proviso, 'to the effect that the land described in the certificate is to be deemed to be subject to any rights acquired over it since first registration under any statute of limitations, notwithstanding that they are not notified as incumbrances in the certificate'. Then, describing the scheme of section 70 as 'reasonably plain', Lord Jenkins went on to add this (at page 739-740):
> '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. …' "

[46] Accordingly, there is substance to the appellant's argument that the learned Parish Court Judge's reliance on **Bryan Clarke v Alton Swaby** "was without due regard to proper context". In that case, the property in dispute was originally owned by Mrs Ellen Watt, who, prior to her death in 1981, permitted her sister (Mr Swaby's mother) to reside there rent-free since 1978. Mr Clarke also resided on the property with Mr Swaby's mother (as her husband), and it was undisputed that they were both gratuitous licensees. Upon Mrs Watt's death, Mr Swaby became her executor and beneficiary; however, he was not registered as the owner of the property until 1993.

[47] Sometime either before or after his mother died in 1983, Mr Swaby had a conversation with Mr Clarke regarding whether he would be interested in purchasing the

property. Mr Clarke, however, made no positive steps towards purchasing the property, and in 1989, Mr Swaby served him with a notice to quit. Despite the notice, he remained on the property. In April 2000, Mr Swaby commenced proceedings for recovery of possession. Their Lordships considered whether Mr Clarke's continued occupation of the property after Mrs Clarke's death in 1983 initiated a period of dispossession.

[48] Considering the facts in that case, it is to be noted that a registered title had already existed for that property. It is in that context that Lord Walker, in delivering the judgment of the Board, said this (para. 15):

> "… In considering the new argument on adverse possession, Panton JA seems to have thought that time could not start running against Mr Swaby until he became registered proprietor in 1993. That was in their Lordships' view an error, since from 1983 Mr Swaby (as the executor of Mrs Watt and as beneficial owner of the property) had been in a position to give notice to quit to Mr Clarke, and the formality of registration did not start time running again. …"

[49] It is my understanding that the "formality of registration" referred to in that case referred to Mr Swaby's interest being registered and not the registration of the property itself, since it had already been brought under the ROTA by the original owner in 1968. The nuances arising from the aforementioned enunciations to my mind, make it clear that the first registration and issuance of a title is to be treated differently from circumstances where land was previously registered, but an interest is being transferred or a replacement title is being issued.

[50] In the instant case, the first registration and issuance of the title in 2013 vested all the interest in the property in the appellant, who then became the registered proprietor. The effect of the first registration of the property is that any rights previously accrued in favour of the respondent by virtue of the statute of limitations were destroyed once the property was brought under the ROTA. Thereafter, if the respondent retained factual possession of the property with the requisite intention to possess, a new period of possession or dispossession would commence. That new period would not, however, satisfy the limitation requirement since 12 years would not have passed between 2013

and the service of the notice to quit in 2018 or the initiation of proceedings for recovery of possession in the court below in 2019. This ground therefore succeeds.

[51] Although the appellant had framed a second ground of appeal, the foregoing conclusion relative to ground one would be dispositive of this appeal since the requisite period of possession would not have been satisfied. There would therefore be no need to ascertain whether the respondent had factual possession or the intention to possess. However, in light of the fulsome submissions made by counsel on both sides on this second ground, I would venture to make a few comments.

Ground two: "The findings of the learned judge are not supported by the evidence"

[52] This second ground had sought to challenge the learned Parish Court Judge's determination that the respondent not only had factual possession but had demonstrated her intention to possess the property. The learned Parish Court Judge's analysis seemed to have proceeded on the basis that the licence had automatically ended in 2004, and since the respondent remained in occupation of the property, she had the requisite factual possession.

[53] The learned Parish Court Judge had then directed her assessment to what weight should be given to the purported acts of ownership by the appellant since her mother's death. Perhaps her approach was a result of her misguided notion that the burden of proof was on the appellant to satisfy the court on a balance of probabilities of her claim and that the defence under the LAA was not justified. On the contrary, it was the respondent who had the onus of proving that the appellant's interest in the property had been extinguished due to her possession.

[54] The learned Parish Court Judge ultimately found that the appellant's efforts in relation to her interest in the property, which she said included obtaining letters of administration in her mother's estate and subsequently acquiring the first registration of the property, were slight. She held that "[a]part from obtaining the services of an engineer and quantity surveyor to pursue her application for a title, [the appellant] took

no formal steps to recover the [disputed property] and did not exercise any exclusive control over the property". Also, she believed it to be critical that, in her estimation, the appellant made no effort to complete the construction of the house or effect repairs. The learned Parish Court Judge concluded that the appellant took no action to recover possession of the property from 2004 to 2018, when she served the notice to quit.

[55] In considering the approach taken by the learned Parish Court Judge, I am mindful of the guidance given in the Privy Council decision of **Paymaster (Jamaica) Limited and another v Grace Kennedy Remittance Services Limited** [2017] UKPC 40, a case emanating from this court. The substance of that guidance is that an appellate court should not overturn a decision unless the judge below had been palpably/demonstrably wrong. In my judgment, the approach of the learned Parish Court Judge was demonstrably wrong. When ascertaining whether a person has adversely possessed property, it is necessary to examine their actions and intentions independent of those of the title holder. Occupation of a property does not inevitably prove factual possession, and the intention to possess cannot be presumed simply based on a finding of factual possession.

[56] From the date of entry onto the land to the initiation of the claim, the respondent resided in the original structure of the house, which she described as a "[f]our-bedroom structure with two bedrooms furnished, with bathroom, [k]itchen and the living". It was the appellant's evidence that when she asked the respondent why the living room was not finished, she said that the "builders" ran off with Ms Cynthia Taylor's money. The only evidence of any improvement to the property was the evidence that the respondent's daughter constructed additional rooms at the rear of the house. The learned Parish Court Judge identified that evidence as proof that the respondent acted as an occupying owner would have; however, I have noted the respondent's evidence that the addition was done by her daughter after the parties' disagreement in 2013. Therefore, I do not think it would be helpful to the examination of whether the respondent exercised custody and control

of the property on her behalf and for her benefit between 2004 to 2016 (the applicable timeline identified by the learned Parish Court Judge).

[57] During cross-examination, the respondent stated that she knew the house was leaking from about 1993 or 1994, when it was built. Her stance in relation to the repairs was thus:

> "Q. In 2013 cracks still in the house.
> A. Yes. It leaking same way till now. My husband is a mason and it no fix.
> Q. How come you don't fix it.
> A. I understand is I have to leave out there them say is not mine so if I not going stay there I not going fix it. I knew before 2013 it was leaking. It leaking from the house finish so I could move in. The house finish 1993 1993, [sic] 1994.
> Q. From then till now, you no fix it because you know is not yours.
> A. No ah no so it go the mason never come. He was the one building it for [Mrs Cynthia Taylor]. Him nuh come back. I was still expecting him to come fix that part of the roof.
> Q. 1993-1994 you knew it was not your place.
> A. No, me Aunty build it and put me in there. When I understand is not my own I say I not fixing it when [the appellant] say is not my own and I must pay rent from 2013.
> …
> Q. You and Ms. Taylor work on the house and talk about the cracks.
> A. Yes."

[58] The respondent also gave evidence that when the roots of a jackfruit tree were causing cracks in the wall of the house, which resulted in leaks in the living room, it was the appellant who paid to cut it down.

[59] Although the respondent refuted the appellant's claims that she made an effort to have work done on the property and insisted that she did not facilitate the visits from the structural engineer or the surveyor, it is my view that they could not have accessed the property without her knowledge. Nevertheless, when she was presented with documentary proof (the survey drawing on the Certificate of Title for the property) that the appellant commissioned a surveyor, whose report was prepared in 2010. She maintained that she was not aware of this. Having regard to the public nature of a survey,

the learned parish judge would have been wrong to ignore or reject that evidence. The respondent either facilitated her access to the property or the appellant's access was unfettered. Nevertheless, both possibilities undermine the respondent's claim. I find that the learned Parish Court Judge failed to demonstrate how she resolved the inconsistencies in the respondent's evidence relative to her credibility. This is especially so since the respondent had the onus of proving that she had, as a matter of fact, dispossessed the appellant.

[60] The physical control and custody required of a possessor must be exclusive, which is not the situation in this case. Both parties testified that between 2004 and 2013, the appellant visited and stayed at the property several times. The respondent expressly referred to three occasions. On the appellant's evidence, it was during that period she commissioned a structural engineer and made arrangements with the respondent for a survey to be done. If it is that the respondent intended to dispossess the appellant, why would she then allow the appellant access to the property and involve her in its maintenance?

[61] In such circumstances, it could hardly be said that the respondent exercised complete physical control of the property to the exclusion of the appellant. To my mind, the respondent's conduct when she said she became aware that the property did not belong to her, runs contrary to the proposition that she exercised acts of ownership. I wish to point out at this time that contrary to the learned Parish Court Judge's ruling, whereas the possessor must illustrate that she has exclusive control of the property, there is no requirement for the legal owner to do so.

[62] The evidence supporting a finding that the respondent possessed the requisite *animus possidendi* is also, in my opinion, deficient. It is a settled principle of law that the doctrine of adverse possession requires more than merely occupying a property for the stipulated period of 12 years. As correctly stated by counsel Ms Shaw, the case of **J A Pye (Oxford) Ltd** makes it clear that in a claim for adverse possession there are two elements that need to be satisfied. These elements are: (1) a sufficient degree of physical

custody and control ('factual possession'); and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ('intention to possess' or '*animus possidendi*').

[63] It is, therefore, striking to me that the learned Parish Court Judge found that the respondent's evidence that she did not do any repairs because she thought she would soon have to leave the property was not sufficient to negate her intention to possess. This is peculiar because she found it to be significant that the appellant (in her opinion) did not effect any repairs. In my judgment, however, the respondent's stance in relation to the maintenance of the property is an unequivocal indication of her true intent. She explained that she was advised in 2013 that the property did not belong to her, and so despite her husband being a mason, she did not effect any repairs. Bearing in mind that she also testified that she knew the house was leaking from in the 1990s, the absence of evidence of any effort on her part to deal with the property the way an owner would (at least from 2004 to 2013) is critical. The manner in which she occupied the property during the period she has claimed is inconsistent with a valid claim of adverse possession. For all of the foregoing reasons, I agree with the appellant's contention.

Conclusion

[64] Having explored the relevant authorities in detail, I am of the view that the learned Parish Court Judge erred in law and in fact in her determination that the respondent had dispossessed the appellant. The requisite period of dispossession had not elapsed by the time the appellant brought an action for recovery of possession, in 2019. It is my view that the effect of the first registration in 2013 would have restarted the "running of time". Therefore, in 2019 when the claim for recovery of possession was initiated by the appellant, only a period of six years would have elapsed and not the requisite 12 years as required by law. Consequently, I find that the learned Parish Court Judge erred in her determination that the appellant was estopped from recovering possession of the property by operation of the LAA.

[65] I would, therefore, recommend that the appeal be allowed and that costs be awarded to the appellant in this court and in the court below.

F WILLIAMS JA

ORDER

1.The appeal is allowed.

2.The judgment and orders of the learned Parish Court Judge, for the parish of St Catherine, in plaint note no SC2019CV01498 for recovery of possession are set aside.

3.The respondent on or before the 31 January 2024 is to quit and deliver up possession of the property located at Byndloss, in the parish of Saint Catherine, registered at Volume 1470 Folio 237 of the Register Book of Titles.

4.Costs to the appellant in the court below are agreed in the sum of $110,000.00.

5.Costs to the appellant in this court are summarily assessed at $90,000.