



[2025] JMSC Civ. 104

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2019CV00533**

**BETWEEN          LEN CUNNINGHAM                                  1<sup>st</sup> CLAIMANT**

**By and through their agent Joyce Bunting**

**AND                  LEROY CUNNINGHAM                                  2<sup>nd</sup> CLAIMANT**

**By and through their agent Joyce Bunting**

**AND                  VICTOR HALL                                                  1<sup>st</sup> DEFENDANT**

**AND                  SONIA HALL                                                  2<sup>nd</sup> DEFENDANT**

**OPEN COURT**

**Yvonne D. Ridguard Harris, Attorney-at-law, of counsel, for the Claimants**

**Jovell C. Barrett, Attorney-at-Law, instructed by Nigel Jones & Company,  
Attorneys-at-Law, for the Defendants**

**Heard: December 11-14, 2023, March 4 - 7 and 22, 2024 and April 19, 2024 and  
September 26, 2025**

**CIVIL PROCEDURE - Agency - Adverse Possession - Fraud - Whether Joyce Bunting was the claimants' agent, and therefore, had the authority to act and deal with the disputed land for and on behalf of the claimants - Whether, by operation of the *Limitation of Actions Act (LAA)*, the claimants' alleged adverse possession of the disputed lands, extinguished the registered title obtained by the 1<sup>st</sup> defendant - Whether the 1<sup>st</sup> defendant committed fraud when obtaining a**

**certificate of title for the lands registered at volume 1471 folio 698 of the Register Book of Titles, which comprise the disputed land, to which the claimants, through their agent, lay claim - Whether the 2<sup>nd</sup> defendant's title, jointly held with the 1<sup>st</sup> defendant, for the disputed land, is vitiated, arising from the alleged fraud of the 1<sup>st</sup> defendant - Whether pursuant to section 158 of the Registration of Titles Act, the court has the jurisdiction to order that the Registrar of Titles cancel the certificate of title for the lands registered at volume 1471 folio 698, on the basis of fraud - Whether the court should direct the Registrar of Titles to issue a new title, in the names of the claimants, for the disputed land - Sections 68, 70, 71, 158, 161 & 163, Registration of Titles Act and Sections 3 & 30, Limitation of Actions Act**

**ANDERSON K. J**

## **BACKGROUND**

### **The Claimants' Case**

[1] This claim was initiated by way of claim form and particulars of claim, which were filed on February 14, 2019. The claimants, through their agent, filed their amended claim form and particulars of claim on December 12, 2023, where they claim that they are the beneficial and equitable owners of lands located at Passley Gardens, in the parish of Portland. They also claim that the said land, to which they claim ownership, containing by survey 972 square metres, has been fraudulently registered in the names of the defendants at Volume 1471 Folio 698 of the Register Book of Titles. They further claim that these lands were previously part of the lands registered at Volume 310 Folio 56 of the Register Book of Titles, in the name of Adella Smith, deceased.

[2] The claimants contend that the aforementioned lands were initially registered in the name of the 1<sup>st</sup> defendant on October 3, 2013, then subsequently registered in the names of both the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant as joint owners, on October 2, 2017. It is the claimants' contention that on November 9, 2015, when they became aware that the 1<sup>st</sup> defendant had obtained title in his name, they lodged a caveat, numbered 1969755, against the said title, registered at Volume 1471 Folio 698 of the Register Book of Titles. They further contend that the caveat had lapsed without their knowledge, and that it was in that period of time, that the disputed land was transferred jointly to both defendants.

**[3]** The claimants assert that on September 13, 1985, they had purchased the disputed land, through their agent, Mrs. Bunting, for Six Thousand Dollars (\$6,000.00), from Cleveland Miller-Bey, who was the brother of Adella Smith, the then registered proprietor. They also assert that they had taken possession of the relevant lands on the said date of purchase. They further assert that, at all material times prior to and up to the date of purchase, Cleveland Miller-Bey held himself out as having authority to sell the lands located at Passley Gardens and owned by Adella Smith. They contend that the transaction to purchase the disputed land was conducted at the office of Ian Grossett, attorney-at-law. They also contend that they and Mr. Miller-Bey had an understanding that Mr. Miller-Bey would be administering Ms. Smith's estate, in order to provide a title for the lands they had purchased, but that, they did not know at the time that she had died testate. They further contend that they were given a copy of a deed of gift dated February 1971, which authorized Mr. Miller-Bey to act on behalf of Ms. Smith as regard the disputed land. They allege that Mr. Miller-Bey had given them a copy of a subdivision approval dated July 15, 1985, which was obtained in his name as agent for Ms. Smith, and issued by the Portland Parish Council for the lands registered at volume 310 folio 56 of the Register Book of Titles.

**[4]** The claimants claim that, although the location of the disputed land is known as Passley Gardens, it is commonly referred to as 'Snow Hill'. Further, they contend that, while Snow Hill is the name of the district where the disputed land is located, Passley Gardens is the name of the estate, and that, any reference to either of the two locations signifies the same property, for the purposes of this claim. There is no dispute between the parties in that regard.

**[5]** The claimants allege that their agent, Mrs. Bunting, and her husband, Basil Bunting, took possession and control of the disputed land on their behalf, and that they established a croton fence, as the common boundary between the lands owned by the Buntings and the disputed land. The claimants also allege that, at the time the Buntings purchased their own lands, as well as the disputed land for and on their own behalf, all the aforesaid lands were registered in the name of Adella Smith at volume 310 folio 56 of the Register Book of Titles. They further allege that from September 1985 until

around 2004, they, through their agent, occupied the disputed land by establishing a farm over most of the said land. It is their contention that, up to 2004, the Buntings planted cash crops and trees on the said land, and that they constructed a fowl coop in which they reared chickens for their personal use and for sale.

[6] They have asserted that Oswald Dunn did not take them or the defendants to court in respect of the disputed land, and that, they, through Mrs. and Mr. Bunting, remained in sole, open, undisturbed, undisputed possession of the disputed land, without interference from the estate of Adella Smith and/or the defendants and/or their agents. They have also asserted that Plaint 193/88, which was brought by Oswald Dunn against Zephaniah Hall, father of the 1<sup>st</sup> defendant, was to recover possession of an adjoining lot of land at Passley Gardens, which is separate and apart from the disputed land in the case at bar. They have further asserted that in 2004, by way of Plaint 182/04 in the Resident Magistrates' Court, they claimed against the 1<sup>st</sup> defendant for trespass and destruction of property, and that, the court ruled in their favour.

[7] In light of the preceding, the claimants are claiming the following orders: -

(a). A declaration that the claimants are the beneficial owners of ALL THAT Parcel of land, part of Passley Gardens in the parish of Portland, containing by survey 972 square metres and being part the lands registered at volume 1471 folio 698 of the Register Book of Titles, which lands were formerly part of the lands registered at volume 310 folio 56 of the Register Book of Titles **and**

(b). A declaration that the defendants acquired title to the said lands at Passley Gardens in the parish of Portland, registered at volume 1471 folio 698 of the Register Book of Titles, by way of fraud **and/or**

(c). A declaration that the transfer of lands into the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, by the 1<sup>st</sup> defendant, the consideration for which is not for value, is a nullity **and/or**

(d). Pursuant to section 158 of the Registration of Titles Act, an order that the said title registered at volume 1471 folio 698 of the Register Book of Titles be cancelled by the Registrar of Titles and a new certificate of title be issued in the claimants' names **and/or**

(e). Costs to be awarded to the claimants **and**

(f). There shall be liberty to apply **and**

(g). That the claimants may have such other and further relief as may be just.

### **The Defendants' Case**

[8] By way of amended defence, which was filed on November 18, 2021, it is the defendants' case that they are the legal and beneficial owners of all that parcel of land contained in certificate of title registered at volume 1471 folio 698 of the Register Book of Titles. The 1<sup>st</sup> defendant claims that he and his mother purchased the said land from Adella Smith, the deceased and former registered proprietor, during her lifetime on or about the months of January, March and April, 1977. It is their contention that the claimants were never the beneficial and/or equitable owners of any part of the disputed land. They vehemently deny that the said title was procured by fraud, but that, the said land forms part of the land formerly registered at volume 310 folio 65 of the Register Book of Titles.

[9] They claim that, at no point in time did Mr. Cleveland Miller-Bey have any capacity to sell, convey, transfer any interest or estate in land owned by Adella Smith at Passley Gardens in the parish of Portland, and that, therefore, any purported sale by Mr. Miller-Bey on or about the September 13, 1985, to the claimants, would amount to a nullity. They contend that the purported deed of gift could not confer upon Mr. Miller-Bey the legal capacity with which to deal with the said land, and that, the purported subdivision has no relevance to the case at hand. They also contend that, on or about September 13, 1985, the 1<sup>st</sup> defendant and his mother were the equitable owners in possession of the disputed land, having purchased same, and having been in continuous possession from the year 1977 to present. The defendants further contend that on or about September 13, 1985, all estate and interest of the lands registered at

Volume 310 Folio 56, except for the portion that was purchased by the 1<sup>st</sup> defendant and his mother in 1977, was vested in Oswald Dunn, the sole executor and beneficiary of the estate of Adella Smith.

**[10]** The defendants allege that the disputed land was never purchased by the Buntings for and on behalf of the claimants, but that, the 1<sup>st</sup> defendant has been in quiet, open, undisturbed and continuous possession of the disputed land from 1977 to present. They also allege that in or around November 2021, the Buntings made attempts to remove the long-standing boundary fence, which existed as far back as 1977, and which separates the property owned by the Buntings and registered at Volume 1495 Folio 699 of the Register Book of Titles, from the land owned by the defendants and registered at Volume 1471 Folio 698 of the Register Book of Titles. They further allege that the Buntings had never established a farm or built a fowl coop on the disputed land. They contend that the Buntings are attempting to secure a piece of land for the claimants at the defendants' expense. They also contend that in 1988, Oswald Dunn took the 1<sup>st</sup> defendant's father, Zephaniah Hall, to court to recover the parcels of land, which were later registered at Volume 1471 Folio 698 of the Register Book of Titles. They further contend that the claim, Plaint 193/1988, brought by Mr. Dunn in the Resident Magistrate's Court for the parish of Portland (now the Portland Parish Court) was unsuccessful in recovering the said lands.

**[11]** The defendants assert that no part of the land, that is currently registered at Volume 1471 Folio 698 of the Register Book of Titles, was ever in the exclusive, continuous, undisturbed and undisputed possession of the claimants' agent, or the claimants, who have always lived abroad. It is the defendants' case that they did not destroy any crops or chicken coop or other property belonging to, or in the exclusive possession of the claimants, through their agent, Joyce Bunting, between February 20, 2004 and March 24, 2004. They have asserted that they have had documentary proof of their title to the disputed land, but that, they were advised by their attorney-at-law that they had no obligation to disclose same to the claimants, or to the court since Plaint 182/04 did not concern ownership of the disputed land or recovery of possession of same. They have also asserted that, in light of the preceding, there was no need to

prove title, and that, the Portland Resident Magistrate's Court had granted a stay of execution of the judgment.

**[12] Chronology of key events**

1. The 1<sup>st</sup> defendant and his mother, Amy Hall, allegedly bought the disputed land from Adella Smith in January, March and April, 1977. (The 1<sup>st</sup> defendant has exhibited receipts and sales agreements to evidence the alleged purchase – exhibits 53 - 55.)

2. The claimants, through their agent, Joyce Bunting, allegedly took possession and control of the disputed property, in or around 1986, by way of farming cash crops and rearing chickens. (They agree that they could not have lawfully purchased the subject property in September 1985 from Cleveland Miller-Bey, who had no legal authority to sell same.)

3. In 2002, the 1<sup>st</sup> defendant commissioned a Land Surveyor, Dennis W. Clay, to survey his mother's land. The claimants' agent, Mrs. Bunting, was orally advised of the impending survey and was present at same. The survey was conducted by Mr. Clay on December 12, 2002, and the survey report bears the examination number 298511 – exhibit 67.

4. In 2004, by way of Plaintiff 182/04, the claimants, through their agent, Joyce Bunting, took the 1<sup>st</sup> defendant to court to recover damages for trespass and damage to their property. On April 9, 2004, both parties consented to an interlocutory injunction, restraining them, their servants and/or agents from going onto the said land, building on it or improving it, until the matter was determined by the court. The court found in favour of the claimants on February 9, 2018.

5. Subsequently, the 1<sup>st</sup> defendant filed a notice and grounds of appeal against the judgment and applied for a stay of execution of the said judgment. On June 7, 2018, the court granted a stay of execution pending the hearing of the appeal.

6. In April 2004, with the consent of the parties to this claim, the court referred the matter to a Commissioned Land Surveyor - Llewelyn Allen of Llewelyn Allen & Associates, who conducted a survey of the disputed property on November 27, 2004 – exhibit 27.

7. On July 19, 2011, the 1<sup>st</sup> defendant applied to the NLA for certificate of title, via adverse possession, of the lands registered at volume 1471 folio 698 of the Register Book of Titles – exhibit 47. He submitted a declaration in support of his application, which bears the same date – exhibit 48.

8. The certificate of title for the disputed property registered at volume 1471 folio 698 of the Register Book of Titles was issued to the 1<sup>st</sup> Defendant on October 3, 2013 – exhibit 2.

9. The certificate of title for the disputed property was transferred into the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, holding as joint tenants, on October 2, 2017 – exhibit 2.

## **ISSUES**

**[13]** The following issues are now before the court for determination:

1. Whether Joyce Bunting was the claimants' agent, and therefore, had the authority to act and deal with the disputed land for and on behalf of the claimants.

2. Whether, by operation of the *Limitations of Actions Act (LAA)*, the claimants' alleged adverse possession of the disputed lands, extinguished the registered title obtained by the 1<sup>st</sup> defendant's registered title.

3. Whether the 1<sup>st</sup> defendant committed fraud when obtaining a certificate of title for the lands registered at volume 1471 folio 698 of the Register Book of Titles, which comprise the disputed land, to which the claimants, through their agent, lay claim.

4. Whether the 2<sup>nd</sup> defendant's title, jointly held with the 1<sup>st</sup> defendant, for the disputed land, is vitiated, arising from the alleged fraud of the 1<sup>st</sup> defendant.

5. Whether pursuant to section 158 of the Registration of Titles Act, the court has the

jurisdiction to order that the Registrar of Titles cancel the certificate of title for the lands registered at volume 1471 folio 698, on the basis of fraud.

6. Whether the court should direct the Registrar of Titles to issue a new title, in the names of the claimants, for the disputed land.

**Whether Joyce Bunting was the claimants' agent and therefore, had the authority to act and deal with the disputed land for and on behalf of the claimants.**

**The Claimants' Submissions**

[14] It is the claimants' case that Joyce Bunting acted as their agent when she occupied the disputed lands, containing by survey 972 square metres, being part of the lands registered at volume 1471 folio 698 of the Register Book of Titles. The claimants have relied on the text, ***Law of Agency***, 2<sup>nd</sup> Edition, by author, G.H.L. Fridman, which states, on page 8, that: *'Agency is the relationship that exists between two persons when one, called the agent is considered in law to represent the other called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.'* The claimants have further relied on page 38 of the said text that: *'even if the agent is appointed to make a contract (such as the purchase of land) which is required to be in writing, the appointment of the agent need not be in writing.'* The claimants claim, based on the above, that the mere fact that the claimants did not state in writing, that Joyce Bunting was their agent before the matter was filed, based on the facts, particularly the conduct of both the claimants and Mrs. Bunting in purchasing the disputed land, the court may draw such a conclusion.

[15] The claimants assert that, according to ***Williams v Pott 1871 LR 12 Eq 149***, *'possession of an agent for purposes of adverse possession is possession of the*

*principal'*, and that, the owner can occupy land through his agent. The claimants also assert that there is no need for a principal to compensate an agent. They further assert that where an agent buys land on behalf of his principal, the agent has an implied right to occupy it on behalf of the principal, as it is implied to be within the scope of authority of the agent. The claimants have proffered that Professor Fridman, at page 42 of ***The Law of Agency (op. cit.)*** opined that a principal may accept and adopt an agent's acts as if there had been a prior authorization by the principal to do exactly what the agent has done. They have also proffered that even if Len Cunningham came to Jamaica two years after Joyce Bunting was occupying the land and farming it, and adopted her actions, that would ratify what Mrs. Bunting had done from the beginning. They have further proffered that Mrs. Bunting gave evidence that when she purchased the lands for the claimants, Len Cunningham, who was overseas, sent her monies to conduct the transaction in the claimants' absence. They contend that Mrs. Bunting occupied the disputed land for the claimants, and planted cash crops thereon for herself and her brother, who had advised her, on his visit to Jamaica, to occupy the land for them. They also contend that it was Mrs. Bunting, who retained a lawyer for the claimants to write a letter to the 1<sup>st</sup> defendant, and also to file an action in court against him.

#### The Defendants' Submissions

[16] It is the defence's contention that the claimants had no control over the disputed property, which they are claiming by way of adverse possession since, under cross-examination, Mrs. Bunting had agreed that the claimants had no control over what was happening on the land in Passley Gardens. In addition, the defence contend that, under cross-examination, Len Cunningham, Mrs. Bunting's brother, agreed that he had never occupied the land he is now claiming, and that, he had first seen and walked on the disputed property in 1987. They assert that Mr. Cunningham further gave evidence that he did not plant any crops on the disputed property, nor did any acts to show that he was occupying same between 1987 and 2004, and that, he had not paid any property tax for the said property. They also assert that Mr. Leroy Cunningham, under cross-examination, agreed that he did nothing to show that he was occupying the disputed property. They further assert that he agreed that he had no control over what was

happening on the land in Passley Gardens. It is the defence's case that this is fatal to the claimants' claim of adverse possession, as it demonstrates a lack of factual possession on the part of the claimants. They have submitted that Leroy Cunningham also admitted that Mrs. Bunting did not ask for his permission to occupy the disputed property. It is the defence's case that the preceding admission negates the claimants' claim that Mrs. Bunting was acting as their agent.

### **The Court's Analysis**

[17] The claimants have provided the court with a power of attorney dated February 5, 2019 and recorded on February 20, 2019, exhibit 1, whereby they have empowered their agent, Joyce Bunting, to represent them in this claim and to take all necessary legal action to protect their interest in the said claim. Also, the claimants have been empowered to be in charge of and oversee all lands owned by them in Jamaica, being that parcel of land registered at volume 1471 folio 698 of the Register Book of Titles, at Passley Gardens in the parish of Portland, and to do all acts necessary to act as fully and effectively as they, the principals, would do themselves in respect of the preceding matters. In addition, the principals have undertaken to ratify and confirm from time to time and at all times, whatsoever the attorney shall lawfully do or cause to be done by virtue of the said power of attorney. It must be noted that this power of attorney came into effect many years after 1985, when Mrs. Bunting purported to have purchased the disputed property and/or have possessed the said property adversely, for and on behalf of the claimants.

[18] The facts of this case do not suggest that there existed a relationship of principal and agent between the claimants and Mrs. Bunting from the outset, that is, beginning in or before 1985, when she purported to purchase the disputed property and/or purported to occupy the said property for and on behalf of the claimants, via adverse possession. If this had occurred, the agent's authority to act would have been granted before the exercise of that authority. However, it is important to note that with 'ratification' the position is reversed. This is the alternative position that the claimants have proffered.

G.H.L. Fridman in ***The Law of Agency, 6<sup>th</sup> Edition, 1990***, on the topic of 'Agency resulting from ratification' states at pages 74 and 75 that:

*'What the "agent" does on behalf of the "principal" is done at a time when the relation of principal and agent does not exist...The agent, in fact, has no authority to do what he does at the time he does it. Subsequently, however, the principal, on whose behalf, though without whose authority, the agent has acted, accepts the agent's act, and adopts it, just as if there had been prior authorization by the principal to do exactly what the agent has done...The interesting point...is that ratification by the principal does not merely give validity to the agent's unauthorized act as from the date of the ratification: it is antedated so as to take effect from the time of the agent's act. Hence the agent is treated as having been authorized from the outset to act as he did. Ratification is "equivalent to an antecedent authority".'*

The learned author confirmed what was enunciated by Tindal CJ in ***Wilson v Tumman (1843) 6 Man & G 236*** at p 242:

*'That an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established principle of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same effect as by, and with all the consequences which follow him from the same act done by his previous authority.'*

[19] In the case, ***Firth v Staines [1897] 2 QB 70*** at 75, Wright J gave three conditions that had to be satisfied to constitute a valid ratification, which are:

*'First, the agent whose act is sought to be ratified must have purported to act for the principal. Secondly, at the time the act was done the agent must have had a competent principal. Thirdly, at the time of the ratification, the principal must be legally capable of doing the act in question himself.'*

The learned author in ***The Law of Agency (op. cit.)*** opined that in order to analyze the three conditions outlined above, one has to pay attention to the four important features of ratification. For the first feature, the principal must be in existence at the time the act was done by the agent, since no one can purport to act as an agent for a person who will come into existence at a future date. In the case at hand, I find that this condition has been satisfied since, Mr. Len and Leroy Cunningham for whom Mrs. Bunting purports to act, are both legal and natural persons, and were in existence at the time the act or acts were done by her. The second feature requires that, at the time of

contracting, the agent must contract as agent for a definite, identified, or identifiable principal, who is the person who later ratifies it. This feature has also been satisfied in the case at bar, since Mrs. Bunting has always purported to act for the Cunninghams, her brother and nephew, and the power of attorney, dated February 5, 2019 and recorded on February 20, 2019, indicates that they are the same persons, who have ratified her acts on their behalf.

**[20]** The third feature, which must be demonstrated, is that the act of the agent for the principal should be legal. This is necessary because the possibility of ratification depends upon the principal's personal capacity to perform the act himself at the time the agent performs it for him. Based on the facts and evidence before the court, Mrs. Bunting purported to purchase property and/or occupy said property via adverse possession, for and on behalf of her brother and nephew. Both of these acts may be legally done by an agent for a principal, or the principal could perform these acts for himself. Further, it would be lawful for the principal to ratify these acts since they are not a nullity, nor are they considered prohibited transactions. In the case at bar, I find that the claimants have satisfied this requirement, since they had and still have the capacity to perform the aforementioned acts for themselves. The fourth feature, which must be assessed, is time for ratification. Not only must the principal have the capacity to ratify the acts of the agent, but he must also enjoy such capacity at the time of the purported ratification. I find that, in the instant case, the claimants, who are the purported principals, possessed the capacity in February 2019, to ratify the acts of the purported agent.

**[21]** Given the preceding, I find that the claimants have satisfied the conditions which must be met in order to properly ratify the acts of their purported agent, Mrs. Bunting, and that, they have provided proof of that ratification via the aforementioned power of attorney instrument. Accordingly, I further find that the ratification is valid, therefore, this produces the same result as if Mrs. Bunting had acted under an antecedent authority. Consequently, Mrs. Bunting had the authority to purchase and/or occupy the disputed lands via adverse possession for and on behalf of the claimants. Also, she had the

authority to take legal action, including initiating court action, against the defendants for the recovery, or otherwise, of the disputed lands for and on behalf of the claimants.

**Whether, by operation of the *Limitations of Actions Act (LAA)*, the claimants' alleged adverse possession of the disputed lands, extinguished the registered title obtained by the 1<sup>st</sup> defendant's registered title.**

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### The Claimants' Submissions

[22] It is the claimants' case that *Ja. Pye (Oxford) Ltd. V Graham and another* 2003 **1 AC 419** sets out the requirement for adverse possession, and that, that case states quite clearly that physical possession is required, whether directly or indirectly through agents, in order to obtain adverse possession. They have proffered that in the ***Ja. Pye (Oxford)*** case (*op. cit.*), Lord Browne-Wilkinson in his judgment, at paragraph 36 stated: *'the question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.'* It is also the claimants' case that possession occurs when there is a sufficient degree of physical control and custody (factual possession) and an intention to exercise such control on one's behalf or for one's own benefit (intention to possess), and that, the claimants satisfy both criteria in respect of the disputed land. The claimants contend that, since they were in actual occupation by farming the lands through their agent for twelve years or more, the defendants' paper title was extinguished.

[23] The claimants assert that the case of ***Recreational Holdings [2016] UKPC 22***, at paragraph 34, is the authority for stating that **section 70, Registration of Titles Act** provides that once the title of the owner is extinguished under the ***Limitations of Actions Act***, there is nothing to pass, not even to a purchaser for value without notice. They also assert that, while the claimants cannot claim a valid purchase of the disputed lands, the purported purchase provides context for the claimants' intention to possess the said lands through their agent between the period 1985 to 2004, and that, the alleged acts of trespass could not dispossess the claimants in the circumstances. The claimants further contend that, where someone occupies land, unless an action is filed

in court, or the person is physically dispossessed, then the person is deemed to be continuing possession. They have proffered that in ***Recreational Holdings HCV [2012] JMSC Civ 165***, at paragraph 21, Anderson J adopted the definition of dispossession in ***Halsbury's Laws, 2<sup>nd</sup> Edition Volume 20*** at paragraph 899, which states:

*'Dispossession is where a person comes in and puts another out of possession, discontinuance of possession is where the person in possession goes out of and another person takes possession. The true test whether a rightful owner has been dispossessed or not is whether the ejectment will lie at his suit against some other person. The rightful owner is not dispossessed, so long as he had all the enjoyment of the property that is possible and where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment. To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it.'*

[24] The claimants also assert that their two independent witnesses, Leopold Miller and Lancelot McFarlane, gave credible evidence that Joyce Bunting had occupied the disputed lands, planted it with cash crops and had a fowl coop thereon, in which she raised chickens. They further assert that, if the land is fenced, it is better demarked; however, they contend that land that is physically occupied by the planting of crops is also a strong indicator of occupation per paragraph 15 of ***Recreational Holdings [2012] (op. cit.)***. They claim that the 1<sup>st</sup> defendant only came forward in December 2002 to occupy his mother's land, and that, he did not call any witnesses to corroborate his alleged occupation of the disputed land during the relevant period. They also claim, however, that the claimants have a court judgment to verify that they were in actual possession, and that, they also called witnesses in this trial to corroborate their occupation. They further claim that if the court finds that Joyce Bunting was in possession of the disputed lands from 1985 to 2004 as agent of the claimants, whether or not the 1<sup>st</sup> defendant purchased the lands directly from the registered proprietor, the claimants would have acquired an adverse interest therein. In addition, they claim that, if the court so finds, the court would not even have to rule on whether or not the receipts and agreements for sale are forgeries.

### The Defendants' Submissions

[25] The defence have proffered that in order to prove title by adverse possession, two elements are necessary, which are: '(1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess")': per Lord Browne-Wilkinson in **Ja. Pye (Oxford) case (op. cit.)**. The defence have also proffered that factual possession in this context must be open, peaceful and adverse. They have further proffered that the requirement of openness means that the possession of the claimant must be 'notorious and unconcealed': **Lord Advocate v Lord Advocate (1880) 5 App Cas 273, 291, 296**. They contend that this requirement is also a necessity, as the owner would not be made aware of the need to challenge the adverse possessor, before the expiry of the limitation period. They also contend that factual possession must be 'adverse' in the sense that it must not be with the consent of the paper owner: **Ja. Pye (Oxford) case (op. cit.)**. They further contend that, in the aforesaid case, Lord Browne-Wilkinson outlined the following:

*'[41] In Powell's case (1977) 38 P & CR 452 at 470 - 471, Slade J said:*

*(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.'*

[26] The defence assert that, along with factual possession, there must exist the intention to possess the land on the part of the claimant. They also assert that the only intention, which has to be demonstrated, is an intention to occupy and use the land as

one's own: per Lord Hope in **Ja. Pye (Oxford)** case (*op. cit.*). They also assert that the dispossessor, who has satisfied the requirements of factual possession and the intention to possess, will obtain a good title, if the true owner fails to assert his superior title within the requisite limitation period per **sections 3 and 30** of the **Limitation of Actions Act**. They further assert that the aforementioned provisions may operate together to bar a true owner with a superior title, and that, he would be barred from making entry or bringing a claim to recover the property after the expiration of twelve years, if certain conditions exist: **Winnifred Fullwood v Paulette Curchar [2015] JMCA Civ 37**, per McDonald-Bishop, JA (Ag), as she then was, at paragraph 37. In addition, they have argued that the **Limitation of Actions Act** prescribes that after twelve (12) years, a person's failure to exercise his right in relation to land will give a dispossessor a complete defence to any claim brought subsequently, and that, such adverse possession can defeat a registered title.

[27] It is the defence's case that there is no dispute regarding the location of the disputed land, which lies between the parcel of land allegedly purchased by Joyce and Basil Bunting, and the land purchased by the 1<sup>st</sup> defendant and his mother, Amy Hall. The defence claim that the Buntings erected a croton fence along the boundary between their parcel of land and the disputed lands. However, the defence also claim that there was never any fence erected by anyone to separate the disputed parcel of land from the parcel owned by the 1<sup>st</sup> defendant and his mother. They further claim that, per **Halsbury's Laws of England, 4<sup>th</sup> Edition, paragraph 769**, *'fencing is often best evidence of possession of surface land. The fencing of property by someone indicated that said person treated with and continued to treat with that property as if it is his/her own.'* They claim that the claimants, in the case at bar, did not fence the disputed land in order to establish a boundary from the undisputed part of the land. The defence have proffered that the claimants live abroad and have never themselves occupied any part of the disputed land, and that, they were never taken to court by Mr. Oswald Dunn in relation to the disputed land. They have also proffered that the 1<sup>st</sup> defendant's father, Zephaniah Hall, was brought to court, by way of Plaint 193/1988 initiated by Mr. Dunn, in relation to approximately half an acre of land, formerly part of the lands registered at volume 310 folio 56 of the Register Book of Titles, and that, the aforementioned lands

include the disputed land. They have further proffered that the aforesaid court action serves to prove that the Halls were occupying the relevant lands, including the disputed land.

[28] The defence contend that there is no evidence to support the claimants' claim that they were in possession of 972 square metres of land, whether by themselves or through an agent, since there was no fence separating the disputed land from the rest of the land owned by the defendants. They also contend that the survey, which the claimants relied on to prove that their agent occupied 972 square metres, does not make reference to any established boundary of the disputed land. They further contend that the claimants' evidence as to when they began occupation of the disputed property is inconsistent, since their agent had initially said that she had commenced possession immediately after having purchased the disputed property, but that, she subsequently said that she began occupation six months thereafter. They have submitted that the claimants' agent did not start to occupy the disputed land, until after she showed the said property to the claimants, and that, this was could not have been earlier than 1987, when the 1<sup>st</sup> defendant first came to Jamaica. They have also submitted that although, Joyce Bunting claimed that her brother, Len Cunningham, wanted to build a house, no house was ever built on the disputed property, and that, that indicates that the claimants were never in possession or control of said property. They, claim that, on the contrary, the 1<sup>st</sup> defendant and his parents had been in open, exclusive and continuous possession of the disputed property for well over twelve years, up to the time of the filing of the suit for trespass, and that, he had the right to be registered as the legal owner from 1977 up until he was so registered.

### **The Court's Analysis**

[29] Central to this issue is the ***Limitation of Actions Act (LAA)***, particularly, ***sections 3 and 30***, which read:

#### **Section 3: Right of entry, or bringing action to recover land or rent, limited to twelve years**

*'No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such*

*entry, or to bring such action or suit, shall have first accrued to some person through whom he claims or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same.'*

#### Section 30: At the end of the period of limitation

*'At the determination of the period limited by this Part to any person for making an entry, or bringing an action or suit, the right and title of such person to the land or rent, for the recovery whereof such entry, action or suit respectively might have been made or brought within such period, shall be extinguished.'*

According to the learned author, Sampson Owusu, **Commonwealth Caribbean Land Law, 2007**, at pages 267 & 269:

*'Title by adverse possession is instituted by legislation which operates to bar the claim of a true owner whenever the circumstances surrounding the possession of the stranger are found to be sufficient to manifest incompatibility with the title of the true owner. The doctrine therefore affords a means by which title to land can be acquired without any payment...From the start to the end of the limitation period, there should be continuous acts of possession...possession is a matter of fact depending on all the particular circumstances...possession cannot, in the nature of things, be continuous from day to day. There would be no interruption, for example, if the squatter is away on vacation or working. If the land is adapted for seasonal pursuits, the test of continuity would be met if the land is utilized seasonally by the squatter...'*

#### Possession

[30] The learned author went on to explore the elements of possession, which must be satisfied in order for the claimants, through their agent, to prove possession of the disputed land. The elements are factual possession and intention to possess. Regarding factual possession (*'factum possessionis'*), Owusu stated at page 283: *'There should be acts of physical custody and control of the land or some degree of physical occupation.'* According to the Guyana Court of Appeal in **Liv Walker (1968) 12 W.I.R. 195, 206**, factual possession *'depends on the quality of occupation, and the circumstances in which it takes place. The circumstances should show: "sole and undisturbed possession, user and enjoyment deliberately, adversely and exclusively exercised" for the limitation period.'* At page 288, Owusu opined that fencing or enclosure is the strongest possible evidence of adverse possession, but, according to the English Court of Appeal in **Seddon v Smith (1877) 36 L.T. 168**, that act is not

indispensable. In that case, the disputed land was used to raise cabbages, potatoes, and other produce; the land was ploughed up and prepared in all sorts of ways necessary for that purpose for a period considerably more than twenty years. It was contended on behalf of the defendant, the paper owner, that such acts did not constitute assertion of an adverse possession, and that there should be something excluding other people, such as erecting fences. The court firmly rejected that contention, Brett L.J. reasoning that in a country where fences are not customary, and only paths or lines divided the land of different owners from each other, mere user of another man's plot could amount to adverse possession. Brett L.J. said that evidence of a user such as a farmer would exercise over such a part of his farm, is evidence of adverse possession. Therefore, cultivation of land or the erection of substantial structures on it, would satisfy the requirement of factual possession.

[31] Owusu opined, at page 291 of his text, that, in addition to factual possession, the claimant should show an intention to possess the land to the exclusion of all others, including the paper owner. Browne-Wilkinson L.J. emphasized this ingredient of '*animus possidendi*' as a necessary ingredient in **Ja. Pye (Oxford)** case (*op. cit.*): '*But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary.*' The learned author also propounded that the requirement of '*animus possidendi*' can be inferred from the acts of possession. He further propounded that, where, therefore, the acts of possession are certain, unequivocal and affirmative, the requirement of animus possidendi loses its importance as an ingredient of a claim for adverse possession. On the other hand, where it is required to be proved as a separate condition, it should be evident that the acts of the squatter were aimed at dispossessing the world at large, including the true owner. According to **Powell v McFarlane (1977) 38 P. & C.R.** 452, 471, per Slade J: '*[There should be an] intention, in one's own name and on one's behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.*'

## **Dispossession**

[32] Owusu propounded at page 276 of his text, that time begins to run only where there is adverse possession, and that, that implies two conditions, which are:

*‘ 1. Absence of possession - either as a result of the paper owner being dispossessed, i.e., where a person comes in and drives out the paper owner from possession of the disputed land; or the paper owner’s possession having been discontinued, i.e., where a paper owner vacates or abandons or goes out of the disputed property and leaves it vacant; and*

*2. Adverse possession of the squatter - An intruder has assumed and retained possession of the land for the statutory period before the institution of action.’*

In the case of **Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd [1975] QB 94**, the Court of Appeal, Civil Division, held that:

*‘In order to establish adverse possession of land for a continuous period of 12 years, a claimant had to show that the true owner had discontinued possession, or that he had been dispossessed for the requisite period. Accordingly, mere non-user did not amount to discontinuance of possession, and in order to prove dispossession, the claimant had to establish actual possession on his part, which was of such a nature as to oust the true owner from possession...’*

## **Burden of proof**

[33] It is to be emphasized that the person/persons claiming title by adverse possession, has/have the burden of proof. On that point, Anderson J in **Recreational Holdings I (Jamaica) Limited [2012] (op. cit.)** at paragraph 18, opined:

*‘To put it another way, that person would have the burden of rebutting the presumption that the paper owner is in possession. Thus, the person seeking to establish adverse possession must produce cogent and compelling evidence of a single degree of occupation and physical control of the land, undisturbed by others, with the relevant intention to possess, for a period of twelve years or more.’*

See: **Basildon v Charge [1996] C.L.Y. 4929**. Therefore, for the purposes of the case at hand and especially bearing in mind the presumption that exists in favour of the paper owner, the claimants bear the burden of providing cogent and compelling evidence to prove that they had been in possession of the disputed land, to the exclusion of all others including the true owner, for the requisite time period. Such cogent and

compelling evidence is required, because there is a presumption that the paper owner is in possession.

### **Standard of proof**

[34] According to the case of ***Winston Leiba et al v Beverly Valeta Warren [2020] JMCA Civ 19***, Morrison P opined on the standard of proof required in civil cases. At paragraphs 75 - 88, he said, inter alia:

*'Even within the civil standard, the law recognizes that there may be differences in the quality of evidence required to meet the standard in particular kinds of matters...Although there is a single standard of proof, on the balance of probabilities, it is flexible in its application...(i) the standard of proof as in civil proceedings generally, is always proof on a balance of probabilities; (ii) the standard, although fixed, is flexible in its application, depending on the issues involved in particular cases; (iii) the more serious the consequences if the allegation is proved, or the less probable the allegation may, on the face of it appear to be, the stronger must be the evidence required to prove it; (iv) the important thing in every case will therefore be strength or quality of the evidence that is proffered in proof of the allegation.'*

Based on the preceding, in order for the claimants in the case at bar to rebut the presumption that the 1<sup>st</sup> defendant was the true owner of the disputed land from 1977 to 2004, then they must provide the court with very cogent, compelling evidence which indicates that they had acquired a squatter's title per the **LAA** between 1986 to 2004. To rebut a presumption is not a simple task; therefore, in order to prove their allegation, the claimants' evidence must carry great weight and must be inherently strong in the circumstances. See also: ***R v Mental Health Review Tribunal (Northern Region) and others [2005] EWCA Civ 1605, para. 62***; ***Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] 563,586***; ***Secretary of State for the Home Department v Rehman [2002] 1 All ER 122, para. 55***. This is the same standard that is required, in order for the claimants to prove fraud, as against the 1<sup>st</sup> defendant.

Whether the claimants, through their agent, were in possession of the disputed land for 12 ears or more pursuant to the LAA.

[35] It is also important to note that possession is single and exclusive. Per the ***Ja. Pye (Oxford)*** case: *'Exclusivity is of the essence of possession.'* It is therefore not

possible in law for an owner of land and an intruder both to be in possession of a piece of land at the same time per **Wallis' Cayton Bay (op. cit.)**, because possession cannot be concurrent. From the evidence led by the claimants, through their agent, and the evidence led by the 1<sup>st</sup> defendant, the court has drawn the conclusion that the disputed land, which is described as 2 ½ squares or 972 square metres by the claimants, is part of the larger parcel of land, registered at volume 1471 folio 698 of the Register Book of Titles. This accords with the 1<sup>st</sup> defendant's evidence, where he has maintained that he and his mother had bought land from the deceased, Adella Smith, which amounted to two (2) 2 ½ squares. Noteworthy is that the corresponding certificate of title for the property registered at volume 1471 folio 698 of the Register Book of Titles describes the parcel as having an area of 1981.147 square metres.

[36] The defence, in their own submissions, have admitted that there is no dispute regarding the location of the disputed land, which lies between the parcel of land owned by Joyce and Basil Bunting, and the land allegedly purchased by the 1<sup>st</sup> defendant and his mother, Amy Hall. This statement serves to confirm that the claimants, through their agent, had furnished Llewelyn Allen & Associates with the correct information, when he had conducted the court ordered survey of the material land on November 27, 2004. The surveyor's notes revealed that the 1<sup>st</sup> defendant is claiming the sections of land, which are described as '1 - 2 - 3 - 4 - 5 - 6 - 7 - 8 - 9 - 1' of the survey diagram; while, the claimants are claiming the section of land described as '1 - 2 - 7 - 8 - 9 - 1' representing 972 square metres (2 ½ squares or ¼ acre) of land. From the said diagram, it is clear that the sections, which the 1<sup>st</sup> defendant is claiming, encompasses the parcel that the claimants are claiming. The surveyor also noted that, based on the instructions of both parties as to their sections of land, the survey reveals that the 1<sup>st</sup> defendant's building is encroaching upon the section of land claimed by the claimants. The apparent encroachment is described as a portion of the section of land being claimed by the claimants and labelled as 'A-B-7-8-9-A' of exhibit 27.

[37] It is important to note that a common error, or mistake by the parties as to true ownership, does not operate to negative an intention to possess, and therefore, cannot be fatal to a claim to title by adverse possession under the **LAA**. In **Palfrey v Palfrey**

**[1974] E.G.D. 711**, Mrs. Lily Palfrey, who was left a widow in 1917, lived in a cottage that had belonged to her husband's grandmother. Her husband used to pay rent to his grandmother and thereafter, Mrs. Palfrey did the same, until the grandmother's death in 1927. Subsequently, she paid rent to the grandmother's personal representatives up to April 23, 1928. On that date, her father-in-law acquired the property, and since then, she paid no rent to anyone. It was later found that Mrs. Palfrey's father-in-law had conveyed the cottage to her eldest son in 1930. Armed with this knowledge, the eldest son attempted to assert his property rights. The issue was whether the eldest son could recover the property from his mother and young brother, who had taken over the property, and were asserting possession under the relevant statute. However, Mrs. Palfrey made the point that she had not paid rent since 1928, and that her father-in-law had informed her that the cottage would have been her husband's, and that, she ought to have it. She claimed that from then on, she knew the cottage was hers. The Court of Appeal found that Mrs. Palfrey would acquire a title by having been so long there herself without paying rent in any way; that her possession was not hostile, but that was not necessary to make or constitute adverse possession. The court also found that her son did not initially know he had the deed or title, but that, it did not make any difference. The court's position was that Lily thought she was the owner, and that state of mind was certainly one which gave rise to title by adverse possession. The court further found that the right of action accrued years ago, and had endured for far more than 12 years, resulting in Lily having gained a squatter's title to the property, and more formally a title by virtue of the statute.

**[38]** The claimants, through their agent, have demonstrated a clear intention to possess the disputed property. This can be seen from Joyce Bunting's attempt to purchase the said land from Cleveland Miller-Bey in 1985, and her subsequent occupation of the said property in 1986 (about six months thereafter) for and on behalf of the claimants. Moreover, the claimants, through their agent, had initiated proceedings against the 1<sup>st</sup> defendant for trespass and destruction of property. This indicates that the claimants had the requisite state of mind to possess the disputed land. I find that the claimants, through the aforesaid acts of their agent, have satisfied the requirement of the intention to possess the disputed property. In fact, the requirement of '*animus*

*possidendi*' can be inferred from their acts of possession, as the said acts may be described as certain, unequivocal and affirmative. On the matter of factual possession, the claimants, through their agent, had allegedly planted cash crops and constructed a fowl coop on the disputed land, and raised chickens for their consumption and sale, beginning in 1986. They had allegedly occupied the said property, from around March 1986 up until around April 2004, when they initiated the aforementioned suit against the 1<sup>st</sup> defendant. It is noted that the Parish court had ruled in the claimants' favour and had ordered the 1<sup>st</sup> defendant to pay them damages for trespass. I am of the view that the claimants have satisfied the criteria for factual possession laid down by Slade J in ***Powell's case (op. cit.)***.

[39] On the other hand, there is no evidence that the 1<sup>st</sup> defendant, who claims to be the true owner of the disputed land, had done any acts, which served to oust the claimants between 1986 and 2004. It is the claimants, who took court action against the 1<sup>st</sup> defendant, to oust him from the disputed land and to prevent further damage to the land they had occupied for many years. Their occupation of the relevant land was without the consent of the 1<sup>st</sup> defendant, and time had begun to run against the 1<sup>st</sup> defendant from around March 1986, when the claimants, through their agent, had dispossessed him. To my mind, the claimants were in sole, undisturbed possession, deliberately, adversely and exclusively exercised in excess of the limitation period.

[40] The defence are of the view that there is no evidence to support the claimants' claim that they were in possession of 972 square metres of land, whether by themselves or through an agent, since there was no fence separating the disputed lands from the rest of the land owned by the defendants. However, the law surrounding adverse possession clearly rejects this notion per the ***Seddon v Smith case (op. cit.)***. It is clear that the law treats the acts of fencing and cultivation as two distinct acts and views both of them as acts signifying possession, and also as signifying an intention to possess land.

[41] The defence have submitted that Joyce Bunting did not start to occupy the disputed lands, until after she showed the said property to the claimants, and that, this

could not have been earlier than 1987, when the 1<sup>st</sup> defendant first came to Jamaica. I am of the view that if the claimants, through their agent, had begun occupation of the disputed land in 1987, as the defence claim, that could not bar their claim for adverse possession, since the claimants would have been in sole, open, exclusive possession from 1987 to 2004, which would still be in excess of the twelve years provided by statute. They have also submitted that, although Joyce Bunting claimed that her brother, Len Cunningham, wanted to build a house, no house was ever built on the disputed property, and that, that indicates that the claimants were never in possession or control of the said property. I cannot accept that because the claimants did not build a house or other structure on the disputed land, that such means that the claimants could not, through Mrs. Bunting – their agent, have been in possession of the disputed property. The evidence before the court is that the claimants' agent farmed and reared poultry on the said property for and on their behalf, which means that the land was occupied, whether or not there was a house erected thereon.

[42] The defence have proffered that the claimants have never occupied the disputed land because they live abroad, and that, they have never done any acts which could equate possession. Also, they have proffered that Joyce Bunting acted on her own accord to serve her own interests. However, the claimants have proven that Joyce Bunting was and is, in fact, their agent for matters as regards the disputed property. By virtue of ratification, discussed in detail in paragraphs 18 - 20 of this judgment, it has been proven that Mrs. Bunting was the claimants' agent and was empowered to act for them with regard to the disputed lands. Therefore, I have concluded that Mrs. Bunting had, at all material times, acted for and on behalf of the claimants, and that, the claimants, through her, have been in sole, undisturbed, exclusive occupation of the disputed land from 1986 to 2004. Furthermore, the case of **Williams v Pott (op. cit.)** stated: '*Possession of an agent is possession of the principal*'. This was confirmed in **Wilson v Cadogan (2011) 79 WIR 366** where the court held that: '*If a person took control of land as an agent, the agent's possession was thereby regarded as the possession of the principal.*'

[43] It is the defence's case that there is no evidence that the claimants had paid taxes for the disputed property, and that, this is an indication that they had not acquired possessory rights in the said land. However, in ***Richardson v Lawrence (1966) 10 WIR 234***, at pages 238 and 239, it is noted that payment of taxes does not create an interest in land, nor is it necessarily evidence of ownership of land, as taxes may be paid by anyone who desires so to do. Further, the tax roll may actually be in the name of someone who has been dispossessed. In that light, payment of taxes, though important, is not decisive of title. It needs to be looked at in conjunction with the other evidence of possession. In the instant case, I have concluded that whether or not the claimants had paid taxes for the disputed property, this alone, could not determine or negative possession.

[44] To my mind, the claimants, through their agent, have proven, on a balance of probabilities, that they had enjoyed open, undisturbed and exclusive possession of the disputed property from 1986 to 2004. They have also met the requisite standard of proof to displace the presumption that the 1<sup>st</sup> defendant was the true owner of the disputed property from 1977 to 2004. Similarly, just as the widow's statutory title defeated the title passed to her eldest son, via a conveyance, in the ***Palfrey v Palfrey (op. cit.)*** case, the claimants' possessory title, in the case at bar, extinguished the 1<sup>st</sup> defendant's title to the disputed land. It is important to note that, once the title of the owner is extinguished under the **LAA**, there is nothing to pass, not even to a purchaser for value without notice. Therefore, in the present case, the 1<sup>st</sup> defendant lost his title to the disputed land, and had no title to pass to the 2<sup>nd</sup> defendant from as far back as around 1988, when the claimants' possession had ripened into a valid title to the said land. That is therefore, one ground upon which this claim must succeed. There is though, another important issue to be addressed, that being the issue of alleged fraud on the part of the 1<sup>st</sup> defendant in having obtained the relevant land title. That issue is addressed further on, in these reasons

**Whether the 1<sup>st</sup> defendant committed fraud when obtaining a certificate of title for the lands registered at volume 1471 folio 698 of the Register Book of Titles, which comprise the disputed land, to which the claimants, through their agent, lay claim.**

The Claimants' submissions

**[45]** It is the claimants' case that the 1<sup>st</sup> defendant obtained the certificate of title for the lands registered at volume 1471 folio 698 of the Register Book of Titles, which were formerly part of the lands registered at volume 310 folio 56 of the Register Book of Titles, by means of fraud. They have relied on the Court of Appeal case of **Thomas Anderson v Monica Wan [2020] JMCA Civ 41**, which they contend, enunciates that the party alleging fraud must particularize the fraud in his statement of claim and prove same. The claimants have outlined the particulars of the alleged fraud by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their amended particulars of claim, which was filed on December 12, 2023, which are:

Particulars of fraud against the 1<sup>st</sup> defendant

*(i) The 1<sup>st</sup> defendant wrongly advised his surveyor D.W. Clay that he was the owner of the lands at Passley Gardens in dispute, as well as the adjoining lands owned by his mother **and/or***

*(ii) At the time of the 1<sup>st</sup> defendant's application for title, the 1<sup>st</sup> defendant failed to disclose to the Registrar of Titles, that neither the 1<sup>st</sup> defendant nor his predecessor in title, were ever in possession as owner of the lands in dispute at Passley Gardens **and/or***

*(iii) At the time of the 1<sup>st</sup> defendant's application for title, the 1<sup>st</sup> defendant failed to disclose to the Registrar of Titles, that the claimants were in sole, continuous, undisturbed and undisputed possession of the lands at Passley Gardens in dispute from September 1985 up to the date of the application for title by the 1<sup>st</sup> defendant **and/or***

*(iv) That the 1<sup>st</sup> defendant failed to disclose to the Registrar of Titles that whilst he was applying for a registered title to the lands at Passley Gardens in dispute, there was a trial pending before the Resident Magistrates Court for the parish of Portland, to determine the very issue of whether or not the claimants or the 1<sup>st</sup> defendant had a better right to possession of the said lands and the said non-disclosure by the 1<sup>st</sup> defendant, was fraudulent **and/or***

*(v) The use of forged receipts dated the 7<sup>th</sup> day of January, 1977, 29<sup>th</sup> day of March, 1977 and 21<sup>st</sup> day of April, 1977 and forged agreements for sale between Adella Smith and Amy Hall and Victor Hall dated the 7<sup>th</sup> day of January, 1977 and the 29<sup>th</sup> day of March, 1977, and the allegedly written by Adella Smith in proof of*

*the purchase of the said lands at Passley Gardens in dispute, which were not written or issued by the said Adella Smith, the Registered Proprietor **and/or***

*(vi) The transferring of title to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant of the said lands at Passley Gardens in dispute, which is not a transfer for value, whilst a trial was ensuing in Plaint 182/04, to determine the 1<sup>st</sup> defendant's right to the said lands at Passley Gardens in dispute.'*

### The Defendants' Submissions

[46] It is the defence's case that the claimants have failed to prove that the copy receipts and agreements for sale evidencing the purchase of the lands registered at volume 1471 folio 698 of the Register Book of Titles, by the 1<sup>st</sup> defendant and his mother, directly from Adella Smith, are forgeries, as the report of the handwriting expert does not exist. They also assert that, based on the claimants' failure to prove otherwise, the court should find that the receipts and agreement for sale being relied on by the defence, are, prima facie, legitimate documents. They further assert that the aforesaid documents represent instruments of disposition proving the 1<sup>st</sup> defendant's ownership of the whole legal and equitable estate in the property, being two (2) 2 ½ square chains of land in Passley Gardens, in the parish of Portland, part of lands which formerly belonged to Adella Smith. The defence contend that the 1<sup>st</sup> defendant's evidence indicate that he, his mother and father, from as far back as 1977, had been in exclusive, continuous, open possession of all the lands registered at volume 1471 folio 698 of the Register Book of Titles. They also contend that the disputed property had been separated from the property that is occupied by Joyce Bunting by a boundary fence that had existed since 1977. They further contend that there is no dispute that Mrs. Amy Hall was among the first persons to occupy at least a portion of the lands comprised in the certificate of title registered at volume 1471 folio 698 of the Register Book of Titles. They assert that the witnesses confirm that there was nothing visible on the disputed land to show any separation between the disputed land, and the land which the claimants admit, was occupied by Mrs. Amy Hall.

[47] The defence also assert that, although the certificate of title issued to the 1<sup>st</sup> defendant, was issued pursuant to adverse possession, it does not change the fact that the 1<sup>st</sup> defendant had legitimately purchased the disputed property from the then

registered owner, and had documents to prove same. They further assert that the 1<sup>st</sup> defendant had submitted a subdivision approval from the then Parish Council in support of his application for the said certificate of title. They maintain that the 1<sup>st</sup> defendant had served the required notices on the relevant parties, including the then registered proprietor, Oswald Dunn, as well as the Daily Gleaner, when he had applied for the aforementioned title. They also maintain that, at that material time, no objection was made by Mr. Dunn or anyone else in response to the said notices. They further maintain that, as a result of the foregoing, the court should find that the 1<sup>st</sup> defendant has established a good root of title to all the lands comprised in the certificate of title registered at volume 1471 folio 698 of the Register Book of Titles, and is entitled to the legal and equitable ownership of the said property from 1977.

**[48]** The defence contend that the claimants were never in occupation of the disputed lands, and that, there was no requirement for the 1<sup>st</sup> defendant to disclose any alleged possession of the said lands to the Registrar of Titles. They also contend that the matter in the Parish Court between the parties was to determine liability and quantum of damages to crops and a fowl coop, that were said to have belonged to the claimants' agent, Joyce Bunting. They further contend that the aforementioned judgment does not support the issue of which party had a better right to possession of the disputed lands. They have proffered that the parish court of Portland had no jurisdiction to entertain a claim involving a dispute over the ownership of the land claimed by the claimants, as the value of the land exceeded its jurisdiction. They have also proffered that the 1<sup>st</sup> defendant had believed that he was in possession of the disputed property, and that, the claimants had no legal or equitable interest in the same as they had taken no action against him for recovery of possession. The defence maintains that the 1<sup>st</sup> defendant did not commit any acts of fraud in the circumstances.

### **The Court's Analysis**

**[49]** While the court has already ruled on which of the parties have been proven as possessing a better title to the disputed land, fraud has been heavily alleged by the claimants and vehemently disputed by the 1<sup>st</sup> defendant throughout this claim.

Accordingly, the court is constrained to consider the allegations of fraud, particularly against the 1<sup>st</sup> defendant. The court would have been remiss in its duty, if it had not properly examined these allegations against the evidence led by both the claimants and the 1<sup>st</sup> defendant. The Privy Council case of ***Villeneuve and another v Gaillard and another* [2011] UKPC 1**, is instructive. At paragraph 67 of that case, the Board opined:

*‘The Board concurs, with regret but with no hesitation, in the Court of Appeal’s view that the judge failed to perform his duty of checking his impressions of the witnesses by reference to contemporaneous documentary evidence, and the probabilities of the situation. That duty was described by Robert Goff LJ in a well-known passage in Armagas Ltd v Mundogas SA (The Ocean Frost) [1988] 1 Lloyd’s Rep 1, 57:*

*“Furthermore it is implicit in the statement of Lord Macmillan in Powell v Streatham Manor Nursing Home [1935] AC 243, at p. 256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives and to the overall probabilities; can be of very great assistance to a Judge in ascertaining the truth.”*

**[50]** From my perusal of the 1<sup>st</sup> defendant’s statutory declaration, dated July 19, 2011, in support of his application to be registered as proprietor of the lands registered at volume 1471 folio 698 of the Register Book of Titles, he furnished the Registrar of Titles and/or the Referee of Titles with the following information, inter alia, as his *‘solemn declaration conscientiously believing the same to be true and by virtue of the Voluntary Declarations Act’*:

*'Paragraph 5: That from 1937 the said Adella Emeline Smith took possession of the said land and exercised sole, open, quiet, undisputed, continuous and undisturbed possession of the said land until on the 25<sup>th</sup> day of November 1976 when the said Adella Emeline Smith sold the land to me, Victor Hall, Amy Hall and Zepheniah Hall, and put us in immediate possession of the said land. And I further state that the said Adella Emeline Smith executed a receipt and an agreement for sale evidencing the said sale.*

*Paragraph 6: That from the 25<sup>th</sup> day of November 1976, we the said Victor Hall, Amy Hall and Zepheniah Hall took possession of the said land and exercise sole, open, quiet, undisputed, continuous and undisturbed possession of the said land until on the 30<sup>th</sup> day of January 1984 when the said Amy Hall died and we, Victor Hall and Zepheniah Hall, remained in possession of the said land.*

*Paragraph 7: That from the 30<sup>th</sup> of January 1984, we, the said Victor Hall and Zepheniah Hall, remained in sole, open, quiet, undisputed, continuous and undisturbed possession of the said land until in October 2004 when the said Zepheniah Hall died and I, the said Victor Hall, remained in possession of the said land.*

*Paragraph 8: That from October 2004, I, the said Victor Hall, remained in sole, open, undisputed, continuous and undisturbed possession of the said land until this date and I am regarded by all the local residents as the person entitled to ownership and possession of the said land.*

*Paragraph 12: That...I had occupied the said land exercising sole, open, quiet, undisputed, continuous and undisturbed possession until this present date.'*

### **The Statutory Framework**

[51] When considering the issue of fraud, I must give due regard and contemplation to the statutory provisions central to this issue. **Sections 68, 70 and 71 of the Registration of Titles Act (RTA)** establish the general indefeasibility of a registered title. However, while **sections 70 and 71** highlight the exception of fraud to the principle of indefeasibility, **sections 68 and 70** underscore that a registered title is subject to a possessory title. Therefore, it is imperative to note that both fraud and a statutory title can defeat a registered title.

**Section 68** provides that a certificate of title issued under the Act shall -

*'...subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.'*

**Section 70** provides that, except in case of fraud, the proprietor of any, estate or interest under the Act shall -

*‘...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 and 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.’*

**Section 71** provides protection to persons contracting or dealing with the registered proprietor:

*‘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 or 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 itself be imputed as fraud.’*

### **Definition of fraud**

[52] The relevant statutory provisions do not define fraud; therefore, one has to look to the common law for that definition. The court in the case of **Harley Corporation Guarantee Investment Company Limited v Estate Rudolph Daley and anor [2010] JMCA Civ 46** defines fraud and outlines the test for fraud as follows:

*'The true test of fraud within the context of the Act [Registration of Titles Act] means actual fraud, dishonesty of some kind and not equitable or constructive fraud. This test has been laid down in **Waimiha Sawmilling Company Limited v Wagon Timber Company Limited [1926] AC 101** by Salmon LJ, when at page 106 he said: "Now fraud clearly implies some act of dishonesty. **Lord Lindley in Assets Co. v. Mere Roihi (2)** states that fraud in these actions (i.e., actions seeking to affect a registered title) means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud - an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud." (paragraph 52).'*

In view of the preceding, it is clear that fraud denotes dishonesty, and that in order to invalidate a registered title, fraud has to be proven. Such fraud must be the actual fraud of the registered proprietor of the relevant land, if such land has subsequently been transferred to an innocent purchaser for value without notice. Also, in paragraph 53 of **Harley Corporation (op. cit.)**, the court made it clear that: *'in placing reliance on an allegation of fraud, a claimant is required to specifically state, in his particulars of claim, such allegations on which he proposes to rely and prove and must distinctly state facts which disclose a charge or charges of fraud.'*

[53] Similarly, the case of **Ervin McLeggan v Daphne Scarlett and the Registrar of Titles [2017] JMSC Civ 115** is very instructive as regards the definition of fraud, the need to particularize the allegations of fraud and how the term, as used in **sections 70 and 71 of the Registration of Titles Act**, is defined. According to paragraph 20 of the **Ervin McLeggan** case (*op. cit.*), the definition of fraud is set out in the Privy Council's judgment in **Assets Company v Mere Roihi and ors. - [1905] UKPC 11**. At pages 27 & 28 of that judgment, Lord Lindley, on behalf of the court, stated as follows:

*'Passing now to the question of fraud, their Lordships are unable to agree with the Court of Appeal. Sections 46, 119, 129 and 130 of the Land Transfer Act, 1870 and the corresponding sections of the Act of 1885 (viz sections 55, 56, 189 and 190) appear to their Lordships to show that by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort; not what is called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents.*

*Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents...'*

The court propounded at paragraph 19, that:

*'Sections 70 & 71 of the Registration of Titles Act, confer on a proprietor, registration of an interest in land, an unassailable interest in that land, which can only be set aside in circumstances of fraud. In **Fels v Knowles - [1906] 26 NZLR 604** the New Zealand Court of Appeal in construing statutory provisions which are similar to sections 70 & 71 said at page 620: "The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ('By statute' would be more correct). Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.'*

The court opined at paragraph 18, that:

*'...in order to raise fraud, the pleadings must disclose averments of fraud or the facts or conduct alleged must be consistent with fraud...Not only should the requisite allegations be made, but there ought to be adequate evidentiary material to establish that the interest of a defendant, which a claimant seeks to defeat, was created by actual fraud.'*

[54] Likewise, the case of *Elain Arem v Vivienne Ancilin Myrie [2018] JMSC Civ 49*, at paragraph 46, the court opined that:

*'The Act (**Registration of Titles Act**) does not define "fraud". It is accepted that the forms and methods of fraud are so varied that no definition of it, can be attempted. However, the authorities show a common thread of requiring evidence of a consciously dishonest act in the plain, ordinary meaning of those words, some type of moral turpitude to prove fraud.'*

It is clear from the relevant case law, that not only should the court consider the allegations of fraud, as outlined in a claimant's pleadings, but it also has to properly assess and weigh the objective facts and evidence before it, in order to ascertain the

veracity of the witnesses, their motives and overall probabilities, and to discern the truth of whether actual fraud has been committed.

**[55]** The claimants particularized the alleged fraud of the 1<sup>st</sup> defendant, as follows:

(i) The 1<sup>st</sup> defendant wrongly advised his surveyor D.W. Clay that he was the owner of the land at Passley garden in dispute, as well as the adjoining lands owned by his mother and/or

(ii) At the time of the 1<sup>st</sup> defendant's application for title, the 1<sup>st</sup> defendant failed to disclose to the Registrar of Titles, that neither the 1<sup>st</sup> defendant nor his predecessor in title, were ever in possession as owner of the lands in dispute at Passley Gardens and/or

(iii) At the time of the 1<sup>st</sup> defendant's application for title, the 1<sup>st</sup> defendant failed to disclose to the Registrar of Titles, that the claimants were in sole, continuous undisturbed and undisputed possession of the lands at Passley Gardens in dispute from September of 1985 up to the date of the application by the 1<sup>st</sup> defendant and/or

(iv) That the 1<sup>st</sup> defendant failed to disclose to the Registrar of Titles that whilst he was applying for a registered title to the lands at Passley Gardens in dispute, there was a trial was pending before the Resident Magistrate's Court for the parish of Portland, to determine the very issue of whether or not the claimants or the 1<sup>st</sup> defendant had a better right of possession of the said lands and the said non-disclosure by the 1<sup>st</sup> defendant was fraudulent and/or

(v) The use of forged receipts dated the 7<sup>th</sup> day of January, 1977, 29<sup>th</sup> day of March, 1977, and the 21<sup>st</sup> day of April, 1977 and forged agreements for sale between Adella Smith and Amy Hall and Victor Hall dated the 7<sup>th</sup> day of January, 1977 and the 29<sup>th</sup> day of March, 1977 and the allegedly written by Adella Smith in proof of the purchase of the said lands at Passley Gardens in dispute, which were not written by the said Adella Smith, the registered proprietor and/or

(vi) The transferring of title to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant of the said lands at Passley Gardens in dispute, which is not a transfer for value, whilst a trial was ensuing in plaint 182/04 to determine the 1<sup>st</sup> defendant's right to the said lands at Passley Gardens in dispute.

**[56]** Based on the first particular of fraud, the claimants' position is that the 1<sup>st</sup> defendant's act of wrongly advising his surveyor, Mr. Clay, that his land included the portion that the claimants have occupied pursuant to the **LAA**, he committed fraud. Fraud denotes dishonesty or some type of moral turpitude. The evidence indicates that the 1<sup>st</sup> defendant did describe two parcels of land as his, when the court ordered survey was conducted in 2004, although one of the said parcels was being claimed by the claimants. It appears that he had given the said description to Mr. Clay when he conducted a survey, prior, in 2002. It is important to note that the 1<sup>st</sup> defendant has maintained throughout the trial that his land encompasses two (2) 2 ½ squares, which would be approximately 1,944 square metres; however, the area of land, as described on the relevant certificate of title, is 1981.147 square metres. The foregoing suggests that he has been claiming more land than what he claims to have purchased. This issue goes to the 1<sup>st</sup> defendant's credibility – he did not appear to be a truthful witness.

**[57]** The 1<sup>st</sup> defendant applied for registered title in 2011; therefore, on the facts and evidence presented by both the claimants and 1<sup>st</sup> defendant in the bundle of agreed documents, which was filed on December 12, 2023, the Parish Court of Portland had granted an interlocutory injunction in Plaint 182/04 in April 2004, restraining both the plaintiffs (claimants) and the defendant (1<sup>st</sup> defendant) and their servants and/or agents from occupying the property, inter alia, until the matter was determined by the court. The matter had not been determined at the time of the 1<sup>st</sup> defendant's application. Accordingly, I agree with the claimants that neither the 1<sup>st</sup> defendant nor his predecessor in title was in possession, as owner of the lands registered at volume 1471 folio 698 of the Register Book of Titles, at the time of the 1<sup>st</sup> defendant's application for title. In fact, the Parish Court found in favour of the claimants on February 9, 2018. Consequently, any declaration by the 1<sup>st</sup> defendant that he was in possession at that

time, and had always been in possession of the aforesaid lands, was a patently false assertion.

**[58]** From a close reading of the 1<sup>st</sup> defendant's declaration in support of his application for title, he failed to disclose that the claimants had been occupying the disputed land from in or around 1985 or 1986, and he failed to disclose the Parish Court matter, which was pending, as regards the said property. Therefore, the Referee/Registrar of Titles was given no notice by him that there was a dispute touching and concerning the land in dispute. In fact, in his declaration, he declared that he, his mother and his father had bought the lands registered at volume 1471 folio 698 of the Register Book of Titles from Mrs. Adella Smith in November 1976. However, the receipts and agreements for sale before the court are dated January - March 1997. The receipts only bear Mrs. Amy Hall's name as payor; while, the agreements bear the 1<sup>st</sup> defendant's name and Mrs. Hall's as purchasers. It seems that the 1<sup>st</sup> defendant evidence tends to change at different times – this suggests dishonesty on his part. The inference may be drawn that the 1<sup>st</sup> defendant deliberately did not disclose those very critical pieces of information so that the Referee/Registrar of Titles would deliver to him a certificate of title for both parcels of the lands registered at volume 1471 folio 698 of the Register Book of Titles. I would agree with the claimants that the 1<sup>st</sup> defendant's non-disclosure, in the circumstances, was fraudulent, as he had intended to and did deceive the Referee/Registrar of Titles.

**[59]** Paragraphs 7 and 8 of the 1<sup>st</sup> defendant's declaration reiterates that the 1<sup>st</sup> defendant persistently and consistently declared that he and his parent remained in sole, open, quiet, undisputed, continuous and undisturbed possession of the disputed land. Further, he declared that from October 2004, he, alone, remained in such occupation, but this could not be true since the Parish Court matter had put an injunction in place, which precluded he and the claimants from occupying the property. In addition, he made a very bold statement that he is regarded by all the local residents as the person entitled to ownership and possession of the said land. This was not an honest statement since, under cross-examination, he admitted that the preceding was '*not entirely true*'. He further admitted that, at the time that he swore the declaration, the

claimants had brought a claim against him for trespass of the disputed lands. Moreover, witnesses like Leopold Miller, Cleveland Miller-Bey's grandson, who hails from the same locale, said otherwise. In his witness statement dated July 28, 2022, Mr. Miller stated that he had known the disputed lands, which form part of a bigger parcel, which was owned by his grandaunt, Adella Smith, and her husband. Mr. Miller further stated that he never saw the 1<sup>st</sup> defendant or his mother, Mrs. Hall, on the said lands, until in the year 2004, when the 1<sup>st</sup> defendant started to build his house. Moreover, it is worthy of note that the 1<sup>st</sup> defendant also admitted, under cross-examination, that the declaration he made, that he had occupied the disputed lands, '*exercising sole, open, quiet, undisputed, continuous and undisturbed possession until this present date*', being the date of his application for title, '*cannot be truthful under the circumstances*'. To my mind, all of that evidence has significantly assisted this court to conclude, to the requisite standard of proof, that fraud had been proven as against the 1<sup>st</sup> defendant, with respect to his application to the National Land Agency (NLA) for title to be granted to him, based on his alleged adverse possession of the disputed property, for over twelve years, which was an application was granted by the National Land Agency (NLA).

**[60]** The claimants have alleged that the agreements for sale and receipts of the purchase of the lands registered at volume 1471 folio 698 of the Register Book of Titles presented are forged. They have submitted a copy of an expert witness report dated September 7, 2022, exhibit 71, in the agreed bundle of documents, which was filed on December 12, 2023, regarding the authenticity of Adella Smith's signature. Ms. Smith's signature, as it appears on copy receipts dated April 21, 1977, March 29, 1977 and January 7, 1977, copy sale agreements dated March 29, 1977 and January 7, 1977, copy deed of gift dated February 1971 and copy Last Will and Testament dated February 1971 were compared to Ms. Smith's signature on her Last Will and Testament dated January 29, 1977, which was probated in this court. It is important to note that the handwriting expert, Ms. Beverley East, opined that the author of the signatures on the aforesaid receipts and agreements for sale is not the same author of the signature on the aforementioned will. Therefore, it is the expert's opinion that if Ms. Smith had, in fact, authored the will, then she was not the author of the receipts and agreements for sale in question.

**[61]** In light of the preceding, it appears the handwriting expert was unable to state definitively that the receipts and agreements for sale are forgeries. I must say though, that I find it curious that Adella Smith died on or about May 25, 1977, yet the 1<sup>st</sup> defendant's copy receipts and agreements for sale are dated January, March and April of that same year. It would appear that the deceased had conveniently signed the third receipt showing the balance of five hundred dollars (\$500.00) for the lands registered at volume 1471 folio 698 of the Register Book of Titles, approximately one (1) month before she died. I further find this quite curious since Mr. Lancelot McFarlane, in his witness statement dated July 28, 2022, claimed that Ms. Smith was very ill in the months before she died, and that, she had to be carried to and from the doctor.

**[62]** I have taken into account the expert report of Ms. East whereby she opined that there are four significant characteristics in handwriting identification, which are movement, form, spacing and trend (also known as line quality), that assist an examiner to determine the authenticity of a handwriting sample. She also opined that handwriting is a habitual behaviour and that handwriting is considered frozen body movement, spacing, zonal qualities, pen lifts, terminal endings and line quality are as individualistic as one's fingerprints. She stated that handwriting elements examined included, but were not limited to, line quality, speed of writing, fluidity, pattern construction, size, relationship to signature line, placement online, and other unique identifying characteristics. She further stated that a comparison of the questioned handwriting and the known exemplars, using accepted principles and techniques of document examination, including magnification and enlargement among other comparison procedures, were considered in determining the authenticity and genuineness of the questioned signature. Ms. East concluded that there are too many significant and fundamental differences between the signatures provided for comparison and the 'questioned signature' (signature on Will dated January 29, 1977) to deem the questioned signature authentic.

**[63]** I accept the expert's opinion as true, and I am satisfied, on a balance of probabilities, that there is no definitive conclusion that the signature on the questioned document was authentic. Further, the scientific evidence provided by Ms. East did not

provide any indication that, in her professional opinion, she deemed the signatures on the copy receipts and copy sale agreements to be forgeries. In light of the preceding, this court has not concluded that the aforementioned signatures were forgeries.

[64] The case of **Thomas Anderson** case (*op. cit.*), on which the claimants rely, is quite instructive. In that case, the applicant, Thomas Anderson, had applied for registered title for the disputed land. In support of his application, the applicant claimed that his uncle had gifted the disputed land to him, that he had applied for and was granted letters of administration of the estate on 15 January 2008, and that he had been in sole, undisturbed possession of the said land since then. However, he had made no mention of the fact that Mrs. Iris Anderson also claimed an interest in the land, and that there had, in fact, been previous litigation by her in support of that claim.

[65] On 18 November 2010, the Registrar of Titles issued title to the land registered at volume 1145 folio 270 of the Register Book of Titles (the disputed land) to Thomas. Mrs. Anderson claimed that Thomas' application for first registration as proprietor of the disputed land was effected by way of fraud on his part, since he knew of, or had constructive notice of, Mrs. Anderson's interest in the land. The court concluded, in paragraphs 41 and 44 of that judgment, that:

*'...the clear intention of the stated requirements [in sections 28 - 31 of the **Registration of Titles Act**] is that the applicant should disclose all such matters as may be necessary to put the Referee in a position to make an informed assessment of whether a case for bringing the land in question under the operation of the **RTA** has been made out. In particular, the information supplied must be...sufficient to enable the Referee to determine that the applicant is in possession of the land in question and that he "would be entitled to maintain and defend such possession against any other person claiming the same or any part thereof"...In these circumstances...the judge's conclusion that Thomas' failure to disclose the existence of Mrs. Anderson's claim to the Registrar in his application for registration "was indicative of a want of candour" is completely unassailable. In a word, Thomas' conduct was dishonest. I accordingly think that Mrs. Anderson's contention that Thomas' registration as proprietor of the land was procured by fraud, was made out on the evidence and the judge was correct to so find.'* (**per Morrison P**)

Accordingly, the court dismissed the appeal, with costs to the respondent.

[66] In light of the facts and evidence before the court in this present case, it is clear that the 1<sup>st</sup> defendant has shown a pattern of artifice, dishonesty, and deceit. I have taken into account his demeanour as well as his sworn evidence. Having seen and heard him, I have concluded that he is not a witness of truth. Therefore, I reject his evidence on all of the disputed facts. On the other hand, the claimants and their agent, I have deemed as having been truthful in their evidence as given to this court. Thus, I accept their evidence. I have concluded that the 1<sup>st</sup> defendant's actions were such as to deceive the Referee/Registrar of Titles, and as such, his actions were fraudulent. He did not fully disclose to the Referee/Registrar of Titles, the state of affairs of the disputed lands per the ***Thomas Anderson*** case (*op. cit.*). Unfortunately, the Referee/Registrar of Titles was not in a position to make an informed assessment because she was not apprised of all the facts and evidence pertaining to the matter. By failing to disclose the existence and extent of the claimants' claim, he showed a lack of candour. I believe that the claimants have met the legal and evidential burden placed upon them in the case at bar. Not only have they proven, on a balance of probabilities, that the 1<sup>st</sup> defendant had committed fraud, when he obtained the certificate of title for the lands registered at Volume 1471 Folio 698 of the Register Book of Titles, but also they met the required standard of proof. They have proffered cogent, credible and compelling evidence to rebut the presumption that the registered title procured by the 1<sup>st</sup> defendant is indefeasible. They have established, tot the requisite standard, their alleged particulars of fraud numbered as (i), and (ii) and (iv) as against the 1<sup>st</sup> defendant. That fraud, as proven both separately, as well as collectively, caused the 1<sup>st</sup> defendant to be issued with the relevant land title, by the Referee of Titles

[67] It must be noted that, although the claimants had alleged fraud against the 2<sup>nd</sup> defendant and particularized same, such allegation is now, no longer being pursued. Accordingly, same will not be addressed.

**Whether the 2<sup>nd</sup> defendant's title, jointly held with the 1<sup>st</sup> defendant, for the disputed land, is vitiated, arising from the alleged fraud of the 1<sup>st</sup> defendant.**

## **The Court's Analysis**

**[68]** Section 163, RTA, provides protection for the bona fide purchaser for value without notice. It states:

*'Nothing in this Act contained shall be so interpreted as to leave subject to an action for the recovery of the land, or to an action for recovery of damages as aforesaid, or for deprivation of the estate or interest in respect to which he is registered as a proprietor, any purchaser bona fide for valuable consideration of land under the operation of this Act, on the ground that the proprietor through or under whom he claims may have been registered as proprietor or through fraud or error, or may have derived from or through a person registered as proprietor through fraud or error, and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land, or otherwise, howsoever.'*

It is clear from the preceding, that, while the Act protects the interest of a bona fide purchaser for value without notice against a registered proprietor, who may have obtained the initial certificate of title through fraud, it does not seek to protect a person who was gifted a title, which was initially obtained by way of fraud. The learned authors of ***The Law of Real Property, Seventh Edition, 2008***, stated at **para. 8-008** of page 257, that: ‘ “Good consideration” (the natural love and affection which a person has for his near relatives) is unimportant and does not amount to value.’ Therefore, the title, which purportedly passed to the 2<sup>nd</sup> defendant in the present case, is a nullity, since it is not protected under **section 71**, RTA. Further, the 1<sup>st</sup> defendant, who committed fraud to procure the said title, did not have a good title to the relevant lands, to begin with. Therefore, the claimants’ sixth and last particular of claim that the 1<sup>st</sup> defendant’s transfer of title to the 2<sup>nd</sup> defendant, while the trial was ensuing in the parish court was fraudulent, becomes moot, since that title was conceived by fraud.

**[69]** Not only is the 1<sup>st</sup> defendant, in the case at bar, at least to my mind for present purposes, but if in a criminal court, it is properly concluded that he committed fraud for the purpose of obtaining the land title which he did, guilty of moral turpitude, he then would also in breach of the offence of obtaining property by false pretence, etc., per **section 3 (1) of the Law Reform (Fraudulent Transactions) (Special Provisions) Act, 2013**, which reads:

*'3 (1) Notwithstanding anything contained in any other law, a person commits an offence where that person by a false pretence, whether directly or indirectly, through the medium of a contract or other arrangement entered into by a false pretence –*

*(a) obtains from any other person, any property for himself or any other person; or*

*(b) induces any other person to deliver to him, or any other person, any property.*

*(2)...*

*(3) The references in subsections (1) and (2) to any other person are references to such other person, whether that person is at the time of the commission of the offence is within or outside Jamaica.'*

It is important to note that as regards penalties for such offence, a person found guilty by the court, may be fined or be imprisoned for up to twenty (20) years, or be both fined and imprisoned. Accordingly, I will be directing the Registrar to transmit this judgment to the Director of Public Prosecution and the Commissioner of Police, with a view to having those offices work together and if possible and deemed appropriate to do so, then the 1<sup>st</sup> defendant should be criminally charged for the offence of obtaining property by false pretence.

**Whether pursuant to section 158 of the Registration of Titles Act, the court has the jurisdiction to order that the Registrar of Titles cancel the certificate of title for the lands registered at volume 1471 folio 698, on the basis of fraud.**

### **The Court's Analysis**

**[70] Sections 68, 70 and 71 of the Registration of Titles Act (RTA)** establish the indefeasibility of a registered title. However, it must be noted that **section 161** of the Act outlines instances where a registered title is not an absolute bar to certain actions. It states, inter alia:

*'No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say –*

*(a) the case of a mortgagee as against a mortgagor in default;*

*(b) the case of an annuitant as against a grantor in default;*

*(c) the case of a lessor as against a lessee in default;*

***(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud;***

*(e) the case of a person deprived of or claiming any land included in any certificate of title of other land by misdescription of such other land, or of its boundaries, as against the registered proprietor of such other land not being a transferee thereof bona fide for value;*

*(f) the case of a registered proprietor with an absolute title claiming under a certificate of title prior in date of registration under the provisions of this Act, in any case in which two or more certificates of title or a certificate of title may be registered under the provisions of this Act in respect of the same land,*

*and in any other case than as aforesaid the production of the certificate of title or lease shall be held in every court to be an absolute bar and estoppel to any such action against the person named in such document as the proprietor or lessee of the land therein described any rule of law or equity to the contrary notwithstanding.'*

[71] Furthermore, **subsection (2) of section 158** of the RTA states:

*'...In any proceeding at law or equity in relation to land under the operation of this Act, the court or a Judge may, upon such notice, if any, as the circumstances of the case may require, make an order directing the Registrar –*

*(a) to cancel the certificate of title to the land and to issue a new certificate of title and the duplicate thereof in the name of the person specified for the purpose in the order; or*

*(b) to amend or cancel any instrument, memorandum or entry relating to the land in such manner as appears proper to the court or a Judge.'*

It is clear, from the above, that the court has jurisdiction to order that the Registrar of Titles cancel a certificate of title to land and issue a new one. Also, it is obvious that actual fraud, in a certain context, will be an exception to the indefeasibility of a registered title.

**Whether the court should direct the Registrar of Titles to issue a new title, in the names of the claimants, for the disputed land, which form part of the lands registered at volume 1471 folio 698 of the Register Book of Titles.**

## **The Court's Analysis**

[72] I find that the claimants have proven their case that the lands registered at volume 1471 folio 698 of the Register Book of Titles comprise their parcel of land, which amounts to 972 square metres or 2 ½ squares (¼ of an acre). This is evident from the survey diagram provided by the court ordered survey conducted by Llewelyn Allen & Associates on November 27, 2004. The said diagram shows the different sections in which lands registered at volume 310 folio 56 of the Register Book of Titles have been divided, since the lands registered at volume 1471 folio 698 were derived from the aforesaid lands. I have concluded that the court is well-placed to direct the Registrar to issue a new certificate of title and its duplicate, in the names of the claimants, only for the disputed land, containing by survey 972 square metres, per **section 158 (2) (a), RTA**.

## **Conclusion**

[73] It is evident that Mrs. Bunting's acts of attempting to purchase the disputed land, then farming it, and raising chickens thereon, for a period of well over twelve years for and on behalf of the principal claimants, demonstrate the requisite factual possession and intention to possess the disputed lands. The acts of Mrs. Bunting had dispossessed the 1<sup>st</sup> defendant. Furthermore, it is clear that Mrs. Bunting acted for and on behalf of the claimants, as their agent. It is also evident from the material documents, which supported the 1<sup>st</sup> defendant's application to the Registrar of Titles for a certificate of title for the lands registered at volume 1471 folio 698, that the defendant was dishonest in his application and this amounted to fraud. As a result, the title he obtained via fraudulent means, and the subsequent transfer to the second defendant, by way of gift, have been rendered a nullity. Consequently, the defendants' concurrent title should be cancelled. I have concluded that the court, in this instance, should direct the Registrar of Titles to issue a new certificate of title and its duplicate, in the names of the claimants, only for the disputed land, which they have claimed.

## **Disposition**

**[74]** My orders are as follows:

1. The certificate of title to the lands registered at Volume 1471 Folio 698 of the Register Book of Titles, including the disputed land, was obtained by the 1<sup>st</sup> defendant by way of fraud.
2. The claimants are the beneficial owners of the disputed land, containing by survey 972 square metres per court ordered survey done on April 5, 2004, being part of the land registered at Volume 1471 Folio 698 of the Register Book of Titles, having been in sole and undisturbed possession adversely and exclusively exercised in excess of twelve years.
3. The transfer of the land registered at Volume 1471 Folio 698 of the Register Book of Titles, including the disputed land, into the joint names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants by the 1<sup>st</sup> defendant, by way of gift, is a nullity.
4. The certificate of title for the land registered at Volume 1471 Folio 698 of the Register Book of Titles, including the disputed land, shall be cancelled by the Registrar of Titles and a new certificate of title for the said land shall be issued, in the names of the claimants, for the disputed land, containing by survey 972 square metres per court ordered survey done on April 5, 2004.
5. By or before December 31, 2025, the defendants shall vacate the premises which is the subject of this claim ('the disputed land') being the said land as registered at Volume 1471 Folio 698 of the Register Book of Titles and the defendants shall use reasonable efforts between now and December 31, 2025, to leave said premises in a reasonable state for habitation and usage.
6. The costs of this claim are awarded to the claimants such costs shall be taxed, if not sooner agreed.
7. The Registrar of this court, shall provide to the Office of the Director of Public Prosecutions, copies of all court documents pertaining to this claim, including the

notes of evidence and this judgment and shall do so, as promptly as reasonably possible, hereafter.

8. The claimants shall file and serve this order.

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**Hon. K. Anderson, J**