IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 07403

BETWEEN	**DAVID ELIE FDEDA**	**1ST CLAIMANT**
AND	**ANTHONY PAUL ALBERGA (under and by virtue of power of attorney from 1st Claimant dated 1st day of November, 2011 and recorded at Liber New Series 559 Folio 353)**	**2ND CLAIMANT**
AND	**JAMES M. KLEIN**	**1ST DEFENDANT**
AND	**SUSAN M. KLEIN-LORD**	**2ND DEFENDANT**

Limitation of Actions Act – Visit to locus in quo – Whether Defendants in possession for 12 years – whether crops and goats reared on property – whether Defendants had fenced property – Whether registered proprietor entitled to an Order for possession.

Judith Clarke, Gloria Brown, Kim Bowen instructed by Kim Bowen & Co. for Claimants.

Donald Scharschmidt Q. C. instructed by Yvonne Bennett of Robinson Phillips & Co. for Defendants.

Heard: 19th, 20th & 21st, June 2013; 29th, 30th & 31st July 2013; 3rd October, 2013; 16th December, 2013; 19th March, 2014; 4th July 2014 and 31st July, 2014

Coram: Batts, J.

[1] On the first morning of hearing the Defendants' Counsel proposed that the court visit the locus in quo prior to the hearing of any evidence. The Claimant's Counsel was not opposed to the idea but had some logistical challenges. I therefore decided that we would commence taking the evidence and decide on the visit to the locus at a later date.

[2] Counsel for the Claimant made an oral opening in full. In the course of doing so reference was made to the Mammee Bay community. I therefore disclosed to all parties that I had acted as counsel for Mammee Bay Ltd. in the past. All parties agreed that I should continue to hear the matter as there was no continuing conflict of interest.

[3] In her opening the Claimant's Counsel described the claim as arising out of the acts of the Defendants relative to property owned by the First Claimant. The 2nd Claimant was added by an Order made at Case Management. This was due to the physical and mental incapacity of the 1st Claimant. The relevant facts on the Claimants' case are that in or about 2010 the Defendants were observed carrying out activities which included the construction of a perimeter fence around the Claimants' said property being, (and hereinafter will be referred to as), Lot 57. That activity precipitated this claim. An interim injunction is currently in place and the Claimants are seeking a Declaration as to the beneficial and legal ownership of Lot 57 as well as a permanent injunction. Counsel pointed out that no undertaking as to damages accompanied the interim injunction and this had been by agreement.

[4] The Defendants she said were alleging that they had been in possession since 1996. They had however filed no counterclaim. The Claimant intended to call 5 witnesses to demonstrate that (a) the Defendants had not been in possession since 1996 (b) Even if so their activity on the land (having regard to the nature of the community, the quality of relationship and the position of the Defendants in relation to the community), was equivocal and was neither open nor continuous.

[5] The Claimant's counsel indicated that the matter had commenced by Fixed Date Claim and hence the evidence was by Affidavit. The Order on Case Management Conference of 18th July 2012 provided in paragraph 9 for Affidavits to be filed. It was also ordered that there be cross examination of deponents. The trial was set for a Judge alone in Open Court. Mr. Scharschmidt Q.C. sought to take objection to matters in the Affidavit which infringed the hearsay rule. He however decided not to press that point after the Claimant's Counsel indicated that no insistence on witness statements was made at the Case Management Conference, nor was objection there taken to the Affidavits already filed along with the attached exhibits.

[6] Several witnesses were thereafter called by both parties to the action and the parties; save for the 1st Claimant, all gave evidence before me. I do not intend to repeat that evidence in the course of this judgment. The issue for my determination is twofold. In the first instance, have the Claimants been in possession for in excess of 12 years and what was the nature of that possession. Secondly, if there was possession, as a matter of law was it sufficient to satisfy the standard required, and have the Claimants lost their right to commence an action for possession due to the operation of the Limitation of Actions Act.

[7] Having carefully reviewed the evidence and the written and oral submissions of Counsel I am satisfied on a balance of probabilities that the 1st and 2nd Defendants here been in peaceful open and undisturbed possession of lot #57 from and since the year 1996. I am satisfied that they had fenced the land, they had introduced some form of irrigation on a portion of it, and they had cultivated a significant section with diverse crops. I am satisfied also that they raised goats on the lot and had them grazing there openly for all to see. Indeed Lot 57 being adjacent to their own lot was treated by them as their own property. I will address the legal consequence of this later in the judgment.

[8] My reason for arriving at this conclusion of fact has to `do with my view of the respective witnesses called by the parties. To that end I will refer to the evidence only to the extent necessary to demonstrate the reasons for my factual, findings.

[9] The Claimant's first witness was Mr. Herbert Murdock. This retired high school principal; swore to an affidavit dated 2nd May 2013. He had been chairman of Mammee Bay Ltd. within the last 3 years but had been a director of the company since 2002. His main purpose was to tender in evidence several minutes of meetings of Mammee Bay Limited. He had no personal knowledge of nor could he speak to whether or not the Defendants had been in possession of Lot 57 since 1996. His knowledge of the property commenced in 2001.

[10] He gave evidence that one of the main purposes of Mammee Bay Ltd. was to protect the interest of lot owners and hence to prevent the persistence or commencement of squatting. It was suggested that the 1st Defendant who for a time was a Director of Mammee Bay Ltd was well aware of this policy. However whether or not that was so I find, bore no great relevance to the issue of fact. So that, the fact that Mr. Klein (the 1st Defendant) as a Director of the Company took steps to prevent squatting on other lots is not evidence that he would not have squatted on a lot neighbouring his property. There is no breach of fiduciary relationship to Mammee Bay Ltd. because the Lot 57 was not owned or controlled by Mammee Bay Ltd. Further since, when taking possession, neither Defendant was acting on behalf of Mammee Bay Ltd, (or purporting to so act) the company could not be said to be breaching a fiduciary duty to the Claimants. At the time possession commenced, and for most of the time it continued, the 1st Defendant was not a director of Mammee Bay Ltd. There is no evidence of, nor was it suggested that there exists any agreement among or between lot owners such as to create any breach of duty or estoppel.

[11] The evidence suggests that the squatting which was of concern to the property owners was "external" squatting. That is by non lot owners who came in and started cultivation. I say this because there is evidence that lot owners within

Mammee Bay were encouraged to embark upon activity, which may in some quarters be considered acts of possession, in relation to unoccupied or unbushed lots within Mammee Bay (see minute of Directors Meeting 21 July 2008 (Fdeda/Murdock) #31.

[12] I find it significant that although Lot 57 was mentioned in a minute dated 18th February 1999 as being up for bushing, there is no indication as to whether this was ever done. I also wonder what of all the other years prior to and since 1999? It is common ground that the Claimants were not bushing it. So it may be inferred that either Lot 57 was not a problem or that Mammee Bay Ltd. was not as astute about having lots bushed as they would pretend. If the former then it supports the Defendants and their witnesses who say they did occupy and were bushing Lot 57. If the latter it weakens the Claimant's suggestion that Mammee Bay Ltd. bushed the empty lots within the community and hence there would have been no need for the Defendants to do so. There is a reference in a minute dated 29th November 2000 to a Lot in front of Blundell House "which needed bushing." The Claimant's have argued that this is a reference to Lot 57. I am not satisfied it is because firstly the evidence is that there are 2 unoccupied lots which could be so described and secondly an earlier minute had identified Lot 57 by number, so why would there be a change?

[13] Mr. Murdock at paragraph 14 of his Affidavit states that he was well acquainted with Lot 57 and had frequently walked past it since 2001. It is important to note that he had never gone onto the lot. This is significant because the Claimant's evidence, and my own observation on the visit to the locus, as well as the view from some of the photographs, is that the cultivation and activity was to the rear of the lot. The bush at the front served to obscure somewhat the activity on the land. I suspect and if necessary so find that Mr. Murdock never took any particular note of Lot 57, nor did he have a need to, until he saw the new fence being constructed. Had he taken a greater interest earlier he would have seen the crops the goats and the old fence in place.

[14] When cross examined Mr. Murdock admitted that he had very little personal knowledge either about the Claimants or the Defendants or Lot 57 or about many of the minutes exhibited. He admitted that there was no record which stated Lot 57 had been bushed. He acknowledged that the policy of bushing lots had its limitations:

> "Q: You as Chairman would not allow any lot to grow high.
>
> A: Sometimes bushing curtailed by availability of funds. Depends on financial state."

Curiously Mr. Murdock when asked, stated that he observed Lot 57 as "unoccupied untended covered in bushes, shrubs and trees of varying heights and sizes." Yet he could not recall ever making a recommendation to bush Lot 57. This former Chairman and Director could give no explanation for his failure to do so.

[15] At the end of Mr. Murdock's evidence the parties jointly expressed a desire to visit the locus in quo at this stage and prior to all the evidence being lead. The visit occurred on the morning of the 20th June 2013. The court in the presence of the parties walked the entire property. I was shown the remnants of a fence and PVC pipes as well as banana and cocoa plants. The premises was mostly overgrown. There was a hole in the fence giving access between lot 56 and 57.

[16] Mr. Claude Burton gave evidence on the afternoon of the 20th June 2014. The purpose of his Affidavit dated 21st May 2013 was to exhibit certain photographs which he had taken in 2006. The photo it is said demonstrated that Lot 57 was not fenced or tended. He had been staying at the RIU hotel and had taken the photo from a balcony. The photograph is Exhibit FB1 to his affidavit. The lot pointed out by the witness as Lot 57 in the photo is to the back of the photo and is not clearly visible. Indeed it is apparent that Lot 57 was not the focus of the photograph. I cannot say that this photograph was very helpful. Mr. Burton subsequently (in 2009) purchased Lot 59 (B) which is one Lot away form Lot 57.

He described himself as well acquainted with Lot 57. He said with certainty that between 2005 and 2010 Lot 57 was not fenced.

[17] When cross examined Mr. Burton stated that since moving to live on his Lot in 2010 he had been burgled 4 times and there had been 3 attempts. As a consequence he bushed the lot next to his. He said he did not bush Lot 57 which was next to that lot. This suggests to me that Lot 57 might not have needed bushing.

[18] The 2nd Claimant Anthony Alberga then gave evidence and his affidavits dated 24th July 2012 and May 2013 stood as his evidence in chief. He states he first knew Lot 57 in 2005 and it was unoccupied. He regularly walked passed it as he was the principal of a company which bought a nearby lot. Lot 57 he says was untended and overgrown. He described his contact and negotiation with the 1st Claimant for its purchase. In 2010 when he decided to renew negotiations he observed that Lot 57 was fenced, and had irrigation piping systems, cocoa and banana trees. He brought this to the attention of the 1st Defendant and in consequence attorneys were instructed to take action.

[19] When cross examined this witness admitted he was a property developer and investor and had earmarked Lot 57 for development along with the adjoining lot. He has not yet purchased Lot 57, but the 1st Claimant is prepared to sell it to him. He admitted that a pathway was cleared to the side of Lot 57 which was next to the Defendant's property. Interestingly, he said prior to 2006 he took no interest in Lot 57 and therefore could not say whether or not a fence was there. Indeed in the period 2006 to 2012 he could not say if it had been bushed. I formed the view that this witnesses main motivation was to acquire Lot 57. He had no genuine recollection of the lot prior to his renewed interest in 2010 which was sparked by the new fence he saw the Defendants erect.

[20] The hearing resumed on the 29th July 2013. Mr. Joseph Issa then gave evidence. His affidavits dated 13th February 2013 and 27 May 2013 stood as his evidence in chief. This witness is a director of the companies which owned lot 4 and 4A (Blundell House and Almond Tree). He said Blundell house is located opposite to Lot 57 and Almond Tree is opposite to Lot 58. He said that in 2007 he had lots 4 and 4a appraised by Mr. Theo M. Dixon realtor and appraisor. The reports of Mr. Dixon are attached as exhibits to his affidavit. He attached as exhibit JJ15 an enlarged photograph which formed part of Mr. Dixon's report. This photograph was subsequently admitted as Exhibit 1. As with the photographs put in by Mr. George Burton, this photo was singularly unhelpful. This is because Lot 57 was not its subject. The witness by an arrow identifies Lot 57 in the background of the photo. The fact that shrubbery is visible to the front of Lot 57 does not contradict the Defendant's case inasmuch as they maintain the cultivation was to the rear of the Lot. Neither can the photo contradict their evidence that a wire fence was in place around the said Lot 57. So contrary to Mr. Issa's evidence I do not find that the photograph shows "clearly" that Lot 57 was densely overgrown and unfenced.

[21] In his second affidavit Mr. Issa states he is a director of Mammee Bay Club (1987) Limited. He says the company has a practice of asking lot owners to clear vacant lots which are overgrown and adjacent to their own. Interestingly, he ends this affidavit as follows:

> "There was no extensive farming activity on Lot 57 as most of the property was covered in dense brush and trees. No fence was erected around Lot 57 before sometime late in the year 2010."

[22] When cross examined he admitted that his interest in this litigation was threefold. First as a Director of Mammee Bay Company Limited which he says had a duty to protect all owners, secondly empty lots pose a security risk so he is interested in seeing Lot 57 developed and thirdly, if an owner lives there maintenance is likely to be paid. He further acknowledged that at a meeting he commented on this suit. The following exchange occurred,

Q: Did you make a statement that “she” (the 2nd Defendant) had already lost the case

A: I can’t remember, it was something about the Injunction

Obj:

J: Will allow it

Q: Did you at a meeting say Mrs. Klein had already lost the case

A: I can’t recall the exact words.

It seems to this court therefore that this was not an uninterested witness and his evidence in consequence has to be very carefully weighed.

[23] The witness, significantly admitted that notwithstanding his concerns about security and his assertion that the property was always overgrown, and his knowledge of the Company’s policy, he did nothing since 2007 as it relates to having Lot 57 bushed. I ask myself whether the lot could have been in the condition the witness alleges whilst across the road from his property. Interestingly although denying it had a fence in 2007 he said when asked, that he “did not know” if bananas and other things were planted on it. On further cross examination as to whether he did not see a fence prior to 2010 or did not notice if one was there this exchange occurred,

“Q: There is a difference between not noticing a fence and no fence

A: there was no fence, I did not see a fence there

Q: Did, you visit night or day

A: that is what I want to explain. Prior to fall of 2010 my visits were in evenings. In Fall 2010 I started visiting in the day.”

In effect the witness was saying that he cannot deny the existence of a fence in period 2007 to 2010 as he would not have been able to see the fence in the dark,

and he paid no particular attention to the lot. Re examination did not rehabilitate him on his aspect nor indeed could it.

[24] The Claimant's next witness was Mrs. Hazelin Levy. Her affidavit dated 27th May, 2013 stood as her evidence in chief. She states that in April 2007 she was employed to Mr. Mayer Matalon the owner of a property in Mammee Bay estate. While there and as a part of her daily exercise routine she would walk by Lot 57. She has done this for 6 years. She says the lot has been overgrown in trees and bushes. She stated there was no fence as she at times walked unhindered into Lot 57 to pick guavas. In 2010 she saw a fence being erected and thereafter goats on Lot 57. She had never seen goats there before. When cross examined this witness said she never walked to the back of Lot 57. She denied ever seeing cultivation on Lot 57. She could not recall seeing bananas. She admitted that on her walks she paid no particular attention to Lot 57 until she saw a fence being built in 2010. She had never noticed an irrigation system. In response to a question from the court this witness said the guava tree was closer to the boundary between Lot 57 and 56 than with the boundary between lots 57 and 58. This is significant as it is clear on the evidence that there is and has for sometime been a cleared area between lots 57 and 56 alongside the boundary. It may explain why the witness was able to access the guava tree unimpeded. Being to the front of the property it may also explain why she did not observe the cultivation which was to the rear. In any event this witness only assists with the 6 years commencing in about 2008.

[25] In contrast to the Claimant's witnesses I found the Defendants' witnesses generally reliable. This may be due to the fact that for the most part they had worked in and around Mammee Bay for an extensive period. They also had worked on Lot 57.

[26] The 2nd Defendant was the first to give evidence. Her 4 affidavits 31 January, 2012; 28th March 2012; 4th April 2013; and one dated 4th April 2013 done jointly

with her husband were admitted as her evidence in chief. She describes herself as a housewife. She attached a Certificate of Title proving that since 1995, herself and the 1st Defendant had owned Lot 56 which adjoins Lot 57. She averred that although the 1st Defendant lives and works in the United States, she has spent at least 3 months of every year in Jamaica since purchasing lot 56. She described how in 1996 she cleared Lot 57 and had it planted out in a variety of crops. In 1997 she said she had workmen erect a wire fence around the lot. The irrigation system was installed in the year 2000 to water the crops and animals. In 2001 a new fence was erected. In 2008 her husband paid taxes for Lot 57 with respect to 2002 to 2009. Proof of payment of tax for 2010/2011 and 2012/2013 was exhibited. In a later affidavit the 2nd Claimant corrected an earlier statement in that she said a new steel posted fence was erected in 2007 as the wooden posted one erected in 1997 had begun to deteriorate. She asserts that between 1997 to April 2011 herself and her husband have been in undisturbed possession of Lot 57.

[27] When cross examined the 2nd Claimant explained that she started living at Lot 56 in 1994 as a tenant. They purchased that lot in 1995. She says they had goats and chickens on Lot 56. She admitted that that was in breach of Restrictive Covenants but explained that it had not been an issue as other owners had also done so. She explained that the goats were kept on 56 but grazed on 57; because of dogs they could not be left out at nights. She said that the reason tax was paid for Lot 57 was on the advice of her attorneys. The following exchange occurred,

> "Q: What is meant by "customary rights of ownership (Para 16)
> A: I mean treated it as though we owned it
> Q: How
> A: We walked freely on it, we cultivated it, we fenced it, we grazed animals on it, kept it clear."

[28] The second Claimant also in cross examination explained that the squatters with which the Mammee Bay Community was concerned, were persons coming from

outside. Furthermore that as other owners had animals her keeping goats had not been a problem. She explained that Lot owners were encouraged to bush adjoining lots. She stated that there had been disagreement between herself and the Mammee Bay Chairman because they would not allow her gardener permission to swim on the beach. The cross examiner elicited from this Defendant that she had 8 children. The 8th child was fathered by Mr. Wayne Scott in 2004. Mr. Wayne Scott had been employed to her as a caretaker and mason off and on since 1994. Mr. Scott as we shall see also gave evidence. It was suggested that her change of date from 2001 to 2007 (being the date the fence was erected) was done after she saw photos in Mr. Issa's affidavit. The witness denied this and said she had not noticed the typographical error when signing. The witness admitted that she had a good relationship with craft vendors Sylvester Linton and Andrew Campbell. It is fair to say that the 2nd Defendant impressed me as a witness of truth.

[29] Lloyd Scarlett, who said he was born on the 29th July 1932, then gave evidence for the Defendants. He said he still worked. He was unable to read and write but recognized the mark on his Affidavit. It was read to the witness by Mr. Scharschmidt and he acknowledged the truth of its contents. The affidavit dated 3rd April 2013 stood as his evidence in chief.

[30] The cross examiner very effectively asked the witness to explain the meaning of the word "contiguous" which appeared in his affidavit. He said he did not know what it meant. The following exchange occurred:

"Q: You and Mr. and Mrs. Klein is friend

A: yes they can trust me

Q: tell me how they treat you

A: good, treat me good. When Mr. Klein come there see me he shake my hand.

Q: how long it take you to build the fence in the 1990's.

A: 3 weeks me one. Hardest thing is to cut the post.

Q: you one cut the post

A: yes carry them on my shoulder.

Q: how long to cut the post

A: One week:

[31] This witness confirmed it was not the entire lot that was planted. When challenged as to how he recalled that it was in the 1990's he first erected a fence on Lot 57, the witness said he did not know what the "mid 1990's' meant. When asked how he knew it was over 14 years they were planting on the lot he said,

> "A whole lot heap a year. Since me own the land in Great Pond, gone over that time." He later told the court that it was over 25 years since he had the land in Great Pond."

The witness was candid enough to say he could not remember when they got goats. He described the goats as "just come." This witness also impressed me. He was candid and although he may have been inaccurate in details as to dates and events was I believe truthful with respect to the fact that he built a fence for the Defendants over twenty years ago.

[32] John Morcocchio was the Defendant's next witness. His affidavit of 3rd April 2013 stood as his evidence in chief. He is a Management Consultant. He has lived at Mammee Bay since 1991. He walked regularly pass the Claimants lot 56 known as "Heaven Can Wait." He recalls in the mid nineties being invited by the Claimants children to view the vegetable garden they were working on. This was located on Lot 57. He had to go through the "old barb wire fence" which separated the lots. He noticed over the years the irrigation system, the fence and goats on the land. When cross examined he admitted that he could not give precise dates and years. This is only to be expected. He too confirmed that he observed goats "much later on." He admitted also that from time to time lot owners were encouraged to bush the empty lots beside theirs. Of Mamee Bay Clubs attitude to squatting, he said,

> "Overarching concern is the likelihood of undesirables harbouring as squatters."

The following exchange occurred,

> Q: As a Director concerned about squatting would you consider yourself to have a duty to discourage squatting on Lot 57.
>
> A: No ma'am not by a fellow Director. In fact I recall the Chairman at one point encouraging Directors to tend to their neighbouring lots. More than one carry on agricultural activity on neighbouring lots specifically to keep away squatters."
>
> Q: Is it that you would not discourage the Klein's activity because to your mind the reason was they were doing it to discourage squatters taking over the land.
>
> A: No, the keeping away squatters would have been an ancillary benefit of their activity. I think their motives were quite different."

This witness also impressed me. His explanation of the attitude of Mammee Bay Company Limited was convincing and went some way to explain why they did not really oppose the Defendant's occupation of Lot 57.

[33] The Defendants' next witness was Mr. Wayne Scott. He too was unable to read or write. His affidavit was also read to him and then allowed to stand as his evidence in chief. That affidavit also confirmed that the Klein's had fenced planted and irrigated the lands. He said in 1997 himself and Mr. Scarlett erected a fence. When cross examined he admitted that the 2nd Claimant had a child for him. The child was born in 2006. He said he met Mrs. Klein in 1994. He and others built a fence in 1997. Another new fence was not built until 2007. The old fence was repaired in 2001. He said about ¼ of the land was planted in crops. He said the first goats were kept on the property in the year 2000. Only one goat but eventually there were 15. He denied that he was giving evidence because his child had an economic interest in the result.

[34] Mr. Sylvester Linton was the Defendants' next witness. His affidavit dated 3rd April 2012 stood as his evidence in chief. He is a craft vendor. He knew the Klein's since the mid 1990's when he was asked by Mr. Klein to cut some fence posts. He soon after saw a fence around Lot 57. When cross examined he explained how he got access to the beach to sell. This witness contradicts Mr. Lloyd Scarlett who said he Scarlett had cut the posts for the fence.

[35] The next witness for the Defendant was Mr. Andrew Leon Campbell. His affidavit dated 3 April 2013 stood as his evidence in chief. He describes himself as a craft maker. Between 1991 and 2010 he spent a lot of time at Mammee bay. He knew the Defendants since 1993. He saw them erect a fence around Lot 57 within a couple of years of taking up residence in Mammee Bay. He also saw the lot cultivated by the Defendants. When cross examined he said it was 2 – 3 years after they came that they built the fence. He too said it was 2000 or 2001 that he first saw goats on the lot. He used to teach craft to the Defendants children. When asked, he said it was the 2nd Defendant who came and asked him to give evidence. He also said the cultivation was not on the entire Lot 57 but to the "back ½". He said grass was in front. This witness impressed me as truthful.

[36] After this witness gave evidence the matter was adjourned part heard to the 3rd October 2013. On that date Defendants counsel indicated that his clients had found some highly relevant photographs. Claimants Counsel was opposed. I rose to allow the parties to have discussions. Upon the resumption the Claimants Counsel agreed to the front and back of the photographs being put in evidence. The photographs were admitted by consent as Exhibits 2 to 6. The First Defendant then gave evidence. His affidavit dated 28th March 2013 was put in as his evidence in chief. He also commented on the photographs Exhibit 26. He had taken them in April 2005. He knows this because he found them in a room where tools were kept at Mammee Bay Estate. He had done additions to

the house and had taken photos. They were developed in the United States. The legend on the back bears the date it was printed. He described what he saw in each photo.

[37] Before commencing cross examination the Claimants Counsel requested time to have the new exhibits examined scientifically. There was no objection and the case adjourned to the 16 December 2013. On this date the cross examination of the 1st Defendant resumed. The Claimant's Counsel indicated that no expert evidence would be called by way of rebuttal, to the photographs admitted as exhibits 2 to 6.

[38] The 1st Defendant admitted that although he knew dues were payable by lot owners he had paid no dues to Mammee Bay Ltd in respect of Lot 57. He also explained that in his view Mammee Bay Ltd was only concerned with Squatters from outside as there were others in Mammee Bay occupying lots next to them. He said the guinea grass to the front of Lot 57 was high and that is one reason he had goats graze on Lot 57. Interestingly, when it was suggested that no fence was erected around Lot 57 the witness answered

'I got the scar on my hand from barb wire to prove it."

[39] It is fair to say that I found the 1st Defendant to be a credible and candid witness. I accept his evidence as truthful.

[40] The case was further adjourned at the close of the Defendants' case for Written Submissions to be filed. The hearing resumed on the 19th March, 2014 at which time each party spoke to the written submissions of the other.

[41] The parties are to rest assured that I have considered both the written submissions as well as the oral rebuttals made. In the interest of keeping an already too long judgment within modest proportions I will not restate those arguments. The result of this matter turns largely on my view of the evidence.

As should be clear from comments made above I preferred the account of the Defendants and their witnesses. These persons for the most part impressed me as truthful. Furthermore they had lived and/or worked for an extended time in the community and in particular in or around Lot 57. They also had had long associations with the Defendants. Generally speaking it is not the number of witnesses called but their quality. The Defendants produced many persons of varying backgrounds who gave evidence to the same effect. To be sure there were inconsistencies and also some lack of certainty as to precise dates when certain things occurred. This is only to be expected as I do not suppose any of them anticipated that 19 years or so later they would be asked when a fence was built. No diary was kept by Mr. Lloyd Scarlett (Little Fren) who so impressed me and who claimed to have cut all the fence posts himself. I however doubt that at age 65 he would have cut and carried all the fence posts by himself. In 1997, it is far more probable that he did so with assistance. It may be that he had done so earlier in his life for others and his recollection is thereby afflicted. However, what he is sure about and what I accept, is that over 20 years ago he built a barbed wire fence around Lot 57 for the Kleins. He was in his 80's when giving evidence and I suppose this bit of what Jamaicans term "bragadociousness" was designed to impress upon us his strength and ability as a labourer. I find, as other witnesses said, that he received some help.

[42] All in all however, I accept as a fact that the Defendants erected a barb wire fence in the mid 1990's and replaced it in or around the year 2007 with metal fencing. That fence caught the attention of the 2nd Claimant and eventually resulted in the commencement of this legal action. I find as a fact also that from in or about 1995 – 1996 the Defendants commenced agricultural activity on Lot 57. Much later they introduced goat husbandry on the lot. They irrigated it in association with the agricultural activity. That activity took place to the rear of the lot and hence was somewhat obscured by the tall guinea grass towards the road (or front) of Lot 57. The decision to farm the rear ½ of the lot was precipitated by the quality of the soil and the fact that more rocky terrain existed on the other part

of the lot. It was not with an intent to hide the activity. I find as a fact also that the Defendants saw no conflict with their role in the Mammee Company Ltd. Squatting as a problem was perceived by the Directors and other owners , as related to non-owners who occupied land illegally. Similarly with respect to the rearing of animals. The proprietors were generally opposed to stray or externally owned animals. I find as a fact that, Lot 57 was cultivated by the Defendants and it is for this reason that none of the Claimants' witnesses who lived in near or about Lot 57, had ever raised a security concern or sought to have Lot 57 bushed.

[43] These being my findings of fact the legal consequence can be shortly stated. It is the intention of the person in possession which is important in this area of the law. The fact of possession for the requisite 12 years is not alone sufficient. The question is was there an *animus possidendi***.** Did the person occupy and take on the incidence of an owner, or did they regard themselves as holding on behalf of another or until that other should return. See: ***JA Pye (Oxford) Ltd. v Graham (2002) 3 AER 865.*** The Defendants to my mind, whatever was their intention when they started bushing, by the time a fence was erected and intensive cultivation embarked upon, were clearly acting as owners. They exercised possession to the exclusion of others, except perhaps the odd passerby who might stop to pick a fruit or two,. Even whilst off the island their gardeners would be left in charge to see to the property. One can hardly otherwise explain the irrigation system; remnants of the piping related to which, were clearly visible on the court's visit to the *locus in quo.*

[44] There is therefore judgment for the Defendants against the Claimants. The Claim is therefore dismissed. Costs will go to the Defendants to be taxed if not agreed.

David Batts
Puisne Judge
31st July 2014