



- 4) Mesne profits from around November 23, 2009 until possession is delivered up at a rate of \$515,333.33 per month.
- 5) Alternatively, an account of the rents and profits from the property received by the 1<sup>st</sup> Defendant and/or Government of Jamaica from about November 23, 2009.
- 6) Payment of the said rents and profits so received
- 7) Damages, including exemplary damages
- 8) Interest at the commercial rate
- 9) Costs
- 10) Such further and/or other relief as this Honourable Court shall deem just

[2] The Particulars of Claim elaborate on the case for the Claimant. The Claim relates to a bus park. The Claimant alleges that he had since in or about 1994 been in exclusive and undisturbed possession of the property (see paragraph 4 of the Particulars of Claim). The Claimant says that it was the Member of Parliament for Central St. Mary Mr. Horace Clarke (now deceased) who invited him to form a committee to rehabilitate the property (Paragraph 7). That committee, it is alleged, did not function effectively. The Claimant avers that “in order to protect” his investment he continued the operation of the park. He alleged that he paid taxes and from his own resources refurbished and improved the bus park. He alleges that since 1994 he had been receiving the rents and profits from the property. He expressly alleged that he was,

“at all material times operating the property privately, and at no time was an agent and/or servant and/or contractor for the 1<sup>st</sup> Defendant and/or the Government of Jamaica”

[3] It is fair to say that those allegations notwithstanding, the evidence before me has cast another light on the matter. The Claimant’s witness statement dated 5<sup>th</sup> February 2014 stood as his evidence in chief. In that statement he asserts consistently with his Claim that he has been in possession since 1994. Paragraphs 4 and 5 of the Witness Statement read as follows:

- (4) “Mr. Clarke said that he did not want the operations to be dealt with by the St. Mary Parish Council, and in an attempt to activate usage of the

park and reduce the congestion he invited me to take it over and to establish a broad based non-partisan committee to rehabilitate the property and commence the operations as a bus park. He asked me to do it because of my earlier involvement in the rehabilitation (of) the Claude Stewart Park in Port Maria in 1994.

- (5) At the time of his invitation, I was not an employee or agent for Mr. Clarke, or for the St. Mary Parish Council or the Government of Jamaica, and Mr. Clarke was not paying me to operate the park. However he asked me to do it in my personal capacity and to use my personal financial resources to rehabilitate the park, and repay same from the operational income, and any surplus of the income was to be used for civic or charitable purposes. I used my personal funds to upgrade the facility, including refurbish the bathrooms, building two gate houses where the transport operators paid their fees and exited. This cost about \$380,000. I was the one who obtained the estimates and got the contractor and paid him. I also built an office.”

[4] The Claimant says further (paragraph 9) that in 1995 a decision was made to have the park gazetted. It was then discovered that the property was not owned by the St. Mary Parish Council as a consequence the arcade could not be established as a gazetted transport centre. He therefore continued to operate the Centre to protect his investment and as a “well-needed service.” (Paragraph 10)

[5] The Claimant says he is no longer in possession because on the 23<sup>rd</sup> November 2009 police officers at the instance of the St. Mary Parish Council evicted him. This action followed meetings and an exchange of letters which commenced in or about 2005.

[6] It should be noted that objection was taken to parts of paragraphs 18, 23 and 26 of the Claimant’s witness statement on the ground that these contained hearsay and opinion evidence. I allowed the objection as regards paragraph 23. The second sentence beginning “The representative” and ending “purchase it” was a report on what was said by an unidentified non-party to the Claim and clearly hearsay and inadmissible. The objection was overruled as regards paragraphs 18 and 26. Paragraph 18 speaks to a meeting attended by the Claimant and its effect. This is first hand evidence not hearsay. Paragraph 26 speaks to a

conversation with the servant or agent of the second Defendant and one who is clearly identified. This is not hearsay as the second Defendant can only speak through its agents.

[7] When cross examined it emerged that the property in question consisted of 3 parcels owned as follows:

- i. 23 Main Street owned by the United Fruit Company
- ii. 25 Main Street owned by Jamaica Producers
- iii. 46 Nevers Street owned by the Commissioner of Lands

He admitted that none of the 3 owners was named as a Defendant.

[8] He said that the committee he formed consisted of the following:

- i. Superintendent of Police Douglas Waite
- ii. The Public Health Inspector
- iii. The Councillor for the Port Maria Division
- iv. Members of the Port Maria business community
- v. Members of the Vendors Association

When asked how if at all the committee he established differed from the one established in 1992, he responded:

“A: Leadership

Q: The 1992 committee was led by Mr. David Crawford

A: That is what I was told

Q: 1994 committee led by you

A: Yes

Q: Save for that all other members would be the same

A: No, I included additional vendor representative and additional business representative. There was only one of each on the former committee

Q: When you say composition was the same earlier it was an error

A: Yes.”

[9] When pressed on the basis and operation of the committee he chaired the Claimant said the following:

“Q: Tell me what about that statement is not true  
A: I had no funding. There was no money to fund rehabilitate the park so he asked me to fund it and later out of the profits of the park I could be repaid  
Q: Paragraphs 4 and 9 of his witness statement read, is that statement true  
A: No, it is not a true statement  
Q: The initial start up was not supposed to come from members’ pocket  
A: I was the only person asked not the entire committee  
Q: Was it presumptuous of Mr. Clarke to ask you to do that  
A: We had a very good relationship”

[10] The Claimant has produced no documentary support regarding the expenditure on rehabilitation of the park. When shown letters passing between the Ministry of Local Government and the Parish Council (Exhibit 2 page 2 letter dated 8<sup>th</sup> March 1993, Exhibit 2 page 3 letter dated 7<sup>th</sup> January 1994, Exhibit 2 page 8 letter dated 10<sup>th</sup> November 1995) the Claimant gave the following evidence:

Q: Do you agree that based on the 3 letters construction was between 1993 - 1995  
A: Based on the letters yes  
Q: Based on those letters construction was funded by the Government  
A: Based on the letters, yes  
Q: Do you agree that based on the letters funds being sent to St. Mary P.C. to construct the said Arcade  
A: Based on three letters yes  
Q: Do you agree that if in your case you established park from your personal resources is correct you would have been doing so at the same time and on the same property as the Government  
A: I come in 1994 and I rehabilitate back the same Arcade  
Q: Do you agree in the suit you filed paragraph 10 you assert that you established the park  
A: Not to establish the park  
Q: Do you agree statement in witness statement at paragraph 5 that you also built an office from your personal resource is untrue

A: It is a true statement”

[11] Later also the following is stated,

‘Q: Why did you not put Mr. Peart as member (of committee?)

A: Because Mr. Clarke (the Minister) indicated he did not want Parish Council to be involved.

Q: Wasn’t it a fact that Secretary of St. Mary Parish Council was a member of the committee

A: I am not denying it”

[12] He later admits that in 1994 he entered possession as Chairman of a committee and not in his personal capacity. The following exchange occurred:

“Q: Were you not acting as Chairman of a committee in 1995

A: Yes

Q: That committee was the entity that was vested control and management of the Arcade and Bus Park

A: Yes

Q: That committee had sole authority to receive funds rent and profit in relation to the operation of Arcade and Bus Park

A: Yes

Q: The funds rent and profits collected by the committee did not belong to committee members

A: No it was not

Q: These funds were to be deposited to a designated bank account for that purpose

A: Yes

Q: The outgoings associated with the management of bus park and arcade were paid from these funds

A: Yes”

[13] Suggestions were put about contact between himself and the Parish Council. He denied any such meeting or contact in the period 1998 to 2005. After a series of questions the following occurred:

“Q: Do you agree even prior to 2005 the Parish Council attempted to assume control of the Arcade and the Bus Park.

A: The date when Mr. Peart told me this but I not sure of date. I ask him what he was offering

Q: What you mean

A: He said to me he wanted to take control. I ask him what was he offering and he said not a red cent and get up and walked out

Q: Do you agree you omitted to write any letter to Parish Council making any such request

A: I did not

Q: Do you agree the first and only letter you wrote to Parish Council was January 23<sup>rd</sup> 2006 (page 35 Exhibit 2) in which you made no mention of need for compensation

A: I agree

Q: You also said you had no objection to the committee being revived

A: Yes

Q: In the last paragraph you reminded them that problems and no mention that you were owner

A: Correct"

[14] When cross examined by the 2<sup>nd</sup> Defendant's representative, he admitted that the committee was established by Mr. Horace Clarke M.P. to operate the park. The surplus from its operations was to go to charitable purposes. He admitted further that when spending his own money he was giving a loan to the park. This would be repaid from the earnings of the park. Although stating that he spent his money in November 1994 the Claimant admitted that the final report for period ending December 1994 made no reference to the loans. He admitted preparing the financial reports (Exhibit 4). Against that background the following exchange:

"Q. You were sure you would get back money when did you get back \$380,000

A: I have not even collected a cent

Q: But you said (it was) guaranteed

A: I have not taken it

Q: There has been no time when the park generated a profit of \$380,000?

A: Yes, there was.”

[15] He admitted that the committee operated “well and consistently up until 1998.”

[16] I have quoted extensively from the evidence of the Claimant to demonstrate that at the close of his case the evidence was:

- a. That the committee he chaired was in possession of and operated the park until 1998
- b. He chaired a committee which was similar but not identical in composition to the one appointed by the Minister in 1992
- c. In 2005 when the Parish Council suggested that the committee be reactivated he had no objection
- d. In 2005 he did not claim a right to own or possess but requested compensation
- e. He had not established the park as public funds had done that
- f. He was evicted in 2009 after at least one meeting and after letters were written to him

[17] It means that at the close of the Claimant’s case there has not been sufficient evidence to satisfy me on a balance of probabilities that he was in possession for the 12 years necessary for a Claim based upon the Limitation of Actions Act. 1998 to 2009 being only 11 years not 12. I am also not satisfied, having seen and heard his evidence, that he had the requisite intent to possess. It is clear that he entered into the arrangement to operate the bus park as an agent of the Minister. Hence the committee he chaired had persons from particular related institutions, including the Parish Council. This latter organization had a vested interest in a properly run bus park and had disbursed public funds for its construction. I find as a fact that the Claimant at all material times was in possession as a representative of the Minister. When the committee stopped functioning in 1998 he continued to operate the bus park in the same capacity. He therefore, for example, paid no taxes on earnings. When the suggestion was made to reconstitute the committee he was only too happy to have the committee return to operate the park. His sole enquiry was for a refund of the sums he allegedly

spent. As to that, the evidence is sadly lacking. He says he has” lost” his receipts. I find it inconceivable that someone who “loaned” funds to the committee, and expected repayment would fail to safely secure the receipts. In 1994 \$380,000 was in real terms a considerable sum. The documentation refutes the assertion that he built anything. Rather it appears he may have contributed to some painting or cosmetic changes or cleaning up. I reject the evidence orally given that \$380,000 was spent.

[18] There is neither a claim for repayment of a loan, nor a claim in quasi-contract for money paid to the use of. The claim for a possessory title having failed, then so too, does the claim for mesne profits and damages including exemplary damages.

[19] Finally I should say a little about the case and evidence presented by the Defendants. This in the event another court disagrees with my pessimistic view of the Claimant’s case.

[20] The First Defendant, in a carefully formulated statement of case averred that:

- a) The Claimant was seeking compensation for an illegal activity
- b) The Claimant never entered into possession for the purpose of carrying on his private business
- c) The monthly meetings of the committee ended because the Claimant repeatedly failed to produce financial reports
- d) There had been sufficient acts of possession by the 1<sup>st</sup> Defendant to defeat the Claimant’s claim to continuous exclusive and undisturbed possession.

[21] The First Defendant counterclaimed for:

- i) an account for all revenue and expenditure during his management and administration of the “Horace Clarke

Arcade and Bus Terminal” also known as the “Port Maria Arcade and Bus Terminal”

- ii) an order that the net rental proceeds collected be paid over to the 1<sup>st</sup> Defendant with interest

[22] The Defence of the 2<sup>nd</sup> Defendant was that the Arcade and Bus Terminus were constructed at the instance of the then Member of Parliament for Central St. Mary. The funds for construction were from the Ministry of Local Government and Works. It was channeled through the 1<sup>st</sup> Defendant. The Claimant succeeded one Mr. David Crawford as Chairman of the Management Committee established to administer the operation of the facility. The Claimant therefore at all material times acted as Park Manager of the facility. In 2009 instructions were given that the Claimant not be paid vending fees or lease payments. This was the result of termination by notice of the Claimant’s services as Park Manager for the facility. It was admitted that in 2009 a police team attended the premises in question to provide security for agents or servants of the 1<sup>st</sup> Defendant who carried out an eviction exercise.

[23] In support of their case the 1<sup>st</sup> Defendant called Mr. Sheldon Peart whom I found to be a credible and honest witness. He described himself as a retired Secretary/Manager of the St. Mary Parish Council. He retired on the 1<sup>st</sup> August 2007 but went on pre-retirement leave in January 2007. His witness statement dated 18<sup>th</sup> October 2013 stood as his evidence in chief, save for the striking out of paragraph 28 which infringed the Best Evidence Rule.

[24] Mr. Peart said he was involved in the development of the Horace Clarke Arcade and Bus Park when it commenced in 1993. It is now called the Port Maria Arcade and Bus Park, and was conceptualized by Mr. Horace Clarke M.P. to reduce traffic congestion and regularize public transportation and vending in Port Maria. It was the M.P. who identified the land and secured the funding. The funds were channeled through the Parish Council which oversaw the construction of an Administrative Building (ticket office) and sanitary facilities. Shops were

constructed later on. He details the arrangements for lighting and other utilities and how they were obtained. He said the Committee of Management was organized by the Minister and consisted of relevant sector interests which he detailed. The witness sat on the committee as a representative of the First Defendant. The committee he said was responsible for the entire operation of the bus park and arcade. He detailed the work and responsibilities of the committee.

[25] According to Mr. Peart, the Claimant's involvement in the day to day operations of the park came after the dismissal of the first Park Manager. The committee was unable to identify a suitable replacement and therefore the Claimant who was at the time Chairman of the committee, was asked to assume the role of manager until a replacement was found.

[26] The witness explained that the monthly committee meetings kept being postponed because financial reports were not ready, until,

“the meetings ceased altogether in about early 1999.”

[27] He said that despite the lack of meetings the 1<sup>st</sup> Defendant's nominees pursued the Claimant for reports. This was because they had a reporting requirement to the 1<sup>st</sup> Defendant. The witness said he discussed the outstanding reports with the Claimant on “numerous” occasions. After some time, with no reports forthcoming and with complaints about the operation of the park increasing, the 1<sup>st</sup> Defendant took a decision to resume control of the bus park. The details of this process are stated in his witness statement. Mr. Peart stated, and I accept as true, that the Claimant promised to provide statements in relation to the overall operation. He also in a meeting indicated a preparedness to hand over the bus park. The Claimant he says at no point during the meeting in 2002, objected to the takeover or maintained that the park was his personal venture or property. This process of dialogue continued until 2006, when in February of that year the Claimant's attorney wrote and questioned the authority of the 1<sup>st</sup> Defendant in the matter. The witness responded to the attorney by letter dated 8<sup>th</sup> March 2006 and says

that up to his retirement in 2007 the Claimant had not vacated the premises or provided the financial statements requested.

[28] When cross examined the witness elaborated on these positions. It is fair to say that he was not tarnished by that process and indeed impressed me with his candour and clarity. So for example when challenged by Counsel about letters of the 13<sup>th</sup> November 1995 (Exhibit 2) page 7, 7<sup>th</sup> November 1995 (Exhibit 2) page 5 and 16<sup>th</sup> November 1995(Exhibit 2) page 8 he says:

“ J: Please explain necessity for 2 letters

A: Letter of 13<sup>th</sup> the M.P. is indicating to Minister of Local Government how he wants \$2.2M to be allocated. The letter of the 7<sup>th</sup> is the part of \$2.2M which he wants to go to Parish Council i.e. \$1.9M

Q: Put to you paragraph (e) \$300,000 is for the old road and had nothing to do with the park

A: I don't agree “

[29] Also, when asked whether the Claimant had been running the park singlehandedly up to 2006 for approximately 10 years, the witness answered “Yes, without the input of the committee.”

Q: In those 10 years up to 2006 Mr. Morales was running the park like his own operation by himself

A: Yes I will agree that despite efforts to get Mr. Morales to submit financial reports he was running it as his own

Q: As far as you are aware up to 2009 he was still running it as his own business

A: I can speak to December 2006. I went on leave January 2007.”

[30] The witness admitted that no letter addressed the Claimant as “Park Manager” but pointed out that he received a salary as such. This was

reflected in the financial statements. The witness denied having a conversation in which the Claimant requested compensation in return for giving up the park. He denied stating that the Claimant would not receive “a red cent”. As the witness said “No, that is totally unlike me.” Quite frankly, I accept this version as truthful. This witness’s demeanor in the witness box was characterized by, for want of a better phrase, old school grace and dignity. He chose his words carefully and, was never ruffled, notwithstanding the sometimes fiery cross examination. I do agree that this former Secretary Manager of the Parish Council would not have said to anyone “not one red cent”, even if indeed he were indicating that compensation was unlikely to be favourably considered. It seems however that mathematics is not his forte. He says Committee meetings continued until early 1999; hence it is inconsistent to say that that the Claimant operated the bus park alone for 10 years preceding 2006. At most 7 or 8 years had elapsed.

[31] The second Defendant’s witness was Paula Russell, a Legal Officer at the Ministry of Local Government and Community Development. Her witness statement dated 23<sup>rd</sup> January 2014 stood as her evidence in chief. The first sentence of paragraph 4 and the last 4 words in the second sentence of paragraph 4 were ordered to be struck out. This was due to the fact that a document not put in evidence was being referenced. She stated that this matter first came to her attention in 2008 when the 1<sup>st</sup> Defendant requested the assistance of the Ministry of Local Government’s intervention and assistance to gain administrative control over the facility. She outlined what she “discerned” about the history of the premises. She then asked for legal advice from the Attorney General’s Chambers. In keeping with that advice a letter dated 16<sup>th</sup> December 2008 was written to the Claimant informing him that his services as Park Manager were terminated and that he was to remove from the facility. Notice was also given to all vendors and tenants at the facility to cease making payments to the Claimant. Another letter dated 13<sup>th</sup> November 2009 was sent to the Claimant as he failed to remove.

[32] When cross examined the witness indicated that she was aware the Claimant was evicted in November 2009. As far as she was aware between 2008 and 2009 there had been no Ministerial Declaration indicating that the premises had been compulsorily acquired, nor had there been anything gazetted to so indicate. She agreed that the Claimant was not employed to the Ministry of Local Government. The following exchange occurred,

“Q: So Ministry can terminate services of someone not employed to it

A: No, what I want to say is Ministry or Parish Council can intervene where a Management Committee is set up and Parish Council is a member. Parish Council as local planning authority and under Road Traffic Parking Regulations have jurisdiction to oversee parking in public places. See Regulations under the Road Traffic Act.”

[33] Save for gazetted regulations the witness was unaware of any instruction given to the Claimant in the period 1996 – 2009. Nor was she aware of documentation with respect to a compulsory acquisition of the premises. The witness stated that to the extent “compensation” was considered it was for the Claimant’s services in terms of facility and to remove his belongings (See Exhibit 2 page 45). The witness said it was the 1<sup>st</sup> Defendant who evicted the Claimant and not the Ministry.

[34] When cross examined by Counsel for the 1<sup>st</sup> Defendant the witness admitted that the Parish Council (1<sup>st</sup> Defendant) was the agent of the Ministry as it related to the construction of the Bus Park and Arcade. The funds to do so she said came from the Ministry. She admitted that authority to direct the use of the Park and who was entitled to operate and manage it stemmed from the fact that it was the Ministry which had funded and created the facility.

[35] The 2<sup>nd</sup> Defendant's next witness was Mr. Alvin Robb a retired Inspector of Police and farmer. His evidence in chief was contained in a witness statement dated the 18<sup>th</sup> December 2012; the effect of which was to say that he received instructions from his superior officer in 2009 to provide security for members of the 1<sup>st</sup> Defendant who were going to carry out evictions. The team of police officers under his control stood by and watched the removal and did not remove any item from the compound. The exercise occurred without incident and there was no breach of the peace. He did not change this position in cross examination.

[36] Upon the close of the case of both Defendants the matter was adjourned to the 20<sup>th</sup> June 2014 when submissions written and oral were made.

[37] It is right that at this juncture I indicate that the witnesses for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants impressed me as truthful. Only Mr. Peart could however speak to the circumstances of the entry into possession of the Claimant. His evidence, which I accept, is that the facility was operated by a committee and was the brainchild of the Member of Parliament. It had been constructed with public funds issued by the Ministry but disbursed by the 1<sup>st</sup> Defendant. I accept and find that the Claimant for the entire period 1994 – 2009 never operated the Park as its owner or with any intent to possess it. He regarded himself as its Manager and operated it in the same capacity in which he was placed there. The fact that the committee stopped meeting did not change his perception of his role. He continued to act as the Park Manager. That is why, and the correspondence in evidence supports this, he was only too happy to agree to a reconstitution of the committee. I accept also that to the extent "compensation" was discussed, it was not for use and occupation or for possession. Rather it was for his work and services and to enable his removal. I accept the evidence of the Defendants that the committee continued to operate and function at least until 1998, and this is supported by the documentation, (See for example letter dated 21<sup>st</sup> February 1995 page 24 Exhibit 2; and letter dated 7<sup>th</sup> November 1995 page 5 Exhibit 2) as well as the Claimant's

own evidence. Those findings of fact would mean that as at his eviction in 2009 only 11 years would have passed. Therefore even if he had the “animus possidendi”, which I have found he did not, time under the Limitation of Actions Act would not yet have accrued.

[38] I accept also that the matter of legal ownership was at best unsettled and quite possibly did not rest in either the Defendants or the Claimant. It really therefore is irrelevant in whom legal ownership resided. As between the parties to this action the Defendants have the greater right to possession. Indeed they were responsible (if the Minister is seen as their agent) for the Claimant being made Chairman of the Committee. Public funds had been spent. It is right also that the Claimant give an account for his stewardship of the bus park.

[39] Finally I agree with the Submission of Counsel for the First Defendant that the Claimant has not on a balance of probabilities, proved damage to his personal property consequent on the eviction exercise ( See para. 40 of 1<sup>st</sup> Defendant s Written Submissions).

[40] I therefore dismiss the claim and will give judgment for the First Defendant on the counterclaim and Order and Direct as follows:

- (i) The Claimant within 90 days of the date of this Judgment give an account to the 1<sup>st</sup> Defendant of all revenue earned and expenditure incurred in the period 1994 to 2009 in respect of the Horace Clarke Arcade and Bus terminal also known as the Port Maria Arcade and bus terminal.
- (ii) The said account is to be certified by the Registrar of the Supreme Court of Judicature of Jamaica.
- (iii) Upon the account being so certified any net earnings from the said bus terminal are to be paid within 30 days to the

First Defendant with interest thereon calculated at a rate of  
3% per annum until the date of this judgment.

Costs of this action will go to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be taxed if not  
agreed.

**David Batts**  
**Puisne Judge**