[2012] JMSC Civ 165

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV05503

BETWEEN	RECREATIONAL HOLDINGS I (JAMAICA) LIMITED	CLAIMANT
A N D	CARL LAZARUS	1ST DEFENDANT
A N D	THE REGISTRAR OF TITLES	2NDDEFENDANT

CONSOLIDATED WITH:
CLAIM NO. 2011 HCV 05582

BETWEEN	CARL LAZARUS	CLAIMANT
AND	RECREATIONAL HOLDINGS I (JAMAICA) LIMITED	1ST DEFENDANT

Michael Hylton Q.C., Duwayne Lawrence and Shanique Scott for Recreational Holdings I Jamaica Limited, instructed by Tracey Long of Long and Co.

Allan Wood Q.C. Miguel Palmer and Miguel Williams instructed by Livingston Alexander and Levy for Carl Lazarus.

HEARD: 21st February, 6th July & 19th September 2012

Summary Judgment Applications – General principles to be applied by Court in respect of Summary Judgment Applications - Adverse possession – What constitutes adverse possession - Trespass to property – Common mistake of parties as to title to property – Both parties holding title – Adverse possession and lawful title – Acquiescence – Relationship between acquiescence and knowledge – Affidavit evidence – Need to state source of information and belief – Opinion evidence deposed to in Affidavit

ANDERSON, K., J.

[1] In April of 1978, the Registrar of Titles issued to Clinton McGann (hereinafter referred to as 'Mr. McGann'), a Certificate of Title registered at Volume 1154, Folio 550 of the Register Book of Titles, in respect of more than three hundred (300) acres of land, known as 'Windsor Lodge' (and hereinafter referred to as such) located in the parishes of Saint Andrew and Saint Thomas. That title was cancelled in 1986 pursuant to Section 79 of the Registration of Titles Act and replaced by Certificate of Title registered at Volume 1294 Folio 10 of the Register Book of Titles. Recreational Holdings I (Jamaica) Limited (hereinafter referred to as 'RHIJL'), purchased Windsor Lodge in March of 2011 and is now the registered proprietor thereof. Certificate of Title registered at Volume 1294 Folio 10, was cancelled in April of 2011, because the duplicate Certificate of Title was lost and thus, that certificate was replaced by one registered at Volume 1449 Folio 349 of the Register Book of Titles. There is dispute between RHIJL and Carl Lazarus (hereinafter described as, 'Mr. Lazarus') as regards this property. More details as to the nature of that dispute are provided below.

[2] In March of 1987, The Registrar of Titles issued to Mr. Lazarus, a Certificate of Title registered at Volume 1204 Folio 807 of the Register Book of Titles, thereby making him the fee simple owner of approximately 27 acres of land, part of Riversdale, in the parish of Saint Thomas ('the Lazarus property'). Mr. Lazarus is also the fee simple owner of land comprised in certificate of title registered at Volume 1204 Folio 806 of the Register Book of Titles (hereinafter described as, 'the second Lazarus property'). There initially existed dispute between Mr. Lazarus and RHIJL as to whether or not RHIJL was trespassing on the second Lazarus property, insofar as it was initially being contended by Mr. Lazarus that RHIJL had erected a fence on the second Lazarus property. There is, however, now no longer existing as between the parties any factual dispute in this regard, as the respective parties' surveyors had prepared a joint expert report in Claim No. 2011HCV05582, in accordance with the Order of Mrs. Justice Thompson James, in

that joint expert report, it was confirmed that there was in fact encroachment by RHIJL upon the second Lazarus' property. Since then, RHIJL has taken all necessary steps to remove that encroachment and as a consequence, as to whether or not the Defendant in Claim No. 2011HCV05582 did or did not have a fence built at his direction, on the Claimant's property, no longer requires determination by this Court. There are also other issues concerning that Claim which require the determination of the Honourable Court and these other issues are more particularly detailed, further below.

[3] Windsor Lodge and the Lazarus property adjoin each other and there is an area of approximately 8.92 acres of land ('the disputed property'), which is included in the Certificate of Title for both properties. It is this disputed property which the respective parties hereto, now seek by means of their respective Claims, to have the ownership of, resolved by this Court.

[4] The first in time of the respective Claims filed by the parties was filed by RHIJL – Fixed Date Claim Form in Claim No. 2011HCV05503, seeking the following primary reliefs:

(a) A declaration that the Claimant is the fee simple owner and registered proprietor of the parcel of land being 8.92 acres and being part of the land registered at both Volume 1440 Folio 349 of at Volume 1204 Folio 807 of the Register Book of Titles ('the disputed property').

(b) An order against the 1st Defendant for recovery of possession of the disputed property

(c) An order that the 2nd Defendant cancel certificate of title registered at Volume 1204 Folio 897 of the Register Book of Titles and issue a new Certificate of Title to the 1st Defendant, excluding the disputed property.

(d) Damages for trespass against the 1st Defendant.

[5] In terms of the Lazarus property, this being the one registered at Volume 1204 Folio 807, there is dispute between the parties at present, as regards whether Mr.

Lazarus is trespassing on that property. This dispute has arisen because there is also dispute as to who owns the disputed property.

[6] On September 7, 2011, Mr. Lazarus filed a Claim Form seeking reliefs related to the disputed property. The Claim number assigned to Mr. Lazarus' Claim which had named therein as the sole Defendant – RHIJL, is: Claim No. 2011HCV05582. Mr. Lazarus thereafter proceeded to file an amended Claim Form. The same was filed on September 16, 2011 and was accompanied by amended Particulars of Claim which were also filed on that same date. By virtue thereof, Mr. Lazarus sought the following primary reliefs:

(i) An injunction restraining the Defendant, whether by itself, or by its servants, agents or otherwise howsoever, from entering, remaining on, or otherwise trespassing on the land being part of land comprised in the Certificate of Title registered at Volume 1204 Folio 807 and 1204 Folio 806 of the Register Book of Titles.

(ii) A declaration that the Claimant has been in open and undisturbed possession of all the land registered at Volume 1204 Folio 807 of the Register Book of Titles in excess of twelve years and that the Defendant's title to such land has been extinguished pursuant to Section 30 of the Limitation of Actions Act.

(iii) A declaration that the Claimant has been in open and undisturbed possession of all the land registered at Volume 1204 Folio 807 of Register Book of Titles in excess of twelve years and that the Defendant's title to such land has been extinguished pursuant to Section 30 of the Limitation of Actions Act.

(iv) A Declaration that the Claimant is the owner of the estate in fee simple to all the lands called Riversdale in the parish of Saint Thomas and being the lands presently comprised in the Certificates of Title registered at Volume 1204 Folio 807 and Volume 1204 Folio 806.

(v) Further or alternatively, a Declaration that pursuant to section 45 of the Limitation of Actions Act the boundaries to the land comprised in Certificates of Title registered at Volume 1204 Folio 807 and Volume 1204 Folio 806 of the

Register Book of Titles have been acquiesced in and submitted to by the Defendant's predecessor in title for a period in excess of seven years and accordingly, this boundary is deemed to be the true boundary between the Claimant's land registered at Volume 1204 Folio 807 of the Register Book of Titles and the Defendant's land registered in Volume 1449 Folio 349.

(vi) An Order that the Defendant deliver up possession of all the land comprised in Certificate of Title registered at Volume 1204 Folio 807 and Volume 1204 Folio 806 of the Register Book of Titles to the Court forthwith.

(vii) An Order that the Defendant remove any fence which it has erected on the lands comprised in the Certificate of Title registered at Volume 1204 Folio 807 and Volume 1204 Folio 806 of the Register Book of Titles.

(viii) An Order that the Defendant deliver up the duplicate Certificate of Title registered at Volume 1449 Folio 349 of the Register Book of Titles and that the Registrar of Titles is directed to rectify the aforesaid Certificate of Title removing from that Certificate of Title any reference or description to any part of the lands now comprised in the Certificates of Title registered at Volume 1204Folio 807 and Volume 1204 Folio 806 of the Register Book of Titles.

(ix) Damages for trespass, inclusive of aggravated damages.

[7] During the hearing of the respective Claims before this Court in Chambers, pursuant to respective applications filed by Mr. Lazarus and RHIJL for Summary Judgment, which the parties' counsel agreed would, once decided upon by this Court, be determinative of the Claims, the counsel for the Defendant (RHIJL) applied on his client's behalf, to amend his client's Defence in respect of Claim No. 2011HCV05582, in order to allow for a plea of misrepresentation to be made as follows:

> *'The Defendant will further say that in support of his application to bring the Claimant's land under the Registration of Titles Act, the Claimant relied on a surveyor's plan which falsely represented the lands to the west as being owned by the Commissioner of Lands as being unregistered and the lands to the north as being owned by Charlie Manhertz and being unregistered.'*

Mr. Hylton has informed the Court that affidavit evidence has been deposed to by Ms. Tracey Long in support of this assertion and also Mr. Lazarus has specifically responded to this assertion in one of his Affidavits. Counsel for Mr. Lazarus has, however, strongly objected to the application for amendment on the ground that that application was made after the Claimant in that Claim, had already placed his oral arguments before the Court and that it therefore, could not be fair for the amendment as sought, to be granted as and when it was applied for – this having been during the defence's presentation of its oral arguments in respect of Claim No. 2011HCV05582. This Court had reserved its ruling on whether the amendment as sought, would be permitted and thus, will herein, render its ruling in relation thereto.

[8] Ms. Tracey Long, Attorney-at-Law, deposed to an Affidavit in respect of Claim No. 2011HCV05582. That Affidavit was filed on behalf of RHIJL on September 27, 2011. Paragraphs 12-17 of that Affidavit do indeed provide support for the proposed amended defence of RHIJL. That being such therefore, it is difficult, if not impossible for this Court to understand why it is that it wasn't until February 21, 2012, when the respective Applications for Summary Judgment were heard by this Court, that the Defendant only then found it necessary to seek this Court's permission to allow for its Defence to be amended, so as to plead misrepresentation. Worse yet, insofar as prejudice to the Claimant is concerned, is that even on February 21, 2011, the Defendant did not apply to amend its defence to include a plea of misrepresentation even at the onset of the Court hearing on that date. Instead, the Defendant only made its application for amendment after the Court had already heard the completed oral arguments of Mr. Lazarus. That delay is in and of itself, highly prejudicial to the Claimant in Claim No. 2011HCV05582. It is prejudicial because the Claimant in that Claim would not have expected to have had to meet this proposed amendment concerning a plea of misrepresentation. Although matters of fact related to the same were deposed to in respective Affidavits of both Mr. Lazarus and Ms. Long, Mr. Lazarus could not and would not have been expecting the issue of there being a misrepresentation of fact on a title, as is being alleged in Affidavit evidence as a matter

of fact, as also constituting another aspect of the defence being relied on by the Defendant as a matter of law, in Claim No. 2011HCV05582. Considered in that context and bearing in mind also, that no reason has been proffered to this Court as to why the amendment Application could not have been made earlier, in the circumstances, this Court is of the considered opinion that if the amendment as sought, were to be granted, the prejudice to the Claimant that would be caused thereby, could not be adequately compensated by an award of costs. In the circumstances, the amendment Application is denied.

[9] Finally, on the outline of the disputes between the parties to the respective Claims, it is to be noted that although served with the Claim Form and Particulars of Claim in Claim No. 2011HCV05503, the Registrar of Titles has not even acknowledged service thereof. Accordingly, the Registrar of Titles has also not filed a defence to that Claim. In the circumstances, it is clear to this Court that the Registrar of Titles is prepared to abide by whatever adjudication this Court may make with respect to this Claim without making an input which will assist in guiding this Court one way of the other in that regard. Whilst this is, at least to some extent, an understandable legal position for the Registrar of Titles to have taken, nonetheless, the Registrar should, if only as a matter of courtesy to the Court, not to mention also so as to enable the Registrar of Titles to instruct, counsel to hold at least, 'a watching brief,' in this matter, so as to possibly be able, if the Court had thought that any useful evidence could have been provided by that office, to provide whatever assistance to the Court may have been required in that regard, to have filed an Acknowledgement of Service and had counsel present at Court throughout the Court hearings in respect of this matter. Also, this was not done. It is hoped that in the future, such will not re-occur.

[10] It is not in dispute between the parties that Section 30 of the Limitation of Actions Act, makes it clear that as regards private land, if a party has been in open and undisturbed possession of the same, for a period in excess of twelve years, then the previous owner's right to that land, which he would otherwise have been the lawful owner of, is extinguished as soon as that twelve year period of open and undisturbed

possession has expired. This is what is known as 'adverse possession' and is referred to by this term, throughout the remainder of this Judgment. Adverse possession, however, does not arise simply as a consequence of open and undisturbed possession of another's land. There is far more required in order to prove adverse possession, than that. All of the requirements of same are set out further on, in this Judgment. In addition, it is the party who alleges that he has acquired legal rights to the property by means of adverse possession that has the burden of proof of same, in Court. The standard of proof required to be met in that regard is proof on a balance of probabilities. Thus in respect of Claim No. 2011HCV05582, it is the Claimant who, in alleging that he is entitled to be declared the owner of the lands registered at Volume 1204, Folio 807 and Volume 1204 Folio 806 respectively and that the Defendant's title to such lands have been extinguished by operation of Sections 3 and 30 of the Limitation of Actions Act, or in other words, as a consequence of the Claimant's alleged adverse possession of these parcels of land, that has the burden of proof in that regard.

[11] It is also not in dispute between the parties that where a boundary to land has been acquiesced in for a period in excess of seven years, the provisions of Section 45 of the Limitation of Actions Act, would operate such as to bar the successful pursuit of a claim that that boundary has been unlawfully established. It is Mr. Lazarus who, in Claim No. 2011HCV05582, has alleged that the boundaries to the land comprised in Certificates of Title registered at Volume 1204 Folio 807 and Volume 1204 Folio 806 of the Register Book of Titles, had been acquiesced in and submitted to, by the Defendant's predecessor in title, for a period in excess of seven years and accordingly, that this boundary, is deemed to be the true boundary between the Claimant's land registered at Volume 1204, Folio 807 of the Register Book of Titles and the Defendant's land registered at Volume 1449 Folio 349 of the Register Book of Titles. In that respect, the burden of proof also rests entirely on the Claimant's shoulders and the standard of proof to be met by the Claimant in respect thereto, is proof on a balance of probabilities.

[12] On the matter of acquiescence, there are two issues which will have to be determined by this Court for the purposes of this case and these are as follows:

(i) Can the acquiescence of the Defendant's predecessor in title, suffice to preclude the Defendant from challenging that which is alleged to be the boundary between the relevant land parcels?

(ii) Did the Defendant's predecessor in title 'acquiesce' (as that term is understood in law), to the relevant boundary? These two issues will also be addressed in some detail, further on in this Judgment.

[13] In **Japye (Oxford) Ltd. and another v Graham and another** [2002] 3 ALL ER 865, the House of Lords provided useful guidance which has since been adopted and applied by Jamaica's Court of Appeal as to what constitutes legal possession and the *ratio decidendi* of that case was specifically approved of and applied by the Privy Council in **Wills v Wills,** a case which emanated from Jamaica and a few other Court of Appeal and Supreme Court's Judgments. The citation for **Wills v Wills** is [2003] 64 W.I.R. 176. In **Pye and Graham**, it was made clear that mere physical possession (factual possession) of property is not enough to establish a Claim to possession adverse to that of the paper owner's possession thereof. In addition, the requisite intention to possess or '*animus possidendi*' must be shown.

[14] Insofar as factual possession (factum possessionis) is concerned what is required to be proven is that there have been acts of physical custody and control of the land, or some degree of physical occupation of the land. In that regard, the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest...are to be taken into account in determining the sufficiency of a possession – **Lord Advocate v Lord Lovat** [1879-80] L.R.5 App. case 273, at p. 288. As stated by Sampson Owusu, in **the text-Commonwealth Caribbean Land Law,** at pp. 283 – 284:

> *'The character and sufficiency or degree of user necessary to constitute possession so as to pass title under the statute therefore depends on many factors and thus renders the concept a relative term. It is a*

question of fact depending on all the circumstances of the case, not only on the physical characteristics of the land, the appropriate and natural uses to which it can be put, but also the conditions and the habits and ideas of the people of the locality, and even to a greater extent, the course of conduct reasonably expected of an owner of that type of property having due regard to his interests. Consequently, acts of possession which may amount to possession in one case may be wholly insufficient to constitute possession in another.'

Thus, the contrasting Court determinations, in cases of similar facts, both of which cases were ultimately adjudicated upon by the Privy Council, albeit from different jurisdictions, the first being from Ceylon (now Sri-Lanka) and the other being from Guyana – **Cadija Umma v S. Don Mavis Appu** [1966] 3 W.L.R. 750 and **West Bank Estates Ltd. v Shakespeare Cornelius Arthur and Ors.** (1966) 3 ALL E.R. 750 esp. at pp. 757-758.

[15] Fencing land, as also, putting a land to cultivation on a permanent basis, constitute distinct acts signifying possession. See **Marshall v Taylor** [1895] 1 Ch. 641 and **Williams Brothers Ltd. v Raftery** [1957] 3 ALL E.R. 593. Again though, because everything in terms of what constitutes factual possession as a matter of law, is relative, it does not in all cases, follow automatically that where a fence has been erected on land by someone other than the paper owner, that this will, regardless of the other circumstances and/or regardless of the reason why that fence was built, be determined by a Court as being sufficient to constitute factual possession. See **Basildon v Charge** [1996] C.L.Y. 4929.

[16] It has also been stated by Sampson Owusu in his text (op. cit.), as follows:

'Such acts which are incompatible or inconsistent with the due recognition of the title of the owner constitute adverse possession. They should effectively exclude the possession of the true owner. The concept does not import any element of aggression, hostility or subterfuge as the word

> *'adverse' suggests. It is a word used to descried conveniently a situation where the land falls into the possession of some person other than the true owner under circumstances in which the true owner can treat that other person as a trespasser who is asserting a claim of right, or under circumstances which cannot be explained in a way which is consistent with the title of the paper owner.' (P .280)*

[17] In the same text from Mr. Owusu, he goes on to state:

> *'Acts done on a portion of land only can serve as evidence of the possession of the whole. A title founded on adverse possession is normally limited to that area of which actual possession has been enjoyed. The law does not presume in favour of a person who is wrongfully in possession that his possession goes far beyond the ambit of the area of which he is in actual possession. He cannot be adjudged as being constructively in possession of an area wider than the area in which actual possession has been enjoyed. For the law will not make a presumption in favour of a wrongdoer against a rightful owner. The Courts would, however, uphold a title by adverse possession to the whole parcel of land which only a portion was in possession of the intruder, provided as it was observed in* ***Lord Advocate v Blantyre*** *[1879] 4 App case. 770, esp. at p. 791, there was such a common character of locality as would justify the inference that if the intruder possesses one part as an owner he possessed the whole, considering the nature of the property and the kind of possession which could be had of it and the acts of possession established in relation to the property.'*

[18] As earlier stated and now reiterated at this juncture, the person claiming title by adverse possession, has the burden of proof. 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. On this point, see **Basildon v Charge** (op. cit.).

[19] Insofar as the intention to possess is concerned, this is required to be proven as a separate element by one who seeks to obtain title by means of adverse possession, in that regard though, it is important to note that the emphasis is on an intention to possess, as distinct from an intention to own or acquire ownership. On this point, see **Buckinghamshire County Council v Moran** [1990] Ch. 623 at p. 642. As stated in **Powell v McFarlane by Slide J.** [1977] 38 P. C.R. 452, at p. 471, there should be an:

> *'Intention in one's name and on one's own 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 process of the law will allow.'*

It should be evident that the squatter had an intention to exclude everybody from the disputed plot, including the paper owner.

[20] For the purposes of the case at hand, 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 cannot therefore be fatal to a claim to title by adverse possession under the Limitation of Actions Act. See **Palfrey v Palfrey** [1974] E.G.D. 711; **Pulleyn v Hall Aggregates** [1992] 65 P. & C.R. 2766 and **Bristow v Mathers** [1990] 74 D. L. R. (4th) 445. It probably will be though, that where there is mutual misapprehension by the parties as to the legal boundary between their properties, unequivocal acts of possession may be required for the purpose of acquiring title by adverse possession. This is why the Claimant ultimately failed to succeed in the **Pulleyn** case (op. cit.), since in that case the Claimant's actions were not considered to be unequivocally sufficient to dispossess the paper owner of title. Thus, a squatter does not have to know that he is on someone else's land, in order for the limitation time to run. It is also unnecessary for it to be shown that the squatter did subjectively intend, with the knowledge of the rights of the paper owner present to his mind, to occupy the land in defiance or denial of those rights. In such a scenario, however, the alleged acts denoting possession and an

intention to possess, must be all the more open and unequivocal. This requirement offers the true owner, the best opportunity to assert his right to that land.

[21] Finally on the law in terms of adverse possession, it must also be recognized that the possession of the person seeking title by means of adverse possession must be exclusive. There must be dispossession of the paper owner's land. Thus, as stated in **Halsbury's Laws,** 2nd ed., Vol. 20, at paragraph 899:

> *'Dispossession is where a person comes in and puts another out of possession, discontinuance of possession is where the person in possession goes out and another person takes possession. The true test whether a rightful owner has been dispossessed or not is whether 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.'*

With respect to a claim for title based on adverse possession, therefore, dispossession of the then rightful owner of the land is what is required. Mere non-use of the land by the then rightful owner is not enough. This is why the acts of possession of the person seeking to claim title based on adverse possession must be continuous and open. Such acts will then go to show not only that the rightful land owner has discontinued possession, but rather, that that rightful land owner has been dispossessed of the land in question.

[22] Moving away from the law as regards adverse possession and moving on briefly to address the law as regards trespass, perhaps the simplest means by which a trespass to land can be explained is that the same arises wherein there has been an unjustifiable interference with possession of land. Contrary to popular belief, trespass is not a criminal offence in Jamaica, and cannot be a criminal offence in the absence of a

particular statutory provision which makes it so. Thus, the familiar notice placed in Jamaica on a notice on a wooden stake, that 'Trespassers will be prosecuted' is nothing more than a hollow wooden notice, or wooden falsehood (pun intended). It is clear that no proof of either intention or negligence on the part of the alleged wrongdoer is necessary in order to prove trespass to land, this unlike trespass to the person, which requires proof of intention. Thus, it is clear law that an entry upon another's land is tortious whether or not an entrant knows that he is trespassing – **Conway v George Wimpey and Company Limited** [1951] 2 K.B. 266, at paragraph 273-274; **and Jolliffe v Willmott & Co.** [1971] 1 ALL E.R. 478. Thus, it is no defence that the only reason for his entry was that he had lost his way or even that he genuinely but erroneously believed that the land was his. See **Basely v Clarkson** [1682] 3 Lev. 37. It follows that a person intentionally enters another's land if that person consciously places themselves on what later proves to be that other's land, even though that person neither knew or even could not reasonably have known that it was not his land. Notwithstanding this though, even in the absence of intention or negligence, tortious liability for trespass to land will nonetheless result, once unauthorized entry upon another's land exists, or has existed.

[23] Trespass consists of a direct, as opposed to a consequential injury to land. Thus, the planting of a tree on another's land is trespass, whereas, the planting of a tree on one's own land, with the roots of that tree extending over to the neighbour's land, would not constitute trespass, but may be actionable in nuisance, upon proof of damage. Trespass is, on the other hand, actionable per se, or in other words, without proof of any damage or loss on part of the Claimant who is the land owner or person lawfully in possession thereof.

[24] From this brief outline, it is abundantly clear that damages must be assessed by this Court, arising from RHIJL being liable to Mr. Lazarus for the tort of trespass, insofar as the placement by RHIJL of a fence on Mr. Lazarus' land is concerned. The length of time for which the fence remained extant, will be an important consideration, though by no means the only one, for this Court at that assessment of damages hearing.

[25] Another matter to be addressed in this case, concerns alleged acquiescence to a boundary and in that regard, Mr. Lazarus is the person who has alleged and is thus relying on the same. Section 45 of the Limitation of Actions Act is relied on in that regard. For all relevant purposes, the portion of Section 45 which requires careful consideration by this Court, reads as follows:

> *'In all cases where the lands of several proprietors bind or have bound upon each other, and a reputed boundary hath been or shall be acquiesced in and submitted to by the several proprietors owning such land, or the persons under whom such proprietors claim, for the space of seven years together, such reputed boundary shall for ever be deemed and adjudged to be the true boundary between such proprietors; and such reputed boundary shall and may be given in evidence upon the general issue, in all trials to be had or held concerning lands, or the boundaries of the same, any law, custom or usage to the contrary in anywise notwithstanding….'*

[26] 'Acquiescence' is typically relied on in claims to land, based on the now well-established equitable doctrine of proprietary estoppel. In the case at hand though, what is instead being relied on by Mr. Lazarus, is not that equitable doctrine, but rather on the express provisions of Section 45 of the Limitation of Actions Act which expressly uses therein, the words, 'acquiesced in.' What then constitutes 'acquiescence' in this regard? **The Oxford Dictionary** (Revised 10th Edition) has defined the term, **'acquiesce'** as meaning – **'accept or consent to something without protest.'** The definition given to the term "acquiescence" as a matter of equity, pursuant to the doctrine of proprietary estoppel, is, of necessity at this time, broader in scope than the natural and ordinary meaning of the definition given to any statutory term, 'acquiesce.' The reason why it is now broader in scope in equity than it would be by statute, is that a statutory definition must, by its very nature, have far more certainty attached to it than even an established doctrine of equity. This is because, by its very nature, equity requires flexibility to meet the circumstances of each particular case. This would not, however, mean that when Section 45 was enacted by the Jamaica Parliament, the draftsman would not have

considered the essence of the equitable doctrine of proprietary estoppels or acquiescence, as that term would have been than understood and applied by the Courts. It is to be expected therefore, that provided the natural and ordinary meaning of the term 'acquiescence' is not palpably inconsistent with the manner in which that term was defined and applied by Courts as at the time when Section 45 of Limitation of Actions Act would have been enacted, then the definition and application of the term 'acquiescence' by those Courts should guide this Court now, in defining that statutory term, this even though those Courts were not then defining a statutory term, but instead, were concluding upon a equitable remedy.

[27] In **Wills v Wills** (op. cit.) at paragraph 14, the Court, in its Judgment stated as follows:

> *'The Limitation of Actions Act of Jamaica was enacted in 1881. Its provisions correspond to those of the English Real Property Limitation Act 1833 ('The 1833 Act'), as amended by the Real Property Limitation Actions Act 1874 (which reduced the statutory period from 20 years to 12 years).'*

[28] From as long ago as 1880, in the case of **Willmott v Barber** – [1880] 15 Ch. D. 96, Fry J. deduced from the then existing authorities, the following principles as regards the doctrine of acquiescence, which is otherwise known as the doctrine of proprietary estoppel. Those principles are as follows:

1) In the first place, the plaintiff must have made a mistake as to his legal rights.

2) The plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) or suffered some detriment on the faith of his mistaken belief.

3) The defendant being the possessor of the legal right must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights.

4) The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights.

5) The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right.

[29] In order to establish the doctrine of acquiescence successfully, all of the five conditions mentioned in the previous paragraph of this Judgment must be satisfactorily proven on this point, see **Matharu v Matharu** [1994] P. and C.R. 93.

[30] In the case of **Nwakobi v Nzekwu** [1964] 1 W.L.R. 1019, it was made clear by the Privy Council that if the developer, representee, has full knowledge of all the relevant facts and the true state of affairs relating to the land, the doctrine of acquiescence/proprietary estoppel, would not apply in his favour. Also, in **Pilling v Armatage** [1806] 33 E.R. 31, at page 33, Ld. Grant (M.R.), stated that it should be a:

> *'Case which supposes a total absence of title on one side, implying therefore, that the act must be done of necessity under the influence of mistake; and undoubtedly it may be expected, that the party should advertise to the other, that he is acting under a mistake. But I do not know any case in which a lessee... making any improvement upon the estate in his possession, though with the complete knowledge of the landlord, has been held entitled as against the landlord to have his lease prolonged, until he shall obtain reimbursement for the improvements he has made; for (he) has title, of which he knows the duration. He is not under a mistake as to the nature of his title.'*

[31] The owner/representor cannot be said to have encouraged where he does not know of his interest in the property and that the acts of the developer were inconsistent with his rights. This is because, the element of 'fraud' which would induce equity to

intervene, arises from the existence of such knowledge. The doctrine cannot be established to defeat the owner's right, if such knowledge on the owner's part, cannot be established. See **Derrick v Mohammed** [1960] 2 W.I.R. 353.

[32] There has, however, since the early 1980's commencing with the case – **Taylor Fashions Ltd. v Liverpool Victoria Trustees Co. Ltd.** [1982] 2 W.L.R. 576, been a marked shift away from the stringency of the requirements as per conditions numbers 3 and 4 as specified in paragraph 28 of this Judgment and expounded upon in paragraph 31 hereof. The new rule was specified by Oliver J. at page 593 of his Judgment as delivered on the Court's behalf in that case, as being:

> *'Simply whether in all the circumstances of the case, it was unconscionable for the defendants to seek to take advantage of the mistake, which, at the material time, everybody shared.'*

This principle was adopted in **Amalgamated Investment and Property Company Ltd. (in liquidation) v Texas Commerce International Bank Ltd. [**1981] 3 W.L.R. 577 **and** also in **Re Basham** [1986] 1 W.L.R. 1498.

[33] Where the owner of the property refrains from alerting the developer to his mistaken belief and by his silence, suffers the developer to make improvements to the property, the owner will be estopped from denying the impression created by his silence. This is because, no doubt, as was stated by Lord Eldon in **Dann v Spurrier** [1802] 32 E.R. 94, at page 95:

> *'The circumstances of looking on is in many cases as strong as using terms of encouragement.'*

[34] It should be noted, however, that in my view, a person cannot either actively encourage another to develop land based on that other's mistaken belief, nor can one passively encourage another, when one is not aware of one's own rights. Nurse L.J. made this point when he stated in **Brinnard v Ewens** [198] 19 H.L.R. 415, at page 418, that: **'***You cannot encourage a belief of which you do not have any knowledge.'* The

judgment of the Court in the **Taylor Fashions** case therefore, has also modified condition No. 5 as above (paragraph 28 hereof). Thus, it seems, in my view, that there no longer need be, in all cases, either active or passive encouragement by the Defendant. The Court must instead consider, whether, it was unconscionable in all the circumstances of the case, for the Defendant to be permitted to retain his interest in the property.

[35] Applying all of the aforementioned learning to the relevant statutory provision in the case at hand, that being Section 45 of the Limitation of Actions Act , the question to be decided is, how is the term 'acquiescence' as used in that Section of that Act, to be interpreted? Should it be interpreted as widely as it now is in cases of equity, particularly ever since the Court's decision in the **Taylor Fashions** case, or should it be interpreted and applied rather more narrowly, as per the dictionary definition of the term, 'acquiescence,' which is more in accordance with the principles as had, prior to the **Taylor Fashions** case become, by then, well established? This is a question which will be answered later on in this Judgment, in the context of the Claimant's Application for Summary Judgment, bearing in mind that it is the Defendant's contention that the Claimant's predecessor in title could not have acquiesced to that, in terms of the boundary between the properties, which he did not know of. Prior to directly addressing that issue, however, this Court must now go on to set out, in brief, the legal principles governing the circumstances in which this Court is empowered to grant Summary Judgment.

[36] The respective disputing parties in the respective Claims have each applied for Summary Judgment. This is somewhat unusual, but then, this is by no means a typical case. Rule 15.2 of the Civil Procedure Rules, provides that:

> *'The Court may give Summary Judgment on the Claim or on a particular issue if, it considers that- (a) the Claimant has no real prospect of succeeding on the claim or the issue; or (b) the defendant has no real prospect of successfully defending the Claim or the issue.'*

There are certain types of proceedings in respect of which Summary Judgment cannot be obtained. One of those types of proceedings is proceedings by way of Fixed Date Claim. In order to obtain Summary Judgment, notice of application for such must be filed. That notice is required to identify the issues which it is proposed that the Court should deal with at the hearing of the application for Summary Judgment. This Court can, however, exercise its powers without such notice, at any case management conference. Of course, this Court can, at any stage of these Court proceedings exercise its case management powers. See Rules 15.3 and 15.4 (3), (4) and (5) and 26.1 (2) and (4) on these points.

[37] Bearing in mind that Summary Judgment cannot be obtained in a Fixed Date Claim matter, what this means for this consolidated case, is that Claim No. 2011 HCV05503, which is a Fixed Date Claim instituted by RHIJL, is not one in respect of which Summary Judgment can be granted. Therefore, Fixed Date Claim No. 2011HCV 05503 would have to proceed to trial, unless Judgment were to be entered in the Claimant's favour in Claim No. 2011HCV05582. RHIJL though, no doubt fully aware of this, did not apply for Summary Judgment in respect of Claim No. 2011HCV05503. Instead, the same was applied for in respect of the Claim instituted by Carl Lazarus by means of Claim Form, that being Claim No. 2011HCV05582. As stated above, interestingly enough, Mr. Lazarus has also applied for Summary Judgment in respect of that Claim of his. There are a few issues which arise to be determined by this Court, arising from each of these applications for Summary Judgment. They are as follows:

i) Where a party claiming relief in terms of a Declaration as to title, on the basis of adverse possession of property in dispute in Court proceedings, had at all material times, title to that property, can such relief, on the ground of adverse possession, properly be granted by this Court?

ii) If such relief can be granted, is the nature of the evidence led in support of the Claim and/or the Claimant's application, for title to be declared in his favour, on the ground of adverse possessing, such that the same ought to be declared by

means of Summary Judgment and thus without requiring the Claimant and his claim to undergo a trial?

iii) Can a party obtain relief under Section 45 of the Limitation of Actions of Act, insofar as acquiescence to a boundary is concerned, in a circumstance wherein the party who allegedly acquiesced to the placement of the relevant boundary as and where such was placed, did not know of the existence of such boundary?

iv) Is the evidence led by Mr. Lazarus in support of his Claim, insofar as that alleged acquiescence is concerned, such that Summary Judgment ought to be granted in favour of either Mr. Lazarus or RHIJL in respect of that Claim?

[38] In determining whether Summary Judgment ought to be granted, the test to be applied is whether the statement of case in respect of which Summary Judgment is sought, has a real prospect of success. Thus, insofar as Claim No. 2011HCV05582 is concerned in the case at hand, both parties are contending that, on the one hand, the Claimant's Claim has no real prospect of success (this being RHIJL's contention) and on the other hand, that the Defendant's defence, has no real prospect of success. It is the respective applicants for Summary Judgment in the case at hand, who bear the burden of proof in this regard. See **ED and F Man Liquid Products Ltd. v Patel** [2003] CPLR 384. In order to have a real prospect of success, a case has to carry some degree of conviction and has to be stronger than merely arguable. See **Bee v Jenson** [2007] RTR 9.

[39] It is worthwhile quoting somewhat extensively, from the lucid summary provided in the text, **A Practical Approach to Civil Procedure** as authored by Stuart Sime, 12th ed., 2009, as to the circumstances in which Summary Judgment both ought and ought not to be granted. In paragraphs 21.18 – 21.21 of that text, the following is stated:

> *'An application for Summary Jjudgment is decided applying the test of whether the respondent has a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly. The question of*

*whether there is a real prospect of success is not approached by applying the balance of probabilities standard of proof required at trial (**Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297). At the other end of the range applying a test of whether the claim is arguable will also give grounds for appeal because this is too lax (**Sinclair v Chief Constable of West Yorkshire** [2000] LTL 12/12/00.... In **Swain v Hillman** [2001] 1 All E.R. 91, Lord Woolf MR said that the words 'no real prospect of succeeding' did not need any amplification as they spoke for themselves. The word 'Real' directed the Court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success.*
*The phrase does not mean 'real and substantial' prospect of success. Nor does it mean that Summary Judgment will be granted only if the claim or defence is bound to be dismissed at trial.' If the Defendant's defence, taken at its highest, shows a distinctly improbable defence, it is right to enter Summary Judgment (**Akinlage v East Sussex Hospitals NHS Trust** [2008] LS law Med 216). Lord Woolf MR went on to say in **Swain v Hillman** that Summary Judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. If the Respondent's case has some prospects of success, Summary Judgment should be refused. (**Cotton v Rickard Metals Inc** [2008] EWHC 824 (QB).' (Para.* 21.19)

[40] A Defendant may seek to show a defence with a real prospect of success by setting up:

'(a) a substantive defence, example *volenti non fit injuria*, frustration, illegality, et cetera.

(b) a point of law destroying the Claimant's cause of action.

(c) a denial of the facts supporting the Claimant's cause of action ...' (Para. 21.20)

[41] *'Most Summary Judgment applications are decided on the basis of the facts which are not disputed by the Respondent, together with the Respondent's version*

> *of the disputed facts (**HRH Prince of Wales v Associated Newspapers Ltd**. [2008] Ch. 57). This does not mean that filing a witness statement will prevent Summary Judgment being entered. This is because there are as discussed at 20.58, cases where the Court will go behind written evidence which is incredible and the Court will disregard fanciful claims and defences. A claim or defence may be fanciful where it is entirely without substance, or where it is clear beyond question that the statement of case is contradicted by all the documents or other material on which it is based (**Three Rivers District Council v Bank of England** (No.3) [2003] 2 A.C. 1. There is no rule of practice that Summary Judgment cannot be given if a case is weak despite there being some documentary evidence in support (**Miller v Garton Shires** [2007] R.T.R. 24). The judge should take into account the filed witness statements and also consider whether the case is capable of being supplemented by evidence at trial (**Royal Brompton Hospital NHS Trust v Hammond** [2001] BLR 297.' (Para. 21.21)*

[42] Where the Court hearing the application for Summary Judgment decides that either the claim or defence as put forward is fanciful and thus, no more than a mere sham, Summary Judgment ought to be entered, as was, for example, done in – **United Bank v Asif** [2000] LTL 11/2/00, C.A.). The same should also be done in cases wherein there are either no primary facts being led in evidence, or which can be led in evidence, to support a party's claim or another party's defence, as for example was the case in – **P&S Amusements Ltd. v Valley House Leisure Ltd.** [2006] EWHC 1510 (Ch).

[43] Where the facts of a case are disputed though, a Summary Judgment hearing should not be utilized either by a party or by the Court, as a means of essentially, under the cloak of such an interlocutory hearing (as would be a Summary Judgment hearing), engaging in a trial of those disputed facts, so as to thereupon resolve those disputed facts without undergoing a trial. See **Cotton v Rickard Metals Inc.** [2008] EWHC 824 (QB). There may, however, be occasions, and the case at hand may very well be considered to be one such, wherein the court has to consider fairly voluminous

evidence before it can understand and fully appreciate whether or not a party's statement of case has any real prospect of success. Provided that this will not require any prolonged argument, then such contentions are not inappropriate for pursuit upon a Summary Judgment hearing. See **Miles v ITV Networks Ltd,** [2003] LTL 8/12/03 **and Three Rivers District Council v Bank of England** (No. 3) (op.cit.).

[44] Turning back now in order to apply the stated principles of law regarding Summary Judgment, to the case at hand, what is immediately clear, is that firstly, Mr. Lazarus is contending that based on the evidence as would be expected to be led both by him and by others at trial, in support of his claim for a declaration of title based on the law regarding adverse possession and that which he also contends is the lack of any palpable defence placed before this Court by RHIJL in response thereto, whether as a matter of law or as a matter of fact, which should result in his being awarded Summary Judgment in respect of Claim No. 2011HCV05582. In response to those contentions, RHIJL has, in turn, contended in Affidavit evidence which exists before this Court in the consolidated claims, one of which, (Claim No. 2011HCV05503) is a Fixed Date Claim and thus, the evidence-in-chief at trial would consist, at least in large measure, this assuming that amplification by means of evidence given *viva voce* and under oath at trial, were to be permitted by this Court to be given, of such Affidavit evidence, that the facts which would be required at a trial, to be proven by Mr. Lazarus in order to support his claim for title based on adverse possession in terms of Sections 3 and 30 of the Limitation of Actions Act, are disputed. Upon the Summary Judgment hearing before me, counsel for RHIJL did not lay any emphasis on this point and this is no doubt why the respective parties' counsel were both agreed that this Court can render an adjudication upon the respective parties' Summary Judgment Applications in Claim No. 2011HCV05582, which will then, regardless of the determination made by the Court with respect thereto, obviate the need for a trial. If however, there exists a dispute on facts which Mr. Lazarus is, in Claim No. 2011HCV05582, relying on to support his claim for a declaration of title based on the law regarding adverse possession and that factual dispute is not of a fanciful nature, then the only place and time at which such a factual dispute can properly be resolved, is at trial. Thus, this Court must address its rnind to

the relevant disputes of fact on Mr. Lazarus' Claim for title to the disputed land to be awarded to him by Order of this Court, pursuant to the provisions of Sections 3 and 30 of the Limitation of Actions Act.

[45] Secondly, in respect of the adverse possession contentions of Mr. Lazarus, an important issue of law must be determined by this Court for the purposes of determining this Summary Judgment application. It is issue No. (i) which I have already set out at paragraph 37 of this Judgment and therefore, will not repeat. If that legal issue is decided upon in RHIJL's favour, then of course, there will be no need to give any consideration to any disputed facts, for any purpose whatsoever. On the other hand, if that legal issue were to be decided upon in Mr. Lazarus' favour, then this Court must, have regard to the disputed facts, albeit not for the purpose of resolving the same as though this Court had earlier embarked upon a trial of this matter, but instead, for the purpose of deciding on whether either Mr. Lazarus' or RHIJL's case on the adverse possession aspect thereof, is fanciful and thus, has no real prospect of success.

[46] Thirdly, Mr. Lazarus has raised, as regards the boundary, this being a fence, which now exists in relation to the disputed property and which was placed on the disputed property by Mr. Lazarus, at a time when RHIJL had not yet received title to same, as that title was then recorded in favour of RHIJL's predecessor in title – Mr. Clinton McGann, acquiescence by Mr. McGann to that boundary, as now precluding RHIJL from successfully contending that Mr. Lazarus is not entitled to be declared as the lawful owner of the land as occupied and utilized by Mr. Lazarus, within the perimeters of that boundary. Mr. Lazarus has placed reliance on Section 45 of the Limitation of Actions Act, in support of this proposition.

[47] In response to the acquiescence contentions of Mr. Lazarus, RHIJL has contended that Mr. McGann could not have acquiesced to a boundary that he did not know about and that as there is no evidence that he knew about the relevant boundary, either for the requisite period of time under the Limitation of Actions Act, that being seven years, or at all, then the law *vis-à-vis* acquiescence cannot properly be applied in

Mr. Lazarus' favour, in the case at hand. Thus, on this legal point, this Court must determine whether RHIJL's legal contention that a person cannot acquiesce to something that such person does not know about, is correct in law, insofar as Section 45 of the Limitation of Actions Act is concerned and then go on to determine whether the evidence as would as expected to be led a trial – if a trial were to later be held, is such as is not fanciful and goes to show that Mr. McGann did not only know about the existence of the relevant boundary, but acquiesced to the same. If that be so, then Summary Judgment must be entered in Mr. Lazarus's favour, arising from this point. On the other hand though, if a person cannot acquiesce to what one does not know about and there is no proposed evidence of at least a fairly substantial, as distinct from a fanciful nature, to show that Mr. McGann knew about the relevant boundary, then, of necessity, Summary Judgment on this, which is placed before this Court, as an alternative aspect of Mr. Lazarus' statement of case, must be awarded in favour of RHIJL.

[48] Reference must now be made for the purposes of this Judgment, to relevant aspects of Jamaica's Registration of Titles Act. This case is one in which both RHIJL and Mr. Lazarus are the respective holders of separate titles to the disputed property. This is what is commonly known as dual registration. Without reciting all of the undisputed facts as are pertinent to such dual registration in this case, suffice it to state that there exists approximately nine acres of land which is located in the parish of St. Thomas, which both falls within Mr. Lazarus' title which is registered at Volume 1204, Folio 807 and in RHIJL's title which is registered at Volume 1449, Folio 349. Thus, both parties are seeking rectification of each other's title to the disputed property. So far as is relevant in that regard, Section 153 of the Registration of Titles Act, provides as follows:

> *'In case it shall appear to the satisfaction of the Registrar that any certificate of title or instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error on any certificate of title or instrument, or that any certificate, instrument, entry or endorsement, has been*

fraudulently or wrongfully obtained, or that any certificate or instrument is fraudulently or wrongfully retained, he may in writing require the person to whom such document has been so issued, or by whom it has been so obtained or is retained, to deliver up the same for the purpose of being cancelled or corrected, or given to the proper party as the case may require....'

The issue of proposed rectification of title is an issue, which only requires determination by this Court, if Mr. Lazarus is unsuccessful in his respective contentions *vis-à-vis* adverse possession and acquiescence, insofar as the respective parties' applications for Summary Judgment are concerned. If he is unsuccessful in that regard, then this Court will have to go on to consider whether, as at this stage, upon Applications for Summary Judgment as made by the respective parties, based upon the issues to be determined in that regard, Summary Judgment can properly be granted to either party in respect of rectification of title. If this Court takes the view that such can be granted, this Court will then have to go on to consider the evidence proposed evidence that exists in relation thereto and make a determination as to in whose favour, Summary Judgment ought to be granted on the aspect of proposed rectification of title.

[49] Turning back now, to the issue of adverse possession, this Court takes the view that it is correct to state that, insofar as RHIJL's title to the disputed land, having been obtained prior to the title for same which was obtained by Mr. Lazarus, is the title which ought, by virtue of the provisions of Section 70 of the Registration of Titles Act, to be viewed by this Court now, as the only valid title which exists in relation to the disputed property. Section 70 of the Registration of Titles Act provides as follows:

'Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate

and to such encumbrances as may be notified on the folium of the register book by his certificate of title, but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title.....'

[50] In the case at hand, Clinton McGann became the owner of the 300 acres of disputed land which is located in the parish of St. Thomas, by virtue of the first registered title issued in respect thereof, which was issued by the Registrar of Titles, in April of 1978. RHIJL purchased that property from Mr. McGann in March of 2011 and is not the title holder for same. In March of 1987, the Registrar of Titles issued title to Mr. Lazarus, for that which is described in this Judgment as 'the Lazarus' Property.' That property adjoins Windsor Lodge and 8.92 acres of land, which is described herein as 'the disputed property,' is included in the respective certificates of title for both properties.

[51] What this means therefore, is that in respect of the disputed property, RHIJL's title having been obtained by purchase from Mr. Clinton McGann, is, subject only to rights to that land as may have been acquired subsequent to the first registration of that land by virtue of the operation of the statute of limitations and/or to fraud and thus, RHIJL is entitled to the entire benefit of the land as purchased from Mr. McGann, other than to the extent of any qualification as may be specified in the certificate of title and subject to any encumbrances as noted on the title at the time of transfer.

[52] In this case, no fraud is being alleged and therefore, it is RHIJL that is currently in possession of the only valid title to the disputed property. By 'valid title' in this regard, I mean, the only title which should be considered as legally operative and lawful, at this time, as it is RHIJL's title which must take priority over Mr. Lazarus' title. I do not understand that there exists any dispute between the parties in this regard. This is why Mr. Lazarus instead relies on the operation of Sections 3, 30 and 45 of the Limitation of Actions Act to request that this Court at this stage, by means of Summary Judgment, grant him the reliefs sought as to declaration of title.

[53] With this in mind, this Court is of the considered opinion that Mr. Lazarus does not presently have 'lawful title' to the relevant property and thus, can properly seek to obtain a Declaration of Title through this Court, if he can properly satisfy this Court that the relevant provisions of the Limitation of Actions Act, should be applied in his favour. Thus, this Court does not at all disagree with the well-established proposition that a person with a 'lawful title' cannot also claim, at the same time, title to that property, based on the law of adverse possession. Law Lords in the United Kingdom have stated this proposition, time and time again, referring to a person with 'lawful title' being unable to successful rely on adverse possession. See **Ramnarace v Lutchman** ([2001] UK PC 24, per Ld. Millett, at paragraph 10. **Thomas v Thomas,** per Page Wood V.C. [1855] 2 - K & J 79, at p. 83 **and Moses v Lovegrove** [1952] 2 Q.B. 533, at pp. 539 – 540. This is an undoubtedly logical and sound legal proposition. No doubt though, it is to be distinguished from a situation involving a person who seeks to rely on adverse possession in a circumstance wherein that person has title, but such title is not a lawful one, for whatever reason. In such a circumstance, this Court can see no reason why a Claim for declaration of title based on the law related to adverse possession, cannot properly be relied upon. No doubt, this is why it is not merely stated by Judges that possession cannot be adverse if it can be referred to a title. The word 'lawful' is used to qualify the word 'title' in that regard and that qualification is of importance for that purpose and ought not to be disregarded.

[54] On this point though, there is one other matter of significance, which is – Since it is only now being determined by this Court that Mr. Lazarus' title is not a lawful one, from whom does or did time begin to run against the lawful title holder (RHIJL), for the purpose of the law of adverse possession *vis-à-vis* the Limitation of Actions Act. This Court takes the view that Mr. Lazarus' title as and when it was obtained by him was not a valid one, this although he then, no doubt, believed that it was. Time therefore, would have been running as against the lawful title holder, this being RHIJL, anytime after first registration of title, when Mr. Lazarus began to take action in relation to that land which clearly evinced his intention to exclusively possess and utilize the same. According to

Mr. Lazarus and his witnesses, this was ever since 1985 and between then and July 2011, Mr. Lazarus remained in open and undisturbed possession of the disputed land. RHIJL it should be recalled, did not become a lawful title holder in relation to the disputed land, until March of 2011.

[55] This Court accepts that a person, even when acting on a view that he has title to land, only at a much later stage having realized that such view is a mistaken one, is nonetheless entitled to rely on his actions in relation to that land, as evidencing his entitlement to claim, through this Court that he be declared title holder by way of adverse possession. See **Palfrey v Palfrey** (op. cit.) **and Bristow v Mathers** (op. cit.)

[56] This Court also accepts that, the actions of Mr. Lazarus, as alleged by several witnesses, in relation to the disputed land, if not seriously contended against, insofar as the proposed evidence at trial as is expected to be led by RHIJL is concerned, are more than sufficient to establish that Mr. Lazarus is entitled to the disputed land by way of adverse possession. This primarily because, according to Mr. Lazarus and his witnesses' proposed evidence at trial is concerned, what such proposed evidence clearly shows, is that Mr. Lazarus and his employees, built on that property, a fence and stone walls and a concrete house, as well as a storeroom with a shed. That land was also used to grow crops such as coffee and citrus. All of these things have been either done or going on, from ever since 1985 and evidence, both an open and undisturbed possession of the disputed land by Mr. Lazarus ever since then, but also, on his part, an intention to possess the same, to the exclusion of others.

[57] Is there though, any proposed evidence capable of belief and which therefore should be left for resolution by the presiding judge at trial, which would be expected to be relied on by the Defendant if this matter were to go to trial? Or is there evidence led by the Defendant in respect of the Defendant's application for Summary Judgment, which should be left for resolution at a trial? This is important, because if so, then Summary Judgment ought not to be granted.

[58] In paragraph 8 of its defence to Mr. Lazarus' claim, RHIJL has contended as follows:

> (i) They deny that the Claimant has been in open and undisturbed possession of the disputed property since 1985, as alleged.
>
> (ii) They admit that the Claimant has erected a wire fence along part of the disputed property, but deny that the same was erected in or about 1986. Instead, they contend that the same was erected in or about June or July, 2011.
>
> (iii) They admit that a shed was built on the disputed property, but deny that it was completed in or about 1986. The Defendant instead contends that the shed was apparently built less than ten years before the defence was filed, that being October 31, 2011.
>
> (iv) They admit that a small building with concrete walls was built on the disputed property, but deny that the same was completed in 1988 and instead suggest, that that concrete structure appears to have been built less than ten years ago, and
>
> (v) The Defendant states that the disputed property is largely overgrown with vegetation and that there are 'permanent trees' of the types as described in the Claimant's amended particulars of claim, throughout the lands in the Defendant's title land thus, throughout the disputed land also. The defendant states that it has no knowledge of any cultivation undertaken by the Claimant, or as to the duration of any such cultivation.

[59] That there are 'permanent trees' as described in Mr. Lazarus' amended particulars of claim, these being trees which Mr. Lazarus and others have contended that Mr. Lazarus, through others, planted, is clear evidence, bearing in mind the nature of the land in question, of not only possession, but also, of the requisite intention to possess. The duration of such planting is not disputed by the Defendant. Mr. Lazarus has contended that such planting began, ever since 1985, which no doubt would be why, by the time Mr. Chikites, who is the Defendant's property manager and who has provided to this Court, affidavit evidence in support of the Defendant's application for

Summary Judgment, that Affidavit having been filed on September 27, 2011, visited the disputed property, he then saw that 'permanent trees' of the types as described by the Claimant, Mr. Lazarus, in his affidavit in support of an interlocutory application which was then before the Court, for injunctive relief to be granted to the Claimant, so as to prevent the Defendant from trespassing on the disputed land. Those 'permanent trees' were alleged in that Affidavit of Mr. Lazarus as being coconut, guava, avocado, naseberry, papaya and banana trees. (See paragraph 16 of that Affidavit which was filed on September 16, 2011).

[60] It is very significant that in Mr. Chikite's Affidavit as aforementioned, he has not at all stated when it was that he visited the relevant property, nor whether, at that time, he walked around the entire length and breadth of the disputed property, which it should be recalled, is approximately 8.92 acres in area. Additionally, in that Affidavit, he has provided no evidence to suggest to this Court that, if a trial were to hereafter be held, he could properly be considered an expert for the purpose of assisting this Court to determine the age of particular structures which he accepts as existing on the disputed property and which Mr. Lazarus contends, were built by others, on his behalf. Additionally though, Mr. Chikites has not provided to this Court any reasons for his opinion evidence to this Court any reasons for his opinion evidence as presented in that Affidavit of his, as to the length of time when the respective structures and fence, would each have been situated on the disputed property. Thus, even if this Court could have considered the opinion evidence of Mr. Chikites as provided to the Court in that Affidavit, nonetheless, such opinion evidence could hardly have carried any weight whatsoever with this Court, as the bases for the proffering of such opinions as to the ages of those respective structures and fence have not at all been provided by Mr. Chikites.

In any event though, it matters not, since Mr. Chikites has not been determined by this Court as being an expert in that regard and thus, his opinion evidence in that regard, whether in an Affidavit or otherwise, would be inadmissible. Furthermore, this Court has no basis, at least at this stage, for concluding that Mr. Chikites is possessed of the

requisite expertise, such that perhaps at a later stage, before a trial – if such were to hereafter ensue, he could properly be appointed by this Court, pursuant to the provisions of Part 32 of the Civil Procedure Rules, as an expert for that purpose. In any event though, insofar as, Mr. Chikites is employed by RHIJL, as their property manager, the likelihood of his being appointed as an expert in this case, is as close to nil as possible, since he would not be possessed of the requisite independence of Judgment, such as to enable him to perform any duties as an expert, in the expected impartial manner.

[61] It should be noted that it is only in the Defendant's Affidavit as filed on September 27, 2011, that the Defendant (RHIJL) has sought to provide any evidence whatsoever in response to the Claimant's Claim to the disputed land, based on the law of adverse possession. Thus, if that evidence is, for any compelling reason, either not worthy of, or capable of belief, or cannot properly be relied on by the Defendant to seriously contend against the Claimant's factual allegations in that regard, then of necessity, since in law, this Court has already concluded that the Claimant can succeed in his Claim to be declared title holder of the disputed property, based on the law of adverse possession, Summary Judgment must be entered in the Claimant's favour, in that regard.

[62] Turning back then to the Defendant's evidence insofar as the Claimant's claim to the disputed land based on the law of adverse possession is concerned, paragraph 7 thereof must be referred to. In that paragraph, Mr. Chikites contends that whilst there does exist a small house and a shed on the disputed property, they were not being occupied by the Claimant or anyone else, when the Defendant acquired the property' and have 'not been occupied or used by the Claimant since the Defendant purchased and receive possession of the property.' It is of course, not disputed that the Defendant purchased and received possession of the disputed property, in March of 2011. By then, Mr. Lazarus would have been engaged in acts in relation to the disputed property, these being the acts of farming, construction and placement of constructed structures thereon and even the construction of a fence, for over twenty-five years, bearing in mind that such actions were allegedly taking place ever since 1985. The statute of Limitations

when interpreted, only requires that the acts of adverse possession coupled with the intention of the rightful owner, be effective for twelve years, in respect of private land. Thus, even if the relevant structures were not occupied by anyone as of March, 2011, or at any time thereafter, this would not preclude the applicability of the Limitation of Actions Act - Sections 3 and 30, in favour of Mr. Lazarus, such as to extinguish the title of the rightful owner (RHIJL) as of twelve years post the end of 1985. That twelve year period post 1985, would have ended beginning as of 1998. Thus, whether or not any of those structures on the land, one of which is a concrete structure and the other of which is a wooden shed, which is used as a store-room, was or was not occupied in March of 2011, is irrelevant to whether the Claimant is now entitled to be declared the lawful owner of that land, based on the law of adverse possession. In any event though, it has never been contended by Mr. Lazarus or anyone else for that matter, that any of those structures were ever occupied by 'anyone.' Also, occupation of those structures, is an irrelevant issue insofar as the law of adverse possession is concerned. This is because, actual physical occupation of the relevant premises is not required to be proven for the purpose of satisfying the Court that the Limitation of Actions Act - Sections 3 and 30 ought to be applied in one's favour. What constitutes 'possession' for the purposes of the law *vis-à-vis* adverse possession, as aforementioned in this Judgment will vary from case to case and also, depend to a large extent, on the nature of the land in question. Thus, proof of actual physical occupation, particularly on a day-to-day basis, will not be required in all, or perhaps even in most cases. This is because possession of land can be evidenced in several different ways, of which, a permanent physical presence on that land, is merely one. All in all therefore, that evidence from Mr. Chikites, as regards the occupation or perhaps more correctly termed as the non-occupation of the disputed land by the Claimant, cannot at all serve to detract from the strength of the evidence of Mr. Lazarus and his several witnesses as to acts of open and undisturbed possession of the disputed land, carried out on Mr. Lazarus' behalf, ever since 1985.

[63] As regards the fence undisputedly built by the Claimant on the disputed property, apart from having made his unfounded assertion that that fence was, as of the date

when he deposed to his Affidavit, that being September 27, 2011, 'new and was obviously erected less than a year ago,' this being an assertion which this Court will not, for reasons already given, even take into account, or give any weight in any event, the Defendant has made a further assertion, this in paragraph 6 of Mr. Chikite's Affidavit, as regards the construction of that fence. In that paragraph, he has stated as follows:

> *'Tony Taylor is a contract worker who does work from time to time at the Claimant's property. I am advised and verily believe that Tony Taylor and other persons employed to the claimant erected that fence in or about June or July, 2011. This was after the Defendant had purchased its property and I had started clearing the land across the river from the disputed property. I understand that the Tony Taylor referred to in this paragraph is the father of the Tony Taylor referred to in paragraph 12 of the Lazarus' Affidavit.*

[64] That evidence as contained in paragraph 6 of Mr. Chikite's Affidavit evidence, could not properly, for more than one reason, serve to detract in any respect whatsoever, from the Claimant and his witnesses' evidence as to the construction by Mr. Lazarus of the wire fence, on the disputed property. These reasons are that firstly, such evidence as contained in the second sentence of paragraph 6 (as recounted above), cannot, as Affidavit evidence, properly be considered by this Court, as the source of Mr. Chikite's information and belief in this regard, has not been specified. Such ought to have specified. See Rule 30.3 (2) (b) (ii) read along with Rule 30.3 (1) of the Civil Procedure Rules in that regard. Secondly, by not having stated the source of his information and belief in that regard, the assertion is thereby deprived of any weight whatsoever, since this Court is therefore unable to determine whether that source is someone who can properly and ought properly to be considered by this Court, as having first-hand knowledge of the date when the construction of the fence began and the date when it was completed. Without knowing the source of Mr. Chikite's belief therefore, this Court cannot give any weight to his belief in that regard. It is yet another unfounded assertion of the Defendant.

[65] Overall therefore, it is this Court's considered opinion that Mr. Lazarus' claim for declaration of title based on the law of adverse possession must succeed, as both the law and the facts are strongly in his favour in respect thereof. That being so, RHIJL's application for Summary Judgment must be and is denied. Additionally, it follows inexorably that there is no longer any issue remaining to be determined by this Court in respect of Fixed Date Claim No. 2011HCV05503 and thus, that matter also should now, for all practical intents and purposes, be considered as being at an end and should be formally discontinued by RHIJL or if not, then concluded by Order of this Court.

[66] Insofar as the wire fence boundary that was installed by Mr. Lazarus is concerned, the same was constructed in or about 1986. See paragraph 12 (i) of Affidavit of Carl Lazarus as filed September 16, 2012, in support of Notice of Application for injunctive relief. In that same paragraph, Mr. Lazarus has also stated that Clinton McGann (RHIJL's predecessor in title) made no objection when that fence was erected as the boundary between Mr. Lazarus' land and his land. It is unknown though, whether, when it was constructed, Mr. McGann knew of its presence, or that the same was built by Mr. Lazarus, much less that the same was built by Mr. Lazarus for the purpose of constituting a boundary between his land and the land which Mr. Lazarus was then already in possession of.

[67] In a later Affidavit of Mr. Lazarus, which was filed on January 17, 2012, reference is again made to that fence, in paragraphs 4 and 5 thereof, as follows:

> *'In particular I crave leave to refer to paragraph 12(i) of my Affidavit filed September 16, 2011, wherein I stated that in or about 1986 I caused a wire fence to be erected as a physical boundary to enclose the lands comprised in my Certificate of Titles registered at Volume 1204 Folio 807 of the Register Book of Titles including the St. Thomas lands. I wish to elucidate the fact that the wire fence erected in 1986 completely enclosed, as one holding, the lands registered at Volume 1204 Folio 807 including the St. Thomas lands together with the lands registered at Volume 1204 Folio 806 of the Register Book of Titles.' (Para. 4)*

> *'Further, Mr. McGann operated a chicken farm which was located on the Saint Andrew side of the Yallahs River. It was my practice to purchase manure from Mr. McGann's chicken farm which was used as fertilizer in the farming and cultivation that was being done on my holding of land. On more than one occasion Mr. McGann visited my holding of land and saw the work that my employees were doing with the manure that I purchased from him. Further, on one of his visits Mr. McGann had complimented me on the beauty and quality of the terracing which was being done on the St. Thomas lands. In the process of making these visits Mr. McGann would have seen my wire fence and the concrete house and storeroom that I had built on the St. Thomas lands.' (Para. 5)*

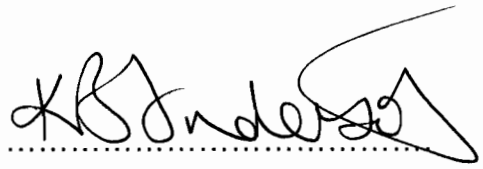
[68] That evidence as to what Mr. McGann, 'would have seen' when he visited the St. Thomas lands, these being the lands now in dispute between the parties hereto, is, to put it at its highest, speculative. In the absence of providing any proper basis upon which such a conclusion could have been reached by him, this Court could not, at anytime, even draw such a conclusion as being a reasonable inference arising from proven facts.

[69] I agree with counsel for the Defendant's submission that one cannot acquiesce to that which one does not know about. In this specific context, what needs to exist as evidence, is evidence showing that not only did Mr. McGann know of the existence of the relevant fence, but also, that he knew that the same was being relied on as constituting a boundary between Mr. McGann's land and Mr. Lazarus' land and also, that it was Mr. Lazarus who was relying on the same, as such. That evidence is entirely lacking in the case at hand and therefore, if this were the only legal issue to be determined herein, then the same would have to be, along with the Claim, even at this early juncture of an Application for Summary Judgment, decided upon in the Defendant's favour. Alas for the Defendant though, this cannot be, as Summary Judgment has already been awarded in the Claimant's favour arising from the law of adverse possession. Primarily for the sake of not adding to the length of that which is already a lengthy Judgment and also because the same is now no longer needed to be

determined upon, in view of this Court's conclusions as to the adverse possession and boundary points, this Court will not make any determination as to the rectification of title.

[71] In the circumstances, this Court adjudicates upon the Claimant's Application for Summary Judgment in favour of the Claimant and also upon the Defendant's Application for Summary Judgment in the Claimant's favour, insofar as declaratory reliefs numbers (ii), (iii) & (iv) are concerned. Declaratory relief number (v) as sought, is denied. The costs of Claim No. 2011HCV05582 and of Claim No. 2011HCV05503 are awarded to the Claimant.

Leave to appeal is granted to the Defendant in Claim No. 2011HCV05582. The Claimant shall file and serve the required order.



Honourable Kirk Anderson, J.